Towards regional cooperation in the establishment of marine protected areas

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Declaration

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Abstract

Marine Protected Areas (MPA) provides an indispensable tool to protect the marine environment. As well as being implemented by individual States, there is an argument for regional cooperation among States to establish the MPAs. Regional cooperation is a critical approach in dealing with many issues in the seas, as shown in the fishing management and the protection of the marine environment from pollution. This research will analyse the relevant global and regional instruments, for example, the CBD, the UNCLOS as well as the regional sea instruments of the UNEP Regional Sea Programmes, with the focus on the regional cooperation to establish the MPAs.

Considering that the establishment of the MPA is ubiquitous in many different global and regional instruments, the thesis addresses the question of if an obligation of the States on the regional cooperation to establish the MPA is emerging as part of the customary international law. This is addressed through a combined approach using the traditional doctrinal methodology, theory on the formation of customary international law and Brunnée and Toope's interactional account of international law to discuss the content of rights and obligations relating to the establishment of MPAs by States and their engagement in regional cooperation.

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List of Abbreviations

ABA	Arctic Biodiversity Assessment: Report for Policy-Makers
Abidjan Convention	Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region
ABNJ	Area Beyond National Jurisdiction
AHTEG	Ad Hoc Technical Expert Group on Marine and Coastal Protected Areas Subsidiary Body on Scientific, Technical and Technological
AJIL	American Journal of International Law
Antigua Convention	Convention for cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific
ANZECC	Australian and New Zealand Environment and Conservation Council Task Force on Marine Protected Areas
APEI	Areas of Particular Environmental Interest
APM	Associated Protection Measure
ASEAN	Association of Southeast Asian Nations
ASMA	Antarctic Specially Managed Area
ASPA	Antarctic Specially Protected Areas
AT	Antarctic Treaty
Barcelona Convention	Convention for the Protection of the Marine Environment and the Coastal Region of the

	Mediterranean, adopted 16 February 1976, entered into force 12 February 1978, 1102 UNTS 27
BSBLCP	Black Sea Biodiversity and Landscape Conservation Protocol to the Bucharest Convention of the Black Sea
BSBLCP-SAP	Strategic Action Plan for the Black Sea Biodiversity and Landscape Conservation Protocol (Draft)
BSPA	Baltic Sea Protected Area
Bucharest Convention	The convention on the Protection of the Black Sea against Pollution
CAFF	Conservation of Arctic Flora and Fauna Working Group
Cartagena Convention	Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region
CBD	Convention on Biological Diversity
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CIL	Customary International Law
CMS	Convention on the conservation of migratory species of wild animals
COBSEA	Coordinating Body on the Seas of East Asia
Colo. J. Int'l Envtl. L&Pol'y	Colorado Journal of International Environmental Law and Policy
COP	Conference of the Parties

CS	Continental Shelf
CUP	Cambridge University Press
EASAP 1994	Action Plan for the Protection and Sustainable Development of the Marin Environment and Coastal Areas of the East Asian Region, adopted in April 1981, revised 1994
EBSA	Biologically Significant Marine Areas
EC	European Commission
EEZ	Exclusive Economic Zone
FAO	Food and Agriculture Organization of the United Nations
FSA	Agreement for the implementation of the provision of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks
Geo Int'l Envtl L Rev	Georgetown International Environmental Law Review
Grupo Ad-HOC AMP	Ad-hoc Group of Experts on Marine and Coastal Protected Areas of the South Pacific
HELCOM	Baltic Marine Environment Protection Commission - Helsinki Commission
Helsinki Convention	Convention on the Protection of the Marine Environment of the Baltic Sea Area
ICLQ	International & Comparative Law Quarterly

ICRW	International Convention for the Regulation of Whaling
ICZM	Integrated Coastal Zone Management
IJMCL	International Journal of Marine and Coastal Management
IMO	International Maritime Organization
Implementing Agreement of Part XI	Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982
ISA	International Seabed Authority
IUCN	International Union for the Conservation of Nature and Natural Resources
Jeddah Convention	Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment
Kuwait Convention	Kuwait Regional Convention for Co-operation in the Protection of the Marine Environment from Pollution
Lima Convention	Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific
MARPOL	International Convention for the Prevention of Pollution from Ships
MCPA	Marine and Coastal Protected Area
MEPC	Marine Environment Protection Committee
MPA	Marine Protected Area

Nairobi Convention	Convention for the protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region
Noumea Convention	Convention for the Protection of the Natural Resources and Environment of the South Pacific Region
NOWPAP 1994	Action Plan for the Protection, Management and Development of the Marine and Coastal Environment of the Northwest Pacific Region, adopted September 1994
OSPAR Convention	Convention for the Protection of the Marine Environment of the North-East Atlantic
PACS	Protected Area of Caspian Sea
Paipa Protocol	Protocol for the conservation and management of protected marine and coastal area of the South-East Pacific
PAME	Protection of the Arctic Marine Environment Working Group
PERSGA	Programme for Environment of Red Sea and the Gulf of Aden
PERSGA PA	Protected Areas of Importance to the Red Sea and Gulf of Aden
PSSA	Particularly Sensitive Sea Areas
Ramsar Convention	Convention on Wetlands of International Importance especially as Waterfowl Habitats
RECIEL	Review of European Community & International Environmental Law

Rio Declaration	The Rio Declaration on Environment and Development
RSGA	Red Sea and the Gulf of Aden
RSP	Regional Sea Programme
SA	Special Area
SASAP 1995	Action Plan for the Protection and Management of the Marine and Coastal Environment of the South Asian Seas Region, adopted 24 March 1995
SPA	Specially Protected Areas
SPA&Biodiversity Protocol	Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean
SPAMI	Specially Protected Area of Mediterranean Importance
SPAW Protocol	Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region
Stockholm Declaration	Declaration of the United Nations Conference on the Human Environment
Tehran Convention	Framework Convention for the Protection of the Marine Environment of the Caspian Sea
Tex. Rev. L. & Pol	Texas Review of Law and Politics
TS	Territorial Sea
UNCLOS	United Nations Convention on the Law of the Sea of 10 December 1982

UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties 1969
WG-BBNJ	Ad Hoc Open-ended Informal Working Group to study issues related to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction
WHC	World Heritage Convention
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

CHAPTER 1 INTRODUCTION

Introduction

The public's awareness of the risk of losing marine resources has been emphasised in the past few decades, as it became evident that stocks of individual fish, such as, tuna, had dramatically decreased due to overfishing.[1] Some living marine mammals, especially whales, have also been greatly endangered by over-fishing.[2] Marine living resources are also affected by the use of fishing gear, as some endangers species can be accidentally caught in gill nets.[3] Not only does active fishing harm the marine living resources, but lost or discarded fishing gear that results in marine litter also causes great concern because it can harm non-target species, such as sea turtles, seabirds or marine mammals.[4] Debris from other human products that have been disposed of, discarded or abandoned, either intentionally or unintentionally, are also increasingly found in the marine environment, with much of this entangling, or being ingested by, many species of marine living resources, 'including sea turtles, marine mammals and seabirds.'[5] Furthermore, according to a report by the Secretariat of the Convention on Biological Diversity, human activities, such as the building of infrastructure, tourism and the fish farming of coastal States, currently contribute to the loss of biological diversity in the ocean.[6] Pollution from human activities is also a factor that

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[1] Robin Kundis Craig, 'Protecting International Marine Biodiversity: International Treaties and National Systems of Marine Protected Areas' (2005) 20 Journal of Land Use & Environmental Law 333, 334-335.

[2] Howard S. Schiffman, *Marine Conservation Agreements: The Law and Policy of Reservations and Vetos* (Martinus Nijhoff Publishers 2008), Chapter 1.

[3] FAO, *The State of World Fisheries and Aquaculture* (FAO Fisheries and Aquaculture Department, FAO, Rome 2012, 2012), 132; Richard Caddell, 'Analysis Caught in the Net: Driftnet Fishing Restrictions and the European Court of Justice' (2010) 22 Journal of Environmental Law 301, 303.

[4] Graeme Macfadyen, Tim Huntington and Rod Cappell, *Abandonded, lost or otherwise discarded fishing gear* (UNEP Regional Seas Reports and Studies, No 185; Fao Fisheries and Aquaculture Technical Paper, No 523, 2009) Graeme Macfadyen, Huntington, Tim, Cappell Rod, *Abandoned, lost or otherwise discarded fishing gear* (UNEP Regional Seas Reports and Studies, No 185; Fao Fisheries and Aquaculture Technical Paper, No 523 Rome, UNEP/FAO 2009 115 p, 2009); See also <http://www.fao.org/news/story/en/item/19353/icode/.>

[5] S.C. Gall and R.C. Thompson, 'The impact of debris on marine life' (2015) 92 Marine Pollution Bulletin 173.

[6] Secretariat of the Convention on Biological Diversity, *Global Biodiversity Outlook* 3 (Montréal, 94 pages, 2010), 46-48.

raises concern about marine environmental protection.[7] Reports have also shown recently that plastic pollution becomes one of the greatest threats to the marine environment.[8] In 2008, the report of the Coordinating Body on the Sea of East Asia advised that marine litters, including plastic and microplastics, is a concern in this region.[9] Moreover, microplastics are a great threat to the marine species, as they may swallow a considerable amount of microplastics in a day, as 'Microplastics are similar in size and mass to many types of plankton'.[10] With this plastic and microplastics pollution having an adverse effect on the marine environment, the United Nation General Assembly adopted Resolution 72/73 in January 2018 to encourage States to take action and respond to the increasing concerns about the plastic and microplastics in the ocean by 2025.[11] These marine environmental issues call for an adequate protection regime. The development of a marine protected area (MPA) can help address the problems of over-fishing, pollution and the loss of marine biodiversity.[12]

Globally, there are many international agreements related to the MPA regime, including the Convention Concerning the Protection of the World Cultural and Natural Heritage[13](WHC) and the Convention on Wetlands of

[7] Craig (n 1), pp 345-347.
[8] BBC' News reports, 'Seven charts that explain the plastic pollution problem', 10 December 2017, <http://www.bbc.co.uk/news/science-environment-42264788> (last accessed June 2018); See also Jenna R. Jambeck and others, 'Plastic waste inputs from land into the ocean' (2015) 347 Science (6223).
[9] UNEP, 2008. Marine litter in the East Asian Seas Region. COBSEA Secretariat, United Nations Environment Programme. 62 pp, 48-50, <https://www.cobsea.org/documents/Meeting_Documents/Marine%20Litter/Marine%20Litter%20Report%202008.pdf> (accessed 13 August 2017).
[10] News reports of BBC, 'Plastic pollution: Scientists' plea on threat to ocean giants', 5 February 2018, <http://www.bbc.co.uk/news/science-environment-42920383, (accessed June 2018); Anthony L. Andrady, 'Microplastics in the marine environment' (2011) 62 Marine Pollution Bulletin 1597.
[11] United Nations General Assembly at its Seventy-second session, Resolution adopted by the General Assembly on 5 December 2017, 72/73 Ocean and the Law of the Sea, A/RES/72/73, online access at http://undocs.org/en/a/res/72/73, para 186-188 (UNGA Res. 72/73).
[12] Alex J. Caveen and others, 'MPA policy: What lies behind the science?' (2013) 37 Marine Policy 2013, 3.
[13] Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, adopted on 23 November, 1972, entered into force on 15 December, 1975. 1037 UNTS 151 (WHC).

International Importance[14] (Ramsar Convention)[15] The Central Amazon Conservation Complex of Brazil and the Great Barrier Reef of Australia are examples of the protected areas listed under the WHC as natural heritage sites.[16] In some cases, a specific area can be protected by more than one protected area regime, due to its uniqueness and significance. For example, the Great Barrier Reef, as mentioned earlier, and the Wadden Sea[17] are not only listed as world heritage sites, but are also designated as Particularly Sensitive Sea Areas (PSSA) by the International Maritime Organization (IMO).[18] Furthermore, the Ramsar Convention is considered to be the first international agreement concerning the protection of a specific habitat, being wetlands in this case.[19] In addition, the Stockholm Declaration[20] highlighted the need to protect natural resources and the natural ecosystem for the benefit of future generations.[21] However, these international agreement are binding only on their signatories.

These global instruments show that marine protected area regimes already exist and this could streamline an emergence of the customary norm regarding the establishment of an MPA, which could, undeniably, offer the means for States to establish an MPA to protect the marine environment. Furthermore, the United Nations Convention on the Law of the Sea[22] (UNCLOS) also requires the State to cooperate, either globally or regionally, to protect and preserve the marine environment, 'taking into account characteristic regional features,'[23] as regional cooperation is important for the promotion of

[14] Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, adopted on 2 February 1971, entered into force on 21 December 1975, 996 UNTS 245 (Ramsar Convention).
[15] Alexander Gillespie, *Protected Area and International Environmental Law* (Martinus Nijhoff Publishers 2007), Introduction 1-5.
[16] For more information of the list of world heritage sites, see <https://whc.unesco.org/en/list/> (accessed 29, 2017)
[17] The Wadden Sea was inscribed as the World Heritage since 2009, <http://whc.unesco.org/en/list/1314/> (accessed August 29, 2017).
[18] The list of the designated PSSA by the IMO are available online at <http://www.imo.org/en/OurWork/Environment/PSSAs/Pages/Default.aspx> (Accessed August 29, 2017).
[19] Michael Bowman, Peter Davies and Catherine Redgwell, *Lyster's International Wildlife Law* (CUP 2011), 19.
[20] Declaration of the United Nations Conference on the Human Environment, conclusion on 16 June 1972, U.N. Doc. A/Conf.48/14/Rev. 1(1973) (Stockholm Declaration).
[21] Ibid., Principle 2.
[22] The 1982 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396 (UNCLOS).
[23] Ibid., Article 197.

conservation of biological diversity.[24] and 'the boundaries of marine ecosystems often cross boundaries of state jurisdiction.'[25] Many Regional Sea Programmes (RSPs) under the United Nations Environment Programme (UNEP) also provide the instruments concerning the conservation of the marine environment of the region.[26] This current research will then investigate further whether there is an emerging customary norm on the obligation for the States to establish an MPA using regional cooperation, which will be further elaborated on in the research aim and scope of this chapter. The consideration of the customary international law (CIL) comes to light as: 1) there are many international agreements relating to the establishment of an MPA; and 2) the States also adopt the MPA regime into the regional instruments, as discovered through the RSPs. As one of the sources of international law recognised in the international procedure,[27] it should be noted that, once the legal obligation is accepted as the CIL, it could be binding for all States, even without any agreement being in place.[28] The assertion of the CIL may be an option to enforce an obligation that cannot be enforced in the treaty's obligation.[29] It may also be argued that the identifying of the CIL is the making of the CIL.[30] However, many believe that the customary law is still active and plays an important role in the international law.[31] It is also considered that the customary norm can fill the gap in the treaties or, at least, help in the interpretation.[32] This will be useful in making

[24] Convention on Biological Diversity, Preamble (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD).
[25] G. Kelleher, *Guidelines for Marine Protected Areas* (IUCN, Gland, Switzerland and Cambridge, UK, 1999), 2.
[26] More information are available online at <http://www.unep.org/regionalseas/who-we-are/regional-seas-programmes>.
[27] Statute of the International Court of Justice, Article 38, adopted on 26 June 1945, entered into force on 24 October 1945, 59 Stat. 1031 (ICJ Statute).
[28] Hugh Thirlway, *The Sources of International Law* (OUP 2004), 53-54; see also Pierre-Marie Dupuy, 'Formation of Customary International Law and General Principles' in Daniel Bodansky, Jutta Brunnee and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007).
[29] Mike Graves, 'Customary Ivory Law: Inefficient Problem Solving with Customary International Law' (2017) 26 Washington International Law Journal, 335-336.
[30] Larissa Van Den Herik, 'The decline of customary international law as a source of international criminal law' in Curtis A. Bradley (ed), *Custom's Future: International Law in a Changing World* (CUP 2016), 231.
[31] Omari Sender and Michael Wood, 'Custom's Bright Future: The Continuing Importance of Customary International Law' in Curtis A. Bradley (ed), *Custom's Future: International Law in a Changing World* (CUP 2016).
[32] Malgosia Fitzmaurice, 'The History of Article 38 of the Statute of the International Court of Justice: The Journey from the Past to the Present' in Samantha Besson and Jean

the States comply with the measure to protect the marine environment, rather than them providing the excuse that they do not agree to any commitment under the international agreement, as will be discussed later in Chapter 6 of this thesis, some RSPs that have not agreed on the regional instruments regarding the establishment of an MPA. If, in this case, the establishment of an MPA could be regarded as the CIL, this should improve, and promote to all States, the protection of the marine environment.

In addition, and as mentioned above, the variety of treaties relating to the establishment of an MPA may raise the possibility of a lack of uniformity of the core principles regarding the establishment of an MPA. In this regard, this chapter will also investigate the possible fragmentation regarding the application of the relevant protection regimes in the international law, as it could be the case that different protection regimes may apply to the same area. However, this is not the priority of this current research, as the research aim is to examine not only the core content of the MPA regime, but also the cooperation in both the global and regional levels to establish an MPA, due to the nature of the ocean that is mostly connected to the sea area of the neighbouring States. Therefore, cooperation between the States with regard to the establishment of an MPA is vital to the examination in this thesis.

The preceding discusion depicts how this thesis perceives the critical issue regarding the establishment of an MPA, and shows it is a topic worthy of analysis. This chapter will further present the significance of an MPA and provide the research aim and scope, including the research question. The research methodology will also be briefly introduced, followed by an examination of the possible fragmentation of relevant international instruments to establish an MPA. The research structure will then be described. The final, and very essential, part of this chapter will present the expected contribution of this research.

d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017), 184-185.

The Significance of marine protected areas

Marine resources are a source of life that produces various kinds of food, especially fish, for the world.[33] However, it is difficult to make an accurate scientific observation, due to the vast area of the sea, and humans have tended to believe that there are still plenty of fish, or other forms of seafood, available in the oceans.[34] The demand for fish continues to rise every year,[35] but overfishing and destructive fishing activities are having an extremely adverse effect on marine biodiversity and habitats.[36] Furthermore, pollution from land-based activities, as well as other pollution caused by human activities in coastal areas and the sea, continues to harm the marine habitats and ecosystem.[37] Consequently, the international community has recognised the need to protect marine ecosystems and marine biological diversity by the formation of an MPA regime.[38]

The notion of a protected area regime is not new in terms of environmental protection, and it still serves its primary purpose of preserving natural resources.[39] The natural resources found in the oceans around the earth are enormously diverse in all aspects, including genetical and ecological.[40] An MPA is internationally recommended as an area-based management tool that will maintain marine biodiversity and the ecosystem.[41] Other principles

[33] Craig (n 1), pp 339-340.
[34] Ibid.
[35] WFP and IFAD FAO, *The State of Food Insecurity in the World 2012: Economic growth is necessary but not sufficient to accelerate reduction of hunger and malnutrition.* (2012), 17.
[36] Rashid Hassan, Robert Scholes and Neville Ash, *Marine Ecosystems and Human Well-being : Current State and Trends, Volume 1* (2005), 479.
[37] Craig (n 1), 345-347.
[38] United Nations General Assembly at its Sixty-sixth session, Recommendations of the Ad Hoc Open-ended Informal Working Group to study issues related to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction and Co-Chairs' summary of discussions, adopted on 30 June 2011, A/66/119, 6-7, (UNGA Doc. A/66/119) online access at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/397/64/PDF/N1139764.pdf?OpenElement.
[39]Alexander Gillespie, 'Obligations, Gaps, and Priorities Within the International Regime for Protected Areas' (2006) 19 Geo Int'l Envtl L Rev 1, 1-3.
[40] Craig (n 1), p 340.
[41] UNGA Doc. A/66/119 (n 38), 2 ; see also Gillespie (n 15), 12.

related to the management of marine areas include environmental impact assessments, capacity building and the transfer of marine technology.[42]

Marine protected areas are one of the significant tools to protect marine biodiversity, as they can protect marine resources, including the management of fish stocks[43] and it also benefits the ecosystem.[44] It has been proved in several studies that the size and variety of fish species have increased where MPAs have been formed, when compared to the record prior to the establishment of an MPA.[45] The MPAs provide not only an ecological benefit but also a socio-economic benefit, for example, through recreational activities that are attractive to tourists.[46] However, effective management of an MPA must be in place to support the tourism to ensure there remains a balance between the environmental protection and the long-term sustainability of the MPA.[47]

Research Aims and Scope

Although protected area regimes have already been widely established at the national level, they should also be present at the regional and global levels, due to the migrating nature of the living resources in the ocean[48] and pollution. Despite the ocean being, in reality, a shared resource providing benefits to all, including, food, transportation, mineral resources and recreational activities, States have established legal maritime boundaries. The

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[42] Ibid.
[43] James Sancgchirico, N., Katryn Cochran and Peter M. Emerson, 'Marine Protected Areas: Economic and Social Implications' (2002) <https://www.cbd.int/doc/case-studies/inc/cs-inc-rf-04-en.pdf> accessed 20 May 2018, 5-6, 10-11.
[44] Richard Kenchington, Trevor Ward and Eddie Hegerl, *The Benefit off marine protected ares - discussion paper* (2003), 6, online access at http://www.environment.gov.au/system/files/resources/5eaad4f9-e8e0-45d1-b889-83648c7b2ceb/files/benefits-mpas.pdf.
[45] P. Dee Boersma and Julia K. Parrish, 'Limiting abuse: marine protected areas, a limited solution ' (1999) 31 Ecological Economics 287, 294.
[46] Sian E. Rees and others, 'The socio-economic effects of a Marine Protected Area on the ecosystem service of leisure and recreation' (2015) 33 Marine Policy 144 Dong-Ryul Chae, Premachandra Wattage and Sea Pascoe, 'Recreational benefits from a marine protected area: A travel cost analysis of Lundy' (2012) 33 Tourism Management 971 Rees and others.
[47] Russi D., Pantzar M., Kettunen M., Gitti G., Mutafoglu K., Kotulak M. & ten Brink P. (2016). Socio-Economic Benefits of the EU Marine Protected Areas. Report prepared by the Institute for European Environmental Policy (IEEP) for DG Environment, 3-4, 27.
[48] G. Kelleher and R Kenchington, *Guidelines for Establishing Marine Protected Areas.* (A Marine Conservation and Development Report IUCN, Gland, Switzerland vii+ 79 pp, 1992), 18.

lack of maritime boundaries for marine living resources coupled with the fact that States share their marine ecosystem and biodiversity[49] leads to a requirement for international cooperation in governance, including the use and protection of the environment.[50] This current research aims to determine States' legal rights and obligations to establish Marine Protected Areas (MPA) with a focus on regional cooperation. It is stated earlier that regional cooperation is vital to the protection of the marine environments. As the marine ecosystem connects to an adjacent area and goes beyond the States' boundary, it is regional cooperation that would offer the better conservation of such connected and shared environment.[51] Regional cooperation is necessary as reliance on global policies alone may not be appropriate. The latter do not fit with the unique character of each regional sea.[52] Incontrast, regional cooperation can be customised to the common interests of the particular region.[53] Regional cooperation has developed and has proved to be an essential mechanism in the combat of marine pollution[54], especially in the semi-enclosed sea region, for example the Baltic Sea and Mediterranean seas.[55] In some cases, the regional cooperation depicts more details of the regime and outperforms the global initiation with regard to the protection of the environment,[56] for example the European Union can achieve conservation of the marine ecosystem in an area beyond national jurisdiction by the

[49] Trevor Sandwith and others, *Transboundary protected area for peace and co-operation* (Adrian Phillips ed, IUCN 2001), 13.
[50] Karen N Scott, 'Integrated Ocean Management: A NewFrontier in Marine Environmental Protection' in Donald R. Rothwell and others (eds), *The Oxford Handbook of the law of the Sea* (OUP 2017),463-464; See also Patricia W. Birnie, Alan E. Boyle and Catherine Redgwell, *International law and the environment* (3 edn, OUP 2009), 379-380 ; See also Björn Hasslera and others, 'Collective action and agency in Baltic Sea marine spatial planning: Transnational policy coordination in the promotion of regional coherence' (2018) 92 Marine Policy, 138.
[51] Kelleher (n 25), 2.
[52] Julien Rochette and others, 'The regional approach to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction' (2014) 49 Marine Policy, 109-110; See also Hanneke Van Lavieren and Rebecca Klaus, 'An effective regional Marine Protected Area network for the ROPME Sea Area; Unrealistic vision or realsitic possibility?' (2013) 72 Marine Pollution Bulletin, 389.
[53] Ken Conca, 'The Rise of the Region in Global Environmental Politics' (2012) 12 Global Environmental Politics, 130; see also Edward J. Goodwin, *International Environmental Law and the Conservation of Coral Reefs* (Routledge 2013), 79.
[54] Charles Odidi Okidi, 'Toward Regional Arrangements for Regulation of Marine Pollution: An Appraisal of Options' (1977) 4 Ocean Development & International Law 1977, 13-19.
[55]Alhéritière Dominique, 'Marine Pollution Control Regulation: Regional Approach' (1982) 6 Marine Policy, 163-164 .
[56] Ibid, 170; See also Conca (n 53), 132.

establishment of the high sea MPA.[57] Also, the Mediterranean can establish an area for the conservation of the marine mammals in the high sea area within the Mediterranean sea by the joint agreement between France, Italy and Monaco.[58] However, the global forum for this matter is still progressively negotiated under the UNCLOS.[59]

The benefit of the establishment of an MPA to protect the marine environment is well known at present, as mentioned above. This has also progressively become the priority in the ongoing negotiation relating to the propect of an agreement within the UNCLOS to conserve the marine environment beyond national jurisdiction.[60] The conservation of the fisheries also benefits from the MPA in the high sea,[61] not to mention the CBD, which is also involved with protection of the overall biodiversity, including the marine biodiversity, which is one of the fundamental instruments regarding the establishment of an MPA within the national jurisdiction.[62] The establishment of an MPA in the high sea or in the area beyond national jurisdiction also exists in many

[57] Rochette and others (n 52), 111; In 2010 the North-East Atlantic adopted 6 high sea MPAs namely, the Milne Seamount Complex MPA adopted by the OSPAR Decision 2010/1 on the establishment of the Milne Seamount Complex Marine Protected Area, the Charlie-Gibbs South MPA adopted by the OSPAR Decision 2010/2 on the Establishment of the Charlie Gibbs South Marine Protected Area, Altair Seamount High Seas MPA adopted by OSPAR Decision 2010/3 on the Establishment of the Altair Seamount High Seas Marine Protected Area, Anitaltair Seamount High Seas MPA adopted by OSPAR Decision 2010/4 on the Establishment of the Altair Seamount High Seas Marine Protected Area, Josephine Seamount High Seas MPA adopted by OSPAR Decision 2010/5 on the Establishment of the Josephine Seamount High Seas Marine Protected Area and the Mid-Atlantic Ridge North of the Azores High Seas MPA adopted by OSPAR Decision 2010/6 on the Establishment of the Mid Atlantic Ridge North of the Azores High Seas Marine Protected Area. In 2012 the Charlie-Gibbs North High Seas Marine Protected Area is also adopted by OSPAR Decision 2012/1 on the establishment of the Charlie-Gibbs North High Seas Marine Protected Area.
<https://www.ospar.org/convention/agreements?q=&t=32282&a=7456&s=1> accessed 12 May 2018.

[58] Agreement Concerning the Creation Of A Marine Mammal Sanctuary In The Mediterranean, online accessed at https://iea.uoregon.edu/treaty-text/1999-concerningcreationmarinemammalsanctuarymediterraneanentxt.

[59] UNCLOS (n 22); Resolution adopted by the General Assembly on 24 December 2017, adopted at Seventy-second session of the UNGA, 24 Decmber 2017, A/RES/72/249 - 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, para 2, (UNGA Res. 72/249)
<http://undocs.org/en/a/res/72/249> accessed 12 May 2018.

[60] Ibid. UNGA Res. 72/249, para 2.

[61] Richard Barnes and others, 'High seas fisheries' in Elisa Morgera and Kati Kulovesi (eds), *Research Handbook on International Law and Natural Resources* (Edward Elgar 2016), 387.

[62] Ibid., 385-386.

areas under the regional initiatives, for example, in the Palegos Sanctuary of the Mediterranean[63] and North-East Atlantic sea.[64]

Furthermore, the legal obligation to cooperate is also regarded as a customary norm, especially in the protection of the marine environment.[65] There are many studies of the establishment of an MPA in the Exclusive Economic Zone (EEZ),[66] which may be subject to the rights of other States in the designated MPA,[67] and in the case where the subject area is transboundary, cooperation is also needed.[68] However, the regional cooperation in the protection of the marine environment by the establishment of an MPA has not been taken into consideration as an avoidable legal obligation even when many regions have been practically implementing them there for many years.[69] Many authors have pointed out the development of the regional sea initiative on the establishment of the MPA,[70] but none have considered such an event as a single legal obligation to establish the MPA using the regional cooperation.

It is essential to develop an understanding of the concept of an MPA, as well as to analyse the legal obligations and rights in relevant international conventions, to achieve the aim of this current research. The contribution of

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[63] Jeff Ardron and others, 'Marine spatial planning in the high seas' (2008) 32 Marine Policy, 836; Tullio Scovazzi, 'Marine Protected Area on the High Sea: Some Legal and Policy Considerations' (2004) 19 IJMCL.

[64] Information of the related OSPAR Decisions to adopted the MPAs is provided above in footnote number 57.

[65] Rio Declaration on Environment and Development, Principle 7, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874, adopted on the 14th June, 1992 (Rio Declaration); see also *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor n (Malaysia v. Singapore)*, ITLOS Case No 12 (2003) (*Land Reclamation case*).

[66] Thomas Dux, *Specially Protected Marine Areas in the Exclusive Economic Zone (EEZ): The Regime for the Protection of the Specific Areas of the EEZ for Environmental Reasons under International Law* (Lit Verlag 2011); see also Sun Zhen, *Conservation and Utilization of the Living Resources in the EEZ* (2012).

[67] UNCLOS, (n 22) Article 56 and 58; see also Fabio Spadi, 'Navigation in Marine Protected Areas: National and International Law' (2000) 31 Ocean Development & International Law 2000.

[68] Catarina Grilo, Aldo Chircop and José Guerreiro, 'Prospects for Transboundary Marine Protected Areas in East Africa' (2012) 43 Ocean Development & International Law 2012, 243-244.

[69] Among 18 RSPs under the UNEP, there are 13 RSPs that implements the MPA regime, details of which are in Chapter 6, section 2.

[70] R. R. Churchill and A.V. Lowe, *The Law of the Sea* (3 edn, Juris Publishing 1999), 392-394; see also Goodwin (n 53), 89-97 ; Gemma Andreone, 'Regional Sea' (2015) 261 Yearbook of international Environmental Law, 289.

this research is to provide an understanding of the legal status and content of the rights and/or obligations of States to establish an MPA. As yet, although many international conventions refer to the establishment of an MPA, there is still no clear understanding of this obligation and, therefore, this research aims to, as a minimum, identify the core element or outline of the legal rights and obligation of the States to establish an MPA based on international law and to determine whether or not an obligation to cooperate at the regional level in the establishment of MPAs exists in customary international law.

At the heart of this research is an analysis of global and regional treaties to find the evidence of common practice and belief around the norm of customary international law. The relevant conventions at the global level are the UNCLOS, the CBD, the International Convention for the Prevention of Pollution from Ships (MARPOL),[71] the WHC and the Ramsar Convention. This research selects these five conventions, as they draw a large number of participating countries. The CBD consists of the highest member of 195 participating nations and one organisation,[72] followed by the WHC with 193 contracting countries.[73] The Ramsar Convention has 170 contracting countries[74] and the UNCLOS comprises 167 countries and one organisation.[75] The MARPOL, which is the convention under the IMO, has adopted six related annexes, with the first five ratified by more than 140 countries and one ratified by 93 States.[76] This many engaging countries to the relevant global instruments means that almost every country has, at least, one existing convention to offer a mechanism to establish an MPA, as no country that does

[71] International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) 1340 UNTS 184; Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (adopted 17 February 1978, entered into force 2 October 1983) 1340 UNTS 61(MARPOL).
[72] List of the CBD' s members is available at <https://www.cbd.int/information/parties.shtml>, last accessed June 2018.
[73] List of the WHC' s members is available at <https://whc.unesco.org/en/statesparties/>, last accessed June 2018.
[74] List of the Ramsar Convention's members is available at <http://www.unesco.org/eri/la/convention.asp?KO=15398&language=E&order=alpha>, last accessed June 2018.
[75] List of the UNCLOS' s members is available at <http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm>, last accessed June 2018.
[76] List of the MARPOL' s members is available at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>, last accessed June 2018.

not participate in any of these five selected global conventions.[77] With this number of participating countries in the global conventions relating to the establishment of an MPA, it is promising to witness the developing trend in this matter.

This current research also observes the International Convention for the Regulation of Whaling (ICRW)[78] and the Convention on the Conservation of Migratory Species of Wild Animals (CMS).[79] However, as the ICRW focuses on whales and the CMS focuses on conservation of the migratory species, these treaties may not be compatible with the considerations of the MPA concept found in the other relevant conventions mentioned above. Further clarification of the concept of the MPA will be provided in Chapter 3 - Concept of a Marine Protected Area. Chapter 3 will include a general understanding of an MPA based on the IUCN Guidelines,[80] as this will help in forming the general concept and characteristics of an MPA for this thesis. As well as the first three conventions that are directly related to the legal mechanisms to establish an MPA, the WHC and the Ramsar Convention can also provide a framework for this research, as their application can sometimes cover marine elements.

The definition of natural heritage provided in the WHC does not explicitly relate to marine protected areas. Nonetheless, it cannot be denied that the protection of natural heritage also plays a role in environmental conservation as a whole, including the marine environment. As for Ramsar Convention, which focuses on the protection of wetlands, although its application does not cover marine areas with a depth of more than six meters from the surface, it does have an (limited) application to marine areas.[81] For ease of reference,

[77] The list of members of the five selected global conventions is attached in Annex I of the thesis List of Members of the Global Conventions (Annex I of thesis).
[78] International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into forced 4 March 1953) 161 UNTS 72 (ICRW).
[79] Convention on the conservation of migratory species of wild animals, (adopted 23 June 1979, entered into forced 1 November 1983) 1651 UNTS 333 (CMS).
[80] The International Union for the Conservation of Nature and Natural Resources (IUCN) produces many guidelines regarding the protected area and its categorised system ; see also Kelleher and Kenchington (n 44); see also Nigel Dudley, *Guidelines for Applying Protected Area Management Categories* (IUCN 2008).
[81] Ramsar Convention (n 14), Article 1.

these five conventions and the IUCN guidelines will be referred to as the Global Instruments in this research, as they were designed to ensure that these issues are regulated in the same way across the globe.

With regard to regional cooperation, this thesis will focus on the Regional Sea Programmes (RSP) provided by the United Nations Environment Programme (UNEP). Currently, there are eighteen RSPs with 143 participating members, including the European Union,[82] and the majority of these have agreed on a general instrument to protect the marine environment.[83] The thesis will not cover the contribution to the protection of marine areas by Regional Fisheries Management Organisations (RFMOs) as RFMOs may only focus on the management of the area for the sustainable management of the fish stocks rather than the holistic environment of the marine area. The purpose of the RFMO is different from the work of the RSPs and this will be clarified further in Chapter 6, which provides a holistic approach to the marine environment. Although the UNEP categorisation of RSPs may not reflect all of the existing cooperation in regional or sub-regional seas, it consist of many coastal States, archipelagic States, and States with enclosed and semi-enclosed seas.[84] Regional and sub-regional initiative other than the RSPs will not be included in this research, not because they lack an element of regional cooperation, but because it is not feasible to thoroughly collect data from them individually. Moreover, the 18 RSPs studied here have 142 participating countries between.[85] Noting that the majority of the non-engagement countries to the RSPs are land lock states,[86] concern about the establishment of an MPA may not be relevant.[87] This, then, covers the majority of States with maritime zones. The dates of some RSPs also show that the development of the RSP

[82] The information of the participating countries to the RSPs can be accessed online at <https://www.unenvironment.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/why-does-working-regional-seas-matter>; see also Annex II of the thesis - List of Members of the Regional Sea Programmes (Annex II of thesis).
[83] The region that agree on the instrument to protect the marine environment are, for example, the Mediterranean, the Baltic, Black Sea, Caspian Sea, North-East Atlantic, Eastern Africa, more details are provided in Chapter 6 section 2.1 of the thesis.
[84] Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Third edn, CUP 2012), 353.
[85] Annex II of thesis (n 82).
[86] UCLOS, (n 22) Article 124 (1) A).
[87] Annex II of thesis (n 82), Details of the non-engagement countries to any RSPs are those highlighted in the List of Members of the Regional Sea Programme.

on the protection of the marine environment began in the early 1970s,[88] which indicates that the regional cooperation has existed for a long time. I, the researcher, believe that the example of RSPs' instruments regarding the establishment of an MPA could lead to globalising or generalising the regime[89] in this case regarding the regional cooperation on the establishment of an MPA. With this record of information, it can be investigated further whether the MPA regime in the regional level is similar to, or implements, the notion of the establishment of the MPA regime of the global instruments. The eighteen RSPs under the UNEP are good examples of the nature of regional cooperation that is collectively shown in the form of a social and legal understanding of the global norm in the establishment of an MPA. The regional conventions or other instruments will be referred to in this current research as the Regional Instruments.

There are many RSPs, some of which are governed by treaty law, while others have an agreement in the form of soft law, notably an Action Plan.[90] These instruments will also be analysed alongside the relevant regional treaties. Some RSPs are well developed in terms of the regional conventions and protocols related to the establishment of an MPA, but others are still developing their regional instruments, or further agreement may be needed. Those RSPs that have developed an instrument for the establishment of their MPA include, but are not limited to, the Cartagena Convention of the Wider Caribbean Region,[91] the Nairobi Convention of the Eastern African Region[92]

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[88] The notable early RSP under the UNEP are the Baltic adopted the Convention on the Protection of the Marine Environment of the Baltic Sea Area in 1974 and the Mediteranean adopted the action plan first in 1975. The starting date of some RSPs also shows that the development of the RSP on the protection of the marine environment begins in the early 1970s which indicates that the regional cooperation has been constructed for a long time. However, the Antarctic is one of the independent regional sea programmes which the main agreement, the Antarctic Treaty, was adopted in 1959. These RSPs' information has been included in the thesis within the 18 RSPs which their information present in the UNEP RSP.

[89] Dominique (n 55), 167.

[90] Examples of RSPs that have not agreed the regional agreement in the hard law form are the East Asian and the ROPME region, further details of which can be found in Chapter 6, section 2.3.

[91] The Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (adopted on 24 March 1983, entered into force on 11 October 1986), more information are available online at <http://cep.unep.org/cartagena-convention> (Catagena Convention).

[92] The Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (adopted on 21 June 1985, entered into

and the Barcelona Convention of the Mediterranean.[93] The East Asian Sea and Northwest Pacific regions are examples of RSPs that have adopted a 'soft law' agreement in the form of an action plan.[94]

The foregoing is a brief introduction to international conventions, regional agreements and other soft law material related to the establishment of an MPA. This thesis will also discuss the obligation to cooperate at the regional level based on the international law and the relevant global and regional instruments, as mentioned above, in Chapter 4. Chapters 5 and 6 of this thesis will provide a more in-depth discussion of the legal mechanisms to establish an MPA under global and regional instruments, respectively. The analysis of the legal obligation for the State to establish an MPA through regional cooperatation will be based on the analysis of Chapter 4, Chapter 5 and Chapter 6. This thesis will engage both the analysis of the legal right or obligation of regional cooperation and the analysis of the source of an obligation of the States to establish an MPA in an attempt to determine if there is an emerging norm in this regard.

With this target, this currentresearch will start with the following question:

> 'What is the nature of the legal rights and obligations of States to establish an MPA through regional cooperation?'

In aiming to address this question, two further subsidiary questions have been formulated, as follows:

1) Are States obliged to cooperate regionally?
2) What are the rights and obligations of States to establish an MPA under global conventions and regional instruments?

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force 30 May 1996, more information are available online at <http://www.unep.org/nairobiconvention/who-we-are/structure/legal-and-policy-instruments> (Nairobi Convention).

[93] The Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, (adopted on 10 June 1995, entered into force 9 July 2004), more information are available online at <http://www.unep.org/unepmap/who-we-are/legal-framework> (Barcelona Convention).

[94] More information on the East Asian region are available online at <http://www.cobsea.org/aboutcobsea/background.html>; see also the information on the Northwest Pacific Region are available online at <http://drustage.unep.org/regionalseas/northwest-pacific.>

However, some secondary research questions will also be answered in different chapters of this thesis, and will be elaborated on accordingly.

In order to answer the relevant research questions, regarding whether the legal requirement to cooperate at a regional level to establish an MPA has been crystallised as the CIL, the common element of the legal obligation to establish an MPA will also be considered. This issue arose from an exciting discovery in the early stage of this research, being that the global instruments contain provisions to urge, or require, States to establish an MPA or other similar protected areas to protect the marine environment, as mentioned above. Many regional instruments are also directly related to the establishment of an MPA as a mechanism to protect the marine environment, for example the Cartagena Convention of the Wider Caribbean Region,[95] the Nairobi Convention of the Eastern African Region[96] and the Barcelona Convention of the Mediterranean.[97] Given the number of locations with the legal obligation and/or rights of States to establish an MPA and the fact that they can also be read with the general obligation to cooperate regionally, whether there is evidence of the emergence of customary international law related to regional cooperation to establish an MPA is also examined in this research.

Research Methodology

As the research will analyse whether there is the customary international law on the establishment of an MPA, it will be necessary to demonstrate both state practice and *opinio juris*. The theory of interactional international law as expressed by Brunnée and Toope in *Legitimacy and Legality in International Law,*[98] will be employed to scrutinise each element of the CIL. This theory is used to explain the reciprocal interaction between the actors in society and the rule that is developed through this interaction and shaped into a legal obligation.[99] Three elements are included to consider a legal obligation: 1) a

[95] Cartagena Convention (n 91).
[96] Nairobi Convention (n 92).
[97] Barcelona Convention (n 93).
[98] Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010).
[99] Jutta Brunnée and Stephen Toope, 'Interactional international law: an introduction' (2011) 3 International Theory 307, 308.

shared understanding, 2) the criteria of legality, and 3) the practice of legality.[100] It should be noted that the interactional international law approach can be applied when determining the common elements of the treaty and non-treaty rule, especially how the interaction of soft law instruments influences global and regional instruments. Further details of the relevant methodologies and how they will be applied to this research will be provided in Chapter 2 - Legal Methodology.

However, the first step is to consider the rule of treaty interpretation provided in the Vienna Convention on the Law of Treaties 1969[101] as a basis to determine the core element of States' legal rights and obligations to establish an MPA,[102] as many of the materials are in the form of the treaty, as mentioned in the Research Aim and Scope.

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[100] Ibid.

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

[102] The relevant global instruments are the relevant IUCN Guidelines on the establishment of an MPA, UNCLOS (n 22), CBD (n 24), MARPOL (n 71), Ramsar Convention (n 14), WHC (n 13), ICRW (n 78) and CMS (n 79). The relevant regional instrument are Cartagena Convention (n 91); Barcelona Convention (n 92); Nairobi Convention (n 93); The convention on the Protection of the Black Sea against Pollution, adopted 21 April 1992, entered into force 15 January 1994 (Bucharest Convention); Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific, adopted 12 November 1981 entered into force 1986 (Lima Convention); Convention for cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific, adopted 18 February 2002 (Antigua Convention); Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment, adopted 14 February 1982, entered into force 20 August 1985 (Jeddah Convention); Convention for the Protection of the Marine Environment of the North-East Atlantic, adopted 22 September 1992, entered into force on 25 March 1998 (OSPAR Convention); Convention on the Protection of the Marine Environment of the Baltic Sea Area, adopted 9 April 1992, entered into force 17 January 2000, 1507 UNTS 167, (Helsinki Convention); Framework Convention for the Protection of the Marine Environment of the Caspian Sea, adopted 4 November 2003, entered into force 12 August 2006 (Tehran Convention); Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, adopted 23 March 1981, entered into force 5 August 1984 (Abidjan Convention) ;Antarctic Treaty, adopted 1 December 1959, entered into force 23 June 1961, 402 UNTS 71; Kuwait Regional Convention for Co-operation in the Protection of the Marine Environment from Pollution, adopted 24 April 1978, entered into force 1 July 1979, 1140 UNTS 154 (Kuwait Convention); Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, adopted 24 November 1986, entered into force 22 August 1990 (Noumea Convention); Action Plan for the Protection and Management of the Marine and Coastal Environment of the South Asian Seas Region , adopted 24 March 1995, entered into force February 1997 (SASAP 1995); Action Plan for the Protection, Management and Development of the Marine and Coastal Environment of the Northwest Pacific Region, adopted September 1994, Seoul, Republic of Korea (NOWPAP 1994); Action Plan for the Protection and Sustainable Development of the Marin Environment and Coastal Areas of the East Asian Region, adopted in April 1981, revised 1994, UNEP(OCA)/EAS IG5/6, Annex IV online access at http://www.cobsea.org/documents/action_plan/ActionPlan1994.pdf (EASAP 1994).

The combining legal methodology that will be used for the analysis of the relevant global and regional instruments will respond to the question 'What is the nature of the rights and obligations of States to establish an MPA through the regional mechanism?' This framework is expected to facilitate the synchronisation of the results of the meaning of legal rights and obligations, which were found in both global and regional instruments from the rule of treaty interpretation and the reciprocal interaction between the set of rules from both treaty and non-treaty sources related to the establishment of an MPA, and the related actors for the implementation of this set of rules. The expected results will be used to examine the likelihood of this rule to legally oblige States to establish an MPA based on the elements of the customary international law.

Fragmentation and Overlaps of relevant international mechanisms to establish an MPA

Many global and regional instruments will be examined in this thesis, and they could lead to fragmented and overlapping rules for the application of the mechanism to establish an MPA. As the concept and purpose of a range of treaties may perceive the similar issues from a different perspective in this case, as it is mentioned that many international conventions relate to the establishment of an MPA and these treaties could interact when the States interpret or apply the treaty. This could lead to fragmentation of the international law applied to a similar problem.[103] The same term may be interpreted differently in different conventions, for example the term 'common concern' may be interpreted differently according to the purpose of the treaties, as one may refer to the concerns of the parties to the treaty with another referring to the concerns of global interest.[104] Fragmentation can also arise when there is a conflicting norm from one convention that intends to be

[103] Margaret A. Young (ed) *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012), Introduction Chapter ; see also Margaret A. Young, *Trading Fish, Saving Fish: The Interaction Between Regimes in International Law* (CUP 2011), 244-249.

[104] Michael Bowman, 'Environmental Protection and the Concept of common concern of mankind' in Malgosia Firmaurice, David M. Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar 2014), 501-504.

applied generally, while another convention or regime relating to the same issue may also mean to be applied specifically.[105] As a consequence, the rules can become fragmented when they compete in one particular matter with only a limited administrative agent,[106] and in this case, States may have to apply different rules in one marine area. Therefore, the potential fragmentation of international law regarding the initial establishment of an MPA will firstly be addressed in this section. Fragmentation can be defined as 'the normative disaggregation or conflict' arising from a specific function of international law.[107] The different roles played by these conventions can also cause a potential fragmentation of rules.[108]

Possible fragmentation or overlapping issues may be encountered when examining the relevant international conventions at global and regional levels. Fragmentation commonly occurs when there is a general regime or a convention with a particular function.[109] As conventions may serve different purposes, one could be based on a more general framework than another that has a specific purpose.[110] Some issues may arise from the application of a convention, which may cover some sections of the marine environment, but not others.

The objectives and purposes of global instruments will be briefly introduced in order to elaborate on potential fragmentation further, as these can influence the application and legal commitment of States to these conventions. Although they have different purposes, these global instruments share some

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[105] Daniel H. Joyner and Marco Roscini, *Non-proliferation law as a Special Regime* (CUP 2012), Introduction Chapter, 1-3; see also James Harrison, *Making the Law of the Sea* (CUP 2013), 237-241.
[106] Anthony J. Colangelo, A Systems Theory of Fragmentation and Harmonization, (page 4-5 from Draft 2/01/2016, online access at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2754402).
[107] Sahib Singh, 'The Potential of International Law: Fragmentation and Ethics' (2011) 24 Leiden Journal of International Law, 24.
[108] Martti Koskenniemi, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 58th Session of the International Law Commission, A/CN.4/L.682, 13 April 2006, 11, online access at <http://www.repositoriocdpd.net:8080/bitstream/handle/123456789/676/Inf_KoskenniemiM_FragmentationInternationalLaw_2006.pdf?sequence=1> (accessed 29 August 2017) (ILC Report on Fragmentation).
[109] Ibid., 33-35.
[110] Ibid., 33-34.

common elements concerning the rights and obligations of States to establish an MPA.[111]

Regarding the areas of application of conventions that may overlap with each other, the CBD is implemented in national jurisdictions,[112] where States enjoy sovereignty. However, member States of the UNCLOS may enjoy particular sovereignty or sovereign rights[113] based on the maritime zone, although the jurisdiction of States in the territorial sea may be greater than their sovereign rights in the EEZ,[114] resulting in complication in the exercising of the jurisdiction of the state, as shown below in *1.1 Applicable jurisdictions of the convention*.[115] The Ramsar convention is mainly concerned with the protection of wetlands and covers some parts of the marine area[116] that are also governed by the CBD and the UNCLOS, while the WHC is focused on natural heritage,[117] which matches the eligibility criteria described in the convention and its guidelines. It is evident that these Global Instruments are material to this current research, as their provisions share and/or cover the protection of the marine environment and its resources; however, they have different applications. There may be other international regimes that partly apply to the marine area as the scope of such convention does not cover every area of the ocean, but these treaties are those with almost universal participation which can draw the trend of the legal regime on the establishment of the MPA. [118]

Based on the above overview, potential fragmentation may arise from, but not be limited to 1) the applicable jurisdiction of the convention; 2) the element of the legal obligations of the convention; 3) the eligible protection measures; and 4) the member States of the conventions, as explained below.

[111] Further details can be read in Chapter 5 of the thesis.
[112] CBD (n 24), Article 4.
[113] UNCLOS (n 22), Article 52.
[114] Ibid., Article 15 and Article 52.
[115] Further elaboration on the competence of State in the different maritime zone is provided in Chapter 5, section 1 – Competence of States in Maritime Zones.
[116] Ramsar Convention (n 14), Article 6.
[117] WHC (n 13), Article 2.
[118] Further details on Chapter 3 and Chapter 5 of this thesis.

1.1 Applicable jurisdiction of the convention

As mentioned above, the applicable jurisdictions of States concerning the implementation of conventions are dissimilar, because different conventions focus on different parts of the marine environment. However, these conventions share a similar interest, either in whole or part, in protecting the marine environment, and the implementation of two or more conventions may clash in cases where different protective regimes are applied in the same designated area. For example, based on the scope of the CBD, States are urged to impose a system to protect areas[119] that will be applied within their national jurisdiction,[120]whereas the right of innocent passage of other States, as specified in Article 19 of the UNCLOS, may result in limiting the application of the possible protection measure within the territorial sea.[121]

These specific rules related to the protection of the marine environment are created in different fora, and they also have their enforcement authority. This causes different interpretations and enforcement of the rules of law and operational systems governing similar subject areas.[122] This lack of a harmonious implementation makes it difficult to operate each regime.[123] For example, the States may impose the regulation on the protected area in the national jurisdiction that limits the access of the designated are, but the other states claim the right of innocent passage through such an area. Without the harmonious implementation of the protection measure in the marine area and the rights of the States under the UNCLOS, this issues may cause at dispute between the States regarding claiming different rights in the marine area.

1.2 Element of the legal obligations of the conventions

The provisions related to the establishment of an MPA will be elaborated in Chapter 5 - Legal Mechanisms for the Establishment of the Marine Protected Area in the Global Instruments, where it will be shown that the different provisions of global instruments may impose some legal elements that are

[119] CBD (n 24), Article 8.
[120] Ibid., Article 4.
[121] UNCLOS (n 22), Article 19.
[122] Young, *Regime Interaction in International Law: Facing Fragmentation* (n 103), 88.
[123] Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden Journal of International Law , 555- 556.

similar or that complement each other, while others may be distinctive. For example, broad legal obligations are imposed by the CBD and the UNCLOS. According to Article 8(a) of the CBD, States are required to 'establish a system of protected areas,'[124] while States are also generally required to protect the marine environment, as stated in Article 192,[125] together with Article 194(5) of the UNCLOS, in which States are urged to implement measures to protect the fragile marine ecosystem.[126] These articles can be regarded as general law, unlike the *lex specialis* indicated in the MARPOL, which has a particular purpose.[127] Since the priority of the MARPOL is to prevent pollution caused by the discharge of harmful substances from maritime activities,[128] its application is explicitly limited.

In addition to these five international conventions, there are many regional instrumentsregarding the establishment of an MPA, some of which contain similar legal obligations.[129] However, the specific purposes of the regional conventions focus on the protection of the marine environment of a particular region. They may, therefore, only address those particular issues of concern to the given region. The result may be that any obligation to establish, or cooperate in the establishment of, MPAs may be interpreted and implemented in a different form in different regional agreements.

1.3 Eligible protection measures

Eligible protection measures are connected with the applicable jurisdiction of the convention in 1.1. The applicable jurisdiction of the convention directly affects the designation of the protected area and available protection measures based on the legal commitment. In general, States that are committed to one international convention should follow the conventional scope of application that may allow, or restrict, specific activities or areas. For example, the

[124] CBD (n 24) Article 8 (a).
[125] UNCLOS (n 22), Article 192.
[126] Ibid., Article 194(5).
[127] ILC Report on Fragmentation (n 108), paras 58, 36.
[128] MARPOL (n 71), Article 1.
[129] Some Regional Sea Programmes that are initiated by the framework of the UNEP's Action Plans may have similar legal requirements regarding the establishment of an MPA, whereas other binding regional instruments have not yet been agreed and the focus is on the legal commitments of global instruments. Details can be read further at Chapter 6, section 2 of the thesis.

protective measure associated with PSSAs approved by the IMO to prevent them from being harmed by maritime activities[130] may conflict with the freedom of navigation imposed by the UNCLOS.[131] However, according to Article 211(6), the UNCLOS recognises the eligibility of the protective measures provided that they are approved by the IMO. The PSSA of the Great Barrier Reef and Torres Strait of Australia[132] is one of the examples, in that its associated protection measure on the compulsory pilotage is approved by the IMO, which is quite controversial when it is first adopted, as some States claim it does not conform to the UNCLOS.[133]

1.4 Member States of the Conventions

Although a large number of States are party to the selected conventions, this does not mean that the same member States are party to all of the conventions.[134] This will make a difference in the level of implementation of obligations. For instance, where one State that agrees to an obligation to protect the marine environment interacts with another that is not bound to such a commitment, as it is not party to the convention, the issue of enforcing the legal obligation may arise.

Although fragmentation is one of the complex issues in the interpretation and implementation of international law, the founding of the emerging customary norm on the establishment of an MPA, which is the focus of this research could offer some resolution to this fragmentation. As the aim of this study is to identify the common elements in the existing relevant global and regional instruments for the establishment of an MPA with a focus on regional

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[130] IMO, Resolution A.982(24), adopted on 1 December 2005 (Agenda item 11), Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, A 24/Res.982(24), 6 February 2006, online access at <http://www.imo.org/en/OurWork/Environment/PSSAs/Documents/A24-Res.982.pdf>, 10 (accessed 29 August 2017).

[131] UNCLOS (n 22), Article 87.

[132] Resolution MEPC.133(53), adopted on 22 July 2005 Designation of Torres Strait as an extension of the Great Barrier Reef Particularly Sensitive Sea Area, MEPC 53/24/Add.2.

[133] Robert C. Beckman, 'PSSAs and Transit Passage—Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS' (2007) 38 Ocean Development & International Law 2007, 326; see also Julian Roberts, 'Compulsory Pilotage in International Straits: The Torres Strait PSSA Proposal' (2006) 37 Ocean Development & International Law.

[134] Young, *Regime Interaction in International Law: Facing Fragmentation* (n 103), 88 ; For example, the United States of America (USA) is neither party to the UNCLOS nor the CBD but is party to the MARPOL.

cooperation that could potentially be regarded as the CIL, once it is found that the CIL is emerging. The purpose and priority of the State to conform to the CIL on the establishment of an MPA should positively affect the fragmentation of law in this matter. However, the ultimate aim is to analyse the likelihood of these elements imposing a legal obligation on States to establish an MPA as customary international law. Therefore, the resolution or lessening, of other aspects of the fragmentation in these international instruments is left for other research projects to address.

Research Structure

Having briefly introduced the argument, aims and legal methodology of this research, a detailed explanation of the Legal Methodology will be provided in Chapter 2. Chapter 3 will draw on a concept of an MPA of this research, followed by an examination of the legal cooperation in international law in Chapter 4. Chapter 5 is an analysis of the legal mechanism to establish an MPA under global instruments. Chapter 6 will contain a similar study based on a regional approach under regional instruments. Finally, the conclusion and analysis of the research are presented in Chapter 7 with a response to the research questions, which is expected to lead to the contributions of this research.

Contributions

This project highlights the legal rights and obligation of States to establish an MPA through regional cooperation under international law. The initial research found that a core or common understanding of the legal element of the obligation may be evident from the many global and regional instruments. This finding was based on an analysis of the legal mechanisms provided in the global and regional instruments shown above. Regional cooperation is essential to promote the conservation of biological diversity[135] and the regional approach to the establishment of an MPA is also crucial, as 'the boundaries of marine ecosystems often cross the boundaries of States' jurisdiction'.[136] Moreover, since international treaties require regional

[135] CBD (n 24), Preamble.
[136] Kelleher (n 25), 2.

cooperation,[137] an examination of regional cooperation for the implementation of an MPA could reveal a better way to conserve and protect marine biodiversity in a regional unit.

Although many legal instruments have been developed to facilitate the establishment of an MPA at both global and regional levels, most of the mechanisms provided in global and regional instruments referring to the establishment of an MPA are in the framework conventions, which fail to punish States that neglect to implement an MPA regime.

For this reason, further analysis was conducted to determine whether or not this set of legal rights and obligations qualify as customary international law by considering the evidence of state practice and *opinio juris*, which are the critical elements of the customary international law.[138] If the obligation to cooperate at the regional level to establish an MPA can be proved to exist already, or be emerging as CIL, this will serve to escalate the standard of marine environment protection. The CIL binds all States, even those that do not participate in any relevant convention,[139] except for those that qualify as 'persistent objectors', having expressed their objection in the early stage of the development of customary international law and continue to do so.[140] Although no persistent objectors are expected to be found in this case, it may be difficult to judge whether the action of States regarding the implementation of an MPA is based on the belief that customary international law obliges them to do so or whether States establish an MPA to conform to the commitment they consented to under the global instruments. This is supported by the finding of the record of participating countries to the global and regional regimes, which shows that every nation is, at least, bound by either one or more global agreements regarding the establishment of an MPA. Furthermore, the participation at the regional level is not generalised and in conformity, as some countries, despite being bound by the global convention

[137] UNCLOS (n 22), Article 197.
[138] Rosalyn Higgins, *Problem and Process: International law and how we use it!* (OUP 1995), Chapter 3; See also Mark Eugen Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (Kluwer Law International 1997), 61.
[139] Dupuy (n 28), 450.
[140] Villiger (n 138), 34.

that recommended the regional cooperation, have not practically applied the commitment to their region.[141] Therefore, it is difficult to conclude the status of the CIL on the regional cooperation to establish an MPA. However, regardless of the uncertainty of the status of the CIL, I, the researcher, believe that the CIL on the establishment of the MPA appears to be emerging from the evidence of relevant global and regional instruments and conclude that the legal norm in this matter is developing according to the legal methodology of this research. In any case, this thesis will contribute to the crystallisation of the law in this regard, as it may demonstrate the importance concept of an MPA that the States should consider when implementing the MPA regime.

[141] Details of the RSPs that have not agreed to the regional agreement or other mechanisms to establish an MPA at the regional level can be read at Chapter 6, section 2.3 of the thesis, which are not the same groups of the non-engagement parties to the RSPs as highlighted in Annex II of thesis (n 82).

CHAPTER 2 LEGAL METHODOLOGY

Introduction

The purpose of this current research is to establish whether or not a norm of customary international law (CIL) relating to regional cooperation to establish Marine Protected Areas (MPAs) exists. The research needs to examine the existing international law related to the establishment of MPAs with a focus on the regional cooperation involved in the formation of these areas. The aim is to gain an understanding of the nature of the rights and obligation this regional cooperation entails to enhance the protection of the marine environment by the establishment of the MPA. Relevant methods will be employed to answer the research question, with two further considerations being required. One of these relates to an analysis of the rights and/or obligation involved in establishing an MPA under international law, while the other entails an analysis of the customary norm on the regional cooperation needed to implement these rights and/or obligation.

This research applies the theory of interactional international law by Brunnée and Toope[1] to determine if there is an emerging customary norm on the regional cooperation to establish an MPA. As this thesis examines whether there is an emerging customary law in the establishment of an MPA, it will be necessary to determine whether such rules or norms are customary international law and how they have emerged. The customary international law is the source of international law according to Article 38 of the Statute of International Court of Justice.[2] There must be evidence of the *opinio juris* and state practice of a particular obligation for it to be customary international law.[3] To identify *opinio juris* and state practice, the interactional international law theory (which follows a constructivist approach)[4] will be introduced in this thesis. This approach is expected to shed light on the overarching or unifying legal norms or obligations in the establishment of an MPA that are

[1] Brunnée J and Toope S, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010).
[2] Statute of the International Court of Justice, entered into forced October 24, 1945, 59 Stat. 1031, (hereinafter ICJ Statute).
[3] Higgins R, *Problem and Process: International law and how we use it!* (OUP 1995), 18-19; See also; Thirlway H, *The Sources of International Law* (OUP 2004), Chapter 3.
[4] Brunnée and Toope (n 1), 15.

found in both international and regional instruments, regardless of its formality, as this approach incorporates the interaction between the parties concerned.[5] As the interactional account of international law is relatively new, not many works of literature have applied this to further the analysis of the *opinio juris* of the element of the CIL. Some agree that the social understanding and the complex action of actors to such an understanding may generate the international law.[6] In any case, the social norm may advance or contribute to, the development of the international law.[7] However, the social norm may also differentiate from the law by the a sanction of the norm, as one will be social sanction if it does not act by the government.[8] It is also accepted that the development of customary law requires there to be a relationship between the state practice and *opinio juris*.[9]

This thesis utilises the interactional international law theory to explain the emergence of customary international law, as this provides a mechanism to understand and identify both State practice and opinio juris. This is done by analysing both statements of norms (e.g. the text of treaties) and the interaction between the subject of law and their action that could show if the emerging norm is there in the establishment of an MPA. The interactional international law theory that will be used in this thesis is based on Brunnée and Toope's book entitled *Legitimacy and Legality in International Law,*[10] in which they mention three vital elements of legal obligations, namely: 1) shared understanding; 2) criteria of legality; and 3) practice of legality.[11] These criteria will be used to examine the elements of obligation and the

[5] Ibid. 70.
[6] Adam Bower, 'Norms Without the Great Powers: International Law, Nested Social Structures, and the Ban on Antipersonnel Mines' (2015) 17 International Studies Review 2015, 351-352; see also Paul F. Diehl, Charlotte Ku and Daniel Zamora, 'The Dynamics of International Law: The Interaction of Normative and Operating Systems' (2003) 57 International Organization 2003.
[7] Paul Hallwood, 'International Public Law and the Failure to Efficiently Manage Ocean Living Resources' (2014) 31 Marine Resource Economics, 135.
[8] Joel P. Trachtman and George Norman, 'The Customary International Law Game' (2005) 99 AJIL, 544-546.
[9] Pierre-Marie Dupuy, 'Formation of Customary International Law and General Principle' in Bodansky D, Brunnée J and Hay E (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007), 454-455.
[10] Brunnée and Toope (n 1).
[11] Brunnée J and Toope S, 'Interactional international law: an introduction' (2011) 3 International Theory 307, 308.

emergence of the customary international law with regard to the establishment of an MPA.

The reason for this thesis preferring this approach in the examination of an obligation to the conventional positivism is quite apparent, in that this research involves many soft-law instruments, including guidelines of the international institution, which may not accommodate other theories of law. The interactional international law engages the development of the norm from the social perspective, but it also provides the criteria of legality for distinguishing the social norm and legal norm that contributes to the formation of the CIL. It also stresses that such a developed norm should be practiced for it to be considered as law. When compared with other theories of law, for example in legal positivism,[12] something may be perceived as a legal obligation when it complies with the form 'posited' in the international law which could be a treaty or existing custom. Positivism has not incorporated 'the social aim or policy standard'.[13] However, even when it may be argued that Hart's positivism also includes social rules, this cannot explain why, in the absence of consequences in the case of non-performance of 'obligations', those same obligations may still be complied with as though they have a binding force.[14] In contrast, the theory of natural law may not be suitable in this regard, as the consideration of the legal obligation in the establishment of an MPA cannot only depend on the moral or voluntary basis,[15] which, in this case, can refer to consent to be bound by the treaty.[16] Instead, as the aim is to establish whether or not a norm of CIL exists, criteria are needed to establish whether or not *opinio juris* exists.

[12] Hans Kelsen, General Theory of Law and State (Anders Wedberg tr, The Lawbook Exchange 1999) 60 (first published by Harvard University Press 1945) cited in Torben Spaak, ' Legal positivism, conventionalism, and the normativity of law, Jurisprudence,' (2017 Jurisprudence; See also Hart, H.L.A., The Concept of Law (OUP 1961).
[13] Harry Gould, 'Categorical obligation in international law' (2011) 3 International Theory 2011, 259-260 ; See also . Hart, H.L.A., The Concept of Law (n 12).
[14] Leslie Green, 'The Concept of Law Reisited' (1996) 94 Michigan Law Review 1996, 1694-1695.
[15] Leslie Green, 'Law and Obligations' in Jules L. Coleman, Kenneth Einar Himma and Scott J. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2012), 515.
[16] Gould (n 13) 262.

In general, if an obligation is considered to be customary law, then it is binding for all States, and not only the members of a particular treaty,[17] although exceptions can be made in the case of persistent objectors and special customary law.[18] However, it is challenging to identify what should count as *opinio juris* and state practice that leads to a particular customary law, especially in this research, which involves many relevant instruments pertaining to the establishment of an MPA. This thesis chooses the identifying of the emerging customary norm, due to the reproduction of a similar pattern of the provision of the international conventions regarding the establishment of an MPA, as they draw the participation of a large number of States, including more and less powerful States,[19] that could potentially influence the development of customary law.[20] However, this thesis will not claim that only the more powerful States are the main contributors to the emergence of the customary law regarding the establishment of an MPA, as some would argue.[21] Similarly, the international relation theory is not particularly helpful, as this may focus on the relations of international society that effects the States; behaviour, althoug it does not provide the mechanism to determine the influencing norm that cause such behaviour.[22] Despite the regime theory also paying attention to the process of regime building and considering engagement in policy discussion and decision-making,[23] it does not provide insights useful to the analysis of the norm of customary international law which is the aim of this thesis.

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[17] Dupuy (n 9), 450.
[18] Thirlway (n 3), 56; Details of exceptions are further elaborated on in section 2 of this Chapter.
[19] For example, the United States of America (USA) which considering as a powerful state ratified to the Ramsar convention, the WHC and the MARPOL but not the CBD and UNCLOS, while almost every countries, except USA are member to the CBD. List of the member of UNCLOS can be accessed at <http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea> List of the member of CBD can be accessed at <https://www.cbd.int/information/parties.shtml.>
[20] Michael Byers, *Custom, Power and the Power of Rules* (CUP 1999), 37.
[21] Ibid.
[22] Oran Young, *International Cooperation: : Building Regimes for Natural Resources and the Environment* (Cornell University Press 1989); see also Stephen Toope, 'Emerging Patterns of Governance and International Law' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2010), 91, 94-95.
[23] Byers (n 20), 24-26 ; See also Young (n 22), Chapter 1, 12-18.

In the process of seeking the emergence of the customary norm on the establishment of an MPA, this research engages the analysis of many international agreements[24] to find such a norm or the common element of the rights and/or obligation to establish an MPA with a focus on the regional cooperation. The analysis of the treaty interpretation should be firstly clarified to identify the nature of the rights and obligation in order to find the shared understanding, which is an element of the legal obligation of the interactional international law theory. Although the IUCN Guidelines, being one of the global instruments, are not in the form of a treaty, it can offer the foundation of the shared understanding of the concept of an MPA for a further examination of the legal obligation to establish an MPA. As the shared understanding is the first element to consider in the legal obligation in the interactional international law, the analysis must also incorporate an understanding of the rule of treaty interpretation, as the majority of the materials in this thesis are in the form of a treaty. Therefore, the rules of treaty interpretation in the Vienna Convention on the Law of Treaties 1969[25] (VCLT) will be applied to interpret the meaning of the applicable treaty provisions in global and regional instruments to find a possible set of rules or norms concerning the establishment of an MPA. For consistency, the same rules will be used to interpret the soft law instruments such as the IUCN Guidelines.

After examining the relevant treaty provisions involved with the establishment of the shared understanding, the current research will proceed by analysing the relevant instruments using the rule of treaty interpretation. Then, the consideration of the formation of customary international law and the interactional international law will be examined in a coordinated approach, which will support the expected contribution of this research, which is to provide an understanding of the rights and obligation of States to establish an MPA through regional cooperation. Therefore, this chapter will

[24] The relevant global instruments of the research are the UNCLOS, the CBD, the MARPOL, the Ramsar Convention, the WHC, and one non-conventional instrument, namely, the relevant Guidelines on the (Marine) Protected Area of the IUCN. The research also engage the analysis of the regional instruments as mentioned in the Introduction Chapter, Research Methodology, page 46.

[25] The Vienna Conventions on the Law of Treaty, adopted on the 23rd May 1969, entered into forced on the 27th January 1980, UN Doc. A/Conf.39/27 / 1155 UNTS 331 (VCLT).

firstly introduce the rules of treaty interpretation as interpreting help to develop the shared understanding on the obligation to establish an MPA. This will be followed by general theory on the emergence of the customary international law, as this will show what elements need to be accepted as the CIL. Fianally, this chapter will present the interactional international law theory, as this theory will explain the criteria to consider the existence of the legal obligation to establish an MPA through regional cooperation. This theory will be applied within this thesis and is the core mechanism to identify whether there is an emerging norm on the regional cooperation to establish an MPA.

1. Treaty Interpretation

As this current research aims to examine the existing elements of the legal obligation to establish an MPA in international law, many global and regional instruments, as mentioned in the previous sections, will be examined. Therefore, the rule of treaty interpretation is one of the methods adopted to analyse the rights and obligations of States with regard to the establishment of an MPA based on relevant international conventions. The core instrument in this regard is the VCLT, Articles 31, 32 and 33 of which contain the rules of treaty interpretation. These rules are accepted as being the customary international law that provides the guidelines for the interpretation of a treaty.[26] Although the VCLT contains three provisions for treaty interpretation, the primary one is Article 31, which is the general rule. As well as, Article 32 includes supplementary means of interpretation and Article 33 relates to the language of the treaty. However, the focus of this research is the general rule of treaty interpretation in Article 31, as this is the primary provision that guides the interpretation.[27] Thus, the rule of treaty interpretation provided in the VCLT will be used to determine the meaning of the relevant provisions of the treaty material in this current research. Prior to applying Article 31, the terms of the application of a 'treaty'should be understood. A treaty is described in Article 2 of the VCLT as follows:

[26] Duncan B. Hollis (ed) *The Oxford Giude to Treaties* (Oxford University Press 2012), 476 ; See also Richard Gardiner, *Treaty Interpretaion* (Oxford University Press 2008), 142.
[27] Hollis (n 26), 478.

> 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.'[28]

This is a limitation of the ability to apply the VCLT to some instruments that have not been concluded between States, or are not in a written form, for example agreements between international organisations or oral agreements.[29] If these instruments possess the character of a treaty, there should be no reason to not apply the rule of treaty interpretation to them.[30] However, with the majority of the materials used in this research being in the form of conventions at both the global and regional level, they are usually agreed by States in a written form. Therefore, whether or not the VCLT will apply to them should not be an issue. While the research draws on all paragraphs of Article 31, it may not be necessary to apply all of them to the interpretation of each treaty provision. Some cases may apply paragraph one, and others may use paragraphs one and two of the Article.

1.1 Ordinary meaning[31]

Article 31(1) begins with the term *ordinary meaning,* which signifies that the starting point of the interpretation is the actual text of the treaty.[32] This statement is based on the principle of textuality,[33] which is also known as *good faith* in interpreting the ordinary meaning of the text.[34] Good faith is the central principle to be applied when determining a treaty as a whole.[35] Nevertheless, good faith can be difficult to define, as it is subjective.

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[28] VCLT (n 25), Article 2.
[29] Gardiner (n 26), 143.
[30] Ibid.
[31] VCLT (n 25), Article 31 (1)
General rule of interpretation
'…
(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
…'
[32] Gardiner (n 26), 144.
[33] Ibid., 64.
[34] VCLT (n 25), Article 31(1).
[35] Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009), 425; See also Anthony Aust, *Handbook of International Law* (Cambridge University Press 2005), 90.

Therefore, judgment usually relies on determining the abuse of rights to identify whether or not the interpretation is in good faith.[36] Good faith connects to reasonableness.[37] If the application of good faith does not result in a reasonable interpretation, then another more reasonable interpretation must prevail.[38] Furthermore, the interpretation of the ordinary meaning of the text should be in line with the objective and purpose of the treaty, which also involves the principle of integration, which requires interpreting a treaty as a whole.[39] The interpretation of the ordinary meaning using both *good faith* in interpretation and the *object and purpose of the treaty* should be applied based on the principle of effectiveness.[40] The interpreter should not only interpret from one particular provision but should rather 'read all the applicable provisions of a treaty in a way that gives meaning to all of them harmoniously'.[41]

Article 31 contains many principles to interpret the ordinary meaning, including the principle of textuality, the principle of good faith, the principle of integration, the principle of effectiveness and the principle of subsequent practice,[42] which will be examined later in the chapter. However, the first paragraph of Article 31 is crucial when beginning to interpret the relevant conventions mentioned in this research, as many of the selected conventions contain provisions related to the establishment of MPAs.

1.2 Context of a treaty[43]

If the application of the first paragraph is insufficient to interpret the treaty, Article 31(2) the '*context for the purpose of the interpretation of a treaty*',

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[36] Gardiner (n 26), 148.
[37] Ibid., 151.
[38] Aust (n 35), 90.
[39] Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (n35), 427; See also Gardiner (n 26), 64.
[40] Gardiner (n 26), 159.
[41] Ibid., 160-161.
[42] Yearbook of the International Law Commission 1964, vol. II, Documents of the sixteenth session including the report of the Commission to the General Assembly, A/CN.4/SER.A/1964/ADD.1, p 55, para 12 (Yearbook of ILC 1964 Vol. II).
[43] VCLT (n 25), Article 31 (2)

> '…
>
> (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> a. Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

may be used for the interpretation.[44] This article suggests the sources of the context to find the purpose of the treaty is the preamble and annexes.[45] Additionally, the related agreements 'which were made between the parties in connection with the conclusion of a treaty'[46] and other instruments 'which were made and accepted' by one or more parties in connection with the conclusion of the treaty[47] are also referred to as relevant sources to examine the context of the treaty. In other words, this paragraph shows what counts as the 'context' of a treaty for the purposes of treaty interpretation.[48] Although it is mentioned as an agreement or other instrument made between the parties, this does not mean that an agreement is ranked higher than other instruments in the hierarchy of the interpretation rule.[49] In this regard, finding an agreement or other instrument drawn between the parties means that they have settled on an additional agreement or instrument that is 'not part of the treaty or is itself a treaty.'[50] However, it must be clear that the parties have agreed that such an agreement or instrument can be used to interpret or apply the treaty. For example, the Understanding of the Convention on the Prohibition of Military or any Hostile Use of Environmental modification techniques[51] was agreed to interpret the meaning of the terms of the convention.[52] While any agreement or instrument that is agreed at the conclusion of a treaty can be referred to as such, it is quite difficult to determine the time of the conclusion of the treaty.[53] The process of conclusion of a treaty includes the period between 'the date of adoption and opening for

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b. Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
…'

[44] VCLT (n 25), Article 31(2).
[45] VCLT (n 25), Article 31(2); See also Aust (n 35), 90.
[46] VCLT (n 25), Article 31(2) a).
[47] VCLT (n 25), Article 31(2) b).
[48] Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (n 35), 429.
[49] Gardiner (n 26), p 207.
[50] Aust (n 35), p 91.
[51] Convention on the prohibition of military or any hostile use of environmental modification techniques, 10th December 1976, 1108 UNTS 151.
[52] The Understanding of Convention on the prohibition of military or any hostile use of environmental modification techniques, 10th December 1976.
[53] E.W. Vierdag, 'The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions' (1989) 59 British Yearbook of International Law, 79.

signature.'[54] This is not related to the time before the treaty was entered into force, although its conclusion and entry into force may be simultaneous.[55] The instrument agreed between the parties in this regard includes the statement they accepted during the ratification or accession,[56] but it may not include an annex of a treaty agreed after its conclusion, even if such an annex is accepted as an integral part of the treaty.[57] Declarations or reservations also may not be the instruments in the meaning of Article 31(2)(b), even when they 'might affect the interpretation.'[58] Thus, the instruments that would be considered to fall within this guide to interpretation may be limited to annexes of the treaty that were concluded at the same time as the treaty, but they may not cover other instruments that are agreed later, and these would be considered to fall under Article 31(3) instead. As to whether annexes that are agreed after the conclusion of a treaty should be treated as an integral part of the treaty[59] or a subsequent agreement of the treaty, this must be determined based on the intention of the parties.

1.3 Subsequent Agreement and Subsequent Practice[60]

In the next paragraph of the Article, the VCLT proceeds with an extrinsic instrument of the original treaty to further interpret a treaty between parties by taking account of the *subsequent agreement or practice, between the parties*.[61] Although this paragraph comprises three sub-paragraphs, only sub-paragraphs a) subsequent agreement and b) subsequent practice will be examined in this section. Sub-paragraph c), which is the relevant rule of international law, will be elaborated on in the next section.

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[54] Gardiner (n 26), pp 211, 214.
[55] Vierdag (n 53), p 82.
[56] Gardiner (n 26), p 215.
[57] Yearbook of the International Law Commission 1964, vol. I, Summary Records of the sixteenth session, A/CN.4/SER.A/1964, 310, para 8 (Yearbook of ILC 1964 Vol. I).
[58] Gardiner (n 26), p 215.
[59] Yearbook of ILC 1964 Vol. I (n 57), 310 – 311.
[60] Article 31 (3) of the VCLT

> '…
> (3) 'There shall be taken into account, together with the context:
> a. Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> …'

[61] VCLT (n 25), Article 31(3).

The subsequent agreement and practice referred to in this paragraph are made after the conclusion of the treaty and do not have to be 'made in connection with its conclusion'.[62] In this regard, the ILC explained in its reports that the subsequent agreement to consider when interpreting a treaty in this paragraph is as follows:

> 'an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.'[63]

The subsequent agreement in this paragraph could be agreed in any form[64] if proper evidence of such an agreement is provided.[65] An essential element of any form of agreement is the intention of the parties to be bound by it.[66] This includes decisions made and adopted by parties at meetings, but such an agreement should include the clear intention of the parties to interpret the provisions of the treaty.[67] In addition, the Ministry's letter[68] or the Ministry's declaration[69] of the governments of the parties could also be recognised as an agreement based on Article 31(3)(a). However, a subsequent agreement could be an amendment to a treaty, which means to clarified the interpretation of the original treaty. If not, it could also be regarded as a subsequent practice between the parties to the original treaty.[70]

With regard to subsequent practice, the ILC commented on its importance as a tool to understand the application of a treaty between the parties, as follows:

> 'The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes

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[62] Gardiner (n 26), 216.
[63] Yearbook of the International Law Commission, 1966, Vol. II, Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly, A/CN.4/SER. A/1966/Add. 1, p 221, para 14. (Yearbook of the ILC 1966 Vol. II).
[64] Gardiner (n 26), 216-218.
[65] Ibid., 220.
[66] Ibid., 217.
[67] Aust (n 35), 92.
[68] *European Molecular Biology Laboratory Arbitration (EMBL v Germany), Award of 29 June 1990, 105 ILR 1* cited in Gardiner (n 26), 221.
[69] *Legal Status of Eastern Greenland (Denmark v Norway) PCIJ Series A/B53*, p 73.
[70] Gardiner (n 26), 219.

> objective evidence of the understanding of the parties as to the meaning of the treaty'.[71]

However, this practice must repeatedly undertake the matter concerning the interpretation and application of a treaty. Hence, '*concordant, common and consistent'*[72] practice is required as evidence of the establishment of a practice related to the interpretation of a treaty. In this case, practice includes legislative or judicial acts and acts of an executive that 'demonstrate a position in relation to the state's treaty commitment or entitlements', which is broader than the act of central governments.[73] Furthermore, in this sense, the practice should be sufficient to provide evidence of the agreement of State parties to interpret a treaty.[74] The acts of States to be considered as subsequent practice in this paragraph should not be isolated from others, but rather be widespread and consistent in order to be accepted as practice.[75] Some particular parties could establish a practice, but, other parties should not disagree with it for it to be a practice used to interpret the treaty.[76]

Other than being treated as a means to interpret a treaty, a subsequent practice can be used as evidence to confirm a supplementary means of interpretation.[77] For example, it may be a confirmatory act based on the preparatory work of a treaty when the application of such an interpretative understanding is adopted by the parties.[78] The treatment of such a practice as a subsequent practice according to Article 31 (3)(b) or as a supplementary means according to Article 32 of the VCLT is accepted as interpretative evidence of a treaty.[79] Since this relates to the application of the treaty, it requires some evidence to support that the parties have accepted such a practice. The use of a subsequent practice based on the dynamic nature of the interpretation may result in

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[71] Yearbook of the ILC 1966 Vol. II (n 63) , 221, para 15.
[72] Gardiner (n 26), 227.
[73] Ibid., 228.
[74] Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (n 35), 431 ; see also Iran – US Claims Tribunal Burton Marks and Harry Uman v Iran cited in Gardiner (n 26), 230-231.
[75] Gardiner (n 26), 230.
[76] Ibid., 236.
[77] VCLT (n 25), Article 32.
[78] Gardiner (n 26), 242.
[79] Ibid.

changing the original contractual terms of a treaty[80] and, in an extreme case, may eventually result in the conclusion of a new treaty.[81]

As this current research involves many global and regional conventions, the meaning or interpretation of a treaty may emerge through a subsequent practice, in addition to a subsequent agreement, because of the nature of some framework conventions, particularly the CBD and the UNCLOS. Moreover, the subsequent agreement between the parties in a meeting or the subsequent practice when the parties apply the treaty could be the key to the interpretation rather than merely focusing on the text of the conventions.

1.4 General rule of international law[82]

In addition to the authentic interpretation in subparagraphs a. and b. of Article 31 (3) above, Article 31 (3) mentions the relevant rules of international law applicable between the parties. With this being an additional source to determine the meaning of a treaty, the general rule of international law should be *taken into account, together with the context,*[83] which means that it should be applied together with the context of the treaty mentioned above. This paragraph will or will not be applied in some instances, depending on the interpretation of whether or not the relevant rule of general law is involved.[84] One difference that can be noted from the text is that the term 'subsequent', which is used in subparagraphs a and b mentioned above, is absent from Article 31(3)(c). This implies that the rule of international law in this subparagraph could refer to the rules of international law that are applicable at the time the treaty is concluded and at the time it is interpreted.[85] This is

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[80] Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (n 35), 432.

[81] Hazel Fox, 'Article 31(3) (a) and (b) of the Vienna Convention and the Kasikili/Sedudu Island Case', 61 cited in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on*, vol I (Martinus Hijhoff Publisher 2010); See Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties - A Commentary*, vol I (OUP 2011), 826.

[82] VCLT (n 25), Article 31(3)(c)

> '…
> 3.) There shall be taken into account, together with the context:
> …
> c. Any relevant rules of international law applicable in the relations between the parties.'

[83] VCLT (n 25), Article 31(3).

[84] Gardiner (n 26), 259.

[85] Ibid.

also called the use of 'intertemporal law', when the interpreter not only has to examine the law at the time the treaty was concluded, but also the development of the law in the subject matter, in order to determine the appropriate meaning of the treaty.[86] In this regard, the relevant rule of international law could take any form, as implied by, the general perception of the source of international law mentioned in Article 38 of the Statute of the ICJ, including conventions, customary law and the general principle of law.[87] However, it is assumed that the rules of international law should be those that have a binding force or those that create the source of obligations and are relevant to the treaty being interpreted.[88] Thus, it seems that the rule of international law can vary, as many rules of international law could be applied to the interpretation. However, the term 'relevance' in this sense implies a significant connection to the parties involved in the interpretation.[89] This significant connection to the involved parties could be that, if another treaty is imported to interpret the meaning, the parties involved must also be parties to the other treaty for it to play a role in influencing the interpretation of the treaty in question,[90] or such a rule must be a customary rule that is binding in all States.[91] Although this interpretative rule may not be applied in every case, this subparagraph will be very much involved with the existing law regarding the establishment of an MPA, as the parties in any one of the relevant global conventions are often party to the others mentioned in this research.[92]

1.5 Special meaning of the treaty[93]

This paragraph appears to be self-explanatory when compared to others in this article, as it is essential to understand the special meaning of a treaty term, if any, according to the parties concerned. However, the term 'special

[86] Ibid., 252-253; See also Aust (n 35), 93.
[87] Gardiner (n 26), 261.
[88] Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (n 35), 433.
[89] Gardiner (n 26), 265; See also Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (n35), 432.
[90] Gardiner (n 26), 273 – 275.
[91] Ibid., 274.
[92] As mentioned in the Introduction Chapter, the reason for selecting these global conventions as the source to identify the existing regime regarding the establishment of an MPA is that it engages a large number of State parties.
[93] VCLT (n 25), Article 31 (4)

> '…
> 4. A special meaning shall be given to a term if it is established that the parties so intended.'

meaning' has two explanations in that the meaning may be: a) a specific term in a particular area or b) a specific term that is different to the common understanding.[94] Although both of these 'special meanings' are included in this paragraph, the particular intention of the parties to the interpretation or what aspect of the special meaning of the treaty term they agree on or understand, is key to determining the special meaning.[95] In this regard, the party that claims the special meaning is responsible for the burden of proof attached to demonstrating it.[96] However, acceptable evidence of the special meaning should be capable of being identified in the context of the treaty, as the agreed definition of the special meaning would commonly have been included in the treaty.[97] If it was not, the preparatory work, or *travaux préparatoires,* or particular interpretative instrument between the parties could also be accepted as evidence of the established special meaning.[98]

Conclusion

The general rule of treaty interpretation elaborated on above is the fundamental methodology for this thesis and it will be incorporated in the analysis of the treaty obligations through the treaty interpretation. This will support the finding of the common rights/obligation of States to establish an MPA specified in global and regional instruments in order to find a common set, if any, of the obligations to establish an MPA. If evidence of the common rights and/or obligation of States to establish an MPA is found in global and regional instruments, this will form the basis of an analysis of the establishment of customary international law, which is the fundamental research method of this study.

2. The Emergence of Customary International Law (CIL)

As mentioned above, there are two essential elements in the emergence of CIL, namely state practice and *opinio juris,* which are the criteria for determining whether or not an emerging legal norm is sufficient to be regarded as CIL. The process of the emergence of CIL is usually more

[94] Gardiner (n 26), 291.
[95] Ibid., 291.
[96] Ibid., 293; See also Aust (n 35), 93.
[97] Gardiner (n 26), 296.
[98] Ibid, 297; See also Corten O and Klein P (eds.), *The Vienna Conventions on the Law of Treaties - A Commentary* (n 81), 569.

informal than the formation of international treaty law, with the result that CIL may not be as precise as the provisions found in treaty law.[99] For example, in the case of the Gulf of Maine, it was stated that:

> 'A body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the Co-existence and vital Co-operation of the members of the international community, together with a set of customary rules whose presence in the *opinio juris* of States…'[100]

The details of state practice and *opinio juris* should be clarified in order to justify the adoption of an obligation/action of States into CIL, and although they are two elements of CIL, it is difficult to separate them. They should be considered together, as there must be evidence of both state practice and *opinio juris* or *opinio juris sive necessitatis*.[101] In addition, the relationship between the practice and the belief about what is the law should be considered together, as elaborated in the *North Sea Continental Shelf case*, as follows:

> 'Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.*'[102]

The characteristics of state practice and *opinio juris* that contribute to the emergence of CIL are elaborated on below.

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[99] Committee on Formation of Customary (General) International Law, International Legal Association, 'Statement of Principles Applicable to the Formation of General Customary International Law, As amended at London Conference', Report of the Sixty Ninth Conference, London 2000, 2 (ILA Statement of the Formation of CIL).
[100] *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment *(Canada v. United States of America)*, I.C.J. Reports 1984, p 246., para 111.
[101] Thirlway (n 3), 57.
[102] *North Sea Continental Shelf* (*Federal Republic of Germany v Denmark; Federal republic of Germany v Netherlands)*, Judgment, I.C.J. Reports 1969, p. 3. para 77 (*North Sea Continental Shelf case*).

2.1 State Practice

In some cases, state practice may be referred to as the 'objective element', and *opinio juris* will be regarded as the subjective element.[103] Some even argue that state practice can be the only evidence of CIL in some cases.[104] However, the international court has asserted that these are both elements of CIL, as declared in many cases, including the aforementioned North Sea Continental Case and the Gulf of Main Case.

It should be noted that not all actions of States, such as an action to comply with any treaty provisions or other acts decided by their government, would be considered as state practice in customary law. According to Article 38 of the ICJ Statute, the sources of international law include 'international custom, as evidence of a general practice accepted as law', which some observe is better described as 'the generalisation of the practice of States'.[105] However, the generalisation of a state practice requires the acceptance of some norm or principle as a law, which is the reason for such acceptance.[106] A general practice does not mean that it has to be universally accepted as such, as[107] it could simply be the practice of States 'whose interests are especially affected.' [108] Such a practice should, at least, be 'followed by others'.[109] A group of States that adopt a similar practice could also instigate customary law, as evidenced in the *Fisheries Jurisdiction* case when the beginning of a preferential fishery zone of more than 12 nautical miles was developed and accepted in many coastal States in the North-west and the North-east Atlantic ocean.[110]

As well as the fact that practice should be generalised to form CIL, it is also crucial for it to be consistent.[111] The duration of the practice does not appear

[103] ILA Statement of the Formation of CIL (n 99), 7
[104] Thirlway (n 3), 136-136.
[105] Dissenting opinion of Judge Read in *Fisheries Case (UK v Norway)*, ICJ reports 1951, 191, cited in James Crawford, *Brownlie's Principle of Public International Law'* (8 edn, OUP 2012), 23.
[106] Ibid.
[107] ILA Statement of the Formation of CIL (n 99), 23-24.
[108] Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (OUP 2013), 64-65.
[109] Crawford (n 105), 25.
[110] *Fisheries Jurisdiction (UK v. Iceland),* Judgment (1974) ICJ report 3, para 58.
[111] Thirlway, *The Sources of International Law* (n 3), 65 ; See also Crawford (n 105), 24.

to be as important as its extensive repetition over a period of time,[112] as mentioned in the North Sea Continental Shelf case, as follows:

> 'Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.'[113] (emphasis added)

While the consistent practice is necessary, it does not have to be completely uniform or consistent,[114] which was elaborated on in the *Military and Paramilitary Activities in and against Nicaragua case,* as follows:

> 'The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.'[115]

It can be seen that the generality and consistency of the practice are crucial factors for determination of CIL. Moreover, the characteristic of state practice that would contribute to the emergence of CIL is also included in the criteria provided by the Committee established by the International Law Association

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[112] Thirlway, *The Sources of International Law* (n 3), 64 ; See also Crawford (n 105), 24; ILA Statement of the Formation of CIL (n 99), 20.
[113] *North Sea Continental Shelf* case (n 102), para 74.
[114] ILA Statement of the Formation of CIL (n 99), 23.
[115] *Military and Paramilitary Activities in and against Nicaragua (Nicaraqua v. USA.),* Judgment, I.C.J. Reports 1986, para 186.

(ILA) in the Statement on the Formation of the Customary General International Law (ILA Statement of the Formation of CIL), as follows;

1) 'Verbal acts, and not only physical acts, of States count as State practice;
2) Acts do not count as practice if they are not public;
3) In appropriate circumstances, omissions can count as a form of State practice.'[116]

Moreover, the ILA Committee on the Formation of Customary Law also observes that, for a practice to be regarded as an act of a State, it should be enacted by recognised officials, including 'the practice of the executive, legislative and judicial organs of the State'[117] and 'the practice of intergovernmental organisations in their own right'.[118] The former makes it quite clear that the actions of representatives and the international legislative are evidence of state practice, while, according to the latter, an action can be considered as a state practice because intergovernmental organisations are usually a group of states, which, by nature, is able to 'contribute to the formation of international law'.[119] These are the practices that should be taken into account ,especially in cases concerning the establishment of the MPA, which is sometimes agreed and clarified in the decision of the conference of the parties to the convention.[120] Reference is made to the resolutions of the UN General Assembly (UNGA) 'containing statements about the CIL' and, therefore, the resolutions adopted in the UNGA can also be regarded as verbal acts of individual States when considering state practice.[121]

This indication of how state practices are accounted for in CIL matches the research purpose of identifying the legal rights and/or obligations to establish an MPA in international law. Although these obligations appear in various sources of law, the legal status as the CIL of the rights and obligations as a whole is unclear, and, thus, an understanding of the criteria of CIL would

[116] ILA Statement of the Formation of CIL (n 99), 14-15, cited in Thirlway, *The Sources of International Law* (n 3), 66.
[117] ILA Statement of the Formation of CIL (n 99), 17.
[118] Ibid.,19.
[119] Ibid.
[120] Example can be seen in the CBD forum which agree the programme of work on marine and coastal protected area and programme of work on protected area, details of which are available in Chapter 5, section 2.2.
[121] *Ibid.*

highlight the status of these rights and/or obligation and demonstrate whether or not States are already legally bound to comply with them. Alternatively, it may demonstrate that protecting the marine environment by means of establishing MPAs is developing as the norm in customary international law.

2.2 *Opinio Juris* or *Opinio Juris Sive Necessitatis*

The *opinio juris* or *opinio juris sive necessitatis* is another element of CIL that can be translated as 'the view that what is involved is a requirement of the law, or of necessity'.[122] Some writers may not consider this element to be as important as state practice.[123] It is argued that, in some cases, the normative intention of the state is a decisive factor in determining the existence of CIL.[124] However, the details of this element will be elaborated on in this research as part of the emergence of CIL, as *opinio juris* is an element that illustrates the 'shared understanding' between States. This belief may lead individual States to decide to follow what they believe to be a legally binding practice,[125] as evidenced by state practice. The importance of *opinio juris* was clarified in the *North Sea Continental Shelf case* when it was shown that the *opinio juris* would be counted when the State concerned felt that the act conformed to what is believed to be its legal obligation, as follows:

> 'The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitua1 character of the acts is not in itself enough.'[126] (emphasis added).

As stated earlier, this element relates to the belief that the rule of law should be followed,[127] which leads to the question of how to identify the rule of law that States must follow. Initially, the rule of law may not be in the form of law as such, but rather a general principle. It is observed that this rule of law

[122] Thirlway, *The Sources of International Law* (n 3), 57.
[123] Hans Kelsen, *Principle of international law* (The Lawbook Exchange, Ltd 1959), cited in Crawford (n 105), 25.
[124] Frederig L. Jr. Kirgis, 'Custom on a Sliding Scale' (1987) 81 American Journal of International Law 146 (1987), 149.
[125] Byers (n 20), 149.
[126] *North Sea Continental Shelf* case (n 102), para 77.
[127] Thirlway, *The Sources of International Law* (n 3), 72.

that a State believes it should follow should be the general rule of law of 'a fundamentally norm-creating character'.[128] A norm that can be perceived to be a general rule of law could be one that already exists, or should exist, as 'a useful and desirable' rule.[129] Some writers argue that the norm that instigates the belief in the law is actually a shared understanding, or collective knowledge, which makes States decide to follow it.[130] Based on this shared understanding, one State expects others to behave in the same way in the processing of CIL.[131]

Although a customary rule can initially emerge from a general rule of law, in this current research some relevant international conventions may contain a shared element required to establish an MPA and, thus, it is possible that a set of 'useful and desirable' norms can be formed. In the case of *Continental Shelf (Libya and Malta)* it could be observed that the provisions of international conventions, albeit created by the consent of States and to which only State parties are bound, could possibly illustrate 'recording and defining rules deriving from custom, or, indeed, in developing them'.[132] One notable example of a convention that has both developed and codified rules of customary international law is the UNCLOS.[133] For example, the UNCLOS codified the customary law in part relating to the territorial seas,[134] where the development of the CIL shows in the principle of the exclusive economic zone,[135] which becomes the recognised customary international law later.[136]

In addition, soft law instruments, which may not bind states on their own account, may also contribute to the consideration of the 'new norms and principles' of law, especially in the area of international environmental law.[137]

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[128] *North Sea Continental Shelf* case (n 102), para 72.
[129] Cf. Sorensen. *Principes de driout international public', Recueil des cours, 101 (1960-III)*, p 50, cited in Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (n 108), 174.
[130] Byers (n 20), 148.
[131] Ibid., 150-151.
[132] Continental Shelf (*Libyan Arab Jamahiriya v Malta*), I.C.J. Report 1985, para 27.
[133] Ibid., para 31 ; see also The 1982 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396 (UNCLOS).
[134] UNCLOS (n 133), Article 1(1) and Article 2; See also Churchill RR and Lowe AV, *The Law of the Sea* (3 edn, Juris Publishing 1999), 53-56; Ashley Roach, 'Today's Customary International Law of the Sea' (2014) 45 Ocean Development & International Law, 242.
[135] UNCLOS (n 133), Article 58.
[136] Roach (n 134), 246.
[137] Dupuy (n 9), 458.

Various declarations made at international conferences, including the Stockholm Declaration in 1972[138] and the Rio Declaration in 1992,[139]are examples of how the principles and norms of environmental protection have been developed.[140] These declarations show the 'acknowledgement by states'[141] of the set of principles they should initially strive to achieve. Some of them may then develop into customary international environmental rules. In this regard, the difference between a principle and a rule was elaborated in the *Gentini* case,[142] in which the following was stated:

> 'A rule 'is essentially practical and, moreover, binding…[T]here are rules of art as there are rules of government', while principles 'express a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence'. [143]

It can be seen from the above statement that, although the principle may create some legal standard, it lacks a binding force. However, rules turn the specific standard into action and the application of the rule by its commitment confirms a legal obligation.[144] The obvious principles that have been developed into the rule of customary law are States' sovereignty over their natural resources and the responsibility of not to cause transboundary harm to other States.[145] This shows how the development of one acknowledged principle of environmental law can become the customary law.

Moreover, the UNGA resolutions, which are not characteristically hard law, may also provide evidence of *opinio juris* due to their normative value.[146] When a resolution is unanimously adopted, this may demonstrate the rule of

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[138] Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev. 1(1973), concluded on the 16th June 1972 (Stockholm Declaration).
[139] Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I), concluded on the 12th June, 1992 (Rio Declaration).
[140] Dupuy (n 9).
[141] Ibid.
[142] Principle 21 of the Stockholm Declaration (n 138).
[143] *Gentini* case (*Italy v. Venezuela*), 10 RIAA 551, cited in Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Third edn, CUP 2012), 189.
[144] Sands and Peel (n 143), 189.
[145] Ibid., 195; See also Ulrich Beyerlin, 'Different types of Norms in International Environmental Law' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007),430.
[146] Byers (n 20), 79.

law or even the creation of the rule of law,[147] and this would also illustrate the consent of the State to some certain rules of law.[148]

Therefore, the aim of this current research is to determine whether, given that a set of rules or the shared understanding of the establishment of an MPA can be drawn from global instruments, regional instruments and international 'soft law' instruments, that set of rules or shared understanding amounts to customary law or, at least, the development stage of the norm in the process of the formation of CIL (that is to the emergence of a norm of CIL). Although the elements that constitute CIL are evident, the identification of each of them, particularly *opinio juris*, is not straightforward. For this reason, another method will have to be imported into this research to support the consideration of *opinio juris*, details of which will be clarified later in the discussion of interactional international law in Section 3.

2.3 Exception of CIL

Based on the process of the emergence of CIL explained above, if a set of norms or principles is evident in state practice, it is to be expected that they will become legally binding law in all States. However, it may be that some states are unwilling to be bound by this CIL, in which case they must explicitly express their objection to the international community.[149] States may object at the beginning of the norm's emergence and would then be referred to as 'persistent objectors' if the persistence continued, and the objection was clear.[150] This is also in line with the principle of international law, in which a law is binding when a State consents to be bound by it.[151] Even when the rule of law may be considered to be a general law, the ICJ affirmed that a persistent objection is acceptable in the *Asylums* case when it concluded the following;

[147] ILA Statement of the Formation of CIL (n 99), 61-62.
[148] Ibid., 65.
[149] Mark Eugen Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (Kluwer Law International 1997), 60-62.
[150] Crawford (n 105), 28; Thirlway, *The Sources of International Law* (n 3), 86.
[151] Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (CUP 2010), 230.

> 'The Court cannot therefore find that the Colombian Government has proved the existence of such a Custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.'[152]

The same approach was also accepted in the *Fisheries* case, indicating that the rule was not applicable to Norway, since the court stated that 'In any event, the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.'[153]

An exception to CIL may also occur when it is not regarded as a 'general' but rather a 'local custom'. This will only be valid when there is evidence that the 'local custom' is bound to certain states or other parties.[154] The *Asylum case* mentioned above can also be evidence of this situation since the court accepted that the treatment of asylum in Latin America might differ from that of other State practices.[155] Consequently, the exceptions to CIL will exclude the objecting State from the binding status of CIL or affect its general binding status in the case of a local custom. Whilst it is not the intention of this current research to identify the exceptions of the rules regarding the establishment of an MPA, an understanding of the exceptions to CIL may help the analysis in cases where the status of the general CIL in this matter has not been certainly established.

Conclusion

Based on the foregoing, CIL can emerge when there is evidence of State practice and *opinio juris*, and with some exceptions, as mentioned above. However, the criteria on how to consider what counts as state practice or evidences *opinio juris* are not explicitly defined. Some believe that the

[152] *Asylum*, (Colombia/Peru), ICJ Rep 1950, pp 277-278 (*Asylum case*).
[153] *Fisheries (UK and Norway), ICJ Rep 1951, p 131*.
[154] Thirlway, *The Sources of International Law* (n 3), 89.
[155] *Asylum case* (n 152), pp 277-278.

relativity of the state practice and *opinio juris* are interlinked and that the belief of state that reflects practice of the state arises from the moral reason.[156] Some may also regard that only the state practice counts as CIL.[157] However, I, the researcher, believe the consideration of CIL should comprise of both the state practice and *opinio juris.* To find the *opinio juris* of the emerging custom on the establishment of an MPA, this thesis uses the interactional account of international law to identify the consensual norm arising.

It is the purpose of this thesis to apply the details of each element of CIL to determine the emerging norm in the establishment of an MPA in international law. To begin with, the general norm in this matter will be analysed from what is required based on international conventions. However, regional instruments that apply similar rules in this matter can also be regarded as evidence of the implementation of global norms, or, in any case, may be regarded as local customs if they are specially implemented in some regions.

3. Interactional International law

The connection between state practice and *opinio juris* should be examined to assist the analysis of the emergence of a norm of CIL. Thus, it is necessary to examine the interactional international law theory as a critical means to determine the legal obligation in international law, as it assists the identification of *opinio juris*. It also states that without 'the shared, and practiced, understandings' the customary norm may not occur.[158] However, as mentioned in the introduction part of this chapter, as this theory was introduced less than ten years ago in the book of Brunnée and Toope, the literature to support the use of this theory in the consideration of the customary international law is not plentiful. This theory was explained in Brunnée and Toope's book entitled '*Legitimacy and Legality in international law; an interactional account'*.[159] It determines the legal obligations under

[156] Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 American Journal of International Law 2001,781-783.
[157] Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988) 12 Australian Yearbook of International Law 1988, 88-89.
[158] Jutta Brunnée, 'Sources of International Environmental Law: Interactional Law' in Samantha Besson and Jean Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017), 969.
[159] Brunnée and Toope (n 1).

international law from the 'creation and effects of legal obligations', which is based on the reciprocity of the actors in international society, rather than on the domestic law, which is based on authority in that the government has authoritative power over individuals.[160]

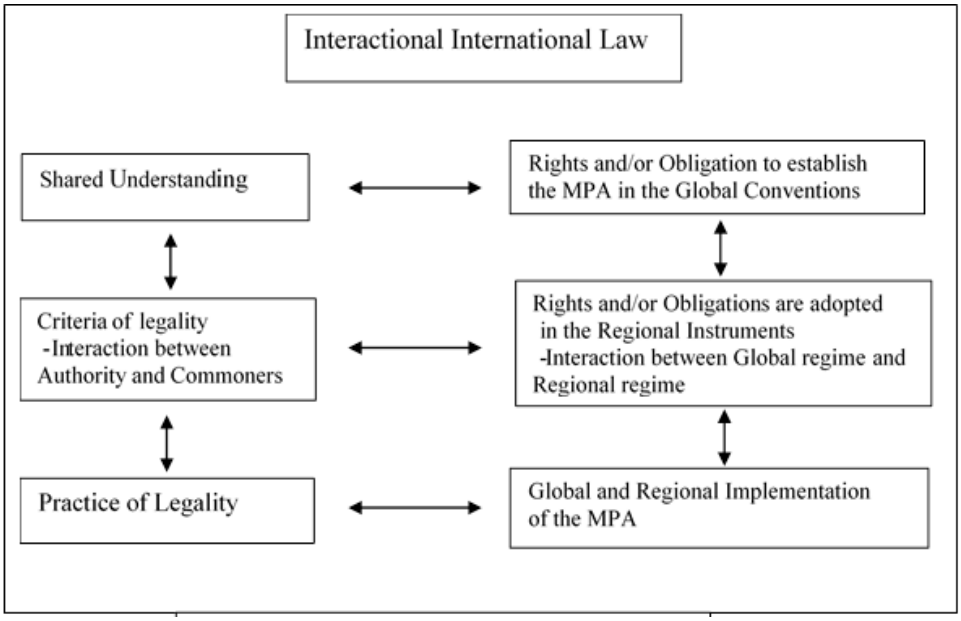
The international legal system is not formulated as domestic law in the sense that the international law is not hierarchical in its application. Thus, the authors of the book perceive that the creation of international law involves interaction among actors, which is a constructivist concept, and they rely on this to explain the legal obligations in international law.[161] In addition, they refer to the criteria of legality based on Fuller's view to determine the law.[162] This also involves the practice of legality as the action that develops changes and confirms the legal obligation. Subsequently, the authors introduce the theory to determine a legal obligation and provide the criteria to consider it, namely 1) a shared understanding, 2) criteria of legality and 3) practice of legality.[163] The interaction between these three elements reflects an emerging legal obligation, which will eventually be added to the analysis of the emergence of the international customary norm with regard to a particular obligation. However, as the theory has only been developed recently by Brunnée and Toope, some critique justification of the elements that the interactional international law account presents. The critique contends against this theory, as it claims that the interactional law relies very much on the interaction between the social norm and practice that may not satisfy what the legal obligation is practically enforcing. It believes 'Law is not obligatory because it is enforced; it is enforced because it is obligatory,' [164] which may not rely only on the interaction in the social perspective but law relies on the authority enforcing them. In addition, as the interactional law theory explain the application through the law-making process of the international law institution, in particular, the climate changes law institution whereby the doubt on the legitimacy of such institution could be raised, as it could refer

[160] Ibid, 7-8.
[161] Ibid (n 1),15.
[162] Ibid., 33; See also Lon Fuller, *The Morality of Law* (Yale University Press 1964).
[163] Brunnée and Toope (n 1), 20.
[164] Gerald Fitzmaurice , 'The Foundations of the Authority of International Law.' 19 The Modern Law Journal 1956:1–13 cited in Christian Reus-Smit, 'Obligation through Practice' (2011) 3 International Theory 339 (2011), 341.

back to the question if the shared norm generates under such circumstance is legitimate.[165] The interactional international law theory explains the application through the law-making process of international law, in particular, the climate changes' institution whereby the doubt on the legitimacy of such an institution could be raised.[166] Furthermore, opposition to this theory suggests that the interactional account of international law is not clear on the categorisation of the creation of the shared understanding, and the critiquing suggests that the shared understanding is, instead, the social history of the legal obligation and not the foundation of the element of the legal obligation.[167]

However, I, the researcher, see the opportunity to apply the interactional international law theory in the test of the formation of the CIL is more promising because it can be applied to any circumstance where the shared understanding of the norm could be occurred not only rely on the existing law. Also, once the test of the shared norm occurs, the theory also use the criteria to test its legality which could then be confirmed by the practice of legality. Therefore, the table below will provide the idea of how the interactional international law will be applied to the relevant research materials, in order to explain its implication on the analysis of the legal obligation of States to establish an MPA.

[165] Martti Koskenniemi, 'The Mystery of Legal Obligation' (2011) 3 Internaional Theory, 322-323.
[166] Ibid.
[167] Reus-Smit (n 164). 344-345.



3.1 Shared understanding

The concept of a shared understanding lies in international relations (IR). This particular concept, however, can be used to account for the start of law-making.[168] The sources of a shared understanding are collective knowledge or norms, which results from interaction between agents and structures.[169] A shared understanding has three critical dimensions that relate to a 'norm cycle'[170], 'epistemic community'[171] and 'community of practice',[172] which are used to explain the interaction of actors who form the legal norm in international law. [173] A norm cycle is the lifecycle of a norm, which comprises of the stage of the emergence of the norm and the norm cascade until it becomes internationalised in the form of law.[174] The epistemic community consists of people whose expertise is considered to generate a collectively-shared understanding.[175] Regarding community practice, this refers to the process of social interaction and practice, which depicts and maintains how

[168] Brunnée and Toope (n 1), 56.
[169] Ibid., 57.
[170] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 International Organization 887, 896.
[171] Peter Haas, 'Epistemic Communities' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007), 792-794.
[172] Etienne Wenger, *Communities of Pracice: Learning, Meaning, and Identity* (CUP 1998).
[173] Brunnée and Toope (n 1), 57.
[174] Finnemore and Sikkink (n 170), 896-898.
[175] Brunnée and Toope (n 1), 59.

society perceives, develops or improves the shared understanding.[176] The emergence of the norm is explained in the norm cycle proposed by Brunnée and Toope using a reference to a shared understanding to explain the originality of a legal norm. In this case, the norm cycle and the epistemic community that plays a crucial role in the shared understanding should be described together to gain an understanding ofthe norm-creating process.

The 'norm entrepreneurs', who are the creators and promoters of norms or standards,[177] contribute to the creation of a shared understanding in the norm cycle. In terms of the international community, norm entrepreneurs could be influential States or organisations.[178] On the other hand, the interplay between the norm entrepreneurs who are influencing many States to act for the norm could make this particular norm be acknowledged by others.[179] On the other hand, the epistemic community is a knowledge-based network[180] that can consist of experts in a particular area, such as science or economics.[181] The importance of the epistemic community is that it considers the learning process of the shared understanding and may develop or expand the work of the norm entrepreneurs.[182] With the epistemic community consisting of experts in one area, it can create or promote an internationally-shared norm.[183] An example of how the work of the epistemic community can contribute to the international norm can be seen in environmental issues, where technical groups collect knowledge that eventually contributes to the emergence of a shared norm.[184] In this case, the shared understanding can enable the pulling together of background knowledge, social norms and practice.[185] A shared understanding can also generate the social norm that affects social behaviour.[186] According to the authors, 'the legal norms are rooted in these shared understandings'.[187] Community practice strengthens those two aspects

[176] Ibid., 62-63.
[177]Finnemore and Sikkink (n 170), 896-897.
[178] Ibid (n 170), 899 ; See also Brunnée and Toope (n 1), 57.
[179] Brunnée and Toope (n 1), 58.
[180] Peter Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 International Organization, 3.
[181] Brunnée and Toope (n 1), 59.
[182] Ibid., 60.
[183] Ibid.
[184] Ibid.
[185] Ibid., 64.
[186] Ibid., 86.
[187] Ibid.

of a shared understanding in the norm cycle and the epistemic community, and a shared understanding is also developed through practice,[188] as people reproduce and react to the norm through practice.[189] These aspects of a shared understanding can help to identify the internal beliefs of the people in the community of how norms are created and then developed into law. This will support determining the elements of the formation of CIL, which are state practice and *opinio juris* of how the law is made based on the interaction of relevant actors from a shared understanding that may be transformed into a legal obligation.

3.2 Criteria of Legality

The concept of Criteria of Legality was first introduced by Lon Fuller in his lectures on jurisprudence.[190] The law and its existence are analysed by Fuller's criteria. His argument is that compliance with the criteria results in fidelity to the law, which rests on reciprocity of action between the legal authority that implemented the law and the practice in the communities that shows the law is applied accordingly. Fuller's work complements the determination of the legal obligation and its legitimacy in the work of Brunnée and Toope, as it emphasises the interaction of each criterion, which will eventually confirm the legitimacy and legality of the law.[191] Although Fuller's criteria were originally introduced in domestic law,[192] the non-hierarchical characteristic of the law explained in his work was found to be appropriate for international law, where actors in society have a horizontal relationship based on the consent of States and the reciprocity principle.[193] The criteria of legality are actually referred to as 'the law's inner morality',[194] which the law is required to comply with in order for it to be said that a legal system exists. The criteria of legality are as follows:[195]

[188] Ibid., 62.
[189] Ibid.,62.
[190] Fuller (n 162).
[191] Brunnée and Toope (n 1), 26-27.
[192] Ibid., 33.
[193] Ibid., 34.
[194] Fuller (n 162), 46.
[195] Lon Fuller, *The Morality of Law* (Yale University Press 1964).

1. General –In Fuller's sense of the law, generality means a law that is impersonal and applies to people in general.[196] Therefore, special and private laws should be avoided to achieve the generality of law in this sense.[197] He further explains that the generality of law should also be received by or conveyed to the people who are subjected to such a law.[198]

2. Promulgation – Since laws govern the actions of people in society, they need to be published for citizens to understand what is right or wrong. Although there are special laws that may not necessarily apply to everyone, they also need to be made accessible to the public.[199] The publication of laws will also subject them to criticism as the public voice their opinion of them and of how they perceive that the law is being conveyed to them.[200]

3. Prospective – It is said that 'a retroactive law is truly a monstrosity'.[201] As laws govern human conduct, it is unlikely that the present action shall be governed by the law of the future.[202]

4. Clear - Clarity is one of the most important elements of the legality of a law. A lack of clarity and incoherence can make a law unattainable.[203]

5. Non-Contradictory – A contradiction in the law can cause a violation of its identity.[204] It can be logically argued that the law 'cannot be both forbidden and commanded at the same time'.[205]

6. Not impossible – It is not possible for a law to include an impossible act, even a technical law, in which some concrete action is required or prohibited. [206] This is because a person should be able to act, or not

[196] Ibid., 47.
[197] Ibid.
[198] Ibid., 48.
[199] Ibid., 51.
[200] Ibid.
[201] Ibid., 53.
[202] Ibid.
[203] Ibid., 63.
[204] Ibid., 65.
[205] Ibid., 66.
[206] Ibid., 71.

act, according to the law only when such an action is possible or prohibited.[207]

7. Constancy - The law should not be changed instantly, as this would be difficult for both the legislators and the followers, who act according to the law.[208]

8. Congruence – In this sense, congruence refers to the action of officials and the law they impose.[209] It relates to the expectation of the law based on public opinion. In a legal system where people should respect the law, it is expected that officials who apply it should comply with it and treat it in the same way as everyone else.[210]

The Criteria of Legality help how to determine the factors of the law that will convince people to be willing to adhere to them. It can be seen that each criterion is connected to the other, which demonstrates the importance of the interaction between the decisive factors to achieve the inner morality of the law, which leads to its legitimacy. The other two elements of interactional international law proposed by Brunnée and Toope are also critical to examine the legal obligation and understand how the legitimacy of the law is important in international law, which relies on the reciprocal principle.[211] This is because the actors in the international community are treated in the same hierarchy and the law that obliges the State parties needs to be legitimate rather than one that is enforced by the authorities in order to obtain and sustain the participation of State parties to the convention.[212] An understanding of the criteria of legality is expected to be a supportive means to determine *opinio juris* and state practice, which are the elements of CIL. This is because the criteria depict the stages of development of a legal obligation and its perception as a binding law in the community.

[207] Ibid., 71-72.
[208] Ibid., 80.
[209] Ibid., 81.
[210] Ibid., 82.
[211] Brunnée and Toope (n 1), 37.
[212] Ibid., 52-53.

3.3 Practice of Legality

Two elements of the interactional international law theory are described above and the third element, the Practice of Legality, is introduced in this section. The Practice of Legality is critical when analysing a legal obligation, as it is evidence of a shared understanding and the criteria of legality that can illustrate the legitimacy of the law when these two elements of interactional law are applied.[213]

The Practice of Legality is significant proof of the interaction between a shared understanding and the criteria of legality. In this sense, it is not only the practice of substantive laws but also the procedural laws, that are counted as the practice of legality.[214] Of course, the practice of the substantive law is the application of the law that the community believes in and then reacts to. The practice of legality in procedural law, or the law-making process, refers to the discussion in the law-making process when the interactional account occurs during the discussion before the law, or the procedure required in the making of the law, or from a decision in some international law forum.[215] It is claimed that a shared understanding and the legality of the law may not be deepened and crystallised into a legitimate law without the interaction of legality in the community of practice.[216] However, this does not mean that the practice of the law can only arise from the practice of the legislation because continuing practice can also depict implicit rules, as the public repeats the guided conduct to achieve its purpose.[217] As a result, the prospective rules can be those of the collective practice acknowledged and executed by society.

In international law where treaties are the result of the law-making process of States, the interaction between the actors, in both the law-making process and the implementation of the commitment of the international law, is proved through 'the community of practice'. This practice is an accumulation of participation and compliance to legal commitments under international law.[218] The practice of legality is well connected to legal obligations, as it

[213] Ibid., 54.
[214] Brunnée and Toope (n 11), 313.
[215] Brunnée and Toope (n 1), 196-197, This book refers to the climate change regime where a compliance committee is in charge of members' compliance.
[216] Ibid., 72-73.
[217] Gerald J. Postema, 'Implicit Law' (1994) 13 Law and Philosophy 361, 365.
[218] Brunnée and Toope (n 1), 73.

relates to compliance with legal obligations. Legality is obviously practised in the enforcement or settlement of disputes.[219] However, the feeling of being committed to legal obligations, which is one of the practices of legality, can also be built into the law-making process.[220] The practice of legality can strengthen the legal obligation,[221] as it is the proof of legality based on which actors attend to a legal order.

Conclusion

In their interactional law theory, Brunnée and Toope explain the dynamics of how law evolves and develops within a society based on the interaction of different actors. They start by describing how legal norms emerge from a shared understanding and are scrutinised through the criteria of legality to achieve legal legitimacy, and this law is then eventually reflected by the practice of legality. This theory will be beneficial in this current research, which involves an analysis of the existing legal mechanisms, as it offers a methodology that can be used to examine how legal obligation is created and developed through the interaction of actors. The account of such a systematic interaction will assist the analysis of the legal obligation of States to establish an MPA under international law, in which the form of the sources of this legal obligation does not have to be explicitly represented by one convention, but rather the evidence of the legal obligation based on the emergence of CIL. The scope of the research mentioned in the Introduction Chapter of this thesis is to gain an understanding of the obligation to establish an MPA, as various international instruments show the development of a shared understanding of the need to protect the marine environment. Thus, the elements that need to be examined are the criteria of legality and the practice of legality, in order to determine if States' behaviour in response to legal instruments portrays evidence that the legal obligation to establish an MPA is customary international law. It could be said that this theory is one of the tools necessary to analyse the emergence of customary international law in order to determine the actual legal obligation of States with regard to the establishment of MPAs.

[219] Ibid., 91.
[220] Ibid.
[221] Brunnée and Toope (n 11), 313

Conclusion

This chapter has introduced all of the relevant legal methods to be used in this thesis, which are drawn from treaty interpretation, the general understanding of the process by which customary international law emerges and the interactional account of international law theory. These three important methods form the legal framework for this thesis that aim to respond to the question of is there an emerging norm of customary international law on the establishment of an MPA through the regional cooperation. With this framework, this research is expected to synchronise the result of the meaning of legal right and obligation in the global instruments and regional instruments from the rule of treaty interpretation and the reciprocal interaction between the set of rules, from both treaty and non-treaty sources regarding the establishment of the MPA and the related actors for the implementation of this set of rules. The expected result will be used to investigate if such a rule would make the establishment of the MPA a legal obligation for States, according to elements of the customary international law and according to the element of the interactional international law approach.

CHAPTER 3 CONCEPT OF A MARINE PROTECTED AREA

Introduction

A concept of a Marine Protected Area (MPA) is a the protection measure recognised by the international community. It is one of many area-based management tools[1] for the conservation and protection of important ecosystems, species or beautiful seascapes.[2] Area-based management regime can be designed to have different objectives that regulate or limit human activities in the area.[3] An area-based management can also be named based on the purpose for which it was established.[4] However, the focus of this thesis is the area of the marine environment.

Despite being mentioned in many international instruments, there is, as yet, no consensus on the definition of an MPA. Some common elements of an MPA can be found in the text of various international instruments.[5] In some cases, the different terms of marine areas under the protection measure are even defined under the auspices of the same organisation or convention with some partial difference in the application, such as the Special Area (SA) and Particularly Sensitive Sea Areas (PSSA) used in the MARPOL,[6] or the Marine and Coastal Protected Area[7] (MCPA) and the Ecologically or Biologically Significant Marine Area (EBSA) of the CBD. This chapter also examines the Whale Sanctuary of the International Convention for the Regulation of Whaling (ICRW)[8] and the Convention on the Conservation of Migratory Species of Wild Animals (CMS)[9] in order to explore what concept

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[1] Julian Roberts, 'Area-based Management on the High Seas: Possible Application of the IMO's Particularly Sensitive Sea Area Concept' (2010) 25 IJMCL 483, 484.
[2] United Nations General Assembly, Report of the Secretary-General, addendum, division of the Ocean and the Law of the Sea at its Sixty-second session, A/62/66/Add.2, 10 September 2007, para 117.
[3] Ibid., paras 117-119.
[4] Ibid.
[5] Markus J. Kachel, *Particularly Sensitive Sea Areas The IMO's Role in Protecting Vulnerable Marine Areas* (Springer 2008), 38-39.
[6] Alexander Gillespie, 'Defining Internationally Protected Areas,' (2009) 11 Journal of International Wildlife Law & Policy 240, 241-243.
[7] Decisions Adopted by the Conference of the Parties to the Convention of the Parties to the convention on Biological Diversity at its Fourth Meeting, COP IV/5, Annex, online access at <https://www.cbd.int/doc/decisions/cop-04/full/cop-04-dec-en.pdf> (Decision IV/5) ; See more details in Chapter 5, section 2.2.
[8] International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into forced 4 March 1953) 161 UNTS 72 (ICRW).
[9] Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979, entered into force 1 November 1983) 1651 UNTS 333 (CMS).

of an MPA can be extracted from these two conventions. However, these two conventions do not conform to the concept of an MPA of the thesis shown in the conclusion of the chapter, because they seek to conserve particular species rather than the whole ecosystem within the designated area.

Because MPAs may be established under different instruments, the definition varies based on the primary objective of the particular convention. Therefore, the aim of this chapter is to establish a universal concept of the MPA from the international instruments, rather than a single definition. This chapter will examine the Concept and Characteristic of an MPA in the relevant international instruments in this order: 1) the IUCN Guidelines, 2) the UNCLOS, 3) the CBD, 4) the MARPOL, 5) the Ramsar Convention, 6) the WHC, 7) the ICRW and 8) the CMS. Although in the conclusion of this chapter, the concept of the area-based protection measure in the ICRW and the CMS will not be included as a concept of this thesis, it is worth examining the objective of the relevant convention.

1. Concept and Characteristics of an MPA in the IUCN Guidelines

MPAs are generally characterised based on the definition of a protected area provided by the International Union for the Conservation of Nature and Natural Resources (IUCN).[10] The IUCN's definition of an MPA is an area that is strictly protected and categorised according to its management objectives.[11] Thus, it is important to examine some details of the IUCN's work on the definition and system of categorising MPAs in order to understand their concept, meaning and characteristics before examining the concept and characteristics of an MPA based on the other relevant global conventions mentioned above.

The IUCN was initially founded in 1948 for the purpose of conserving biodiversity.[12] The term 'MPA' was first developed from the work of the IUCN in resolution 17.38 of its General Assembly in 1988. The IUCN found that, despite the vulnerability of marine areas, the protection of the sea and

[10] National Research Council, *Marine Protected Areas: Tools for Sustaining Ocean Ecosystem* (The National Academies Press 2001), 11-12.
[11] Vu Hai Dang, *Marine Protected Areas Network in the South China Sea: Charting a Course for Future Cooperation* (Martinus Nijhoff 2014), 5.
[12] The information can be accessed online at <http://www.iucn.org/about/> (accessed 4 September 2017)

seabed areas was 'far behind' the protection of the terrestrial area.[13] It, therefore, called for national and international action to conserve the marine environment.[14] In this meeting, the IUCN structured the objective of a conservation system of the marine environment and initially defined the term 'marine protected area' as follows:

> 'Any area of intertidal or subtidal terrain, together with its overlying waters and associated flora, fauna, historical and cultural features, which has been reserved by legislation to protect part or all of the enclosed environment'.[15]

However, after the adoption of Resolution 19.46 of the General Assembly of the IUCN, it was recognised that all MPAs were eligible to be considered for protected area status.[16]

The IUCN therefore developed a new term for protected areas in 2008, which superseded the previous definition of an MPA. The latest definition required an MPA to be qualified with the new classification under the IUCN's concept of a protected area, which covered both terrestrial and marine areas.[17] With this change, the IUCN published the 2008 Guidelines for Applying the IUCN Protected Area Management Categories to Marine Protected Areas.[18] It is further clarified in this version of the guidelines that there are three dimensions of the protected area, *above*, *in* and *under* it, and these dimensions should remembered when referring to the word 'space' in the new definition.[19] As the impact of human activities in the airspace of the protected area, such as the operating of an aircraft above the protected area, fishing in the (marine)

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[13] Resolution 17.38 of The General Assembly of IUCN, online access at <http://data.iucn.org/dbtw-wpd/edocs/GA-17th-011.pdf>, 104 (accessed 4 September 2017).
[14] ibid., 105.
[15] Ibid.
[16] Resolution 19.46 of the General Assembly of IUCN, 42 online access at <https://cmsdata.iucn.org/downloads/resolutions_recommendation_en.pdf, 233> (accessed 4 September 2017).
[17] Dudley N, *Guidelines for Applying Protected Area Management Categories* (Gland, Switzerland: IUCN 2008), 8 (IUCN Guidelines 2008), which provides the new definition of protected area as:

> 'A protected area is a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values'. (emphasis added).

[18] Ibid.
[19] Ibid., 9.

area and mining under the area, could affect the management of the protected area. Therefore, the guidelines suggest that these activities should be considered when determining the protective measures of the protected area.[20]

The IUCN published another guideline in 2012 to supplement the categorisation of protected areas to marine protected areas,[21] in which it was further explained that the primary objective of the new definition of a protected area was completely focused on nature conservation and excluded any area that was not established for this purpose.[22] Thus, the new definition excluded other spatial areas, such as fisheries management, community-based or other management areas designed for other purposes.[23] The IUCN Guideline 2012 also clarified the definition of a protected area to aid the understanding of the application to the management of a marine protected area. The relevant IUCN guidelines not only provide the general concept and characteristics of an MPA, but they also refer to the concept of the protected areain other relevant protected area regimes in the international instruments, for example the Ramsar Convention, the WHC and the CBD[24] (these instrument will be later examined in this chapter). According to the IUCN Guidelines 2008 and 2012, to qualify as a protected area under the IUCN category, an MPA should incorporate the following concept and characteristics:[25]

> 1. **The area has to be <u>clearly defined</u>**, including the delineation of a geographical space. Because the marine protected area will have to be maintained and managed, it should be stated whether the clearly defined geograpgical space includes the airspace above and the seabed under the water column.[26]

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[20] Dudley., 9.
[21] Jon Day and others, *Guidelines for applying the IUCN Protected Area Management Categories to Marine Protected Areas* (Gland, Switzerland: IUCN, 2012), 11 (IUCN Guidelines 2012).
[22]Ibid., 10
[23] Ibid., introduction.
[24] IUCN Guidelines 2008 (n 17), 69
[25] IUCN Guidelines 2012 (n 21), 10; The elements explained should be read together with the definition of a protected area in the IUCN Guidelines 2008 (n 17), 8

'A protected area is a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values'.

[26] IUCN Guidelines 2012 (n 21), 12.

2. **The area should be legally recognised** in some database of protected areas, and its establishment as a marine protected area should imply a specific commitment, either nationally or internationally, under domestic law or an international agreement.[27]

3. **There should be a management plan for the area**, including not only conservation activity but also the decision to leave the area intact.[28]

4. **The area must contribute to nature conservation**, which is 'the *in situ* maintenance of ecosystems and natural and semi-natural habitats...'.[29] The word 'nature' here refers to 'biodiversity, at genetic, species and ecosystem levels, and often also refers to geodiversity,[30] landform and broader natural values.'[31]

The focal point of the new guidelines for a protected area, including a marine protected area, is that the primary objective must be nature conservation. This primary objective is shown in the latest version of the IUCN guidelines from 2013, [32] in which the main elements remain similar to those mentioned above.

The concept of an MPA the IUCN guidelines has changed over time. The 1992 guidelines began by focusing on the marine area before the definition of a protected area was broadened to cover MPAs and the definition of an MPA was eventually replaced in the 2008 guidelines. The latest guidelines are more comprehensive and can be applied to both land and marine areas. The gradual change has made the definition more consistent with the system developed by the IUCN to categorise protected area.[33] The guidelines of the

[27] Ibid. 13.
[28] Ibid.
[29] Ibid., 14.
[30] Ibid. ; Geodiversity is a shortened version of the term, 'geological and geomorphological diversity', which means the natural range (diversity) of geological (rocks, minerals, fossils), geomorphological(land form, processes) and soil features; see also Murray Gray, 'Geodiversiy: developing the paradigm' 119 Proceedings of the Geologists' Association 287.
[31] IUCN Guidelines 2008 (n 17),14.
[32] Dudley, N. (Editor) (2008). *Guidelines for Applying Protected Area Management Categories*. Gland, Switzerland: IUCN. x + 86pp. WITH Stolton, S., P. Shadie and N. Dudley (2013). *IUCN WCPA Best Practice Guidance on Recognising Protected Areas and Assigning Management Categories and Governance Types*, Best Practice Protected Area Guidelines Series No. 21, Gland, Switzerland: IUCN. xxpp. (IUCN Guidelines 2013), 8-9.
[33] Ibid., Introduction.

IUCN help to avoid confusion caused by the adoption of many different terms to describe different kinds of protected areas.[34] Based on the meaning of the IUCN guidelines, an MPA is characterised as a protected area by its management system.

It should be noted that, under the different regimes that will be discussed later in this chapter, the concept and characteristics of an MPA may be developed under different names or terms due to the purpose of the regime. In cases where the concept of an MPA is similar to the scope of an MPA in the meaning of the IUCN above, it will generally be referred to as an MPA. However, there are a couple of instruments which protected area regime does not fit the concept of an MPA that this thesis is using, and so those global instruments will not be used in this thesis.[35]

2. Concept and characteristics of an MPA under UNCLOS

The United Nations Convention on the Law of the Sea[36] (UNCLOS) is considered to be 'the constitution of the ocean'.[37] It was agreed in 1982 and entered into force in 1994. Due to the absence of any specific regulation in UNCLOS regarding the establishment of MPAs, the concept and characteristics of an MPA discussed here are deduced from various regulations related to the governance of the ocean. These include the conservation of marine living resources in the Exclusive Economic Zone ('EEZ') in Part V, the conservation and management of the living resources of the High Seas in Part VII, the main part of the protection of the marine environment in Part XII of the convention, and the implementation agreement of the convention that contributes to the development of the concept of an MPA under the UNCLOS.[38]

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[34] IUCN Guidelines 2008 (n 17), 5.
[35] See section 7 and 8 of this chapter.
[36] The 1982 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396 (UNCLOS).
[37] David. Freestone, Richard Barnes and David M. Ong (eds), *The Law of the Sea: Progress and Prospect* (OUP 1999), 1
[38] Currently, UNCLOS has two implementing agreements i) United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted on 4 August 1995, entered into force on 11 December 2001, 2167 UNTS 88, (FSA) and ii) Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10

Although none of the provisions in Parts VII and V of the UNCLOS relates to the concept of an MPA, the general provision for States to conserve and protect marine living resources can be found in Articles 56 and 116 of the Convention. These provisions do not define an MPA, but rather establish the general scope of States' jurisdiction over the conservation of marine living resources. Moreover, Article 194 (5) in Part XII of the Convention includes a measure to protect and preserve rare or fragile marine ecosystem,[39] and Article 211(6) mentions the prevention of pollution of the marine environment by vessels. Details of these provisions contribute to the MPA norm in the UNCLOS will be discussed in Chapter 5 of this thesis. Although these collective provisions contain the apparent requirement to protect and preserve the marine environment and its resources, the concept of an MPA in the UNCLOS is incomplete. However, some relevant characteristics of the MPA are found in the Implementing Agreement of Part XI of the UNCLOS,[40] in which Areas of Particular Environmental Interest (APEIs) in the Clarion-Clipperton Fracture Zone is mentioned as being designated by the ISA in 2012.[41] The APEIs are a network of MPAs that include nine MPAs in the Clarion-Clipperton Fracture Zone. The APEIs are designated by the exercise of authority in the Area[42] by the International Seabed Authority (ISA)[43] for the protection of the marine environment in the area.[44] However, the APEIs cannot be used as the sole representative of the concept and characteristics of an MPA under the UNCLOS, since their application is limited to the Area.

December 1982, adopted on 28 July 1994, entered into force on 28 July 1996, 33 ILM 1309, (Implementing Agreement on Part XI)

[39] UNCLOS (n 36), Article 194(5).

[40] UNCLOS (n 36), Implementing Agreement on Part XI (n 38).

[41] International Seabed authority, Decision of the Council relating to an environmental management plan for the Clarion-Clipperton Zone, adopted at its Eighteenth session, ISBA/18/C/22 26 July 2012, para 1

[42] UNCLOS (n 36), Article 1 (1)

> …
> '(1) Area means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.
> …'.

[43] Michael Lodge and others, 'Seabed mining: International Seabed Authority environmental management plan for the Clarion–Clipperton Zone. A partnership approach' (2014) 49 Marine policy 66, 69; see also David Johnson and Maria Ferreira, 'ISA Areas of Particular Environmental Interest in the Clarion-Clipperton Fracture Zone' (2015) 30 International Journal on Marine and Coastal Law 559, 559-562.

[44] UNCLOS (n 36), Article 145 and 165(2)(e).

The lack of an explicit reference to the concept of an MPA in the Convention does not mean that this has never been discussed under the auspices of a conference on the law of the sea. Indeed the United Nations General Assembly (UNGA) first mentioned the need for States to develop 'a tool for conserving and managing vulnerable marine ecosystems,..., including the possible establishment of marine protected areas' at its fifty-eighth session in 2003.[45] The importance of implementing Part XII of the Convention (for the protection and preservation of the marine environment and its marine living resources) was emphasised at this meeting.[46] Moreover, the growing interest in high seas marine protected areas was discussed in the Department of the Oceans and the Law of the Seas (DOALOS) with a definition, and some of the characteristics of an MPA were created by referring to other related conventions, particularly the CBD.[47] Decision IX/20 in COP 9 of the CBD contains the scientific criteria for identifying ecologically or biologically significant marine areas in need of protection and scientific guidance for designating representative networks of marine protected areas.[48] The CBD forum defines MPAs as Marine and Coastal Protected Areas (MCPAs) and Ecologically or Biologically Significant Marine Areas (EBSAs), the details of which are elaborated in section 3 of this chapter. By that time, the concept and characteristics of an MPA may not have been established under the UNCLOS, but there are some associated conventions that show that the UNCLOS recognised the MPA concept.

In addition, the establishment of an Ad Hoc Open-ended Informal Working Group to study issues related to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (WG-ABNJ)[49] was agreed at the fifty-ninth session of the UNGA in 2004 in order

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[45] United Nations General Assembly at its Fifty-eight session, Resolution adopted by the General Assembly on 23 December 2003, Decision 58/240 Ocean and the Law of the Sea, A/RES/58/240, para 54 (UNGA Res. 58/240); See also United Nations General Assembly at its Fifty-ninth session, Resolution adopted by the General Assembly on 17 November 2004, 59/24 Ocean and the Law of the Sea, A/RES/59/24, para 72 (UNGA Res. 59/24)

[46] UNGA Res. 58/240 (n 45), para. 46.

[47] United Nations General Assembly, Report of the Secretary-General, at the Sixty-fourth session of the division of Ocean and the Law of the Sea, A64/66/Add.2 on 19 October 2009, para 137 (UNGA Res. 64/66)

[48] Decision adopted by the Conference of the parties to the Convention on Biological Diversity at it Ninth Meeting, COP IX/20, UNEP/CBD/COP/DEC/IX/20 on 9 October 2008 (Decision IX/20) ; See also section 3 of this chapter.

[49] UNGA Res. 59/24 (n 45), para 73

to further the conservation of the marine environment. This working group would consider matters related to the sustainable use of marine biological diversity beyond 'areas of national jurisdiction' (ABNJ), [50] including marine protected areas.[51] However, the recommendation did not define the MPA under the law of the sea forum.

Based on the above discussion, although the UNCLOS is considered to be the Constitution for the ocean, it contains a gap with regard to the establishment of MPAs as a crucial tool to protect and preserve the marine environment. The concept of MPA has not yet been agreed within the UNCLOS forum but the development of the concept of MPA is a work in progress for the WG-ABNJ. The UNCLOS forum also takes note of the criteria for identifying ecologically-significant marine areas in need of protection in open-ocean waters and deep-sea habitats adopted under the CBD forum.[52] This ongoing process of developing an MPA regime under the UNCLOS may be conceived as a working concept that has some elements similar to those in other treaties. The work of the WG-ABNJ regarding the conservation and sustainable use of marine biodiversity in the ABNJ, including on MPAs in the ABNJ, should be mentioned, as this may establish the concept of an MPA under the new implementing agreement of the UNCLOS.

Although it is clear that the UNCLOS has not difined the characteristics of an MPA *per se*, some elements of an MPA can be seen in Article 194(5), which says that 'the measures taken in accordance with this part shall include those necessary to protect and preserve' the marine environment.[53] No other details of the characteristics of an MPA are mentioned in the Convention or the discussion forum of the DOALOS.

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[50] Ibid.
[51] United Nation General Assembly, Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, Sixty-sixth session, Division of Ocean and the Law of the Sea, A/66/119, 30 June 2011, Annex, para 1 (UNGA Doc. A/66/119).
[52] United Nations General Assembly, Resolution adopted by the General Assembly on 9 December 2013 at its Sixty-eight session, 68/70 Ocean and the Law of the Sea, paras 209, 212-213 (UNGA Res. 68/70).
[53] UNCLOS (n), Article 194(5).

3. Concept and characteristics of an MPA under the CBD[54]

The CBD was established in 1992. Its objectives are stated in Article 1 as 'the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources'.[55] Although some may claim that the regulations of the CBD are vague,[56] this is one of the conventions in which the principle regarding the conservation of biodiversity, in general, is established, including marine biodiversity. The programme of work for the implementation of the commitment of a treaty is developed in this Convention, and two of the many programmes of work in the CBD are related to MPAs, namely, the Programme of Work on Marine and Coastal Biological Diversity, in which the concept of the Marine and Coastal Protected Area (MCPA) is developed,[57] and the Programme of Work on Protected Areas, [58] in which the concept of the Ecologically or Biologically Significant Marine Area (EBSA) is developed.[59] The details of how the programme of work is developed and contributes as a mechanism to establish an MPA will be discussed in Chapter 5 of the thesis, while the focus of this part is the concept and characteristics of an MPA under the programme of work. These two parallel programmes will be used to depict the concept and characteristics of an MPA under the CBD.

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[54] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD).
[55] Ibid., Article 1.
[56] Elisa Morgera and Elsa Tsioumani, 'Yesterday, Today, and Tomorrew: Looking Afresh at the Convention on Biological Diversity' (2010) 21 Yearbook of International Environmental Law 3, 3.
[57] Decisions Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Fourth Meeting, COP IV/5, Annex, 32, online access at <https://www.cbd.int/doc/decisions/cop-04/full/cop-04-dec-en.pdf> (access 5 September 2017) (Decision IV/5).
[58] Decisions Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Seventh Meeting, UNEP/CBD/COP/DEC/VII/28 on 13 April 2004, online access at <https://www.cbd.int/doc/decisions/cop-07/cop-07-dec-28-en.pdf> (access 5 September 2017) (Decision VII/28).
[59] Decisions Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Eight Meeting, UNEP/CBD/COP/DEC/VIII/24 on 15 June 2006, Annex II 11, para 1, online access at <https://www.cbd.int/doc/decisions/cop-08/cop-08-dec-24-en.pdf> (access 5 September 2017) (Decision VIII/24).

3.1 The concept and characteristics of an MPA under the Programme of Work on Marine and Coastal Biological Diversity

Elements of the Marine and Coastal Biodiversity Management Framework in Appendix III were introduced to Annex I of Decision VII/5[60] as a result of the guidance for the development of a national marine and coastal biodiversity management framework provided by the Ad Hoc Technical Expert Group on Marine and Coastal Protected Area (AHTEG on MPCA) before COP VII was convened.[61] Both the report of the AHTEG on MCPA and the decision in VII/5 emphasise the significance of a network and connectivity between MCPAs to protect all the biodiversity within the marine area because of the mobile nature of marine life.[62] Therefore, from a design perspective, the network and connectivity between MCPAs are very important.[63] However, details of the characteristics of MCPAs were further elaborated in a report in the AHTEG on MCPA. The implementation of a marine and coastal biodiversity management framework should aim to achieve the three main objectives stated in Article 1 of the CBD, namely, the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the utilisation of genetic resources.[64]

The essential element of the framework adopted by Decision VII/5 was that the integrated network of an MCPA should consist of a) MCPAs, and b) Representative MCPAs. However, the characteristics of the MCPAs under this programme are not explained in the form of criteria, but provided in the AHTEG Report on MCPA that were later adopted by the COP.[65] These reports were included in Appendix 3 of Annex I of the decision regarding the Elements of a Marine and Coastal Biodiversity Management Framework,[66] in

[60] Decision adopted at the Conference of Parties to the Convention on Biological Diversity at its Seventh Meeting, UNEP/CBD/COP/DEC/VII/5, Decision VII/5, 13 April 2004, Annex I, Appendix III, 36 (Decision VII/5).
[61] Guidance for the Development of a National Marine and Coastal Biodiversity Management Framework, Report of the Ad Hoc Technical Expert Group on Marine and Coastal Protected Areas Subsidiary Body on Scientific, Technical and Technological, Doc. UNEP/CBD/SBSTTA/8/INF/7 on 13 February 2003, Annex II, 21 (AHTEG Report).
[62] Decision VII/5 (n 60), Annex I, Appendix III, 36-37; See also Ibid., Annex II, 7, 21.
[63] Ibid.
[64] Ibid., Appendix III, 36.
[65] AHTEG Report (n 61), Annex II.
[66] Decision VII/5 (n 60), Annex I, Appendix III, 37.

which MCPAs are separated into two types: 1) MCPAs where extractive uses are permitted[67] and 2) Representative MCPAs where extraction is excluded.[68]

These MCPAs will also contribute to other purposes, such as the sustainable use of fisheries.[69] Nonetheless, the representative area should be of sufficient size to fulfil its objectives, as well as being ecologically viable over time.[70] The important element of a representative MCPA is that no extraction is allowed except for scientific or educational purposes.[71] These two types of MCPA serve different purposes, but the AHTEG on MCPA defines a network of MCPAs as 'an appropriate mix of highly protected MCPAs and ancillary MCPAs which interact collectively to provide benefits greater than the sum of their individual benefits.'[72] The details of how, and the criteria by which, areas could be designated as MCPAs or Representative MCPAs are not mentioned in the decision; therefore, the implementation is left to the country concerned, provided that the elements of the framework respect the national legislation and the interests of indigenous and local communities.[73] However, a marine and coastal biodiversity management framework is based on the principle that an MCPA should have a 'biodiversity objective or recognised biodiversity effect.'[74]

Although the criteria for choosing an MCPA or representative MCPA are not elaborated in the decision, the purpose of the areas to be selected and the management that should be practised in order to establish and manage an MCPA are provided.

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[67] Ibid. This area includes areas 'subject to site-specific controls that have an explicit biodiversity objective or recognized biodiversity effect'. The controls within these areas could be fishing-related or rotational closures.

[68] Ibid. It is stated that the key purpose of this type of area is

> …'to provide for intrinsic values, to allow for a better understanding of the marine and coastal environment by acting as scientific reference areas to contribute toward marine environmental recovery and to act as insurance against failures in management.'

[69] Ibid.

[70] Ibid.

[71] Ibid.

[72] AHTEG Report (n 61), 13-14 para 43.

[73] Decision VII/5 (n 60), Annex I, Appendix III, 37, para 7.

[74] Ibid., para 8.

3.2 The concept and characteristics of an MPA under the Programme of Work on Protected Areas

Apart from the MCPA, the marine area-based management under the CBD is also prescribed under Decision VII/28 of the Programme of Work on Protected Areas, which creates another area-based management regime in the marine area. As mentioned above, the aim of this programme of work is to establish both terrestrial and marine protected areas.[75] This involves the establishment of an Ad Hoc Open-ended Informal Working Group to study issues related to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (WG-BBNJ), since it was agreed in the 60th meeting of the General Assembly that the scientific criteria for identifying ecologically or biologically significant marine areas in need of protection would be developed in the context of the CBD.[76] The Ad-hoc Open-End Working group on Protected Areas (WGPA) was established later. [77] One of the mandates of the WGPA is as follows;

> 'a. to explore options for cooperation for the establishment of marine protected areas in marine areas beyond the limits of national jurisdiction, consistent with international law, including the United Nations Convention on the Law of the Sea, and based on scientific information'[78] (emphasis added).

It was agreed by the WGPA presented in the report in COP VIII/24 and COP VII/28 that the CBD would develop a set of scientific criteria to identify ecologically or biologically significant marine areas in need of protection in open ocean waters and deep-sea habitats (Criteria for EBSAs), building upon existing criteria used nationally, regionally and globally.'[79] In this respect, the open ocean waters and deep sea habitats in the decision are applicable to sea

[75] Decision VII/28 (n 58), 7.
[76] UNGA Resolution adopted by the General Assembly on 29 November 2005, Division of Ocean and the Law of the Sea 60/30, A/RES/60/30, 8 march 2006, para 75 (UNGA Res. 60/30) ; see also Decision IX/20 (n 48), 2.
[77] Decision VII/28 (n 58).
[78] Ibid., 4, para 29 ;See also Ad Hoc Open-ended Working Group on Protected Area, online access at https://www.cbd.int/convention/wgpa.shtml.
[79] Decision VIII/24 (n 59), Annex II, p 11, para 1.

areas, including those beyond national jurisdictions.[80] The development of the criteria for EBSAs is also in accordance with the above-mentioned mandate of the working group. Although the criteria of EBSAs can be applied to open oceans and deep sea habitats in areas beyond national jurisdictions, the application of these criteria may not be fully enforceable under the CBD.[81] It relies on the 'goodwill' of the State parties and other competent organisations, particularly in the ABNJ, the authority in this regard will be under the UNCLOS[82] because the CBD has limited authority in areas beyond national jurisdictions.[83]

The Criteria for EBSAs and the Scientific Guidance for Selecting Areas to establish a representative network of marine protected areas, including open ocean waters and deep-sea habitats ('Scientific Guidance') were adopted in Decision IX/20,[84] as recommended by the Expert Workshop on Ecological Criteria and Biogeographic Classification Systems for Marine Areas in Need of Protection.[85] The Criteria and Scientific Guidance also guides the application of each criterion, more details of which can be found in Annex I of Decision IX/20. The Criteria adopted for EBSAs should have one of the following characteristics;

1. **Uniqueness or rarity** - area contains either (i) unique ('the only one of its kind'), rare (only occurs in a few locations) or endemic species, populations or communities, and/or (ii) unique, rare or distinctive habitats or ecosystems; and/or (iii) unique or unusual geomorphological or oceanographic features;

2. **Special importance for life-history stages of species** - Areas that are required for a population to survive and thrive;

3. **Importance for threatened, endangered or declining species and/or habitats** - Areas containing habitats for the survival and

[80] Jeff A.Ardron and others, 'The sustainable use and conservation of biodiversity in ABNJ: What can be achieved using existing international agreements?' (2014) 49 Marine Policy, 102.
[81] Ibid, 100.
[82] Ibid, 100.
[83] CBD (n 55), Article 4.
[84] Decision IX/20 (n 48), 4, para 14.
[85] Ibid., Annex I and Annex II.

recovery of endangered, threatened, declining species or areas with significant assemblages of such species;

4. **Vulnerability, fragility, sensitivity, or slow recovery**- Areas that contain a relatively high proportion of sensitive habitats, biotopes or species that are functionally fragile (highly susceptible to degradation or depletion by human activity or by natural events) or with slow recovery;

5. **Biological productivity**- Areas containing species, populations or communities with comparatively higher natural biological productivity

6. **Biological diversity** – Areas with a comparatively high diversity of ecosystems, habitats, communities, or species, or higher genetic diversity; and

7. **Naturalness** - Areas with a comparatively higher degree of naturalness as a result of the lack of, or low level of, human-induced disturbance or degradation[86]

The guidance for selecting representative MPAs provides both the required scientific condition and its application. Further details of the consideration for the application can be found in Annex II of Decision IX/20 as follows:

a) **Uniqueness or rarity –** Uniqueness or rarity is a criterion that risks being subjected to a 'biased view' because the unique features in one area may be typical in another.[87] In this case, it is recommended that the global or regional perspective is considered.[88]

b) **Special importance for life-history stages of species-** The area should be connected to and interact with the life-history of species

[86] Ibid., Annex I, 7.
[87] Ibid., 7-11.
[88] Ibid.

in terms of tropical interaction, physical transport and physical oceanography.[89]

c) **Importance for threatened, endangered or declining species and/or habitats-** The area should be important to species in that 'recovery in many cases will require the re-establishment of species in areas of their historic range'.[90]

d) **Vulnerability, fragility, sensitivity, or slow recovery –**To meet these criteria, the area should contain vulnerable species that have suffered from human impact and natural events. [91]

e) **Biological productivity –** The productivity of species in areas that meet this criterion may be evidenced by the rate of growth of marine organisms and their populations based on a scientific calculation.[92]

f) **Biological diversity – '**The diversity needs to be judged in relation to the surrounding environment.'[93]

g) **Naturalness –** This criterion should be prioritised in areas where there is a 'low level of disturbance relative to the surroundings.' It also includes areas where the naturalness has been successfully restored.[94]

It should be noted that the criteria of d) Vulnerability, fragility, sensitivity, or slow recovery and g) Naturalness can be used alone or in conjunction with other criteria when considering the application.[95]

The scientific conditions of a network of MPAs are required by the Scientific Guidance [96]to meet the five following criteria:

[89] Ibid., 7.
[90] Ibid., 8.
[91] Ibid.
[92] Ibid., 9.
[93] Ibid., 10.
[94] Ibid.
[95] Ibid., 8, 10.
[96] Ibid.

i) **Ecologically and biologically significant areas** are geographically or oceanographically discrete areas that provide important services to one or more species/populations of an ecosystem, or to the ecosystem as a whole, compared to other surrounding areas or areas of similar ecological characteristics, or otherwise meet the criteria as identified in Annex I to Decision IX/20;

ii) **Representativity** is captured in a network when it consists of areas in which different biogeographical sub-divisions of the global oceans and regional seas are represented and reasonably reflect the full range of ecosystems, including the biotic and habitat diversity of those marine ecosystems;

iii) **Connectivity** in the design of a network facilitates linkages whereby protected sites benefit from the exchange of larval and/or species and functional linkages from other network sites. Individual sites in a connected network benefit one another;

iv) **Replication of ecological features** means that more than one site should contain examples of a specific feature in the given biogeographic area. The term "feature" means the "species, habitats and ecological processes" that naturally occur in the given biogeographic area; and

v) **Adequate and viable sites** indicate that all the sites within a network should be of sufficient size and protection to ensure the ecological viability and integrity of the feature(s) for which they were selected.[97]

The summary above illustrates that the characteristics of an MPA, under the CBD, are developed from different perspectives from two MPA-related Programmes of Work. The characteristics under the Programme of Work on Marine and Coastal Biodiversity focus more on the national application, while those of the EBSAs described under the Programme of Work on Protected Areas refer to open water and deep-sea habitats that are beyond the

[97] Ibid., Annex II.

limits of national jurisdiction.[98] However, these two programmes have to be implemented together, since the implementation of MCPAs and EBSAs will strengthen the MPA system, as well as the network of representative MPAs.[99] The implementation of these two programmes of work is significant for delivering the Aichi targets established in COP X at Decision X/2,[100] which requires at least 10 percent of coastal and marine areas to be protected under the system of protected areas and other effective area-based conservation measures by 2020.[101] In any case, the concept and characteristics of an MPA under the CBD are similar to those in the IUCN Guidelines in the sense that it can be used for general application to the marine area, in which their specific value to be protected may vary according to the purpose of the conservation.

4. Concept and characteristics of marine protected areas under MARPOL[102]

The MARPOL is said to be the main instrument under the International Maritime Organization (IMO) that targets the pollution from ships.[103] The primary objective of the MARPOL is 'to prevent the pollution of the marine environment by the discharge of the harmful substances or effluents containing such substances'.[104] In addition, the parties to this Convention are not only bound to the Convention itself but also its Annexes.[105] MARPOL adopts some important guidelines that provide the fundamental concept and characteristics of an MPA in terms of protecting the marine environment from pollution from vessels. However, the details of what this entails for the parties to the Convention will be discussed in Chapter 5 of the thesis. For now, the

[98] A.Ardron and others (n 86), 102.
[99] Decision X/29, Decision adopted by the Conference of the Parties to the Convention on Biological Diversity at its Tenth Meeting, UNEP/CBD/COP/DEC/X/29 29 October 2010, p 3, para 13 (Decision X/29).
[100] Decision adopted at the Conference of the Parties to the Convention on Biological Diversity at its tenth Meeting, UNEP/CBD/COP/DEC/X/2 on 29 October 2010 (Decision X/2).
[101] Ibid., p 9.
[102] MARPOL (adopted 2 November 1973, entered into force 2 October 1983) 1340 UNTS 184; Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (adopted 17 February 1978, entered into force 2 October 1983) 1340 UNTS 61(MARPOL).
[103] Kachel(n 5), 95.
[104] MARPOL (n 102), Article 1.
[105] Ibid.

concept and characteristics of the Special Areas (SA) and the Particularly Sensitive Sea Areas (PSSAs) will be separately described.

4.1 Special Areas[106]

The first guidelines were the 1991 Guidelines,[107] which were adopted in Resolution A.720(17) of the IMO. For an area to be designated as a Special Area[108], the guidelines say it has to satisfy one of three key factors: 1) oceanographic conditions; 2) ecological conditions; and 3) vessel traffic characteristics.[109] These three factors are described in detail, as follows:[110]

1) Oceanographic conditions

An area in which the discharge from ships can change or have an adverse effect on the area because it has particular circulation patterns based on its temperature or salinity, a long residence time caused by low flushing rates, extreme ice state and adverse wind conditions.

2) Ecological conditions

Areas that could be designated as the SA based on their ecological conditions and the need to protect them from harmful substances are as follows;

i) Areas that contain depleted, threatened or endangered marine species;
ii) Areas of high natural productivity;
iii) Areas of spawning, breeding and nursery of important marine species and the migratory routes of sea-birds and marine mammals;
iv) Areas with rare or fragile ecosystems such as coral reefs, mangroves, seagrass beds and wetlands; and

[106] IMO, Resolution A.720(17), Guideline for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Areas, adopted on 6 November 1991, 4 and 27 (IMO Res. A.720(17))
[107] Ibid.
[108] MARPOL (n 102), Annex I, Regulation 1,
Special Area means 'a sea area where for recognised technical reasons in relation to its oceanographical and ecological conditions and to the particular character of its traffic the adoption of special mandatory methods for the prevention of sea pollution by oil is required.'
[109] IMO Res. A.720(17) (n 106), 26.
[110] Ibid.

v) Critical habitats for marine resources and/or of critical importance for the support of the large marine ecosystem.

3) Vessel traffic characteristics

These criteria refer to busy shipping areas to the extent that the discharge of harmful substance would be unacceptable for the area due to its specific oceanographic and ecological conditions.

The guidelines for the designation of Special Areas were amended by the IMO in resolution A.927(22) in 2001. It was further clarified by this amendment that Special Areas may be located in the marine areas of several States, but the explanation of the three key terms elaborated above remains the same as specified in resolution A.720(17).[111]

4.2 The PSSAs[112]

PSSAs were introduced by resolution A.720(17) in 1991,[113] where it was explained that there are two important questions to be asked when adopting a PSSA to be considered. One is i) the reason why the area should be protected against the damage from maritime activities, and the other is ii) the measure of protection for the area.[114] However, the aim of the 1991 guidelines was only to clarify the first part of the procedure to adopt a PSSA, which relates to information on the importance of the area that needs to be protected for ecological or socio-economic or scientific reasons.[115] The three main criteria for determining whether or not an area qualifies for designation as a PSSA are as follows;

1. Ecological criteria

[111] IMO, Resolution A.927(22), Guidelines for the designation of Special Areas under MARPOL 73/78 and guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, adopted on 29 November 2001, Annex I of Resolution, 3 (IMO Res. A.927(22))

[112] IMO Res. A.720(17) (n 106), The 1991 Guidelines provided the meaning of PSSAs as 'areas which need special protection through action by the IMO because of their significance for recognised ecological or socio-economic or scientific reasons and which may be vulnerable to damage by maritime activities.'

[113] Ibid.

[114] Ibid., 30.

[115] Ibid., 32.

This includes areas with unique ecosystems, areas of high importance for other marine components, areas of the highly representative ecological process that represent the diversity of marine species, and areas with a high diversity of species, ecosystem, habitats and communities. These criteria also cover areas of high natural biological productivity, areas with a high degree of naturalness, and areas that are highly susceptible to degradation by natural events or human activities.[116]

2. Socio-economic criteria

These criteria include areas that represent an economic benefit, especially those concerning the utilisation of living marine resources. They also cover areas for recreational and tourism activities or those that are important to local traditions or culture.[117]

3. Scientific and educational criteria

These criteria refer to areas that are important for scientific research and the study of particular natural phenomena, as well as areas of particular naturalness or historical value.[118]

The procedure for the identification of PSSAs was revised by the IMO in 1 999 in resolution A.885(21), in which the application by the Member States to propose a PSSA was clarified. The guidelines explained that, apart from the description of the proposed area and the significant reason it should be protected, the *vulnerability of the area to damage by international maritime activities* should also be highlighted.[119] Therefore, the maritime activities and potential harm that may pose a risk have to be explained in the proposal to designate an area as a PSSA.

Another important factor, namely, the Associated Protective Measures (APM) in the second part of the requirement for a proposal of a PSSA, was

[116] Ibid., 32.
[117] Ibid., 33.
[118] Ibid.
[119] IMO, Resolution A.885(21) Procedure for the Identification of Particularly Sensitive Sea Areas and the Adoption of Associated Protective Measures and Amendments to the Guidelines contained in Resolution A.720(17), adopted on 25 November 1999, 5 (IMO Res. A.885(21)).

also clarified in this resolution. The general criteria for an eligible APM to be applied in the PSSA is as follows:

i) 'any measure available in an existing instrument; or

ii) any measure that does not exist yet but should be applicable within the competence of the IMO; or

iii) any measure that is applied in the territorial sea or pursuant to Article 211(6) of the United Nations Convention on the Law Of the Sea that is specifically tailored to a particular area.'[120]

The Guidelines for the Identification and Designation of PSSAs were amended by the IMO in 2001 by resolution A.927(22),[121] in which some details of the criteria of the significance of the area were revised. The criteria of a PSSA, especially the ecological criteria, were expanded to cover critical habitats, spawning or breeding areas and areas of bio-geographical importance.[122] The three main factors for considering the identification of a PSSA were also summarised as a) the particular environmental condition of the area; b) the vulnerability of the area that would be damaged by international maritime activities; and c) the availability of protective measures to be used in the area.[123]

The latest version of the guidelines for the identification and designation of PSSA was issued in 2005 by resolution A.982(24) of the IMO, in that PSSA refers to:

> 'an area that needs special protection through action by the IMO because of its significance for recognised ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities'.[124] (emphasis added).

[120] Ibid., 5.
[121] IMO Res. A. 927 (22) (n 111), Annex II, 6.
[122] Ibid. 8-10.
[123] Ibid., 7.
[124] IMO, Resolution A.982(24) Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, adopted on 1 December 2005 (Agenda item 11), A 24/Res.982, 6 February 2006, 3 (IMO Res. A. 982(24)).

This version further clarified that the areas that are to be proposed as PSSAs are those that are vulnerable to damage by international shipping activities.[125] It should be noted that one area may qualify as both a Special Area and a PSSA since it has been explained since the very first Guidelines in 1991 that the criteria for the designation of a Special Area and the identification of a PSSA are not mutually exclusive.[126]

The concept and characteristics of Special Areas and PSSAs provided in the relevant guidelines adopted by the IMO are very detailed. For Special Areas, the important factors to consider in the application of this regime are 1) oceanographic conditions; 2) ecological conditions and 3) vessel traffic characteristics.[127] In the case of PSSAs, not only are the oceanographic conditions of three main criteria of the area important when proposing a PSSA, namely 1) ecological criteria; 2) socio-economic criteria; and 3) scientific and educational criteria, but also the eligible APM. The APM is a mechanism that gives the PSSA its legal status by binding State parties to comply with the adopted PSSA and its APM. For this consideration, although the MARPOL only focuses on pollution from one source, namely, shipping, when its mechanism is applied to an SA and a PSSA, it implies that the marine environment should be protected and preserved by protective measures. Because of its single focus on the impact of shipping activity, it does not cover to other sources of pollution but the consequences of its application implies a holistic concept of the conservation of the marine environment within the area.

5. Concept and characteristics of an MPA under Ramsar Convention[128]

The Ramsar Convention perceives that wetlands are important for a water management regime and habitats, which are said to be the ‘world’s most productive environments, containing biological diversity and providing water

[125] IMO Res. A.720(17) (n 106), 27.
[126] Ibid., 34; See also IMO Res. A. 982(24) (n 124), 7
[127] IMO Res. A.720(17) (n 106), 26.
[128] Convention on Wetlands of International Importance especially as Waterfowl Habitat (adopted 2 February 1971, entered into force on 21 December 1975) 996 UNTS 245 (Ramsar Convention)

and primary productivity for species of plants and animals'.[129] Alhought other obligatory pillar under the convention (the wise use of wetland)[130] is importance, the focus of this part of the chapter will only be the definition of wetlands, which in its meaning, may be considered as an MPA that the thesis aims to examine. The Ramsar convention defines 'wetlands' as follows;

> 'areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres'.[131]

Another critical obligations of the Ramsar convention is that States are required to designate 'suitable wetlands within their territory for inclusion in the List of Wetlands of International Importance' (Ramsar list).[132] (emphasis added). In addition, Article 2.1 of the Convention expands the definition of wetlands to cover:

> 'riparian and coastal zones adjacent to the wetlands, and islands or bodies of marine water deeper than six meters at low tide lying within wetlands, especially where these are important as waterfowl habitats' (emphasis added).

The Convention further clarifies that the words, 'suitable wetlands' used in Article 2.1 refer to an area that should be listed based on its international significance in terms of ecology, botany, zoology, limnology or hydrology.[133] Within this scope of wetlands referred to in Articles 1.1 and 2.1 above, it can be said that 'wetlands' can cover some parts of the marine area where the depth 'at low tide does not exceed six meters' or in some cases, include an area where

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[129] Ramsar Convention Secretariat, *The Ramsar Convention Manual: a guide to the Convention on Wetlands (Ramsar, Iran, 1971)* (6th ed. edn, 2013), 9 (Ramsar Manual 2013).

[130] Further details can be read at Ramsar Convention Secretariat, 2010. *Wise use of wetlands: Concepts and approaches for the wise use of wetlands. Ramsar handbooks for the wise use of wetlands*, 4th edition, vol. 1. (Gland, Switzerland 2010).

[131] Ramsar Convention (n 128), Article 1.

[132] Ibid., Article 2.1.

[133] Ramsar Convention (n 128), Article 2.2; See also Resolution XI.8 Annex 2, Strategic Framework and guidelines for the future development of the List of Wetlands of International Importance of the Convention on Wetlands (Ramsar, Iran, 1971) – 2012 revision, adopted by Resolution XI.8 (2012) Framework and guideline COP 11, p 6, para 6 (Ramsar Convention-Strategic Framework and guidelines 2012).

the depth at low tide is more than six meters. In this respect, once wetlands have been designated, the parties to the Convention are obliged to establish 'nature reserves' on them, regardless of whether or not they are included in the Ramsar list.[134]

In terms of whether the definition of wetlands in the Convention could be interpreted to include some marine elements, the Ramsar convention authority has published a manual to further explain examples of wetlands, one of such includes 'Marine (coastal wetlands including coastal lagoons, rocky shores, and coral reefs).' [135]

Although the wetlands may include marine area, it does not mean that all of the designated wetland must include marine area. Thus, the application of the convention may include the designation of wetlands which could qualify an MPA. However, in the case where the designated wetland is not a marine area, such a wetland should not be referred to as an MPA.To assist contracting parties with the designation of wetlands, the Conference of the Parties (COP) developed and adopted the Criteria for Identifying Wetlands of International Importance (Criteria of Wetlands) for the first time in COP 4 (1990) and these were revised by the COP until the latest revision in COP 9 (2005). Along with the Criteria of Wetlands, the COP has also developed a 'Strategic Framework and Guidelines for the future development of the List of Wetlands of International Importance of the Convention on Wetlands' (Strategic Framework and Guidelines) in COP 7 in 1999. Now, the updated edition of the Strategic Framework and Guidelines can be found in COP 11, Resolution XI.8 in 2012. The Criteria of Wetlands and Strategic Framework and Guidelines should be analysed together, since they contain information and long-term targets for the implementation of the Convention, as well as a guide to the application of each of the Criteria of Wetlands to create comprehensive

[134] Ramsar Convention (n 125), Article 4.1.
[135] Ramsar Manual 2013 (n 129), 7
'Wetland includes
- Marine (coastal wetlands including coastal lagoons, rocky shores, and coral reefs)
- Estuarine (including deltas, tidal marshes, and mangrove swamps);
- Lacustrine (wetlands associated with lakes);
- Riverine (wetlands along rivers and streams); and
- Palustrine (meaning "marshy" – marshes, swamps and bogs).'

Ramsar site networks at the national level that will eventually be reflected internationally.[136]

The Criteria of Wetlands concludes that the designated wetlands in the Ramsar List should meet one of two main criteria, namely, 1) Group A: Sites containing representative, rare or unique types of wetland and 2) Group B: Sites of international importance for conserving biological diversity.[137] Moreover, the Group B criterion is a combination of four sub-groups that are based on the importance of the wetlands in response to certain types, ecology or species. These four sub-groups are as follows:

1. Wetland sites based on species and ecological communities;
2. Wetland sites based on waterbirds;
3. Wetland sites based on fish; and
4. Wetland sites based on other taxa.[138]

The criteria in sub-group B represent wetland areas where specific conditions significantly support the maintenance of biological diversity in specific biogeographic regions or in any stage of the lifecycle of certain species which then will finally 'contribute to global biological diversity'.[139] However, it may be unable to be fully applied to other marine areas due to its limited application to areas of 'wetland'. This is another type of an MPA which limits the application to those areas within the scope of the convention only.

6. Concept and characteristics of an MPA under the WHC[140]

The WHC was adopted by the Conference of the United Nations Educational, Scientific and Cultural Organisation ('UNESCO') in 1972 with the aim of preserving cultural and natural heritage for mankind as a whole when it is threatened by traditional, social and economic factors.[141] This Convention

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[136] Ramsar Convention Secretariat, *Designating Ramsar Sites: Strategic Framework and guidelines for the future development of the List of Wetlands of International Importance, Ramsar handbooks for the wise use of wetlands*, vol 17 (Dave Pritchard ed, 4 edn, Ramsar Convention Secretariat 2010), 8.
[137] Ramsar Convention - Strategic Framework and guidelines 2012 (n 133), 90.
[138] Ramsar Convention Secretariat, 2010. *Wise use of wetlands: Concepts and approaches for the wise use of wetlands*. Ramsar handbooks for the wise use of wetlands, 4th edition, vol. 1. Ramsar Convention Secretariat, Gland, Switzerland., 29 online accessed at http://www.ramsar.org/sites/default/files/documents/library/hbk4-01.pdf.
[139] Ramsar Convention - Strategic Framework and guidelines 2012 (n 133).
[140] Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972. 1037 UNTS 151 (WHC).
[141] Ibid., Preamble.

generally requires the Member States to identify and delineate a different area within their territory to be inscribed on the world heritage list. Areas are to be chosen based on their outstanding universal value.[142] Therefore, the world heritage list is defined and divided by the WHC into two main types, one of which is cultural heritage and the other is natural heritage.[143] Cultural heritage can also be considered as an area-based management regime; however, based on the definition provided in Article 1 of the Convention,[144] it is not linked to environmental protection as much as to natural heritage. Therefore, only the definition of natural heritage will be examined in this section based on the role it plays in environmental protection. This section of the chapter aims to analyse whether the definition of natural heritage could be included in the concept of an MPA.

Since the general obligation of the WHC requires States to identify heritage sites within their territory, environmental protection area regimes are implemented through the Convention by the term 'natural heritage', which it defines as follows:

> **'Article 2**
>
> natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
>
> geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

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[142] Ibid., Preamble and Article 3.
[143] Ibid., Articles 1 and 2.
[144] Ibid., Article 1
'For the purpose of this Convention, the following shall be considered as "cultural heritage":
monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.'

> natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.'[145] (emphasis added).

Based on the above definition, natural heritage may cover various natural environments, including an MPA, but if the 'outstanding universal value' (OUV) of such heritage is not qualified, it is not considered to be natural heritage under the WHC.[146] Therefore, the Convention authority has adopted various Operational Guidelines for the World Heritage Committee (Operational Guidelines) to determine the world heritage list between 1997 and 2016.[147] The purpose of these guidelines is to enable members of the Convention in the undertaking of the following procedures:

1) 'the inscription of properties on the World Heritage List and List of World Heritage in Danger;
2) the protection and conservation of World Heritage properties;
3) the granting of international assistance under the World Heritage Fund; and
4) the mobilisation of national and international support in favour of the Convention.'[148]

Various Operational Guidelines were developed during the time of the Convention, and the guidelines published from 1977 to 2015 can be divided into the following three periods;

> 1) The early stage of operational guidelines from 1977 to 1992

Nine Operational Guidelines were produced with a focus on the definition and establishment of criteria for inclusion on the world heritage list and plans to manage the heritage;

> 2) Second stage guidelines from 1994 to 2002

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[145] Ibid., Article 2.
[146] Edward J Goodwin, 'The World Heritage Convention, the Environment, and Compliance' (2009) 20 Colo J Int'l Envtl L & Pol'y, 162.
[147] WHC provides the list of operational guidelines for the Implementation of the World Heritage Convention online at http://whc.unesco.org/en/guidelines/.
[148] Operational Guidelines for the Implementation of the World Heritage Convention, WHC.16/01 26 October 2016, para 1, online access at <http://whc.unesco.org/en/guidelines/ > (Operational Guidelines 2016).

Five Operational Guidelines were produced to adjust some of the details of the criteria for inclusion in the world heritage list and to add the criteria for inclusion in the list of world heritage in danger; and

3) Third stage guidelines from 2005 to 2016 (present)

Seven Operational Guidelines were produced to add more details to the criteria for inclusion in the world heritage list. The status of mixed cultural and natural heritage was introduced. The guidelines in this period also included the development of details in determining an OUV, which is an important element for determining whether the nominated area should be included in the world heritage list.

The Operational Guidelines set and develop the criteria for determining which areas qualify as cultural or natural heritage under the definition provided in the Convention. However, only the criteria for the identification of natural heritage will be examined in this section, since it relates to the establishment of an MPA. If there is no indication of the year the guidelines were published, it means that they are the latest guidelines that were published in 2015.

The important element of natural heritage under the WHC is the qualification of 'outstanding universal value' (OUV). The Operational Guidelines provide details of the process to identify and conserve world heritage.[149] Since the concept of natural heritage remained unchanged from the text in the WHC, the Operational Guidelines later focused on details of the natural conditions of an area that may qualify as natural heritage. Details of such natural conditions are summarised from different operational guidelines provided by the WHC authority from the first version in 1977 to the latest version in 2015. It should be noted that the main element of each criterion for inclusion as natural heritage is not so different in each version of the guidelines, but there were some additional details of natural conditions across the years.

The criteria to assess the OUV of an area that can be listed as 'natural heritage' should meet the following natural conditions:[150]

[149] Ibid., 24.
[150] Part D: Criteria for the inclusion of natural property in the World Heritage list of Operational Guidelines (1977 to 2015).

(i) The area represents 'the major stages of the earth's history';[151] or

(ii) The area 'represents significant ongoing ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals,'[152]; or

(iii) The area contains 'superlative natural phenomena or *formations or features, for instance, the most important ecosystems or areas of exceptional natural beauty or an exceptional combination of natural and cultural elements.'*[153] It should be noted that from 1994 the italicised words of this criterion were later deleted and replaced by the criteria of 'areas of exceptional natural beauty and aesthetic importance'[154]; or

(iv) The area must be 'the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of Outstanding Universal Value from the point of view of science or conservation.'[155]

Apart from these characteristics of the potential sites of natural heritage that relate to criteria (i) - (iv), such areas shall fulfil the criterion of 'integrity' to qualify as World Heritage.[156] The guidelines explain that 'integrity is a measure of the wholeness and intactness of the natural and/or cultural heritage and its attributes'.[157] For properties to qualify as having integrity, they should i) contain the necessary element of OUV; ii) be of an adequate size to 'ensure the complete representation of the features and processes which convey the property's significance'; and iii) have suffered from the adverse effect of development and/or neglect.[158] Since the characteristics of natural heritage sites are different based on their naturalness, the determination of the integrity

[151] Operational Guidelines 2016 (n 155), Part D: Criteria for the assessment of Outstanding Universal Value, para 77 (viii).
[152] Ibid., Part D: Criteria for the assessment of Outstanding Universal Value, para 77 (ix).
[153] Operational Guidelines for the Implementation of the World Heritage Convention, WHC/2/Revised, 27 March 1992, para 36, online access at <http://whc.unesco.org/en/guidelines/> (Operational Guidelines 1992).
[154] Operational Guidelines 2016 (n 148), para 77 (vii).
[155] Ibid., para 77 (x).
[156] Ibid., para 87.
[157] Ibid., para 88.
[158] Ibid.

of the properties with the OUV condition in criteria (i) -(iv) is also different. Each condition of integrity based on the condition of the natural area is as follows:

> a) The potential area under (i) should represent 'all or most of the key interrelated and interdependent elements in their natural relationships'; for example, the 'ice age' area should contain all the snowfields, glaciers, cutting patterns, decomposition and colonisation of the area.[159]
>
> b) The potential area under (ii) should be of sufficient size and have the necessary components to represent the 'key aspects of the process and be self-perpetuating'.[160]
>
> c) The potential area under (iii) should contain a required ecosystem component of related species and or other natural elements or processes to be preserved.[161] This requirement was deleted as a result of changes in 1994, and instead,, it was required that the potential area under (iii) 'should contain outstanding universal value and include essential areas for maintaining the beauty of the property'.[162]
>
> d) In the past, the potential areas under (iv) were required to hold threatened species and be of sufficient size to be a necessary habitat for the survival of the species.[163] In the latest guidelines of 2015, these areas should be the most important properties for the conservation of biological diversity. It is said that only the areas that are 'most biologically diverse and/or representative are likely to meet this criterion'.[164]

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[159] Ibid., para 93.
[160] Ibid., para 94.
[161] This explanation used in the Operational Guidelines from 1977 to 1992. Online access at <http://whc.unesco.org/en/guidelines/>.
[162] Operational Guidelines 2016 (n 148), para 92.
[163] This explanation was given in the Operational Guidelines from 1977 to 1992.
[164] Operational Guidelines 2016 (n 148), para 95.

> e) The potential areas in (i) - (iv) should have a management plan and adequate long-term legislative regulatory, institutional or traditional protection.[165]

After the operational guidelines were amended in 2005, the WHC Conference adopted new operational guidelines with a different structure of explanation from that in the previous guidelines.[166] Although the definition and content of the natural conditions for sites to qualify as natural heritage remained the same, the criteria of each natural condition were rearranged. From 2005, the definition of 'Mixed Cultural and Natural Heritage' was introduced to the guidelines, which provided that the property must satisfy 'a part or the whole of the definition of both cultural and natural heritage' specified in Articles 1 and 2 of the WHC.[167] The operational guidelines from 2005 to 2015 also emphasised the condition of the OUV of the properties or areas eligible to be designated cultural or natural heritage. Unlike the new version, the previous guidelines before 2005 did not explain the term, 'outstanding universal value', separately. The older guidelines rather explained it as if it was understood that the term had been defined within the text of Articles 1 and 2 of the Convention, the definition of cultural and/or natural heritage.[168] According to the above discussion, the OUV is the primary purpose of the international protection of heritage under this Convention.[169]

In addition to the interpretation of the WHC on the application to the marine element, the convention also operates World Heritage Marine programmes, which are joint research programmes with the IUCN.[170] The IUCN published a handbook of the interpretation of World Heritage criteria in marine systems[171] in 2013, which contained extensive details on the possible

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[165] Ibid., para 97.
[166] See the Operational Guidelines from 2005 onwards, online access at <http://whc.unesco.org/en/guidelines/>.
[167] Operational Guidelines for the Implementation the World Heritage Convention, WHC.05/2, 2 February 2005, pp 13-14, para 46 online access at <http://whc.unesco.org/en/guidelines/> (Operational Guidelines 2005).
[168] Operational Guidelines for the Implementation of the World Heritage Convention, WHC.02/2, July 2002, para 5 online access at <http://whc.unesco.org/en/guidelines/> (Operational Guidelines 2002).
[169] Operational Guidelines 2005 (n 167), para 49.
[170] WHC (n 140), Article 8.3; The IUCN is the the official technical advisory body of the convention.
[171] Abdulla, A., Obura, D., Bertzky, B. and Shi, Y. (2013). *Marine Natural Heritage and the World Heritage List: Interpretation of World Heritage criteria in marine systems*,

application of criteria (i) - (iv) to the marine system. The important factors of criteria (i) to (iv) are summarised and grouped in the handbook, as follows:

1. Criterion i) has a Geology and Oceanography theme because it concerns geology, which also involves oceanography in the context of a marine system.[172] There are 9 variations of the possible features of this condition, which are as follows:[173]

1.1 Plates and associated tectonic features

1.2 Hotspots, seamounts and Large Igneous Provinces

1.3 Sedimentary features and submarine canyons

1.4 Hydrothermal vents, seeps and other hydrogeological features

1.5 Water masses and stratification

1.6 Ocean Currents

1.7 Waves and other fluid phenomena

1.8 Coastal and land-sea interactions

1.9 Ice

2. Criterion ii) is explained as an ecological and biological processes theme. It also explains that this criterion is different from criterion iv), since it relates to the ecosystem, communities and ecological and biological processes rather than species and habitats criterion iv).[174] It offers three important conditions to be considered in cases where this criterion will be used as the OUV of properties, which are as follows:

2.1 Productivity and biogeochemical cycles

2.2 Connectivity

2.3 Marine ecosystem patterns, processes and services

3. Criterion iii) is explained as superlative natural phenomena or natural beauty.[175] This criterion is different from the others in that it concerns the natural beauty of properties. In this respect, the book proposes that it could be interpreted as marine phenomena and spectacles of nature.[176]

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analysis of biogeographic representation of sites, and a roadmap for addressing gaps. IUCN, Gland, Switzerland. xii + 52pp.

[172] Ibid., 10.

[173] Ibid., 10 – 16.

[174] Ibid., 17.

[175] Ibid., 25.

[176] Ibid., 25.

4. Criterion iv) is explained as species and diversity.[177] The important factors that properties should possess in order to be nominated as natural heritage based on this criterion are as follows;

4.1 Diversity of marine life

4.2 Biogeography and components of diversity

4.3 Threatened and flagship species

There are many natural world heritage sites with marine value; in fact, 47 sites are currently recognised as having marine value.[178] As a result of the collaboration of the WHC and the IUCN, the book contains great detail on the interpretation and possible application of the criteria by which to assess the OUV of marine natural heritage.

When considering the concept of natural heritage provided in the WHC and the detailed characteristics of the natural heritage provided in the operational guidelines, they are not specifically directed towards marine protected areas. Again, similar to the concept and characteristics of an MPA discussed in 1.4 and 1.5 above, the application of the WHC is another form of limitation of the treaty in that some areas have to, at first, qualify as heritage and cannot be applied generally.

Nonetheless, it is undeniable that the WHC plays an important role in the conservation of the environment as a whole, including the marine environment. This is because the eligible area in the criteria for determining natural heritage mentioned in (i)-(iv) can also include the marine area. Moreover, the work of the IUCN in an attempt to interpret natural world heritage to the marine system is very useful as a reference for any States parties that are interested in the inscription of marine natural heritage. This would bring marine heritage into the protection system of the WHC since a management plan for safeguarding is one of the requirements when considering the nomination to natural heritage. With this important element, a marine area that represents a significant ecological or biological process or

[177] Ibid., Chapter 2.

[178] Information on the list can be accessed online at <http://whc.unesco.org/en/marine-programme/>.

habitat can be protected by a management plan and the related legislation under the WHC regime.

7. International Convention for the Regulation of Whaling ('ICRW')[179]

The ICRW succeeded the 1937 Convention on Regulation of Whaling in 1946. At that time, the aim of the Convention was to regulate whaling and ensure the proper and effective conservation and development of whale stock.[180] The parties to the Convention agreed to establish an International Whaling Commission (IWC) as the authority to encourage and recommend or investigate whales and whaling matters, including collecting and analysing statistics of whale stock.[181] Moreover, Article 5 of the Convention authorises the IWC to amend the schedule related to the adoption of 'regulations with respect to the conservation and utilisation of whale resources'.[182]

It was originally understood that the aim of the whaling convention was not only to conserve the stock of whales but rather to try to balance the development of the whaling industry and proper conservation.[183] However, after the depletion of stock in 1960, the IWC adopted a more conservation-orientated approach,[184] which later led to a whaling moratorium in 1985 when it adopted zero quotas on all stock of commercial whales. [185] In addition, the IWC established the Indian Ocean Sanctuary in 1979 and the Southern Ocean

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[179] ICRW (n 8).
[180] Ibid., Preamble.
[181] Ibid., Articles 3 and 4.
[182] ICRW(n 8), Article 5
These regulations include the designation of
'(a) protected and unprotected species;
(b) open and closed seasons;
(c) open and closed waters, including the designation of sanctuary areas;
(d) size limits of each species;
(e) time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season);
(f) types and specifications of gear and apparatus and appliances that may be used;
(g) methods of measurement; and
(h) catch returns and other statistical and biological records'.
[183] Bowman M, Davies P and Redgwell C, *Lyster's International Wildlife Law* (CUP 2011), Chapter 6, 152.
[184] Bowman, Davies and Redgwell, 164-165.
[185] Schedule of the ICRW as amended by the Commission at the 65th Meeting, September 2014 paragraph 10(e) online access at https://archive.iwc.int/pages/view.php?ref=3606&k= (Schedule of the ICRW); See also ibid, 165.

Sanctuary in 1994,[186] and the establishment of these whale sanctuaries resulted in the prohibition of any commercial whaling in those areas.[187]

The implementation of sanctuaries can be considered as an area-based management regime, since a restriction, particularly the prohibition of commercial whaling, was applied within the designated marine areas. However, with the core objective of a sanctuary, the ICRW could be considered as a 'species-specific convention', which is instead concerned with the protection of one species.[188] Therefore, the sanctuary established under the ICRW does not directly relate to the concept of an MPA in the sense of this chapter because it does not conserve nature as a whole but only to one species.[189] Therefore, the ICRW will not be subject to further discussion regarding the source of an obligation to establish an MPA or the regional cooperation for the implementation of an MPA under the global conventions in this research.

8. Convention on the Conservation of Migratory Species of Wild Animals (CMS)[190]

The CMS is a conservation-based agreement base on specific animal species similar to the ICRW,[191] but the scope is broader as they refer to 'wild animal'. The convention fulfils Recommendation 32 of the Stockholm Declaration which recommended the States to agree on a treaty 'to protect species inhabiting international waters or those which migrate from one country to another'.[192] The CMS aims for the wild animal as mention in the preamble, it seeks to conserve migratory species,[193] as the definition of migratory species

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[186] Resolution in Relation to the Establishment of a Whale Sanctuary in the Indian Ocean, Rep. int. Whal. Commn 30) at 31st Annual Meeting, 1979, IWC Resolution 1979-3; See also Resolution on a Sanctuary in the Southern Ocean, Rep.int.Whal.Commn 44 at 45th Annual Meeting 1993, IWC Resolution 1993/6; See also ibid., 170-171.
[187] Schedule of the ICRW (n 185), paragraph 7(a) and 7(b).
[188] Alexander Gillespie, *Protected Area and International Environmental Law* (Martinus Nijhoff Publisher 2007), 20-21.
[189] IUCN Guidelines 2008 (n 17), 14; See also Concept and characteristic of an MPA under the IUCN above in section 1 of this chapter.
[190] CMS (n 9).
[191] Ibid., Preamble.
[192] Ibid., ; see also Report of the United conference on the Human Environment, Stockholm, 5-16 June 1972, Recommendation 32 of Action Plan, 12, A/CONF.48/14/Rev.1, online accesses at <http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.48/14/REV.1&referer=/english/&Lang=E>; See also Bowman, Davies and Redgwell (n 183), Chapter 16.
[193] Ibid. 536.

is provided in Article 1(a) of the CMS[194] and other animals that do not fall under this definition are not included under the jurisdiction of the convention. The CMS emphasises the conservation of migratory species because it is the fundamental principle of the convention.[195] The endangered species are listed in Appendix I of the convention,[196] while Appendix II lists species which are in 'unfavourable conservation status' and those conservation 'would significantly benefit from the international co-operation…' that the States should decide on the ancillary agreement to conserve and manage them.[197] The CMS also authorises the Range State[198] on the jurisdiction over the Range[199] of the migratory species, including the conservation or restoration of the habitat of the subject migratory species[200] and the prohibition of taking of the listed species;[201] these jurisdiction ties primarily to the species concerned. The term 'Range' or 'Habitat'[202] given in this convention may refer to the area to be regulated for the conservation of the subject species, but without the listed species their status or protection measure cannot be

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[194] CMS (n 9), Article 1 (a)
'1. For the purpose of this Convention:
a) "Migratory species" means the entire population or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries;
…'

[195] Ibid., Article 2.

[196] Ibid., Article 3.

[197] Ibid., Article 4 (1).

[198] Ibid., Article 1 (h)
'1. For the purpose of this Convention:
…
(h) "Range State" in relation to a particular migratory species means any State (and where appropriate any other Party referred to under sub-paragraph (k) of this paragraph) that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species;
…'

[199] Ibid., Article 1 (f)
'1. For the purpose of this Convention:
…
(f) "Range" means all the areas of land or water that a migratory species inhabits, stays in temporarily, crosses or overflies at any time on its normal migration route;
…'

[200] Ibid., Article 3(4) a).

[201] Ibid., Article 3(5).

[202] Ibid., Article 1 (f)
'1. For the purpose of this Convention:
…
(g) "Habitat" means any area in the range of a migratory species which contains suitable living conditions for that species;
…'

authorised. This is quite different from the purpose of the UNCLOS, the CBD, the Ramsar Convention and the MARPOL which are concerned with the area to be protected and not the species. Nonetheless, it must be acknowledged that the CMS has contributed to the conservation of many endangered species that are subject to Appendix I of the convention, including sea turtles and some birds.[203]

Considering that migratory species 'cyclically and predictably cross one or more national jurisdictional boundaries,' it is feasible that the application of any measure concerning the conservation of the listed species should interact with the species.[204] In that the CMS lays a duty on States to conserve the listed species, it could be a complementary means to a broader convention relating to the establishment of an MPA.[205] For these reasons, therefore, the CMS can shed no further light on the concept and characteristics of an MPA. In the next chapter, the thesis will not include the analysis of the CMS for the examination of the legal rights and/or obligation to establish the MPA.

Conclusion

The different types of MPA or other specific protected area regimes in different conventions have been discussed in this part of the paper in order to better understand the scope of an MPA. This will lead to the consideration of the obligation of States regarding the designation of an MPA and the protective measures that are available through international instruments.

It can be seen from this examination of the concept of the MPA that it has been used differently in different conventions. The definition varies from focusing on the protection of nature or the environment, as in the IUCN, the CBD and the WHC, to one that focuses on particular activities, as in the IMO-related conventions or those focus on the conservation of the animal species in the ICRW and the CMS. As for the Ramsar Convention, which focuses on

[203] Ibid., Appendix I, 4 , as of 26 January 2018, online accessed at <https://www.cms.int/sites/default/files/basic_page_documents/cms_cop12_appendices_e_0.pdf> ; see also Douglas Hykle, 'Convention on Migratory Species and Other International Instruments Relevant to Marine Turtle Conservation: Pros and Cons' (2002) 5 J Int'l Wildlife L & Pol'y.

[204] Bowman, Davies and Redgwell (n 183), 545.

[205] Lyle Glowka, 'Complementarities between the Convention on Migratory Species and the Convention on Biological Diversity' (2000) 3 Int'l Wildlife L & Pol'y 205, 216-217.

the protection of wetlands, although its application does not cover a marine area where the depth is more than six meters from the surface, it is possible to consider the wetlands protected under it as constituting protected areas with a limited application to marine areas. With regard to the UNCLOS, which is in the process of developing the regime of MPAs in the ABNJ, although the term has not been defined, it is quite clear that it will focus on the conservation of marine biodiversity and marine living resources.

When considering the elements mentioned above, the MPAs, or other similar terms used in different conventions, that have similar conditions are those in the IUCN, the MCPA in the CBD, the Wetlands in the RAMSAR and the Natural Heritage in the WHC, while the protected area of MARPOL seems to be more specific to the area of international shipping.

Nonetheless, the definition of marine protected areas in different conventions have some common elements. These common elements will be used here to arrive at a common concept of an MPA as follows:

i) An area that encloses part of the marine environment and may also encompass areas of land, or wetlands;
ii) An area that needs a measure or plan for the conservation and/or protection of its environment and ecosystem;
iii) An area under the regulation that protects the marine environment from any activities within the area.

The objective of the PSSA and SA under the IMO is also to protect the marine environment, even though the application has a distinctive element since they focus on areas that are adversely affected by international shipping activities.[206] For this reason, the definition of PSSAs and SA will be included in the analysis of an MPA with the notion that it concerns the effect of the environment from a particular activity.

As for the ICRW, it is clear that the objective of this Convention is to regulate whaling so that the essential characteristic of the protection measures in the ICRW is their focus on this one marine mammal. Therefore, the sanctuaries in the ICRW are not included in the concept of an MPA in this research. The

[206] MARPOL (n 102), Annex I, Regulation 1; see also IMO Res. A.720(17) (n 106), 4 and 27.

current research also excludes the CMS because it focuses on the conservation of migratory species, so that its connection to the protected area is not similar to the other relevant conventions mentioned above.

The characteristic of an MPA is, however, very diverse in each of the instruments. However, the core element of the characteristic of an MPA emphasises the particular value of the area to be protected. The special importance of the marine area can be natural, scientific, education, cultural or human. But the details of the characteristic of an MPA shown above can include differences in terms of the objective of the area. For example, the MARPOL design their characteristic of the SA and PSSAs based on their vulnerability to international shipping, while the WHC emphasises the 'outstanding universal value' of the heritage. Regardless of their different purpose for MPAs, the essence is the same in that these instruments aim to protect or conserve the particular importance of the marine area in one way or another.

This chapter shows the common elements of MPAs to be examined later. The next part of this research, in response to the question of whether or not there is an obligation for the States to establish an MPA will be based on the concept of an MPA provided in global instruments comprising the UNCLOS, the CBD, the MARPOL, the Ramsar Convention and the WHC.

CHAPTER 4 OBLIGATION TO COOPERATE AT THE REGIONAL LEVEL

Introduction

In order to answer the question of whether there is an obligation to cooperate at the regional level to establish an MPA, it is firstly necessary to understand the general obligation to cooperate. Therefore, the international legal obligation to cooperate is examined in this chapter with a focus on a general understanding of the obligation to cooperate in the context of the international environmental law. This is followed by an examination of the particular aspect of cooperation at the regional level within the global and regional instruments that are included in the scope of this research.

Before going any further it should be noted that the conclusion of the regional sea conventions represents one form of regional cooperation to protect and conserve the marine environment.[1] This on its own does not, however, answer the research question for this chapter. To reach that answer treaty interpretation will be applied to the analysis of global and regional conventions to establish whether or not they contain an obligation of regional cooperation, whilst the interactional account of international law will be applied to determine whether or not a single customary norm has been established. This chapter will begin with an examination of the obligation to cooperate as a general aspect of international law, as well as the obligation to cooperate to protect the environment. Details of the cooperation depicted in international judicial decisions will also be elaborated on in this chapter. The opportunity for regional cooperation based on the provision of the duty of States to cooperate in the aforementioned conventions will then be identified with a focus on the obligation for regions to cooperate to establish an MPA. The establishment of an MPA may be only one mechanism of regional cooperation to protection the marine environment, in the scope of the global and regional instruments delineated in the Introduction chapter.

[1] Kenneth W. Abbott and Duncan Snidal, 'Pathways to international cooperation' in Eyal Benvenisti and Moshe Hirsch (eds), *The Impact of international law on international cooperation* (CUP 2009), 55-56.

1.Obligation to Cooperate

Cooperation is said to be a basic rule of international law and it is also accepted as being the customary norm.[2] This can be ascertained from many international cases, including the *Lac Lanoux Arbitration,*[3] the *Gabcikovo-Nagymaros Case*[4] and the *MOX Plant Case.*[5] In terms of the social norm, humans instinctively cooperate to achieve a specific purpose,[6] and this also applies to environmental law, as multilateral environmental treaties promote cooperation between the member States. The obligation to cooperate is integrated into many treaties, including the UN Charter, where the cooperation principle is described as a stepping stone to further support other areas of interest of States, as provided in Article 1(3) and Article 13 of the UN Charter.[7] It is also mentioned in Article 74 of the UN Charter that the principle may have evolved from the notion of 'good-neighbourliness'.[8]

Disputes between States in cases of environmental harm or damage to the environment have long been admissible in many international judicial fora, such as the International Court of Justice (ICJ), the Permanent Court of

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[2] Nicholas A. Robinson, 'Evolved Norms; A canon for the Anthropocene' in Christina Voigt (ed), *Rule of Law for Nature: New Dimenstions and Ideas in Environmental Law* (CUP 2013), 60.

[3] *Lake Lanoux Arbitration* (France v. Spain), (1957) 12 R.I.A.A. 281, November 16, 1957.

[4] *GabCikovo-Nagymaros Project* (Hungary v. Slovakia), Judgment, 1. C. J. Reports 1997, *p. 7.*

[5] *MOX Plant*, ITLOS case No.10 (2001).

[6] Robinson (n 1), 61.

[7] Charter of the United Nations, adopted on 26 June 1945, entered into force on 24 October 1945, 1 UNTS XVI

'Article 1 The Purposes of the United Nations are: …

> 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion..'

; See also Article 13

'1. The General Assembly shall initiate studies and make recommendations for the purpose of:

> a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification;
>
> b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

2. The further responsibilities, functions, and powers of the General Assembly with respect to matters mentioned in paragraph 1 (b) above are presented in Chapters IX and X.'

[8] Phillipe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Third edn, CUP 2012), 203; see also Patricia W. Birnie, Alan E. Boyle and Catherine Redgwell , *International law and the environment* (3 edn, OUP 2009), 137.

Arbitration (PCA) and the International Tribunal for the Law of the Sea (ITLOS). Although the international environmental law has not been formally established by judicial decisions, the legal principle, or legal norm, regarding the environment can be identified from the rationale of the decisions made in this forum.[9]

The no harm rule is a notable principle that was confirmed as the customary international law regarding the environment in the *Trail Smelter Arbitration*[10] case. In that case, the principle that a State shall ensure that the activities within its jurisdiction or control do not harm the environment of other States was established,[11] as well as the principle concerning the responsibility or liability of States for environmental damage.[12] The Stockholm Declaration, which was the result of the United Nations Conference on the Human Environment in 1972,[13] is noted as having established the fundamental principles of environmental law, as well as confirming the fundamental principles of the customary international law concerning the control of transboundary harm to the environment of other States.[14] This principle was restated in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration and later acknowledged as the key principle[15] relating to the environment.[16] It has also been integrated into many global treaties, for instance the preamble of the UN Framework Convention on Climate Change.[17] The no harm rule is integrated into Article 3 of the CBD[18], as well as Articles 193 and 194 (2) of the UNCLOS[19]. It can also be seen in some regional instruments, such as Article 3 (5) of the Convention for the

[9] Tim Stephens, *International Courts and Environmental Protection* (CUP 2009), 14-15.
[10] *Trail Smelter Arbitration* (*US v. Canada*) (1941) 3 RIAA1907, 1911.
[11] Ibid., 1965.
[12] Birnie, Boyle and Redgwell (n 8), 216-217.
[13] UN General Assembly, United Nations Conference on the Human Environment, Declaration of the United Nations Conference on the Human Environment, conclusion on 16 June 1972, U.N. Doc. A/Conf.48/14/Rev. 1(1973) (Stockholm Declaration).
[14]Birnie, Boyle and Redgwell (n 8), 48-50; see also Stockholm Declaration, Principle 21.
[15] Ibid., 143.
[16] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, 241-242, para 29.
[17] 1992 United Nation Framework Convention on Climate Change, adopted on 9 May 1992, enter into forced 21 March 1994, 1771 UNTS 107 (UNFCCC).
[18] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD).
[19] The 1982 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396 (UNCLOS).

Protection of the Marine Environment and Coastal Area of the South-East Pacific and Article 3(6) of the Convention on the Protection of the Marine Environment of the Baltic Sea Area.

Similar to the no harm rule above, the customary norm of cooperation in matters related to the environment has been well established through treaties and non-binding instruments. Many judicial cases also confirm the existence of the obligation to cooperate that solidified the norm from the development of the principle in soft law regulations, as provided in the Stockholm Declaration and the Rio Declaration, into the hard law format contained in many environmental treaties.[20]

According to Principle 24 of The Stockholm Declaration, '…the protection and improvement of the environment should be handled in a co-operative spirit by all countries….'[21] Although this Declaration is not binding, it is evident that States need to cooperate in matters that relate to the protection of the environment. The principle of cooperation was again referred to in the 1992 Rio Declaration, which was the result of the 1992 United Nations Conference on the Environment and Development (UNCED).[22] The cooperation principle is incorporated in many principles of the Rio Declaration, for example principles 7, 9 and 12 to 14 and principle 24. It should also be noted that most of the aforementioned principles use the term 'should' when referring to the cooperation of States in matters concerning environmental protection, apart from principle 7, in which the term 'shall cooperate' is used, which implies the significance of the principle in terms of the conservation, protection and restoration of the ecosystem. It reads as follows:

> 'States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but

[20] Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (OUP 2000), 223-224.
[21] Stockholm Declaration (n 13), Principle 24.
[22] Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992) adopted on the 14th June, 1992 (Rio Declaration).

> differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.[23] (emphasis added)

Principle 7 of the Rio Declaration not only contains the principle of cooperation but also other principles, for example the principle of common but differentiated responsibilities, as well as sustainable development.[24] Cooperation is vital to conserve, protect and restore ecosystems. According to Principles 18 and 19 of the Declaration,[25] cooperation relates to the principle of notification and consultation between States when there are natural disasters and other emergencies that could possibly harm the environment. Although not directly presented as the cooperation of States, these two principles are regarded as being part of the principle of cooperation.[26] This was illustrated in the case of *Land Reclamation*[27] between Singapore and Malaysia, when the tribunal ordered that the States concerned 'shall cooperate and shall, for this purpose, enter into consultations forthwith…'[28] The tribunal further elaborated that the information should be exchanged on a regular basis to fulfil the obligation to cooperate stated in the order.[29]

The notion of cooperation was also repeated in the *Pulp Mills case.*[30] Although the principle of State cooperation may not have been central to this

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[23] Ibid., Principle 7.
[24] Pierre-Marie Dupuy and Jorge E. Viñuales, *International Environmental Law* (CUP 2015), 65.
[25] Rio Declaration (n 22), Principles 18 and 19.
[26] Günther Handl, 'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration, 1972) and The Rio Declaration on the Environment and Development, 1992', 5 online access at <http://legal.un.org/avl/pdf/ha/dunche/dunche_e.pdf> (access 5 September 2007); See also Mari Koyano, 'The Significance of Procedural Obligation in International Environmental Law: Sovereignty and International Co-operation' (2011) 54 Japanese Yearbook of International Law, 117.
[27] *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor n (Malaysia v. Singapore)*, ITLOS Case No 12 (2003) (*Land Reclamation case*).
[28] Ibid. 27.
[29] Ibid.
[30] *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, [2006] ICJ Rep. 113 (*Pulp Mills case*).

dispute, it was mentioned as fulfilling the general obligation of prevention. [31] The duty to notify was also mentioned, although the States, in this case, were bound by the treaty agreed between them, in which it was provided that the obligation to notify is 'the condition for successful co-operation between the parties', as follows:

> 'In the opinion of the Court, the obligation to notify is intended to create the conditions for successful co-operation between the parties, enabling them to assess the plan's impact on the river on the basis of the fullest possible information and, if necessary, to negotiate the adjustments needed to avoid the potential damage that it might cause.[32] (emphasis added)

The flow of procedural obligations contained in this statement shows that notification leads to cooperation and negotiation between related States. Although their obligation was established based on the agreement between the States concerned in this case, the connection of the cooperation to other obligations, such as the notification, negotiation and prevention of environmental risk, is well elaborated in the above paragraph. It can be seen that the duty to cooperate has a close relationship with the other procedural obligations, including the notification and exchange of information, from which it can be understood that 'cooperation is hinged on notification and consultation.'[33]

Many of the above-mentioned cases concerning the cooperation obligation have collectively indicated that other actions or obligations may be necessary to facilitate and fulfil the obligation to cooperate. These may include the obligations to consult, notify and exchange information.[34] The *Lac Lanoux Arbitration*[35] between France and Spain stated that any State that engages in

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[31] Ibid., para 102.
[32] *Pulp Mills Case* (n 30), para 113.
[33] Phoebe N. Okowa, 'Procedural Obligations in International Environmental Agreement ' (1996) 67 British Yearbook of International Law, p 333 ; See also *Land reclamation case* (n 27).
[34] Jon M. Van Dyke and Sherry P. Broder, 'International Agreements and Customary International Principles Providing Guidance for National and Regional Ocean Policies' in Biliana Cicin-Sain, David Vanderzwaag and Miriam C. Balgos (eds), *Routledge Handbook of National and Regional Ocean Policies* (Routledge 2012), 54-55.
[35] *Lake Lanoux Arbitration (France v. Spain)*, 24 *ILR* (1957) (*Lake Lanoux Arbitration*).

an activity that may significantly harm the environment of other States should consult and coordinate with the States concerned.[36] However, the obligation to consult and cooperate with the States concerned does not mean that an agreement must then be reached to fulfil the duty.[37] In other words, this is an obligation of conduct, or a procedural obligation, the essence of which lies in genuine action to implement the obligation, rather than requiring an accurate result of such action.[38] The substantive notions established in this case are i) the State of origin shall consult and cooperate with the other States likely to be affected by the operation of the State of origin; and ii) such consultation or cooperation does not mean that the State of origin should receive the prior consent of the other States in order to commence the operation within its jurisdiction.[39] These notions later became the background principle to the further development of the Watercourse Convention,[40] which has a similar concern regarding the cooperation for the protection of the shared resources in the marine regime relating to the establishment of an MPA. It also provides an example of the cooperation that could be made in the neighbouring State regarding the management of shared resources. Interestingly, although the tribunal in the *Lac Lanoux* case had not confirmed the legal status at that time, the notion of cooperation between States in terms of consultation and cooperation was repeatedly cited in the case of *Gabcikovo-Nagymaros*.

As well as due diligence in the prevention of environmental risk, it has been observed that 'if due diligence is the first rule of transboundary environmental risk management, cooperation is the second.'[41] It was stressed in the *Gabcikovo-Nagymaros case* that States have a duty to perform an EIA before and after the operation of activities in order to monitor the ongoing risk to the environment.[42] In this case, the obligations to cooperate and negotiate were also extremely significant since they concerned the management of the shared

[36] Ibid.
[37] Ibid., 25.
[38] Okowa (n 33), 307; See also Birnie, Boyle and Redgwell (n 8), 178.
[39] Birnie, Boyle and Redgwell (n 8), 178; See also Stephens (n 9), 171.
[40] Convention on the Law of the Non-Navigational Uses of International Watercourses, conclusion on 21 May 1997, 36 ILM 700 (1997) (Watercourse Convention); See also Stephens (n 9), 171; Birnie, Boyle and Redgwell (n 8), 177.
[41] Ibid (n 7), it is stated that due diligence includes the duty to perform an EIA and the duty to notify the risk, 175.
[42] *Case concerning the Gabcikova-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, 7, para 140 (*Gabcikova-Nagymaros case*).

watercourse. The court also utilised the principle of cooperation specified in the Watercourse Convention, which had not yet entered into force at the time of the dispute, to consider the case, as specified in Paragraph 147 of the judgment, as follows:

> 'Re-establishment of the joint regime will also reflect in an optimal way the concept of common utilisation of shared water resources for the achievement of the several objectives mentioned in the Treaty, in accordance with Article 5, paragraph 2, of the Convention on the Law of the Non-Navigational Uses of International Watercourse, according to which:
>
> > "Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilise the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention."(General Assembly doc. A/51/869 of the 11th April 1997).'[43]

Although the application of the principle to cooperate in shared watercourses is highlighted in the cases of *Lac Lanoux* and *Gabcikovo-Nagymaros*,[44] its application extends to other areas of the environment, such as the management or prevention of transboundary environmental harm.[45] This is further evidence of the implication that the cooperation principle is a significant part of the obligation to prevent transboundary harm.

As for the obligation to negotiate, this is also related to the obligation to cooperate. In the case of the *North Sea Continental Shelf*, it was provided that the negotiations between States should be '..meaningful, which will not be

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[43] Ibid., para 147.
[44] Stephens (n 9), Chapter 6; See also Alan E. Boyle, 'The Prinicple of Co-operation: the environment' in Vaughan Lowe and Colin Warbrick (eds), *The United Nations and the Principle of International Law: Essays in Memory of Michaeal Akehurst* (Routledge 1994),122.
[45] Boyle (n 44), 124-126.

the case when either of them insists upon its position without contemplating any modification of it.'[46] However, although the negotiations between States may be ongoing, there is no requirement for them to reach an agreement at the time of the negotiation, or even after a judgment has been passed.[47]

The obligation to cooperate was again emphasised in the *MOX Plant* case,[48] which concerned issues under the UNCLOS and also referred to the obligation to cooperate that is included in the treaty. The role of the duty to cooperate was reiterated in the following statement:

> 'the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that right arose therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention'[49]

It was further elaborated on in this case that the cooperation of the parties should consist of 'exchanging information concerning the risks or effects of the operation of the MOX Plant.'[50] The statement mentioned above concerning the duty to cooperate referred to cooperation as a fundamental principle in the prevention of pollution and general international law, which is different from the customary international law. This could be the reason for considering the case based on the dispute under the UNCLOS, in which the principle of cooperation 'for the protection and preservation of the marine environment' is emphasised in Article 197 of Part XII of the Convention.[51] Therefore, cooperation in terms of the relevant global and regional instruments that fall within the scope of this thesis will be elaborated on in the next part of this chapter.

As shown in the *MOX Plant* or *Pulp Mill* cases above, the principle of cooperation has been especially accommodated in matters concerning

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[46] *North Sea continental Shelf (Germany v Denmark)*, 1969 I.C.J. Reports 3, p. 47, para. 85.
[47] Birnie, Boyle and Redgwell (n 8), 179; See also Stephens (n 9), 185-186.
[48] *The MOX Plant Case (Ireland v. UK),* , ITLOS case No.10 (2001) (*MOX Plant Case*).
[49] Ibid., para 82.
[50] Ibid., para 84.
[51] UNCLOS (n 19), Article 197.

environmental protection: However, the obligation to cooperate discussed in the early cases mainly referred to regional cooperation until recently, when the *Advisory Opinion for SRFC*[52] concerned the obligation to cooperate in the conservation and management of natural resources under the UNCLOS, as well as regional and sub-regional cooperation in dealing with illegal unreported and unregulated (IUU) fishing. In this respect, the advisory opinion underpinned the relevance of cooperation to manage the shared fish stock between States through regional or sub-regional organisations in Article 63 of UNCLOS, as well as cooperation to conserve highly migratory fish stock in Article 64.[53] This case especially focused on the obligation to cooperate underlined in the obligation to both conserve and manage shared resources in Articles 61 and 62 of the UNCLOS and the general obligation to protect the marine environment in Article 192.[54] The principle of cooperation in the conservation of fisheries and marine living resources that had been clarified in the *Icelandic Fisheries* case was also reinstated in this case.[55]

As well as the emphasis on the legal obligation shown in the judicial decision, cooperation has also been well established in global treaties, for example, Article 197 of the UNCLOS, Article 5 of the CBD and the Ramsar Convention, as well as such non-binding instruments such as the WCPA Guidelines for MPA.[56] The existence of the obligation to cooperate has been confirmed in many judicial cases and this has solidified the norm from the development of the principle into a hard law form in many environmental treaties.[57] Moreover, it is not only the legality of the obligation to cooperate that has been confirmed by international decisions, as the details of the obligation to cooperate with regard to environmental protection cases have also been elaborated on, for example, in the *Gabcikova-Nagymaros case* and the *Advisory Opinion for SRFC*. In this regard, many judicial precedents state

[52] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, ITLOS Case no. 21, April 2015 (*Advisory Opinion for SRFC*).
[53] Ibid., paras 199, 203, 207.
[54] Ibid., paras 207, 219.
[55] *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Judgment, I.C.J. Reports 1974, p 3, paras 53,54.
[56] Graeme Kelleher, Guidelines for Marine Protected Areas (1999). IUCN, Gland, Switzerland and Cambridge, UK. xxiv +107pp., 1-2.
[57] Shelton (n 20), 223-224.

that the cooperation includes negotiation,[58] consultation, notification[59] and exchange of information.[60] Collectively, the principle of cooperation has been firmly established in international conventions and reaffirmed by judicial decisions to be a customary international law concerning the protection of the environment.[61]

2. Regional cooperation in the Global and Regional Instruments relating to the establishment of an MPA

An MPA is accepted as a tool to protect the marine environment and the duty to cooperate to protect the marine environment from pollution is a part of the general principle.[62] The focus of this part of the thesis is the regional cooperation obligation provided in relevant global and regional instruments. The global conventions to be examined are the UNCLOS, CBD, MARPOL, Ramsar Convention and WHC, while the regional instruments refer to those provided in the RSPs.[63] Although, as will be depicted below, the UNCLOS contains many provisions of the term 'regional or sub-regional cooperation', this term has not been explained in the convention.[64] Nor is the term 'cooperation' provided in the UNCLOS or the CBD, MARPOL, Ramsar Convention and WHC or regional instruments. As the definition of regional cooperation is not provided elsewhere in the relating global and regional instruments, this part of the thesis will attempt to observe what might be relevant as the regional cooperation based on the understanding of regional cooperation explained in the dictionary meaning of the terms 'region' and 'cooperation' as follow:

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[58] *North Sea continental Shelf (Germany v Denmark)*, 1969 I.C.J. Reports 3,, p. 47, para. 85.
[59] *Pulp Mills Case* (n 30), para 113.
[60] *Lake Lanoux Arbitration* (n 35).
[61] Stephens (n 9), 4; See also Birnie, Boyle and Redgwell (n 8), 175.
[62] *The MOX Plant Case* (n 48).
[63] The details of relevant instruments provides in Introduction Chapter of the thesis, research aim and scope.
[64] Boleslaw Adam Boczek, 'Global and Regional Approaches to the Protection and Preservation of the Marine Environment' (1984) 16 Case Western Reserve Journal of International Law 1984, 66.

Region means:

‘1) a particular area or part of the world, or any of the large official areas into which a country is divided;

2) an area of a country, especially one that has a particular characteristic or is known for something’[65];

‘3) an area, especially part of a country or the world having definable characteristics but not always fixed boundaries.[66]

Cooperation means:

‘1) the act of working together with someone or doing what they ask you’[67];

‘2) the action or process of working together to the same end.’[68]

With these two terms combined, the regional cooperation refers to ‘the action or process of working together within the region to reach the same end.’ It should be noted that once the cooperation applies to the State’s action to achieve a particular purpose, cooperation can be seen as

‘a process that governments enter because they believe that the policies of their partners can facilitate realization of their own objectives through policy collaborations or coordination.’[69]

In this case, the purpose of the thesis is to find the obligation for the States to establish an MPA through regional cooperation, and this casuses the adaptation of the meaning of the regional cooperation to establish an MPA that the research aims as: ‘The act or process that the governments of the countries within the region enter to establish MPAs.

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[65] Cambridge Advanced Learner's Dictionary & Thesaurus © Cambridge University Press online accesses at <https://dictionary.cambridge.org/dictionary/english/region>.
[66] Oxford Living Dictionary, online accesses at <https://en.oxforddictionaries.com/definition/region>.
[67] Cambridge Advanced Learner's Dictionary & Thesaurus © Cambridge University Press online accesses at <https://dictionary.cambridge.org/dictionary/english/cooperation>.
[68] Oxford Living Dictionary, online accesses <https://en.oxforddictionaries.com/definition/cooperation>.
[69] Mark J. Valencia, ‘Regional Maritime Regime Building: Prospects in Northeast and Southeast Asia’ (2000) 31 Ocean Development & International Law (2000), 225.

However, the notion of regional cooperation in this regard does not entail what kind of action or process that could be made. Therefore, this research will examine whether the global and regional instruments require, or offer, the means for the State to process the establishment of an MPA through regional cooperation. In considering the details of how the obligation to cooperate, particularly in the protection of the marine environment, can be described, by negotiation, consultation, notification and exchange of information, as mentioned in the previous section of this chapter, this detailed action of cooperation can form the process of reaching the establishment of an MPA.

Moreover, entering into a framework convention for the regional implementation of global treaties, or customary obligations is evidently one form of cooperation.[70] To fully understand the degree of cooperation, however, the details of how the regional cooperation is described in the relevant instruments will also be clarified. The analysis of the details of cooperation in regional instruments will be derived from the RSPs that have accepted a formal regional agreement. However, countries in the RSPs that do not agree to regional instruments may cooperate by other means of agreeing to the policy, as entering into the agreement is not the only mean to achieve the regional cooperation to establish an MPA. This part of the chapter will begin with the regional cooperation in each relevant global conventions, followed by details of regional cooperation that in the existing regional sea conventions.

2.1 Regional cooperation for the implementation of MPAs under UNCLOS

Regardless of the definite meaning of the regional cooperation in the convention, states are required to cooperate at both global and regional levels by many provisions of the UNCLOS, especially those that are involved with the management of marine living resources and the protection and preservation of the marine environment. Cooperation at either a global or regional level is particularly recommended for the purpose of protecting the

[70] Abbott and Snidal (n 1), 56.

environment in Article 197 in Part XII of the UNCLOS.[71] It is also found in provisions on the management, utilisation and conservation of living resources, dispersed throughout Parts V and VII of the Convention. The observation of the UNCLOS's provisions regarding regional cooperation in this part of the thesis will be considered in accordance with the general obligation to protect and preserve the marine environment,[72] and the specific rights and obligation relating to the establishment of MPAs will be considered in Chapter 5 - Legal Mechanism for the establishment of the MPA under the Global Instruments. As a consequence, coastal States may enjoy their sovereignty, or sovereign right, with regard to the navigation rights of other States.[73]

Regarding the general obligation to protect the marine environment in Part XII, it is provided in Article 192 that 'States have the obligation to protect and preserve the marine environment,'[74] which reflects the customary norm in the protection of the marine environment.[75] It is also specified in Article 197 that 'States shall cooperate on a global basis, as appropriate, and on a regional basis..., for the protection and preservation of the marine environment'.[76] According to Article 31 of the Vienna Convention on the Law of Treaties (VCLT),[77] this article has to be interpreted in good faith by considering the context, as well as the objective and purpose of the treaty.[78] Therefore, the 'marine environment' needs to be taken into account, but this is not defined in the UNCLOS. However, the 'pollution of the marine environment' is defined as follows:

> 'the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in

[71] David M. Ong, 'The 1982 UN Convention on the Law of the Sea and Marine Environmental Protection' in Malgosia Firmaurice, David M. Ong and Panos Merkouris (eds), *Research Handbook on International Environmental law* (Edward Elgar 2014), 570.
[72] UNCLOS (n 19), Article 192.
[73] Ibid., Article 17, 56 and 58.
[74] Ibid., Article 192.
[75] Birnie, Boyle and Redgwell (n 8), 387 ; see also Tanaka Yoshifumi, *The International Law of the Sea* (CUP 2012), 264.
[76] UNCLOS (n 19), Article 197 ; see also Ong (n 71).
[77] Vienna Convention on the Law of Treaties 1969, entered into force 27th January 1980, 1155 UNTS 331 (VCLT).
[78] Ibid., Article 31(1).

> 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.'[79]

Based on this meaning of the pollution of the marine environment, marine living resources should also be considered as part of this environment. Thus, the conservation and management of living resources in the EEZ and high sea regime should be included in the context of the marine environment. In terms of the conservation and management of living resources in the EEZ, it is provided in Article 61 of the UNCLOS that States shall ensure that living resources are not over-exploited, using their best scientific evidence to create measures to conserve and manage them.[80] Similar to the context of Article 197, States can cooperate in the conservation and management of living resources through competent international organisations, including regional or sub-regional organisations.[81] In cases of shared fish stocks and highly migratory fish stocks in the EEZ, it is provided in Articles 63 and 64 of the convention, respectively, that the States of shared or highly migratory fish stocks shall agree on a conservation measure, either directly or through a regional organisation.[82]

A similar approach to the conservation and management of living resources also applies to the high seas. It is stated in Article 116 of the UNCLOS that States may engage in fishing in the high seas subject to the rights and duties of other States. This means that the approach to the conservation and management of living resources of the EEZ, as provided in Article 63(2) and Articles 64 to 67 of the Convention that stress on the regional cooperation, should also be applied to the high sea regime. Therefore, regional cooperation is also required in the conservation of highly migratory fish stocks. With regard to cooperation to conserve and manage living resources, according to Article 118 of the Convention, this is also required in the regime of the high

[79] UNCLOS (n 19), Article 1(4).
[80] Ibid., Article 61.
[81] Ibid., Article 61(2).
[82] Ibid., Article 63.

seas, where they shall '…as appropriate, cooperate to establish sub-regional fisheries organisations to this end.'[83] However, the cooperation of States in the high seas does not effectively require States to negotiate until an agreement is reached and there are no specific consequences if States fail to negotiate or cooperate.[84] The implications of Article 116, together with Articles 63 and 64 of the UNCLOS, led to the adoption of the FSA,[85] which was created to fill the gap in the management and conservation of straddling fish stocks and highly migratory fish stock.[86] The aspect of regional cooperation in terms of highly migratory fish stocks has been extended and strengthened by the adoption of the FSA,[87] which can be considered as an agreement subsequent to the UNCLOS, according to the rule of treaty interpretation.[88] It is recommended in the FSA that straddling and highly migratory fish stocks should be managed and conserved by sub-regional or regional fishery management organisations (RFMO),[89] and, in terms of highly migratory fish stock, regional cooperation is strongly promoted, as the cooperation to conserve the highly migratory fish stocks shall be conducted 'throughout the region, both within and beyond national jurisdictions.'[90] The FSA specifically contains obligations regarding the management and conservation of fish stock, mainly in the high seas. However, its provisions also connect to the management of straddling fish stock, which falls under the regime of the EEZ, which is under national jurisdiction.[91]

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[83] Ibid., Article 118.
[84] Tanaka Yoshifumi, 'The Changing Approaches to conservation of Marine Living Resources in International Law ' (2011) 71 ZaöRV 291, 300.
[85] The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted 4 August 1995, entered into force 11 December 2001, 2167 UNTS 88 (FSA).
[86] Yoshifumi, 'The Changing Approaches to conservation of Marine Living Resources in International Law ' (n 84), 296-297; see also Dolliver Nelson, 'The Development of the Legal Regime of High Seas Fisheries' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999) , 126.
[87] FSA (n 85).
[88] VCLT (n 77), Article 31(2).
[89] FSA (n 85), Articles 4 and 5.
[90] Myron Nordquist and others (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol II (Martinus Nijhoff Publishers 1993), 649.
[91] FSA (n 85), Article 3(2) and Article 5; see also Marion Markowski, 'The International Legal Standard for Sustainable EEZ Fisheries Management' in Gerd Winter (ed), *Towards Sustainable Fisheries Law A Comparative Analysis* (IUCN, Gland, Switzerland in collaboration with the IUCN Environmental Law Centre, Bonn, Germany 2009), 7.

Based on these collective provisions, the significance of the duty to cooperate at the regional level with regard to living resources cannot be denied precisely, regarding the conservation and management of certain fish stocks.[92] However, a limitation of the FSA is that it applies to some fish stocks, but not all of the natural resources in the high seas. The FSA is the implementing agreement of the UNCLOS that ties the management and conservation of the living resources in the EEZ and the high seas by emphasising the arrangement of fisheries as a means of cooperation among States.[93] Therefore, the States may participate in the regional organisation as a means 'to cooperation in the conservation of living resources in the high seas'[94] to comply with this obligation. If regional organisations could be an option for States to cooperate in the high seas, it is possible that they would apply an MPA regime as a conservation measure in the high seas. However, this approach would have possible complications since other States may argue that they are not members of this regional organisation and are, thus, not subject to the measure applied in the MPA.

Although the FSA is only focused on the management and conservation of straddling and highly migratory fish stocks, the implementation of this agreement could also involve the establishment of an MPA, provided that it is agreed by the regional fishery management organisation.[95] Moreover, the FSA contains principles of environmental law to manage and conserve certain fish stocks, which has led to the establishment of regional co-operative organisations to manage and conserve the fish stocks within the same sub-region or region.[96] This can be seen from the decrease in the prevention of IUU fishing in the Antarctic as a result of the conservation of toothfish by

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[92] Mary Ann E. Palma, Martin Tsamenyi and William R. Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Martinus nijhoff Publishers 2010), 201; see also Robin Warner, Kritina M. Gjerde and David Freestone, 'Regional governance for fisheries and biodiversity' in *Governance of Marine Fisheries and Biodiversity Conservation: Interaction and Coevolution* (Wiley-Blackwell 2014), 211.

[93] Nelson (n 86),126.

[94] Yoshifumi, 'The Changing Approaches to conservation of Marine Living Resources in International Law '(n 84), 300.

[95] FSA (n 85), Article 8(4).

[96] Ibid., Articles 5 and 6 contain some environmental principles, for example, the sustainable use of resources, the protection of marine biodiversity and the application of the precautionary approach.

means of a regional arrangement.[97] However, the impact of fisheries on marine biodiversity in the high seas remains not completely covered by regional fishery organisations.[98] The important contribution of the RFMO in protecting and preserving living marine resources is acknowledged in this thesis to the extent that MPAs can also be implemented as one of the protective measures under Article 8(4) of the FSA. Nonetheless, the analysis of how the RFMO can exercise its role is not the priority of this current research, as it is mainly concerned with fish stocks, which is only part of the marine environment. The contribution of the RFMO to the conservation of living resources could potentially be the next step of this research project, but at this stage, details of the contribution of the RFMO on this matter can be found elsewhere.[99]

The General Assembly reiterated the implementation of the obligation to cooperate to protect and preserve the environment, found in Article 197, in a discussion at the UNGA regarding the Oceans and the Law of the Seas, by requiring States to 'cooperate directly or through competent international organisations for the protection and preservation of the marine environment'.[100] The competent international organisations in Article 197 may be global or both global and other organisations.[101] The obligation to protect and preserve the marine environment under other conventions is accepted in Article 237 of the UNCLOS, in order to facilitate the conclusion of other agreements related to protecting and preserving the marine environment. However, the implementation of other environmental agreements should be 'consistent with the general principles and objectives

[97] Kristina M. Gjerde, 'High Seas Fisheries Management under the Convention on the Law of the Sea' in David Freestone, Richard Barnes and David M. Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP 2006), 288-290.
[98] Ibid., 290 ; See also Erik Jaap Molenaar, 'Addressing regulatory gaps in high sea fisheries' (2005) 20 The International Journal of Marine and Coastal Law.
[99] Takei Yoshinobu, *Filling regulatory gaps in high seas fisheries: discrete the high seas fiosh stocks, deep-sea fisheries, and vulnerable marine ecosystems*, vol 75 (Vaughan Lowe, Churchill, Robin ed, 1 edn, Brill 2013); see also Tore Henrikson, Geir Hønneland and Are Sydnes, *Law and Politics in Ocean Gevernane: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes* (Brill, Martinus Nijhoff Publishers 2006),
[100] United Nations General Assembly at its Fifty-eight session, Resolution adopted by the General Assembly on 23 December 2003, Decision 58/240 Ocean and the Law of the Sea, A/RES/58/240, para 46 (UNGA Res. 58/240) ;See also United Nations General Assembly at its Fifty-ninth session, Resolution adopted by the General Assembly on 17 November 2004, 59/24 Ocean and the Law of the Sea, A/RES/59/24, para 54 (UNGA Res. 59/24).
[101] Nordquist and others (n 90), Part V, p 81.

of this Convention.'[102] In this connection, it could be interpreted according to the rule of the treaty interpretation[103] that the UNCLOS should be taken into account for the consideration of an obligation to protect and preserve the marine environment.

The UNCLOS can be seen to promote the regional cooperation of States in implementing the provisions related to the management and conservation of marine resources, as well as the protection of the marine environment.[104] However, these obligations are not solely designed for the establishment of an MPA, but rather as general obligations to be implemented by States on a regional basis. It could be said that the FSA, together with the primary obligation to conserve and manage fish stocks, either in Part V or Part VII of the UNCLOS, could be used as a means to achieve regional cooperation in the conservation of certain fish stocks. As for the meaning of the regional cooperation to establish an MPA of this current research, the provisions of the UNCLOS and its subsequent agreement entail the opportunities for the States to regionally cooperate to establish an MPA through the mechanism provided herewith. Again, although the general duties of States to cooperate regionally that are distributed within Parts V, VII and XII of the Convention are not detailed in terms of requiring a State to especially cooperate to implement an MPA regime to conserve living marine resources, they illustrate the significance of regional cooperation in the law of the sea.

2.2 Regional cooperation for the implementation of MPAs under CBD

The objectives of the CBD, which is a multilateral environmental treaty, are: 1) the conservation of biological diversity; 2) the sustainable use of its components; and 3) the fair and equitable sharing of the benefits that arise from the utilisation of genetic resources.[105] Therefore, this Convention is directly related to the conservation of the marine environment, as the definition of biological diversity includes the marine environment and it

[102] UNCLOS (n 19), Article 237(2).
[103] VCLT (n 77), Article 31.
[104] Erik Franckx, 'Regional Marine Environment Protection Regimes in the Context of UNCLOS' (1998) 13 International Journal on Marine and Coastal Law, 313.
[105] CBD (n 18), Article 1.

ecosystems,[106] and they are subject to the conservation purpose of the Convention.[107] The CBD also contains the general principle of cooperation, as follows:

> 'Article 5 Cooperation
> Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or where appropriate, through competent international organisations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.'[108] (emphasis added)

As the marine environment, its resources and the ecosystem are all included in the context of biological diversity, the provision regulating the cooperation in the matter concerning the ABNJ or other issues of mutual interest may apply to the matter with regard to the protection of the marine environment and its ecosystem. Having considered the context and ordinary meaning of Article 5 of the CBD, according to Article 31 of the VCLT, the duty to cooperate for the conservation and sustainable use of biological diversity is established in this provision in areas beyond national jurisdictions and other interests,[109] which implies that the cooperation between States shall be established when the need for conservation arises in areas beyond national jurisdictions (ABNJ) or when States have a mutual interest. However, the CBD does not specifically provide the mechanism for the regional cooperation to establish an MPA.

Unlike the UNCLOS, where at least specific regional cooperation is required in the different provisions governing the exploitation and conservation of the marine living resources and its environment, the CBD provides the requirement of cooperation in the more general concerns. In this regard, not

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[106] Ibid., Article 2
'Biological diversity means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.'
[107] Ibid., Article 1.
[108] Ibid., Article 5.
[109] Ibid.

only is general cooperation in ABNJ provided for, but cooperation in other areas is also referred to in the CBD. Where these are under national jurisdiction, the CBD can be exercised based on other areas of mutual interest.

In addition, the different provisions also demonstrate the emphasis being placed on the principle of cooperation, for example in the exchange of information in Article 17,[110] as well as specific cooperation in technological and scientific conservation and the sustainable use of biological diversity in Article 18.[111] The exchange of information is the procedural obligation with regard to the cooperation as mentioned in the *Land reclamation case.* However, as the main provision in this context is Article 5, another article of the CBD, these provisions will be interpreted in the detailed context of cooperation that may arise both within and beyond national jurisdictions.

According to Article 5 of the CBD, other relevant conventions may also have to be considered if cooperation is applied to the marine environment. More precisely, the UNCLOS will also have to be considered when States have an interest in elements of the marine environment, as the CBD also acknowledges its relationship with other international conventions, which includes the rights and obligations under the UNCLOS.[112] Thus, issues concerning the marine environment are to be construed in accordance with the UNCLOS. As a result, both the CBD and the UNCLOS should be taken into account when considering the establishment of an MPA under the relevant Programmes of work on Protected Areas and Programmes of work on Marine and Coastal Biological Diversity,[113] as they are both programmes of work relating to the establishment of an MPA. Moreover, similar to some provisions in the UNCLOS, the term 'competent international organisation' appears in the CBD and, although the CBD does not contain a specific reference to a competent international organisation, the term 'international organisation' could be interpreted as being both regional and global. For example, in cases where States agree to have a network of MPAs in their respective Territorial Sea or Exclusive Economic Zone, the competent

[110] Ibid., Article 17.
[111] Ibid., Article 18.
[112] Ibid., Article 22(2).
[113] The details of these two programmes of work with regard to the establishment of an MPA will be discussed in Chapter 5, section 2.2.

international organisation that facilitates the arrangement could be either regional or international. However, regional cooperation is essential in the implementation of MCPAs, because the marine ecosystems are open and environmental conditions can easily be connected from inland water to coastal and distant oceans.[114] The Element of Marine and Coastal Biodiversity Management Framework, adopted in COP VII/5, suggests that one MPCA cannot cover marine biodiversity and a networked approach should be taken. This may require a regional approach to cover this issue, as well as implementation at the national level.[115] To accommodate the network of an MPA, regional or global cooperation may be required for such a purpose. The need to collaborate with regional bodies to manage issues in the ABNJ that were discussed in COP VII of the CBD forum corresponds with the discussion in the General Assembly for Oceans and the law of the sea in the UNGA Resolution 58/240.[116] In this case, it is accepted by the CBD that the UNCLOS, as well as the collaboration of regional organisations, is the main instrument for ocean governance and activities in the ABNJ. However, both the CBD and the UNCLOS leave States to arrange regional cooperation in the conservation and sustainable use of biological diversity in ABNJ, including the establishment of MPAs.[117] The debate about the conservation of marine biodiversity and MPAs in ABNJ is currently ongoing in both CBD and UNCLOS forums.[118]

There is no doubt that the CBD provides an obligation for States to cooperate, particularly in conserving biological diversity in ABNJ, which could engage with ther regional cooperation when considering the provisions of the CBD together with the decisions of its COP. However, regional cooperation is not detailed when compared to the provisions of the UNCLOS. It is clear that regional cooperation is essential to create a network of MCPAs and to achieve

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[114] CBD, Decision VII/5 adopted at the Conference of Parties to the Convention on Biological Diversity at its Seventh Meeting, UNEP/CBD/COP/DEC/VII/5, 13 April 2004, 36 (Decision VII/5).
[115] Ibid., Appendix III, p 37.
[116] Ibid., para 3, p 5, See also UNGA Res. 58/240 (n 100), para 54.
[117] Ibid., para 59, 61, Appendix II, p 17.
[118] Decision adopted by the Conference of the parties to the Convention on Biological Diversity at it Ninth Meeting, COP IX/20, UNEP/CBD/COP/DEC/IX/20 on 9 October 2008 (Decision IX/20); See also United Nations General Assembly, Report of the Secretary-General, at the Sixty-fourth session of the division of Ocean and the Law of the Sea, A/64/66/Add.2 on 19 October 2009 (UNGA Docs. A/64/66/Add.2).

the full benefit of the conservation of marine biological diversity.[119] At this stage, it seems that the CBD leaves further implementation of the regional cooperation to establish an MPA to regional bodies rather than imposing any commitment on State parties.

2.3 Regional cooperation for the implementation of MPAs under MARPOL[120]

The MARPOL contains no explicit regulation or guidelines regarding the identification of Special Areas and PSSAs that specifically require States to cooperate regionally. However, States can cooperate voluntarily within regions or sub-regions since the principle of cooperating to protect the environment is considered to be a customary norm.[121] It is agreed that the 'Special areas may encompass the maritime zones of several States or even entire enclosed or semi-enclosed areas'.[122] In practice, the existing Special Areas adopted under the MARPOL are semi-enclosed or enclosed sea areas, the boundaries of which are within sub-regional or regional sea areas. With regard to PSSAs, four of the existing PSSAs that have been adopted were proposed by more than one country, namely the Wadden Sea (Denmark, Germany and The Netherlands), the Western European Waters (Belgium, France, Ireland, Portugal, Spain and the United Kingdom), the Great Barrier Reef and the Torres Strait (Australia and Papua New Guinea) and the Baltic Sea (Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland and Sweden).[123]

Although the MARPOL and the relevant guidelines to identify the Special Areas and PSSAs adopted by the IMO do not stress regional cooperation among State parties, any application, in fact, that is capable of identifying the Special Areas and PSSAs proposed by more than one country within a sub-

[119] Decision VII/5 (n 114), Appendix III, p 37.
[120] International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) 1340 UNTS 184; Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (adopted 17 February 1978, entered into force 2 October 1983) 1340 UNTS 61(MARPOL)
[121] Stephens (n 9), 4; See also Birnie, Boyle and Redgwell (n 8), 175.
[122] IMO, Resolution A.927(22), Guidelines for the designation of Special Areas under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, adopted on 29 November 2001, Annex I of Resolution, 3 (IMO Res. A.927(22)).
[123] List of the PSSAs can be access online at <http://www.imo.org/en/OurWork/Environment/PSSAs/Pages/Default.aspx>, (accessed 5 September 2017).

region or region is welcome. This is evidence of the existence of regional cooperation to establish marine protected areas, which is acknowledged by the IMO, though not as an obligation to cooperate.

2.4 Regional cooperation for the implementation of MPA under Ramsar Convention[124]

Similar to the UNCLOS and the CBD where the definition of the cooperation is, however, not provided, the Ramsar Convention provides the obligations concerning international cooperation among member States in Article 5 of the Convention, as follows:

> 'The Contracting Parties shall consult with each other about implementing obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties. They shall at the same time endeavour to coordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna.'[125]
>
> (emphasis added)

Although the context of the provision does not specifically refer to cooperation, it still refers to consultation and coordination among the State parties, as this 'consultation' and 'coordination' is accommodated within the meaning of regional cooperation to establish an MPA mentioned in the introduction part of this section. Moreover, cooperation between States may also be required in Article 4(3), in which the exchange of data related to research on wetlands is encouraged.[126] The Ramsar Convention authority also published a handbook regarding international cooperation in 2010[127] to assist the contracting parties in their implementation and this could be considered

[124] Convention on Wetlands of International Importance especially as Waterfowl Habitat (adopted 2 February 1971, entered into force on 21 December 1975) 996 UNTS 245 (Ramsar Convention).
[125] Ibid., Article 5.
[126] Ibid., Article 4 (3).
[127] Ramsar Convention Secretariat, 2010. *International cooperation: Guidelines and other support for international cooperation under the Ramsar Convention on Wetlands*. Ramsar handbooks for the wise use of wetlands, 4th edition, vol. 20. Ramsar Convention Secretariat, Gland, Switzerland., online accessed at <http://archive.ramsar.org/pdf/lib/hbk4-20.pdf > (accessed 5 September 2017)(Ramsar Handbook on International Cooperation).

as a subsequent practice to enable State parties to interpret and apply the treaty.[128] The interpretation of Article 5 is highlighted in this handbook by means of an emphasis on the interpretation of the cooperation of State parties.[129] In addition to this, the Ramsar convention also contains other relevant resolutions of the COP that recommend international cooperation in other related conventions, such as the CBD.[130] It is further noted that the Guideline for International Cooperation can be applied in a transboundary context to some specific cases, such as shared wetland, transboundary wetlands and river basins.[131]

Although these guidelines relate to international cooperation that occurs as a result of implementing the Convention, the same source of the obligation to cooperate internationally can be applied to a regional approach. Thus, it is worth examining the form of international cooperation proposed in the guidelines as a possible form of regional cooperation in the implementation of the Ramsar Convention. International cooperation is encouraged in the Ramsar Convention, especially in the management of shared wetlands, which are also referred to as international wetlands, meaning 'those wetlands which cross international boundaries.'[132] In this case, State parties 'are encouraged to identify all of their shared wetland systems and cooperate in their management with the adjoining jurisdiction.'[133] Not only is the Convention concerned in cases of shared wetlands, but the Regional Sea Programme framework should also be applied and developed for the management of coastal wetland systems.[134] Regional cooperation under the Ramsar could occur in the sharing of knowledge and information, and the training of people, as well as networking the Ramsar sites,[135] either at a regional or international level, as these are examples of cooperation provided in the guidelines.

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[128] VCLT (n 77), Article 31(3).
[129] Ramsar Handbook on International Cooperation (n 127), 8.
[130] Ibid. 9.
[131] Ibid. 10-14.
[132] Ibid., 10.
[133] Ibid., 14.
[134] Ibid, para 13, 1.
[135] Guidelines for international cooperation under the Ramsar Convention, adopted at the Seventh meeting of the Conference of the Contracting Parties to the Convention on Wetlands (Ramsar, Iran, 1971), San José, Costa Rica, 10-18 May 1999, 13-14 Online access at <http://www.ramsar.org/sites/default/files/documents/library/key_res_vii.19e.pdf> (accessed 5 September 2017).

Although few details are provided in the text of this Convention, the principal is clarified in further guidelines as a subsequent practice of the Convention, in that international cooperation is to be implemented through the many possible activities mentioned above. With regard to regional cooperation to establish an MPA under this Convention, this could emerge from the designation and management of shared coastal wetlands or from the sharing of information and knowledge among State parties.

2.5 Regional cooperation for the implementation of MPAs under WHC[136]

Since this Convention was designed to represent the conservation of world heritage sites,[137] no particular regional cooperation is indicated. However, international cooperation is emphasised more than regional cooperation, as the 'duty of the international community as a whole to cooperate' for the protection of world heritage is established in Article 6.[138] Other contexts of cooperation in the WHC that indicate international cooperation include, for example, State parties' request for help from other State parties to identify, protect, conserve and present cultural and natural heritage.[139] A general understanding of international cooperation is further established in the Convention, as follows:

> 'the establishment of a system of international cooperation and assistance designed to support the State Parties to the Convention in their efforts to conserve and identify the heritage.'[140]

The context of this provision shows that international cooperation under the WHC is centred on the identification and conservation of heritage. International cooperation is emphasised in the WHC and, in this regard, the regional cooperation is one form of international cooperation. The encouragement of international cooperation in Articles 6 and 7 above could

[136] Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted on 23 November 1972, entered into force 15 December 1975) 1037 UNTS 151 (WHC).
[137] Ibid., Preamble.
[138] Ibid., Article 6(1).
[139] Ibid., Article 6(2).
[140] Ibid., Article 7.

be used to form regional or sub-regional cooperation in the implementation of the WHC.

Although regional cooperation may not be specified as an obligation under the WHC, State Parties have the right to cooperate regionally in the implementation of this Convention. It should be noted that, as well as the text of the Convention, the WHC authority has produced Operational Guidelines to help State parties to implement the Convention, which could be considered as the subsequent practice of parties based on the rule of treaty interpretation.[141] The latest guidelines in 2015 show that world heritage sites can include transboundary properties that require the cooperation of concerned States in the process of identifying and conserving them.[142] It is highly recommended that concerned States should jointly submit the required evidence for the inscription of world heritage sites.[143] This could be one form of cooperation between State parties, as well as regional cooperation, which may arise in cases where the nominated site is situated in a transboundary area.

2.6 Regional cooperation in RSP instruments

As mentioned in the Introduction part of this thesis, this current research is based on the Regional Sea Programme (RSP) of the UNEP, in which there are eighteen RSPs, only four of which have not agreed a regional sea convention regarding the protection of the marine environment, namely, the Arctic, East Asian, Northwest Pacific and South Asian programmes. Despite the fact that fourteen of the eighteen RSPs provide the regional conventions or protocols relating to the establishment of an MPA, the regional cooperation is not defined but the regional instruments in this regard contain details of cooperation for special purposes. However, as mentioned previously, as entering into the convention is one form of cooperation,[144] States working together by entering into an agreement that serves the purpose to establish an MPA is the means to reach the regional cooperation in the establishment of

[141] VCLT (n 77), Article 31(3).
[142] Operational Guidelines for the Implementation of the World Heritage Convention, WHC.16/01 26 October 2016, para 134-136, online access at <http://whc.unesco.org/en/guidelines/> (Operational Guidelines 2016).
[143] Ibid.
[144] Valencia (n 69), 232.

an MPA as mentioned in the introduction of this section. For instance, it is provided in the preambles of a number of regional sea conventions that cooperation among States in a regional approach is necessary for the protection of the marine environment, as well as cooperation with competent international organisations.[145] It should be noted that it is even claimed in the preamble of the regional convention of one RSP, namely the North-East Atlantic, that regional cooperation to protect the marine environment reflects the customary international law, as follows:

> 'RECALLING the relevant provisions of customary international law reflected in Part XII of the United Nations Law of the Sea Convention and, in particular, Article 197 on global and regional cooperation for the protection and preservation of the marine environment.'[146]

These RSP instruments serve as a remarkable example of regional cooperation in terms of the conservation and protection of the marine environment, as they commit to, and extend the further details on the regional cooperation concerning the protection and conservation of the marine environment.[147] According to the observed regional instrument, it is evident that, at the regional level, they design many provisions regarding how the cooperation can be made within the region. The RSP merge the obligations to cooperate with many other aspects related to the protection of the marine environment of regional seas, including cooperation in combating marine

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[145] The following RSPs provide such a statement in their Preamble:
1) Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, adopted 16 February 1976, entered into force 12 February 1978, 1102 UNTS 27 (Barcelona Convention) ;
2) Convention on the Protection of the Black Sea against Pollution, adopted 21 April 1992, entered into force 15 January 1994 (Bucharest Convention);
3) Convention for the protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, adopted 21 June 1985, entered into forced 30 May 1996 (Nairobi Convention);
4) Convention for cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific, adopted 18 February 2002 (Antigua Convention) ;
5) Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment, adopted 14 February 1982, entered into force 20 August 1985 (Jeddah Convention); and
6) Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific, adopted 12 November 1981 entered into force 1986 (Lima Convention).

[146] Convention for the Protection of the Marine Environment of the North-East Atlantic, adopted 22 September 1992, entered into force on 25 March 1998 (OSPAR Convention).

[147] Dominique Alhéritière, 'Marine Pollution Control Regulation: Regional Approach' (1982) 6 Marine Policy, 170.

pollution from different sources,[148] cooperation in preventing and mitigating marine pollution caused by unforeseen accidents[149] and cooperation in the exchange of marine scientific information.[150] It should be noted that the exchange of information is also recognised as being part of cooperation, as mentioned in the *Land Reclamation case*[151] mentioned above.

Moreover, some RSPs have agreed on additional protocols for the protection of natural resources or biodiversity that also cover the establishment of specially protected areas or MPAs.[152] Such instruments relate to cooperation in the conservation and sustainable use of natural resources and biodiversity.[153] The protocols of some RSPs on the protection or conservation of wild fauna and flora also refer to coordination in the protection of migratory species.[154] These provisions demonstrate the variety of the existing

[148] Barcelona Convention (n 145), Article 4 ; Lima Convention (n 145), Article 3 ; OSPAR Convention (n 146), Article 7; Convention on the Protection of the Marine Environment of the Baltic Sea Area, adopted 22 March 1974, entered into force 3 May 1980 (Helsinki Convention), Article 14; Framework Convention for the Protection of the Marine Environment of the Caspian Sea, adopted 4 November 2003, entered into force 12 August 2006 (Tehran Convention), Article 6 ; Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, adopted 24 March 1983, entered into force 11 October 1986 (Cartagena Convention), Article 4 ; Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, adopted 23 March 1981, entered into force 5 August 1984 (Abidjan Convention), Article 4 ; Kuwait Regional convention for Co-operation on the Protection of the Marine Environment from Pollution, adopted 24 April 1978, entered into force 30 June 1979 (Kuwait Convention), Article 3 ; Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, adopted 24 November 1986, entered into force 22 August 1990 (Noumea Convention), Article 5.

[149] Antigua Convention (n 145), Article 8 ; Bucharest Convention (n 145), Article 9 ; Lima Convention (n 145), Article 6 ; Abidjan Convention (n 148), Article 12 ; Nairobi Convention (n 145), Article 12 ; Kuwait Convention (n 148), Article 9 ; and Noumea Convention (n 148), Article 15.

[150] Antarctic Treaty, adopted 1 December 1959, entered into force 23 June 1961, 402 UNTS 71 (Antarctic Treaty), Article 3 ; Nairobi Convention (n 145), Article 15; Tehran Convention (n 148), Article 16 ; Bucharest Convention (n 145), Article 15 ; Jeddah Convention (n 145), Article 20 ; Helsinki Convention (n 148), Article 24 ; and Abidjan Convention (n 148), Article 14.

[151] *Land Reclamation case* (n 27), 27.

[152] Barcelona Convention (n 145); Nairobi Convention (n 145)); Bucharest Convention (n 145) ; Jeddah Convention (n 145) ; Tehran Convention (n 148); and Cartagena Convention (n 148.

[153] Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region, adopted 21 Jun 1985, entered into force 30 May 1996 (Nairobi Convention Protocol), Article 2 ; Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, adopted 10 June 1995, 12 December 1999 (SPA&Biodiversity Protocol), Article 3 ; and Protocol Concerning the Conservation of Biological Diversity and the Establishment of Network of Protected Areas in the Red Sea and Gulf of Aden, adopted on 12 December 2005 (Jeddah Protocol), Article 4.

[154] Nairobi Convention Protocol (n 153), Article 6; Black Sea Biodiversity and Landscape Conservation Protocol to the Convention on the Protection of the Black Sea against Pollution, adopted 14 June 2002, entered into force 20 June 2011 (BLCP of Black Sea),

means of regional cooperation in the protection of the marine environment for the member States to implement to reach the purpose of the protection of the marine environment. They not only serve as examples of the implementation of regional cooperation, but they also confirm that regional cooperation in the conservation and protection of natural resources and the marine environment has long been established and developed by means of concluding treaties at the regional level.

Conclusion

The obligation for States to cooperate is an important part of international law. It could be one of the very first principles of any further obligation of States in other areas of interest. As illustrated in this chapter, the significance of the obligation for States to cooperate regarding the environment is that cooperation is essential to achieve the purpose of preventing risk to the environment and protecting both the environment and natural resources. This is the core of the obligation to cooperate and cooperation is especially encouraged or required when States have a shared interest. This can be seen in the text of Article 5 of the CBD, Articles 63 and 64 of the UNCLOS and Articles 4 and 5 of the Ramsar Convention.

The meaning of regional cooperation to establish an MPA in this current research refers to 'the act or process that the governments of the countries within the region enter to establish MPAs.' Thus, when considering regional cooperation to establish an MPA using the mechanisms provided under the relevant conventions, a variety of possible means are presented, although, in the global conventions, they may not all exclusively for the establishment of an MPA. However, the mean or process for regional cooperation to establish the MPA is more promising at the regional level, as there are many RSPs agree on the instruments relating to the establishment of the MPA, which is the process that the governments of the countries of the region enter to

Annex 3 ; SPA&Biodiversity Protocol (n 153), Article 11 ; and Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, adopted 18 January 1990, entered into force 18 June 2000 (SPAW Protocol), Article 10.

establish the MPAs.[155] Further analysis of this will have to be considered in line with the rest of this thesis. Nonetheless, the CBD requires States to cooperate in Article 5, similar to the Ramsar Convention, which requires the cooperation of State parties in Article 5, as does the WHC in Articles 6 and 7. In the case of the UNCLOS, it can be said that regional cooperation is explicitly mentioned in many provisions, especially in relation to the management and conservation of marine resources or the marine environment, for example Article 63, Article 118 and Article 197 of the UNCLOS. In the case of the MARPOL, regional cooperation is not referred to in the Convention, but State parties have cooperated in practice at both regional and sub-regional levels in the designation of PSSAs.

Cooperation or regional cooperation thrives based on the shared interest of States. If the establishment of an MPA is one of the means to fulfil the obligation to protect the marine environment, as provided in the respective global conventions mentioned in the Introduction Chapter of this thesis, the cooperation of States is also a tool that can be recognised to protect and conserve the marine environment based on the shared interest of States.

Having considered the legal obligation by analysing relevant global and regional instruments, as well as the assertion of this obligation in the judicial decisions provided above, it is evident that the obligation to cooperate can be regarded as customary law, as it satisfies both the internal and external elements, or the *opinio juris* and state practice.[156] A State's belief, as well as their practice of cooperation, is expressed by their formation of treaties and the inclusion of cooperation into many international and regional treaties, for example the Ramsar Convention, the CBD and the UNCLOS, or the regional sea conventions. The integration of a legal obligation to cooperate as the action required for the settlement of disputes was also reiterated in the affirmation of the judicial decision provided above in Section 1.[157] The obligation of States to cooperate was also clarified and interpreted as

[155] Nairobi Convention Protocol (n 153), Article 2 ; SPA&Biodiversity Protocol (n 153), Article 3 ; and Jeddah Protocol (n 153), Article 4.
[156] Hugh Thirlway, *The Sources of International Law* (OUP 2004), 57.
[157] *Land reclamation case* (n 27).

cooperation in negotiations and coordination to achieve the purpose of conserving the marine environment by agreeing to regional instruments.

However, at this stage, it is yet to confirm that the evidence of regional cooperation in the establishment of an MPA emerges as the obligation for States under the global and regional instruments. In this regard, especially in the global conventions, the shared understanding[158] on the regional cooperation to establish an MPA seems uncertain as it could be the optional means to achieve the purpose of conservation and protection of the marine environment. Nonetheless, the analysis on the legal status of the obligation for State to establish an MPA through regional cooperation will be clarified once of the thesis combines the analysis of the relevant global and regional mechanisms in particular on the establishment of an MPA in the following chapters of the thesis. Such an analysis could offer the idea of whether the regional cooperation to establish an MPA is an obligation or an optional mean to achieve to the purpose of conservation and protection of the marine environment.

It appears the cooperation at the regional level is mostly exercised through the regional framework convention, at the beginning stage, to target the marine pollution or protect the overall stage of marine environment of the region,[159] and then, the establishment of an MPA appears to be one of the means to achieve the initial objectives of the framework convention of the region. Therefore, it may be too early to conclude that there is enough practice of the States in the establishment of an MPA at the regional level, as some of the RSPs do not provide rules regarding the establishment of an MPA. Nevertheless, it is indisputable that the obligation to cooperate is well established at the regional level based on its inclusion in the regional sea conventions concerning the conservation and protection of the marine environment discussed in section 2.6 above. The cooperation obligation actually are complements to other forms of obligation, for example it could be supportive to the implementation of the no harm rule in the more general

[158] Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010).
[159] Boczek (n 64).

principle of protecting the marine environment.[160] This complementary nature of the legal obligation to cooperate may promote the idea to establish an MPA at the regional level, but it does not indicate a strong requirement that the State must comply.

[160] Brunnée J, 'Sources of International Environmental Law: Interactional Law' in Besson S and Jean d'Aspremont J (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017), 972.

CHAPTER 5 LEGAL MECHANISMS FOR THE ESTABLISHMENT OF MARINE PROTECTED AREAS IN GLOBAL INSTRUMENTS

Introduction

As the concept and characteristics of an MPA were introduced in Chapter 3, this chapter will refer to the global instruments from that chapter to determine the essential and common elements of the rights and/or obligations to establish an MPA. Non-binding mechanisms, particularly the IUCN guidelines as mentioned in Chapter 3, section 1 of this thesis, will not be examined in this chapter because the aim is to ascertain the sources of rights and/or obligations of States in the establishment of an MPA. Also, this chapter excludes the sources of rights and legal obligations of the International Convention for the Regulation of Whaling (ICRW) and the Convention on the Conservation of Migratory Species of Wild Animals (CMS) as these two conventions have a concept of protected area that differs from the concept used in this research.[1] Therefore, the main materials that will be examined are the global instruments that have some form as a binding instrument to the States that are party to them.

The legal methodology in chapter 2 will be applied to the analysis in this part, and the treaty interpretation rule of the Vienna Convention on the Law of Treaties[2] (VCLT) and the interactional account will play an important role in identifying the rights and/or obligations to establish an MPA. It is expected that the relevant provision once it is interpreted could generate a shared understanding of the legal obligation to establish MPA as a customary law. As mentioned in the Introduction of the thesis, the five selected global instruments draw the almost universal participation, almost every country is bound to at least one of the global conventions regarding the establishment of an MPA.[3] It is expected that the examination of these global instruments will

[1] International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into forced 4 March 1953) 161 UNTS 72 (ICRW) ; Convention on the Conservation of Migratory Species of Wild Animals, (adopted 23 June 1979, entered into forced 1 November 1983) 1651 UNTS 333 (CMS); The justification for this exclusion is provided in Chapter 3, sections 7 and 8.
[2] Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331 (VCLT).
[3] The list of participating countries to each of the global conventions is provided in Annex I of the thesis.

amount to the analysis of whether the establishment of an MPA through regional cooperation is developing into a solid legal obligation and if it is qualifying as the customary international law.

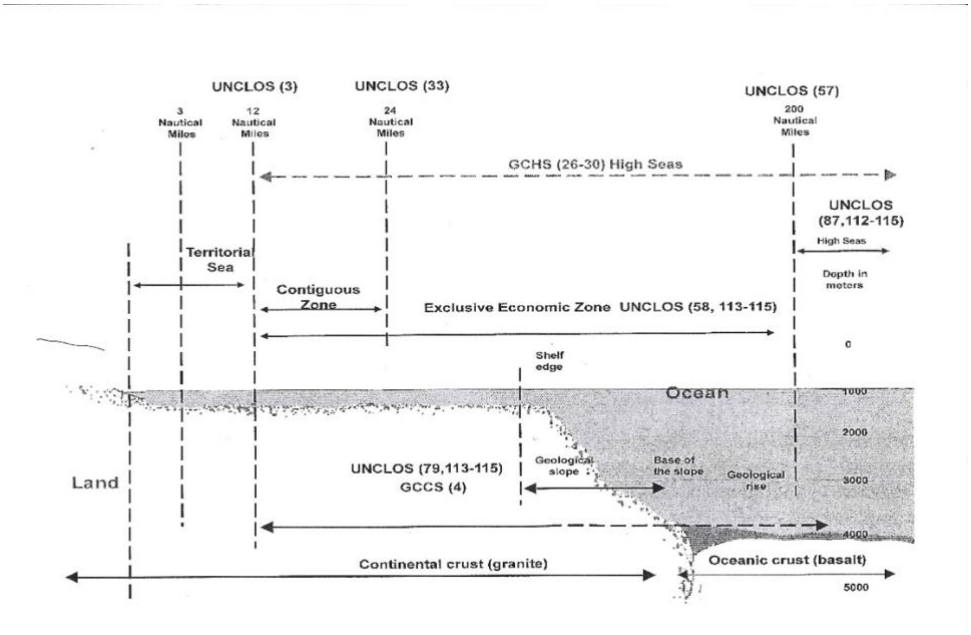
However, as the establishment of an MPA involves the rights and duties of the State within the different maritime zone according to the law of the sea, this chapter will discuss first the competence of States in the different maritime zones under the United Nations Convention on the Law of the Sea[4] (UNCLOS), as it affects the implementation of the rights and/or obligation to establish the MPA. Subsequently, the analysis of the rights and/or obligation to establish the MPA of each of the mechanisms of the global instruments will be examined.

1. Competence of States in Maritime Zones

Before considering whether there are rights or obligations for States to establish an MPA under international law, it is necessary to determine if they are sufficiently competent to establish an MPA in the ocean. In this respect, the UNCLOS is the framework for ocean affairs and it provides the scope of competence of States in different maritime zones as some parts are regarded as part of the customary international law.[5] Although there are various zones and areas where specific rules are applied under the UNCLOS, the focus of this chapter will be the five main maritime zones, namely, a) territorial sea; b) exclusive economic zone; c) continental shelf; d) high seas; and e) the Area.[6] Moreover, there are some special areas, such as international straits, where other States are granted the right of passage,[7] or in the case of archipelagic States, where special rules are applied to the rights of other States.[8]

[4] The 1982 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396 (UNCLOS).
[5] L Dolliver M Nelson, 'Reflections on the 1982 Convention on the Law of the Sea' in David Freestone, Richard Barnes and David M. Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP 2006), 28-31; See also Patricia W. Birnie, Alan E. Boyle and Catherine Redgewell, *International law and the Environment* (3 edn, OUP 2009), 382-383.
[6] UNCLOS (n 4), Part II, V, VI, VII and XI.
[7] Ibid., Part III; see also R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3rd edn. Juris Publishing 1999), Chapter 5.
[8] Ibid., Article 49.

In addition to the abovementioned zones, it should be noted that the baseline is also important in the UNCLOS since it is the starting point to measure any maritime zone.[9] It is agreed that the landward side of the water of the baseline is the internal water[10] where coastal States have full sovereignty.[11] This means that States' sovereignty over the land territory is applied in this area and the right of innocent passage does not apply to the internal water.[12] Then, starting from the baseline, the outward water is the territorial sea and other maritime zones based on the international law. Although there are many procedures for drawing the baseline according to the geographical location of the coastal States and customary international law, these will not be discussed here.[13] Details of the sovereignty and the sovereign right of States in different maritime zones will be elaborated below according to the breadth of the zone from the baseline.



*This is an illustration from the Lecture of Prof. Myron H. Nordquist on 22 October 2014 at Yeosu Academy, South Korea.

[9] Churchill and Lowe (n 7), 31.
[10] UNCLOS (n 4), Article 8; see also ibid,60.
[11] Ibid, Chapter 3, 60.
[12] Ibid, Chapter 3, 61.
[13] Ibid.; Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing 2010).

Territorial Sea (TS)

According to Article 2 of the UNCLOS, the State has sovereignty over the TS. The breadth of the TS is up to 12 nautical miles from the baseline[14] and 'the water on the landward side of the baseline' of the TS forms the internal water of the State.[15] In the internal water and the TS, the State has sovereignty over the air above and the seabed and subsoil of the TS.[16] States may exercise their sovereignty, but they must also respect the right of innocent passage of other States, even when it is in the territorial sea.[17] States can exercise their sovereignty subject to the Convention, which mainly refers to the right of innocent passage of other States, [18] according to Section 3 of Part II of the UNCLOS.

Regarding the right of innocent passage, the coastal States must refrain from hampering or levying charges on the innocent passage of foreign vessels or discriminating against the ships of any state.[19] The general competence of coastal states in the TS is provided in Article 21 of the UNCLOS; for example, a coastal State may adopt the laws and regulations of safe navigation, the conservation of living resources, the preservation of the environment of coastal states and the prevention, reduction and control of pollution.[20] The coastal States have the competence to regulate all resources and activities in the TS,[21] this includes the exercise of an MPA as a measure to protect the marine environment and its resources. However, exceptions may be applied, since these States also have to comply with other international laws,[22]for example, the principle of State responsibility not to cause transboundary harm to other States.[23] The competence of States with regard to the marine resources in the TS implies that they may establish an MPA within the TS;

[14] UNCLOS (n 4), Article 3.
[15] Ibid., Article 8.
[16] Ibid., Article 2(2).
[17] Ibid., Article 17.
[18] Churchill and Lowe (n 7), 81.
[19] UNCLOS (n 4), Article 24; see also Ibid. (n 7), Chapter 4.
[20] Ibid., Article 21.
[21] Rothwell and Stephens (n 13), 75.
[22] Phillipe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Third edn, CUP 2012), 404.
[23] Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992) adopted on the 14th June, 1992 (Rio Declaration), Principle 2.

however, this competence does not give the coastal State the absolute sovereignty to deny the rights of other States under international law.

Exclusive Economic Zones (EEZs)

An EEZ is generally the water column of the marine area within 200 nautical miles of the baseline.[24] The coastal state's power to establish MPAs in this area is derived from its sovereign rights over the natural resources in this area, including living and non-living resources,[25] based on Article 56 (1) (a) of the UNCLOS.[26]

In addition, the power to establish MPAs may be derived from the coastal state's jurisdiction for the protection and preservation of the marine environment within the EEZ.[27] However, the exercising of the sovereign rights of coastal states 'shall have due regard to the rights and duties of other states',[28] according to Article 58 of the UNCLOS.[29] Even though other states may enjoy the freedom of navigation and overflight according to Article 87 of the UNCLOS and they can lay submarine cable and pipelines subject to Article 79,[30] they have to comply with the law and regulations of coastal states concerning their natural resources, as specified in Article 56.[31]

Regarding the management and conservation of the shared fish stock within the EEZ of two or more states, as specified in Article 63, and the highly migratory stock in Article 64, States shall cooperate to agree to the conservation of the shared stock, either directly or through an international organisation.[32] These two Articles were expanded later as the grounds of the

[24] UNCLOS (n 4), Article 57.
[25] Rothwell and Stephens (n 13), 88-89.
[26] UNCLOS (n 4), Article 56 (1) (a)

> …
> '1). In the exclusive economic zone, the coastal state has:
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.'…

[27] Ibid., Article 56 (1)(b)(iii).
[28] Ibid., Article 56 (2).
[29] Ibid., Article 58.
[30] Churchill and Lowe (n 7), 174.
[31] UNCLOS (n 4), Article 58(2).
[32] Ibid., Articles 63 and 64.

FSA.[33] However, any measures that States may choose to use to protect and preserve their resources must comply with the right of freedom of navigation of other States.[34]

Moreover, States not only have to cooperate in the management and conservation of the shared fish stock but also the conservation of marine mammals, as specified in Article 65. Not only can coastal States enjoy their sovereign rights in the EEZ, but they are also obliged to conserve the living resources in order to prevent over-exploitation[35] and to promote the optimum utilisation of the resources within the EEZ.[36] The UNCLOS specifies the general obligation to protect and preserve marine living resources, but it does not require States to adopt any particular measure for the implementation of this obligation.

The sovereign right, as well as the commitment to protect and conserve marine living resources within its EEZ, forms the basis for any State to establish an MPA as a protective measure within its EEZ. Under the UNCLOS, States have the right to choose any protective measure, including an MPA, to fulfil their obligation to protect and preserve marine resources within their EEZ.

Continental Shelf (CS)

Based on the definition of the UNCLOS, the CS is 'the seabed and subsoil of the submarine areas that extend beyond the territorial sea.'[37] Unlike the TS and the EEZ where the breadth of such areas is calculated from the baseline, the CS has additional methods of measurement from other maritime zones. In general, the breadth of the CS relies on the 'natural prolongation of its land

[33] The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted 4 August 1995, entered into force 11 December 2001, 2167 UNTS 88 (FSA).
[34] Sun Zhen, Conference Proceeding paper of the Law of the Sea Institute, UC Berkeley–Korea Institute of Ocean Science and Technology Conference, held in Seoul, Korea, May 2012, online access at <https://www.law.berkeley.edu/files/Sun-final.pdf> (accessed 6 September 2017).
[35] UNCLOS (n 4), Article 61, further details on the cooperation under the UNCLOS is provided in Chapter 4, section 2.1.
[36] Ibid., Article 62.
[37] Ibid., Article 76.

territory to the outer edge of the continental margin'[38] up to 200 nautical miles from the baseline.[39] Since the CS extends from the physical continental shelf of the land territory, there may be cases where the CS is broader than the EEZ.[40] According to Article 76, there are two measures that can be applied to calculate the breadth of the CS in cases where States claim that their CS is more than 200 nautical miles based on their natural prolongation. These will not be discussed here since it is not the focus of the research.

The sovereign rights of States in the CS 'exist *ipso facto* and *ab initio* by virtue of its sovereignty over the land.'[41] States can exercise their sovereign rights without the need for a proclamation.[42] If the limit of the CS is within 200 nautical miles from the baseline, the coastal States' sovereign rights in the CS are similar to their rights in the EEZ, in that they have the sovereign right to explore and exploit the natural resources.[43] However, the natural resources of the CS are restricted to those in the seabed and subsoil, including non-living resources such as minerals or organisms and living resources, which are limited to sedentary species.[44] Unlike the sovereign right in the EEZ, the right in the CS does not mention the jurisdiction of coastal states in the protection and preservation of natural resources in general.

In cases where the CS is longer than the EEZ, which means that the CS goes under the high seas, which do not belong to the coastal States, the sovereign right of the States over the natural resources will belong to two different regimes, one of which is the CS and the other is the high seas. The rights of States in these two maritime zones are significantly different. The high seas regime governs over the living resources in the water column over the outer limit of 200 nautical miles according to Article 87 of the UNCLOS.[45] When

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[38] Ibid.
[39] Ibid.
[40] Churchill and Lowe (n 7), 145.
[41] *North Sea Continental Shelf* (Federal Republic of Germany v Denmark; Federal republic of Germany v Netherlands), Judgment, I.C.J. Reports 1969, p. 3, para 19.
[42] UNCLOS (n 4), Article 77 (3); see also Churchill and Lowe (n 7), 145.
[43] Ibid., Article 77.
[44] Ibid., Article 77 (4)
The definition of Sedentary Species provided in Article 77 (4) as:
'(4)… organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.'
[45] Churchill and Lowe (n 7), 156.

the State decides to establish an MPA in the CS which extends more than 200 nautical miles, the issues of the protection measures in different maritime areas may arise, because the state's competence is subject to the sovereign rights over the resources within the water column and the seabed, and they are different.

States may exercise their sovereign right over the resources of the CS within 200 nautical miles from it, but this cannot infringe the right of navigation belonging to other states under the UNCLOS.[46] In the CS regime, only the issue concerning the laying of submarine cables and pipelines of other states has the protection of marine environmental pollution, which allows the coastal states to take reasonable measures to prevent, reduce and control the pollution from pipelines.[47] The limit of this measure is that it may not impede the laying and maintenance of the cables and pipelines.[48] This means the coastal States may establish an MPA on the CS or the EEZ, including the seabed under the EEZ, for the protection of the marine environment, but they have to consider the rights of other States in the EEZ and the CS.

High Seas

The high seas are under the principle of freedom of the high seas, which is open to all States.[49] The high seas regime applies to 'all parts of the sea that are not in the exclusive economic zone, territorial sea or the internal water of a State, or in the archipelagic waters of archipelagic States.'[50] Although some claim that, according to the convention, the high seas regime applies to all

[46] UNCLOS (n 4), Article 78(2).
[47] Ibid., Article 79(2).
[48] Ibid.
[49] Ibid., Article 87

'1. The high seas are open to all states, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked states:

(a) freedom of navigation;
(b) freedom of overflight;
(c) freedom to lay submarine cables and pipelines, subject to Part VI;
(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
(e) freedom of fishing, subject to the conditions laid down in section 2;
(f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all states with due regard for the interests of other states in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.'

[50] Ibid., Article 86.

parts, including water columns and seabed and subsoil,[51] the UNCLOS has a separate regime applicable to the seabed and subsoil beyond the national jurisdiction defined as the Area under Part XI of the UNCLOS, which will be elaborated later.

Every state can enjoy the freedom of the high seas as it is elaborated in Article 87 of the convention.[52] But states must exercise this freedom 'with due regard for the interest of every state', as specified in Article 87(2) of the UNCLOS.[53] Some of the regulations of the management and conservation of living resources in the EEZ also apply to the high seas due to the migratory nature of some living resources.[54]As the states have the freedom of the high seas, including fishing in this area[55], the UNCLOS specifies that every state is obliged to conserve and manage the marine living resources, particularly the fish stocks.[56] In addition, states need to cooperate to conserve and manage the living resources of the high seas.[57]

With regard to the rights of States to implement an MPA as a conservation measure on the high seas, in principle, the obligation to conserve the marine resources on the high seas applies to every State.[58] Article 116, regarding the right to fish in the high seas, also allows Articles 63 and 64 to be applied in the high seas regime that refers to the shared fish stock and migratory fish stock. The conservation and management of living resources in the high seas is an important activity that needs the cooperation of States, either regionally or globally, in order to determine the allowable catch and ensure the conservation of living resources.[59] Also, Article 118 of the UNCLOS states that the conservation of the resources in the high seas relies on the cooperation of the state. It is implied that cooperation is required in the management and

[51]Alex G. Oude Elferink, 'The Regime of the Area: Delineating the Scope of Application of the Common Heritage Principle and Freedom of the High Seas' (2007) 22 The International Journal of Marine and Coastal Law, 145 ; See also Petra Drankier, 'Marine Protected Areas in Areas beyond National Jurisdiction' (2012) 27 IJMCL, 292.
[52] UNCLOS (n 4), Article 87.
[53]Churchill and Lowe (n 7), 206.
[54] UNCLOS (n 4), Article 116 (3).
[55] Ibid., Article 116.
[56] UNCLOS (n 4), Article 117 and 118.
[57] Ibid., Articles 117 and 118; see also Erik J. Molenaar and Alex G. Oude Elferink, 'Marine Protected Areas in area beyond national jurisdiction: The pioneering efforts under the OSPAR Convention' (2009) 5 Utrecht Law Review, 5.
[58] Ibid., Articles 117 and 118.
[59] Ibid., Article 118

conservation of living resources in the high seas. This was already elaborated in Chapter 4 - Obligation to cooperation at the regional level.

In this respect, it could be said that each State has the right to establish an MPA as a measure to conserve marine biodiversity but it also depends on the cooperation of the States concerned,[60] because without the cooperation of other States, it would conflict with other states' right to fish. Since the high seas are not under any State jurisdiction, it is unlikely that any State will establish an MPA or other measures concerning the marine environment without the coordination of other States.

Cooperation among States seems necessary in the conservation of marine living resources on the high seas. Not only have States to cooperate in order to establish an MPA in the high sea, but the application of possible protection measures in an MPA must not interfere with the rights of other states, as specified in Article 87 of the UNCLOS.

The Area

It is defined in Article 1 of the UNCLOS that 'the Area means the seabed and subsoil thereof beyond the limits of national jurisdiction.'[61] The resources in the Area are the focus of this part, which are defined in Article 133 as follows:

> '(a) "resources" are all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules;
>
> (b) resources, when recovered from the Area, are referred to as "minerals".'

The principle governing the Area is the principle of the 'common heritage of mankind' (CHM),[62] which implies that it belongs to any State but no State may claim sovereignty over the Area and its resources.[63] The CHM principle is created to protect the benefits that States may extract from the resources of

[60] Drankier (n 51), 296; see also Karen N. Scott, 'Conservation on the High Seas: Developing the Concept of the High Seas Marine Protected Areas' (2012) 27 International Journal on Marine and Coastal Law, 855-857.
[61] UNCLOS (n 4), Article 1.
[62] Ibid., Article 136.
[63] Ibid., Article 137.

the Area, which are for every State.[64] Therefore, the Area and its resources are deemed to be the common heritage of mankind which no State can benefit from individually, but rather such benefits should be shared by every State to prevent one from taking economic advantage or else 'the strong would get stronger, the rich richer.'[65] This is because the benefit from the resources in the Area is valuable, but advanced technology is required to extract it to the extent that some States could not afford the exploration and extraction procedure.[66] It is stated in Article 140 that 'activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole'.

With the CHM principle as the centre of the Area regime, the UNCLOS established the International Seabed Authority (ISA) as the responsible body to 'organise and control activities in the Area, particularly with a view to administering the resources of the Area.'[67] The ISA has other functioning organs to organise the exploration and exploitation of the resources of the Area. [68] It also has other general duties[69] with regard to the activities in the Area, for example, to promote 'the transfer of technology and scientific knowledge related to the activities in the Area',[70] the protection of the marine environment[71] and the protection of human life.[72]

As a result of the establishment of the ISA based on the CHM principle, it is clear that States do not have right to conduct activities related to seabed minerals in the Area unless permitted to do so by the ISA and its regulations.[73] Although the high seas and the Area are beyond national jurisdiction so that

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[64] Tullio Scovazzi, 'The Conservation and Sustainable Use of Marine Biodiversity, Including Genetic Resources, in Areas beyond National Jurisdiction: A Legal Perspective', 4, online access at <http://www.un.org/Depts/los/consultative_process/ICP12_Presentations/Scovazzi_Presentation.pdf> (accessed 29 August 2017).
[65] David Pardo, The Common Heritage - Selected Papers on Oceans and World Order, Valletta, 1975, p. 31 cited in Scovazzi (n 64), 3.
[66] Louise Angélique de La Fayette, 'A New Regime for the Conservation and Sustainable Use of Marine Biodiversity and Genetic Resources Beyond the Limits of National Jurisdiction' (2009) 24 International Journal on Marine and Coastal Law, 255.
[67] UNCLOS (n 4), Article 157.
[68] Ibid., Articles161 and 163.
[69] Elferink (n 51), 157.
[70] UNCLOS (n 4), Article 144.
[71] Ibid., Article 145.
[72] Ibid., Article 146.
[73] Ibid., Articles 156 and 157; Churchill and Lowe (n 7), 240.

no State can claim sovereignty over these areas, different principles are applied to them. The high seas are under the freedom of the high seas,[74] while the Area is under the principle of the common heritage of mankind.[75] In the area beyond national jurisdiction, the high seas regime, or in some circumstances including the FSA, is applied to the water column of the sea, while the seabed and subsoil underneath are under the Area regime in Part XI of the UNCLOS.[76] In this respect, Traves claims that the freedom of the high seas is the general principle whereas the regime of the Area and the fish stock agreement are special rules (*leges speciale)* that apply to certain activities.[77]

In the regime of the Area, under the UNCLOS States have almost no right or authority unless given and approved it by the ISA; thus, States cannot solely establish an MPA as a measure to protect the marine environment without involving the ISA. Nonetheless, the ISA may adopt regulations to prevent, reduce and control pollution and other hazards to the marine environment and to protect and conserve the natural resources of the Area, which may include the establishment of an MPA.[78] In this capacity, as will be elaborated further in section 2.1 of this chapter, the ISA adopted APEIs in the Clarion-Clipperton Fracture Zone in 2012 in order to protect the marine environment in that area.[79]

Conclusion

The above discussion shows that States have different rights and sovereignties in different maritime zones. The coastal States have rights and sovereignties in zones that are closer to their land territory and in most cases, they have the right or sovereign right to the marine living resources in the zone. It is clear that the conventional right of coastal States in terms of regulating the natural resources in the territorial sea and EEZ allows them to enforce measures to

[74] Ibid., Article 87.
[75] Ibid., Article 136.
[76] Elferink (n 51), 144.
[77] Tullio Treves, 'Principles and Objectives of the Legal Regime Governing Areas beyond national jurisdiction' in Alex G. Oude Elferink and Erik J. Molenaar (eds), *The International Legal Regime of Areas beyond National Jurisdiction: Current and Future Developments* (Martinus Nijhoff Publishers 2010), 13.
[78] UNCLOS (n 4), Article 145 (1) (2); also Drankier ibid(n 51), 295.
[79] International Seabed Authority, Decision of the Council relating to an environmental management plan for the Claion-Clipperton Zone, adopted at its Eighteenth session, ISBA/18/C/22, adopted on 26 July 2012, para 1, online accessed at <https://www.isa.org.jm/documents/isba18c22> (accessed August 2017).

protect and conserve the marine environment and living resources. However, they also have to comply with the right of innocent passage of other States[80] in the territorial sea and freedom of navigation in the EEZ and the high seas.[81] In the farthest zones, particularly the high seas and the Area, States have very limited rights to the extent that they must agree to cooperate, either in the form of a global organisation through the IMO, the ISA or a regional organisation, in order to regulate maritime activities.

The varying authority of the States in different maritime zones may prevent States from establishing an MPA as it may interfere with the rights of other States. However, this does not mean the approval of other States is needed before the establishment of an MPA. The coastal states are subject to their sovereignty or sovereign right in the maritime zones mentioned above to protect and conserve the marine environment and its resources. Also, once an analysis of the source of an obligation of the State to establish an MPA becomes more prominent (as will be shown in this thesis), the States may be required to establish an MPA as a tool to protect the marine environment. In such a case, an understanding of the authority of the State, as provided above, can facilitate the scope of the designated area and the practical protection measure.

2. Legal mechanisms for the implementation of an MPA under global instruments

This part will contain a discussion of the mechanisms under global conventions related to the establishment of an MPA, which were mentioned in Chapter 3 Concept of a Marine Protected Area, namely, the UNCLOS, the

[80] UNCLOS (n 4), Articles 17, 18 and 19.
[81] Ibid., Articles 58 and 87.

CBD[82], MARPOL[83], Ramsar Convention[84] and the WHC.[85] As mentioned above, the ICRW and the CMS are not included because they focus on the protection of selected species rather than on all aspects of the marine area. The analysis of each convention will focus on the content of the rights and/or obligations to establish an MPA.

2.1 Right or obligation to establish an MPA under UNCLOS

As mentioned in chapter 3 and chapter 4, there are many provisions of the UNCLOS that concern the protection of marine resources and the marine environment.[86] The relevant provisions of the UNCLOS do not directly impose an obligation on State Parties to establish an MPA. However, some specific provisions require them to protect and conserve marine resources, particularly maritime zones; for example, Part V: EEZ, Part VII: High Seas, and Part XII: Protection and Preservation of the Marine Environment.[87]

Part V of the UNCLOS is the regime in the Exclusive Economic Zone (EEZ), in which States can exploit their sovereign right to explore or exploit living and non-living marine resources within a specific limited area according to Article 56 of the convention.[88] Based on the treaty interpretation rule of the

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[82] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD).
[83] International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) 1340 UNTS 184; Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (adopted 17 February 1978, entered into force 2 October 1983) 1340 UNTS 61(MARPOL).
[84] Convention on Wetlands of International Importance especially as Waterfowl Habitat (adopted 2 February 1971, entered into force on 21 December 1975) 996 UNTS 245 (Ramsar Convention).
[85] Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted on 23 November 1972, entered into force 15 December 1975) 1037 UNTS 151 (WHC).
[86] See Chapter 3, section 2.
[87] UNCLOS (n 4), Articles 56, 61, 62, 118, 119, 194, and 211.
[88] UNCLOS (n 4), Article 56 (1)

> …
> '1. In the exclusive economic zone, the coastal State has:
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
> (i) the establishment and use of artificial islands, installations and structures;
> (ii) marine scientific research;
> (iii) the protection and preservation of the marine environment;

VCLT,[89] the sovereign right mentioned in this article allows States to establish measures to protect and preserve the marine environment. The convention contains a framework of the eligible conservation measures which the Member States shall be obliged to take, which include the requirement that States should determine the allowable catch and provide conservation and management measures in order to ensure that living resources are not over-exploited.[90] Moreover, Article 61 of the convention goes further in stating that associated species and interdependent species should also be considered in the determination of such measures.[91] The ordinary meaning of Article 61 seems to be to conserve the marine resources in the EEZ. It can be understood that the UNCLOS allows States to designate a special area to be a protected area in the EEZ.[92]

The *Bering Fur Seal* arbitration could be one example of how the measure to protect fur seals was developed and enforced within the sea areas under States' jurisdiction as an example of the area-based management regime.[93] This case shows the eligible measures to protect and conserve the fur seals within the Pribilof Islands and its surrounding waters,[94] at that time such area was not under any specific maritime zone in which such area would be under the EEZ regime based on the UNCLOS. These protection measures included prohibiting the killing or capture of fur seals within the designated areas, prohibiting the citizens of the respective parties, the US and the UK, from killing fur seals in the high seas and Bering sea in a particular period, only allowing sealing by authorised license, and prohibiting some sealing gear.[95]

(c) other rights and duties provided for in this Convention.'

[89] VCLT (n 2), Article 31 ; see details of this rule in Chapter 2, section 1.

[90] UNCLOS (n 4), Article 61(1)(2)

…

'1. The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.

2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal state and competent international organizations, whether sub-regional, regional or global, shall cooperate to this end.'

…

[91] UNCLOS (n 4), Article 61(3)(4).

[92] Zhen (n 34),14.

[93] Award between the United States and the United Kingdom related to the right of jurisdiction of the United States in the Bering sea and the preservation of fur seals, RIAA 1893, 15 August 1893, 265 (*Bering Sea Fur Seal*).

[94] Ibid., 270.

[95] Ibid., 270-271.

It could be said that a similar approach to the establishment of an MPA for the protection of the marine living resources had been executed under the international law.

The ITLOS delivered an Advisory Opinion on a request submitted by the Sub-Regional Commission Fisheries Commission (SRFC) on the 2nd April 2015.[96] Although this case concerned the obligations of flag States with regard to IUU fishing, the Advisory Opinion contained an interesting interpretation of those obligations for the management of fisheries and the conservation of the marine environment. In response to the first question asked by the SRFC regarding the obligations of flag States in the cases where IUU fishing activities are conducted within the EEZ of a third party,[97] the Tribunal clarified the rights and obligations of coastal States within the EEZ and reiterated the fundamental principle to protect the marine environment in Article 192. In this respect, Article 192 of UNCLOS provides that 'States have the obligation to protect and preserve the marine environment.'[98] Therefore, the sovereign right of coastal States in the EEZ with regard to the conservation of living resources and the conservation and management of shared fish stocks in Articles 61, 62 and Article 192 allows them to adopt the necessary measure to prevent the over-exploitation of living resources.[99] In this respect, a flag State fishing in other States' EEZ has to comply with the conservation measures of those coastal States.[100] Moreover, the tribunal also clarified the meaning of 'sustainable management' provided in Article 61 as 'the ultimate goal of the sustainable management of fish stocks is to conserve and develop them as viable and sustainable resources'.[101]

Although these two cases cannot be said to introduce MPA regimes, they illustrate the competence of States to establish measures to protect and

[96] Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal) 2 April 2015, ITLOS Case No.21, online access at <https://www.itlos.org/en/cases/list-of-cases/case-no-21/> (Request for Advisory Opinion of the SRFC).
[97] Request made by the SRFC of the Request for Advisory Opinion of the SRFC, 2 online access at <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Request_eng.pdf.>
[98] UNCLOS (n 4), Article 192.
[99] Request for Advisory Opinion of the SRFC (n 96), para 104.
[100] Ibid., para 111; see also UNCLOS (n 4), Article 62 (4).
[101] Ibid., para 190.

conserve marine resources within an EEZ that could potentially develop into an MPA regime. The interpretation and explanation of the cases also confirm that States have an obligation to protect marine living resources in an EEZ as well as the general obligation in Article 192 of the Convention, but it does not expressly oblige States to establish MPAs in order to fulfil these obligations.

The principle of the freedom of the high seas is applied in Part VII of the Convention.[102] States are required to take the necessary measures to conserve the living resources in the high seas.[103] The general obligation to manage marine living resources is similar to that applied in the EEZ;[104] however, the duty to conserve the living resources in the high seas is slightly different because it relies on the cooperation of more States than in the EEZ, since the high seas do not belong to any State. On the other hand, coastal States can manage and conserve the marine living resources within their EEZ themselves because they have the sovereign right over their natural resources based on Articles 56(1), Article 61 and Article 62 of the UNCLOS. Additional cooperation is only required for the management and conservation of some shared fish stock and highly migratory fish stock in an EEZ, as specified in Articles 63 and Article 64. Although some of the EEZ regulations on the conservation of living resources can be applied in the high seas, states cannot fully control the protection and conservation measures in the high seas. According to the treaty interpretation, the context of the convention has to consider the freedom of the high seas principle in Article 87. Since this is the general governing principle[105] when considering the conservation of marine biological diversity, it is difficult to accommodate the interests of all States.[106] Later, in 2003, the resolution adopted by the General Assembly with regard to the Oceans and the Law of the Sea again reiterated the implementation of

[102] UNCLOS (n 4), Article 87.
[103] Ibid., Article 117.
[104] Ibid., Article 116.
[105] Ibid., Article 87.
[106] David Osborn, 'Challenges to Conserving Marine Biodiversity on the High Seas Through the Use of Integrate Marine Protected Areas - An Australian Perspective' (Expert workshop on Managing risks to biodiversity and the environment on the high seas, including tools such as marine protected areas) 2001, 107.

Part XII of the UNCLOS[107] and began to observe the development of 'tools for conserving and managing the vulnerable marine ecosystem, including the establishment of marine protected areas…'.[108] The resolution to establish a WG-BBNJ[109] was adopted in the following session of the General Assembly to study the possible means to manage and conserve marine biological diversity beyond the areas of national jurisdiction.[110] This group was able to observe some possible activities that could have been implemented by States to manage the risk of losing marine biodiversity in the areas beyond national jurisdiction.[111]

However, it is specified in Article 118 of the Convention that 'States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas'.[112] Moreover, the States concerned are required to cooperate at sub-regional, regional or global levels when determining the allowable catch and other measures to conserve the living resources in the high seas.[113] When considering the context of the convention, the principle of the conservation of the living resources in an EEZ and in the high seas is also compatible with States' general obligation to protect and preserve the marine environment in Article 192 of the UNCLOS, as provided in the SRFC above.[114]

The general obligation of States to protect the marine environment[115] in Part XII of the Convention also contains the general framework of eligible

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[107] United Nations General Assembly at its Fifty-eight session, Resolution adopted by the General Assembly on 23 December 2003, Decision 58/240 Division for Ocean Affairs and the Law of the Sea, A/RES/58/240, para 43 (UNGA Res. 58/240).
[108] Ibid., para 54.
[109] The WG-BBNJ is An Ad-hoc Open-ended Informal Working Group to study issues related to the conservation and sustainable use of marine biological diversity, established by Decision of United Nations General Assembly on 29 November 2005, Division for Ocean Affairs and the Law of the Sea,
Resolution 60/30, A/RES/60/30, 8 March 2006.
[110] See also United Nations General Assembly at its Fifty-ninth session, Resolution adopted by the General Assembly on 17 November 2004, 59/24 Ocean and the Law of the Sea, A/RES/59/24, para 73 (UNGA Res. 59/24) 73; See also Katherine Houghton, 'Identifying new pathways for ocean governance: The role of legal principles in areas beyond national jurisdiction' (2014) 49 Marine Policy, 119-120.
[111] Ibid., para 73.
[112] UNCLOS (n 4), Article 118.
[113] Ibid., Article 119.
[114] Request for Advisory opinion by the SRFC (n 96), para 104.
[115] UNCLOS (n 4), Article 192.

measures[116] that State Parties could implement in order to fulfil the obligation to protect the marine environment in Article 192. The interpretation of this general obligation of Article 192 was also initiated alongside the conservation measure in an EEZ. However, the very broad text of Article 192 does not specify that the UNCLOS requires States to establish an MPA to protect and preserve the marine environment. It is, therefore, possible that States may implement other measures to protect the marine environment such as a measure to control marine pollution by restricting the discharge of harmful substances from shipping vessels.[117] Nonetheless, there are some provisions for states to implement an MPA regime as a tool to fulfil the general obligation to protect the marine environment; for example, it is mentioned in Article 194(5) that 'the state shall take…all measures to prevent, reduce and control the pollution of the marine environment from any sources.' This implies that such measures include those 'to protect and preserve rare or fragile ecosystems as well as habitats...'.[118] The commentary to Article 194 usually refers to any measures to prevent, reduce and control pollution from any source in order to protect the marine environment;[119] however, the history of the addition of paragraph 5 does not show a reference that would limit the application of measures to the problem of marine pollution.[120] Therefore, the interpretation of this paragraph is 'self-explanatory' since it 'extends the concept of the protection and preservation' to particular marine environments,[121] especially to those 'rare or fragile ecosystems, as well as the habitat of depleted, threatened or endangered species and other forms of marine life'.[122]

Academics discuss whether Article 194(5) could be interpreted to cover other measures that are not limited to marine pollution since even the heading of

[116] Ibid., Article 194.
[117] Ibid., Article 194(3); see also Protocol of 1978 related to the International Convention for the prevention of pollution from ships 1973, adopted on the 17th February 1978, 1340 UNTS 61.
[118] Ibid., Article 194(5).
[119] Myron Nordquist and others (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary :Article 192 to 278, and Final Act, Annex VI*, vol IV (Martinus Nijhoff Publishers 1991), Commentary to Article 194, 50.
[120] Ibid., 63-64.
[121] Ibid., 68.
[122] UNCLOS (n 4), Article 194(5).

the article implies that it is about pollution.[123] In this connection, the Permanent Court of Arbitration (PCA) recently issued an award in the *Chagos Marine Protected Area* Arbitration between Mauritius v. United Kingdom (*Chagos Arbitration*) that determined the matter regarding an MPA.[124] Although the PCA did not directly refer to the characteristics of an MPA, it did refer to Article 194(5) and interpreted this Article as not meaning to merely 'prevent, reduce and control' marine pollution, since it noted the following:

> '…Far from equating the preservation of the marine environment with pollution control, the Tribunal notes that Article 194(5) expressly provides that –
>
> > 'The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.'
>
> Notably, in the Tribunal's view, this provision offers a far better fit with an MPA as presented by the United Kingdom than its characterisation as a fisheries measure.'[125]

This interpretation of the ITLOS gave weight to the interpretation of Article 194(5) as the grounds to establish an MPA, which implies that States can also establish an MPA as a measure to protect the marine environment or marine habitat according to Article 194(5) of the UNCLOS.

A further note about the interpretation of the scope of application of Article 192 is that the obligation does not only cover the marine environment within the national jurisdiction but also includes the marine environment beyond it.[126] The general obligation of States to protect the marine environment is

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[123] Nordquist and others (n 119), 66-67.
[124] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, ICGJ 486 (PCA 2015), 18 March 2015 online access at <http://www.pca-cpa.org/showpage.asp?pag_id=1429> (*Chagos MPA Arbitration*).
[125] Ibid., para 320.
[126] Elisa Morgera, 'Competence or Confident?: The Appropriate Forum to Address Multi-purpose High Seas Protected Areas' (2007) 16 Review of European, Comparative & International Environmental Law, 4.

broad and it can be interpreted that this duty 'is not limited to areas within the national jurisdiction.'[127] Also, some believe that the obligation in Article 192 of the UNCLOS is part of the customary international law that binds States, regardless of their membership of the UNCLOS.[128] Nonetheless, the general obligation under the UNCLOS is a broad framework that allows States to implement an MPA as a tool to protect aspects of the marine environment. It can be said that, apart from the general obligation of States to protect or conserve marine resources and the marine environment, the UNCLOS contains no specific obligation to establish an MPA at this stage. This could also mean that the establishment of an MPA is the fulfilment of the obligation to protect and preserve the marine environment, as originated in Article 192 of the UNCLOS and that it may be implied in connection with other measures to conserve and protect marine living resources in EEZs and the high seas,[129] as well as the rare and fragile ecosystem of marine habitats or species.[130]

Part XII also contains regulations regarding the obligation to prevent, reduce and control the pollution of the marine environment. The cause of the pollution is separated in this section based on the area and the activity that involves other international rules or organisations as a result. Therefore, the scope of the measures States could adopt in order to prevent, reduce and control the pollution of the marine environment will be very broad and it does not serve the purpose of this part. However, details of the area-based management measures that can be adopted as a result of the implementation of the obligation to prevent, reduce and control pollution from vessels under Article 211 and the regulation of the IMO will be discussed in 2.3 of this chapter, Mechanisms under MARPOL as it is overarching to the authorisation of the IMO. Article 211(1), which relates to protection from pollution from vessels, requires States to ‘establish standards to prevent, reduce and control

[127] Kritsina M. Gjerde, ‘Current Legal Development: High Seas Marine Protected Areas—Participants' Report of the Expert Workshop on Managing Risks to Biodiversity and the Environment on the High Seas, Including Tools Such As Marine Protected Areas: Scientific Requirements and Legal Aspects’ (2001) 16 The International Journal of Marine and Coastal Law 515, 524.
[128] Tanaka Yoshifumi, *The International Law of the Sea*, 264; Birnie, Boyle and Redgwell(n 5), 387; Sands and Peel (n 22), 396.
[129] UNCLOS (n 4), Articles 56 and 118.
[130] Ibid., Article 194(5).

pollution of the marine environment from vessels.' The IMO plays an important role in interpreting Article 211 in practice, since Article 211(6) allows States to implement measures developed by a competent international organisation to prevent, reduce and control the pollution of the marine environment by establishing special areas 'where the adoption of special mandatory measures for the prevention of pollution from vessels is required' within their exclusive economic zone.[131] Some believe that this Article is the 'only provision of the convention expressly dealing with the topic of special areas in an environmental context.'[132] In this respect, the 'competent international organisation' that is sufficiently competent to develop a special mandatory measure with regard to vessels is the IMO.[133]

It should be noted that the UNCLOS is agreed to be the framework convention for ocean governance since its main objectives are not only focused on protecting marine resources and the marine environment. Some problems have been observed regarding the decrease of marine resources and the degradation of the marine environment, especially in areas beyond national jurisdiction, such as the high seas and the Area.[134] In the past, the UNCLOS had to fill some gaps, including the management and conservation of marine living resources in the form of adopting the implementation agreement to the convention,[135] which is the FSA.[136] The FSA has proved to fill those gaps regarding fishing in the high seas by the arrangement of active regional fisheries, as mentioned above. Another implementation agreement, namely, the Agreement related to the implementation of Part XI of the UNCLOS (Implementing Agreement of Part XI)[137] also gives the ISA the authority to

[131] Dux T, *Specially Protected Marine Areas in the Exclusive Economic Zone (EEZ): The Regime for the Protection of the Specific Areas of the EEZ for Environmental Reasons under International Law* (Lit Verlag 2011), 187.
[132] Dux.
[133] Ibid., 195; For more information please see 2.4 below.
[134] Michal W. Lodge and Satya N. Nandan, 'Some Suggestions Towards Better Implementation of the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995' (2005) 20 International Journal on Marine and Coastal Law, 369-370.
[135] Houghton (n 110), 119.
[136] FSA (n 33).
[137] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, adopted on 28 July 1994, entered into force on 28 July 1996, 1836 UNTS 3 (Implementing Agreement on Part XI).

implement the APEI[138] according to the UNCLOS, as well as Annex III of the 1994 Agreement. However, the Implementing Agreement of Part XI is not as universal as the UNCLOS due to some complications with the acceptance of the conventional terms.[139] And this may hamper the full competence of the Authority in the establishment of other APEIs as the parties to the Implementing Agreement of Part XI are smaller than those of the UNCLOS. This issue can be researched further elsewhere, but not in this thesis since it does not correspond with the aim of the research.[140] Since gaps are envisaged in the protection of the marine environment regulated under the convention, it is possible that there will be another implementing agreement to fill or reduce these gaps under the UNCLOS in the form of negotiation.

It is interesting to note that the implication between the UNCLOS and other related conventions in this matter, as in Article 237 of the UNCLOS, accepts that 'the specific obligations assumed by States under other different conventions with respect to the protection and preservation of the marine environment should be carried out in a manner consistent with the general principles and objective of this convention'.[141]

The work under the UNCLOS forum is generally closely linked to other treaties, including the CBD and the IMO. Precisely in the protected area regime, apart from the text of the UNCLOS mentioned above, other evidence can be seen in many resolutions adopted by the General Assembly in the discussion of the Oceans and Law of the Sea. For example, the meeting clearly expressed that it welcomed the work of the CBD and other relevant global and regional organisations in the part that involved the marine environment, marine resources and the protection of vulnerable marine ecosystems.[142] It also set the same targets to develop the representative networks of marine protected areas by 2012 as established in the CBD in COP

[138] See section 1 of the Chapter, Comepetence of States in maritime zones.
[139] D.H. Anderson, 'Resolution and Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea: A General Assessment' (1995) 55 Max Planck Institute for Comparative Public Law and International Law, 276-278.
[140] Further details can be read in Edwin Williamson, 'The Controversial Part XI', (2008) 2 Tex. Rev. L. & Pol. 443.
[141] UNCLOS (n 4), Article 237.
[142] UNGA Res. 58/240 (n 107), para 50.

7 Decision VII/5.[143] Moreover, it is clearly stated in Article 5 of the CBD that the parties should cooperate through the competent international organisation, which is the UNCLOS, for the conservation and sustainable use of biological diversity in areas beyond their national jurisdiction.[144]

The above discussion demonstrates that the UNCLOS may not directly impose an obligation on States to establish an MPA, but the general provisions could cover the establishment of an MPA as a tool to conserve the marine environment. This is part of the obligation to protect and preserve the marine environment according to Article 192 of the UNCLOS. The engagement to the convention is also promising as there are 168 members so the general obligation regarding the protection of the marine environment is bound by many States. What is more interesting is that the discussion in the BBNJ working group led to the negotiation of a new instrument, which may include a provision that requires States to establish an MPA as a measure to manage and conserve the marine environment in the area beyond their national jurisdiction.[145] In this respect, it has been agreed that some area-based management measure to protect marine biological diversity, including the marine protected area, should be provided in the new instrument.[146] Therefore, it is quite likely that an MPA regime will be developed under the new instrument in terms of conserving marine biodiversity in the area beyond States' national jurisdiction; however, other area-based management tools could be agreed among states at the very end of the negotiation.

2.2. Rights and Powers to establish MPAs under CBD

According to Article 8 of the CBD, it is clear that the Member States have an obligation to establish a system of protected areas. In terms of the treaty

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[143] UNGA Res. 59/24 (n 110), para 72 ; see also CBD, Decision VII/5 adopted at the Conference of Parties to the Convention on Biological Diversity at its Seventh Meeting, UNEP/CBD/COP/DEC/VII/5, 13 April 2004, para 19 (Decision VII/5).

[144] A. Charlotte De Fontaubert, David R. Downes and Tundi S. Agardy, 'Biodiversity in the Seas: Implementing the Convention on Biological Diversity in Marine and Coastal Habitats' (1997) 10 Georgetown International Environmental Law Review 753, 839

[145] Outcome of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction and Co-Chairs' summary of discussions, adopted at Sixty-ninth session of the UNGA, 13 February 2015, A/69/780, 3, Annex, online access at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/041/82/PDF/N1504182.pdf?OpenElement> (UNGA Res. 69/780).

[146] Ibid. para (f) of the recommendation of the resolution.

interpretation, the context, the subsequent agreement and practice need to be considered to interpret the treaty.[147] In the case of the CBD, due to its character as the framework convention, it is found that there are some subsequent agreements in the interpretation that arose from the decision of the Conference of the Parties (COP). In this respect, the COP of the CBD agreed to the details of the implementation of different targets, including the establishment of Protected Areas and Marine and Coastal Protected Areas (MCPAs), which are the MPA-related regime under the CBD.[148] The CBD developed two programmes of work related to marine protected areas, namely, the Programme of Work on Marine and Coastal Biological Diversity[149] and the Programme of Work on Protected Areas.[150] It could be said that, in addition to Article 8 of the convention, these two programmes of work are the source of an obligation to establish marine protected areas under the CBD. Some details of these two Programmes of Work has already been elaborated in Chapter 4, section 2.2. Regional cooperation for the implementation of MPAs under the CBD.

2.2.1 Programme of Work on Marine and Coastal Biological Diversity

The requirement to establish an MCPA is a result of the adoption of the Jakarta Mandate, which is considered as the starting point of the conservation of marine biodiversity under the CBD. [151] The development of the Jakarta Mandate led to the adoption of the Programme of Work on Marine and Coastal Biological Diversity in COP IV.[152] This Programme of work covers five elements, namely, 1) integrated marine and coastal area management; 2)

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[147] VCLT (n 2), Article 31.
[148] Decisions Adopted by the Conference of the Parties to the Convention of the Parties to the convention on Biological Diversity at its Fourth Meeting, COP IV/5, Annex, online access at <https://www.cbd.int/doc/decisions/cop-04/full/cop-04-dec-en.pdf> (Decision IV/5).
[149] Ibid., p 32.
[150] Decisions Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Seventh Meeting, UNEP/CBD/COP/DEC/VII/28 on 13 April 2004, online access at <https://www.cbd.int/doc/decisions/cop-07/cop-07-dec-28-en.pdf> (access 5 September 2017) (Decision VII/28).
[151] Decision adopted by Conference of the Parties to the Convention of the Parties to the convention on Biological Diversity at its Second Meeting, UNEP/CBD/COP/2/19, COP II/10, 16 online access at <https://www.cbd.int/doc/decisions/cop-02/full/cop-02-dec-en.pdf> (Decision II/10).
[152] Decision IV/5 (n 148), 32.

marine and coastal living resources; 3) marine and coastal protected areas; 4) mariculture; and 5) alien species and genotypes.[153]

The focal point of this research will be the programme element 3) marine and coastal protected areas. In general, the ecosystem approach and the precautionary approach are the main principles that govern the operation of the Programme of work.[154] Although this programme focuses on national and local levels, regional cooperation is also recommended, since the regional organisations 'should be invited to coordinate activities of and/or relevant to the programme of work'.[155] However, the details of regional cooperation in the CBD have already been discussed in Chapter 4 Legal Obligation to Cooperate.

Also, the characteristics of a marine ecosystem MCPA were elaborated in the report by the Ad Hoc Technical Expert Group on Marine and Coastal Protected Areas Subsidiary Body on Scientific, Technical and Technological (AHTEG)[156] at COP VII, together with an overview of an MCPA and a broad definition of an MCPA, which also incorporated the IUCN's definition of a protected area.[157] The establishment of an MCPA in the programme of work aims to benefit the global environment.[158]

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[153] Ibid., Annex, 33.
[154] Ibid.
[155] Ibid., 35.
[156] Decision adopted by Conference of the Parties to the Convention of the Parties to the convention on Biological Diversity at its Fifth Meeting at Nairobi, 15-26 May 2000, UNEP/CBD/COP/5/23, COP V/3, 74 (Decision V/3) ; see also Annex II of Recommendations adopted by the Subsidiary Body on Scientific, Technical and Technology Advice, UNEP/CBD/COP/5/3, p 92
[157] Report of the Ad Hoc Technical Expert Group on Marine and Coastal Protected Areas Subsidiary Body on Scientific, Technical and Technological, Doc. UNEP/CBD/SBSTTA/8/INF/7 on 13 February 2003, 6-12 (AHTEG Report); More details on this matter can be read at Chapter 3 Concept of a Marine Protected Area, section 3
[158] Decision VII/5 (n 143), 3, para 18:

'18. Agrees that the goal for work under the Convention relating to marine and coastal protected areas should be:

The establishment and maintenance of marine and coastal protected areas that are effectively managed, ecologically based and contribute to a global network of marine and coastal protected areas, building upon national and regional systems, including a range of levels of protection, where human activities are managed, particularly through national legislation, regional programmes and policies, traditional and cultural practices and international agreements, to maintain the structure and functioning of the full range of marine and coastal ecosystems, in order to provide benefits to both present and future generations.';

It should be noted that the goal agreed in the COP VII/5 is slightly different from the goal presented in the report of the AHTEG Report (n 157), 3, 10, para. 23.

Decision VII/5 says that MCPAs 'are one of the essential tools and approaches in the conservation and sustainable use of marine and coastal biodiversity'.[159] It is further proposed in the AHTEG that, to fully benefit from a network of MCPAs, it should be representative and 'include the full range of marine and coastal ecosystems, and that individual MCPAs in the network should reflect the biotic diversity of the ecosystems from which they are derived'.[160] The Guidance for the Development of a National Marine and Coastal Biodiversity Management framework which provides the framework for the states that implement the MCPA is also adopted by Decision VII/5.[161] The guidelines provide that when establishing an MPA 'the goals and objectives of each marine and coastal protected area should be clearly established when they are created.'[162] Although it does not provide details of how the MPA should be established, this framework provides the overall factors to be considered. This implication of the MCPA generated in this programme of work could be the subsequent practice[163] that is agreed by the members of the convention as it is adopted by the conference of the parties to the convention.

2.2.2 Programme of Work on Protected Areas

In COP VII/5 the guidelines for the national framework of the implementation of MCPAs were adopted, but another important decision was adopted in COP VII.[164] Decision 28 (Decision VII/28) relates to the Protected Areas based on Article 8 of the CBD. In terms of this programme of work, it was stated in Article 8(a) of the CBDS that the Contracting Parties are required to 'establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity.'[165] Therefore, the Programme of Work on Protected Areas and an Ad Hoc Open-ended Working Group on Protected Areas were adopted at Decision VII/28 in order to implement this Article.[166] Decision VII/5 regarding marine and coastal biological diversity was also

[159] Ibid., para 16.
[160] AHTEG Report (n 157), 14, para 43.
[161] Decision VII/5 (n 143), Annex 2.
[162] Ibid., Annex 2, para 1.
[163] VCLT (n 2), Article 31(3)(b).
[164] Decision VII/28 (n 150).
[165] CBD (n 82), Article 8.
[166] Decision VII/28 (n 150), paras 18 and 25, respectively.

recognised as being an integral part of the Programme of Work on Protected Areas.[167] This means that two programmes of work should be analysed when considering the obligation to establish an MCPA under the CBD as the subsequent practice of the treaty in the interpretation of the treaty. One is the Programme of Work on Marine and Coastal Biological Diversity mentioned above and the other is the Programme of Work on Protected Areas based on Article 8 of the CBD. The overall purpose of the Programme of Work on Protected Areas is to support the establishment of protected areas, including marine protected areas.[168] The purpose of this Programme of Work is also to reiterate that a *global network* of protected areas could contribute to achieving the three objectives of the CBD.[169] The achievement of a global network is the same goal as the establishment of an MCPA mentioned in 2.2.1 above. The ecosystem approach will be considered in the Programme of Work so that the establishment and management of a system of protected areas will extend beyond the national jurisdiction.[170] In this respect, the Decision agreed that the MCPAs in the ABNJs should be consistent with Decision VII/5.[171] After the Ad Hoc Open-ended Working Group on Protected Areas was established, the working group submitted a report to the COP, which contained an agenda of substantive issues to be considered, including the options for States to cooperate for the establishment of marine protected areas in marine areas beyond the limits of their national jurisdiction.[172] However, the study of the legal aspects of the establishment of marine protected areas in the ABNJ[173] was also presented and it was concluded from that study that the UNCLOS might be the appropriate instrument for the discussion of the future development of issues related to the marine area in the ABNJ.[174]

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[167] Ibid., para 20
[168] Ibid., Annex Programme of Work on Protected Area, 7.
[169] CBD (n 82), Article 3 ; see also Decision VII/28 (n 150), p 7.
[170] Decision VII/28 (n 150), p 7.
[171] Ibid.
[172] Report of the First Meeting of the Ad Hoc Open-ended Working Group on Protected Areas, UNEP/CBD/COP8/8*, 20 February 2006, paras 38, p 11 (First Report of AHTEG).
[173] Kimball, Lee A. (2005). The International Legal Regime of the High Seas and the Seabed Beyond the Limits of National Jurisdiction and Options for Cooperation for the establishment of Marine Protected Areas (MPAs) in Marine Areas Beyond the Limits of National Jurisdiction. Secretariat of the Convention on Biological Diversity, Montreal, Technical Series no. 19, 64 pages.
[174] First Report of AHTEG (n 172), paras 41-42, p 12.

It is clear that the decision adopted in COP VII imposed important commitments on the Member States in terms of the establishment of MPAs under the CBD from both Decision COP VII/5 and Decision COP VII/28. The further development of the implementation of an MCPA regime is still ongoing. The COP adopted the Strategic Plan for Biodiversity 2011-2020 at the COP X in 2010 and the Aichi Biodiversity Targets of Decision X/2 were adopted in 2010.[175] The Aichi Biodiversity Targets are a combination of many promising targets regarding 'action to halt the loss of biodiversity' and one of the targets agreed is Target 11, which is as follows:

> 'By 2020, at least 17 per cent of terrestrial and inland water areas, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes.'[176] (emphasis added)

These two commitments regarding the establishment of an MCPA and the maintenance of an MCPA can be regulated through national, regional, traditional and international levels. Although the main obligation of the establishment of an MCPA under the CBD is national implementation, the COP VII stresses the importance of cooperation for a network of MCPAs.[177]

As for the establishment of an MPA regime, as mentioned above, based on Article 8 of the CBD, the Contracting Parties are required to establish a system of protected areas and this constituted the grounds for establishing the Programme of Work on Protected Areas. It can be said that the Programme of Work on Protected Areas adopted by the COP at Decision VII/5 arose from the decision-making power of the COP to interpret the substantive obligation

[175] Decision adopted by the Conference of the parties to the Convention on Biological Diversity at it Ninth Meeting, COP IX/20, UNEP/CBD/COP/DEC/IX/20 on 9 October 2008 (Decision IX/20).
[176] Decision adopted by the Conference of the parties to the Convention on Biological Diversity at it Tenth Meeting, UNEP/CBD/COP/DEC/X/2, 29 October 2010, Annex of the COP X/2, p 9 (Decision X/2).
[177] Decision VII/5 (n 143), para 18, 30.

in Article 8(a).[178] Therefore, this Programme of work and the criteria regarding the selection of the EBSA[179], which are area-based management regimes concerning the marine environment, clarify the interpretation of Article 8(a) as a subsequent practice to which the Contracting Parties are bound.

On the other hand, the Programme of Work on Marine and Coastal Biological Diversity does not refer to any specific provision of the CBD but merely requires States to implement the programme to comply with the objectives of the convention. The CBD, together with its adoption of the two relevant programmes of work as a subsequent practice[180] related to how to implement such programmes of work, was later adopted by the COP could provide the source of power of the State to establish an MPA. The implementation of could be considered as a soft-law measure developed by the COP, in which a recommendation is made to the parties.[181] Although the commitment of the CBD regarding the establishment of an MPA is quite general requirement in order to achieve the objectives of the conservation of biological diversity as provided in Article 1, considering that the CBD has the highest number of members, including 195 countries and one organisation, it could be said that the conscience of the State concerning the establishment of an MPA is visible.

2.3 Rights and Obligations regarding MPAs under MARPOL

MARPOL was previously introduced as the key instrument to control pollution from ships[182] in Chapter 3, section 4 of the thesis. It should be reiterated that the main objective of MARPOL is 'to prevent the pollution of the marine environment by the discharge of harmful substances or effluents containing such substances'.[183] The details of the harmful substances that are to be controlled or prohibited from being discharged from ships are adopted in the annexes of the convention, and the parties are also bound to the context

[178] R. R. Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 The American Journal of International Law, 641.
[179] Details of which is provided in Chapter 3, section 3 Concept of an MPA under the CBD.
[180] VCLT (n 2), Article 31 (3)(b).
[181] Churchill and Ulfstein (n 178), 642.
[182] Markus J. Kachel, *Particularly Sensitive Sea Areas The IMO's Role in Protecting Vulnerable Marine Areas* (Springer 2008), 95
[183] MARPOL (n 83), Article 1

of the annexes.[184] The MARPOL currently has six Annexes, each of which specifies different harmful substances, which are controlled or prohibited from being discharged into the ocean. Annex I prohibits oil pollution, Annex II prohibits the pollution of noxious liquid substances, Annex III prohibits the pollution of harmful substances in a packaged form, Annex IV prohibits the pollution of sewage, Annex V prohibits the pollution of garbage, and Annex VI prohibits air pollution from ships.[185]

MARPOL creates regulations to enable the establishment of Special Areas (SA), which, according to the definition provided, can be considered as a type of MPA.[186] The SA regime is also established in Annex I, Annex II and Annex V, but the focus of harmful substances under the prevention of the Special Area is changed to noxious liquid substances in Annex II and garbage in Annex V.[187] The SA under these three annexes of MARPOL are areas where the discharge of harmful substances is controlled or prohibited under the annexes. Based on the interpretation rule, the annexes under MARPOL are a subsequent agreement[188] of MARPOL, and as such, according to the rule of treaty interpretation, they are binding on States that are party to the convention based on Article 1 of MARPOL. It is observed that those approved SA under the relevant annexes are either enclosed sea or semi-enclosed sea areas[189] and these areas are clearly identified in the relevant Annexes.[190] The proposal to establish the SA made by the States will be reviewed and approved by the Marine Environment Protection Committee (MEPC).[191] The procedures for the designation of the area to be considered as an SA and the amendment of the Annex to include it will be approved by the MEPC, which is in a meeting of the Conference of the Parties to the Convention.[192] This process can be said to make the status of the Special Area

[184] Ibid.
[185] The Final Act of Convention of the International Conference on Marine Pollution 1973.
[186] Details are in Chapter 3, section 4.
[187] MARPOL (n 83), Annex II, Regulation 1 (7) and Annex V, Regulation 1 (3).
[188] VCLT (n 2), Article 31(2).
[189] Nihan Ünlü, 'Particularly Sensitive Sea Areas: Past, Present and Future' (2004) 3 WMU Journal of Maritime Affairs, 160.
[190] MARPOL (n 83), Annex I, Regulation 10; Annex II, Regulation 1(7) ; and Annex V, Regulation 1(3).
[191] IMO Resolution A.720(17), Guideline for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Areas, adopted on 6 November 1991, para 3.1 (IMO Res. A.720(17)).
[192] Kachel (n 182), 234.

binding on all other parties, which make the SA, or an MPA under the MARPOL becomes effectively regulated.[193]

In the same year that the SA was developed, the IMO also adopted the guidelines for the identification of the Particularly Sensitive Sea Areas (PSSA).[194] Nonetheless, the PSSA regime is not included in any of MARPOL's annexes, and State parties are not bound to comply with this guideline.[195] However, States have the right to propose a PSSA as an option to protect sensitive sea areas which may contain protection measures other than controlling or prohibiting harmful substances. In 1999, the guidelines for further procedures for application to identify the PSSA were clarified in the Procedures for the Identification of PSSA, and the Associated Protective Measures and Amendments to the 1991 Guidelines (1999 Guidelines) were adopted in Resolution A.885(21) of the Assembly. These guidelines allow parties to adopt a measure that may not exist under the IMO Convention as an associated protective measure[196] in the PSSA; however, the application of the measure has to fall within the competence of the IMO. The condition of an eligible associated protective measure is distinct from the protection measure in SA since the latter controls the discharge[197] or prohibits the discharge of harmful substances,[198] while the associated protective measure could be another protective measure.[199] The associated protective measure in a PSSA is the reason for the efficiency of the PSSA regime in protecting the marine environment from shipping pollution since it can adopt a measure for a routing and reporting system for ships[200] so that vessels avoid sensitive sea areas. Moreover, an associated protective measure is the mechanism that enables the PSSA to legally bind States Parties to comply with the associated protective measure in the designated and approved PSSAs, since it is clearly stated in the latest guidelines for the identification and designation of PSSAs

[193] Ibid.
[194] IMO Res. A.720(17) (n 191); see also Chapter 3, section 4.
[195] Ünlü (n 189), 160.
[196] Details of associated protective measures are provided in Chapter 3, section 4.
[197] IMO Res. A.720(17) (n 191), 1991, 29-30.
[198] Ünlü (n 189), 161.
[199] IMO, Resolution A.982(24) Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, adopted on 1 December 2005 (Agenda item 11), A 24/Res.982, 6 February 2006, Annex, 8 (IMO Res. A.982(24)).
[200] Ibid. 8.

adopted in the IMO Resolution A.982 (24) that 'Member governments should take all appropriate steps to ensure that ships flying their flag comply with the associated protective measures adopted to protect the designated PSSA'.[201] In cases where States Parties aim to propose any area as a PSSA, the oceanographic conditions, as well as the associated protective measure, have to comply with the details provided in the guidelines.

The Special Areas and the PSSA regimes also relate to the implementation of the UNCLOS, and the APM of a PSSA can also be considered as a measure under Article 211(6) of the UNCLOS and can thus be considered as a subsequent practice[202] of the UNCLOS. This is because the IMO is acknowledged as 'the competent international organisation' and its rules and standards as 'the generally-accepted international rules and standards' with regard to the prevention of pollution from ships.[203] The implications of the implementation of Special Areas and PSSA regimes under the IMO affect the implementation of the UNCLOS, particularly the implementation of Article 211 regarding the pollution from vessels, which prescribes the following:

> '1. States, acting through the competent international organisation…, to establish *international rules and standards* to prevent, reduce and control pollution of the marine environment from vessels…
>
> 2. States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulation shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organisation or general diplomatic conference[204] (emphasis added)

[201] R.R. Churchill, 'The growing establishment of high seas marine protected areas: implications for shipping' in Richard Caddell and Rhidian Thomas (eds), *Shipping, Law and the Marine Environment in the 21st Century: Emerging Challenges for the Law of the Sea - Legal Implications and Liabilities* (Lawtext Publishing 2013), 81.
[202] VCLT (n 2), Article 31(3)(b).
[203] IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organisation, IMO Doc LEG/MISC.7 (19 January 2012), 49 (IMO, Implications of UNCLOS for the IMO) ; see also Churchill (n 201), 74-75.
[204] UNCLOS (n 4), Article 211.

In addition, it is further stated in Article 211(6) that coastal States, through the competent international organisation, may adopt special mandatory measures to prevent pollution from vessels in the clearly-defined areas of their EEZ when there are 'recognised technical reasons in relation to its oceanographical and ecological conditions…'.[205] In this connection, the application of Special areas and PSSAs through the procedures of the IMO can be considered as specific mandatory measures to prevent pollution from vessels in a clearly-defined area, which are response to the implementation of Article 211(6) of the UNCLOS.[206]

It can be said that there are two main area-based management regimes under the IMO, namely, Special Areas and PSSAs. Although States Parties to MARPOL are not obliged to propose a Special Area, when a Special Area has been approved by the MEPC, its status as a Special Area is binding on all State Parties as a result of Article 1 of MARPOL. Similarly, the proposal of a PSSA is obviously not a requirement under MARPOL, but unlike Special Areas, the PSSA status alone does not bind the States Parties. Instead, if an associated protection measure within a proposed PSSA is accepted by the IMO's MEPC, then members of the IMO will be bound by it.[207] With this effect and considering that the mechanisms are also in response to Article 211 of the UNCLOS, the establishment of the PSSA can be regarded as the implementation of Part XII of the UNCLOS. It could be said that this makes the PSSA regime one of the area-based management regimes with protective measures that contain a legal status that binds States parties to the respective conventions. Considering the recorded number of participating countries to either MARPOL or the UNCLOS,[208] the PSSA, once implemented and approved by the IMO, could be the legal binding mechanism a large number of countries, except Afghanistan, Andorra, Bhutan, Burundi, Central African Republic, Ethiopia, Kyrgyzstan, Liechtenstein, Rwanda, San Mario, South

[205] Ibid., Article 211 (6).
[206] IMO, Implications of UNCLOS for the IMO (n 203), 62-63; see also Saiful Karim, *Prevention of Pollution of the Marine Environment from Vessels The Potential and Limits of the International Maritime Organisation* (Springer 2015), 32-34.
[207] Ünlü (n 189), 163.
[208] See Annex I of the thesis, the details of the participating countries to five selected global conventions that are parties to both MARPOL and UNCLOS.

Sudan and Uzbekistan.

2.4 Rights and Obligations regarding MPAs under Ramsar Convention

Before examining the rights and obligations of States to establish an MPA under the Ramsar Convention, the connection of the wetlands to an MPA should be reiterated, since the wetlands could have marine elements under this Convention and once it is designated as a wetlands, it becomes a protected area. This is based on the definition of wetlands under Article 1.1, which is as follows:

> 'areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres.' (emphasis added).

In addition, Article 2.1 further provides that wetlands 'may incorporate riparian and coastal zones adjacent to the wetlands, and islands or bodies of marine water deeper than six metres at low tide lying within the wetlands.'

These two Articles show that coastal and marine areas falling under Article 2.1 above can be considered as wetlands covered by Ramsar Convention.[209] In addition, Resolution VIII.4 adopted by COP 8 in 2002 reaffirmed that 'the coastal zone around the world falls under the definition of wetland.'[210]

Unlike some multilateral environmental agreements, the Ramsar Convention imposes a very clear obligation on States Parties to designate the suitable wetlands within their territory, since it is stated in Article 2 of the convention that States Parties 'shall designate suitable wetlands within its territory'.[211] The conditions for becoming a contracting party to Ramsar Convention are also stated in this Article, as follows: 'Each Contracting Party shall designate at least one wetland to be included in the List when signing this Convention

[209] Edward Goodwin, *International Environmental Law and the Conservation of Coral Reefs* (Routledge 2013), 150.
[210] Resolution VIII.4, Resolutions of the 8th meeting of the Conference of the Contracting Parties, Valencia, Spain, 18-26 November 2002, para 1 online access at <http://archive.ramsar.org/pdf/res/key_res_viii_04_e.pdf> (access 6 September 2017).
[211] Ramsar Convention (n 84), Article 2.1.

or when depositing its instrument of ratification or accession, as provided in Article 9'.[212]

It can be seen from the context of Article 2 that the interpretation of the Ramsar Convention provides a clear obligation regarding the designation of wetlands. This obligation is even set as a precondition to be fulfilled for States to become members of Ramsar Convention. This Article distinguishes Ramsar Convention from other previously-mentioned conventions related to the establishment of an MPA. Some of those conventions, namely the UNCLOS, the CBD and MARPOL, do not contain a specific requirement for States Parties to comply with the objective of conservation prior to ratifying them. In the case of the Ramsar Convention, the establishment of protected areas becomes the essential element to become a member of the convention. Therefore, the obligation of States parties to designate wetlands strongly binds them to designate the wetlands according to Article 2 of Ramsar Convention. Nevertheless, the designation of wetlands does not necessarily have to include the marine area element, since the definition of wetlands is broader and covers more areas of other types of wetland.

In addition, the Member States have another important obligation 'to promote the conservation of wetland and waterfowl by establishing nature reserves on wetlands', based on Article 4.1. This means that not only are wetlands designated as such but nature reserves as well. When considering the context of the treaty according to the treaty interpretation rule, these two Articles contain the main obligations for States parties to designate wetlands as nature reserves in order to comply with the Convention.

Since Ramsar Convention imposes a clear set of obligations on States parties to designate wetlands as nature reserves, the Convention authority has produced a manual to assist States Parties to implement the convention, the latest of which was the 6th edition in 2013.[213] The mission of the convention is as follows: 'the conservation and wise use of all wetlands through local and

[212] Ibid., Article 2.4.
[213] Ramsar Convention Secretariat, 2013. *The Ramsar Convention Manual: a guide to the Convention on Wetlands (Ramsar, Iran, 1971),* 6th ed. Ramsar Convention Secretariat, Gland, Switzerland (Ramsar Manual 2013)

national actions and international cooperation, as a contribution towards achieving sustainable development throughout the world.'[214]

In this respect, the four main commitments of States Parties to the convention are reiterated in the manual, as follows:

1. To designate wetlands for inclusion in the list of wetlands of international importance (Ramsar list)
2. To promote the wise use of wetlands
3. To establish nature reserves in wetlands and promote training in wetland research
4. To cooperate internationally with other member States[215]

Although these four main commitments are the sources of obligation for States Parties to Ramsar to designate wetlands, this does not mean that the designated wetlands are MPAs. Wetlands could occur in geographical areas other than coastal and marine areas.[216]

With regard to the designation of wetlands that involve coastal and marine areas, Ramsar Convention's authority provides an interpretation tool in the form of a Handbook of Coastal Management concerning the issue of wetlands in Integrated Coastal Zone Management (ICZM).[217] However, since it is not in the form of an agreement, the handbook can only be considered as a tool to clarify the practice of the parties in the implementation of the treaty. The details of this handbook will not be discussed further, since the main focus in this part of the chapter was to identify the main obligation of States Parties to the Convention, namely, the obligation regarding wetlands identified above.

Although the minimum number of wetland sites to be listed prior to States' ratifying or acceding to the convention is set to just one, States parties are free to include more than one site. In fact, they usually list more than one wetland[218] to illustrate that they are implementing the convention. With 170

[214] Ibid., 7
[215] Ibid., 13-14.
[216] Ibid., 7.
[217] Ramsar Convention Secretariat, 2010. Coastal management: Wetland issues in Integrated Coastal Zone Management. Ramsar handbooks for the wise use of wetlands, 4th edition, vol. 12. Ramsar Convention Secretariat, Gland, Switzerland.
[218] More details of listed sites are available online at http://www.ramsar.org/sites-countries/the-ramsar-sites.

countries participating in it, it could be said that Ramsar Convention is one of the conventions that imposes a clear obligation on a large group of States Parties regarding the designation of wetlands, unlike the other aforementioned related conventions.

2.5 Source of the obligation to establish an MPA under WHC

The WHC is a convention that aims to preserve the heritage of the world for the interests of mankind as a whole.[219] However, the rights and obligations regarding the establishment of an MPA will be examined in this part and natural heritage will be the primary focus since an MPA might fit this definition. As stated in Chapter 3- The Concept of the MPA of this thesis, the meaning of natural heritage in the WHC is connected to an MPA based on the definition of natural heritage provided in Article 2 of the convention.[220]

According to the definition, natural heritage may cover various natural environments, including an MPA, but if such heritage has no 'outstanding universal value' (OUV), it would not be considered as natural heritage under the WHC.[221] It is because the convention aims to protect the most outstanding or the 'best of the best' which represent world heritage from an international perspective.[222] Although the convention defines heritage, it does not explicitly require States Parties to designate heritage; instead, it leaves States to freely identify and delineate the properties within their territory that may fit the definition provided in the Convention.[223] This Article on its own

[219] WHC (n 85), Preamble; see also Chapter 3, section 6.
[220] Ibid., Article 2.

> 'natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
>
> geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;
>
> natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.'[220] (emphasis added)

[221] Goodwin (n 209), 162.
[222] Operational Guidelines for the Implementation the World Heritage Convention, WHC.05/2, 2 February 2005, 26 online access at http://whc.unesco.org/en/guidelines/ ; see also Ibid., 162.
[223] WHC (n 85), Article 3.

indicates that the WHC does not impose an obligation on state Parties to identify and delineate either cultural or natural heritage.

Nonetheless, Article 4 of the Convention provides that States parties have the duty to secure the cultural and natural heritage for the future generation.[224] In cases where the States Parties nominate a site to be inscribed on the list, the nominated site should be qualified as having OUV which will be deliberated by the World Heritage Committee.[225] Once the site has been verified as a heritage site, States Parties are obliged to ensure the implementation of effective and active measures to protect and conserve the heritage in their territory.[226]

Therefore, according to Article 4, States Parties have a duty to ensure the identification and conservation of their cultural and natural heritage in order to protect it for future generations. However, the meaning of the text of Article 4 does not interfere with the right of State Parties to select sites within their territory that may fall within the definition of either cultural or natural heritage. This means that the establishment of an MPA, which could fit the definition of natural heritage, depends on the State's willingness to establish or identify an area within their territory as natural heritage. Even with such a highly engaged convention of 193 member States,[227] it is difficult to see the WHC as an enforcing agreement to establish an MPA because 1) there is no specific timescale on when to designate the protected area and 2) it is uncertain whether the natural heritage will be located to encompass the marine area. Therefore, despite the WHC, it cannot be said that States have an obligation to establish an MPA.

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[224] Ibid., Article 4 provides

'Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.'

[225] Ibid., Article 11.

[226] Ibid., Article 5.

[227] Details of Member States of the WHC can be accessed online at <https://whc.unesco.org/en/statesparties/>.

Conclusion

With regard to the sources of obligations and/or rights to establish an MPA in the global conventions, it is observed that these are not well constituted yet. The establishment of an MPA is rather perceived as a measure to implement the obligation to protect and preserve the marine environment[228] or to prevent pollution from international shipping,[229] or it could be a designation of Wetlands[230] or of Natural Heritage of WHC.[231] Because, although these conventions attract a large number of States, the application of the SA and PSSA by the IMO under the MARPOL, the Wetlands under the Ramsar Convention and the Natural Heritage under the WHC imply the details of the application of the protected area directly to the specific purpose of the each of the Convention. In this case, the shared understanding on the purpose of the establishment of an MPA to protect the marine environment as a whole could be hindered by some limitations of the purpose such establishment of the protected area, pertaining to the different objectives of the conventions concerned. It may be difficult to assume that the shared understanding is clear and consistent in the practice that could form the customary norm on the establishment of an MPA to protect the marine environment and its ecosystems. However, in the scope of the CBD, an MPA could be the implementation of a protected area to fulfil the objective of the convention as conservation of the biological diversity[232] that includes the establishment of an MPA to protect the marine environment.

Although the UNCLOS establishes the broad obligations to protect the marine environment in Part XII of the Convention, it also has a sectoral approach that allows the coastal States to adopt a protective measure in the EEZ, the CS and the high seas. As proposed earlier, the implementation of an MPA could be a practice to fulfil the obligation to protect and preserve the marine environment. Based on the imposition of the obligation on States to establish a system of protected areas in Article 8, the CBD supports the implementation

[228] See section 2.1 of this Chapter.
[229] See section 2.3 of this Chapter.
[230] see section 2.4 of this Chapter.
[231] See section 2.5 of this Chapter.
[232] CBD (n 82), Article 1.

of States Parties using the COP decisions and the work from relevant Programmes of Work that provide guidelines for States.

On a smaller scale, the objectives of MARPOL, Ramsar Convention and the WHC also contribute to the development of an MPA with the application being limited based on the purpose of each convention, as mentioned above. Since MARPOL is focused more on international shipping activities, its application of a specially protected area must be connected to a shipping route, since areas that are disturbed by shipping activities are required to be identified in the proposal of Special Areas and PSSAs. The Ramsar Convention has a very clear objective to conserve the wetlands, including wetlands with a marine element. The Ramsar Convention even sets an obligation for States to designate the wetlands within their jurisdiction; however, the definition of a wetland is broader than just an MPA, since it allows States to propose other eligible wetlands rather than only focusing on marine and coastal areas. A similar indirect contribution to the establishment of an MPA can be seen in the WHC. Since its aim is to conserve world heritage, both cultural and natural, its objective is not only directly focused on the marine environment, but also other varieties of the environment. Although these three conventions impose indirect obligations on States regarding the establishment of an MPA, they clearly provide mechanisms within their scope for States to exercise their right to establish an MPA.

In addition, the details of implementation of an MPA in the global instruments, except for the UNCLOS, are usually agreed in a separate implementing document as a subsequent agreement or practice. The resolutions adopted by the authority of each of the conventions that copes with the details implementation of the MPA, as shown above, can be regarded as soft law instruments that the States is more keen to agree to as it is not as rigid as the conventional law.[233] The soft law instruments not only attract the participation of State, it can also show technical and more dynamic law in response to matters that rely on scientific information,[234] in this case, the marine environment. The less formal process of creating soft law can

[233] Pierre-Marie Dupuy, 'Soft law and the International Law of the Environment' (1991) 12 Michigan Journal of International Law (1990), 422.
[234] Ibid., 421.

contribute to the crystallisation of the law, or even the customary international law, as they may shed light on the *opinio juris* of the states.[235] When looking at the provisions and the supplemental instruments of the global conventions in this chapter, the establishment of an MPA may be seen as an option. However, as they can still show the trend toward the MPA regime, it is expected that further observation on the regional instruments may show with more certainty whether the establishment of an MPA is the right or obligation of States.

As collectively shown through the sources of right or obligation to establish an MPA of these global instruments, at least, it show the social understanding on the importance of the establishment of an area to be protected. According to the record of participating countries to the selected global conventions show the States are bound to at least one convention, [236] at this stage, the collection of the principles in global instruments could form a shared understanding on the protection of the marine environment. The shared understanding, although not yet in consistence among the application of the global instruments in this regard, may include the norm toward the better protection of the marine environment by the establishment of protection measures, including the MPA. However, to determine if these common principles form an obligation for States, other factors, such as the practice of legality at the regional level, also need to be considered and these will be examined and supported by the implementation in regional instruments in the next chapter.

Conclusion

After an observation of the rights and obligations of States in the establishment of an MPA under the global mechanisms, it was also determined that the implementation of an MPA has some considerations based on the competence of the State to implement it. States generally have the competence in the measures regarding the protection of the marine resources and environment within their national jurisdiction, provided that the right of navigation of other States prevail[237] as shown in section 1 of the

[235] Ibid., 432.
[236] Annex I of the thesis.
[237] UNCLOS (n 4), Articles 17 to 19.

chapter. However, there may be some exceptions to a case concerning the SA and the PSSAs that are adopted through the IMO, since they can interfere with the navigation route of the vessels of other states.[238]

The analysis showed that the current existing conventions, in most cases, offer an MPA as an option for States to use as a mechanism to protect marine resources and the marine environment, but the obligation to protect the environment is still the core obligation. In practice, even when considering a single convention, for example, the CBD or the UNCLOS, the research finds it does not require States to establish an MPA as such, but it gives them the right to do so using the mechanisms provided in the conventions.

With this conclusion and the examination in Chapter 4 – Legal Obligation to Cooperation at the Regional Level, it is interesting to note that, although regional cooperation is only recommended in global instruments, many regional or sub-regional initiatives or organisations have actively cooperated, in many cases shown in the form of an agreement with regard to the establishment of an MPA. However, this could be the result of other mechanisms apart from those examined in this chapter and the previous chapter. An analysis combining the conclusion of Chapter 4 and the conclusion of this chapter, at this stage, appears unclear, whether the global treaties examined in this chapter form the legal obligation to establish an MPA through regional cooperation. However, this current research will further examine the regional instruments in Chapter 6 - Legal Mechanisms for the Establishment of Marine Protected Areas in Regional Instruments. As it is expected to help analyse the practice of regional organisations that could produce evidence to support the consideration of whether the regional cooperation to establish an MPA is merely the right of States or an obligation with which they must comply.

[238] Kachel (n 182), 186-188; see also Gemma Andreon, 'The Exclusive Economic Zone' in Donald R. Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015),179.

CHAPTER 6 LEGAL MECHANISMS FOR THE ESTABLISHMENT OF MARINE PROTECTED AREAS IN REGIONAL INSTRUMENTS

Introduction

Regional cooperation can generally be established in any form that can act as an instrument for an MPA regime, for example a Regional Sea Programme (RSP). The RSPs examined in this chapter are those that are based on being initiated, or recognised, by the UNEP Regional Sea Programmes.[1] The reasons for selecting RSPs, rather than another regional arrangement, are already provided in the Introduction Chapter. However, the main reason for this selection is that the UNEP collect the RSPs' information with regional instruments in the form of both hard law and soft law. With there being eighteen RSPs, it is believed that this will provide extensive examples of the regional cooperation regarding the establishment of an MPA.

The establishment of an MPA through regional cooperation is convincing, as it is functional to the unique stage of the marine environment in the region.[2] In some regions which have a distinctive characteristic of its environment, for example, the Arctic and Antarctic, the regional cooperation can cater the need for such a specific requirement better than the global regime.[3] Regional Sea convention is also further development of the United Nations Convention on the Law of the Sea[4] (UNCLOS) in which designs and responds to the protection of the marine ecosystem in addition to the marine pollution.[5] In some regions, implementing a marine protected area is a necessity, as it is believed that this will reduce the threat of emergencies for the marine

[1] United Nations Environment Programme (UNEP).
[2] Katrina Soma, Jan van Tatenhove and Judith van Leeuwe, 'Marine Governance in a European context: Regionalization, Integration and cooperation for ecosystem-based management' (2015) 117 Ocean & Coastal Managment, 7; See also Jesper Raakjaer and others, 'Ecosystem-based marine management in European regional seas calls for nested governance structures and coordination—A policy brief' (2014) 50 Marine Policy, 376; Donald R Rothwell and Tim Stephens, *The International Law of the Sea*, (Hart Publishing 2010), 346.
[3] Oran R. Young, 'Governing the antipodes: international cooperation in Antarctica and the Arctic' (2016) Polar Record , 230-231.
[4] The 1982 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396 (UNCLOS).
[5] Alan Boyle, 'Further Development od the 1982 Convention on the Law of Sea: Mechanisms for change' in David Freestone, Richard Barnes and David M. Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP 2006), 53-54.

environment and enhance the conservation of marine biodiversity.[6] However, it should be noted that, once there is regional cooperation resulting in conclusion of the regional convention, other procedural legal binding obligations are indicated,[7] including monitoring and exchanging information[8] and reporting the compliance of the conventions[9] by the State members, which could progress to regional cooperation regarding the establishment of an MPA. These subsequent obligations are also considered as being part of the cooperation obligation mentioned in Chapter 4 of this thesis. However, it should also be noted that the regional instruments that explicitly generate these subsequent obligations are especially evident to those RSPs with the conclusion of, at least, a regional framework convention, which will be discussed in Sections 2.1 and 2.2 of this chapter, as those details of obligation to establish an MPA is directed in the provision of their regional instruments. Although some of the RSPs have not agreed to the use of regional instruments related to the marine environment in the form of hard law, they have provided some relevant policy-based instruments in this matter.

As Chapter 4 of the thesis provide an idea of regional cooperation to establish an MPA in the meaning of the research, which is referred to 'the act or process that the governments of the countries within the region enter to establish the MPAs.'[10] In that chapter examples of the mean that the RSPs instruments offer for the State to act cooperatively is introduced. Having explored the general rights and obligation of States to establish an MPA using the legal mechanisms in global conventions in the previous chapter, the aim of this

[6] Hanneke Van Lavieren and Rebecca Klaus, 'An effective regional Marine Protected Area network for the ROPME Sea Area: Unrealistic vision or realistic possibility?' (2013) 72 Marine Pollution Bulletin 389, 402 ; See also Clinton N. Jenkins and Kyle S. Van Houtan, 'Global and regional priorities for marine biodiversity protection' (2016) 204 Biological Conservation, 333.

[7] David M. Dzidzornu, 'Marine Environment Protection under Regional Conventions: Limits to the Contribution of procedural Norms' (2002) 33 Ocean Development & International Law, 293-295.

[8] See details in Chapter 4, section 2.6, the duty to monitor and exchange of information is provided in Antarctic Treaty, Article 3; Nairobi Convention, Article 15; Tehran Convention, Article 16; Bucharest Convention, Article 15; Jeddah Convention, Article 20; Helsinki Convention, Article 24; Abidjan Convention, Article 14 ; Kuwait Convention, Article10 Kuwait Convention; Cartagena Convention, Article 13; Barcelona Convention, Article 10.

[9] See details in Chapter 4, section 2.6, the duty to report the compliance of the conention is provided in Barcelona Convention, Article 20; Cartegena Convention, Article 13; Kuwait Convention, Article 24; Cartagena Convention, SPAW Protocol, Article 19.

[10] See details in Chapter 4, section 2.

current chapter is to explore the same general rights and obligations when an MPA is established using regional instruments. The purpose of this chapter is to identify the similarities and/or differences in the rights and/or obligation of States to establish an MPA, as well as to examine the concept and criteria of an MPAs in the mechanisms provided in global conventions and RSP instruments. It is expected that these similarities and differences will illustrate the tendency to streamline the implementation of the MPA regime with the use of regional instruments that the States within the region enter into to achieve the establishment of an MPA. This chapter will also analyse whether regional cooperation to protect the marine environment, particularly by the establishment of an MPA, is generated by a commitment in a global convention or whether it emerges from the relevant regional instruments.

As mentioned above, the regional instruments in this chapter may be binding or non-binding and, thus, the rule of treaty interpretation of the Vienna Convention on the Law of Treaties[11] (VCLT) will be applied to the instruments where an agreement has been formed. The interactional international law approach will be employed to investigate the interaction between the treaty interpretation of the conventional-based instrument and the non-conventional agreements, or soft-law instruments, regarding the establishment of an MPA that reflects at the regional level, which may collectively provide some evidence of the emergence of customary international law in the regional cooperation to establish an MPA.

Regional instruments from RSPs are the focus of this current chapter, as they will highlight the regional mechanisms used in the establishment of an MPA, which may bind or influence the members of such regional arrangements. This chapter will be divided into two parts, one of which will focus on the concept and characteristics of an MPA, with the othere focusing on questions related to the source of the rights and obligation of States to establish an MPA provided in regional instruments.

The examination of the similarities of, and differences in, regional instruments will be discussed in this chapter based on three questions, in order

[11] Vienna Convention on the Law of Treaties 1969, entered into force 27th January 1980, 1155 UNTS 331 (VCLT).

to identify the source of the obligation to establish an MPA in the regional instruments. These questions relate to: 1) the concept of an MPA; 2) the characteristics of an MPA; and 3) the source of the rights and/or obligation to establish an MPA. Since RSPs are evidence of regional cooperation under international law, it is considered worthy to integrate the analysis to the previous chapters on the legal obligation to cooperate and on the right and/or obligation of the States to establish an MPA, as will be examined in the conclusion of the thesis.

1. Concept and Characteristics of MPAs in Regional Instruments

According to the Regional Seas Convention and Action Plan provided by the UNEP, there are eighteen Regional Sea Programmes (RSPs), some of which are initiated and administrated by the UNEP, whilst others, although initiated by the UNEP, are not under its administration and are independent programmes.[12] However, although the RSPs categorised in the UNEP, which are referred to in this chapter, may not reflect all of the existing cooperations in regional and sub-regional seas, they do consist of many coastal States, archipelagic States, and States with enclosed and semi-enclosed seas.[13] The eighteen RSPs under the UNEP are good examples to highlight the nature of the regional cooperation that is collectively portrayed in the form of a social and legal understanding of the global norm in the establishment of an MPA.

These eighteen RSPs comprise of the Wider Caribbean, North-East Pacific, Pacific, Western Africa, Black Sea, Northeast-Atlantic, Eastern Africa, Mediterranean, Red Sea and Gulf of Aden, South-East Pacific, Caspian, ROPME Sea Area, Baltic, East Asian Sea, South Asian Seas, Northwest Pacific, Arctic and Antarctic.[14] The instruments of the RSPs will be analysed

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[12] Regional Seas Conventions and Action Plans, online access at <https://www.unenvironment.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/regional-seas-programmes> (accessed July 2018).

[13] Phillippe Sands and Peel, *Principles of International Environmental Law* (Third edn, CUP 2012) 353.

[14] Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, adopted 16 February 1976, entered into force 12 February 1978, 1102 UNTS 27 (Barcelona Convention);
Convention on the Protection of the Black Sea against Pollution, adopted 21 April 1992, entered into force 15 January 1994 (Bucharest Convention);
Convention for the protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, adopted 21 June 1985, entered into forced 30 May 1996 (Nairobi Convention);

based on their similarity to the instruments in global conventions, or those that explicitly mention the commitment of the global instruments, as this will demonstrate whether the source of the obligation to establish an MPA is a commitment in a global convention or other regional norms. Moreover, once the RSPs are separated to form a small group of similarity to the global instrument, in each section of the chapter, this will reflect the answers to the above-mentioned questions in this chapter.

The concept of an MPA was identified in Chapter 3 – Concept of a Marine Protected Area of this thesis, and it was founded that an MPA regime under the RSPs also contains a similar meaning to, and criteria of, an MPA. Again, it should also be noted that the term 'MPA' will be applied to the different terms mentioned in the regional instruments, for example the term Specially

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Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific, adopted 12 November 1981 entered into force 1986 (Lima Convention);
Convention for cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific, adopted 18 February 2002 (Antigua Convention);
Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment, adopted 14 February 1982, entered into force 20 August 1985 (Jeddah Convention);
Convention for the Protection of the Marine Environment of the North-East Atlantic, adopted 22 September 1992, entered into force on 25 March 1998 (OSPAR Convention);
Convention on the Protection of the Marine Environment of the Baltic Sea Area, adopted 9 April 1992, entered into force 17 January 2000, 1507 UNTS 167, (Helsinki Convention);
Framework Convention for the Protection of the Marine Environment of the Caspian Sea, adopted 4 November 2003, entered into force 12 August 2006 (Tehran Convention);
Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, adopted 24 March 1983, entered into force 11 October 1986 (Cartagena Convention);
Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, adopted 23 March 1981, entered into force 5 August 1984 (Abidjan Convention) ;
Antarctic Treaty, adopted 1 December 1959, entered into force 23 June 1961, 402 UNTS 71 (Antarctic Treaty);
Kuwait Regional Convention for Co-operation in the Protection of the Marine Environment from Pollution, adopted 24 April 1978, entered into force 1 July 1979, 1140 UNTS 154 (Kuwait Convention);
Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, adopted 24 November 1986, entered into force 22 August 1990 (Noumea Convention);
Action Plan for the Protection and Management of the Marine and Coastal Environment of the South Asian Seas Region , adopted 24 March 1995, entered into force February 1997 (SASAP 1995);
Action Plan for the Protection, Management and Development of the Marine and Coastal Environment of the Northwest Pacific Region, adopted September 1994, Seoul, Republic of Korea (NOWPAP 1994);
Action Plan for the Protection and Sustainable Development of the Marin Environment and Coastal Areas of the East Asian Region, adopted in April 1981, revised 1994, UNEP(OCA)/EAS IG5/6, Annex IV online access at <http://www.cobsea.org/documents/action_plan/ActionPlan1994.pdf> (EASAP 1994)

Protected Area used in some of the RSPs.[15] However, the different term will be regarded as an MPA if the concept of the specially protected area includes the three important elements of an MPA identified in Chapter 3 of this current research, as follows:

i) An area that encloses part of the marine environment and may also encompass areas of land, or wetlands;
ii) An area that needs a measure or plan for the conservation and/or protection of its environment and ecosystem;
iii) An area under the regulation that protects the marine environment from any activities within the area.[16]

Some of the RSPs have an MPA regime with an objective similar to some RSPs, which is to conserve and protect the significant value of the marine environment and its ecosystem. However, some RSPs contain a similar MPA provision in their instrument with the concept and criteria of an MPA provided in a global instrument, or they may not have developed, or agreed, to a regional instrument in this respect.

1.1 Concept and Characteristics of an MPA in RSPs that implement Global Conventions

Of the eleven RSPs in this group, the Black Sea and the Northwest Pacific do not refer to the agreed concept of an MPA or explicitly refer to the concept of an MPA used in global conventions. Although the Arctic, Baltic and South Asian RSPs have no formal written agreement on this matter, their soft-law agreements refer to the concept of an MPA in a global instrument.[17] Only the North-East Atlantic and the Antarctic have produced guidelines for

[15] Barcelona Convention (n 14), Article 10 ; Nairobi Convention (n 14), Article 11
[16] See Chapter 3, conclusion.
[17] A working group of the Arctic Council produced the Framework for a Pan-Arctic Network of Marine Protected Areas (April 2015), which refers to the development of an MPA and an MPA network by make a reference to the EBSAs term used in the CBD, the IUCN Guidelines and the PSSA, 12-16, online access at <https://pame.is/index.php/projects/marine-protected-areas> (PAME Framework of MPA 2015); Baltic refers to the commitment of the CBD and the IUCN guidelines in the HELCOM Recommendation 35/1, Adopted 1 April 2014, 1-3 online access at <http://www.helcom.fi/Recommendations/Rec%2035-1.pdf> (Helcom. Rec. 35/1); South Asian Seas refers to the MPCA of the CBD and the commitment of the CBD in the First Order Draft (Amended)- Based on the findings of Thematic Desk Review Reports and the Technical Consultative Workshop in Colombo, Version – 30th December 2014 , 26, 50 online access at <http://www.sacep.org/pdf/Reports-Technical/2015.01.15-First-Order-Draft-Marine-&-Coastal-Bio-diversity-Strategy.pdf>.

identifying an MPA,[18] including the criteria of an MPA, which will be elaborated on later.

The Mediterranean, Black Sea, Caspian, Red Sea and the Gulf of Aden and Eastern Africa apply an approach similar to the concept of an MPA.[19] The preamble of the treaties of these five regions refers to the Convention on Biological Diversity[20] (CBD). However, the Caspian and the Red Sea and the Gulf of Aden have adopted the definition of the Protected Area of the CBD in their protocols,[21] whilst the Mediterranean, Black Sea and Eastern Africa have not explicitly adopted it.

It seems that the definition of an MPA used in the CBD is accepted among these RSPs, as four of them mention this definition. Furthermore, tf the draft Strategic Action Plan for the Black Sea Biodiversity and Landscape Conservation Protocol to the Bucharest Convention of the Black Sea (BSBLCP)[22] is enforced, then a further RSPs will apply the CBD concept of an MPA at the regional level. In addition, the Mediterranean, Red Sea and the Gulf of Aden, North-east Atlantic and Antarctic have also developed a concept of an MPA, or particular protected area, in their regional instruments. The Baltic adopts the global concept of an MPA using the IUCN category of

[18] Guidelines for the Identification and Selection of Marine Protected Areas in the OSPAR Maritime Area (Reference number: 2003-17), online access at <https://www.ospar.org/convention/agreements/page9> ; Antarctic Treaty (n 14); Protocol on Environmental Protection to the Antarctic Treaty, adopted 4 October 1991, entered into force 14 January 30 ILM 1455 (1991) (Environmental Protocol), Annex V, Article 3, Guidelines for implementation of the Framework for Protected Areas, online access at <https://www.ats.aq/documents/recatt/Att081_e.pdf>.

[19] Barcelona Convention (n 14); Bucharest Convention (n 14); Tehran Convention (n 14); Jeddah Convention (n 14) ; and Nairobi Convention (n 14).

[20] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD).

[21] Protocol for the Conservation of Biological Diversity to the Framework Convention for the Protection of the Marine Environment of the Caspian, adopted 30 May 2014 (Ashgabat Protocol), Article 1 (a), (b), (j), (o)(q) and (t) ; Protocol Concerning the Conservation of Biological Diversity and the Establishment of Network of Protected Areas in the Red Sea and Gulf of Aden, adopted on 12 December 2005 (Jeddah Protocol).

[22] Black Sea Biodiversity and Landscape Conservation Protocol to the Convention on the Protection of the Black Sea against Pollution, adopted 14 June 2002, entered into force 20 June 2011 (BSBLCP) ; Strategic Action Plan for the Black Sea Biodiversity and Landscape Conservation Protocol (Draft) online access at <http://www.blacksea-commission.org/_od-draft-biodiversity-strategy.asp> (BSBLCP-SAP).

a protected area[23] and, as it works in close collaboration with the North-east Atlantic, it also refers to the MPA regime of the North-east Atlantic region.[24]

The characteristics of an MPA in the RSPs that have adopted the concept of an MPA, namely, the Mediterranean, Baltic, Black Sea, Caspian, Red Sea and the Gulf of Aden, will be examined firstly, followed by the characteristics of an MPA of the North-East Atlantic and the Antarctic.

1.1.1 Mediterranean

The Mediterranean neither provides a definition nor the criteria of a specially protected area, although the objective of a specially protected area is established in Article 4 of the SPA&Biodiversity Protocol.[25] In this regard, it should be noted that, although the term used in this protocol is 'specially protected area', it will be referred to as an MPA, since, as demonstrated below, it contains the essential element of an MPA as defined in the previous Chapter 3, which is that the purpose of the protected area is for the conservation of the marine environment as a whole:

> 'Article 4 Objectives
>
> The objective of specially protected areas is to safeguard:
>
> (a) representative types of coastal and marine ecosystems of adequate size to ensure their long-term viability and to maintain their biological diversity;
>
> (b) habitats which are in danger of disappearing in their natural area of distribution in the Mediterranean or which have a reduced natural area of distribution as a consequence of their regression or on account of their intrinsically restricted area;
>
> (c) habitats critical to the survival, reproduction and recovery of endangered, threatened or endemic species of flora or fauna;

[23] Helcom. Rec. 35/1 (n 17), p 4.
[24] Ibid., 2.
[25] Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, adopted 10 June 1995, 12 December 1999 (SPA&Biodiversity Protocol).

> (d) sites of particular importance because of their scientific, aesthetic, cultural or educational interest.'[26]

In addition, the Mediterranean has a provision that promotes regional cooperation, as will be highlighted later when discussing the Red Sea and Gulf of Aden region, which includes the provision of a specially protected area of Mediterranean Importance (SPAMI) that a member state can include as an MPA in the 'List of Specially Protected Areas of Mediterranean Importance' (SPAMI List).[27] The SPAMI list will include MPAs that contain a particular component of the region, being the first stage of the criteria of the SPAMI,[28] and this could be a way to strengthen the regional cooperation, as the Member States have to cooperate and share a similar standard of protection of the marine environment in order to select an area which should be listed.

> 'Article 8 Establishment of the List of Specially Protected Areas of Mediterranean Importance
>
> …
>
> 2. The SPAMI List may include sites which:
>
> - are of importance for conserving the components of biological diversity in the Mediterranean;
> - contain ecosystems specific to the Mediterranean area or the habitats of endangered species;
> - are of special interest at the scientific, aesthetic, cultural or educational level.'[29]

The Mediterranean provides the criteria of the SPAMI in its Annex. When the area to be selected as the SPAMI meets the regional value criteria of Article 8 of the SPA&Biodiversity Protocol, its uniqueness, natural representativeness, diversity, naturalness, presence of habitats and cultural representativeness will be evaluated.[30] It should be noted that the areas in the

[26] SPA&Biodiversity Protocol (n 25), Article 4.
[27] Ibid., Article 8.
[28] Ibid., Article 8(2).
[29] Ibid.
[30] Ibid., Annex I, Part B.

SPAMI list must have the legal status of long-term protection and, in cases where part or the whole of the MPA is situated in an area that other States are involved in, its protected status should be recognised by all of the parties concerned.[31] This element of the SPAMI highlights that an MPA in the Mediterranean may be established in the EEZ, or even in the high sea. However, the States concerned should acknowledge the legal status of the area for the protective measure to be applicable.[32] The Mediterranean, one of the prominent regions with regard to protection of the marine environment, is quite advanced in its level of implementation of an MPA regime, as they developed a systematic legal instrument for this process. This could be because the region is administered by the UNEP, which has produced many guidelines for the establishment and management of the Mediterranean MPA and has made them available through the UNEP website.[33]

1.1.2 Red Sea and the Gulf of Aden

The Jeddah Protocol applies the same definition of Protected Areas as that used in the CBD, which is 'geographically-defined coastal and marine areas that are designated or regulated and managed to achieve specific conservation objectives.'[34] However, prior to the conclusion of the Jeddah Protocol, the Red Sea and the Gulf of Aden adopted the Regional Master Management Plan for Marine Protected Areas (Master Plan), which includes the objectives of developing a regional network of MPAs consistent with the CBD.[35] The Master Plan refers to Article 8 of the CBD, which states that parties are required to 'establish a system of protected area(s)'[36] and develop guidelines for the selection, establishment and management of protected area(s).[37] However, the guidelines for the identification and selection of MPAs are adapted from the IUCN guidelines and the Australian and New Zealand Environment and Conservation Council Task Force on Marine Protected

[31] Ibid., Annex I, Part C.
[32] Ibid., Annex I, Part C.
[33] For more information please see http://www.rac-spa.org/publications.
[34] Jeddah Protocol (n 21), Article 2 (10), (11); See also CBD (n 20), Article 2.
[35] PERSGA/GEF. 2002. The Red Sea and Gulf of Aden Regional Network of Marine Protected Areas. Regional Master Plan. PERSGA Technical Series No.1. PERSGA, Jeddah., p 1 accessed online at <http://www.persga.org/Files//Common/MPA/3_MPAnetwork_MasterPlan.pdf.> (PERSGA Master Plan).
[36] CBD (n 20), Article 8 (a).
[37] Ibid., Article 8 (b).

Areas (ANZECC).[38] The criteria for identification are divided into two parts, with the first requiring potential MPAs to meet the criteria of Biodiversity Value, Representativeness, Ecological Importance, International, Regional or National Importance, Naturalness, Uniqueness, Productivity and Vulnerability,[39] and the second requiring the selection process to be based on Economic Value, Social and Cultural Interests, Scientific and Educational Interests and Practicality or Feasibility.[40]

In addition, the Jeddah Protocol, in Article 9, also specifies the establishment of a list of protected areas of importance by selecting a specially protected area of the region, which is referred to as the PERSGA PA. This article aims to broaden regional cooperation by nominating a protected area for inclusion in the 'List of Protected Areas of Importance to the PERSGA region'.[41] In this regard, the areas to be included in this list should represent the specific components of the biological diversity of the region, as detailed below.

> 'Article 9
>
> 2. The PERSGA PA List shall include sites which:
>
> (a) are of importance for conserving the components of biological diversity in the PERSGA region.
>
> (b) contain ecosystems specific to the PERSGA region or the habitats of threatened species.
>
> (c) are of special interest at scientific, aesthetic, cultural or educational levels, such as coral reefs and mangroves, or lakes, marshes and khors that are directly connected to the sea, as well as nursery grounds for shrimp and migratory fish.

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[38] PERSGA Master Plan (n 35), 82; See also ANZECC (Australian and New Zealand Environment and Conservation Council Task Force on Marine Protected Areas). 1999. Strategic Plan of Action for the National Representative System of Marine Protected Areas: A Guide for Action by Australian Governments. 80 pp. Canberra, Environment Australia.; see also G. Kelleher and R Kenchington, *Guidelines for Establishing Marine Protected Areas.* (A Marine Conservation and Development Report IUCN, Gland, Switzerland vii+ 79 pp, 1992) ; G. Kelleher, *Guidelines for Marine Protected Areas* (IUCN, Gland, Switzerland and Cambridge, UK, 1999).
[39] PERSGA Master Plan (n 35), 78-79.
[40] Ibid., 79-80.
[41] Jeddah Protocol (n 21), Article 9(1).

(d) include zones that help to promote sustainable fisheries, the conservation of biodiversity and/or the maintenance of ecosystem functioning.

(e) contribute to the regional network or system of protected areas.'[42]

In this regard, these areas should be evaluated based on the common criteria provided in Annex 3 of the Jeddah Protocol, namely Uniqueness, Natural Representativeness, Diversity, Naturalness, Presence of Habitats and Cultural Representativeness.[43] It could be said that the scope of the regional importance has been established in Article 9(2), but the common criteria are developed using a similar consideration similar to the criteria of an MPA in the Master Plan above.

1.1.3 The Black Sea RSP

The Black Sea provides the objectives with which Member States should comply with in the designation of an MPA.[44] However, the 'criteria/guidelines for identifying areas' based on Article 2 of the Annex of the BSBLCP have not yet been adopted. The objectives of an MPA as specified in Article 1 of the Annex of the BSBLCP are presented below.

'Article 1

1. The objective of protected areas is to safeguard:

a) representative types of coastal and marine ecosystems, wetlands and landscapes of adequate size to ensure their long-term viability and to maintain their unique biological and landscape diversity

b) habitats, biocoenoses, ecosystems or landscapes that are in danger of disappearing in their natural area of distribution or distraction in the Black Sea or that have a reduced natural area of distribution or aesthetic values

[42] Ibid., Article 9 (2).
[43] Ibid., Annex 3.
[44] BSBLCP (n 22), Annex I, Article 1.

> c) habitats critical to the survival, reproduction and recovery of threatened species of flora or fauna
>
> d) sites of particular importance because of their scientific, aesthetic, landscape, cultural or educational value.'[45]

Unlike the Mediterranean and the Red Sea and Gulf of Aden the regions above also adopt the regional list of MPAs, which may eventually show the shared concept and characteristics of an MPA and the region. Although an attempt to further implement this protocol can be seen in the BSBLCP-SAP,[46] in which the definition of a protected area is provided based on the CBD, this draft Strategic Action Plan has not yet been enforced.

1.1.4 Caspian RSP

The Ashgabat Protocol of the Caspian RSP applies the same definition of a protected area as the CBD, which is similar to the PERSGA Protocol.[47] In addition, the Ashgabat Protocol also imports many of the terms used in the CBD, including biodiversity, in-situ conservation, ex-situ conservation and genetic resources.[48] The contents of Article 9 of the Ashgabat Protocol regarding the establishment of an MPA are shown below.

> 'Article 9 Designation of Protected Areas
>
> 1. For the purpose of in-situ conservation and after ensuring that none of the other Contracting Parties objects, each Contracting Party may, for the purpose of this Protocol, designate protected areas in the marine environment and land affected by its proximity to the sea in accordance with the criteria contained in Annex II of this Protocol. Such protected areas may be designated with the objective of safeguarding:
>
> (a) Representative types of coastal and marine ecosystems of adequate size to ensure their long-term viability and to maintain their biological diversity;

[45] Ibid.
[46] BSBLCP-SAP (n 22).
[47] Ashgabat Protocol (n 21), Article 1(t).
[48] Ibid., Article 1 ; see also CBD (n 20), Article 2.

> (b) Habitats that are in danger of disappearing in their natural area of distribution and in the Scope of Application of this Protocol, including those that have a reduced natural area of distribution as a consequence of their regression or on account of their intrinsically-restricted area;
>
> (c) Habitats critical to the survival, reproduction and recovery of threatened or endemic species of flora and fauna;
>
> (d) Sites of particular importance because of their scientific, aesthetic, cultural or educational interest.'[49]

These objectives not only form the framework for establishing MPAs but also serve as the minimum criteria of an MPA that may be listed in the Protected Areas of the Caspian Sea (PACS List).[50] The procedure to establish the PACS list can be found in Article 11 and the common criteria of the PACS are provided in Annex II of the Protocol. The Caspian RSP applies an approach that is similar to that of the Mediterranean and the Red Sea and the Gulf of Aden to establish a list of regional MPAs. Once the proposed area meets the framework objectives specified in Article 9 above, it can be selected based on the common criteria of the PACS, being Global Significance, Regional Value, National Status, Uniqueness, National Representativeness, Biological Diversity, Manageable Anthropogenic Stressors, Manageable Natural Stressors, Availability of Adequate Baseline Data, Cultural Representativeness, Scientific, Educational and Aesthetic Values, and Civil Society Involvement.[51] These criteria form the standard of the characteristics shared by the Members of the RSP, which also shows that the region has agreed on a common understanding of the concept and characteristic of an MPA.

1.1.5 Eastern African (or West Indian Ocean RSP)[52]

Eastern Africa is different to the first four RSPs since it not only contains an obligation to establish an MPA in the main convention, the Nairobi

[49] Ibid., Article 9.
[50] Ibid., Article 11.
[51] Ibid., Annex II.
[52] The Amendment to the Nairobi Convention is made on 31 March 2010, which actually changed the reference to the region from Eastern Africa to Western Indian Ocean in the

Convention, but the region also adopts the Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region (Nairobi Convention Protocol)[53] to implement the obligation to establish an MPA. In terms of the concept and characteristics of the MPA, although it applies an approach similar to that of many of the above RSPs since it has not adopted the guidelines for the establishment of an MPA, the concept and characteristics of an MPA provided in Article 8 of the Protocol are more apparent than the other protocols mentioned above.

> 'Article 8 Establishment of Protected Areas
>
> 1. The Contracting Parties shall, where necessary, establish protected areas in areas under their jurisdiction with a view to safeguarding the natural resources of the Eastern African region and shall take all appropriate measures to protect those areas.
> 2. Such areas shall be established in order to safeguard:
>
> (a) The ecological and biological processes essential to the functioning of the Eastern African region;
>
> (b) Representative samples of all types of ecosystems of the Eastern African region;
>
> (c) Populations of the greatest possible number of species of fauna and flora that depend on these ecosystems;
>
> (d) Areas having a particular importance by reason of their scientific, aesthetic, cultural or educational purposes.
>
> 3. In establishing protected areas, the Contracting Parties shall take into account, inter alia, their importance as:

name of the regional sea convention, however, as the protocol to the convention is still referred to as the Eastern Africa and the thesis use the regions' instrument for the reference, therefore, the thesis will refer to this RSP as Eastern Africa. Online information in this matter can be accessed at <http://www.unep.org/nairobiconvention/amended-nairobi-convention-protection-management-and-development-marine-and-coastal-environment>.

[53] Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region, adopted 21 Jun 1985, entered into force 30 May 1996 (Nairobi Convention Protocol).

> (a) Natural habitats, and in particular as critical habitats for species of fauna and flora, especially those that are rare, threatened or endemic;
>
> (b) Migration routes or as wintering, staging, feeding or moulting sites for migratory species;
>
> (c) Areas necessary for the maintenance of stocks of economically-important marine species;
>
> (d) Reserves of genetic resources;
>
> (e) Rare or fragile ecosystems;
>
> (f) Areas of interest for scientific research and monitoring.'

It can be seen from the details of Article 8 above that the concept of an MPA appears in the first paragraph, while the characteristics of an area that could be established as a protected area are presented in the second and third paragraphs. Although Eastern Africa has not adopted any other guidelines of an MPA, the Managing Marine Protected Areas; A Toolkit for the Western Indian Ocean was published in partnership with the IUCN in 2004.[54] This document provides the definition of the MPA based on the IUCN, as well as the IUCN system that categorises protected areas.[55] Moreover, the region recognises a commitment in a global convention, the CBD, by describing the EBSAs in the region, as a result of the collaboration of the Nairobi Convention, CBD, FAO and UNEP.[56] The designation of Marine World heritage sites under the WHC is also considered, as it could contribute to the establishment of an MPA in the region.[57]

In addition, similar to the RSPs mentioned above, Eastern Africa includes a

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[54] Managing Marine Protected Areas; A Toolkit for the Western Indian Ocean, online access at <http://www.wiomsa.org/mpatoolkit/> (MPA toolkit).
[55] Ibid., 9.
[56] Report of the seventh Conference of Parties to the Convention for the Protection, Management and Development of the Marine and coastal Environment of the Western Indian Ocean (Nairobi Convention), UNEP(DEPI)/EAF/CP.7/, 31 October 2012, para 82 online accessed at <http://drustage.unep.org/nairobiconvention/sites/unep.org.nairobiconvention/files/report_for_cop7_revised_27032013.pdf> (COP 7 of Nairobi Convention).
[57] Ibid., para 83.

provision regarding regional cooperation to establish 'a regional programme to coordinate the selection, establishment and management of protected areas.. with a view to creating a representative network of protected areas…'[58] The difference is that the additional criteria for an MPA to be included in the regional list of MPAs are not mentioned in this RSP.

Comparison and Analysis

These five regions are quite similar to each other in that, although they do not specifically contain the concept and characteristics of an MPA, they attribute the same general objective to an MPA that gives member States more room to designate an MPA using their discretion. However, the Black Sea does not mention a regional list of MPAs unlike the provisions in the protocols of the Mediterranean, Red Sea and the Gulf of Aden, Caspian and Eastern Africa Region. Moreover, Eastern Africa provides more details of the characteristics of an MPA in the Protocol, but although the regional list of protected areas is mentioned, the common criteria for the regional protected areas as shown in the Mediterranean and the Red Sea and the Gulf of Aden, are not adopted in this RSP. Some of the common criteria for an MPA that can be listed in the regional list of MPAs are also similar to each other, except for the Caspian, which seems to provide more details of the common criteria than the criteria of the PERSGA PA and the SPAMI list of the Red Sea and the Gulf of Aden and the Mediterranean. As the similarity is evident above, this also indicates the development of a shared understanding of the concept of an MPA and characteristic of this region, in the sense that they focus on a similar objective of protection and conservation of the marine environment.

1.1.6 North-East Atlantic RSP

As mentioned in the first part of this chapter, the North-East Atlantic adopts a variety of recommendations regarding an MPA. A definition of an MPA is provided in the OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas as follows:

[58] Nairobi Convention Protocol (n 53), Article 16.

> 'an area within the maritime area for which protective, conservation, restorative or precautionary measures, consistent with international law have been instituted for the purpose of protecting and conserving species, habitats, ecosystems or ecological processes of the marine environment.'[59]

When comparing the above definition of an MPA with the global concept of an MPA provided in the updated IUCN definition of a protected area[60] or the MCPA under the CBD,[61] it can be seen to contain similar elements, such as that the area shall be protected by protective measures that can protect and conserve the marine environment, regardless of what is actually defined by global or regional instruments. Also, this recommendation is is line with the OSPAR Network of Marine Protected Areas as follows:

> 'those areas which have been and remain reported by a Contracting Party under paragraph 3.1, paragraph 3.2 or paragraph 3.4 below, together with any other area in the maritime area outside the jurisdiction of the Contracting Parties, which has been included as a component of the network by the OSPAR Commission.'[62]

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[59] OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas, OSPAR 03/17/1-E, Annex 9, adopted at the Meeting of the OSPAR Commission (OSPAR), Bremen, 23 - 27 June 2003, para 1.1, online access at <http://www.ospar.org/convention/agreements?q=&t=32283&a=7456&s=1> (Ospar Rec. 2003/3).

[60] Jon Day and others, *Guidelines for applying the IUCN Protected Area Management Categories to Marine Protected Areas* (Gland, Switzerland: IUCN, 2012), 56 (IUCN Guidelines 2012), 8; The IUCN Guidelines 2012 provides the definition of a Protected Area as 'A protected area with a clearly defined geographical space, recognised, dedicated and managed through legal or other effective means to achieve the long-term conservation of nature with associated ecosystem services and cultural values'

[61] COP VII/5. Marine and coastal biological diversity, adopted at the Conference of Parties to the Convention on Biological Diversity at its Seventh Meeting, UNEP/CBD/COP/DEC/VII/5, 13 April 2004, (Decision VII/5): Marine and coastal biological diversity of the CBD gives the definition of an MCPA as a 'marine and coastal protected area', which means 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 protection than its surroundings.'

[62] Ospar Rec. 2003/03 (n 59), para 1.1.

Even though the OSPAR Convention does not provide details of the regional cooperation in other regards, the fact that they are continuing to develop a recommendation in the details of how to identify and manage an MPA of the region acts as a statement that regional cooperation of this region is effectively provided. In order to complement the objective of an MPA and the MPA network in the Northeast Atlantic region, the North-East Atlantic also adopts the guidelines for identification of an MPA.[63] The Guidelines for the Identification and Selection of an MPA in the OSPAR Maritime Area agreed in 2003 (OSPAR Guideline for Identification) can be used for both a single MPA and an MPA that can be included in an MPA network, as shown below.

> '4. The components of the OSPAR Network individually and collectively, aim to:
>
> • protect, conserve and restore species, habitats and ecological processes which are adversely affected as a result of human activities;
> • prevent degradation of and damage to species, habitats and ecological processes, following the precautionary principle;
> • protect and conserve areas that best represent the range of species, habitats and ecological processes in the OSPAR maritime area.'[64] (emphasis added)

According to these guidelines, the designated area should first meet the Ecological criteria,[65] and the Practical criteria/considerations will be applied later. These ecological considerations are applied to an area that is subjected to one or more of the following conditions: 1. Contains threatened or declining species and habitats/biotopes; 2. Contains important species and habitats/biotopes; 3. Is of ecological significance;[66] 4. Has high natural

[63] Guidelines for the Identification and Selection of Marine Protected Areas in the OSPAR Maritime Area, Reference number: 2003-17, As amended by BDC 2007 (BDC 2007 Summary Record (BDC 07/12/1) § 3.43b), online access at <https://www.ospar.org/convention/agreements> (OSPAR Guideline for Identification).
[64] Ibid., 1.
[65] Ibid., Appendix I.
[66] Ibid., Appendix 2
'The Ecological significance refers to areas that have
•a high proportion of a habitat/biotope type or a biogeographic population of a species at any stage in its life cycle;

biological diversity; 5. Has representativity; 6. Has Sensitivity; and 7. Possesses Naturalness.'[67]

When the above Ecological criteria are satisfied, the Practical criteria will be considered. These criteria relate to the management of the protective measures within the MPA. They include the size, the possibility of being accepted politically, and the level of restoration to the natural state.[68] A chart showing the connection between the aims of the OSPAR network for an MPA and the ecological criteria of the proposed area is provided in Appendix 3 of the guidelines.[69] However, the practical criteria will not be examined here because the aim of this current research is to establish the characteristics of an MPA in the regional instrument, rather than analysing how it is managed.

1.1.7 Baltic RSP

The Baltic RSP adopted Recommendation 35/5, in which it is stated that it will 'apply the newest IUCN categorisation system when describing the HELCOM MPAs to allow for global comparisons of regional networks.'[70] However, HELCOM has also adopted guidelines for the identification of potential MPAs in the 'Planning and management of Baltic Sea Protected Areas: Guidelines and tools.'[71] These guidelines were published when the Baltic MPA was called the 'BSPA',[72] based on the HELCOM Recommendation 15/5 adopted in 1994 before it was superseded by HELCOM Recommendation 35/1, which was adopted in 2014 when the Baltic also stressed on a network of MPAs within the region by referring to them as the 'HELCOM MPA.'[73] The guidelines only provide a general

•important feeding, breeding, moulting, wintering or resting areas;
•important nursery, juvenile or spawning areas; or a high natural biological productivity of the species or features being represented.'

[67] Ibid., Appendix 1.
[68] Ibid., Appendix 2.
[69] Ibid., Appendix 3.
[70] Helcom. Rec. 35/1 (n 17), p 4.
[71] HELCOM 2006 Planning and management of Baltic Sea Protected Areas: guidelines and tools Balt. Sea Environ. Proc. No. 105, online access at <http://www.helcom.fi/Lists/Publications/BSEP105.pdf> (Baltic Guidelines of BSPA no. 105).
[72] Coastal and Marine Baltic Sea Protected Areas (BSPA), HELCOM Recommendation 15/5, adopted by the Baltic Marine Environment Protection Commission on 10 March 1994 online access at <http://www.helcom.fi/Recommendations/Rec%2015-5.pdf> (Helcom. Rec. 15/5).
[73] Helcom. Rec. 35/1(n 17).

understanding of an MPA using the IUCN definition and IUCN category,[74] but also outline the collaborative work of the North-East Atlantic with the OSPAR Convention concerning the Implementation of the Joint HELCOM/OSPAR Work Programme on Marine Protected areas.[75] This is the result of the Member States of the Baltic also being party to the EU and due to the fact that natural habitat regimes are covered by the EC Birds Directive[76] and the Habitat Directive,[77] which form the network of Natura 2000.[78] Moreover, the Baltic also stressing on a regional network of MPAs was also meant to strengthen the regional cooperation.[79] However, this does not change the concept of an MPA used in the Baltic, since there is no conflict between the IUCN definition and the definition of the North-East Atlantic. Although the conventional instrument does not provide the provision of an MPA, the Baltic have shown that they have developed a regime within the region, as well as establishing the cooperation with an adjacent region, being the North-East Atlantic, which expresses regional cooperation to establish an MPA.

1.1.8 Antarctic RSP

The Antarctic has two relevant MPA regimes, namely, the Environmental Protocol[80] and the CCAMLR.[81] According to the Environmental Protocol, any area in Antarctica may be designated as an Antarctic Specially Protected Area (ASPA) or an Antarctic Specially Managed Area (ASMA).[82] However, only ASPAs will be analysed in this current research, due to the fact that the concept of an ASPA provided in the Protocol below fits the purpose of protecting and conserving the marine environment, which is similar to the concept of an MPA in this current study. Furthermore, an ASMA focuses on

[74] Baltic Guidelines of BSPA no. 105 (n 71), 17-20.
[75] Helcom. Rec. 35/1(n 17),2 ; See also Ibid., 5-6.
[76] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds online access at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0147&from=EN>.
[77] European Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora online access at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992L0043&from=EN>.
[78] Baltic Guidelines of BSPA no. 105 (n 71), 8.
[79] Helcom. Rec. 35/1 (n 17), 1-2.
[80] Environmental Protocol (n 18).
[81] Convention on the Conservation of Antarctic Marine Living Resources, adopted 20 May 1980, entered into force 7 April 1982, 1329 UNTS 48 (CCAMLR).
[82] Environmental Protocol (n 17), Annex V, Article 2.

the management of the area, which may serve a purpose other than the conservation and protection of the environment.[83]

> 'Article 3 Antarctic Specially Protected Areas
>
> 1. Any area, including any marine area, may be designated as an Antarctic Specially Protected Area to protect outstanding environmental, scientific, historic, aesthetic or wilderness values, any combination of those values, or ongoing or planned scientific research….'[84]

Article 3 of the Annex further provides that an ASPA shall be subjected to a management plan[85] and a permit will be required to enter the ASPA,[86] which makes the protection measure more stringent. It should be noted that the commission of the CCAMLR can also propose an area to be designated as an ASPA,[87] hence making a connection to the CCAMLR, which also contains the provision for an MPA in the region. The CCAMLR adopts the general framework for the establishment of the CCAMLR Marine Protected Areas,[88] which seeks to implement Article IX.2(f) and 2(g) of the CCAMLR to set the objectives[89] of the CCAMLR MPA and also the eligible conservation measures.[90] In this regard, the general framework specifies that an MPA should be established 'on the basis of the best available scientific evidence'[91] to achieve the following objectives:

> '(i) the protection of representative examples of marine ecosystems, biodiversity and habitats at an appropriate scale to maintain their viability and integrity in the long term;
>
> (ii) the protection of key ecosystem processes, habitats and species, including populations and life-history stages;

[83] Ibid., Annex V, Article 4.
[84] Ibid., Annex V, Article 3.1.
[85] Ibid., Annex V, Articles 2 and 5.
[86] Ibid., Annex V, Articles 3.4 and 7.
[87] Ibid., Annex V, Article 7 ; see also Guidelines for the implementation of the Framework for Protected Areas set out in Annex V, Article 3 (n 18).
[88] General framework for the establishment of CCAMLR Marine Protected Areas (2011), online access at <https://www.ccamlr.org/sites/drupal.ccamlr.org/files//91-04.pdf>.
[89] Ibid., para 2.
[90] Ibid., para 3.
[91] Ibid., para 2.

> (iii) the establishment of scientific reference areas for monitoring natural variability and long-term change or for monitoring the effects of harvesting and other human activities on Antarctic marine living resources and on the ecosystems of which they form part;
>
> (iv) the protection of areas vulnerable to impact by human activities, including unique, rare or highly biodiverse habitats and features;
>
> (v) the protection of features critical to the function of local ecosystems;
>
> (vi) the protection of areas to maintain resilience or the ability to adapt to the effects of climate change.'[92]

These objectives, especially (i), (ii) and (iii), are not only similar to the objectives of an MPA of the other RSPs in this group,[93] but also serve as the criteria for the area that can be proposed as a CCAMLR MPA, while the objectives in (iv) and (v) can be seen as additional features when compared to other RSPs. The guidelines are adopted through regional cooperation, during which the common criteria are set and a shared understanding of how to select and establish an MPA is agreed. The CCAMLR guidelines go further by proposing eligible conservation measures, as well as suggestions for a plan to manage the MPA. However, these two aspects will not be examined here, as they are beyond the scope of this current research.

The criteria to establish an MPA in Antarctica are provided in the ASPA under the Environmental Protocol and the CCAMLR. The ASPA should be identified 'within a systematic environment', namely the framework criteria of the area to be selected as the ASPA, and as required in Article 3 of Annex V of the Environmental Protocol, as follows:

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[92] Ibid., para 2.

[93] See, for example the objectives of an MPA provided in SPA&Biodiversity Protocol (n 25), Article 4; Ashgabat Protocol (n 21), Article 9 ; and Nairobi Convention Protocol (n 53), Article 8(2).

> ‘(a) areas kept inviolate from human interference so that future comparisons may be possible with localities that have been affected by human activities;
>
> (b) representative examples of major terrestrial, including glacial and aquatic, ecosystems and marine ecosystems;
>
> (c) areas with important or unusual assemblages of species, including major colonies of breeding native birds or mammals;
>
> (d) the type of locality or only known habitat of any species;
>
> (e) areas of particular interest to ongoing or planned scientific research;
>
> (f) examples of outstanding geological, glaciological or geomorphological features;
>
> (g) areas of outstanding aesthetic and wilderness value;
>
> (h) sites or monuments of recognised historical value; and
>
> (i) such other areas as may be appropriate to protect the values set out in paragraph 1 above.’[94]

This set of criteria for establishing an ASPA can be seen to serve as the general scope of the area whose particular value needs to be protected. This is not so different to other regions, since the characteristics concern the typical value based on the representativeness of the ecosystems, the importance of natural habitat or species, scientific research and the outstanding feature of the area.[95] In addition, the Antarctic also adopts the Guidelines for the Implementation of the Framework for Protected Areas set out in Annex V of the Environmental Protocol (CCAMLR Guidelines for Implementation).[96] These guidelines provide the criteria for assessment of a potential MPA,

[94] Environmental Protocol (n 18), Annex V.
[95] See SPA&Biodiversity Protocol (n 25), Articles 4 and 8 ; The Action Plan of the Red Sea and the Gulf of Aden; BSBLCP (n 22), Article 1 ; Nairobi Convention Protocol (n 53), Article 8(2); and the OSPAR Guidelines for the Identification (n 63), Appendix 1.
[96] Guidelines for the implementation of the Framework for Protected Areas set out in Article 3, Annex V of the Environmental Protocol, Resolution 1 (2000) Annex, SATCM XII Final Report, online accessed at <https://www.ats.aq/documents/recatt/Att081_e.pdf> (CCAMLR Guidelines for Implementation).

which consist of the characteristics of the MPA, the feasible criteria related to the boundaries and the tools to manage the proposed MPA.[97] The assessment criteria begin with an assessment of the value of the area to satisfy the definition of the ASPA in Article 3(1) of Annex V of the Environmental Protocol, as mentioned in the previous part of the paper. The proposed area is considered based on its environmental, scientific, historic, aesthetic, wilderness value, or ongoing or planned scientific activities or a combination of these values.[98] Having justified the value of the area, identification of the type of area to be protected will be considered to fit the category of protection, or 'what is being protected.'[99]

The category of protection to be considered includes ecosystems, habitats, species, geological, glaciological or geomorphological features, and landscape and wilderness for historic, aesthetic and intrinsic reasons.[100] In this regard, the proposed area should be identified based on whether it is protected for scientific research or conservation.[101] Moreover, the Quality Criteria of the ASPA will also be considered based on its representativeness of the area, the diversity of species or habitats, its distinction from other areas, its ecological importance, the degree of interference and how the area will be used for scientific and monitoring purposes.[102] It could be said that the Guidelines for Identification provide a very detailed description of the characteristics of the area. When comparing the criteria of the MPA of the North-East Atlantic, its ecological criteria are similar to those of the ASPA, apart from the consideration of scientific research. This is because the Antarctic pays more attention to research, as the uniqueness of the area can contribute a great deal to ecological knowledge. In terms of other regions that provide detailed characteristics of an MPA, it could be said that the main feature of the characteristics centres on the representativeness of the area, the importance of the biological diversity of the species and the natural habitat of

[97] Ibid., Part II and Part III.
[98] CCAMLR Guidelines for Implementation (n 96), Table 1 ; see also Environmental Protocol (n 18), Annex V, Article 3 (2).
[99] Ibid., Table 2.
[100] Ibid.
[101] Ibid.
[102] Ibid., Table 3.

the area to be protected,[103] which is a shared the similar characteristic of other RSPs.

1.1.9 Arctic RSP

The Arctic refers to the IUCN definition of a protected area and the EBSA of the CBD. [104] Moreover, it has also developed a definition of the Pan-Arctic Marine Protected Area Network, as follows:

> 'An ecologically representative and well-connected collection of individual marine protected areas and other effective area-based conservation measures in the Arctic that operate cooperatively, at various spatial scales, and with a range of protection levels, in order to achieve the long-term conservation of the marine environment with associated ecosystem services and cultural values more effectively and comprehensively than individual sites could alone.'[105]

No further comment on the characteristics of an MPA is provided in the Arctic. However, as it refers to the global regime, it is assumed that the categorised system of the protected area of the IUCN will be applied, as well as the criteria of the EBSA of the CBD.

1.1.10 South Asian RSP

The South Asian RSP has not accepted the regional agreement in terms of the obligation to establish an MPA. However, its concept of an MPA includes a definition of the MCPA as well as the EBSA used in the CBD.[106] Therefore, it is assumed that it will develop its MPA using the existing mechanism of the

[103] See, for example, the objective of an MPA provided in SPA&Biodiversity Protocol (n 25), Article 4 ; Ashgabat Protocol (n 21), Article 9; and Nairobi Convention Protocol (n 53), Article 8(2).
[104] PAME Framework of the MPA (n 17), 11-13.
[105] Ibid., 12.
[106] Marine and Coastal Biodiversity Strategy for the South Asian Seas Region: Living in Harmony with our Oceans and Coast, P 51-54, accessed online at <http://www.sacep.org/pdf/Reports-Technical/2015.01.15-First-Order-Draft-Marine-&-Coastal-Bio-diversity-Strategy.pdf> .

CBD, which also provides guidelines and the criteria of both the MCPA[107] and the EBSAs,[108] which were discussed in Chapter 5.

1.1.11 North-west Pacific RSP

The North-west Pacific neither mentions the definition of an MPA[109] nor has agreed with the regional criteria of an MPA. However, the member States of the Northwest Pacific regional sea have implemented a national MPA, as well as designating the Ramsar site, and they provide a record of this in a regional database.[110]

As the Arctic, South Asian and North-west Pacific have not agreed on the conventional instruments, any regional cooperation made in the region is based on the voluntary basis. Although no conventional agreement has been developed, they still refer to implementing the MPA regime of the global instrument in the region, which could be an implication of the emergence of the customary norm in regional cooperation, as mentioned in Chapter 4 of this thesis.

Conclusion

The above RSPs apply a varied approach to their concept and criteria of an MPA. Some RSPs have accepted the subsequent agreement[111] in the form of a protocol that provides details of the concept, as well as the characteristics of an MPA, for example Eastern Africa or the Mediterranean, the Caspian, the Red Sea and the Gulf of Aden, provide details of the common criteria of MPAs to be regionally listed. However, some of them do not mention the criteria of a single MPA, emphasising more on the regional value of the MPA to be listed as a regional list of MPAs, which stresses an attempt to establisha shared norm on the concept and characteristics of an MPA. These common criteria have some similarities since they maintain that the purpose of an MPA

[107] Marine and Coastal Protected Areas (MCPAs) are developed by the Decision V/7 of COP 7 of the CBD, the details of which were provided in Chapter 3.
[108] Ecologically and Biologically Significant Marine Areas (EBSAs) are4 developed by Decision IX/20 of COP 9 the CBD, the details of which were provided in Chapter 3.
[109] Fourteenth Intergovernmental Meeting of the Northwest Pacific Action Plan, UNEP/NOWPAP IG. 14/11, Para 59, accessed online at <http://www.nowpap.org/data/IGM14%20report.pdf> .
[110] Summary of Marine and Coastal Protected Areas in the NOWPAP Region, online access at <http://dinrac.nowpap.org:8080/publications.php?item=Marine%20Protected%20Area%20(MPA)&var=topic&topic_code=i&topic=Marine%20Protected%20Area%20(MPA)>.
[111] VCLT (n 11), Article 31(3)(a).

is to protect, conserve or preserve the important habitats, species of fauna and flora, the diversity or the representativeness, uniqueness or rarity of the natural features of the area.[112]

In addition, some of the RSPs adopt a subsequent practice[113] in the form of recommendations and/or guidelines for the establishment of an MPA and provide details of their MPA, as shown in the North East Atlantic and the Antarctic. This practice provided in the guidelines has more details, as well as application of the criteria of the MPA, than agreements. This practice is also seen in the global and other regional agreements, in which details of the characteristics of the MPA may be limited by the formal process of adoption, and this is a reason to adopt the guidelines instead. These guidelines could be considered as soft-law based instruments that serve the purpose of interpreting the treaty in this regard[114] as a subsequent practice of the parties concerned, according to Article 31 (3)(b) of the VCLT.

It can be observed that, even when the MPA provisions of the RSPs can be seen to be similar, they may apply the term differently, as shown in the first five RSPs, namely, the Mediterranean, Red Sea and the Gulf of Aden, Black Sea, Caspian and Eastern Africa. Whilst these five RSPs have developed an objective of their MPA, only the Caspian and the Red Sea and the Gulf of Aden have provided a definition and they have done so by adopting the CBDs' definition of the protected area. Apart from the Black Sea, four of them have adopted the provision of the regional list of the MPA.

In addition, two regions, namely the North-East Atlantic and Antarctic, have developed a concept of an MPA, as well as providing details of the criteria of an MPA. Global instruments, as defined by the CBD and the IUCN, are often referred to by RSPs without a regional instrument to establish an MPA, as shown in the reference to the IUCN definition of a protected area by the Baltic RSP and the CBD concept of an MPA that is mentioned in the South Asian RSP. The IUCN guidelines also serve to provide a general understanding of

[112] SPA&Biodiversity Protocol (n 25), Annex ; Jeddah Protocol (n 21), Annex ; and Nairobi Convention Protocol (n 53), Annex.
[113] VCLT (n 11), Article 31(3)(b).
[114] Jürgen Friedrich, *International Environmental ''soft law'': The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Springer 2013), 144.

the categories of protected areas that work in parallel with the other regimes, as they are mentioned in the Northwest Pacific, the Arctic, the North-East Atlantic and the Baltic RSPs. Although the shared concept and characteristics of an MPA of these instruments vary in some details, the fundamental concept and characteristic are similar. Moreover, regional cooperation can be seen to be expressively developing in these regions, in that the process of forming an established practice on the MPA of the region is envisaged.

1.2 Concept and Characteristics of an MPA in RSPs that are similar to the Global Conventions

There are five RSPs in this group, namely the Wider Caribbean, Western Africa, the Pacific, the South-East Pacific and the North-East Pacific. Although the first three of these RSPs appear to reflect a similar pattern in terms of the source of the obligation to establish an MPA, their agreement with the concept and criteria of an MPA may differ in details, as they may place a different focus on the particular feature of the environmental stage of the region. However, some of them still have a concept similar to an MPA of this research, which will be examined later.

1.2.1 Wider Caribbean RSP

The main convention of the Wider Caribbean requires States to establish an MPA. It also adopts the Protocol Concerning Specially Protected Areas and Wildlife (SPAW Protocol)[115] to further implement the convention. The SPAW protocol simply defines the area to be protected, as stated in Article 4 of the SPAW protocol.[116] However, Article 4 does not provide a definite concept, but, rather, depicts the general concept of an MPA and provides some examples of an MPA, as shown below.

> 'Article 4 Establishment of Protected Areas
>
> 1. Each Party shall, when necessary, establish protected areas in areas over which it exercises sovereignty or sovereign rights or jurisdiction, with a view to sustaining the natural resources of the

[115] Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, adopted 18 January 1990, entered into force 18 June 2000 (SPAW Protocol).
[116] Ibid., Article 1.

> Wider Caribbean Region, and encouraging ecologically-sound and appropriate use, understanding and enjoyment of these areas, in accordance with the objectives and characteristics of each of them.
>
> 2. Such areas shall be established in order to conserve, maintain and restore, in particular:
>
> a) representative types of coastal and marine ecosystems of an adequate size to ensure their long-term viability and to maintain biological and genetic diversity;
>
> b) habitats and their associated ecosystems critical to the survival and recovery of endangered, threatened or endemic species of flora or fauna;
>
> c) the productivity of ecosystems and natural resources that provide economic or social benefits and upon which the welfare of local inhabitants is dependent; and
>
> d) areas of special biological, ecological, educational, scientific, historic, cultural, recreational, archaeological, aesthetic, or economic value, including, in particular, areas whose ecological and biological processes are essential to the functioning of the Wider Caribbean ecosystems.'[117]

The first paragraph of Article 4 provides the scope of the MPA and the second paragraph provides its characteristics. The SPAW Protocol contains not only a provision for a single protected area[118] but also a provision regarding regional cooperation in the establishment of a list of protected areas in the region.[119] In this regard, the Wider Caribbean adopted the guidelines and criteria of the list of MPAs in 2010.[120] This is similar to the establishment of the list of protected areas shown in the first group of RSPs that have implemented a global convention, namely the Mediterranean, the Red Sea

[117] Ibid., Article 4.
[118] Ibid.
[119] Ibid., Article 7.
[120] Guidelines and Criteria for the Evaluation of Protected Areas to be Listed under the SPAW Protocol, 2 November 2010, online access at <http://cep.unep.org/content/about-cep/spaw/development-of-guidelines-for-the-management-of-protected-areas-and-species/protected-areas/protected-area-guidelines> (Caribbean Guidelines for Evaluation).

and the Gulf of Aden, as well as the Caspian. The protected area to be listed according to Article 7 of the protocol should firstly satisfy the conditions of Article 4 before the Ecological and Cultural and Socio-Economic Criteria are considered.[121] Having satisfied the ecological criteria, the area should at least contain the Cultural and Socio-Economic criteria, where applicable.[122] The elements of the Ecological Criteria are Representativeness, Conservation Value, Rarity, Naturalness, Critical Habitats, Diversity, Connectivity/coherence and Resilience.[123] The Cultural and Socio-Economic Criteria are considered to be Productivity, Cultural and Traditional use and Socio-economic benefits.[124] These are the criteria of an MPA that could be included in a regional list. Although they are similar to the criteria provided in the SPAMI or PERSGA PA, an additional requirement is that the area should satisfy at least one cultural and socio-economic criterion, in addition to the ecological criteria, when the SPAMI or PERSGA include cultural criteria in the general features of the area.

1.2.2 Western Africa RSP

The Western Africa RSP has not adopted the protocol, but it decided to develop the protocol on marine protected areas at the ninth Conference of the Parties to the Abidjan Convention (COP 9).[125] Apart from the source of the obligation to establish a specially protected area in Article 11 of the Abidjan Convention, no further instrument regarding the implementation of an MPA has been adopted at this stage. The Western Africa RSP also neither provides the concept of an MPA nor guidelines for the establishment of an MPA. However, aworkshop was arranged for capacity building in describing EBSAs in which it was agreed in COP 11 Decision COP 11/9 to facilitate a description of ecologically or biologically significant marine areas (EBSAs)

[121] Ibid., para 11.
[122] Ibid., para 11.
[123] Ibid., para 12.
[124] Ibid., para 12.
[125] Decision CP. 9/12, Report of the ninth meeting of the Contracting Parties to the Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West, Central and Southern African Region, accessed online at <http://abidjanconvention.org/media/documents/cop9/K1171118%20-%20Report%20Abidjan%20Convention.pdf> ; See also paras 70 and 108.

in the region.[126] This indicates a possibility that Western Africa will adopt the concept of an MPA of the CBD.

1.2.3 Pacific RSP

The Noumea Convention has not provided details of implementing the protocol on the establishment of an MPA and the convention has not provided the regional concept or characteristics of an MPA. However, the parties have established a portal for information relating to the protected area, which shows that the MPA established by member States of the region applied the IUCN-categorised system of a protected area.[127] Nonetheless, the Pacific has taken many actions, or made strategic plans for a protected area that is not administered by the UNEP. This includes adoption of the Framework for Nature Conservation and Protected Areas in the Pacific Islands Region, which integrates the Aichi target of the CBD regarding the establishment of a protected area, including an MPA.[128] Having acknowledged the mechanism to establish an MPA provided by global instruments, the Pacific RSP implements its MPA regime without a regional concept and characteristics, and relies, rather, on the legal mechanisms of the global instruments. This indicates that the existing regional cooperation can be developed through the use of the mechanisms of the global instrument.

1.2.4 South-East Pacific RSP

Following the conclusion of the Lima Convention, the South-East Pacific adopted the Protocol for the Conservation and Management of Protected Marine and Coastal Areas of the South-East Pacific,[129] which does not contain a definition or the characteristics of an MPA. However, in 2006, the region

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[126] Decision – CP 11/9. Marine Areas of Ecological or Biological Significance (EBSAs), adopted at the Eleventh Meeting of Contracting Parties to the Convention for Cooperation in the Protection, Management and Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central and Southern Africa Region, Cape Town, South Africa, 17-21 March 2014, UNEP (DEPI)/WACAF/COP.11/9/Rev1 21 March 2014, 30

[127] The Pacific islands Portal of Protected area, available online at <http://pipap.sprep.org/content/About-Pacific-Islands-Protected-Area-Portal-PIPAP>.

[128] Purpose of the regional framework, Framework for nature and conservation of protected areas in the Pacific Islands region 2014-2020, Apia, Samoa: SPREP, 2014, 5 accessed online at <http://www.sprep.org/publications/framework-for-nature-conservation-and-protected-areas-in-the-pacific-islands-region-2014-2020>.

[129] Protocol for the conservation and management of protected marine and coastal area of the South-East Pacific, adopted 21 September 1989, entered into 24 January 1995 (Paipa Protocol).

adopted guidelines for the establishment of an MPA provided by the Ad-hoc Group of Experts on Marine and Coastal Protected Areas of the South Pacific (Grupo Ad-HOC AMP).[130] These guidelines contain details of the concept and criteria of an MPA that a member of the RSP applies, but they are only available in Spanish.[131] In addition, the Grupo Ad-HOC AMP further developed its regional network of coastal and marine protected areas of the South East Pacific with the support of the CBD and IUCN[132] in accordance with the Paipa protocol.[133] The objectives of the regional network of protected areas are as follows:

> '- To strengthen the management of marine and coastal protected areas.
>
> - To significantly increase the coverage of the marine and coastal protected areas by 2012. This network should be wide enough to contribute to the global goal to secure the health and productivity of the oceans.
>
> - To contribute to the global goal by establishing a representative network of MPAs based on scientific information and according to the international law by 2012.
>
> - To promote the exchange of experiences and information about the individual status of the protected areas included in the network in terms of their development and management.
>
> - To promote the development and strengthening of local, national and regional capacities for the management of the MPA.'[134]

Although the criteria of the MPA is not examined here, the regional network of protected areas shows that the record of the MPAs regulated by the

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[130] Guias, Directrices Y Principios Para El Establecimiento De Areas Costeras Y Marinas Protegidasen El Pacifico Sudeste, Documento actualizado durante la IV Reunión del Grupo Ad-hoc de Expertos sobre Áreas Marinas y Costeras Protegidas del Pacífico Sudeste. Guayaquil-Ecuador, 25 - 27 de agosto de 2004, y aprobado mediante la Decisión Nº 7 de la XIII Reunión de las Altas Partes Contratantes el 31 de agosto de 2006.
[131] Ibid.
[132] Regional Network of Coastal and Marine Protected Areas of the South East Pacific, para 2, accessed online at http://www.cpps-int.org/cpps-docs/pda/areas/docs/sep_eng.pdf.
[133] Ibid., para 3.
[134] Ibid.,, para 12 .

Member States in the region reflects the IUCN categorised system of protected areas,[135] which may imply that the region also refers to global instruments for identification of an MPA.

1.2.5 North-East Pacific RSP

Although the Antigua Convention provides the source of the obligation for States to establish an MPA in Articles 2 and 6,[136] the regional concept and characteristics of an MPA have not been developed further. There are no guidelines for the establishment of an MPA, but Article 10(2)(h) of the convention provides that the objective of the protected areas is 'maintaining biological integrity and diversity.'[137]

Conclusion

The Wider Caribbean and the South East Pacific provide more details on the concept and characteristics of an MPA than the other remaining RSPs in this group. The IUCN category system of protected areas is used in the Pacific region, as well as the South-East Pacific region with the difference being that the Pacific has not developed its guidelines. Nonetheless, the list of MPAs provided in the regional record is categorised according to the IUCN category of protected areas.[138] This reference to the global instrument may imply that the global norm is conducive to the establishment of an MPA at the regional level.

Of the five RSPs in this group, it is only the North-East Pacific region that does not provide the concept of an MPA in a regional instrument, nor does it refer to global instruments. The other RSPs are likely to apply the IUCN's concept of a protected area, as well as the categorised system that reflects the characteristics of an MPA based on the type of protected area, as mentioned in the publication regarding MPAs in the Pacific and South East Pacific. The concept of an MPA in the CBD is only referred to in Western Africa.

[135] Ibid., para 20.
[136] Details are available in section 2 of this chapter.
[137] Antigua Convention (n 14), Article 10 (h).
[138] The list of protected areas of the Pacific region, online accessed at <http://pipap.sprep.org/protected_area_search?field_pa_marine_value=2>.

1.3 Concept and Characteristics of an MPA in RSPs that are not similar to or do not implement a Global Convention

The RSPs in this group are the ROPME and the East Asian Sea, both of which do not have a regional MPA regime. Therefore, the concept or characteristics of an MPA may not be directly available in the regional instruments of these regions.

1.3.1 ROPME Sea Area RSP

The Kuwait convention does not contain a provision regarding an MPA, neither has it agreed to the protocol to implement the obligation. However, the Regional Profile[139] shows that there was an attempt to develop a Protocol Concerning the Conservation of Biological Diversity and the Establishment of Protected Areas in 2004, but it has not yet been developed further.[140]

1.3.2 East Asian RSP

Although the East Asian Sea has not developed the concept and characteristics of an MPA, it did adopt the Association of Southeast Asian Nations (ASEAN) Criteria for National Marine Protected Areas (ASEAN Criteria of MPA) in 2002 by cooperating with the ASEAN.[141] It should be noted that these criteria are the result of the coordinated work of the Coordinating Body on the Seas of East Asia (COBSEA) and the ASEAN, as most of the members of the East Asian Sea RSP are also members of the ASEAN.[142] The ASEAN criteria of an MPA are divided into five groups, namely Social, Economic, Ecological, Regional and Pragmatic Criteria,[143] each of which is considered based on different aspects. The Social criteria are considered based on social acceptance, public safety, recreation, culture,

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[139] The regional sea profile of ROPME Sea Area can be accessed online at <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=B55453F8801C96C6AB7A182EA7AF0D6D?doi=10.1.1.639.8031&rep=rep1&type=pdf> (ROPME Regional Profile).
[140] Ibid., 20.
[141] 2002 ASEAN Criteria for National Marine Protected Areas, Adopted by the Environment Ministers at the 7th Informal ASEAN Ministerial Meeting on the Environment in Vientiane, Laos on 20 November 2002 accessed online at <https://cil.nus.edu.sg/rp/pdf/2002%20ASEAN%20Criteria%20for%20National%20Marine%20Protected%20Areas-pdf.pdf> (ASEAN Criteria of MPA).
[142] UNEP, 2008. *New Strategic Direction for COBSEA (2008-2012).* COBSEA Secretariat, United Nations Environment Programme. 23 pages, 12, online accessed at <http://www.cobsea.org/documents/Meeting_Documents/19COBSEA/New%20Strategic%20Direction%20for%20COBSEA%202008-2012.pdf>.
[143] ASEAN Criteria of MPA (n 141).

aesthetics, conflicts of interest, accessibility, research, education and public awareness and conflict and compatibility,[144] while the Economic criteria are considered by the importance of economic species, the nature of threats and direct and indirect economic benefits.[145] The Ecological criteria considered are quite similar to the ecological criteria provided in RSPs in the Wider Caribbean and Eastern Africa region, namely diversity, naturalness, dependency, representativeness, uniqueness, integrity, productivity and vulnerability.[146] The regional criteria are considered based on transboundary implications and regional representativeness, in which the emphasis is on regional cooperation as the member of the region has to agree to the representativeness of the region. In this regard, it may be the case that the region will possibly develop an obligation to establish an MPA in the region. Lastly, the Pragmatic criteria are considered to be as urgency, size, degree of the threat, practicality, opportunism, availability and restorability.[147]

Conclusion

The concept of the MPAs found in RSPs tends to be very similar, or even tends to directly refer to the concept of an MPA found in global conventions. This is especially true of RSPs in the first and second groups above that are connected to global instruments. One observation of development of the concept of an MPA used in regional instruments is that, in cases where there is no clear objective or concept of an MPA, RSPs often refer to the IUCN concept or the protected area, as referred to by the Arctic, Baltic, Caspian, Eastern Africa and Pacific RSPs. The lack of a precise definition and criteria of an MPA, as seen in some of the regional instruments, for instance the Black Sea, the Mediterranean and the South-East Pacific, may negatively affect the forming of a regional MPA regime, because a State may develop its own MPA criteria, leading to inconsistency in the characteristics of the MPAs between States in the region.[148] However, the key principle of the concept of an MPA can still be gleaned from the relevant instruments.

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[144] Ibid., 1.
[145] Ibid., 2.
[146] Ibid., 3.
[147] Ibid., 3-4.
[148] Marjus J Kachel, *Particularly Sensitive Sea Areas The IMO's Role in Protecting Vulnulable Marine Protected Areas* (Springer 2008),128.

Among others, the North-East Atlantic and the Antarctic have a system for an MPA, in that they develop a more stringent regime than the other regions, although both of these regimes of an MPA do not conflict with those of global instruments. In fact, their concept of the area is similar to that of global instruments since it refers to the designated area that requires a measure of protection for the purpose of protecting or conserving the marine environment and the particular value of the marine area. This concept is the concept of an MPA employed in this current research, as mentioned in the previous chapter. Although there is no precise meaning or absolute definition of the concept of an MPA, the concept applied in regional instruments does not differ significantly from the concept of an MPA in global instruments.

However, some RSPs, such as the Arctic, Baltic and Eastern Africa, adopt global instruments that provide details of the concept and characteristics of an MPA. In addition, some RSPs have not yet developed their guidelines for the establishment of an MPA, but have, rather, categorised the protected area based on the IUCN guidelines, as shown in the cases of the Pacific and South East Pacific. Their references to the IUCN guidelines show how the IUCN guidelines, which are actually non-binding instruments, influence the implementation of an MPA regime at the regional level. This soft-law instrument often boosts the interpretation, as it can provide a detailed definition, or criteria, of the terms in international law.[149] Some of the RSPs that provide further details of the characteristics of an MPA in their recommendations or separate guidelines include the North-East Atlantic, Baltic, Arctic, South-east Pacific and East Asian Sea. In cases where RSPs have not adopted a respective instrument with regard to an MPA, they refer to the available guidelines provided by the IUCN. Moreover, soft-law based instruments, such as the IUCN guidelines or the decision of the COP, can be seen in the process of forming the customary international law.[150] It could be the case that the IUCN guidelines and other decisions made by the authority of the regional organisation collectively show the process of the emergence of the customary law in this matter.

[149]Friedrich (n 114), 171.
[150] Ibid, 144.

The characteristics of an MPA presented in this part are diverse and based on the RSPs. Nonetheless, a resemblance can be found in the criteria, as they are also linked to the criteria of an MPA provided in global instruments, due to the global criteria being mentioned in the regional instruments. Although only half of the RSPs provide an example of an MPA and/or the criteria of an MPA, this does indicate that there exist some common criteria of an MPA, which are utilised by the RSPs and are shown below. It should be acknowledged, however, that these criteria have been taken from the above RSPs that contain the criteria of an MPA.

Firstly, the RSPs adopte a similar format to the objective of an MPA, being to safeguard the following areas of importance:

i) Representative type of ecosystems;
ii) Biological Diversity ;
iii) Natural habitats that are under threat or the resource with which they are associated is an endangered species;
iv) Productivity of the ecosystems is important to the economy;
v) Areas with special features, including ecological, educational, scientific, cultural, historic and economic features.[151]

Secondly, in cases where the RSPs emphasise either the production of a regional list of MPAs or a network of MPAs, the regional value will also include those areas to be listed, in which the criteria are similar to the above common criteria with an emphasis on their importance to the regional features.[152]

Lastly, when the significant natural features of an area are identified, the practical criteria, which concern the possibility of the designated size of the area corresponding to the eligible protective measures or management plan of the MPA, will be identified by the authority of the RSP. This also portrays the trend that the regional organisation has some power to identify the MPA,

[151] SPA&Biodiversity Protocol (n 25), Article 5 Jeddah Protocol (n 21), Article 4 ; Ashgabat Protocol (n 21), Article 9 ; Nairobi Convention Protocol (n 53), Article 8 ; Ospar Recommendation 2003/3 (n 59) ; and Environmental Protocol (n 18), Annex V, Article 3.
[152] This may be limited to the Mediterranean, Red Sea and the Gulf of Aden, Caspian Sea, Eastern Africa, North-East Atlantic, Antarctic and the Wider Caribbean.

and this reflects the shared concept and understanding of an MPA in the regional level.

2. Source of rights and/or obligations to establish an MPA under Regional Instruments

It should reiterates again the meaning of the regional cooperation to establish an MPA of the research means 'the act or process that the governments of the countries within the region enter to establish MPAs.'[153] Because this meaning is inclusive of the agreement on the regional instruments that provide the source of rights or obligation of the State to establish an MPA under the regional instruments in this part. The discussion on the source of the rights and/or obligations of an MPA will be in accordance with the analysis of the first part, by separating the RSPs into groups that have provisions that are similar to global conventions for ease of reference. Some of the many RSPs mentioned above have accepted binding agreements that have specific regulations on the establishment of an MPA or some other similar regime. It should be noted that almost all of the RSP instruments explicitly specify the area of coverage within the regional seas convention or action plan of the member State, excluding internal water or archipelagic waters.[154] The Antarctic Region is an exception, due to it being an independent programme regulated by its treaty system and the specified area of coverage includes the ice-shelf area on the land of Antarctica.[155]

This current research aims to examine the obligation of the States in the regional cooperation to establish an MPA. This obligation was explored under global conventions in the previous chapters of the thesis. This part of the current chapter provides an examination to determine whether the regional instruments exhibit the implementation of global conventions' obligations, or whether the regional cooperation in the RSPs, with regard to the establishment of an MPA and protection of the marine environment, has its origin in a different customary international law. These considerations will

[153] See Chapter 4, section 2.
[154] Abidjan Convention (n 14), Article 1 ; Cartagena Convention (n 14), Articles 1 and 2; and Bucharest Convention (n 14), Article 1.
[155] Antarctic Treaty (n 14), Article 6.

be accumulated, in order to understand the legal status of the rights and/or obligation of States to establish MPAs. Because in some case, the region even going further beyond the explicit requirement of the global instruments by establishing the networks of MPAs,[156] through regional cooperation, in the area beyond national jurisdiction that the global conventions in this regard have not yet been able to reach to this result.[157]

The analysis will also involve the rule of treaty interpretations, as mentioned in Chapter 2 Legal Methodology, which will clarify the meaning and contribution of the RSPs' instrument to the norm of the rights and/or obligations to establish an MPA, noting the interpretation fo the treaty can show the shared understanding[158] of this norm in the regional level. Since this will entail elaboration of the treaty interpretation, whether the RSPs in each group fall under each paragraph of the rule of treaty interpretation specified in Article 31 of the VCLT will also be discussed. However, the VCLT cannot be applied if an RSP has no written agreement as a governing instrument, andonly agrees in the form of soft law. In this case, the interactional account approach can still be applied to complement the rule of treaty interpretation in order to comprehend all the evidence of the emerging trend of law in this regard. The interactional account will also be used to assess whether or not

[156] See, for example the Barcelona Convention (n14), the Jeddah Convention (n14).
[157] Julien Rochette and others, 'The regional approach to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction' (2014) 49 Marine Policy, 111; In 2010 the North-East Atlantic adopted 6 high sea MPAs namely, the Milne Seamount Complex MPA adopted by the OSPAR Decision 2010/1 on the establishment of the Milne Seamount Complex Marine Protected Area, the Charlie-Gibbs South MPA adopted by the OSPAR Decision 2010/2 on the Establishment of the Charlie Gibbs South Marine Protected Area, Altair Seamount High Seas MPA adopted by OSPAR Decision 2010/3 on the Establishment of the Altair Seamount High Seas Marine Protected Area, Anitaltair Seamount High Seas MPA adopted by OSPAR Decision 2010/4 on the Establishment of the Altair Seamount High Seas Marine Protected Area, Josephine Seamount High Seas MPA adopted by OSPAR Decision 2010/5 on the Establishment of the Josephine Seamount High Seas Marine Protected Area and the Mid-Atlantic Ridge North of the Azores High Seas MPA adopted by OSPAR Decision 2010/6 on the Establishment of the Mid Atlantic Ridge North of the Azores High Seas Marine Protected Area. In 2012 the Charlie-Gibbs North High Seas Marine Protected Area is also adopted by OSPAR Decision 2012/1 on the establishment of the Charlie-Gibbs North High Seas Marine Protected Area. Online available at <https://www.ospar.org/convention/agreements?q=&t=32282&a=7456&s=1>.
[158] Brunnée J, 'Sources of International Environmental Law: Interactional Law' in Besson S and Jean d'Aspremont J (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017), 966.

the customary international law can be envisaged from the interaction of the global and the regional norms.

The regional instruments will be examined in this part in groups based on their similarity to global conventions. The first group will consist of RSPs that show the commitment to establish an MPA based on global conventions, since they refer to a global convention in their instrument. The second group will consist of RSPs that exhibit some similarity to the provision of global conventions, with regard to protecting the marine environment or establishing an MPA. Finally, the third group will consist of RSPs that neither have similar provisions nor implement global conventions.

2.1 RSPs that exhibit implementation of a commitment from a global convention

The governing instruments of the first group of RSPs refer to the global conventions mentioned in Chapter 5 - Legal Mechanism to establish an MPA under Global Conventions. This group also includes RSPs that may only have soft-law based instruments, but, nevertheless, mention commitments from global conventions. These RSPs that have regional conventions are the Mediterranean, Red Sea and the Gulf of Aden, Black Sea, Caspian, Eastern Africa, North-east Atlantic, Baltic and Antarctic, and these will be discussed firstly within one group, as the clarity of their provision is somewhat similar. Then, the RSPs that have not agreed to a regional sea convention, but have an Action Plan or other instruments that mention a commitment from a global convention, will be analysed. These are the Arctic, South Asian and Northwest Pacific RSPs.

Mediterranean, Red Sea and the Gulf of Aden, Black Sea, Caspian and Eastern Africa (or Western Indian Ocean)[159] *RSPs*

The Mediterranean, Red Sea and the Gulf of Aden, Black Sea, Caspian and Eastern Africa or Western Indian Ocean RSPs each have a regional sea

[159] The Amended Nairobi Convention for the Protected, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean, adopted on March 31, 2010 changed the reference to the region from Eastern Africa to Western Indian Ocean. But some of the instruments of the region, including the Protocol Concerning Protected Areas

convention or relevant protocol concerning MPAs that refers to the commitment in the CBD.[160] Although the Caspian RSP does not refer to implementation of the CBD, the provision of the Ashgabat Protocol[161] includes many terms that are identical to those used in the CBD, for example the definition of the terms of use in Article 1 of the Protocol. This implies the significant aspect of the norm of the global instruments to the regional instrument and also shows that the global and the regional share a similar underlying statement regarding the establishment of an MPA.

These RSPs contain a provision that directly refers to the establishment of an MPA. The Mediterranean contains the provision in Article 3 of the SPA Protocol[162] and the Jeddah Protocol[163] of the Red Sea and the Gulf of Aden contains a similar provision in Article 4.[164] The Black Sea RSP's Biodiversity and Landscape Protocol[165] refers to the commitment in the CBD[166] and a similar general obligation to establish an MPA is provided in Article 4 of the Protocol,[167] which is also similar to Article 5 of the Ashgabat Protocol.[168] The

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and Wild Fauna and Flora in the Eastern African Region, still use the previous reference, which is Eastern Africa. This research, therefore, refers this RSP as Eastern Africa, according to its relevant protocol.

[160] SPA&Biodiversity Protocol (n 25), Preamble ; Jeddah Protocol (n 21), Preamble ; BSBLCP (n 22), Preamble; and Nairobi Convention (n 14), Preamble.

[161] Ashgabat Protocol of the Caspian Sea

[162] SPA&Biodiversity Protocol (n 25), Article 3

> '1. Each Party shall take the necessary measures to:
> (a) protect, preserve and manage in a sustainable and environmentally-sound way areas of particular natural or cultural value, notably by the establishment of specially protected areas;
> (b) protect, preserve and manage threatened or endangered species of flora and fauna…' (emphasis added).

[163] Jeddah Protocol (n 21).

[164] Ibid., Article 4

> 'Contracting Parties shall take all appropriate measures to:
> …
> 2) Protect, preserve and manage in an environmentally sound and sustainable manner areas that are unique, highly sensitive or regionally representative, notably by the establishment of protected areas;…' (emphasis added).

[165] BSBLCP (n 22).

[166] Ibid., Preamble.

[167] Ibid., Article 4

> '1. Each Contracting Party shall take all necessary measures to:
> a) protect, preserve, improve and manage in a sustainable and environmentally-sound way areas of particular biological or landscape value, notably by the establishment of protected areas according to the procedure in Annex 1;…' (emphasis added).

[168] Ashgabat Protocol (n 21), Article 5

Eastern Africa RSP contains the provision related to the establishment of an MPA in Article 11 of the Nairobi Convention,[169] as well as in Article 8[170] of the Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region.[171]

The MPA provisions of these five RSPs can be seen to be similar. These RSPs contain details of a similar obligation and demonstrate that the establishment of protected areas would be required to protect and preserve the marine environment for the particular value described. They set similar objectives for the protection, preservation and conservation of the specific marine area or habitat or species of fauna and flora in the protected area.[172]

When applying the rule of treaty interpretation in Article 31 of the VCLT to the relevant provisions of the above-mentioned RSPs, it is found that the meaning of these provisions is rather clear, ass they all require the state to establish the protected areas for the protection, conservation and preservation of the marine environment. The context of the protocols also outlines the objective of the establishment of a protocol with a further criterion of the

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'The implementation of this Protocol by the Contracting Parties shall be guided by their national legislation, taking into account Article 9, paragraph 1, Article 11, paragraph 2, and Article 30 of this Protocol. Within that context the Contracting Parties shall:

…

(d) Protect, preserve and restore areas that are unique, highly sensitive or regionally representative in an environmentally sound and sustainable manner, notably by the establishment of protected areas;…' (emphasis added).

[169] Nairobi Convention (n 14), Article 11

'1. The Contracting Parties shall, individually or jointly, take all appropriate measures to conserve biological diversity and protect and preserve rare or fragile ecosystems as well as rare, endangered or threatened species of fauna and flora and their habitat in the Convention Area.

2. The Contracting Parties shall, in the area under their jurisdiction, establish protected areas, such as parks and reserves, and shall regulate and, where required and subject to the rules of international law, prohibit any activity likely to have an adverse effect on the species, ecosystems or biological processes that such areas are established to protect.

3. The establishment of such areas shall not affect the rights of other Contracting Parties and third States and in particular other legitimate uses of the sea.' (emphasis added).

[170] Nairobi Convention Protocol (n 53), Article 8

…'1. The Contracting Parties shall, where necessary, establish protected areas in areas under their jurisdiction with a view to safeguarding the natural resources of the Eastern African region and shall take all appropriate measures to protect those areas…' (emphasis added).

[171] Nairobi Convention Protocol (n 53).

[172] SPA&Biodiversity Protocol (n 25), Article 3.1 ; Jeddah Protocol (n 21), Article 4 ; BSBLCP (n 22), Article 4.1 ; and Ashgabat Protocol (n 21), Article 9.1; and Nairobi Convention Protocol (n 53), Article 8.

designation of the protected area described in the protocol, which will be clarified in the next part.

It is interesting to note how the obligation to establish the protected area was generated in the form of RSPs' Protocol after the conclusion of global conventions and that they also replicate the guidance in global conventions that further implementation is needed. The protocol is obviously a subsequent agreement to the main regional sea convention of their RSPs' convention,[173] because the members of the main regional sea convention are also members of the protocol. In addition, they show the connection to the global conventions in the preamble and the area of application of these four protocols also includes coastal areas as well as wetlands, which re-enforces the importance of another global convention, anmely the Ramsar Convention.[174] The protocols could, therefore, be regarded as implementing commitments found in the CBD and Ramsarn Convention to protect the coastal and marine environment.[175]

North-east Atlantic RSP

The North-east Atlantic has a different form of convention from the above region. The North-East Atlantic RSP adopted the OSPAR Convention on the Protection and Conservation of the Ecosystem and Biological Diversity of the Maritime Area (OSPAR Convention) in 1992 as a regional convention and thereafter adopted a number of recommendations and decisions with regard to the establishment of an MPA. As a framework convention, the OSPAR does not contain a provision for the establishment of an MPA, although Article 2 (1)(a) General Obligations of the OSPAR Convention is cited as being the basis of subsequent instruments related to establishing an MPA:

> 'The Contracting Parties shall, in accordance with the provisions of the Convention, take all possible steps to prevent and eliminate pollution and shall take the necessary measures to protect the maritime area against the adverse

[173] VCLT (n 11), Article 31(3); see also Richard Gardiner, *Treaty Interpretation* (OUP 2008), 216-220.
[174] Jeddah Protocol (n 21), Article 3 ; Ashgabat Protocol (n 21), Article 3; BSBLCP (n 22), Article 3; and SPA&Biodiversity Protocol (n 25), Article 2.
[175] R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3 edn. Jursi Publishing 1999), 392-394.

> effects of human activities so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been adversely affected.'[176]

Although only the decisions of the OSPAR commission are binding,[177] various recommendations adopted by the commission influence decisions of the Member States, and the key recommendation in this respect is the OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas (OSPAR Rec. 2003/3). This recommendation reiterates the general obligations in Article 2 (1) as well as Annex V of the OSPAR Convention. The OSPAR Rec. 2003/3 sets out the definition, purpose and scope, as well as the management, of the OSPAR MPA. With this system, the region not only adopts the Recommendation on a Network of MPAs[178] but also many decisions regarding the establishment of the MPA.[179] As mentioned above in the first section of this chapter, the North-East Atlantic RSP also adopts the OSPAR Guidelines for Identification, which provides the criteria of the MPA and the OSPAR network of MPAs.[180]

Unlike the first four RSPs, the OSPAR Convention of the North-east Atlantic refers to many global conventions in its preamble, including the CBD, the UNCLOS, and the Stockholm Declaration. In addition, they adopt some of the definitions used in the CBD to the OSPAR Convention.[181] One observation of the direct reference to the UNCLOS is that the OSPAR Convention refers to the requirement of global and regional cooperation contained in Article 197 of the UNCLOS,[182] which is a very explicit connection to further implementation of this global convention.

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[176] OSPAR Convention (n 14), Article 2.
[177] Ibid., Article 13.
[178] OSPAR Rec. 2003/3 (n 59).
[179] OSPAR Decision 2010/2 on the establishment of the Charlie-Gibbs South Marine Protected Area, OSPAR 10/23/1-E, Annex 36; see also OSPAR Decision 2010/1 on the Establishment of the Milne Seamount Complex Marine Protected Area, OSPAR 10/23/1-E, Annex 34.
[180] See section 1.1 of the chapter.
[181] OSPAR Convention (n 14), Annex V refers to the definition used in the CBD.
[182] Ibid., Preamble.

Baltic RSP

The Baltic region adopted the Helsinki Convention[183] as its primary regional instrument. This convention contains details of the control of pollution from different sources, for example from harmful substances in Article 5, land-based sources in Article 6, ships in Article 8, aircraft in Article 9, incineration in Article 10, dumping in Article 11 and seabed activities in Article 12. Although the Baltic does not have a subsequent protocol or agreement regarding MPAs, it has subsequent mechanisms regarding the implementation of the MPA in the form of an Action Plan, which contains the protected area regime, as well as some recommendations. The HELCOM adopted recommendation 15/5 regarding the System of Coastal and Marine Baltic Sea Protected Areas (BSPAs),[184] which was superseded by the HELCOM recommendation 35/1 regarding the System of Coastal and Marine Baltic Sea Protected Areas (HELCOM MPAs) in 2014.[185] The HELCOM recommendation 35/1 was developed for the implementation of Article 15 of the Helsinki Convention and reads as follows:

> 'The Contracting Parties shall individually and jointly take all appropriate measures with respect to the Baltic Sea Area and its coastal ecosystems influenced by the Baltic Sea to conserve natural habitats and biological diversity and to protect ecological processes. Such measures shall also be taken in order to ensure the sustainable use of the natural resources within the Baltic Sea Area. To this end, the Contracting Parties shall aim to adopt subsequent instruments containing appropriate guidelines and criteria.'

Moreover, the designation of many protected area regimes, as the Baltic Sea Protected Areas (BSPAs), by 2010 is mentioned in the Baltic Action Plan 2007. These include Marine Natura 2000 and Emerald sites.[186] The Aichi Biodiversity Target to increase the marine and coastal protected areas agreed

[183] Helsinki Convention (n 14).
[184] Helcom. Rec. 15/5 (n 72).
[185] Helcom. Rec. 35/1 (n 17).
[186] Baltic Action Plan 2007, p 19 online access at <http://www.helcom.fi/Documents/Baltic%20sea%20action%20plan/BSAP_Final.pdf>.

in Decision X/2 at COP 10[187] of the CBD conference is also recognised.[188] Although the Baltic RSP does not subscribe to a form of agreement or protocol regarding the MPA regime, it developed mechanisms for the implementation of the MPA in the form of recommendations based on Article 15 of the Helsinki Convention, and it also reiterates the commitment of the CBD to a global target. However, when it comes to the concept of an MPA, the Baltic refers back to the definition provided by the IUCN Guidelines.[189] The North-east Atlantic and Baltic RSPs use a similar approach in their compliance of the global commitment in the development of their regional mechanisms to implement an MPA regime.

Antarctic RSP

The Antarctic is different, due to there being a number of regional conventions and agreements associated with the Antarctic Treaty System.[190] The agreements for the establishment of an MPA are the Environment Protocol [191] and the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR).[192] It should be noted that the Antarctic treaty system is open for all States to become members if they are members of the United Nations or are invited by all of the member States at the meeting of the treaty.[193] This means the Antarctic not only aims for regional cooperation but also universal cooperation to protect and conserve the marine environment of the region.

Article 2 of the Environment Protocol designates 'Antarctica as a natural reserve, devoted to peace and science.'[194] This means that the entire Antarctica is designated as a nature reserve by the protocol, in which certain

[187] Decision adopted by the Conference of the parties to the Convention on Biological Diversity at it Tenth Meeting, UNEP/CBD/COP/DEC/X/2, 29 October 2010, Annex of the COP X/2, p 9 online access at <https://www.cbd.int/doc/decisions/cop-10/cop-10-dec-02-en.pdf> (Decisin X/2).
[188] Helcom. Rec. 35/1 (n 17), p 1.
[189] Helsinki Commission, Baltic Sea Environment Proceedings No. 105, Planing and Management of Baltic Sea Protected Areas: Guidelines and tools 2007, 17, this guidelines is referred to in Helcom. Rec. 35/1, 3 online access at <http://www.helcom.fi/Lists/Publications/BSEP105.pdf> (access 9 September 2017).
[190] Antarctic Treaty (n 14); Environmental Protocol (n 18) ; CCAMLR (n 81).
[191] Environmental Protocol (n 18).
[192] CCAMLR (n 81).
[193] Antarctic Treaty (n 14), Article IX.
[194] Environmental Protocol (n 18), Article 2.

activities are prohibited, particularly those related to mineral resources.[195] Although it is claimed that the protocol was created to prohibit the extraction of mineral resources within the Antarctic, as reflected in Article 7 of the Environmental Protocol, it also contains environmental principles and environmental protection measures.[196] Annex V of the protocol is devoted to Area Protection and Management, which entails designation of the Antarctic Specially Protected Areas (ASPA) and/or Antarctic Specially Managed Area (ASMA), which include any marine area that may be protected under this regime.[197] In the Antarctic Specially Protected Areas 'activities shall be prohibited, restricted or managed in accordance with Management Plans'.[198] The purpose of these areas, which may include the marine area in the Antarctic, is 'to protect outstanding environmental, scientific, historic, aesthetic or wilderness values, any combination of those values, or ongoing or planned scientific research.'[199] The detailed regulations in the annexes to the Environmental Protocol, including the concept of the Antarctic Specially Protected Area, thus resemble the concept of an MPA,[200] as mentioned in Chapter 3 of this thesis.

The CCAMLR was adopted in response to Article 9(1)(f) of the Antarctic treaty with regard to the preservation and conservation of the living resources in the Antarctic.[201] Although the main objective of the CCAMLR is 'the conservation of Antarctic marine living resources' in general,[202] at the time it was concluded its aim was to conserve krill.[203] Hence, it is also acknowledged as a fisheries management agreement that complies with the FSA of the UNCLOS.[204] However, the implementation of the CCAMLR not only fulfils

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[195] Ibid., Article 7.
[196] Alan D. Hemmings, Donald R. Rothwell and Karen N. Scott, *Antarctic Security in the Twenty-First Century: Legal and policy perspectives* (Routledge 2012), 43
[197] Environmental Protocol (n 18), Annex V, Article 2.
[198] Ibid., Article 3.
[199] Ibid., Article 3.1.
[200] The concept of an MPA mentioned in chapter 3 is as follows;
i) An area that encloses part of the marine environment and may also encompass areas of land, or wetlands;
ii) An area that needs a measure or plan for the conservation and/or protection of its environment and ecosystem;
iii) An area under the regulation that covers all the activities within the area, and is not just focused on one particular activity.
[201] CCAMLR (n 81), Preamble.
[202] Ibid., Article 2.
[203] Hemmings, Rothwell and Scott (n 196), 222.
[204] Ibid.

the purpose of managing the regional fisheries but goes beyond the traditional regional fisheries organisation to conserve the marine living resources,[205] not merely commercial fish.[206] This convention also mentions the conservation measures, including the designation of the opening and closing of areas for scientific study and conservation in Article 9(2)(g). It is undeniable that this measure has a positive effect on the protection of the marine environment of the Antarctic.

The Antarctic treaty system may contain a form of agreement that differs to the RSPs initiated by the UNEP, but its objectives and purposes are similar to those of global conventions, and regarding the CCAMLR, that also resembles the principle of the conservation of the marine living resource in the EEZ of the UNCLOS as discussed in Chapter 5, section 2.1.

One of the global conventions is either directly or indirectly mentioned in the preamble of relevant instruments from each of the first seven RSPs above, [207] which implies a commitment to establish the regional cooperation in the protection of the marine environment. The main regional convention was first applied as a framework to regulate matters related to the marine environment, and they subsequently adopted instruments that provided a legal mechanism to establish a protected area in the protocol or other instruments.

However, some RSPs have not yet agreed to the regional sea convention, but have developed an Action Plan or other soft-law based instrument for the implementation of the MPA regime. These are the Arctic, Northwest Pacific and South Asian Seas. Among these three RSPs, the Arctic region has an independent programme. Although it has not adopted the Action Plan generated by the UNEP, it has developed a Strategic Plan based on the marine policy in the region.

Arctic RSP

As mentioned earlier, the Arctic does not have an Action Plan or other binding instruments regarding the establishment of an MPA. Nonetheless, it has

[205] CCAMLR (n 81), Article 2.3.
[206] Hemmings, Rothwell and Scott (n 196), 222.
[207] Jeddah Protocol (n 21), Preamble ; and Ashgabat Protocol (n 21), Preamble; BSBLCP (n 22), Preamble ; and SPA&Biodiversity Protocol, Preamble.

regional authority in the form of the Arctic Council,[208] which was established to enhance the cooperation among the Arctic States in terms of 'particular issues of sustainable development and environmental protection in the Arctic'.[209] The Arctic Council is composed of six working groups, but the two working groups related to the protection of the marine environment are the focus of this section. One is the Protection of the Arctic Marine Environment Working Group (PAME) and the other is the Conservation of Arctic Flora and Fauna Working Group (CAFF).[210]

The CAFF, which is the working group for the conservation of flora and fauna, also published the Arctic Biodiversity Assessment: Report for Policy-Makers[211] (ABA) in 2013, in which the status of Arctic Biodiversity is identified, and some recommendations are provided. The importance of 'the protection of large areas of ecologically-important marine, terrestrial and freshwater habitats' is emphasised in Recommendation 5,[212] which also mentions the existing mechanisms regarding the identification of important marine areas in both national and international regimes. The publication of the CAFF, entitled Actions for Arctic Biodiversity,[213] contains an action plan for implementing the recommendations in the ABA report. The action plan also refers to the implementation of Recommendation 5 on the 'safeguarding of critical areas'.[214] It contains an illustration of a clear timeline for the implementation and relevant organisation. With regard to the identification of Arctic areas that are important ecologically or biologically, it refers to the work of the PAME, which provides the Framework for a Pan-Arctic Network

[208] The Artic Council is established in 1996 and comprises Canada, the Kingdom of Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden and the United States; see further details in the Declaration on the Establishment of the Arctic Council, Ottawa 19 September 1996 (Ottawa Declaration).
[209] Ottawa Declaration (n 208), Article 1(a).
[210] <http://www.arctic-council.org/index.php/en/about-us>; see also Declaration on the Establishment of the Arctic Council (n 208), Article 1(b).
[211] Conservation of Arctic Flora and Fauna (CAFF). 2013. Arctic Biodiversity Assessment: Report for Policy Makers 2013. CAFF, Akureyri, Iceland. Online accessed at <https://www.caff.is/assessment-series/arctic-biodiversity-assessment/229-arctic-biodiversity-assessment-2013-report-for-policy-makers-english> (accessed June 2018) (CAFF Report for Policy Makers 2013)
[212] Ibid. 19.
[213] Actions for Arctic Biodiversity, 2013-2021: Implementing the recommendations of the Arctic Biodiversity Assessment. Conservation of Arctic Flora and Fauna, Akureyri, Iceland. Online accessed at <https://www.caff.is/administrative-series/293-actions-for-arctic-biodiversity-2013-2021-implementing-the-recommendations-of-th> (accessed June 2018) (Actions for Arctic Biodiversity)
[214] Ibid., 14.

of Marine Protect Areas.[215] The PAME published the Framework for a Pan-Arctic Network of Marine Protected Areas in April 2015 in an attempt to develop a network of MPAs within the Arctic region.[216] Although this is not a binding instrument,[217] it provides member States with guidelines of the goal and objectives for the development of an MPA within their jurisdiction, which is the first step in the creation of an MPA network in the Arctic. This Framework reiterates the existing international mechanisms that refer to the definition of an MPA as well as the criteria of an MPA using the IUCN system.[218] Not only is the IUCN definition of an MPA mentioned, but the criteria of EBSAs under the CBD[219] and PSSAs under the IMO[220] are also identified in the framework.[221] Although there are many references to the MPA-related regimes of global instruments, these concepts and characterised systems share a shared understanding of the protection of a particular area, which is the core concept of an MPA. The existence of a reference to the term and criteria of an MPA in global mechanisms or to an area management regime in the Arctic highlights the critical role of global mechanisms in the establishment of an MPA at the regional level.

South Asian RSP

The Action Plan for the Protection and Management of the Marine and Coastal Environment of the South Asian Seas was adopted in 1995. The clear objective of the plan was 'to protect and manage the marine environment and related coastal ecosystems of the region' and 'include the promotion of sustainable development and sound management of regional marine and coastal resources.'[222] The plan of the South Asian region is streamlined from environmental assessment, environmental management and environmental legislation to institutional and financial arrangements and supportive measures. Although the regional MPA regime has not been adopted, Decision No. 11 on South Asia's Biodiversity Beyond 2010 stresses the

[215] Ibid., 22.
[216] PAME Framework of MPA 2015 (n 17), 5.
[217] Ibid.
[218] Ibid., 11-12.
[219] Ecologically or Biologically Significant Areas, details of which are provided in Chapter 5, section 2.2.
[220] Particularly Sensitive Sea Areas, details of which are provided in Chapter 5, Section 2.3.
[221] PAME Framework of MPA 2015 (n 17), 13-16.
[222] SASAP 1995 (n 14), Para 5.

commitment of the CBD adopted at the Conference of the Parties to the CBD at COP 10.[223] The details of the Strategic Plan 2011-2020 adopted at the CBD also include reference to the Aichi Targets, which aim to increase the number of MPAs around the world.[224] This illustrates that, although lacking its regional instrument, the implementation of the South Asian MPA was facilitated by the application of the existing global mechanisms for the establishment of an MPA. Such an application depicts the trend of the norm created at the global instrument toward the regional instrument as the shared understanding and the criteria of legality used in the region are of the global instrument.

North-west Pacific RSP

The objectives of the North-west Pacific Action Plan adopted in 1994 (NOWPAP) consist of the following five main elements:

> ‘- Monitoring and assessment of the environmental conditions
> - Creation of an efficient and effective information base
> - Integrated coastal area planning
> - Integrated coastal area management
> - Establishment of a collaborative and cooperative framework’[225]

The first two objectives focus on the assessment and collection of regional environmental data for further decisions,[226] while the remaining three are related to the environment, as follows:

> ‘iii) To develop and adopt a harmonious approach toward coastal and marine environmental planning on an integrated basis and in a pre-emptive, predictive and precautionary manner;

[223] Report of the 12th Meeting of the Governing Council of South Asia Co-operative Environment Programme 1 – 3, November 2010, Colombo, Sri Lanka, p 1.
[224] Target 11 of the Aichi Target, available online at <https://www.cbd.int/sp/targets/>.
[225] NOWPAP 1994 (n 14), para 12 online access at <http://www.nowpap.org/data/ACTION%20PLAN.pdf.>.
[226] Ibid., para 13.

> iv) To develop and adopt a harmonious approach toward the integrated management of the coastal and marine environment and its resources, in a manner that combines protection, restoration, conservation and sustainable use; and
>
> v) To develop and adopt a regional framework for collaboration in the management of contiguous bodies of water and cooperation in the protection of common resources as well as in the prevention of coastal and marine pollution:'[227]

The South Asian and Northwest Pacific RSPs have quite similar objectives in terms of the protection and management of the marine and coastal environment, which incorporate the sustainable use of resources for future generations of the region, as mentioned above. The programme or activities regarding the marine environment also covers the management of the marine zone for the purpose of conserving the marine resources and environment. For example, integrated coastal environmental management plans for a particular area to prevent environmental degradation are mentioned in the environmental management of the South Asian Sea Action Plan[228] and 'cooperation in the establishment of the national protected coastal and marine habitats and in the establishment of a regional network of protected area'.[229] The North-west Pacific also especially mentions the zoning of selected special areas of the coast and the seabed of marine parks and natural reserves,[230] zoning of the marine area for specific purposes and controlling the discharge and other input into the water.[231] Although the specific binding instrument in relation to the establishment of the MPA is not well established in the Action Plans of these RSPs, the plans contain a framework that can be used to establish MPAs in order to fulfil the plans' objectives. Member States are also entitled to develop and establish MPAs because, as mentioned in Chapter 3, MPAs may have various purposes and objectives. For example,

[227] Ibid., Objective iii), iv) and v), para 13.
[228] SASAP 1995 (n 14), para 10.7.
[229] Ibid., para 10.12.
[230] Ibid., Activities and Task of Action Plan, para 20 e).
[231] Ibid., para 21 b).

they can be implemented to prevent environmental degradation or act as a nature reserve that contributes to the conservation of biodiversity. Lacking the regional instruments does not mean that the implementation of an MPA cannot succeed, as the common concept of an MPA and its right and obligations to establish an MPA of the global instrument can be applied.

Conclusion

The implementation of commitments from global conventions in the above RSPs may not be visible in the sense that the specific provision of the individual conventions mentioned in Chapter 5 is not directly referred to. However, the above details of regional obligations show a comprehensive idea that follows through the commitment under global conventions, especially from the UNCLOS and the CBD, and that accompanies the RSPs' intention to protect and conserve the marine environment by the establishment of an MPA into their instrument. These messages from the instrument of the RSPs presented above clarify that the norm for the establishment of an MPA not only arises from a global instrument, but is also received at the regional level. This highlights the shared understanding of the establishment of an MPA, with the aim of protecting or conserving a particular or special feature of the marine environment in each region. Thus, it could be said that one element, at least, of an obligation according to the interactional international law[232] is satisfying.

2.2 RSPs that are similar to a global convention

This group relates to the RSPs that contain provisions in the relevant regional instruments that are similar to the mechanism for the establishment of an MPA in a global convention. The RSPs in this group comprise of the Caribbean, Western Africa, Pacific, Southeast Pacific and Northeast Pacific. The provisions in the relevant regional instrument are similar to those in global instruments, in the sense that the choice of words used in the global convention is presented in the regional instrument of these RSPs, but the crucial difference between this group and the preceding group is that the global commitment of the global instrument is not explicitly mentioned.

[232] See Chapter 2, section 3.

However, the provision related to the establishment of an MPA of these regional instruments and the global convention can be seen to be similar. The provisions related to the establishment of an MPA in three of them have a very similar format, and this format is also extremely similar to Article 194 (5) of the UNCLOS.[233] These three RSPs are the Wider Caribbean, Western Africa and Pacific. They also provide similarly clear obligations for member States to establish a specially protected marine area[234] within their regional seas. Brief information about the RSPs is provided below, as well an excerpt from the provisions of the regional instruments that relates to the establishment of an MPA in the three RSPs.

Caribbean, Western Africa and Pacific RSPs

The words in the provision regarding the establishment of an MPA in Article 10 of the SPAW Protocol of the Caribbean,[235] Article 11 of the Abidjan Convention of Western Africa[236] and Article 14 of the Noumea Convention[237] are similar to those in Article 194(5) of the UNCLOS, which includes the following:

Convention	Similar text of the convention
Article 194 (5) of the UNCLOS	'…to protect and preserve *rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered (species/marine life/flora and fauna as well as their habitat).*' (emphasis added)
Article 10 of the SPAW Protocol	'The Contracting Parties shall, individually or jointly, take all appropriate measures to protect and preserve rare or fragile

[233] UNCLOS (n 4), Article 194 (5)

> …
> '5.The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems, as well as the habitat of depleted, threatened or endangered species and other forms of marine life'.

[234] It should be noted that, when considering the meaning of the specially protected area used in the mentioned regions, the MPA concept of the research fits well with the term 'specially protected area'; see further comment in the section 1 of this chapter, Concept and characteristics of an MPA under a regional instrument.

[235] SPAW Protocol (n 115), Article 10.

[236] Abidjan Convention (n 14), Article 11.

[237] Noumea Convention (n 14), Article 14.

	ecosystems, as well as the habitat of depleted, threatened or endangered species, in the Convention Area. To this end, the Contracting Parties shall endeavour to establish protected areas...' (emphasis added)
Article 11 of the Abidjan Convention	'The Contracting Parties shall, individually or jointly as the case may be, take all appropriate measures to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other marine life. To this end, the Contracting Parties shall endeavour to establish protected areas, such as parks and reserves, and to prohibit or control any activity likely to have adverse effects on the species, ecosystems or biological processes in such areas.' (emphasis added)
Article 14 of the Noumea Convention	'The Parties shall, individually or jointly, take all appropriate measures to protect and preserve rare or fragile ecosystems and depleted, threatened or endangered flora and fauna as well as their habitat in the Convention Area. To this end, the Parties shall, as appropriate, establish protected areas, such as parks and reserves, and prohibit or regulate any activity likely to have adverse effects on the species, ecosystems or biological processes that such areas are designed to protect. The establishment of such areas shall not affect the rights of other Parties or third States under international law….' (emphasis added)

In addition, the three RSPs above apply a similar concept, as they refer to the protection of specific marine areas where some characteristics are worth protecting.[238] These three RSPs, as well as the UNCLOS provisions, share a common concept of an MPA, as they specify that the particular value of an area shall be protected, and this is also similar to the finding of RSPs in the preceding group, as well as the global instrument.[239]

North-East Pacific and South-East Pacific RSPs

However, the provision for the establishment of an MPA in the North-East Pacific and South-East Pacific RSPs have a format different to the above-mentioned four RSPs, which have a similar form of the provisions regarding the establishment of a protected area. A slightly different format is also applied in the Antigua Convention of the North-East Pacific, in which it is clearly stated in Article 1 that the purpose of the convention is:

> 'to establish a regional cooperation framework to encourage and facilitate the sustainable development of marine and coastal resources of the countries of the Northeast Pacific…'[240]

The main convention of the Lima Convention, which serves as the framework convention of the region, and it does not mention the establishment of an MPA. However, the Paipa Protocol, which relates to the establishment of an MPA was adopted later, in 1989. The general obligations provided in Article 2 of the protocol mention not only the protection and preservation of the fragile ecosystem, but also the protection of the 'vulnerable or of unique natural and cultural value, with particular emphasis on flora and fauna threatened by depletion or extinction…'[241] (emphasis added) This seems to integrate the value of the WHC regime, which is concerned with the natural or cultural value of the area.[242] The Reference, Guidelines and Principles for the Establishment of Coastal and Marine Protected Areas in the South-East

[238] Abidjan Convention(n 14), Article 11 ; Nuomea Convention (n 14), Article 14 ; and SPAW Protocol (n 115), Article 10.
[239] See Chapter 3 of the thesis.
[240] Antigua Convention (n 14), Article 1.
[241] Paipa Protocol (n 129), Article 2.
[242] Details of the WHC can be seen in Chapter 3, section 6 and Chapter 5, section 2.5.

Pacific were also adopted in 2006, and this was elaborated on previously in section 1 of this chapter.

The Northeast Pacific RSP agreed to the Convention for cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific (Antigua Convention) in 2002. The Antigua Convention is slightly different to the global conventions adopted by other RSPs in this group in that it mentions Agenda 21,[243] especially Chapter 17 of Agenda 21, which relates to the Protection of the Oceans.[244] Although the details concerning the protection measures specified in the Antigua Convention differ to those in Article 194(5) of the UNCLOS, the core context of the provision shown in this group replicates the idea that States are required to establish an MPA within the region.

Further Analysis

The MPA provision of the RSPs in this group is straightforward. When applying the rule of treaty interpretation of the VCLT to the provision of these RSPs, it is necessary to, firstly, determine the ordinary meaning in which good faith should be incorporated.[245] In this regard, the objective and purpose of the entire treaty need to be considered in line with interpretation in good faith, in order to understand the meaning of the provision.[246] The objective and purpose of the treaty may be found in its context, including the preamble and the annex.[247] In terms of identifying the objective and purpose of the conventions that govern these RSPs, apart from the Antigua Convention, the purpose of which is explicitly shown in Article 1, the objective and purpose of the conventions of these RSPs are concerned with their 'responsibility to preserve their natural heritage for the benefit and enjoyment of present and future generations', which is clearly illustrated in the preamble of the main conventions of most of the RSPs in this group.[248] The fact that it is important

[243] Agenda 21: Programme of Action for Sustainable Development , U.N. GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/26 (1992).
[244] Antigua Convention (n 14), Preamble.
[245] VCLT (n 11), Article 31(1).
[246] Gardiner, *Treaty interpretation* (n 173), 160-161.
[247] VCLT (n 11), Article 31(2).
[248] Cartagena Convention (n 14), Preamble ; Abidjan Convention (n 14), Preamble; Nairobi Convention (n 14), Preamble; Noumea Convention (n 14), Preamble ; and Antigua Convention (n 14), Preamble.

to 'prevent, reduce and control the pollution' of the regional seas is especially stressed in the general provisions and general obligations.[249] When reading the objective and purpose of the convention in the provision that requires States to establish the MPA within their regional sea area, it can be said that this provision imposes a legal obligation on the member States to establish the MPA within their region.

In terms of interpreting the obligation to establish the MPA in the specific provisions of the above-mentioned RSPs, most of the RSPs in this group use the phrasing '…To this end, the Contracting Parties shall endeavour to establish protected areas..'[250] or '…shall, as appropriate, establish the protected areas'.[251] The meaning of this provision can be deemed to be a vague requirement, as the term 'endeavour' or 'as appropriate' does not provide details of when or how to establish a protected area. If only observing the ordinary meaning of the text of the provision based on Article 31 of the VCLT, terms such as 'endeavour'[252] or 'as appropriate' may not impose a strong obligation on the member States to establish an MPA. The same requirement can also be seen in global conventions, more precisely in Article 194 of the UNCLOS[253] as follows:

> 'Article 194 Measures to prevent, reduce and control the pollution of the marine environment
>
> 1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonise their policies in this connection.

[249] Cartagena Convention (n 14), Preamble ; Abidjan Convention (n 14), Preamble; see also Noumea Convention (n 14), Article 5 ;and the Antigua Convention (n 14), Article 5.
[250] Article 10 of the Cartagena Convention, Article 11 of the Abidjan Convention and Article 10 (5) of the Antigua Convention
[251] Article 14 of the Nuomea Convention
[252] Cambridge Dictionary: Meaning an effort or attempt to do something, accessed https://dictionary.cambridge.org/dictionary/english/endeavor
[253] Churchill and Lowe (n 175), 332.

…

> 5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.'[254] (emphasis added)

It could be said that the UNCLOS is the framework convention in the matter of protecting the marine environment,[255] which requires further interpretation. However, this further interpretation may be in an additional form, and, in this case, the regional instruments above that contain similar text related to protecting and preserving the rare and fragile ecosystem[256] could be regarded as a further interpretation of the UNCLOS,[257] or implementing the UNCLOS. It should be noted that Article 194(5) does not only refers to measures regarding the pollution of the sea because of the use of the term 'in accordance with this part' but also includes other provisions in Part XII of the UNCLOS that aim to protect and preserve the marine environment.[258] Although the Northeast Pacific integrates the term used in the WHC when referring to 'unique natural and cultural value',[259] the regional instruments of the RSPs in this group have an additional element to the global instruments. Their instruments precisely provide[260] for the establishment of a protected area, which is not directly mentioned in the establishment of an MPA in the UNCLOS or the WHC. This regional instrument, together with the provision in the UNCLOS on the same matter regarding the protection of the marine environment, gives States an option to establish an MPA as one of the measures to satisfy their obligation to protect the marine environment.

In addition, some of the RSPs administered by the UNEP have taken another step towards the implementation of an MPA regime by adopting a protocol

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[254] UNCLOS (n 4), Article 194(5).
[255] UNCLOS, Part XII.
[256] This include the RSPs' instrument of the Wider Caribbean, Western Africa, Pacific and Southeast Pacific.
[257] Marta Chantal Ribeira, 'Marine Protection Areas: the case of the extended continental shelf' (30 years after the signature of the United Nations Convention on the Law of the Sea: the protection of the environment and the future of the Law of the Sea) (2014), 184.
[258] Ibid., 184.
[259] Paipa Protocol (n 129), Article 2.
[260] Antigua Convention (n 14).

for details of an MPA, whereas global instruments, especially the UNCLOS, contains only the framework provisions that support the establishment of an MPA, as mentioned in Chapter 5 of this thesis. This is a step that goes further than the development of the MPA regime of the global instrument. This type of more details rule in the regional instrument are also evident in the combatting of marine pollution.[261] The regional level is more practical to achieve an agreement with clear obligations than the global agreement, which may result from the fact that the global conventions tend to draw more participating countries and it is difficult to compromise each individual States' interest accordingly.[262] However, the CBD contains details of an MPA regime, which are adopted in the form of decisions based on soft law instruments, and which are also seen in other specific global instruments, including the Ramsar Convention and the MARPOL. The RSPs with an MPA-related protocol that provides further details of an MPA are the Wider Caribbean - the Protocol Concerning Specially Protected Area and Wildlife (SPAW)[263] - and the Eastern Africa or West Indian Ocean - the Nairobi Convention Protocol on Protected Areas.[264] These two protocols can be regarded as subsequent agreements[265] for the member States that have agreed on the main regional convention. The SPAW protocol of the Wider Caribbean entitles its member States to establish an MPA in an area where they can exercise their sovereignty, sovereign rights and jurisdiction, which could imply that the MPA can be within the EEZ of the member States[266] of the Wider Caribbean, as all of its members are party to this protocol. The Nairobi Convention Protocol on Protected Areas not only specifies the importance of States' adoption of the measures to protect and preserve the rare or fragile ecosystem but also prescribes the significance of protecting specific wild flora[267] and fauna with a list of the available measures to be adopted.[268] It also

[261] Dominique Dominique.
[262] Boleslaw Adam Boczek, 'Global and Regional Approaches to the Protection and Preservation of the Marine Environment' (1984) 16 Case Western Reserve Journal of International Law, 53-54.
[263] SPAW Protocol (n 115).
[264] Nairobi Convention Protocol (n 53).
[265] VCLT (n 11), Article 31(2).
[266] SPAW Protocol (n 115), Article 4.
[267] Nairobi Convention Protocol (n 53), Article 3.
[268] Ibid., Articles 4 and 5.

clearly states that the protected area can be established within their jurisdiction to safeguard the natural resources of the region.[269]

The SPAW and the Nairobi Convention Protocol are also somewhat similar in the context of the general criteria of the area to be considered as a specially protected area in Article 8.2 of the protocol of the Eastern Africa and Article 4.2 of the SPAW. The similarities appear in the details of the eligible protection measures[270]and the establishment of a buffer zone in the protected area.[271] Details such as these are rarely found in a framework global convention, as their inclusion may make it difficult to obtain the agreement of all members. Moreover, although the protocols acknowledge the traditional activities in the area, those activities may not endanger the maintenance of the protected area or cause extinction or a substantial risk of reduction of species within the protected area.[272] A list of species of the fauna and flora to be protected is provided in the Annexes of these two protocols. However, while the management plan of the specially protected area is also specified in the SPAW, it does not appear in detail in the Protocol of Eastern Africa. To be precise, the global instruments, namely the UNCLOS and the CBD, are the framework conventions and, thus, it may not be possible to foresee the specific details of the application of the MPA in the preparation of the convention. Nonetheless, the framework conventions endeavouring to assist the implementation can be seen in the CBD, in which the COP adopts the decision to provide more details of the criteria of an MPA,[273] while the UNCLOS will engage in negotiating a new implementation agreement regarding the conservation of the marine environment in the ABNJ.[274] The adoption of the MPA specific regime in the RSPs of this group, however, is not contradictory to the shared understanding of the MPA of the global instrument, as shown in Chapter 3 and Chapter 5. Instead, it provides detailed

[269] Ibid., Article 8.
[270] Ibid., Article 10 ; and SPAW Protocol (n 115), Article 5.
[271]Ibid., Article 11 ; and SPAW Protocol (n 115), Article 8.
[272] Ibid., Article 12 ; and SPAW Protocol (n 115), Article 14.
[273] See Chapter 5 of the thesis.
[274] United Nation General Assembly, Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, Sixty-sixth session, Division of Ocean and the Law of the Sea, A/66/119, 30 June 2011, Annex, para 1 (UNGA A/66/119).

information that would suit the particular interest of the States of the region to implement.

2.3 RSPs that are not similar to or do not implement global conventions

This group refers to the RSPs that neither show evidence of their instrument being formed from the implementation of a global convention nor implement a similar obligation of the States to establish an MPA from a global convention. The ROPME region and the East Asian Sea fall within this group, as they have neither a hard-law nor soft-law instrument that provides for the establishment of an MPA. Although the regional regime of these regions may need to be further developed, they can adopt the measure provided in the global conventions, as mentioned in the previous chapter, as a mechanism to establish an MPA within the region.

ROPME RSP

The ROPME Sea Area adopted the Kuwait Regional Convention for Co-operation in the Protection of the Marine Environment from Pollution as a governing instrument (Kuwait Convention) in 1978.[275] The control of pollution in the Kuwait Convention starts from the control of pollution from ships in Article 4, dumping and aircraft in Article 5, land-based sources in Article 6, sea-bed activities in Article 7 and human activities in Article 8. It should be noted that the details of the control of pollution are further clarified in the Annexes of the Kuwait Convention. Apart from the main convention, a number of protocols have been adopted concerning pollution by oil and other harmful substances in cases of emergency, marine pollution from the exploration and exploitation of the continental shelf, pollution from land-based sources and the movement and disposal of hazardous waste and other waste. However, the protocol for the conservation of biological diversity and the establishment of a protected area have not yet been agreed.[276]

The ROPME may not yet have agreed to the regional mechanism regarding the establishment of an MPA, but the ROPME Sea Area became a ‘Special

[275] Kuwait Convention (n 14).
[276] The ROPME Regional Protocol information, available online at <http://www.memac-rsa.org/ropme-region-protocols>.

Area' under Annex I and Annex V of the MARPOL in 2007.[277] For the entire area to be protected as the Special Areas under the MARPOL the members of this region must regionally cooperate to propose such an area to be protected. Annex I of the MARPOL73/78 regulates the control of discharge of oil from ships,[278] while Annex V regulates the disposal of garbage from ships.[279] Although the status of Special Areas in these two annexes cannot cover other sources of pollution in the marine area of the ROPME sea area, this, at least, shows that there is some control over the marine pollution in this region. However, the Special Area regime is implemented based on the IMO procedure, not from the regional mechanism of the ROPME. Although the ROPME has not agreed to the regional mechanism regarding the establishment of an MPA, the region is entitled to implement other global mechanisms mentioned in Chapter 5, as it has already done with the Special Area regime under the MARPOL. This is because almost all of the member States of the ROPME are also members of the global mechanisms mentioned in Chapter 5, including the CBD,[280] the UNCLOS[281] and the MARPOL.[282]

East Asian RSP

The East Asian Seas region adopted the 1st Action Plan in 1983, and the latest Action Plan was adopted in 1994 with a general framework regarding the management of the marine environment. The 1994 Action plan of the East Asian Sea does not provide a clear objective, unlike the 1983 Action Plan, which contained the following statement:

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[277] Resolution of MEPC, 168(56), adopted 13 July 2007, available online at <http://www.memac-rsa.org/sites/default/files/Resources/RSA-Special-Sea-Area.pdf> ; See also Chapter 3, section 4.

[278] International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) 1340 UNTS 184; Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (adopted 17 February 1978, entered into force 2 October 1983) 1340 UNTS 61 (MARPOL), Annex I.

[279] Ibid., Annex V.

[280] List of Parties of the CBD, online available at <https://www.cbd.int/information/parties.shtml> ; see also Annex I of the thesis.

[281] The member of ROPME Sea Area are member of the UNCLOS except United Arab Emirates that is not yet ratified as a parties to the UNCLOS List of Parties of the UNCLOS, online available at <http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm>.

[282] All of the members of ROPME Sea Area are member of the MARPOL 73/78 at <https://imo.amsa.gov.au/public/parties/marpol78.html.> ; see also Annex I and Annex II of the thesis.

> 'The Principal objective of the action plan is the development and protection of the marine environment and the coastal areas for the promotion of the health and well-being of present and future generations. The action plan is intended to provide a framework for an environmentally-sound and comprehensive approach to coastal area development particularly appropriate for the needs of the region.'[283]

Both the previous and the latest Action Plans of the East Asian Region do not contain details of the establishment of an MPA, but do refer to the implementation of Chapter 17 of Agenda 21 of the UNCED in relation to the Protection of the Ocean.[284] However, the Coordinating Body on the Seas of East Asia (COBSEA) emphasises the existing regional cooperation in the Association of Southeast Asian Nations (ASEAN), in which seven of the nine member States of the East Asian Seas are also parties to the ASEAN. It was emphasised in Strategy 4 Regional Cooperation of the New Strategic Direction of COBSEA in 2008-2012 that the cooperation within the ASEAN had been developed together with the Regional and National Criteria of Marine Protected Areas, which was adopted at the meeting of the ASEAN in 2003.[285] The region continues to stress its desire to strengthen the implementation of the conservation of coastal and marine habitats.[286] Although there is some coordination between COBSEA and the ASEAN regarding the criteria of an MPA, as mentioned previously, it is unclear whether there is a regional mechanism regarding the MPA. It has been mentioned that the concept of the MPA 'plays a critical role in the conservation of biodiversity.'[287] It is also stated in the Action Plan that the establishment of an MPA is required to be scientifically examined to determine if it could be a protected area for endangered species and if it is a

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[283] Action Plan for the Protection and development of the marine and coastal areas of the East Asian Region, 1983 para 3, p 5 (EASAP 1983).
[284] Ibid., para 19-20.
[285] UNEP, 2008. New Strategic Direction for COBSEA (2008-2012). COBSEA Secretariat, United Nations Environment Programme. 23 pages., p 12 online accessed at <http://www.cobsea.org/documents/Meeting_Documents/19COBSEA/New%20Strategic%20Direction%20for%20COBSEA%202008-2012.pdf> (New Strategic Direction for COBSEA).
[286] Ibid., preamble and p 6.
[287] EASAP 1994 (n 14), Para 12, p 3.

suitable size or extent of area 'to form a viable network for the preservation of critical habitats or species'.[288] However, none of the scientific criteria in this matter have been further developed. These statements are based on an Action Plan that contains no solid implementation guidelines on the establishment of the MPA that has been agreed within the region, which implies that the MPA regime in the COBSEA region may need to be further developed.

Conclusion

The relevant regional instruments described above show the regional cooperation in the mean that they agree together on the legal and/or policy-based instruments to establish MPAs that provide the detail to facilitate the members of the region in the implementation of MPA regime. The analysis also show that not only the marine pollution problem, as the RSPs may first begin its concern to cooperate in solving this problem, many RSPs take it to the broader scope to cover the protection of the marine ecosystem, which is not only focusing in the source of pollution.[289] The regional instrumemnts also embraces the global trend to implement an MPA as a measure to protect the valuable marine environment. One interesting factor is that, at the time of the negotiation and conclusion of the UNCLOS and the CBD, there was an increased interest in the protection and preservation of the environment. During that period of time, the Rio Declaration was published in 1992 followed by the conclusion of the CBD in the same year and the entry into force of the UNCLOS in 1994. While this may not have been relevant to the subsequent instruments, it showed, at least, the emergence and burgeoning of social awareness of the protection of the environment at that time. Some of the RSPs also reiterate the environmental law principles, such as the precautionary principle and polluter pays.[290] The two global conventions, the CBD and the UNCLOS, may contain an outline of the general obligation to establish a protected area as one of the tools to protect the marine environment. However, a further implementation is needed. The trend in the protection of the marine environment at the regional level was also developed

[288] Ibid., para 12, p 3.
[289] Kjell Grip, 'International marine environmental governance: A review' (2017) 46 Ambio, 418-419.
[290] Tehran Convention (n 14), Article 5.

during that period, as can be seen by the aforementioned regional protocols that were concluded after the CBD and the UNCLOS. The SPA Protocol of the Mediterranean is a prominent example of a protocol that implements a global convention by mentioning the CBD in its preamble.[291] Some regional MPA regimes were even agreed upon before the conclusion of the CBD, including the SPAW Protocol of the Caribbean[292] and the Nairobi Convention Protocols of Eastern Africa,[293] whose their stance on generating the legal norm on the protection of the marine environment are no less than the principle adopted in the global instruments, as details of the provisions of these protocols have shown above. It is undeniable that the above protocols not only contain a further interpretation of their main regional sea convention, but also provide a further interpretation of the UNCLOS and the CBD, which are the global conventions.

The global norm regarding the establishment of an MPA can be seen in many regional instruments. This shows the interaction between the global norm and regional implementation in response to the obligation of States to establish an MPA. Although it was discussed in the previous chapter that the global norm in this matter may not be as clear as it should be, the implementation of the obligation to establish an MPA in regional instruments supports the fact that, one way or another, the establishment of an MPA is part of the obligation of States to protect the marine environment. This contention arises from the analysis of various regional instruments, especially the RSPs in Sections 1.1 and 1.2, which clearly refer to the global commitment to establish MPAs. The connection between global level and regional level is vital and is the key to this statement.

According to interactional international law, a legal obligation can arise from the interaction between a shared understanding, the criteria of legality and the practice of legality.[294] In this regard, the interaction between the norm of the

[291] SPA&Biodiversity Protocol (n 25), Preamble ; see also Churchill and Lowe (n 175), 287
[292] SPAW Protocol (n 115) was adopted in 1990, and enforced in 2000.; See also Nilufer Oral, *Regional Co-Operation and Protection of the Marine Environment under Internaitonal Law : The Black Sea* (Brill 2014), 146.
[293] Nairobi Convention Protocol (n 53) was adopted in 1985, even though it enforced in 1996, the principles that are developed under the protocol predates that of the CBD.
[294] Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010), 15.

establishment of an MPA as a tool to protect and conserve the marine environment generated from global conventions and regional instruments shows that a shared understanding is developed among the international community. The consensus in the norm regarding the establishment of an MPA to protect the marine environment could be regarded as evidence of States' belief in this regard.[295] Many regional instruments directly refer to the commitment in global instruments, as shown in section 2.1. Some, including Eastern Africa (or Western Indian Ocean), Wider Caribbean, Western Africa and Pacific, even integrate the term used in a global convention into their instrument and their relevant provisions apply some of the terms used in Article 194(5) of the UNCLOS. The consensus on the MPA regime of States reflected in both global and regional instruments leads to the formation of an obligation to establish an MPA. The regional organisations implement and apply the obligation in more detail by adopting relevant conventions, protocols and other instruments, such as plans or recommendations.[296] This serves as the practice of legality, in that the MPA norm is actually interpreted and implemented by the member States of regional organisations. The criteria of legality in this regard may be slightly different to the original idea of Fuller[297] because the nature of the international law is different to the domestic law. However, the reciprocal action by the regional organisations that adopt, or reiterate, the establishment of an MPA from the global norm is evidence of the interaction between global conventions as the authority and the publication of the law on an MPA regime. Furthermore, the action taken at the regional level can be regarded as evidence of society practicing and developing the criteria of legality.

Nonetheless, two of the RSPs in section 2.3 above have not adopted a clear regional instrument in the establishment of their MPA, while the sixteen RSPs in section 2.1 and 2.2 demonstrate the interaction of the global norm and the implementation at the regional level. Although the practice of the import of the global norm into the regional level is not yet uniform, which raises the

[295] Peter Haas, 'Compliance Theories Choosing to Comply: Theorizing from International Relations and Comparative Politics' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non -binding Norms in the International Legal System* (OUP 2007), 62-64.
[296] Baltic and Northeast Atlantic adopt the recommendations for the implementation of the MPA regime, see 1.1.7-1.1.6 above.
[297] Lon Fuller, *The Morality of Law (Yale University Press 1964).*

question of whether a customary norm exists or is emerging. However, if the customary norm of the regional cooperation to establish an MPA exist, these two regions will have to comply with such a norm, regardless of their lack of regional instruments.

Even if the clarity of the obligation, which is the element of criteria of the legality,[298] may not yet be well established by the regional instrument as it lacks uniformity, the RSPs in the first two groups above are, at least, not in conflict or objecting to the norm on the obligation to establish an MPA. This could contribute to an accumulation of evidence of the emergence of a customary international norm with regard to the establishment of MPAs, although it may not have been fully settled. Also in the case where customary norm on the establishment of an MPA could be seems to emerged as there are many RSPs that implement the MPA regime as shown in 2.1 and 2.2 above, the two regions in 2.3 above (ROPME and East Asian Sea) will need to enhance their regional cooperation to comply with the customary norm.

The customary international law is composed of two elements, namely *opinio juris* and state practice, which is collected in the process of creating a norm and States' reaction to its emergence.[299] In terms of the establishment of an MPA, the above discussion shows the development of this obligation within both the global level and regional level. It should be noted that fourteen of the eighteen RSPs have already developed the regional sea agreements, in which the rising of the regional cooperation to protect the marine environment could be emphasised. Furthermore, the state practice in this situation is seen in the States' implementation of the MPA at the regional level from both the conventional and non-conventional form of instruments. However, the *opinio juris* is obscure, as both global and regional instruments require States to implement an MPA regime. Thus, it is difficult to conclude whether States' response to the obligation to establish an MPA is in compliance with the

[298] Jutta Brunnée and Stephen Toope, 'Interactional international law: an introduction' (2011) 3 International Theory 307, 310-311.
[299] Pierre-Marie Dupuy, 'Formation of Customary International Law and General Principles' in Bodansky D, Brunnee J and Hey E (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007), 451-452.

convention or instruments to which they are bound or is because they believe that a customary obligation exists with which they must comply.

Conclusion

In light of the preceding discussion, the concept of an MPA developed by RSPs and some of the RSPs that refer to the idea of an MPA used by global instruments indicate a shared understanding of the concept of an MPA. The interaction in this concept represents a common understanding of an MPA between global and regional instruments, with the exception of East Asian Sea and the ROPME region as they have not yet developed the regional instrument on the establishment of MPAs. In addition, the regional cooperation in the establishment of the MPA regime by the member States of the RSPs demonstrates the practice of an MPA regime at the regional level, as thirteen RSPs have developed the MPA regime.[300] However, in terms of the common criteria of an MPA, it could be said that most of the RSPs only establish a framework or general scope of the area to be protected and leave the implementation to the discretion of States, rather than agreeing on a set of common criteria. However, this does not mean that the agreement with the idea of protecting the marine environment by establishing an MPA is recognised less at the regional, or even the global level, as the general understanding of the need to establish an MPA as a tool to protect, conserve and preserve marine resources, ecosystems and the associated environment is well established in both global and regional conventions.[301]

Interpretation and application of, the legal obligation to establish an MPA could be achieved by soft-law instruments.[302] As seen in this case, the use of soft-law instruments in the form of guidelines, decisions or recommendations adopted by the COP of some of the RSPs provided greater details of the application, including how to select and manage an MPA.[303] This is also supported by the regional cooperation in the implementation of the obligation

[300] This refers to Mediterranean, Black Sea, North-East Atlantic, Red Sea and the Gulf of Aden, Caspian, Baltic, Antarctic, Caribbean, Eastern Africa, Western Africa, Pacific, South-East Pacific and North-East Pacific.
[301] See Chapter 3 and section 1 of this chapter.
[302] Alan E. Boyle and Christine Chinkin, *The making of international law* (Oxford University Press 2007),225.
[303] See the first group of the RSPs, provided in 2.1.

to establish an MPA by adopting a relevant legal instrument, which the members of the RSPs apply within their jurisdiction. The establishment of MPAs within the RSPs can represent an emergence of the customary international norm in this matter. However, it remains difficult to identify if such a norm of the practice at the regional level comes from a global treaties or from the *opinion juris* of customary international law, as they may practice from the belief that they should establish an MPA or merely because they are responding to the commitment of an agreement they have accepted.

Moreover, it should also be noted that the existence of the conventions of the RSPs already confirms the obligation to protect the marine environment under Article 192 of the UNCLOS, which supports the *opinio juris* of the customary law status of the obligation to protect the marine environment.[304] However, it is interesting how the particular obligation of States to establish an MPA will be escalated in its status and perceived as the same level as the obligation to protect in the future, as there is evidence that many regions adopt the regional instrument on the establishment of the MPA.

[304] Patricia W. Birnie, Alan E. Boyle and Catherine Redgwell, *International law and the environment* (3 edn, OUP 2009), 387.

CHAPTER 7 ANALYSIS AND CONCLUSION

Introduction

This research is concluded in this chapter with an observation of the relevant international instruments concerning regional cooperation, in terms of the obligation to establish a Marine Protected Area (MPA). The status of regional cooperation in international law is firstly examined, followed by an examination of the concept of an MPA in international instruments at both the global and regional level. Whether the establishment of an MPA is considered to be an obligation or merely a right of States under global, as well as regional, instruments, is then addressed. The aim of this current thesis is to address the question of whether or not there is a clear obligation to cooperate at a regional level to establish an MPA. This is based on an observation that the MPA regime repeatedly appears in many global and regional instruments, leading to further consideration about whether this ubiquitous legal mechanism related to the formation of MPAs is established as customary law or is, at least, an indication of the emergence of a customary status of this obligation.

Research findings in response to the research questions

The findings in the current research will be elaborated on in two parts, with the first focusing on the legal mechanism for the establishment of an MPA under global instruments and the second focusing on this legal mechanism under regional instruments. Whilst the conclusion is based on the research questions proposed in the Introduction Chapter of the thesis, it will not be presented in that order where the global and regional mechanisms were examined separately. The concept and characteristics of an MPA, based on both global and regional instruments, will be addressed together in a part of this chapter, while the legal mechanisms of global and regional instruments will be addressed together in another part. This is to illustrate how an analysis of global and regional instruments contribute to the development of a legal obligation for States to establish an MPA.

1. Concept and Characteristics of an MPA

1.1 Concept of an MPA

To gain an understanding of the concept of an MPA, the range of related global instruments will firstly be explored, followed by the range of related regional instruments. It will be demonstrated that the concept of an MPA is similar in both global and regional instruments, regardless of the specific term uses, as the creation of the term 'MPA' in the IUCN guidelines influenced the development of other later terms. Although member States are not bound by international treaties, the definition of an MPA put forward by the IUCN[1] provides a general understanding. Based on observation, definitions of an MPA can vary from focusing on the general nature or environmental protection, as in the CBD[2] and the WHC[3], to emphasing particular activities, as in the MARPOL, the ICRW [4] and the CMS.[5] However, some of the protected area regimes, such as in the ICRW and the CMS, are eventually excluded from further examination in this current research where,f or example, the purpose of the protected area does not fit the concept of an MPA in this study. To further explain, the concept of an MPA explained in Chapter 3 focuses on the conservation and protection of the marine environment of a designated area as a whole, rather than being concerned with only concerned with animal species, as with the ICRW,[6] or a particular subjected migratory species, as is the case under the CMS.[7]

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[1] Day J and others, *Guidelines for applying the IUCN Protected Area Management Categories to Marine Protected Areas* (Gland, Switzerland: IUCN, 2012), 56 (IUCN Guidelines 2012).

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

[3] Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted on 23 November 1972, entered into force 15 December 1975) 1037 UNTS 151 (WHC).

4 International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into forced 4 March 1953) 161 UNTS 72 (ICRW)

[5] Convention on the Conservation of Migratory Species of Wild Animals, (adopted 23 June 1979, entered into forced 1 November 1983) 1651 UNTS 333 (CMS)

[6] ICRW (n 2), Preamble; See also Alexander Gillespie, *Protected Area and International Environmental Law* (Martinus Nijhoff Publishers 2007), 20-21.

[7] See Chapter 3, section 8.

Although different terms are used across the global instruments they still fit with the concept of an MPA employed in this thesis. For example, MARPOL[8] uses PSSAs and Special Areas under the MARPOL to protect the marine environment from being vulnerable to international shipping.[9] Whilst distinct from general MPAs, their purpose is, nevertheless, to protect and conserve the overall environment of a designated area that is affected by shipping activities. The MARPOL, therefore, still fits with the concept of an MPA in this thesis. This concept of conservation and protection of the marine environment as a whole also applies to different conventions that use other similar terms, for example 'MCPA'[10] and 'EBSA'[11] in the CBD, 'wetlands'[12] in the Ramsar Convention and 'world heritage'[13] in the WHC. Furthermore, the UNCLOS[14] is currently In an ongoing process of developing the regime of an MPA in the ABNJ. Although the MPA has not yet been defined in that process, its purpose is quite clear, in that it will focus on the conservation of marine biodiversity and marine living resources.[15]

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[8] International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) 1340 UNTS 184; Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (adopted 17 February 1978, entered into force 2 October 1983) 1340 UNTS 61(MARPOL).

[9] MARPOL, Annex I, Regulation 1; see also IMO, Resolution A.720(17) adopted on 6 November 1991, Guideline for the designation of Special Areas and the Identification of Particularly Sensitive Sea Areas, 4 and 27 (IMO Res. A.720(17)).

[10] Marine and Coastal Protected Area (MCPA) means

'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 have 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 protection than its surroundings'.

Summary Report of the Ad Hoc Technical Expert Group on Marine and Coastal Protected Areas, Eighth Meeting of the Subsidiary Body on Scientific, Technical and Technological Advice (2003), Doc. UNEP/CBD/SBSTTA/8/9/Add. 1, 27 November 2002, 3, online access at <http://www.cbd.int/doc/meetings/sbstta/sbstta-08/official/sbstta-08-09-add1-en.pdf> (accessed 31 August 2017).

[11] Ecologically or Biologically significant Marine Areas (EBSA) adopted by Decision IX/20 in COP 9, on the need for protection and the scientific guidance for designating representative networks of marine protected areas, Annex I of Decision IX/20, UNEP/CBD/COP/DEC/IX/20, UNEP/CBD/COP/DEC/IX/20, 9 October 2008, online access at <https://www.cbd.int/doc/decisions/cop-09/cop-09-dec-20-en.pdf> (accessed 31 August 2017) (Decision IX/20).

[12] Convention on Wetlands of International Importance especially as Waterfowl Habitat (adopted 2 February 1971, entered into force on 21 December 1975) 996 UNTS 245 (Ramsar Convention) ; Ramsar Convention, Article 1.

[13] WHC (n 3), Article 2.

[14] The 1982 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396 (UNCLOS).

[15] Recommendation of Ad Hoc Open-ended Informal Working Group to study issues related to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, 13th February, 2015, A/69/780, para (e), online access at

In addition, there is no significant difference in the concept of an MPA in regional and global instruments. Most RSPs do not provide a specific definition for an MPA, using, instead, their objectives as the general scope. Exceptions are seen in the North-east Atlantic and the Antarctic regions, where the definition of an MPA can be found in their respective agreements. As mentioned in Chapter 6, section 2 some RSPs, especially those with established regional conventions,[16] such as the Mediterranean, Eastern Africa and North-east Atlantic RSPs, refer to the concept in global instruments, as do some that have no established regional conventions.[17]

Nonetheless, the core elements of the concept of an MPA in both global and regional instruments are similar, regardless of the specific terms used in these legal instruments. Thus, it could be said that a shared understanding of the concept of an MPA is forming. As presented in Chapter 3 of this thesis, the common elements present in the different definitions of an MPA used in global and regional instruments are as follows:

i) An area that encloses part of the marine environment and may also encompass areas of land, or wetlands;
ii) An area that needs a measure or plan for the conservation and/or protection of its environment and ecosystem;
iii) An area under the regulation that protects the marine environment from any activities within the area.

These three elements are considered to form the concept of an MPA adopted in this research, due to the fundamental concepts of the marine protected area mentioned above being similar, even in the different circumstances of each global or regional instrument.

One observation regarding the development of the concept of an MPA used in regional instruments is that, in cases where there is no clear objective, or

<http://www.un.org/ga/search/view_doc.asp?symbol=A/69/780> (accessed 31 August 2017).
[16] See Chapter 6, section 2.1.
[17] See Chapter 6, section 2.2.

concept, of an MPA, RSPs often use other words to the global instruments, based on either the IUCN's or the CBD's concept, as can be seen in the cases of the Arctic, Baltic, Caspian, Eastern Africa and Pacific RSPs.[18] However, it should not be concluded from this lack of a precise universal definition of an MPA that there is no shared understanding of an MPA.

It could be said that this shared understanding of the concept of an MPA developed from soft law instruments, such as the IUCN guidelines and the MCPA, and the EBSA's concept in the CBD. The MCPA was adopted from the decision of the COP VII/5,[19] whereas the EBSA criteria developed from the Decision IX/20,[20] which is a soft-law instrument. It also includes decisions by, or recommendations of, some RSPs, for example those in the Baltic[21] and the Arctic regions[22] that have not adopted a hard-law instrument regarding the concept of an MPA but share a similar concept derived from global instruments, particularly the IUCN Guidelines and the CBD. These soft-law instruments often boost the interpretation, as they can provide details of the definition, or criteria, of the term in international law.[23] Cases that refer to the IUCN guidelines show how these guidelines, which are, in fact, non-binding instruments, influence the establishment of MPA regimes at the regional level.[24] In this respect, when RSPs have not adopted the respective guidelines with regard to MPAs, they refer to the available guidelines provided by the IUCN. Moreover, a soft law-based instrument can be seen to contribute to the process of forming a customary international law.[25] The interaction of the international instruments regarding the establishment of an MPA also shows that both global and regional instruments display the concept of an MPA in their soft law-based instruments. The fact that this shared understanding of the overall concept as well as the criteria of legality

[18] See Chapter 6, section 1.
[19] CBD, Decision adopted by the Conference of the Parties to the Convention on Biological Diversity at its Seventh Meeting, UNEP/CBD/COP/DEC/VII/5, 14 April 2004. (Decision VII/5); More information available at Chapter 3.1.2
[20] Decision IX/20 (n 11); See also Chapter 3, section 3.2 of the thesis.
[21] See Chapter 6, section 1.
[22] See Chapter 6, section 1.
[23] Jürgen Friedrich, I*nternational Environmental ''soft law": The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Springer 2013), 171.
[24] Ibid.
[25] Ibid, 144.

that are met by the norm generated at the global level and regional level, has been legitimately practised by the States exercising their right to establish an MPA based on the concept of an MPA is creating the process of an international customary law.

1.2 Characteristics of MPAs

The characteristics of MPAs have been developed based on their purpose in the relevant global instruments, with the exception of the UNCLOS, which has not provided the characteristics of MPAs at this stage, although it is likely that the possible new implementation agreement in the UNCLOS will contain more details of this aspect.

One notable characteristic of an MPA in the CBD is that it can be applied in any marine area, either within or beyond national jurisdictions. This is because two programmes of work related to an MPA are operational in the CBD forum, with onebeing the MCPA,[26] and the other being the EBSA,[27] as mentioned in Chapter 5. An outstanding common characteristic of an MPA of the global instruments is that the MPA must be assinged to protect the designated area's important value, for example its naturalness and uniqueness, or its significant contribution to the surrounding ecosystem or productivity of its living resources.[28] However, the scope of application of an MPA is more limited in the MARPOL, the Ramsar Convention and the WHC than in the CBD, as the original purpose of these conventions is not merely to conserve and protect the marine environment. Some examples of the

[26] The MCPA was established under the Programme of work on Marine and Coastal Biological Diversity ; Decisions adopted by the Conference of the Parties to the Convention of the Parties to the convention on Biological Diversity at its Fourth Meeting, COP IV/5, UNEP/CBD/COP/4/5, 4-19 May 1998, Annex, p 32. online access at <https://www.cbd.int/doc/decisions/cop-04/full/cop-04-dec-en.pdf> (Decision IV/5).
[27] Biologically Significant Marine Areas were established under the Programme of work on Protected Areas ; Decision adopted by the Conference of the Parties to the Convention of the Parties to the convention on Biological Diversity at its Eighth Meeting, VIII/24, Protected areas, UNEP/CBD/COP/DEC/VIII/24, 15 June 2006, Annex II of the Decision VIII/24, p 11, para 1 (Decision VIII/24).
[28] See Chapter 3.

limitations are that the Special Areas,[29] or PSSAs,[30] in the MARPOL must be connected to international shipping activities. An MPA under the Ramsar Convention has to qualify as a wetland first, and the natural heritage in the WHC could refer to other natural heritages, rather than being limited to a heritage that is marine related.[31] These differences do not, however, substantively degrade the shared understanding of the concept of an MPA, as mentioned above, as they rather accommodate the specific purpose of each of the instruments that do not contradict the shared value of the MPA's characteristcs.

Regarding the concept and characteristics of the MPAs in the RSPs illustrated in Chapter 6, it is evident that many of them explicitly refer to the concept and characteristics of the MPAs in global instruments, especially the IUCN Guidelines and the CBD. This may be because they have not developed their own regime or, in most cases, because the concept and characteristics of MPAs already exist in global instruments and, thus, it is convenient to use them for reference when implementing a common understanding of an MPA.

When considering the similarities in both global and regional conventions, it can firstly be observed that the areas that qualify for an MPA should comprise of some important elements that need to be protected or conserved. These important elements can also be divided into the natural features of the area, or its geographic and oceanographic characteristics, and the importance of the area for flora and fauna. Secondly, if a proposal is made to protect a certain area, the proposal should include eligible management or protection measures, which could be legal or traditional and customary measures.

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[29] A Special Area is a sea area where the adoption of special mandatory methods for the prevention of sea pollution by (specified harmful substance) is required for recognised technical reasons related to its oceanographical and ecological condition and the particular characteristics of its traffic.
; IMO, Resolution A.720(17) adopted on the 6th November 1991, Guideline for the designation of Special Areas and the Identification of Particularly Sensitive Sea Areas (IMO Res. A.720(17)); See Chapter 3.

[30] Particularly Sensitive Sea Areas are 'those areas that need special protection through action by the IMO because of their significance for recognised ecological or socio-economic or scientific reasons and which may be vulnerable to damage by maritime activities.'
; IMO Res. A.720(17) (n 29), 4, 27; See also Chapter 3, section 4.

[31] WHC, Article 2.

2. Legal rights and/or obligation of States to establish an MPA

It is evident from this current research that the legal rights and/or obligation to establish an MPA in global instruments, including the IUCN, UNCLOS, CBD and the MARPOL, have contributed to the MPA regime's development. However, this obligation is imposed under the jurisdiction of the State, in which case, the scope of the State's jurisdiction in matters concerning the implementation of an MPA regime is provided in the UNCLOS.[32] It is important to note that the obligation to establish an MPA regime based on international conventions may not be precise and the influence of global instruments is also reflected in the adoption of RSP instruments related to the establishment of MPAs. Many of the RSP instruments refer to the commitment under global instruments, as illustrated in Chapter 6. In addition, States may exercise their right to create an MPA within their jurisdiction based on international law. In this case, national jurisdiction under international law is provided in the UNCLOS, under which States are granted the power to adopt measures regarding protection of the marine environment provided that coastal States respect the rights of other States to legitimately use the ocean based on the law of the sea. It was also point out in Chapter 5 that the UNCLOS, in Part XII of the Convention, contains a general obligation to protect and preserve the marine environment.[33] The jurisdiction of the State under the law must be taken into account when considering the legal obligation to establish an MPA in both global and regional instruments. When establishing an MPA, States may have limited power, to a certain degree, to not violate other States' rights, but this does not mean that establishment of an MPA is merely the optional right of a State to exercise its sovereignty without the law being obligatory.

In practice, although the relevant global instruments do not specifically contain a strict obligation for States to establish an MPA, many global conventions provide a mechanism for implementation that refers to the establishment of an MPA to meet the particular commitment of the

[32] See Chapter 5, section 1.
[33] UNCLOS (n 14), Article 192.

convention in question. For example, the designation of many MPAs within their territorial sea and EEZ[34] can be considered as fulfilling their obligation to protect and preserve the marine environment, based on Article 192 of the Convention, and the establishment of an MPA is regarded as implementating Article 194(5), as mentioned in the case of *The UK v Mauritius*.[35] In a broad scope, it is both possible and practical to establish an MPA using the mechanisms provided in the UNCLOS and the CBD, as these two global conventions impose a broad duty on States to protect both the marine resources and the marine environment within and beyond their national jurisdiction. Although broad obligations to protect the marine environment are included in Part XII of the UNCLOS, it also provides for a sectorial approach that allows coastal States to adopt protective measures in the EEZ, the Continental Shelf and the high seas[36] with the exception that the protection of the marine environment of the high seas or the area beyond national jurisdiction has to respect the right of freedom to navigate, since the high seas are not subject to the national jurisdiction of any coastal State.[37] However, identifying the existence of this right to establish MPAs is not the same as claiming that an obligation exists under UNCLOS to establish MPAs.

In the case of the CBD, the obligation for States to establish a system of protected areas can be found in Article 8 and the CBD supports the implementation of State parties through the decision of the Conference of the Parties (COP) and the relevant Programmes of Works that provide guidelines for States. The decisions adopted based on these relevant programmes of work are the interpretative mechanism of the CBD, in which is provided technical details of how to implement the obligation of Article 8. The decisions of the COP of the CBD are usually adopted by consensus,[38] which may not alter the treaty, but can be considered as a subsequent agreement or

[34] Map of Marine Reserves of New Zealand, online access at <http://www.doc.govt.nz/nature/habitats/marine/marine-reserves-a-z/marine-reserves-map/>.
[35] *Chagos Marine Protected Area Arbitration (Mauritius v. UK)*, PCA Case No. 2011-3 (Unclosannex VII Arb. Trib. Mar. 18, 2015), at <http://www.pca-cpa.org.> para. 320 (Chagos MPA Arbitration)
[36] See Chapter 5, section 1 and section 2.1.
[37] UNCLOS, Articles 87 and 89.
[38] Rule 40 for the Rule of Procedure of the COP of the CBD, <https://www.cbd.int/doc/legal/cbd-rules-procedure.pdf>

subsequent practice of the party with regard to the interpretation and application of the treaty.[39] The requirement to establish an MCPA, as a result of the adoption of the Jakarta Mandate at COP II in 1995, was the starting point for conservation of marine biodiversity.[40] This was followed by COP IV decision IV/5, which guides the different actions of marine biological conservation, including the establishment of Marine and Coastal Protected Areas (MCPAs).[41]

The MARPOL, the Ramsar Convention and the WHC share objectives that contribute to developing of MPAs of a smaller scope, or in more specific areas, although these conventions may have limited application based on their individual purposes. For example, the MARPOL focuses more on international shipping activities and the special protection area to which it is applied must have a connection with a shipping route, since details of any area being disturbed by shipping activities requires to be identified in the proposal of Special Areas and PSSAs.[42] The Ramsar Convention has a very clear objective to conserve wetlands, including those with a marine element.[43] This convention even includes an obligation for States to designate wetlands within their jurisdiction; however, the definition of a wetland is broader than just an MPA, which enables States to propose other eligible wetlands, rather than focusing only on marine and coastal wetlands. Similar to the Ramsar Convention, a contribution to the establishment of an MPA can be seen in the WHC, which has the aim of conserving both cultural and natural world heritage sites,[44] and, hence, the objective of this Convention is not directly

[39] Vienna Convention on the Law of Treaties 1969, entered into force 27th January 1980, 1155 UNTS 331 (VCLT), Article 31 (3) ; See also Annecoos Wiersema, 'The New International law-Makers? Conference of the Parties to Multinational Environmental Agreements' (2009) 31 Michigan Journal of International Law 231, 234-236.
[40] Decision adopted at the Conference of the Parties to the Convention on Biological Diversity at its second meeting, Jakarta, Indonesia, 6 - 17 November 1995, Conservation and Sustainable use of Marine and Coastal Biological Diversity, COP II/10, UNEP/CBD/COP/2/19, <https://www.cbd.int/decisions/cop/?m=cop-02> (accessed 30 August 2017) (Decision II/10) ; see also Decision IV/5 (n 26).
[41] Decision adopted at the Conference of the Parties to the Convention on Biological Diversity, at its Seventh Meeting, UNEP/CBD/COP/DEC/VII/5, 13 April 2004, Annex, p 11, <http://www.cbd.int/doc/decisions/cop-07/cop-07-dec-05-en.pdf> (accessed 30 August 2017) (Decision VII/5).
[42] IMO Res. A.720(17) (n 29), Guideline for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Areas.
[43] Ramsar Convention (n 12), Article 1.
[44] WHC (n 3), Preamble.

focused on the marine environment alone, but also on other types of environment.

Although these three conventions have only an indirect influence on the obligation of States to establish an MPA, States can exercise their right to establish an MPA within the scope of the legal mechanism of these conventions. These three conventions refer to the establishment of an MPA or similarly protected area regime and assert that legal mechanisms in global instruments do exist and are available for use in the formation of a legal obligation to establish an MPA. Nonetheless, by the nature of the international environmental agreement, these conventions may only provide legal mechanisms for States, rather than imposing a strict obligation on them. This results in a change in behaviour of the States with regard to protection and conservation of the marine environment by the establishment of an MPA, which should be appraised, as this is an indicator of a norm developing in this matter. Compliance of the environment obligation should not be justified only by the number of regimes being implemented, but also by the change in behaviour of the States with the same particular interest,[45] which, in this case, is showing consideration to protect and preserve the marine environment from both the global and regional levels.

A shared understanding of the notion of a legal obligation to establish an MPA can be found by combining the legal consequences of the framework conventions, for example, the UNCLOS and the CBD, with those of specific conventions, such as the MARPOL, the Ramsar Convention and the WHC. Although it is uncertain if this obligation can be viewed as a single obligation, as the details, objectives and application of the designated MPAs may differ, implementation of the establishment of an MPA also fulfils the customary norm of the duty to protect, as mentioned above.[46] In addition, development of the decisions adopted by the COP is one of the most important mechanisms in the shaping of a legal obligation in multinational environmental treaties.[47]

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[45] Ronal B. Mitchell, 'Compliance Theory: Compliance, effectiveness, and behaviour change in international environmental law' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007).
[46] See Chapter 5, section 2, conclusion.
[47] Jutta Brunnée, 'Coping with Consent : Law-Making Under Multilateral Environmental Agreements' (2002) 15 Leiden Journal of International Law , 5.

Despite the binding consequence of these decisions not fitting the traditional concept of law, their influential force can contribute to the development of a legal norm that will eventually make the obligation 'self-binding'.[48] Although the criteria of legality[49] of the obligation may differ to the adoption of the law in the form of a convention, the criteria of legality, in terms of its generality, promulgation and prospective, are met, as this is agreed in the meeting of the parties and publicly provided to the parties. The clarity, non-contradictory and the realistic measures and constancy of how to conduct the obligation are also provided in the form of guidelines or the recommendations that States may follow. The congruence of the obligation could be evident from the norm being reiterated from the global to the regional instrument. Subsequently, the practice of legality of the obligation is expressed through the adoption and development of global and regional instruments to facilitate the State into establishing MPA.

As mentioned above, although the information related to RSPs categorised by the UNEP is the source of the materials examined in this current research, this does not mean that regional cooperation in the protection of the marine environment is limited to RSPs, as regional cooperation may be agreed in different formats. However, for ease of reference and in order to complete the research within the limited time allowed, only the eighteen RSPs categorised by the UNEP are examined.[50] These eighteen RSPs include those administered by the UNEP and those that are independently administered. The RSPs are categorised into three groups based on the indication of commitment in global instruments with a focus on an analysis of the legal mechanism to establish an MPA.

The first group consists of the RSPs that include a direct reference to global instruments, while the second group consists of RSPs with legal instruments

[48] Ibid., 37-38.
[49] Jutta Brunnée and Stephen Toope, 'Interactional International Law: an introduction' (2011) 3 International Theory 307, 310-311.
[50] The Regional Sea Programmes (RSP) were developed by the UNEP in 1974, and there are currently eighteen of them. More details can be found at <https://www.unenvironment.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/why-does-working-regional-seas-matter> (accessed July 2018).

that are, regardless of their reference to global instruments, somewhat similar to the MPA-related provision of global instruments. The third group consists of RSPs that contain neither a direct reference nor any similarity to global instruments, although they may include legal mechanisms that are applied in the establishment of an MPA.

The governing instruments of the first group of RSPs implement or refer directly to global instruments. This group also includes RSPs that may only be soft-law based instruments, but they mention the commitments of global conventions. There are eleven RSPs in this group: the Mediterranean, Red Sea and the Gulf of Aden, Black Sea, Caspian, Eastern Africa, North-east Atlantic, Baltic, Antarctic, Arctic, South Asian and Northwest Pacific.

Five of the regions in the first group of RSPs, namely the Mediterranean, Red Sea and the Gulf of Aden, Black Sea, Caspian, and Eastern Africa, adopted instruments that impose a legal obligation to establish protected areas. They exhibit the intention to fulfil the commitment of the global instruments in the preamble of the regional convention demonstrating a close link to global instruments and this could be regarded as exemplifying the commitment to protect the marine environment included in global instruments.[51] The North-east Atlantic adopted a number of recommendations and decisions with regard to the establishment of an MPA by referring to Article 2 of the General Obligation of the OSPAR Convention. With this system, the region not only adopts the Recommendations for a Network of MPAs,[52] but also many decisions related to the establishment of an MPA.[53] Many global instruments, including the CBD, the UNCLOS and the Stockholm Declaration, are referred to in the preamble of the OSPAR Convention. In addition, the region expressively adopts the definitions of 'biodiversity', 'ecosystems' and

[51] R.R. Churchill and A.V. Lowe, *The law of the Sea* (3 edn, 1999), 392-394.
[52] OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas, Annex 9, Ref. § A-4.44a, adopted at the meeting of the Ospar Commission on the 23rd – the 27th June, 2003. (Ospar Rec. 2003/3).
[53] OSPAR Decision 2010/2 on the establishment of the Charlie-Gibbs South Marine Protected Area, OSPAR 10/23/1-E, Annex 36 ; See also the OSPAR Decision 2010/1 on the Establishment of the Milne Seamount Complex Marine Protected Area, OSPAR 10/23/1-E, Annex 34.

'habitat' which are used in the CBD.[54] One observation of direct reference to the UNCLOS is that the OSPAR Convention refers to global and regional cooperation in Article 197 of the UNCLOS,[55] which is a very explicit implication of the further implementation of this global convention.

The Antarctic agreements related to the establishment of an MPA are the Environment Protocol[56] and the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR).[57] These two instruments provide an obligation for States to establish an MPA within their region as the mechanisms for the marine environment and its living resources. The Baltic adopted a recommendation regarding the System of Coastal and Marine Baltic Sea[58] Protected Areas that relates to the implementation of the commitment of the CBD to protect the marine environment and manage MPAs.[59] Hence, this direct reference to the CBD could be considered as further implementation of the global convention. However, the legal status of the recommendation differs to the agreement, as it is not transfromed into a binding obligation, even though it may influence the implementation of an MPA regime in member States.

The first eight RSPs either directly or indirectly mention one of the global conventions in the preamble of the regional instrument.[60] They first adopted the main regional convention as a framework to regulate matters related to

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[54] Convention for the Protection of the Marine Environment of the North-East Atlantic, adopted 22 September 1992, entered into force on 25 March 1998 (OSPAR Convention), Annex V ; OSPAR Convention, Annex 5 refers to the definition used in the CBD, Article 2.
[55] Ibid., Preamble.
[56] Protocol on Environmental Protection to the Antarctic Treaty, adopted 4 October 1991, entered into force 14 January 1998, 30 ILM 1455 (1991) (Environmental Protocol).
[57] Convention on the Conservation of Antarctic Marine Living Resources, 1329 UNTS 48, entered into force on 7 April 1982 (CCAMLR).
[58] Helcom Recommendation 35/1, adopted at the Baltic Marine Environment Protection Commission on the 1st April, 2014, online accessed at <http://www.helcom.fi/Recommendations/REC%2035-1.pdf>. (Helcom Rec. 35/1)
[59] Ibid., 1
[60] Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, adopted 10 June 1995, 12 December 1999 (SPA&Biodiversity Protocol), Preamble ; Black Sea Biodiversity and Landscape Conservation Protocol to the Convention on the Protection of the Black Sea against Pollution, adopted 14 June 2002, entered into force 20 June 2011 (BSBLCP), Preamble; Protocol Concerning the Conservation of Biological Diversity and the Establishment of Network of Protected Areas in the Red Sea and Gulf of Aden, adopted on 12 December 2005 (Jeddah Protocol), Preamble; and Protocol for the Conservation of Biological Diversity to the Framework Convention for the Protection of the Marine Environment of the Caspian, adopted 30 May 2014 (Ashgabat Protocol), Preamble.

the marine environment and subsequently adopted instruments that provide a legal mechanism to establish a protected area in the protocol or other instruments.

The Arctic does not have a regional agreement, but uses working groups that are related to the protection of the marine environment, one of which is the Protection of the Arctic Marine Environment Working Group (PAME) and another is the Conservation of Arctic Flora and Fauna Working Group (CAFF).[61] The Arctic adopts the Arctic Marine Strategic Plan 2015-2025, which relates to development of marine protected areas.[62] This reiterates the fact that a norm is forming in the establishment of an MPA, even without the agreement of the conventional law. This plan is adopted by the PAME. Although the Action Plan does not have such a binding force as a convention, it can be used as evidence of the regional policy to protect the marine environment.

While the South Asian Sea adopted the Action Plan and later agreed to comply with the commitment to establish an MPA using the CBD mechanisms, [63] the North-west Pacific also especially mentions the zoning of selected special areas of the coast and seabed of marine parks and natural reserves,[64] the zoning of the marine area for a specific purpose and controlling the discharge and other inputs into the water.[65] This is also parallel to the shared concept of an obligation to establish an MPA that is used in the global and other regional instruments.

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[61] Conservation of Arctic Flora and Fauna Working Group, online accessed at <http://www.arctic-council.org/index.php/en/about-us>; see also Declaration on the Establishment of the Arctic Council, Ottawa, 1996, Article 1(b).
[62] Arctic marine Strategic Plan 2015-2025, Action 7.2.10, p 14 online accessed at <http://www.pame.is/images/03_Projects/AMSP/AMSP_2015-2025.pdf>.
[63] Report of the 12th Meeting of the Governing Council of South Asia Co-operative Environment Programme on 1 - 3 November 2010, Colombo, Sri Lanka, Decision No. 11, Annex XX GC 12.SACEP, p 91, online access at <http://www.sacep.org/pdf/Reports-GC-SACEP/2010.11.01-03-GC_12_Report.pdf> (accessed 1 September 2017).
[64] Action Plan for the Protection, Management and Development of the Marine and Coastal Environment of the Northwest Pacific Region, para 20 e), online access at <http://www.nowpap.org/> (access 31 August 2017).
[65] Ibid., para 21 b).

The second group with MPA provisions that are similar to global instruments consists of five RSPs, namely the Caribbean, Western Africa, Pacific, Southeast Pacific and Northeast Pacific. The provisions related to the establishment of an MPA in three of the RSPs, being the Wider Caribbean, Western Africa and the Pacific regional sea programmes, have a very similar format, which is also similar to Article 194 (5) of the UNCLOS[66] and, thus, also similar to the MPA regime of the Eastern Africa RSP in the first group. These three RSPs are similar, in that they include a clear obligation for the Member States to establish especially protected marine areas[67] within their regional seas. However, the provision regarding establishment of an MPA in the North-East Pacific and South-East Pacific has a different format, as their provisions did not use the term in the provision of the three RSPs, regarding the establishment of a protected area in the above-mentioned four RSPs. However, this does not lessen the fact that their instruments provide an obligation to the establish an MPA.

The MPA provision of the RSPs in this group is straightforward. The ordinary meaning (applied in accordance with Article 31(1) of the VCLT), as revealed in light of the objective and purpose of the whole treaty in line with the good faith principle,[68] shows that, apart from the Antigua Convention, the purpose of which is explicitly detailed in Article 1, the objective and purpose of the conventions of these RSPs are based on their 'responsibility to preserve their natural heritage for the benefit and enjoyment of present and future generations'. This is explicitly shown in the preamble of the main conventions of most of the RSPs in this group.[69] Again, the RSPs that adopted the

[66] UNCLOS (n 14), Article 194 (5)

> '…
> 5.The measures taken in accordance with this part shall include those necessary to protect and preserve rare or fragile ecosystems, as well as the habitat of depleted, threatened or endangered species and other forms of marine life.'

[67] The specially protected marine area is a term generally used in regional instruments; however, the concept of this term is similar to an MPA as defined in Chapter 3, conclusion and Chapter 5, section 1 of the thesis ; See also Amended Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean, adopted on 31 March 2010, Article 10 ; SPA&Bioversity Protocol (n 60).

[68] Richard K. Gardiner, *Treaty Interpretation* (OUP 2008), 160-161.

[69] Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, adopted 24 March 1983, entered into force 11 October 1986 (Cartagena Convention), Preamble; Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, adopted 23

subsequent protocol are evidence of subsequent agreement to the main convention of the region, and an examination of the period when these three protocols were adopted illustrates that this occurred after the increased concern about protection of the marine environment in global instruments.[70] It could be said that the conclusion of global instruments has been extremely influential to the adoption of marine environment agreements at the regional level. Again, this notion indicates a trend in the setting of an obligation for the States to establish an MPA at the regional level.

The third group, consisting of RSPs that are not similar to, and do not implement, global instruments, including two RSPs, namely the ROPME sea area and the East Asian Seas, and the legal mechanism may need to be further developed to establish an MPA at the regional level. While the ROPME Sea Area has adopted the Kuwait Convention,[71] which follows the traditional form of a regional sea convention that is based on the protection of marine pollution being the main regional instrument, the East Asian Sea has adopted an Action Plan.[72]

This evidence indicates that, although a policy-based instrument may not have the same impact as a regional convention or contain a clear obligation when compared to the RSPs in the first and second groups, it responds to the

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March 1981, entered into force 5 August 1984 (Abidjan Convention), Preamble ; Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, adopted 24 November 1986, entered into force 22 August 1990 (Noumea Convention), Preamble ; and Convention for cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific, adopted 18 February 2002 (Antigua Convention), Preamble.

[70] Details provided in Chapter 6, section 2, for example, Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, adopted 18 January 1990, entered into force 18 June 2000 (SPAW Protocol); Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region, adopted 21 Jun 1985, entered into force 30 May 1996 (Nairobi Convention Protocol); and Protocol for the Conservation and Management of Protected Marine and Coastal Areas of the South-east Pacific, adopted on 21 September 1989, entered into forced 24 January 1995 (Paipa Protocol).

[71] Kuwait Regional Convention for Co-operation in the Protection of the Marine Environment from Pollution, adopted on 24 April 1978, entered into force 1 July 1979 (Kuwait Convention).

[72] Action Plan for the Protection and development of the marine and coastal areas of the East Asian Region, 1983, online access at <http://www.cobsea.org/documents/action_plan/ActionPlan1983.pdf>.

common interest of a regional organisation to protect the marine environment, which is the trend in global instruments. However, it cannot be denied that the legal mechanism in these two RSPs may need further development for the establishment of an MPA.

The regional mechanisms to establish an MPA presented in the different groups above prove that a shared understanding of an obligation to establish an MPA is developing. The majority of the RSPs either directly refer to the notion of this obligation in the global scope or resonate with the creation of a legal norm of the global instruments shown above in the second group. The practice by sixteen of the RSPs that provide a legal regime to establish an MPA is in line with the criteria of legality and the practice of legality demonstrated from the global level to the regional level as discussed above. With only the last group lacking a regional mechanism, they can utilise the global legal mechanism to establish an MPA. Two regions not providing a legal instrument in this regard should not have an adverse impact on the emerging norm of establishment of an MPA. It is safe to say that the regional instruments depict the practice of legality in the notion of establishing an MPA that is provided in global instruments. In addition, this obligation could be a detailed expansion of the duty to protect the environment, which attracts wider recognition in international law. Moreover, some of the regional instruments, especially the RSPs in the first and second groups as shown in Chapter 6, provide more specific reference to the establishment of an MPA when compared to the global instruments, and this could be a step towards the desirable development of what is required at the global level, such that States should comply with the obligation to protect by means of establishing an MPA.

3. Is there an obligation to cooperate at the regional level?

As previously mentioned, a duty to cooperate is crucial to international law,[73] and the obligation to cooperate to protect the environment is emphasised even

[73] See Chapter 4.

more in international disputes related to the environment.[74] An obligation to cooperate applies to all States and it is only occasionally highlighted as regional cooperation, mainly in the conservation and management of marine living resources,[75] with regional cooperation being well established in the form of a regional fisheries organisation. In addition, the regional cooperation for the general scope of protecting and conserving the marine environment shown in the Regional Sea Programmes of the UNEP also proves that States implement, and comply with, the obligation to cooperate based on a regional agreement. In fact, States are explicitly required to cooperate according to Article 5 of the CBD and, similarly,Article 5 of the Ramsar Convention, requires State parties to cooperate, as do Articles 6 and 7 of the WHC. However, regional cooperation in terms of the environment is usually left to the discretion of States, since, apart from the explicit provision to recommend regional cooperation in Article 197 of the UNCLOS, hardly any treaties specifically target regional cooperation.[76] Other global instruments, such as the CBD, Ramsar Convention, WHC and MARPOL, do not specifically refer to regional cooperation. However, although regional cooperation is not specifically referred to in the MARPOL, State parties have practically cooperated at the sub-regional and regional levels in the designation of PSSAs. Thus, it is quite clear that regional cooperation is desirable in global instruments.

At this stage, it is safe to say that the duty to cooperate to protect the environment is becoming the customary law, but this does not relate to regional cooperation. As the research also set the meaning of regional cooperation in Chapter 4, that the regional cooperation refers to the action or process of working together within the region to reach the same end.[77] In this regard, regional cooperation to protect and preserve the marine environment could be perceived as i) the specific implementation of a general duty to cooperate or ii) the specific implementation of an obligation to protect the

[74] See Chapter 4, section 1.
[75] See Chapter 4, section 2.1.
[76] See Chapter 4, section 2.1.
[77] See Chapter 4, section 2.

environment. Both of the wider obligations, to either cooperate or protect the environment, could be considered as customary norms. The first notion is based simply on the significance of cooperation in international law, including collective evidence of the principle of cooperation in international disputes and incorporated into global treaties, as shown in Chapter 4, as well as cooperation to achieve the purpose of protecting and preserving the marine environment. In any case, it is undeniable that States agree to cooperate to achieve a common interest, which, in this case, is the conservation and protection of the marine environment.

The second notion relates to regional cooperation in the protection and preservation of the marine environment as specified in Article 197 of the UNCLOS, which was only mentioned in the preamble of the OSPAR Convention of the North-East Atlantic sea region. However, it is not mentioned as specifically as it is in the OSPAR Convention, in most RSPs. This is evident from the fact that regional cooperation in the protection and conservation of the marine environment is implemented based on the agreement of the RSPs, as shown in Chapter 6. And this confirms the cooperation at the regional level which could imply a belief of a broader obligation to cooperate. Nonetheless, cooperation to protect the environment can be strengthened at the regional level. The UNCLOS is the instrument that has the most influence on the regional cooperation of all the global instruments examined in this thesis, as many of its provisions refer to regional cooperation, as shown in Chapter 4. Although other global instruments may not accommodate regional cooperation as much as the UNCLOS does, it is recommended in all of them.

4. Is there a clear obligation to cooperate at the regional level to establish an MPA and is this obligation emerging as customary law?

If the rights and/or obligations of States in the establishment of an MPA only in global instruments are examined in this research, it can be seen that two of these instruments, namely the CBD and the Ramsar Convention, require States to establish a protected area, while the UNCLOS, WHC and MARPOL offer an MPA as an option for States to use as a tool to protect marine

resources and the marine environment. This is similar to the requirement for regional cooperation in the establishment of an MPA, which is voluntary, depending on the States concerned. However, regional cooperation is strongly recommended in the exchange of information and consultation among the related States for better implementation of a global commitment to conserve and protect the marine environment. Since the research states clearly in chapter 4, section 2 that by regional cooperation to establish an MPA it refers 'the act or process that the governments of the countries within the region enter to establish MPAs.' It should be noted that, even though regional cooperation in the act of conservation begins with a mere recommendation, many regional or sub-regional initiatives or organisations have actively cooperated to establish an MPA, as seen in the existing mechanisms contained in RSPs.

Based on the application of treaty interpretation and interactional international legal methods to consider the emergence of customary international law, the analysis in Chapter 4, 5 and 6 have been combined to examine the regional cooperation to establish an MPA provided in global and regional instruments. This highlighted the individual obligation to cooperate and the individual obligation to establish an MPA in global and regional instruments. Furthermore, the combination of these two obligations into one notion of regional cooperation to establish an MPA is the most important aspect this current research aims to justify. It was found from the analyses in previous chapters that regional cooperation to establish an MPA successfully is deemed to be a legal obligation based on the interactional international law, due to the following characteristics.

4.1 The shared understanding[78]

A shared understanding of the obligation is form by agreement related to the concept of an MPA in both global and regional instruments that the MPA refers to the enclosed part of the marine environment that need a protection measure for the conservation and protection of its environment and ecosystems from any activities.[79] Such a the shared understanding develops

[78] See Chapter 2, section 3.
[79] See Chapter 3, conclusion.

from what societies believe about some particular issues, in this matter, the marine environment needs protection by establishing an MPA. As from the global and regional instruments, the norm of regional cooperation to establish an MPA as a tool to protect the marine environment is quite ubiquitous. The list of the members to the global conventions[80], it demonstrates that every State bind to, at least, one of the global conventions regarding the establishment of an MPA. Moreover, among eighteen RSPs only the ROPME and East Asian which comprise of seventeen countries[81] between them, only amount to 11.88% of 143 participating members to the RSPs, which have not implemented further the regional mechanism for the establishment of an MPA. In this respect, regional organisations tend to implement an MPA regime by either adopting regional mechanisms or directly referring to global instruments.[82] The shared understanding is that an MPA is implemented at the regional level in order to protect and conserve the marine environment, including natural habitats, marine living resources and some unique features of the environment.[83] To a certain extent, 4 RSPs have even adopted text similar to the global instrument in their regional instruments.[84] This concept is found in the global and regional instruments and reflects the concept of the MPA used in this current research.

4.2 The criteria of legality[85]

The criteria of legality in this obligation may not be as explicit as in the domestic law. However, the notion of regional cooperation to establish an MPA generally indicates the formation of a shared understanding of the concept of an MPA, as previously stated. The obligation has been publicly announced and it is prospective, either in the form of a regional agreement or a recommendation that relates to a global commitment that binds member States to protect the marine environment. It is not impossible to achieve the establishment of an MPA. Although ways in which States could establish an MPA may differ, in terms of the purpose and objective of the global or

[80] See Annex I of the thesis, List of the Members of the Global Conventions.
[81] See Annex II of the thesis, List of the Members of the Regional Sea Programmes.
[82] See Chapter 6, section 1.
[83] See Chapter 6, section 2.
[84] See Chapter 6, section 2.2.
[85] See Chapter 2, section 3.

regional convention to which they refer, the principal purposes of an MPA remain similar in many of the relevant regimes, as previously discussed in Chapters 5 and 6, which shows that the clarity of the important purpose of the marine environment is protected by the law. With regard to the non-contradictory feature of the obligation, within the selected instruments that share the purpose of protecting and conserving the marine environment it is uncommon for them to contradict one another over the same purpose. However, when a State complies with one treaty obligation that governs different areas under the national jurisdiction, this may lead to possible fragmentation of the application of the law, as mentioned in the introduction.[86] However, the special regime that governs the particular area, for example the regime of the MARPOL or the Ramsar Convention can be treated as *lex specialis,*[87] which is applied to a particular area rather than causing conflicting issues where the State must choose one over the other. The consistency of the obligation is portrayed through the objective and purpose of an MPA, which are similar in both global and regional instruments and emphasise that the important value of the marine environment should be protected. The only difference is in the details of the characteristics of an MPA in a specific RSP that requires more specific features than the others.

The criteria of the legality of regional cooperation are illustrated by its development from the global to the regional level. The congruence of law between the authority of the people, which, in this case, is the norm from global to regional instruments, is also satisfied, although not in the sense that regional instruments adopt identical obligations as global instruments, but rather in the sense that regional instruments correspond to, and complement, the commitment to protect and preserve the marine environment of their global counterparts.[88] This act of corresponding to the global commitment at the regional level shows that the shared norm of protection of the marine

[86] See Chapter 1.
[87] Martti Koskenniemi, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 58th Session of the International Law Commission, A/CN.4/L.682, 13 April 2006, 34-35, online accessed at <http://www.repositoriocdpd.net:8080/bitstream/handle/123456789/676/Inf_KoskenniemiM_FragmentationInternationalLaw_2006.pdf?sequence=1> (accessed 29 August 2017) (ILC Report on Fragmentation of Law).
[88] See Chapter 6, section 2.

environment is repeated in the practice of the regional communities with the legality criteria that has been satisfied, and this helps in clarifying the *oipinio juris* of the CIL.[89] Moreover, the concept of an MPA provided in Chapter 3 shows that the common element of the emerging norm of the establishment of an MPA is ubiquitous across the global and regional instruments.

4.3 The practice of legality

The practice of legality is the actual exercise of the obligation. In this case, the existing mechanisms adopted by regional organisations in the form of, for example, the protocol for the implementation of an MPA, are positive evidence of the practice of legality. Furthermore, RSPs that do not create a regional mechanism also refer to the global mechanisms to implement their MPA.

The obligation to cooperate is firmly implanted in international law, especially in terms of protecting the environment. Various possible means are available for regional cooperation, although this does not only apply to the establishment of an MPA, as mentioned in Chapter 4. However, the obligation to establish an MPA is slowly transitioning from being one of the means to protect and preserve the marine environment, as shown in Chapter 5, and is imported to the regional instruments, as shown in Chapter 6. This trend is also supported by the forthcoming negotiations regarding the implementation of a potentially new agreement of the UNCLOS when the MPA in the ABNJ will be discussed in detail.[90] The existing regional cooperation to establish an MPA is highlighted in Chapter 5 as ascertaining the implementation of the regime, which is the result of a global commitment to protect and preserve the marine environment.

RSPs implement an MPA based on adopting some regional instruments, including a binding convention and policy-based recommendations depict States' practice in terms of the actual implementation of regional cooperation

[89] See Jutta Brunnée, 'Sources of International Environmental Law: Interactional Law' in Besson S and Jean d'Aspremont J (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017), 970.
[90] See Chapter 5, section 2.1.

to establish the MPA. Nevertheless, it is difficlut to conclude that regional cooperation to establish an MPA is customary international law at this stage, even when many RSPs are implementing an MPA regime. This is because the majority of RSPs implement their MPA regime based on hard-law instruments, some of which, nevertheless, refer to global commitments from different conventions that share the same purpose of protecting and conserving the marine environment.[91] It is noticeable that the regional cooperation between the States in agreeing about the instruments for the establishment of an MPA indicates a belief that they should agree on the establishment of an MPA. Although it may be difficult to conclude that all States share the *opinio juris* and the action of States with regard to the establishment of an MPA as they may only do so to comply with the treaty obligation, the examination of regional instruments shows that the States actually adopt and implement the MPA regime at the regional level. Although widespread participation to one obligation through the contractual obligation alone cannot confirm the *opinion juris*, it may support the consistency of the practice of the States.[92] Moreover, it should be noted that the customary status of one obligation can be developed based on a treaty, as can be seen in the case of customs in the UNCLOS, including the acceptance of the right of States in the EEZ[93] and the continental shelf,[94] which was initially developed from a treaty-based source of law and later accepted as customary law. Therefore, it is possible that the legal obligation for States to cooperate regionally to establish an MPA, which is the focus of this current research, could potentially develop into customary law.

Contributions of the research

The finding of this current research, the purpose of which was to examine the legal rights and/or obligations of States to establish an MPA under international law, has provided evidence of the existence of a core, or common, understanding of the legal element of the rights and/or obligations

[91] See Chapter 5.
[92] Mark E. Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (Kluwer Law International 1997), 156-157.
[93] Churchill and Lowe (n 51),161.
[94] Ibid., 145.

of States to establish an MPA under international law. This finding is based on an analysis of the legal mechanisms provided in the related global and regional instruments, as shown above. Despite the development of many regulations and further legal instruments for the establishment of an MPA at both global and regional levels, it justifies the emergence of an obligation to establish an MPA. However, most of the mechanisms included in global and regional instruments refer to the establishment of an MPA, with the basis of the obligation being in the form of a framework convention, which fails to disadvantage, or reprimand, States that do not implement the MPA regime. Also, the obligation to establish an MPA is considered as being the implementation of a wider obligation to protect, rather than a single obligation on its merit.

A further analysis was concluded in the research based on whether this set of legal rights and obligations qualify as customary international law in considering the evidence of State practice and *opinio juris*, which are the key elements of the customary international law.[95] If the obligation to cooperate at the regional level to establish MPAs can be shown to exist, or be emerging in customary international law, this will raise the standard of protection for the marine environment. This is because customary international law binds all States, even those that are not party to any relevant convention,[96] with the exception of those that qualify as 'persistent objectors' who expressed their objection in the early stages of the development of customary international law and continue to do so.[97] However, no evidence has been found of persistent objectors in this case. The regions that have not established an MPA regime appear to be laggards rather than persistent objectors, as their choice to not agree on the specific regional regime on the establishment of an MPA does not mean they are objecting to the establishment of an MPA. Those

[95] Rosalyn Higgins, *Problem and Process: International law and how we use it!* (OUP 1995); See Chapter 3; See also Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (n 92), 61.
[96] Pierra-Marie Dupuy, 'Formation of Customary International Law and General Principles' in Danieal Bodansky, Jutta Brunnee and Ellen Hey, (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007, 450.
[97] Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (n 92), 34.

regions can also exploit the mechanism to establish an MPA using the global instruments.

After examining the obligation to establish an MPA under international law, it was found that it lacked a customary international law status. It is difficult to judge whether or not the action of States with regard to the implementation of an MPA, at either the global or regional level, has arisen from a belief that they are obliged to do so under the customary international law. This is because the obligation to establish an MPA and regional cooperation to establish an MPA mainly operate based on a commitment to treaties, rather than a belief of the State. Therefore, the internal element of the CIL is yet to be solidified at this stage. However, regardless of the CIL status, the trend towards the development of international law related to protecting the marine environment has been found to be as described below.

1. Development of an obligation to establish an MPA is generated based on an obligation to protect and preserve the marine environment, which is already accepted as being part of customary international law.[98]
2. Regional cooperation in the establishment of MPAs is considered to be a legal obligation that facilitates the implementation of the global obligation to protect and preserve the marine environment, because it is quite clear that many regional initiatives have been established, and continue to be established, based on a commitment to global conventions.[99]

However, this does not mean that the obligation to establish an MPA, or the obligation to cooperate regionally to establish an MPA, cannot subsequently advance and stand on its own merit. Evidence of an existing legal obligation, which is first performed as the implementation of one obligation and then becomes a separate obligation, can also be found in the obligation to

[98] Patricia W. Birnie, Alan E. Boyle and Catherine Redgwell, *International law and the environment* (3 edn, OUP 2009), 378 ; See also Tanaka Yoshifumi, *The International Law of the Sea* (CUP 2012), 267.
[99] See Chapter 6.

undertake an Environmental Impact Assessment (EIA) in the transboundary context, which has now become part of customary international law.[100] The EIA obligation is now accepted as a freestanding obligation as part of the customary international law,[101] although in the past, it was developed as part of the precautionary principle as a detailed implementation of the obligation to protect and preserve.[102]

The findings of this current research suggest that, des[ite the obligation to establish an MPA currently lacking the status of customary international law, the norm of regional cooperation to establish an MPA is emerging. This obligation can still be escalated to stand on its own merit as a freestanding obligation, as its status in international law is becoming increasingly solid, according to evidence from the forthcoming negotiations regarding the implementation of a new agreement under the UNCLOS, which will include the issue of MPAs. The wider the recognition is of the obligation to establish an MPA, the more solidified the obligation to cooperate regionally in the establishment of the MPA will be. In any case, regional cooperation to establish an MPA in the RSPs demonstrates maintenance of the marine environment, as well as solidifying the global norm to protect it. Thus, it is strongly believed that regional cooperation promotes better protection of the marine environment.

In summary, the objectives of this current research have been achieved: firstly, by identifying the available mechanism for States to establish an MPA; secondly, by depicting the details of the obligation to establish an MPA based on international law; and thirdly, by highlighting the significance of regional cooperation in the establishment of MPAs by demonstrating the implementation of the global norm through regional arrangements. However,

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[100] Alan Boyle, 'Development in the International Law of environmental Impact Assessments and their Relation to the Espoo Convention' (2011) 21 Review of European, Comparative & international Environmental Law, 227; Alexander Gillespie, 'Environmental Impact Assessments in International Law' (2008) 17 Review of European, Comparative & international Environmental Law, 222.

[101] Boyle, 'Development in the International Law of environmental Impact Assessments and their Relation to the Espoo Convention' (n 100), 227.

[102] Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgment) [2010] ICJ.Rep 14, para 204; See also Chapter 5.

this research could be further developed by examining some of the work of regional fisheries that would be useful to increase the knowledge of how regional cooperation can contribute to the broader obligation to protect and preserve the marine environment. There is also some room for a detailed examination of the application of the obligation to establish an MPA in different jurisdictions, as this may highlight the overlapping of authorisation that this research has not been able to address, due to the time limitation and the permitted length of the thesis.

ANNEX I LIST OF MEMBERS OF THE GLOBAL CONVENTIONS

As of June 2018	RAMSAR 1971	WHC 1972	IMO Convention 48	MARPOL (Annex I/II)	MARPOL (Annex III)	MARPOL (Annex IV)	MARPOL (Annex V)	MARPOL (Annex VI)	CBD 1992	UNCLOS 1982
Afghanistan		x							x	
Albania	x	x	x	x	x	x	x		x	x
Algeria	x	x	x	x	x	x	x		x	x
Andorra	x	x							x	
Angola		x	x	x	x	x	x		x	x
Antigua & Barbuda	x	x	x	x	x	x	x	x	x	x
Argentina	x	x	x	x	x	x	x		x	x
Armenia	x	x	x						x	x
Australia	x	x	x	x	x	x	x	x	x	x
Austria	x	x	x	x	x	x	x		x	x
Azerbaijan	x	x	x	x	x	x	x	x	x	x
Bahamas	x	x	x	x	x	x	x	x	x	x
Bahrain	x	x	x	x			x		x	x
Bangladesh	x	x	x	x	x	x	x	x	x	x
Barbados	x	x	x	x	x	x	x	x	x	x
Belarus	x	x	x	x	x	x	x		x	x
Belgium	x	x	x	x	x	x	x	x	x	x
Belize	x	x	x	x	x	x	x	x	x	x

As of June 2018	RAMSAR 1971	WHC 1972	IMO Convention 48	MARPOL (Annex I/II)	MARPOL (Annex III)	MARPOL (Annex IV)	MARPOL (Annex V)	MARPOL (Annex VI)	CBD 1992	UNCLOS 1982
Benin	x	x	x	x	x	x	x	x	x	x
Bhutan	x	x							x	
Bolivia	x	x	x	x	x	x	x		x	x
Bosnia & Herzegovina	x	x	x						x	x
Botswana	x	x							x	x
Brazil	x	x	x	x	x	x	x	x	x	x
Brunei Darussalam		x	x	x					x	x
Bulgaria	x	x	x	x	x	x	x	x	x	x
Burkina Faso	x	x							x	x
Burundi	x	x							x	
Cambodia	x	x	x	x	x	x	x		x	
Cameroon	x	x	x	x	x	x	x		x	x
Canada	x	x	x	x	x	x	x	x	x	x
Cabo Verde	x	x	x	x	x	x	x		x	x
Central African Republic	x	x							x	
Chad	x	x							x	x
Chile	x	x	x	x	x	x	x	x	x	x
China	x	x	x	x	x	x	x	x	x	x

As of June 2018	RAMSAR 1971	WHC 1972	IMO Convention 48	MARPOL (Annex I/II)	MARPOL (Annex III)	MARPOL (Annex IV)	MARPOL (Annex V)	MARPOL (Annex VI)	CBD 1992	UNCLOS 1982
Colombia	x	x	x	x	x	x	x		x	
Comoros	x	x	x	x	x	x	x		x	x
Congo	x	x	x	x	x	x	x	x	x	x
Cook Islands		x	x	x				x	x	x
Costa Rica	x	x	x						x	x
Cote d'Ivoire	x	x	x	x	x	x	x		x	x
Croatia	x	x	x	x	x	x	x	x	x	x
Cuba	x	x	x	x			x		x	x
Cyprus	x	x	x	x	x	x	x	x	x	x
Czechia	x	x	x	x	x	x	x	x	x	x
Dem. People's Rep. Korea	x	x	x	x	x	x	x		x	
Dem. Rep. of the Congo	x	x	x						x	x
Denmark	x	x	x	x	x	x	x	x	x	x
Djibouti	x	x	x	x	x	x	x		x	x
Dominica		x	x	x	x		x		x	x
Dominican Republic	x	x	x	x	x	x	x		x	x
Ecuador	x	x	x	x	x	x	x		x	x
Egypt	x	x	x	x	x	x	x		x	x

As of June 2018	RAMSAR 1971	WHC 1972	IMO Convention 48	MARPOL (Annex I/II)	MARPOL (Annex III)	MARPOL (Annex IV)	MARPOL (Annex V)	MARPOL (Annex VI)	CBD 1992	UNCLOS 1982
El Salvador	x	x	x	x	x	x	x		x	
Equatorial Guinea	x	x	x	x	x	x	x		x	x
Eritrea		x	x						x	
Estonia	x	x	x	x	x	x	x	x	x	x
Ethiopia		x	x						x	
European Union									x	x
Fiji	x	x	x	x		x	x		x	x
Finland	x	x	x	x	x	x	x	x	x	x
France	x	x	x	x	x	x	x	x	x	x
Gabon	x	x	x	x	x	x	x		x	x
Gambia	x	x	x	x	x	x	x		x	x
Georgia	x	x	x	x	x	x	x		x	x
Germany	x	x	x	x	x	x	x	x	x	x
Ghana	x	x	x	x	x	x	x	x	x	x
Greece	x	x	x	x	x	x	x	x	x	x
Grenada	x	x	x						x	x
Guatemala	x	x	x	x	x	x	x	x	x	x
Guinea	x	x	x	x	x	x	x		x	x
Guinea-Bissau	x	x	x	x	x	x	x		x	x

As of June 2018	RAMSAR 1971	WHC 1972	IMO Convention 48	MARPOL (Annex I/II)	MARPOL (Annex III)	MARPOL (Annex IV)	MARPOL (Annex V)	MARPOL (Annex VI)	CBD 1992	UNCLOS 1982
Guyana		x	x	x	x	x	x		x	x
Haiti		x	x						x	x
Holy See		x								
Honduras	x	x	x	x	x	x	x	x	x	x
Hungary	x	x	x	x	x	x	x		x	x
Iceland	x	x	x	x	x		x	x	x	x
India	x	x	x	x	x	x	x	x	x	x
Indonesia	x	x	x	x	x	x	x	x	x	x
Iran (Islamic Republic of)	x	x	x	x	x	x	x	x	x	
Iraq	x	x	x	x	x	x	x		x	x
Ireland	x	x	x	x	x	x	x	x	x	x
Israel	x	x	x	x	x		x		x	x
Italy	x	x	x	x	x	x	x	x	x	x
Jamaica	x	x	x	x	x	x	x	x	x	x
Japan	x	x	x	x	x	x	x	x	x	x
Jordan	x	x	x	x	x	x	x	x	x	x
Kazakhstan	x	x	x	x	x	x	x		x	
Kenya	x	x	x	x	x	x	x	x	x	x

As of June 2018	RAMSAR 1971	WHC 1972	IMO Convention 48	MARPOL (Annex I/II)	MARPOL (Annex III)	MARPOL (Annex IV)	MARPOL (Annex V)	MARPOL (Annex VI)	CBD 1992	UNCLOS 1982
Kiribati	x	x	x	x	x	x	x	x	x	x
Kuwait	x	x	x	x	x	x	x	x	x	x
Kyrgyzstan	x	x							x	
Lao People's Dem. Rep.	x	x							x	x
Latvia	x	x	x	x	x	x	x	x	x	x
Lebanon	x	x	x	x	x	x	x		x	x
Lesotho	x	x							x	x
Liberia	x	x	x	x	x	x	x	x	x	x
Libya	x	x	x	x	x	x	x		x	
Liechtenstein	x								x	
Lithuania	x	x	x	x	x	x	x	x	x	x
Luxembourg	x	x	x	x	x	x	x	x	x	x
Madagascar	x	x	x	x	x	x	x		x	x
Malawi	x	x	x	x	x	x	x		x	x
Malaysia	x	x	x	x	x	x	x	x	x	x
Maldives		x	x	x			x		x	x
Mali	x	x							x	x
Malta	x	x	x	x	x	x	x	x	x	x

As of June 2018	RAMSAR 1971	WHC 1972	IMO Convention 48	MARPOL (Annex I/II)	MARPOL (Annex III)	MARPOL (Annex IV)	MARPOL (Annex V)	MARPOL (Annex VI)	CBD 1992	UNCLOS 1982
Marshall Islands	x	x	x	x	x	x	x	x	x	x
Mauritania	x	x	x	x	x	x	x		x	x
Mauritius	x	x	x	x	x	x	x		x	x
Mexico	x	x	x	x			x		x	x
Micronesia (Fed. States of)		x							x	x
Monaco	x	x	x	x	x	x	x	x	x	x
Mongolia	x	x	x	x	x	x	x	x	x	x
Montenegro	x	x	x	x	x	x	x	x	x	x
Morocco	x	x	x	x	x	x	x	x	x	x
Mozambique	x	x	x	x	x	x	x		x	x
Myanmar	x	x	x	x	x	x	x		x	x
Namibia	x	x	x	x	x		x		x	x
Nauru			x						x	x
Nepal	x	x	x						x	x
Netherlands	x	x	x	x	x	x	x	x	x	x
New Zealand	x	x	x	x	x		x		x	x
Nicaragua	x	x	x	x	x	x	x		x	x
Niger	x	x							x	x

As of June 2018	RAMSAR 1971	WHC 1972	IMO Convention 48	MARPOL (Annex I/II)	MARPOL (Annex III)	MARPOL (Annex IV)	MARPOL (Annex V)	MARPOL (Annex VI)	CBD 1992	UNCLOS 1982
Nigeria	x	x	x	x	x	x	x	x	x	x
Niue		x		x	x	x	x	x	x	x
Norway	x	x	x	x	x	x	x	x	x	x
Oman	x	x	x	x	x	x	x		x	x
Pakistan	x	x	x	x	x	x	x		x	x
Palau	x	x	x	x	x	x	x	x	x	x
Palestine (State of)		x							x	x
Panama	x	x	x	x	x	x	x	x	x	x
Papua New Guinea	x	x	x	x	x	x	x		x	x
Paraguay	x	x	x						x	x
Peru	x	x	x	x	x	x	x	x	x	
Philippines	x	x	x	x	x	x	x	x	x	x
Poland	x	x	x	x	x	x	x	x	x	x
Portugal	x	x	x	x	x	x	x	x	x	x
Qatar		x	x	x	x	x	x		x	x
Republic of Korea	x	x	x	x	x	x	x	x	x	x
Republic of Moldova	x	x	x	x	x	x	x		x	x
Romania	x	x	x	x	x	x	x	x	x	x
Russian Federation	x	x	x	x	x	x	x	x	x	x

As of June 2018	RAMSAR 1971	WHC 1972	IMO Convention 48	MARPOL (Annex I/II)	MARPOL (Annex III)	MARPOL (Annex IV)	MARPOL (Annex V)	MARPOL (Annex VI)	CBD 1992	UNCLOS 1982
Rwanda	x	x							x	
Saint Kitts and Nevis		x	x	x	x	x	x	x	x	x
Saint Lucia	x	x	x	x	x	x	x	x	x	x
St. Vincent & Grenadines	x	x	x	x	x	x	x	x	x	x
Samoa	x	x	x	x	x	x	x	x	x	x
San Marino		x	x						x	
Sao Tome & Principe	x	x	x	x	x	x	x		x	x
Saudi Arabia		x	x	x	x	x	x	x	x	x
Senegal	x	x	x	x	x	x	x		x	x
Serbia	x	x	x	x	x	x	x	x	x	x
Seychelles	x	x	x	x					x	x
Sierra Leone	x	x	x	x	x	x	x	x	x	x
Singapore		x	x	x	x	x	x	x	x	x
Slovakia	x	x	x	x	x	x	x	x	x	x
Slovenia	x	x	x	x	x	x	x	x	x	x
Solomon Islands		x	x	x	x	x	x		x	x
Somalia			x						x	x
South Africa	x	x	x	x	x	x	x	x	x	x

As of June 2018	RAMSAR 1971	WHC 1972	IMO Convention 48	MARPOL (Annex I/II)	MARPOL (Annex III)	MARPOL (Annex IV)	MARPOL (Annex V)	MARPOL (Annex VI)	CBD 1992	UNCLOS 1982
South Sudan	x	x							x	
Spain	x	x	x	x	x	x	x	x	x	x
Sri Lanka	x	x	x	x	x	x	x		x	x
Sudan	x	x	x	x	x	x	x		x	x
Suriname	x	x	x	x	x	x	x		x	x
Swaziland	x	x							x	x
Sweden	x	x	x	x	x	x	x	x	x	x
Switzerland	x	x	x	x	x	x	x	x	x	x
Syrian Arab Republic	x	x	x	x	x	x	x	x	x	
Tajikistan	x	x							x	
Thailand	x	x	x	x					x	x
the former Yugoslav Republic of Macedonia	x	x	x						x	x
Timor-Leste		x	x						x	x
Togo	x	x	x	x	x	x	x		x	x
Tonga		x	x	x	x	x	x	x	x	x
Trinidad & Tobago	x	x	x	x	x	x	x	x	x	x
Tunisia	x	x	x	x	x	x	x	x	x	x
Turkey	x	x	x	x	x	x	x	x	x	

As of June 2018	RAMSAR 1971	WHC 1972	IMO Convention 48	MARPOL (Annex I/II)	MARPOL (Annex III)	MARPOL (Annex IV)	MARPOL (Annex V)	MARPOL (Annex VI)	CBD 1992	UNCLOS 1982
Turkmenistan	x	x	x	x	x	x	x	x	x	
Tuvalu			x	x	x	x	x	x	x	x
Uganda	x	x	x						x	x
Ukraine	x	x	x	x	x	x	x	x	x	x
United Arab Emirates	x	x	x	x	x	x	x		x	
United Kingdom	x	x	x	x	x	x	x	x	x	x
United Rep. of Tanzania	x	x	x	x	x	x	x		x	x
United States	x	x	x	x	x		x	x	S	
Uruguay	x	x	x	x	x	x	x	x	x	x
Uzbekistan	x	x							x	
Vanuatu		x	x	x	x	x	x	x	x	x
Venezuela (Bolivatian Republic of)	x	x	x	x	x	x	x		x	
Viet Nam	x	x	x	x	x	x	x	x	x	x
Yemen	x	x	x						x	x
Zambia	x	x	x						x	x
Zimbabwe		x	x						x	x

Source of information

Ramsar Convention-
<http://www.unesco.org/eri/la/convention.asp?KO=15398&language=E&order=alpha>

WHC- <https://whc.unesco.org/en/statesparties/>

MARPOL-
<http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>

CBD-<https://www.cbd.int/information/parties.shtml>

UNCLOS-
<http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm>

*RAMSAR 1971 has total number of 170 members

*WHC 1972 has total number of 193 members

*IMO Convention 48 has total number of 177 members

*MARPOL 73/78 (Annex I/II) has total number of 157 members

*MARPOL 73/78 (Annex III) has total number of 151 members

*MARPOL 73/78 (Annex IV) has total number of 146 members

*MARPOL 73/78 (Annex V) has total number of 153 members

*MARPOL Protocol 97 (Annex VI) has total number of 93 members

*CBD 1992 has total number of 195 country members with 1 organisation and 1 only signed the contract but have not ratified.

*UNCLOS 1982 has total number of 167 country members with 1 organisation

ANNEX II LIST OF MEMBERS OF THE REGIONAL SEA PROGRAMMES

As of June 2018	Antarctic	Arctic	Baltic	Black Sea	Caspian	Caribbean	East Asian	Eastern Africa	Mediterranean	North-East Atlantic	North-East Pacific	North-West Pacific	Pacific	Red Sea and Gulf of Aden	ROPME Sea Area	South Asian	South-East Pacific Region	Western Africa
Afghanistan																		
Albania									x									
Algeria									x									
Andorra																		
Angola																		
Antigua & Barbuda						x												
Argentina	x																	
Armenia																		
Australia	x																	
Austria																		
Azerbaijan					x													
Bahamas						x												
Bahrain															x			
Bangladesh																x		
Barbados						x												
Belarus																		
Belgium	x									x								

As of June 2018	Antarctic	Arctic	Baltic	Black Sea	Caspian	Caribbean	East Asian	Eastern Africa	Mediterranean	North-East Atlantic	North-East Pacific	North-West Pacific	Pacific	Red Sea and Gulf of Aden	ROPME Sea Area	South Asian	South-East Pacific Region	Western Africa
Belize						x												
Benin																		x
Bhutan																		
Bolivia																		
Bosnia & Herzegovina									x									
Botswana																		
Brazil	x																	
Brunei Darussalam																		
Bulgaria				x														
Burkina Faso																		
Burundi																		
Cambodia							x											
Cameroon																		
Canada		x																
Cabo Verde																		
Central African Republic																		
Chad																		

As of June 2018	Antarctic	Arctic	Baltic	Black Sea	Caspian	Caribbean	East Asian	Eastern Africa	Mediterranean	North-East Atlantic	North-East Pacific	North-West Pacific	Pacific	Red Sea and Gulf of Aden	ROPME Sea Area	South Asian	South-East Pacific Region	Western Africa
Chile	x																x	
China	x						x					x						
Colombia						x					x						x	
Comoros								x										
Congo																		x
Cook Islands													x					
Costa Rica						x					x							
Cote d'Ivoire																		x
Croatia									x									
Cuba						x												
Cyprus									x									
Czechia																		
Dem. People's Rep. Korea																		
Dem. Rep. of the Congo																		
Denmark		x	x							x								

As of June 2018	Antarctic	Arctic	Baltic	Black Sea	Caspian	Caribbean	East Asian	Eastern Africa	Mediterranean	North-East Atlantic	North-East Pacific	North-West Pacific	Pacific	Red Sea and Gulf of Aden	ROPME Sea Area	South Asian	South-East Pacific Region	Western Africa
Djibouti														x				
Dominica						x												
Dominican Republic						x												
Ecuador																	x	
Egypt									x					x				
El Salvador											x							
Equatorial Guinea																		
Eritrea																		
Estonia			x															
Ethiopia																		
European Union	x		x						x	x								
Fiji													x					
Finland		x	x							x								
France	x					x		x	x	x								
Gabon																		x
Gambia																		x
Georgia				x														

As of June 2018	Antarctic	Arctic	Baltic	Black Sea	Caspian	Caribbean	East Asian	Eastern Africa	Mediterranean	North-East Atlantic	North-East Pacific	North-West Pacific	Pacific	Red Sea and Gulf of Aden	ROPME Sea Area	South Asian	South-East Pacific Region	Western Africa
Germany	x		x							x								
Ghana																		x
Greece									x									
Grenada						x												
Guatemala						x					x							
Guinea																		x
Guinea-Bissau																		
Guyana						x												
Haiti																		
Holy See																		
Honduras											x							
Hungary																		
Iceland		x								x								
India	x															x		
Indonesia							x											
Iran (Islamic Republic of)					x										x			
Iraq															x			

As of June 2018	Antarctic	Arctic	Baltic	Black Sea	Caspian	Caribbean	East Asian	Eastern Africa	Mediterranean	North-East Atlantic	North-East Pacific	North-West Pacific	Pacific	Red Sea and Gulf of Aden	ROPME Sea Area	South Asian	South-East Pacific Region	Western Africa
Ireland										x								
Israel									x									
Italy	x								x									
Jamaica						x												
Japan	x											x						
Jordan														x				
Kazakhstan					x													
Kenya								x										
Kiribati													x					
Kuwait															x			
Kyrgyzstan																		
Lao People's Dem. Rep.																		
Latvia			x															
Lebanon									x									
Lesotho																		
Liberia																		x
Libya									x									
Liechtenstein																		

As of June 2018	Antarctic	Arctic	Baltic	Black Sea	Caspian	Caribbean	East Asian	Eastern Africa	Mediterranean	North-East Atlantic	North-East Pacific	North-West Pacific	Pacific	Red Sea and Gulf of Aden	ROPME Sea Area	South Asian	South-East Pacific Region	Western Africa
Lithuania			x															
Luxembourg										x								
Madagascar								x										
Malawi																		
Malaysia							x											
Maldives																x		
Mali																		
Malta									x									
Marshall Islands													x					
Mauritania																		x
Mauritius								x										
Mexico						x					x							
Micronesia (Fed. States of)													x					
Monaco									x									
Mongolia																		
Montenegro									x									
Morocco									x									

As of June 2018	Antarctic	Arctic	Baltic	Black Sea	Caspian	Caribbean	East Asian	Eastern Africa	Mediterranean	North-East Atlantic	North-East Pacific	North-West Pacific	Pacific	Red Sea and Gulf of Aden	ROPME Sea Area	South Asian	South-East Pacific Region	Western Africa
Mozambique								x										
Myanmar																		
Namibia	x																	
Nauru													x					
Nepal																		
Netherlands						x				x								
New Zealand	x																	
Nicaragua						x					x							
Niger																		
Nigeria																		x
Niue													x					
Norway	x	x								x								
Oman															x			
Pakistan																x		
Palau													x					
Palestine (State of)																		
Panama						x					x							

As of June 2018	Antarctic	Arctic	Baltic	Black Sea	Caspian	Caribbean	East Asian	Eastern Africa	Mediterranean	North-East Atlantic	North-East Pacific	North-West Pacific	Pacific	Red Sea and Gulf of Aden	ROPME Sea Area	South Asian	South-East Pacific Region	Western Africa
Papua New Guinea													x					
Paraguay																		
Peru																	x	
Philippines							x											
Poland	x		x															
Portugal										x								
Qatar															x			
Republic of Korea	x						x					x						
Republic of Moldova																		
Romania				x														
Russian Federation	x	x	x	x	x							x						
Rwanda																		
Saint Kitts and Nevis						x												
Saint Lucia						x												

As of June 2018	Antarctic	Arctic	Baltic	Black Sea	Caspian	Caribbean	East Asian	Eastern Africa	Mediterranean	North-East Atlantic	North-East Pacific	North-West Pacific	Pacific	Red Sea and Gulf of Aden	ROPME Sea Area	South Asian	South-East Pacific Region	Western Africa
St. Vincent & Grenadines						x												
Samoa													x					
San Marino																		
Sao Tome & Principe																		
Saudi Arabia														x	x			
Senegal																		x
Serbia																		
Seychelles								x										
Sierra Leone																		
Singapore							x											
Slovakia																		
Slovenia									x									
Solomon Islands													x					
Somalia								x						x				
South Africa	x							x										

As of June 2018	Antarctic	Arctic	Baltic	Black Sea	Caspian	Caribbean	East Asian	Eastern Africa	Mediterranean	North-East Atlantic	North-East Pacific	North-West Pacific	Pacific	Red Sea and Gulf of Aden	ROPME Sea Area	South Asian	South-East Pacific Region	Western Africa
South Sudan																		
Spain	x								x	x								
Sri Lanka																x		
Sudan														x				
Suriname																		
Swaziland																		
Sweden	x	x	x							x								
Switzerland										x								
Syrian Arab Republic									x									
Tajikistan																		
Thailand							x											
the former Yugoslav Republic of Macedonia																		
Timor-Leste																		
Togo																		x
Tonga													x					

As of June 2018	Antarctic	Arctic	Baltic	Black Sea	Caspian	Caribbean	East Asian	Eastern Africa	Mediterranean	North-East Atlantic	North-East Pacific	North-West Pacific	Pacific	Red Sea and Gulf of Aden	ROPME Sea Area	South Asian	South-East Pacific Region	Western Africa
Trinidad & Tobago						x												
Tunisia									x									
Turkey				x					x									
Turkmenistan					x													
Tuvalu													x					
Uganda																		
Ukraine	x			x														
United Arab Emirates															x			
United Kingdom	x					x												
United Rep. of Tanzania								x										
United States	x	x				x												
Uruguay	x																	
Uzbekistan																		
Vanuatu													x					
Venezuela (Bolivatian						x												

As of June 2018	Antarctic	Arctic	Baltic	Black Sea	Caspian	Caribbean	East Asian	Eastern Africa	Mediterranean	North-East Atlantic	North-East Pacific	North-West Pacific	Pacific	Red Sea and Gulf of Aden	ROPME Sea Area	South Asian	South-East Pacific Region	Western Africa
Republic of)																		
Viet Nam							x											
Yemen														x				
Zambia																		
Zimbabwe																		

The information of the Members to each of the Regional Sea Programme is accessed through the official website of UNEP Regional Sea Programme. <**https://www.unenvironment.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/regional-seas-programmes**>

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