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EXPERT WORKSHOP TO DEVELOP OPTIONS FOR  
MODIFYING THE DESCRIPTION OF ECOLOGICALLY  
OR BIOLOGICALLY SIGNIFICANT MARINE AREAS,  
FOR DESCRIBING NEW AREAS, AND FOR  
STRENGTHENING THE SCIENTIFIC CREDIBILITY AND  
TRANSPARENCY OF THIS PROCESS

Berlin, Germany, 5-8 December 2017

### **BACKGROUND DOCUMENT ON INTERNATIONAL TRENDS AND DISTINCTIVE APPROACHES OF RELEVANCE TO THE CBD PROCESS ON ECOLOGICALLY OR BIOLOGICALLY SIGNIFICANT MARINE AREAS**

*Note by the Executive Secretary*

1. The Executive Secretary is circulating herewith a background document as information for the participants at the Expert Workshop to Develop Options for Modifying the Description of Ecologically or Biologically Significant Marine Areas, for Describing New Areas, and for Strengthening the Scientific Credibility and Transparency of this Process. The document was prepared by the Strathclyde Centre for Environmental Law and Governance, as commissioned by the Secretariat, in support of the Secretariat of the Convention on Biological Diversity in its preparation for the above-mentioned workshop, with the financial support from the Government of Sweden.
2. The document benefitted from input received from experts with direct experience in some of the other intergovernmental processes referred to in various parts of the document.
3. The document is being circulated in the form and language in which it was received by the Secretariat.

**International trends and distinctive approaches of relevance to  
the CBD process on ecologically or biologically significant marine areas**

**Background Information Document for  
the CBD Expert Workshop to Develop  
Options for Modifying the Description of  
Ecologically or Biologically Significant  
Marine Areas, for Describing New Areas, and  
for Strengthening the Scientific Credibility  
and Transparency of this Process  
(5-8 December 2017, Berlin)**

*Prepared by:*

Dr. Daniela Diz, Prof. Elisa Morgera and Ms. Mara Ntona  
Strathclyde Centre for Environmental Law and Governance

*Commissioned by:*  
the Secretariat of the Convention on Biological Diversity

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# List of Acronyms

ABMT	Area-based management tools
ABNJ	Areas Beyond National Jurisdiction
APEI	Area of particular environmental interest
ASMA	Antarctic Specially Managed Areas
ASPA	Antarctic Specially Protected Areas
CAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CBD	Convention on Biological Diversity
CEMP	Coordinated Environmental Monitoring Programme
CMS	Convention on Migratory Species
COP	Conference of the Parties
CSIRO	Commonwealth Scientific and Industrial Research Organisation
DOALOS	Division for Ocean Affairs and the Law of the Sea
EBSA	Ecologically or biologically significant marine area
EEZ	Exclusive Economic Zone
EIA	Environmental impact assessment
EMP-CCZ	Environmental Management Plan for the Clarion-Clipperton Zone
GOBI	Global Ocean Biodiversity Initiative
HELCOM	Baltic Marine Environment Protection Commission (Helsinki Commission)
HSMs	Historic Sites and Monuments
ICES	International Council for the Exploration of the Sea
ICOMOS	International Council on Monuments and Sites
ICSU	International Council for Science
IMO	International Maritime Organization
IPBES	Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services
IPLCs	Indigenous peoples and local communities
ISA	International Seabed Authority
IUCN	International Union for Conservation of Nature
JPOI	Johannesburg Plan of Implementation
MoU	Memorandum of understanding
MPA	Marine protected area
MSP	Marine spatial planning
NAFO	Northwest Atlantic Fisheries Organization
NASCO	North Atlantic Salmon Conservation Organization
NEAFC	North East Atlantic Fisheries Commission
NGO	Non-governmental organization
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
PSSA	Particularly Sensitive Sea Area
RFMO	Regional fisheries management organisation
SAI	Significant adverse impact
SBSTTA	Subsidiary Body on Scientific, Technical and Technological Advice
SEA	Strategic environmental assessment
SEAFO	South East Atlantic Fisheries Organisation
SPAMI	Specially Protected Areas of Mediterranean Importance
SPAW	Specially Protected Areas and Wildlife

UNCLOS United Nations Convention on the Law of the Sea  
UNGA United Nations General Assembly  
VME Vulnerable marine ecosystem  
WHC World Heritage Convention  
WSSD World Summit on Sustainable Development  
WWF World Wide Fund for Nature

# EXECUTIVE SUMMARY

This background report aims to inform the Expert Workshop to Develop Options for Modifying the Description of Ecologically or Biologically Significant Marine Areas, for Describing New Areas, and for Strengthening the Scientific Credibility and Transparency of this Process (5-8 December 2017, Berlin), by providing information on: (1) the process on ecologically or biologically significant marine areas (EBSAs) and its legal status; (2) how other international processes/instruments address issues concerning the updating of relevant scientific information that can lead to the description of new areas of conservation value or modification of existing areas through scientifically robust and transparent processes; and 3) elements for consideration in relation to the EBSA process.

The **EBSA process is a global scientific and technical process**, which although not foreseen at the time of the adoption of the Convention, can be related to the objectives and purpose of the Convention on Biological Diversity (CBD) as a whole (notably conservation of biodiversity as a common concern of humankind); finds its legal basis under CBD Articles 7 and 17-18; and facilitates the implementation of other CBD obligations (Arts. 8, 10, 12 and 14), both for Parties individually and collectively. The relevance of the adoption of consensus-based the Conference of Parties to the Convention (COP) decisions for addressing such common concern through the duty to cooperate substantiates the view that future modification of EBSA descriptions would require the retirement of the corresponding portion of a decision or of the annex of a decision containing reference to that particular EBSA description.

The scientific and technical rigour applied in the description of areas that meet the EBSA criteria in the EBSA regional workshops organised by the CBD Secretariat to date confers the workshops the status of a *de facto* peer-review process. While the description of EBSAs has no management measures attached to it, the modification of described areas can have implications when the EBSA description has been used as a basis for the implementation of management measures pursuant to other international legally binding obligations, such as the UN Convention on the Law of the Sea (UNCLOS), regional fisheries management organisations regulations, and CMS, as well as other international cooperation initiatives (e.g., International Maritime Organization's work on Particularly Sensitive Sea Areas (PSSA), Food and Agriculture Organization of the United Nations' work on Vulnerable Marine Ecosystems(VME)). This further corroborates the view that the CBD COP is best placed to make a decision to modify EBSAs.

There are **experiences under various intergovernmental processes** (e.g. Ramsar Convention, World Heritage Convention, IMO PSSAs, FAO VMEs, regional seas conventions and action plans) that can be informative to the EBSA process with regards to approaches and methodologies for the description of new areas, the modification of descriptions and ensuring scientific credibility and transparency.

**Description of new areas:** Most processes/instruments analysed require that nominations be scrutinised by a specialised scientific and technical body, which can be established either within the concerned processes/instruments or be an external entity to the processes. These bodies have a limited margin of discretion in assessing whether the nominated area satisfies the relevant ecological and/or socioeconomic criteria, with a view to recommending its designation to the decision-making body. In some instances, these bodies may be asked by Parties to help identify possible areas of international importance situated within their territory and prepare their nominations. Proposals are often submitted by individual States or by two or more in cases



where a common interest in the area concerned exists. Most processes stipulate that their provisions are without prejudice to the sovereignty and sovereign rights of Parties and that the designation of an area shall not prejudice the outcome of any dispute relating to the territory in which it is situated. In contrast to areas within national jurisdiction, the designation of areas beyond national jurisdiction may, under certain processes, be instigated by treaty bodies. The analysed international processes and instruments with competence in areas beyond national jurisdiction do not tend to distinguish significantly between processes for areas within or beyond national jurisdiction (e.g. PSSAs, Specially Protected Areas of Mediterranean Importance (SPAMIs)).

**Modification of descriptions:** The most common ground for modification of descriptions is irremediable loss of the distinguishing features that led to the designation of the area, although some processes permit modification in cases where a site was listed either wholly or partly by error; or, exceptionally, for reasons relating to urgent national interests. Overall, there is limited experience with the modification of descriptions, which proceeds on the basis of guidelines to ensure scientific rigour and follow-up procedures. In addition, certain processes provide for a temporary remedial regime for sites that have been found to be under threat, or the condition of which appears to have deteriorated, in order to: raise awareness; catalyse cooperation towards their recovery or restoration; and allow the Party concerned to access financial or technical support available under the relevant process. Under all the instruments analysed, States do not wish to revoke designated areas within their jurisdiction, as designation is a matter of prestige.

**Scientific credibility and transparency:** For example, the World Heritage Convention provides a well-developed approach to ensure scientific credibility, relying on: the recruitment of external organizations as advisory bodies; carefully prepared documentation; thorough and consistent procedures for evaluation by qualified experts and, where necessary, expert referees; and clear channels of communication between technical and/or scientific bodies and decision-making bodies, with all views being reflected in the outcome document.

**The current process for submission of national exercises regarding areas that meet EBSA or similar criteria may benefit from further procedural clarification.** Currently, there is no CBD peer-review process for assessing national submissions, while the EBSAs considered by CBD COP undergo a peer-review process as part of CBD regional EBSA workshops, which allow a plenary/subgroup review by all scientific experts present of all described areas before the adoption of the workshop report. The current process allows CBD Parties to decide whether to send information on national exercise on EBSAs, to the global repository or the information-sharing mechanism. Further clarification could include procedures for, *inter alia*: (i) submitting information from national processes to the information-sharing mechanism through individual, or joint submissions in case of areas under overlapping jurisdictional claims, or transboundary areas between two or more States; (ii) if a Party chooses to have their respective national exercises considered by the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) and/or COP for inclusion of the respective areas in the global repository, this could require a CBD peer-review process, including the one currently utilized during the regional workshops (for consistency) or by a group of scientific experts, prior to being considered by SBSTTA and COP.

**CBD regional or subregional workshops** can still be used for describing additional areas where new scientific information becomes available and in new regions where workshops have not yet been held, as this is the existing procedure and it is still valid. Workshops have a number of advantages. For instance, they provide a consistent platform for the EBSA description with scientific and technical rigour, while also providing capacity building for participants. But sufficient resources may be unavailable for regular

workshops. Questions remain concerning the appropriate frequency of such workshops, or whether a threshold should be established, based on a minimum number of areas with the potential to meet the EBSA criteria, to trigger further workshops in areas where these have already been taken place. Furthermore, thematic workshops (e.g., on seamounts, deep pelagic areas) have been proposed to fulfil scientific gaps identified in previous workshops, which could provide a new approach for describing areas. In addition, Parties may consider establishing alternative peer-review procedures (other than workshops) that may not be as dependent on resource availability, for which the COP may consider adopting operational guidelines to guide the application of scientific criteria.

The scientific and technical information contained in the descriptions would benefit from updating and monitoring for the purposes of CBD Article 7, based on best available science and a transparent process for which scientific criteria for any resulting modification of the original descriptions should be developed prior to the establishment of a process for updating information, in accordance with the precautionary approach and common concern. The scientific rationale for modifications should be provided and made publically available through the global repository, and a peer-review process (through means decided by COP) be established. Archiving the original EBSA descriptions (including respective polygons) in the repository and information-sharing mechanism should prevent losing baseline information, which can remain useful for other purposes (e.g., monitoring effects of climate change on marine biodiversity). The procedure established under the Ramsar Convention to address erroneous listings could be adapted to the EBSA process.

With a view to preventing significant biodiversity loss in areas described as meeting the EBSA criteria, which could lead to eventual modifications, the COP could establish a procedure to categorise the respective EBSA as “under risk,” in order to facilitate the adoption of necessary measures by the competent authority, as well as to mobilise resources and streamline any required assistance. Such an approach has been used by other processes and instruments (e.g. Ramsar Convention and World Heritage Convention).

# INTRODUCTION

In paragraph 10 of decision XIII/12, the Conference of the Parties (COP) to the Convention on Biological Diversity (CBD) requested the Executive Secretary to continue the work set out in paragraph 10 of decision XII/22<sup>1</sup> concerning the development of practical options to further enhance scientific methodologies and approaches on the description of areas meeting the EBSA criteria, ensuring that the best available scientific and technical information and traditional knowledge of various users of marine resources are used and that the products are scientifically sound and up-to-date.<sup>2</sup>

In the same decision (decision XIII/12, paragraph 10), the COP requested the Executive Secretary to organise an expert workshop to: (i) develop options for cases both within and beyond national jurisdiction, regarding procedures within the Convention to modify the description of areas meeting the EBSA criteria and to describe new areas, while fully respecting the respective sovereignty, sovereign rights and jurisdiction of coastal States; as well as to: (ii) develop options for strengthening the scientific credibility and transparency of the EBSA process, including by enhancing the scientific peer review by Parties, other Governments and relevant organisations. This expert workshop will take place in Berlin from 5 to 8 December 2017. The report of the workshop will be made available for peer review by Parties, other Governments and relevant organizations.

This background report aims to inform the expert workshop by providing relevant information regarding the EBSA process and its legal status, as well as by considering how other international processes/instruments address issues concerning the updating of relevant scientific information that can lead to the description of new areas of conservation value or the modification of existing descriptions of such areas. In drawing from lessons learned from the EBSA process and other international processes/instruments, this report suggests elements for consideration of the workshop participants that could inform the development of the respective options mentioned in the paragraph above.

The research for the preparation of this background document was undertaken with the generous financial support of the Government of Sweden.

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<sup>1</sup> See CBD decision XIII/12 (2016), para 10.

<sup>2</sup> CBD decision XII/22 (2014), para 10.

# 1. BACKGROUND, RATIONALE AND RECENT DEVELOPMENTS RELATED TO THE EBSA PROCESS

This section will provide a background on the EBSA description process within the context and spirit of the Convention. It will briefly summarize the history of the EBSA process and its rationale, reflecting on the role of the repository, the workshop procedures and methodology, related international processes, and the legal status and implications of the EBSA process.

## 1.1. The origins of the EBSA criteria

The origins of the EBSA process can be traced back to 2006, when CBD COP considered the target established in the 2002 World Summit on Sustainable Development's (WSSD) Johannesburg Plan of Implementation (JPOI) on the development of diverse approaches and tools, such as the establishment marine protected area (MPA) networks globally by 2012, in accordance with international law and scientific information,<sup>3</sup> and discussions around biodiversity conservation in areas beyond national jurisdiction under the UN General Assembly (UNGA).<sup>4</sup> It is also important to note paragraph 42 of decision VIII/24, through which COP recognizes that the key role of the CBD is “in supporting the work of the General Assembly with regard to marine protected areas beyond national jurisdiction, by focusing on the provision of scientific and, as appropriate, technical information and advice relating to marine biological diversity, the application of the ecosystem approach and the precautionary approach, and in delivering the 2010 target”.<sup>5</sup> On that basis, the COP decided to convene a scientific expert workshop<sup>6</sup> to, *inter alia*,

“refine and develop a consolidated set of scientific criteria for identifying ecologically significant marine areas in need of protection, in open waters and deep sea habitats, building upon existing sets of criteria used nationally, regionally and globally”.<sup>7</sup>

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<sup>3</sup> See UNGA Resolution 60/30 (2005), para 75.

<sup>4</sup> CBD decision VIII/24 (2006), para 46, which recalls UNGA Resolution 60/30 (2005), para 75, and CBD COP decision VII/5, para 31. UNEP/CBD/COP/8/INF/39, at 3. See also E Morgera, ‘Competence or Confidence? The Most Appropriate Forum to Address Multi-Purpose High Seas Protected Areas’ (2007) 16 Review of European Community and International Environmental Law 1.

<sup>5</sup> The CBD 2010 Biodiversity Target reads “to achieve by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on Earth”. CBD Decision VI/26 (2002), Annex, para 11.

<sup>6</sup> COP decision VIII/24 (2006), para 46.

<sup>7</sup> COP decision VIII/24 (2006), Annex II, para 1. See also para 46 of the Decision.

The resulting Expert Workshop on Ecological Criteria and Biogeographic Classification Systems for Marine Areas in Need of Protection (Azores, Portugal, 2-4 Oct 2007) developed such criteria, building on work conducted on criteria for identification of ecologically or biologically significant areas beyond national jurisdiction at a scientific experts' workshop, held in Ottawa, Canada, in 2005.<sup>8</sup> Discussions leading to the Ottawa workshop identified science-based criteria for identifying marine areas beyond national jurisdiction in need of enhanced protection.<sup>9</sup> In light of this shared interest, the Ottawa workshop focused on "ecological and biological criteria for identifying areas that are biologically or ecologically significant,<sup>10</sup> and on those grounds would particularly benefit from more risk-averse than "normal" management and protection."<sup>11</sup> It is noteworthy that the expert meeting "did not prejudge what specific management approaches are best suited to provide the enhanced degree of risk-aversion needed to protect" these areas.<sup>12</sup> Nonetheless, it acknowledged that the criteria would have many commonalities with criteria to select MPA sites.<sup>13</sup>

In 2008, in decision IX/20, the COP adopted the seven scientific criteria for identifying ecologically or biologically significant marine areas in need of protection<sup>14</sup> developed at the Azores workshop.<sup>15</sup> In the same decision, the COP adopted the scientific guidance for selecting areas to establish a representative network of marine protected areas, including in open-ocean waters and deep-sea habitats, which was also developed by scientific experts at the Azores workshop,<sup>16</sup> including: EBSAs; representativity; connectivity; replicated ecological features; and adequate and viable sites.

## 1.2. The development of the EBSA process

In 2010, COP requested the CBD Secretariat to work with Parties and other Governments, as well as competent organisations and regional initiatives to organize a series of regional workshops to facilitate the

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<sup>8</sup> UNEP/CBD/EWS.MPA/1/2 (2007), Report of the Expert Workshop on Ecological Criteria and Biogeographic Classification Systems for Marine Areas in Need of Protection (Azores, Portugal, 2-4 Oct 2007), para 13. See also UNEP/CBD/COP/8/INF/39, Report of the scientific experts' workshop on criteria for identifying ecologically or biologically significant areas beyond national jurisdiction- (Ottawa, Canada, 6-8 December 2005). See also DC Dunn, J Ardron, N Bax, P Bernal, J Cleary, I Cresswell, B Donnelly et al., 'The Convention on Biological Diversity's Ecologically or Biologically Significant Areas: Origins, Development, and Current Status' (2014) 49 Marine Policy 137.

<sup>9</sup> UNEP/CBD/COP/8/INF/39, Report of the scientific experts' workshop on criteria for identifying ecologically or biologically significant areas beyond national jurisdiction- (Ottawa, Canada, 6-8 December 2005).

<sup>10</sup> The scientific expert workshop defined EBSAs as: "geographically defined areas that have higher significance to one or more species of an ecosystem or to the ecosystem as a whole, compared to other areas of similar bathymetric, latitude, and general ecological characteristics. Management of human activities in Ecologically or Biologically Significant Areas needs to be particularly effective because of the higher potential or more lasting consequences of harm at that location and also the greater potential for long-term benefits obtained by effective management."

<sup>11</sup> UNEP/CBD/COP/8/INF/39, *Ibid.*, at 2.

<sup>12</sup> UNEP/CBD/COP/8/INF/39, *Ibid.*, at 3.

<sup>13</sup> UNEP/CBD/COP/8/INF/39, *Ibid.*

<sup>14</sup> Namely: uniqueness or rarity; special importance for life-history stages of species; importance for threatened, endangered or declining species and/or habitats; vulnerability, fragility, sensitivity or slow recovery; biological productivity; biological diversity; and naturalness. See Annex I of CBD Decision IX/20 (2008).

<sup>15</sup> CBD Decision IX/20 (2008), para 14 and Annex I.

<sup>16</sup> CBD Decision IX/20 (2008), Annex II.

description of EBSAs “through application of scientific criteria in annex I of decision IX/20, as well as other relevant compatible and complementary nationally and intergovernmentally agreed scientific criteria.”<sup>17</sup> In this context, Parties also noted that the application of the EBSA criteria is a scientific and technical exercise,<sup>18</sup> and that areas found to meet the criteria may require enhanced conservation and management measures. Parties also noted that this can be achieved through a variety of means, including MPAs and impact assessments, emphasizing that the identification of EBSAs and the selection of conservation and management measures is a matter for States (if in areas within national jurisdiction) and competent intergovernmental organizations (if in ABNJ), in accordance with international law, including the United Nations Convention on the Law of the Sea (UNCLOS).<sup>19</sup> Therefore, the description of an area that meets the EBSA criteria does not result per se in management measures. More recently, Parties and other Governments have been encouraged to make use of the scientific information contained in the EBSA description when carrying out marine spatial planning (MSP), designing MPA networks and other area-based management measures with a view to contributing to the Aichi Biodiversity Targets.<sup>20</sup> Parties are also encouraged, and intergovernmental organizations and other Governments are invited, to take measures, within their respective jurisdictions and competencies, to “ensure conservation and sustainable use by implementing relevant tools, in accordance with national law, including area-based management tools such as marine protected areas, environmental impact assessments and strategic environmental assessments, and fisheries management measures, and to share their experience in taking these measures through national reports and/or voluntary reports”.<sup>21</sup> This information should be made available through the Clearinghouse Mechanism by the Secretariat.<sup>22</sup>

In addition, the incorporation of traditional scientific, technical and technological knowledge of indigenous peoples and local communities (IPLCs) in such descriptions was encouraged,<sup>23</sup> and specific guidance for such integration was developed in 2012.<sup>24</sup>

The need for capacity building of developing country Parties through workshops was also emphasised.<sup>25</sup> In 2012, the COP urged Parties, financial mechanisms and funding organizations, as appropriate, to provide adequate and timely support to capacity building, training and other activities related to EBSAs, in particular for developing countries, especially least developed countries and small island developing States.<sup>26</sup> A training manual on EBSA description has been produced<sup>27</sup> and capacity building training sessions have been held one day prior to the EBSA regional workshops for the following regions: (a)

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<sup>17</sup> CBD Decision X/29 (2010), para 36.

<sup>18</sup> E Morgera, ‘Competence or Confidence? The Most Appropriate Forum to Address Multi-Purpose High Seas Protected Areas’ (2007) 16 *Review of European Community and International Environmental Law* 1.

<sup>19</sup> COP decision X/29 (2009), para. 26; United Nations Convention on the Law of the Sea (adopted on 10 December 1982, entered into force on 16 November 1994) 1833 UNTS 3 (UNCLOS).

<sup>20</sup> COP decision XII/22 (2014), para 8.

<sup>21</sup> COP decision XIII/12 (2016), para 14.

<sup>22</sup> COP decision XIII/12 (2016), para 14.

<sup>23</sup> COP decision X/29 (2009), para 34.

<sup>24</sup> COP decision XI/17 (2012), para 23; see also UNEP/CBD/SBSTTA/16/INF/10.

<sup>25</sup> COP decision X/29 (2009), para 37.

<sup>26</sup> COP decision XI/17 (2012), para 22.

<sup>27</sup> COP decision XI/17 (2012), para 19; see also UNEP/CBD/SBSTTA/16/INF/9.

North-East Indian Ocean region (2015); (b) North-West Indian Ocean and Adjacent Gulf Areas (2015); and (c) Seas of East Asia (2015). Previously, a capacity-building workshop for West Africa was held in Dakar in 2013 in preparation for the South-Eastern Atlantic Regional EBSA Workshop, held in Swakopmund, Namibia in October 2015.

In 2014, Parties requested the Secretariat in collaboration with Parties, other Governments and competent organizations, to facilitate technical training, including through the organisation of regional or subregional capacity-building workshops on scientific methodologies and approaches for applying the EBSA criteria and using scientific and technical information contained in the EBSA repository and information-sharing mechanism (see below) and other relevant information with a view to contributing to the achievement of the Aichi Biodiversity Targets.<sup>28</sup> Furthermore, the short-term action plan (2017-2020) to enhance and support capacity-building for the implementation of the Convention and its Protocols included activities concerning the organisation of training to facilitate the use of the training manual on using traditional knowledge in the application of the EBSA criteria for the achievement of Aichi Targets 6, 10 and 11.<sup>29</sup>

### 1.3. Procedural Steps

The practice that has emerged since 2011 entails that:<sup>30</sup>

1. The CBD Secretariat, in collaboration with Parties, other Governments and competent organizations and initiatives, organizes regional or subregional workshops for the regions or subregions where Parties wish workshops to be held, as appropriate and subject to availability of resources;
2. CBD Secretariat makes the workshop(s) report(s) available to SBSTTA for consideration;
3. SBSTTA prepares summary reports (with standardised templates,<sup>31</sup> containing the approximate geographical coordinates of the area described as meeting the EBSA criteria, but does not include maps or EBSAs polygons<sup>32</sup>) based on the original report, for consideration by COP;
4. COP considers the summary reports, and like SBSTTA, may review them, with a view to including them in the repository (see below).<sup>33</sup> The summary reports are thus annexed to the respective COP decision,<sup>34</sup> and the annexes include reference and web links to the full workshop reports.

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<sup>28</sup> COP decision XII/22 (2014), para 12.

<sup>29</sup> COP decision XIII/23 (2016), Annex, B, para 42.

<sup>30</sup> COP decision XI/17 (2012), para 12.

<sup>31</sup> The template includes a brief description of the area, including its location and a ranking (high, medium and low) of how the area meets each of the EBSA criteria.

<sup>32</sup> Polygon delineation can be found in the workshop reports per se.

<sup>33</sup> Note that the COP was initially required to 'endorse' the Summary Reports prepared by SBSTTA, prior to their inclusion in the EBSA repository and submission to competent organisations by the Secretariat: CBD decision X/29 (2010), para 36.

<sup>34</sup> COP decision X/29 (2010), para 39. See EBSA repository, online: <https://www.cbd.int/ebsa/> (last checked 19 November 2017); see also decision XII/22 (2014), para 3.

5. The Secretariat submits these summary reports to the General Assembly of the United Nations and its relevant processes, as well as Parties, other Governments and competent organizations.<sup>35</sup> These organisations “may choose to use” the EBSA information “to progress towards the implementation of ecosystem approaches in relation to areas both within and beyond national jurisdiction, through the identification of areas and features of the marine environment that are important for conservation and sustainable use of marine and coastal biodiversity”.<sup>36</sup>



Fig 1: Summary of the EBSA process (Graphics by Mitchell Lennan, research assistant at the Strathclyde Centre for Environmental Law and Governance.)

#### 1.4. The EBSA repository and information-sharing mechanism

As per decision X/29 (2010), the CBD Secretariat, in collaboration with a number of organizations,<sup>37</sup> was requested to establish a global repository for “scientific and technical information and experience related to the application of” the EBSA criteria, as well as other relevant compatible and complementary nationally and intergovernmentally agreed scientific criteria.<sup>38</sup>

The EBSA portal website (<http://www.cbd.int/ebsa/>) was developed as a gateway to the EBSA repository, which is hosted in the CBD Clearinghouse Mechanism and currently contains the description (summary,

<sup>35</sup> COP decision X/29 (2010), para 42.

<sup>36</sup> COP decision X/29 (2010), para 25 (emphasis added). Some organizations have chosen to use the EBSA information to strengthen their conservation and management measures. See section 1.4 below.

<sup>37</sup> These include: FAO, the UN Division for Ocean Affairs and the Law of the Sea (DOALOS), the Intergovernmental Oceanographic Commission (IOC) of the UN Educational, Scientific and Cultural Organization (UNESCO), in particular the Ocean Biogeographic Information System (OBIS), the World Conservation and Monitoring Centre (WCMC) of UN Environment and the Global Ocean Biodiversity Initiative (see decision X/29 (2010), para 39).

<sup>38</sup> CBD decision X/29 (2010), para 39.



introduction of the area, location, map, feature description, feature conditions and future outlook, references) of EBSAs from the CBD regional workshops as considered by COP 11, 12 and 13 (decision XI/17, XII/22 and XIII/12).

The EBSA portal website hosts an information sharing-mechanism on EBSAs, including a global map of EBSA polygons that provides links to the EBSA description in the repository; all the reports of the EBSA regional workshops and other EBSA related meetings; resource materials such as EBSA booklets, brochures, video, training materials or other publications; weblinks to relevant global processes (e.g. FAO's work on vulnerable marine ecosystems, IMO's work of Particularly Sensitive Sea Areas); schedule of EBSA meetings. The EBSA portal website thus aims to facilitate the use of available scientific and technical information related to areas meeting EBSA criteria by a wide range of stakeholders, and to convey the outcomes of the regional workshops to facilitate the description of EBSAs in a clearly understandable way. It also intends to improve general understanding about the EBSA process, facilitate participation in future regional/subregional EBSA workshops, and promote the application of the EBSA criteria at the national level.

In 2016, the COP welcomed the voluntary practical options for further enhancing scientific methodologies and approaches, including collaborative arrangements, on the description of areas meeting the criteria for EBSAs, which included considerations for enhancing the EBSA repository and information-sharing mechanism by the CBD Secretariat for areas beyond national jurisdiction, or in consultation with Parties and other Governments for areas within national jurisdiction.<sup>39</sup> Suggested measures to improve the repository and information-sharing mechanism include:<sup>40</sup>

- (i) The incorporation of multi-faceted filtering in the functionality of the EBSA repository and information-sharing mechanism that enables searches based on specific ecological or biological features;
- (ii) The application of cartographic methods to better visualise the EBSA information on the map through metadata (e.g., characterisation of ecological or biological features, EBSA criterion ranking, incorporation of information sources);
- (iii) Providing links to relevant open-access portals such as OBIS and other relevant global and regional information portals; and
- (iv) Facilitating access to more detailed information about each area meeting the EBSA criteria by linking the information-sharing mechanism with other databases and/or knowledge holders at national and global levels, including experts and referenced authors, and respecting information-sharing agreements, as appropriate.

The Secretariat was requested to facilitate the implementation of these voluntary practical options and establish an informal advisory group on EBSAs<sup>41</sup> to, *inter alia*, advise on scientific and technical matters relating to the improvement of the functionality of the EBSA repository.<sup>42</sup>

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<sup>39</sup> COP decision XIII/12 (2016), para 9, and Annex II, para 3.

<sup>40</sup> COP decision XIII/12 (2016), Annex II, para 3.

<sup>41</sup> COP decision XIII/12 (2016), para 11.

<sup>42</sup> COP decision XIII/12 (2016), Annex III, para 1 (a).

## 1.5. Regional workshops

Thirteen CBD regional workshops<sup>43</sup> have been conducted around the world to describe areas that meet the EBSA criteria. CBD Parties with interest in the region to be covered by the workshop are invited to nominate scientific experts to attend.<sup>44</sup> Areas within national jurisdiction are also included in the geographical scope of the regional workshops when so decided by the concerned countries.<sup>45</sup> As mentioned above, the outcome of each of these regional workshops includes a workshop report, containing detailed information on: the geographical scope of the workshop, the areas described as meeting the EBSA criteria (including location, EBSA properties, references, assessment against the criteria, which includes a ranking system), maps of the EBSA polygons, data and/or capacity gaps). Many reports contain sections listing areas that are likely to meet the EBSA criteria but which require further studies for a sound scoring to be performed.<sup>46</sup>

Workshop participants/experts use a template provided by the CBD Secretariat for assessing specific areas against the criteria. Peer-reviewed literature and robust scientific data are assessed to substantiate the descriptions. Subgroups focus on specific geographical areas to facilitate the review, and all descriptions are reviewed collectively by the participants. This procedure functions as a de facto peer-review process. The chair(s) of the workshops, the Secretariat and a technical support team (working with 90-200 data layers and modelling techniques) provide full support and guidance during the workshops, which have also included training sessions on how to access and use the data to describe areas meeting the EBSA criteria.<sup>47</sup> Scientific and technical support to the Secretariat for all workshops to date has been provided by either Duke University or CSIRO/Australia, which has contributed to the use of consistent methods.<sup>48</sup> It has been underscored that the scientific and technical support provided by this team “to regional workshops conducted thus far is considered essential by workshop participants and must remain a core part<sup>49</sup> of the process for describing areas that meet the EBSA criteria.”<sup>50</sup> The technical

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<sup>43</sup> Covering the Western South Pacific (November 2011); Wider Caribbean and Western Mid-Atlantic (February-March 2012); Southern Indian Ocean (July-Aug 2012); Eastern Tropical and Temperate Pacific (August 2012); North Pacific (Feb-Mar 2013); South-Eastern Atlantic (April 2013); Arctic (March 2014); North-West Atlantic (March 2014); Mediterranean (April 2014); North-East Indian Ocean (March 2015); North-West Indian Ocean (April 2015); Seas of East Asia (December 2015); and Black Sea and the Caspian Sea (April 2017).

<sup>44</sup> N J Bax, J Cleary, B Donnelly, D C Dunn, P K Dunstan, M Fuller, P N Halpin, ‘Results of Efforts by the Convention on Biological Diversity to Describe Ecologically or Biologically Significant Marine Areas’ (2015) 30 Conservation Biology 571.

<sup>45</sup> Ibid.

<sup>46</sup> UNEP/CBD/SBSTTA/20/INF/20 (2016).

<sup>47</sup> NJ Bax, J Cleary, B Donnelly, D C Dunn, P K Dunstan, M Fuller, PN Halpin, ‘Results of Efforts by the Convention on Biological Diversity to Describe Ecologically or Biologically Significant Marine Areas’ (2015) 30 Conservation Biology 571.

<sup>48</sup> UNEP/CBD/SBSTTA/20/INF/20 (2016).

<sup>49</sup> See section 3 below on scientific rigour.

<sup>50</sup> UNEP/CBD/SBSTTA/20/INF/20 (2016), at 18.

support provided also ensured consistency in how the criteria have been applied at the different workshops.<sup>51</sup>

Data from global, regional and national sources have been used in the workshops.<sup>52</sup> Data availability has been a constraint at some workshops, such as the Western South Pacific and Southern Indian Ocean workshops, among others.<sup>53</sup> In this connection, the importance has been noted of making geo-referenced data bases available and respective training in advance of the workshops to enable preparatory work that contributes to the quantity and quality of information for the application of the criteria.<sup>54</sup> It has also been noted that several workshops lacked consistent georeferenced data on scales conducive to the precise delineation of the EBSA polygon.<sup>55</sup>

It should be noted that there is an ongoing process, led by the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Commission) and the North-East Atlantic Fisheries Commission, for the description of areas meeting the EBSA criteria in the North-East Atlantic. The workshop to describe areas meeting the EBSA criteria in the North-East Atlantic (8-9 September 2011, Hyères, France) was different to subsequent EBSA workshops, as in this case two competent regional organizations, i.e., the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) and the North East Atlantic Fisheries Commission (NEAFC), jointly took the initiative to propose to the CBD Secretariat to act as workshop co-organizers. This workshop benefitted from: a joint steering group (with representatives of OSPAR, NEAFC and the CBD); the proactive invitation of relevant scientists through the joint steering group; and a peer-review process to examine the results of the workshop conducted by the International Council for the Exploration of the Sea (ICES), due to a special request by NEAFC, as it is common practice within this regional fisheries management organization to make decisions based on advice provided by ICES.

As a result of these regional workshops, the total number of areas that meet the EBSA criteria through the CBD process is 279 to date (based on the first 12 CBD workshops, and not including the workshop for the North-East Atlantic, described above). Out of this total, 169 are located in areas within national jurisdiction; 37 are found in more than one EEZ (not entirely within areas of national jurisdiction); 38 occur partially within one or more EEZs and in ABNJ; and 33 occur exclusively in ABNJ. In this regard, it is important to recall the CBD jurisdiction in these areas vis á vis UNCLOS. CBD Article 22 expressly refers to UNCLOS, affirming that “Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea”.<sup>56</sup> This article also clarifies that CBD provisions will not affect the rights and obligations under any international

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<sup>51</sup> NJ Bax, J Cleary, B Donnelly, D C Dunn, P K Dunstan, M Fuller, PN Halpin, ‘Results of efforts by the Convention on Biological Diversity to Describe Ecologically or Biologically Significant Marine Areas’ (2015) 30 Conservation Biology 571.

<sup>52</sup> Ibid.

<sup>53</sup> UNEP/CBD/SBSTTA/20/INF/20 (2016).

<sup>54</sup> UNEP/CBD/SBSTTA/20/INF/20 (2016).

<sup>55</sup> UNEP/CBD/SBSTTA/20/INF/20 (2016).

<sup>56</sup> CBD, Art. 22(2).

agreement, except when this would lead to serious damage or threat to biodiversity<sup>57</sup> in which case the CBD would prevail.<sup>58</sup> Article 4 of the CBD is also of relevance, and as noted by Lafayette:

“Within national jurisdiction, in relation to each State party, the Convention applied both to components of biological diversity and to processes and activities. However, pursuant to Article 4 (b) in ABNJ it applies only to processes and activities carried out under the jurisdiction or control of States. The CBD cannot apply to specific components of marine biodiversity in ABNJ, because under the law of the sea, States parties individually do not have jurisdiction or sovereign rights over these components. Nevertheless, these components of biodiversity are not left unprotected, as States must apply the general principles of the CBD to processes and activities carried out under their jurisdiction and control. (...) Furthermore, under Article 5, States parties are required to cooperate directly, or through competent international organizations, for the conservation and sustainable use of biodiversity in ABNJ.”<sup>59</sup>

In the specific case of EBSAs, in 2014 and 2016, the COP clarified that the “sovereignty of coastal States over their territorial sea, as well as their sovereign rights and jurisdiction in the exclusive economic zone and continental shelf, as well as the rights of other States in these areas, in accordance with international law, including [UNCLOS], and recogniz[ed] that the sharing of the outcomes of the EBSA process does not prejudice the sovereignty, sovereign rights or jurisdiction of coastal States, or the rights of other States”.<sup>60</sup>

#### 1.6. The Need for Additional Research and Monitoring

In 2012, COP took note “of the need to promote additional research and monitoring in accordance with national and international laws, including the United Nations Convention on the Law of the Sea, to improve the ecological or biological information in each region with a view to facilitating the further description of areas already described, the future description of other areas meeting the scientific criteria for ecologically or biologically significant marine areas as well as other relevant compatible and complementary nationally and intergovernmentally agreed scientific criteria”.<sup>61</sup> COP also affirmed that that EBSA scientific description is “an evolving process that should be continued to allow ongoing improvement and updating as improved scientific and technical information becomes available in each region”.<sup>62</sup>

The Secretariat was also requested to further collaborate with Parties and other Governments, as well as competent organizations, and with the participation of IPLCs, to organize additional regional or

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<sup>57</sup> CBD, Art. 22(1).

<sup>58</sup> P Birnie, A Boyle, C Redgwell, *International Law & the Environment* (3<sup>rd</sup> Edn.) (Oxford: OUP, 2009).

<sup>59</sup> L 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 *IJMCL* 221, at 243.

<sup>60</sup> COP decisions XII/22 (2014), para 5; XIII/12 (2016), para 3.

<sup>61</sup> COP decision XI/17 (2012), para 7. These criteria include PSSAs, VMEs, World Heritage Sites, Ramsar sites, and possibly others such as Important Bird Areas, Key Biodiversity Areas, etc. See D Dunn et al. ‘The Convention on Biological Diversity’s Ecologically or Biologically Significant Areas: Origins, Development, and Current Status’ (2014) 49 *Marine Policy* 137.

<sup>62</sup> COP decision XI/17 (2012), para 9.

subregional workshops for the remaining regions where Parties wish to have workshops held, “and for the further description of the areas already described where new information becomes available, as appropriate, subject to the availability of financial resources”.<sup>63</sup>

In 2014, building upon experience collected from the regional workshops and views from Parties, other Governments, and relevant organizations, the Secretariat was requested to develop practical options “to further enhance scientific methodologies and approaches on the description of areas meeting the EBSA criteria, ensuring that the best available scientific and technical information and traditional knowledge of various users of marine resources, including fishers, are used and that the products are scientifically sound and up-to-date”.<sup>64</sup> COP also recognised scientific gaps<sup>65</sup> concerning the description of areas meeting the EBSA criteria, and requested the Secretariat to collaborate with the relevant international scientific bodies, including the Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES), to address knowledge gaps and lack of scientific information for EBSA description.<sup>66</sup> For instance, Bax et al. notes challenges associated with synthesis and mapping of scientific data by the workshop technical teams due to the “absence of a common global data network”, which might have resulted in unaccounted data sets.<sup>67</sup> The dearth of information in areas such as the deep pelagic, haydal and abyssal regions was also noted by the authors.

As part of this discussion, COP welcomed the voluntary practical options for further enhancing scientific methodologies and approaches of the scientific and technical exercises for the description of areas meeting the EBSA criteria.<sup>68</sup> These voluntary practical options include reference to:<sup>69</sup>

- i. Improving data compilation and synthesis for the EBSA description, including through: improving scientific guidance for the application of the criteria; improving systematic assessment of areas against the EBSA criteria; characterizing areas meeting the criteria (e.g., spatial and temporal dynamics of ecological and biological characteristics); improving data availability and accessibility; enhancing the use of traditional, scientific, technical and technological knowledge of indigenous peoples and local communities;
- ii. Approaches for incorporating new information and new consideration of existing information in future description of areas meeting the EBSA criteria, including scientific and traditional knowledge; and

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<sup>63</sup> COP decision XI/17 (2012), para 12 (emphasis added).

<sup>64</sup> COP decision XII/22 (2014), para 10.

<sup>65</sup> For instance, members of the scientific community have called for a gap analysis to address geographical and thematic gaps, and for a formal process for data submission and review, engaging the broader scientific community. This may include a common data network and global standard for data exchange that would allow easy aggregation of data. See: GOBI, 2015, Response to the request for views and information on practical options to further enhance scientific methodologies and approaches for the description of areas meeting the EBSA criteria SCBD/SAM/DC/JL/JA/JG/85006.

<sup>66</sup> COP decision XII/22 (2014), para 13.

<sup>67</sup> NJ Bax, J Cleary, B Donnelly, D C Dunn, P K Dunstan, M Fuller, PN Halpin, ‘Results of Efforts by the Convention on Biological Diversity to Describe Ecologically or Biologically Significant Marine Areas’ (2015) 30 Conservation Biology 571.

<sup>68</sup> COP decision XIII/12 (2016), para 9 and annex II.

<sup>69</sup> COP decision XIII/12 (2016), Annex II.

iii. Enhancing the EBSA repository and information-sharing mechanism.

In order to facilitate the implementation of these voluntary practical options, the Secretariat was requested to establish an informal advisory group for EBSAs comprising up to 30 scientific and technical experts nominated by Parties and other Governments and relevant organizations, including IPLCs, who will be selected by the Secretariat in consultation with the SBSTTA Bureau.<sup>70</sup> Due regard will be given to geographical representation, gender balance and the special conditions of developing countries. The group is established for a two-year period, which can be renewed by a COP decision.

1.7. Use of EBSA information by the CBD and other international processes

As noted above, CBD COP decisions have encouraged parties to make use of the EBSA scientific information in the preparation of environmental impact assessments (EIAs) and strategic environmental assessments (SEAs).<sup>71</sup> In this connection, COP developed guidance on EIAs under decision VIII/28, which endorsed the Voluntary Guidelines on Biodiversity-inclusive Environmental Impact Assessment. In response to the need for more specific guidance for marine and coastal areas, decision XI/18 took note of the Revised Voluntary Guidelines for the consideration of Biodiversity in Environmental Impact Assessments and Strategic Environmental Assessments in Marine and Coastal Areas.<sup>72</sup> With respect to the screening stage of the EIA, the CBD Guidelines recommend considering whether the activity would cause “substantive pollution, or significant and harmful changes to an EBSA.” The Voluntary Guidelines further suggest that “any activity with the potential to cause substantial pollution of or significant and harmful changes should be subject to some form of initial screening and initial environmental evaluation”.<sup>73</sup>

In the context of marine spatial planning, in 2014 Parties requested the Secretariat to “facilitate through technical training and the information-sharing mechanism on ecologically or biologically significant marine areas, the use of scientific information compiled for the description of areas meeting the scientific criteria for EBSAs to support efforts, at the regional or national level, on the use of marine spatial planning by Parties and competent intergovernmental organizations”.<sup>74</sup> Furthermore, under the 2014 Priority Actions to Achieve Aichi Biodiversity Target 10 for Coral Reefs and Closely Associated Ecosystems, Parties were encouraged to “prioritize the enhancement of conservation and management measures for coral reefs and closely associated ecosystems in areas described to meet the scientific criteria for EBSAs”.<sup>75</sup> Also related to the achievement of Aichi Target 10, the 2016 Voluntary Specific Workplan on Biodiversity in Cold-water Areas within the Jurisdictional Scope of the Convention, Parties

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<sup>70</sup> COP decision XIII/12 (2016), para 11 and annex II.

<sup>71</sup> COP decision XIII/12 (2016), para 14.

<sup>72</sup> CBD, Marine and Coastal Biodiversity: Revised Voluntary Guidelines for the Consideration of Biodiversity in Environmental Impact Assessments and Strategic Environmental Assessments in Marine and Coastal Areas, Doc. UNEP/CBD/COP/11/23 (2012).

<sup>73</sup> Ibid., para. 10 (b).

<sup>74</sup> COP decision XII/23 (2014), para 19.

<sup>75</sup> COP decision XII/23 (2014), Annex, para 8.3.

were encouraged to identify and prioritise, as appropriate, for conservation, protection and management certain areas such as EBSAs, VMEs and PSSAs in cold-water areas.<sup>76</sup>

In assessing progress towards the achievement of Aichi Biodiversity targets 11 and 12 in 2016, Parties were invited, “as appropriate and taking into account national circumstances” to pursue efforts to protect areas particularly important for biodiversity and ecosystem services (as per Target 11), considering among other criteria,<sup>77</sup> the progress made in describing EBSAs in establishing or expanding MPAs or other effective area-based conservation measures (OECMs).<sup>78</sup> Also in 2016, with respect to strategic actions to enhance the implementation of the Strategic Plan for Biodiversity 2011-2020 and the achievement of the Aichi Biodiversity Targets, including on mainstreaming and the integration of biodiversity within and across sectors, Parties called for further collaboration and information-sharing among the Secretariat, FAO and regional fishery bodies on the use of scientific information on areas meeting the EBSA criteria and VMEs in support of various Aichi Targets.<sup>79</sup>

Furthermore, scientific information contained in EBSA descriptions has been the object of attention in other processes. In the context of marine biodiversity, several UNGA resolutions on Oceans and the Law of the Sea have highlighted the role of the CBD in providing scientific and technical information on areas in need of protection, noting with satisfaction the adoption of the EBSA criteria, and the ongoing work of the CBD on the application of the scientific criteria for EBSAs through the organization of a series of workshops.<sup>80</sup>

FAO has noted the absence of extensive deep-water surveys in the Indian Ocean, highlighting the importance of the respective EBSA information for VME identification in the region.<sup>81</sup>

A few examples demonstrate that Regional Fisheries Management Organisations (RFMOs) have also made use of EBSA information to inform management measures. The Northwest Atlantic Fisheries Organization (NAFO) has assessed the impacts of its fishing activities on the Sargasso Sea EBSA, and as a result bottom trawling was banned from the Corner Rise and New England Seamount chains found within this EBSA.<sup>82</sup> In addition, gear modification for mid-water trawl has been imposed to avoid bottom contact that could impact cold-water corals and sponges found in these seamount chains (which had also been identified as vulnerable marine ecosystems (VMEs)<sup>83</sup> by NAFO).<sup>84</sup> The scientific information

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<sup>76</sup> COP decision XIII/11 (2016), Annex II, 5.3 (b).

<sup>77</sup> Such as Key Biodiversity Areas, VMEs and PSSAs.

<sup>78</sup> COP decision XIII/2 (2016), para 5 (b).

<sup>79</sup> COP decision XIII/3 (2016), para 68.

<sup>80</sup> UNGA Resolutions 61/222 (2006), paras 98, 99; 63/111 (2008), para 135; 64/71 (2009), para 154 and 156; 65/37 (2010); 66/231 (2011); 67/68 (2012); 68/70 (2013); 69/245 (2014), para 228; 70/235 (2015), para 234; 71/257 (2016), para 256.

<sup>81</sup> A Thompson, J Sanders, M Tandstad, F Carocci and J Fuller, eds. *Vulnerable Marine Ecosystems: Processes and Practices in the High Seas*, by FAO Fisheries and Aquaculture Technical Paper No. 595. (Rome, FAO, 2016).

<sup>82</sup> D Diz, ‘The Seamounts of the Sargasso Sea: Adequately Protected?’ (2016) 31 *International Journal of Marine and Coastal Law* 359. These seamount chains also meet the EBSA criteria, as per the NW Atlantic workshop, SBSTTA-18 and COP 12 (2014) respectively.

<sup>83</sup> See section 2 *infra*.

contained in the EBSA description assisted in further developing conservation and management areas for these VMEs. Measures such as these – to assess significant adverse impacts (SAIs) on VMEs (and in this case, also EBSAs) and protect habitats and fragile species – make part of NAFO’s Ecosystem Approach to Fisheries Management Roadmap.<sup>85</sup>

The South East Atlantic Fisheries Organisation (SEAFO) has noted that the EBSA information (environmental and biological data) can be used for planning scientific surveys.<sup>86</sup>

In the context of advancing ecological networks to address the needs of migratory species, the Convention on Migratory Species (CMS)<sup>87</sup> COP has welcomed the EBSA process and progress made under it, while noting that some of the EBSA criteria<sup>88</sup> are particularly relevant to marine migratory species. The CMS COP has also welcomed the GOBI review of EBSAs and marine migratory species to determine how marine migratory species have factored in the description of EBSAs to explore the potential for the respective scientific data and information could contribute to the conservation of migratory species in marine areas within and beyond national jurisdiction.<sup>89</sup>

The IMO Marine Environment Protection Committee has “suggested that, when considering potential Particularly Sensitive Sea Areas (PSSAs)<sup>90</sup> in future, interested parties should consider EBSAs as a valuable reference tool to support the use of the Revised PSSA Guidelines.”<sup>91</sup> The Banc d’Arguin PSSA proposal submitted by Mauritania has drawn data from the 2014 EBSA description by COP 12.<sup>92</sup>

## 1.8. Legal status

The annex to CBD COP decisions on EBSAs with the summary reports contains standard language stating that:

“The description of marine areas meeting the criteria for ecologically or biologically significant marine areas does not imply the expression of any opinion whatsoever concerning the legal status of any country,

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<sup>84</sup> D Diz, ‘The Seamounts of the Sargasso Sea: Adequately Protected?’ (2016) 31 *International Journal of Marine and Coastal Law* 359.

<sup>85</sup> A Kenny, N Campbell, M Koen-Alonso, P Pepin, D Diz, ‘Achieving Sustainable Development Goals in Data Limited Situations through the Implementation of the Ecosystem Approach to Fisheries Management’ (2017) *Marine Policy*. In press. [10.1016/j.marpol.2017.05.018](https://doi.org/10.1016/j.marpol.2017.05.018), at 5 (last checked 19 November 2017).

<sup>86</sup> UNEP/CBD/SBSTTA/20/INF/19 (2016)

<sup>87</sup> Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 1651 UNTS 333.

<sup>88</sup> Namely, ‘special importance for life history stages of species’, ‘importance for threatened, endangered or declining species and/or habitats’, ‘vulnerability, fragility, sensitivity or slow recovery’ and biological productivity’.

<sup>89</sup> CMS Resolution 11.25, preambular para 21; see also UNEP/CMS/COP11/Inf.23; UNEP/CBD/SBSTTA/20/3 (2016).

<sup>90</sup> See section 2 below for discussion on PSSAs.

<sup>91</sup> MEPC 69/21 (2016), para 10.5.

<sup>92</sup> D Diz, D Johnson, M Riddell, S Rees, J Battle, K Gjerde, S Hennige, J M Roberts, ‘Mainstreaming Marine Biodiversity into the SDGs: The Role of Other Effective Area-Based Conservation Measures’ (2017) *Marine Policy*. In press. <https://doi.org/10.1016/j.marpol.2017.08.019> (last checked 19 November 2017).



territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries. Nor does it have economic or legal implications, and is strictly a scientific and technical exercise.”<sup>93</sup>

This statement reflects a shift in the understanding of the role of the EBSA process over time, from its initial focus on the use of such information by Parties and competent organizations for designing MPAs and MPA networks to a wider range of conservation and management measures.<sup>94</sup> Accordingly, the COP has underscored the scientific and technical nature of the application of the EBSA criteria, and the differentiation between the description of areas meeting the criteria and the identification of those,<sup>95</sup> with the latter being linked with the selection of conservation and management measures, which, “is a matter for States and competent intergovernmental organizations, in accordance with international law, including the United Nations Convention on the Law of the Sea”.<sup>96</sup>

As noted above, in its initial stages<sup>97</sup> the development of the EBSA criteria was closely associated with the work of the UN General Assembly in addressing considerations for the establishment of MPAs in areas beyond national jurisdiction (ABNJ). In this respect, and as noted section 1.2 above, the scientific and technical support of the CBD to the UNGA deliberations on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction has been emphasised. However, over time, COP decisions also reflect the usefulness of the EBSA criteria for describing areas that require enhanced protection in areas within national jurisdiction. Nonetheless, the relevance of the EBSA criteria for the UNGA BBNJ process has been noted by UN member States during the UNGA PrepCom meetings.<sup>98</sup> In this connection, it is also important to note that in 2016 the CBD COP<sup>99</sup> recalled its endorsement of guidance<sup>100</sup> on enhancing the conservation and sustainable use of marine biodiversity in ABNJ, which had expressly mentioned EBSAs as an indicative activity, as follows:

“In order to avoid degradation or destruction of ecologically or biologically significant marine areas,] to encourage Parties and invite other Governments and intergovernmental organizations, within their respective jurisdiction and competence, to take measures to ensure conservation and sustainable use by implementing relevant tools, including area-based management tools such as MPAs, environmental impact assessments (EIAs) and strategic environmental assessments (SEAs).”<sup>101</sup>

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<sup>93</sup> CBD Decisions XI/17 (2012), Annex, para 7;

<sup>94</sup> In addition to MPAs and MPA networks (emphasised in Ddecisions VIII/24 and IX/20 and subsequent EBSA Ddecisions), EBSA information has also been highlighted as relevant to management tools such as environmental impact assessments (EIAs), Strategic Environmental Assessments (SEAs), and marine spatial planning (MSP), as per Ddecisions X/29 (2010), para 26; XI/17 (2012), XII/22 (2014), and XIII/12 (2016).

<sup>95</sup> COP decision X/29 (2010), para 26.

<sup>96</sup> COP decision X/29 (2010), para 26.

<sup>97</sup> See COP decisions VII/5 (2004), VIII/24 (2006) and IX/20 (2009), but see also decision X/29, paras 35-36.

<sup>98</sup> As reflected in the BBNJ PrepCom Chair’s “streamlined non-paper on elements of a draft text of an international legally-binding instrument under UNCLOS” for the fourth session of the PrepCom (10-21 July 2017), para 99. Available online at: [http://www.un.org/depts/los/biodiversity/prepcom\\_files/Chairs\\_streamlined\\_non-paper\\_to\\_delegations.pdf](http://www.un.org/depts/los/biodiversity/prepcom_files/Chairs_streamlined_non-paper_to_delegations.pdf) (last checked 19 November 2017).

<sup>99</sup> CBD decision XIII/12 (2016) para 14.

<sup>100</sup> For the implementation of Operational Objective 2.4 of the Programme Element 2 on marine and coastal living resources: para (d) of the annex to decision X/29 (2010).

<sup>101</sup> COP decision X/29 (2010), annex, para (d).

In this connection, the COP encourages Parties and invites other Governments and competent intergovernmental organisations to “take measures to ensure conservation and sustainable use by implementing relevant tools, in accordance with national law, including area-based management tools such as MPAs, EIAs and SEAs, and fisheries management measures, and to share their experience in taking these measures through national reports and/or voluntary reports”.<sup>102</sup> The Secretariat was then requested to make this information available through the clearing-house mechanism.<sup>103</sup>

While the CBD decisions on EBSAs have not indicated their specific legal basis within the Convention, it is possible to relate the EBSA process to: 1) the object and purpose of the CBD as a whole (teleological interpretation); 2) CBD Articles 7 and 17-18 as legal bases (textual interpretation); 3) to other CBD Articles the implementation of which is facilitated by the EBSA process (CBD Articles 8, 10, 12 and 14), with a view to understanding the role of EBSAs in the CBD as a whole (contextual interpretation); and 4) other relevant international rules (systemic interpretation).<sup>104</sup>

1) The EBSA process and outcomes can be related to the object and purpose of the CBD concerning conservation and sustainable use.<sup>105</sup> The object and purpose of a treaty can also be deduced from the treaty preamble.<sup>106</sup> Accordingly, the contribution of EBSAs to conservation and sustainable use can be understood in light of the common concern of humankind for biodiversity conservation, States’ responsibility to conserve and use sustainably biodiversity in the exercise of their sovereignty rights over biological resources, and the urgent need to develop scientific, technical and institutional capacities to provide the basic understanding upon which to plan and implement appropriate measures.<sup>107</sup> The common concern concept (or principle)<sup>108</sup> does not infringe upon national sovereignty, but indicates that CBD Parties are accountable to the whole international community (as, for instance, embodied in the COP) for the way they exercise national sovereignty in complying with their obligations and cooperating with one

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<sup>102</sup> COP decision XII/12 (2016), para 14.

<sup>103</sup> COP decision XIII/12 (2016), para 14

<sup>104</sup> These are the general rules of treaty interpretation contained in VCLT Art. 31, which are considered customary international law (i.e. applicable to all states, regardless of whether they are party to the VCLT): See *Territorial Dispute, Libya v Chad*, Judgement of 3<sup>rd</sup> February 1994, ICJ Rep.6, (1994), para 41

<sup>105</sup> CBD Art. 1.

<sup>106</sup> See R Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), at 196.

<sup>107</sup> CBD preamble.

<sup>108</sup> For instance, Cottier argues that the common concern is an emerging principle of international law. See T Cottier, ‘The Principle of Common Concern and Climate Change’ (2014) 52 *Archiv Des Völkerrechts* 293.

other under the Convention. Accordingly, the main characteristics and implications of the common concern of humankind identified in legal scholarship include:<sup>109</sup>

- (a) A global duty to cooperate, in areas both within and beyond national jurisdiction;
- (b) Common responsibility and burden-sharing;
- (c) The supremacy of matters of common concern over individual State interests;
- (d) Transparency and inclusiveness in decision-making;
- (e) The fact that common concern does not impinge on claims over affected territories.

Some scholars have also linked common concern with sustainable development, the precautionary principle, inter-generational and intra-generational equity and the human right to a healthy environment.<sup>110</sup>

The above considerations should be kept in mind as the object and purpose of a treaty are the chief criterion for its interpretation<sup>111</sup> and serve to:<sup>112</sup>

- (a) Facilitate the evolutionary interpretation of a treaty by guiding Parties collectively in further developing certain provisions of the treaty (as, for instance, embodied in a COP decision);
- (b) Guide Parties in unilaterally implementing the treaty where they are allowed a wide margin of discretion;
- (c) Support transboundary cooperation; and
- (d) Maintain the balance of rights and obligations created under the treaty.

Accordingly, the fact that CBD COP decisions are adopted by consensus, which under international law confers them enhanced legitimacy (it promotes consistent State practice),<sup>113</sup> is also a reflection of the

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<sup>109</sup> L Horn, 'Globalisation, Sustainable Development and the Common Concern of Humankind' (2007) 7 *Macquarie LJ* 53; L Horn, 'Climate Change and the Future Role of the Concept of the Common Concern of Humankind' (2015) 2 *Australian Journal of Environmental Law* 24; M Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind' in M Fitzmaurice, D Ong and P Merkouris (eds.), *Research Handbook on International Environmental Law* (Edward Elgar Publishing Ltd, 2010) 493; J Brunnee, 'Common Areas, Common Heritage, and Common Concern' in D Bodansky, J Brunnee and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 550; Frank Biermann, *Saving the Atmosphere: International Law, Developing Countries and Air Pollution* (Peter Lang, 1995); Murillo, Jimena, 'Common Concern of Humankind and Its Implications in International Environmental Law' (2008) 5 *Macquarie Journal of International and Comparative Environmental Law* 133; D French, 'Common Concern, Common Heritage and Other Global(-ising) Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge?' in M Bowman et al. (eds), *Research Handbook on Biodiversity Law* (Cheltenham: Edward Elgar, 2016), pp. 334; D Shelton, 'Common Concern of Humanity' (2009) 39 *Environmental Policy and Law*, 83; A Jaeckel, 'Intellectual Property Rights and the Conservation of Plant Biodiversity as a Common Concern of Humankind' (2013) 2 *Transnational Environmental Law* 167; L Horn, 'The Implications of the Concept of Common Concern of a Human Kind on a Human Right to a Healthy Environment' (2004) 1 *Macquarie Journal of International and Comparative International Law*, 233; T Cottier & K Nadakavukaren, 'Responsibility to Protect (R2P) and the Emerging Principle of Common Concern, NCCR Trade Regulation' Working Paper No. 2012/29; T Cottier, 'The Principle of Common Concern and Climate Change' (2014) 52 *Archiv Des Völkerrechts*, 293.

<sup>110</sup> L Horn, 'The Implications of the Concept of Common Concern of a Human Kind on a Human Right to a Healthy Environment' (2004) 1 *Macquarie Journal of International and Comparative International Law*, 233- 268; See also A Boyle and J Harrison, 'Judicial Settlement of International Environmental Disputes: Current Problems' (2013) 4 *J International Dispute Settlement* 245-276, on public interest litigation derived from erga omnes obligations owed to the international community as a whole.

<sup>111</sup> VCLT Article 31(1).

<sup>112</sup> D Jonas and T Saunders, 'The Object and Purpose of a Treaty: Three Interpretative Methods' (2010) 43 *Vanderbilt Journal of Transnational Law* 565, 567.

common concern of humankind. As a consequence, as the EBSA Summary Reports form part of COP decisions, any modification of EBSA descriptions would require a new COP decision to ‘retire’ or ‘amend’ the corresponding elements of previous COP decisions where the original description is contained. The current procedure for retiring paragraphs entails the identification by the Secretariat of cases “where the preparation of elements for a new decision on the same subject matter show that the previous decision in question: (i) would inevitably be superseded by the new decision; and (ii) may not be consistent with the new decision.”<sup>114</sup> In accordance with this procedure, a COP decision or its elements (sections or paragraphs) can only be superseded by another COP decision.

2) On the basis of the ordinary meaning of certain CBD provisions, it is possible to point to CBD Articles 7(a), 8(b) and 17-18 as providing legal bases for the EBSA process. First, the development of the EBSA criteria and the associated EBSA process can be linked to specific CBD provisions regarding Parties’ obligations to identify components of biodiversity important for its conservation and sustainable use, having regard to CBD Annex I, as well as monitor, through sampling and other techniques, these components, paying particular attention to those that require urgent conservation measures and those which offer the best potential for sustainable use.<sup>115</sup> The EBSA description also serves to fulfil Parties’ obligation to “develop guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity.”<sup>116</sup> The indicative list of biodiversity components, contained in CBD Annex I, particularly, its paragraphs 1 and 2, are general in scope, but align well with the EBSA criteria.<sup>117</sup>

Furthermore, the scientific description of EBSAs and their inclusion in the global repository (or CBD clearing-house mechanism) and information-sharing mechanism contributes to the implementation of Parties’ obligations related to technical and scientific cooperation under Articles 17 and 18 of the Convention. In this respect, Parties are obliged to facilitate information-sharing from all publically available sources relevant to the conservation and sustainable use of biodiversity, including regarding scientific and technical research.<sup>118</sup> Parties also have the duty to promote international technical and scientific cooperation on conservation and sustainable use of biodiversity through appropriate international and national institutions.<sup>119</sup> In the context of EBSAs, COP decision X/29 and subsequent EBSA decisions conferred COP the mandate to facilitate such scientific cooperation by requesting the Secretariat to include the EBSA Summary Reports in the repository that is hosted in the CBD Clearing-

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<sup>113</sup> J Brunnee, ‘COPing with Consent: Law-Making under Multilateral Environmental Agreements’ (2002) 15 *Leiden Journal of International Law* 1; Boyle and Chinkin, *The Making of International Law* (Oxford; OUP 2007) 160.

<sup>114</sup> COP decision XII/28 (2014) para 3 (d).

<sup>115</sup> CBD Art. 7 (a) and (b). See also T Henriksen, ‘Conservation and Sustainable Use of Arctic Marine Biodiversity: Challenges and Opportunities’ (2010) 1 *Arctic Review on Law and Politics* 249.

<sup>116</sup> CBD, Art. 8 (b).

<sup>117</sup> These include ecosystems and habitats containing: high diversity, large numbers of endemic or threatened species or wilderness; required by migratory species, of social, economic, cultural or scientific importance or which are representative, unique or associated with key evolutionary or other biological processes (CBD Annex I, para 1). As well as, inter alia, species and communities which are threatened, and indicator species (CBD, Annex I, para 2).

<sup>118</sup> CBD Art. 17.

<sup>119</sup> CBD Art. 18 (1).

House Mechanism, which was also established under Article 18.<sup>120</sup> In this regard, it is noteworthy that the mission of the clearing-house mechanism is to significantly contribute to the implementation of the Convention and its Strategic Plan for Biodiversity 2011-2020.<sup>121</sup>

3) Besides contributing to the implementation of the above-listed specific obligations under the Convention, the EBSA process facilitates the implementation of other CBD obligations (Articles 10, 12 and 14), so it is necessary to consider the role of the EBSA process in the context of the CBD as a whole. First, the EBSA process provides an evidence base for Parties to fulfil their obligations to “identify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and monitor their effects”<sup>122</sup> in connection with the conservation and sustainable use of biodiversity, respectively.<sup>123</sup> In addition, the EBSA process provides a platform for building capacity, especially of developing states, while assisting in the description of such biodiversity components and monitoring exercises.<sup>124</sup> Furthermore, EBSA descriptions provide a scientific and technical basis for the realization of the obligations on assessing impacts and minimizing adverse impacts.<sup>125</sup>

4) Finally, the CBD and the EBSA process under it need to be placed in the broader context of international law, and particularly that of the Law of the Sea, as under general international law, no treaty is to work in isolation from others but rather according to a logic of mutual supportiveness.<sup>126</sup> The EBSA description contained in the repository hosted in the CBD Clearing-House Mechanism can support the implementation of UNCLOS obligations regarding the promotion of international cooperation in marine scientific research by States and competent international organisations.<sup>127</sup> In addition, the EBSA process can provide the evidence base for the realization of States’ obligations under UNCLOS to adopt measures “to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.”<sup>128</sup> Furthermore, the several references to the EBSA criteria in CBD guidelines and workplans (see section 1.4 above) may be considered minimum agreed standards that supplement the general provisions on the conservation of marine living resources in the high seas and in the Exclusive Economic Zone (EEZ) under UNCLOS<sup>129</sup> and the UN Fish Stocks

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<sup>120</sup> CBD Art. 18 (3).

<sup>121</sup> COP decision X/15 (2010), Annex.

<sup>122</sup> CBD Art. 7 (c).

<sup>123</sup> CBD Arts. 8 and 10.

<sup>124</sup> CBD Art. 12.

<sup>125</sup> CBD Art. 14.

<sup>126</sup> Riccardo Pavoni, ‘Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the ‘WTO-and-Competing-Regimes’ Debate?’ (2010) 21 *European Journal of International Law* 649.

<sup>127</sup> UNCLOS, art. 242.

<sup>128</sup> See D Diz, ‘The Seamounts of the Sargasso Sea: Adequately Protected?’ (2016) 31 *International Journal of Marine and Coastal Law* 359.

<sup>129</sup> UNCLOS Article 194(5); UNGA Resolution 71/123 (2016), para 176.

<sup>129</sup> UNCLOS Article 119(1)(a) requires States, in establishing conservation measures for living resources on the high seas, to take into account generally recommended minimum standards. Similarly, Article 61(3) requires the same approach in the EEZ.

Agreement.<sup>130</sup> These interpretative considerations suggest that an EBSA description may have legal implications when an EBSA description been explicitly related to other sources of legally binding obligations. Therefore, a change to the EBSA description can have knock-on effects on other international regimes. For instance, CMS and IMO have been utilising EBSA information for their respective processes as discussed in more detail in section 1.7 above. The concern for mutual supportiveness is shared by the international community as a whole and can be addressed by COP as a manifestation of the duty to cooperate.

### **Key Findings:**

- While the EBSA process was not foreseen at the time of adoption of the Convention, it is in line with the object and purpose of the Convention (notably, conservation as a common concern of humankind) and finds legal bases under CBD Articles 7 and 17-18, while supporting the implementation of CBD Articles 8, 10, 12 and 14 both for Parties individually and collectively.
- The relevance of the adoption of consensus COP decisions for addressing such common concern through the duty to cooperate substantiates the view that future modification of EBSA descriptions would require the retirement of the corresponding portion of a decision containing reference to that particular EBSA description.
- While the description of EBSAs has no management measures attached to it, its modification may have implications when linked to other international legally binding obligations under CBD (Articles 8 10, and 14), and other treaties, such as UNCLOS, regional fisheries management organisations conventions, and CMS, as well as other international cooperation initiatives (e.g., IMO PSSAs, VMEs). This further corroborates the view that the CBD COP is best placed to make a decision to modify EBSAs.
- The CBD EBSA process has been praised for its scientific rigour and high standards. Workshop participants, who benefited from technical support and training, have used consistent methods to describe EBSAs.
- Gaps in scientific information have been noted in each workshop report, which has led to discussions around a follow-up process to update the scientific information contained in the EBSA description, as well as the possibility to describe new areas. Fulfilling such gaps and keeping the scientific information updated will maintain the scientific rigour.

The next section explores the experiences of other international processes (although different in nature) on the identification and/or designation of areas important for conservation, as well as respective review processes for some insights that could be useful for the EBSA process moving forward.

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<sup>130</sup> See 1995 UN Fish Stocks Agreement, Articles 5(b) and (d), and 10(c).

## 2. INTERNATIONAL TRENDS AND DISTINCTIVE APPROACHES OF RELEVANCE FOR EBSA DESCRIPTION

This section will highlight key considerations relevant to describing new areas meeting the EBSA criteria, as well as modifying described areas based on trends identified in other international processes. The aim is to identify trends around procedural elements as well as scientific criteria for modification, which will provide elements for consideration by workshop participants in the concluding section. In addressing these issues, the first part of this section will focus on experiences concerning the description, identification or designation of new areas within and beyond national jurisdiction, while the second part will focus on experiences regarding modification of such areas. Before proceeding, however, it is necessary to recall here the unique character of the EBSA process in relation to other established processes, in two respects: first, in terms of the legal basis under which respective processes were developed; and second, in terms of the legal implications deriving from the identification of areas.

### 2.1. Unique features of the EBSA process when compared with other international approaches

#### 2.1.1. Legal basis

##### 2.1.1.1. Within national jurisdiction

Most processes for the identification and designation of areas of international interest have a treaty basis, found either in the text of an international agreement, or in an annex or protocol thereto. There are, however, exceptions, where no treaty basis is available or where the process of identification/designation is based on soft-law instruments.

The Ramsar Convention is one example of the dominant trend: Parties are required to designate suitable wetlands within their territory for inclusion in a List of Wetlands of International Importance,<sup>131</sup> with a view to realizing the vision of the Convention to develop and maintain an international network of wetlands that are important for the conservation of global biodiversity and for sustaining human life through the maintenance of their ecosystem components, processes and benefits/services.<sup>132</sup> The Convention text specifies that at least one such wetland must be designated by the Parties when signing the Convention or when depositing their instrument of ratification or accession.<sup>133</sup>

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<sup>131</sup> Ramsar Convention, art 2(1). More information on the List of Wetlands of International Importance is available at: [http://archive.ramsar.org/cda/en/ramsar-documents-list/main/ramsar/1-31-218\\_4000\\_0](http://archive.ramsar.org/cda/en/ramsar-documents-list/main/ramsar/1-31-218_4000_0) (last checked 19 November 2017).

<sup>132</sup> Ramsar COP 9 (2005) Resolution IX.1, Annex B.

<sup>133</sup> Ramsar Convention, art 2(4).

Similar provisions can be found in some of the Regional Seas Conventions: the Protocol Concerning Specially Protected Areas and Wildlife (SPA/W Protocol)<sup>134</sup> to the Cartagena Convention<sup>135</sup> requires Parties to establish protected areas in areas over which they exercise sovereignty, sovereign rights or jurisdiction, “with a view to sustaining the natural resources of the 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”.<sup>136</sup> The ultimate goal of the Protocol is the creation of a comprehensive and representative network of protected areas,<sup>137</sup> which will contribute to the implementation of complementary environmental treaties.<sup>138</sup> To this end, Parties shall establish a list of protected areas (SPA/W List).<sup>139</sup> The Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (SPA/BD Protocol)<sup>140</sup> adopted under the Barcelona Convention<sup>141</sup> also provides for the establishment of a List of Specially Protected Areas of Mediterranean Importance (SPAMI List), “in order to promote cooperation in the management and conservation of natural areas, as well as in the protection of threatened species and their habitats”.<sup>142</sup>

Another example is the World Heritage Convention, which stipulates that it is for each State Party to identify and delineate properties situated within its territory that might constitute cultural or natural heritage of Outstanding Universal Value<sup>143</sup> within the meaning of the relevant treaty provisions.<sup>144</sup> Prior to the nomination of sites, Parties shall submit to the World Heritage Centre<sup>145</sup> an inventory of such properties, which is referred to as the Tentative List (discussed below, under 2.2.1). Nomination files are submitted by States Parties to the World Heritage Centre, and evaluated by the Advisory Bodies mandated by the World Heritage Convention. Once a site has been nominated and evaluated, it is up to the World Heritage Committee to make the final decision to include the site in the World Heritage List.<sup>146</sup>

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<sup>134</sup> 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 on 18 January 1990, entered into force 18 June 2000) (SPA/W Protocol).

<sup>135</sup> 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 2011) 1506 UNTS 157 (Cartagena Convention).

<sup>136</sup> SPA/W Protocol, art 4(1). More information on the areas listed under the SPA/W Protocol is available at: <http://www.spaw-palisting.org/> (last checked 19 November 2017).

<sup>137</sup> SPA/W Protocol, art 7(1).

<sup>138</sup> UNEP, Guidelines and Criteria for the Evaluation of Protected Areas to Be Listed under the SPA/W Protocol (SPA/W Protocol Guidelines), para A, principle IV.

<sup>139</sup> SPA/W Protocol, art 7(2). The SPA/W List is available at: <http://www.car-spaw-rac.org/?Protected-Areas-listed-under-the-715> (last checked 19 November 2017).

<sup>140</sup> Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (adopted on 10 June 1995, entered into force on 12 December 1999) (SPA/BD Protocol).

<sup>141</sup> Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (adopted on 16 February 1976, entered into force on 2 December 1978, was amended and renamed on 10 June 1995) 1102 UNTS 27 (Barcelona Convention).

<sup>142</sup> SPA/BD Protocol, Article 8(1). The SPAMI List is available at: <http://www.rac-spa.org/spami> (last checked 19 November 2017).

<sup>143</sup> Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted on 23 November 1972, entered into force on 15 December 1975) 1037 UNTS 151 (World Heritage Convention), arts 3 and 4.

<sup>144</sup> World Heritage Convention, arts 1 and 2.

<sup>145</sup> World Heritage Convention, art 8.

<sup>146</sup> World Heritage Convention, art 11. More information on the World Heritage List is available at: <http://whc.unesco.org/en/list/> (last checked 19 November 2017)



A notable exception to the rule that areas of international interest have an explicit treaty basis are Particularly Sensitive Sea Areas (PSSAs) established under the International Maritime Organization (IMO).<sup>147</sup> PSSAs are defined by IMO Resolution as areas that need special protection through action by the IMO because of their significance for recognized ecological, socio-economic, or scientific attributes, where such attributes may be vulnerable to damage by international shipping activities.<sup>148</sup> They may therefore be understood as a type of specialised area-based management tool, focusing on the impacts of shipping activities.<sup>149</sup>

As PSSAs are not established pursuant to any specific treaty provision, they have been developed through IMO practice since the 1970s and are designated on the basis of a set of guidelines laid down in an IMO Resolution (the PSSA Guidelines).<sup>150</sup> As will be further discussed in the following sub-section, IMO resolutions are generally regarded as soft-law instruments, although they may be considered to have legal implications.<sup>151</sup> For instance, PSSAs can be regarded as fulfilling certain obligations assumed by States under the UN Convention on the Law of the Sea (UNCLOS)<sup>152</sup> and other treaties designed to protect the marine environment and/or biodiversity.<sup>153</sup> Within the context of UNCLOS in particular, the establishment of PSSAs has been linked<sup>154</sup> to the general obligation to protect the marine environment,<sup>155</sup> the obligation to prevent, reduce and control marine pollution,<sup>156</sup> and the more specific duty to “[act] through the competent international organization” to “establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels”.<sup>157</sup> In addition, PSSAs are also widely associated with UNCLOS Article 211(6), which allows Coastal States to take mandatory protective measures for the prevention of pollution from vessels in a “particular, clearly defined area” situated within their EEZ for reasons relating to that area’s oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic.<sup>158</sup> Since measures of this kind may have an impact on the freedom of navigation that is otherwise enjoyed by

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<sup>147</sup> Information on listed PSSAs is available at:

<http://www.imo.org/en/OurWork/Environment/PSSAs/Pages/Default.aspx> (last checked 19 November 2017).

<sup>148</sup> IMO Resolution A.982 (24), Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas (adopted on 1 December 2005) (PSSA Guidelines), Annex, para 1.2.

<sup>149</sup> de La Fayette L, ‘The Marine Environment Protection Committee: The Conjunction of the Law of the Sea and International Environmental Law’ (2001) 16 *The International Journal of Marine and Coastal Law* 155, 186.

<sup>150</sup> I U Jakobsen, *Marine Protected Areas in International Law: An Arctic Perspective* (Brill Nijhoff 2016).

<sup>151</sup> H Ringbom, *European Union Maritime Safety Policy and International Law* (Martinus Nijhoff 2008), 24.

<sup>152</sup> United Nations Convention on the Law of the Sea (adopted on 10 December 1982, entered into force on 16 November 1994) 1833 UNTS 3 (UNCLOS).

<sup>153</sup> PSSA Guidelines, Annex, para 1.3. See also de L La Fayette, ‘The Marine Environment Protection Committee: The Conjunction of the Law of the Sea and International Environmental Law’ (2001) 16 *The International Journal of Marine and Coastal Law* 155, 186.

<sup>154</sup> UNDOALOS, West European Particularly Sensitive Sea Area (PSSA): Comments made by the Division for Ocean Affairs and the Law of the Sea of the United Nations (DOALOS) in connection with issues raised in document LEG 87/16/1, IMO Doc LEG 87/17, Annex 7, 1; JP Roberts and J S H Pullen, ‘A Review of Global Experience With Particularly Sensitive Sea Areas (PSSAs)’ in N Oral and F Simard (eds.), *Maritime Traffic Effects on Biodiversity in the Mediterranean Sea, Vol 2 (Legal Mechanisms to Address Maritime Impacts on Mediterranean Biodiversity)* (IUCN 2008), 56.

<sup>155</sup> UNCLOS, art 192.

<sup>156</sup> UNCLOS, art 194.

<sup>157</sup> UNCLOS, art 211(1).

<sup>158</sup> UNCLOS, art 211(6).

States in the EEZ,<sup>159</sup> the Coastal State must notify and obtain permission from the competent international organization prior to their adoption. When UNCLOS uses the expression “competent international organization” in the singular and in connection to the adoption of international shipping rules and standards in matters concerning the prevention and control of marine pollution, it refers exclusively to the IMO, “bearing in mind the global mandate of the Organization as a specialized agency within the United Nations system”.<sup>160</sup>

On the other hand, PSSAs provide a higher level of protection than the one envisaged in UNCLOS article 211(6), insofar as they take into account a broader range of criteria, provide protection from more types of harm, and allow for a broader range of protective measures.<sup>161</sup> Accordingly, and even though this UNCLOS provision is intimately linked with PSSAs, it does not contain the precondition for their designation and can only be partially considered as a legal basis for the PSSA concept.<sup>162</sup>

Other examples of protected areas that have been established under non-binding instruments can be found, for instance, the World Network of Biosphere Reserves established within the framework of UNESCO’s Man and the Biosphere Programme is underpinned by the so-called ‘Seville Strategy’ and the ‘Statutory Framework of the World Network of Biosphere Reserves’, which were developed at an international expert conference and subsequently adopted by the UNESCO General Conference via a Resolution.<sup>163</sup> These two instruments form the legal basis for the establishment of Biosphere Reserves, without, however, being binding under international law.<sup>164</sup>

**Key finding:** While the majority of international processes for the identification and designation of areas of international importance have a clear treaty basis, which often establishes a list or network in which all newly designated sites are included, as an obligation or the prerogative of the States Parties to the relevant legal instrument, there are some international processes that have relied on soft-law instruments for the designation of areas of international importance. The latter processes can be more closely compared to the EBSA process for this reason.

#### 2.1.1.2. Beyond national jurisdiction

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<sup>159</sup> UNCLOS, arts 58 and 87.

<sup>160</sup> IMO Secretariat, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc LEG/MISC, 7.

<sup>161</sup> L de La Fayette, ‘The Marine Environment Protection Committee: The Conjunction of the Law of the Sea and International Environmental Law’ (2001) 16 *The International Journal of Marine and Coastal Law* 155, at 186 and 191; UNDOALOS, West European Particularly Sensitive Sea Area (PSSA): Comments made by the Division for Ocean Affairs and the Law of the Sea of the United Nations (DOALOS) in connection with issues raised in document LEG 87/16/1, IMO Doc LEG 87/17, Annex 7, 1.

<sup>162</sup> J Roberts, *Marine Environment Protection and Biodiversity Conservation: The Application and Future Development of the IMO’s Particularly Sensitive Sea Area Concept* (Springer 2006), 102.

<sup>163</sup> UNESCO General Conference, 28 C/Resolution 2.4 (adopted in November 1995). A list of the areas designated as Biosphere Reserves is available at: <http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves/world-network-wnbr/wnbr/> (last checked 19 November 2017).

<sup>164</sup> German MAP National Committee (ed.), *Full of Life: UNESCO Biosphere Reserves - Model Regions for Sustainable Development* (Springer 2005), 11.

In some cases, the legal basis for the designation of areas of international importance beyond the limits of national jurisdiction can be found in an explicit treaty provision. In other instances, the possibility of designating such areas is inferred from the absence of any provisions that explicitly prohibit it.

The Antarctic Treaty System is one example of a regime that explicitly allows the designation of protected areas in areas beyond national jurisdiction. More specifically, the Protocol on Environmental Protection to the Antarctic Treaty<sup>165</sup> includes an Annex on ‘Area Protection and Management’, which provides for an integrated approach to the creation and management of protected areas in the Antarctic.<sup>166</sup> The Annex distinguishes among ‘Antarctic Specially Protected Areas’ (ASPAs), which are designated to protect outstanding environmental, scientific, historic, aesthetic or wilderness values, or ongoing or planned scientific research,<sup>167</sup> and ‘Antarctic Specially Managed Areas’ (ASMAs), which are designated to assist in the planning and co-ordination of activities, avoid possible conflicts, improve cooperation between Parties and minimise environmental impact.<sup>168</sup> In addition to ASPAs and ASMAs, the Annex foresees the listing of sites or monuments of recognised historic value as ‘Historic Sites and Monuments’ (HSMs).<sup>169</sup> CAMLR, on the other hand, empowers the Commission for the Conservation of Antarctic Marine Living Resources to formulate and adopt conservation measures for the purpose of protecting and preserving the environment of the Antarctic Treaty area.<sup>170</sup> Such measures include “the designation of the opening and closing of areas, regions or sub-regions for purposes of scientific study or conservation, including special areas for protection and scientific study”.<sup>171</sup> It is worth noting that the Commission’s Scientific Committee has developed a programme of work for the development of a representative network of MPAs.<sup>172</sup>

Another example is the SPA/BD Protocol to the Barcelona Convention, which clearly provides for areas situated either partly or wholly on the high seas to be included in the SPAMI List.<sup>173</sup>

UNCLOS empowers the International Seabed Authority (ISA) to adopt appropriate rules, regulations and procedures for, among others, “the prevention, reduction and control of pollution and other hazards to the marine environment ... and of interference with the ecological balance of the marine environment”, particularly from the harmful effects of seabed mining activities, and for “the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment”.<sup>174</sup> Moreover, the Convention requires the ISA Council, which is the executive organ of the Authority, to disapprove areas for exploitation where substantial evidence indicates the risk of serious

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<sup>165</sup> Protocol on Environmental Protection to the Antarctic Treaty (adopted on 4 October 1991, entered into force on 14 January 1998) 30 ILM 1455 (1991) (Madrid Protocol).

<sup>166</sup> Annex to Recommendation XVI-10, Annex V to the Protocol on Environmental Protection to the Antarctic Treaty - Area Protection and Management (adopted on 18 October 1991, entered into force on 24 May 2002) (Annex V to the Madrid Protocol).

<sup>167</sup> Annex V to the Madrid Protocol, art 3(1).

<sup>168</sup> Annex V to the Madrid Protocol, art 4(1).

<sup>169</sup> Annex V to the Madrid Protocol, art 8(1).

<sup>170</sup> Convention on the Conservation of Antarctic Marine Living Resources (adopted on 20 May 1980, entered into force on 7 April 1982) 1329 UNTS 48 (CAMLR), art IX (1)(f).

<sup>171</sup> CAMLR, art IX (2)(g).

<sup>172</sup> CCAMLR, Report of the Twenty-Seventh Meeting of the Commission (CCAMLR-XXVII), paras 7.2 and 7.3.

<sup>173</sup> SPA/BD Protocol, art 9(1).

<sup>174</sup> UNCLOS, art 145; Annex III, art 17(2)(f).

harm to the marine environment.<sup>175</sup> The Legal and Technical Commission is tasked with recommending such action.<sup>176</sup> The Commission is an organ of the Council, entrusted with various functions relating to activities in the Area, including the review of applications for plans of work, the supervision of exploration or mining activities, the assessment of the environmental impact of such activities, and the provision of advice to the Authority's Assembly and Council on all matters relating to exploration and exploitation of non-living marine resources. Under the Mining Code, the Commission may not recommend approval of a plan of work for exploration if it covers an area that has been disapproved for exploitation by the Council on environmental grounds.<sup>177</sup> It has been argued that, because the disapproval of areas for exploitation may lead to the prohibition of seabed mining activities therein, this measure may serve as a spatial management tool, consistent with the general obligation of States to "protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life".<sup>178</sup> The relevant UNCLOS provisions may therefore be regarded as a legal basis for the establishment of marine protected areas by the ISA. Also relevant are the provisions of the Mining Code that require the ISA to apply best environmental practices,<sup>179</sup> since the Authority has acknowledged that "[b]est-practice management of damaging human activities in the marine environment generally involves the use of spatial management tools, including the protection of areas thought to be representative of the full range of habitats, biodiversity and ecosystem structure and function within the management area".<sup>180</sup>

UNCLOS also foresees the development of minimum standards to supplement its general provisions on the conservation of marine living resources in the high seas.<sup>181</sup> In this connection, United Nations General Assembly (UNGA) resolutions, FAO instruments and other international instruments such as CBD COP decisions can provide these minimum standards. For instance, the measures to protect Vulnerable Marine Ecosystems (VMEs)<sup>182</sup> from bottom fishing impacts described in the 2006 UNGA Resolution 61/105 as well as posterior FAO guidance, can be considered "minimum standards" for the purposes of UNCLOS. Furthermore, they can also be understood as States' measures "to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life."<sup>183</sup> Standards and measures to protect VMEs have been further developed through reviews by the

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<sup>175</sup> UNCLOS, art 162(2)(x).

<sup>176</sup> UNCLOS, art 165(2)(l).

<sup>177</sup> Nodules Exploration Regulations, Regulation 21(6); Sulphides Exploration Regulations, Regulation 23(6); Crusts Exploration Regulations, Regulation 23(6).

<sup>178</sup> UNCLOS, art 194(5); A Jaeckel, 'An Environmental Management Strategy for the International Seabed Authority? The Legal Basis' (2015) 30 *The International Journal of Marine and Coastal Law* 93, at 107.

<sup>179</sup> Nodules Exploration Regulations, Regulation 31(2); Sulphides Exploration Regulations, Regulation 33(2); Crusts Exploration Regulations, Regulation 33(2).

<sup>180</sup> ISA - LTC, Environmental Management Plan for the Clarion Clipperton Zone, ISA Doc ISBA/17/LTC/7 (adopted on 13 July 2011) (EMP-CCZ), para 22.

<sup>181</sup> UNCLOS art. 119(1)(a) requires States, in establishing conservation measures for living resources on the high seas, to take into account generally recommended minimum standards.

<sup>182</sup> While VMEs can also be identified within national jurisdiction, UNGA Resolutions (UNGA Resolutions 61/105 (2006); 64/72 (2009); 66/68 (2011); 71/123 (2016)) and the 2009 FAO, *International Guidelines for the Management of Deep-sea Fisheries in the High Seas* (FAO Guidelines) have focused on areas beyond national jurisdiction.

<sup>183</sup> See D Diz, 'The Seamounts of the Sargasso Sea: Adequately Protected?' (2016) 31 *International Journal of Marine and Coastal Law* 359-370.

<sup>183</sup> UNCLOS art. 194(5); UNGA Resolution 71/123 (2016), para 176.

UNGA in 2009, 2011 and 2016, with a strong emphasis placed on impact assessments, cumulative impact assessments, and transparency,<sup>184</sup> since it became clear that if EIAs were being conducted, most of them were not being made publicly available as required under UNCLOS<sup>185</sup> and the respective UNGA Resolutions.<sup>186</sup>

In the case of the IMO PSSAs the possibility of employing these area-based management tools on the high seas is implicit rather than explicit. The PSSA Guidelines allow for areas to be designated “within and beyond the limits of the territorial sea”.<sup>187</sup> This has been interpreted to mean that PSSAs may also be established on the high seas,<sup>188</sup> granted that any protective measures adopted in this regard are consistent with international law, as reflected in UNCLOS.<sup>189</sup>

Similarly, although the World Heritage Convention does not explicitly provide for the designation of World Heritage Sites on the high seas, it has been argued that its provisions do not exclude the protection of natural or cultural heritage of Outstanding Universal Value located in areas outside national jurisdiction.<sup>190</sup> The Convention therefore “appears to encompass these sites, but they have been neglected in the development of the procedural means by which inscription [to the World Heritage List] takes place”.<sup>191</sup> In 2011, an independent external audit on the Global Strategy of the Convention<sup>192</sup> recommended that the World Heritage Committee reflect on appropriate means to preserve sites that meet the criteria of Outstanding Universal Value but fall outside the limits of national jurisdiction. In 2016, a report published by UNESCO explored the following mechanisms by which the Parties to the Convention could implement changes to allow the inscription and protection of such sites in the World Heritage List: interpretation of the Convention, either through incremental change or a formal policy change; adoption of an instrument akin to the 1994 Part XI Implementing Agreement to UNCLOS; and an optional protocol to the Convention, developed through an international negotiation among Parties, binding only those States that choose to ratify it.<sup>193</sup> It remains to be seen how the Parties to the Convention will proceed.

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<sup>184</sup> UNGA Resolution 66/68 (2011), para. 129 (a).

<sup>185</sup> UNCLOS art. 206,

<sup>186</sup> UNGA Resolution 61/105 (2006), paragraph 84; UNGA Resolution 64/72 (2009), paragraph 122 (b); See also para 179 of UNGA Resolution 71/123 (2016) “which notes with concern the uneven implementation of those provisions and that, in particular, bottom fishing continues to occur in certain areas beyond national jurisdiction without an impact assessment having been completed in the 10 years since the adoption of resolution 61/105, in which the General Assembly called for such assessments to be undertaken by 31 December 2008”. See D Diz, ‘The Seamounts of the Sargasso Sea: Adequately Protected?’ (2016) 31 *International Journal of Marine and Coastal Law* 359-370.

<sup>187</sup> PSSA Guidelines, para 4.3.

<sup>188</sup> S Prior, A Chircop and J Roberts, ‘Area-based Management on the High Seas: Possible Application of the IMO’s Particularly Sensitive Sea Area Concept’ (2010) 25 *The International Journal of Marine and Coastal Law* 483.

<sup>189</sup> PSSA Guidelines, para 7.9.

<sup>190</sup> D Freestone et al., *World Heritage in the High Seas: An Idea Whose Time Has Come* (UNESCO 2016), 11.

<sup>191</sup> *Ibid.*

<sup>192</sup> More information on the Global Strategy is available at: <http://whc.unesco.org/en/globalstrategy/> (last checked 19 November 2017).

<sup>193</sup> *Ibid.*

**Key findings:**

- Some regimes explicitly provide for the designation of areas of international importance beyond the limits of national jurisdiction. Where no treaty basis exists, the possibility of designating such areas may be inferred from the absence of any provision to the contrary.
- The impetus created by UN General Assembly process towards the negotiation of a new legally binding instrument for the conservation and sustainable use of biodiversity in areas beyond national jurisdiction has led some regimes to explore their applicability to the high seas in a more concerted fashion.

## 2.1.2. Legal implications of designation

### 2.1.2.1. Within national jurisdiction

As opposed to EBSAs, most international processes foresee that designation of areas of international importance per se entails that the Party who exercises sovereignty or jurisdiction upon the designated area assumes legal obligations that are both positive (duty to actively protect the area) and negative (duty to refrain from any action that could adversely impact the area).

Under the Ramsar Convention, once a site has been listed as a Wetland of International Importance, the Party in whose territory it is situated must formulate and implement its planning in a way that promotes the site's conservation and, as far as possible, its wise use.<sup>194</sup> This is an obligation of result: the Parties are bound to adopt measures towards the conservation and wise use of listed wetlands, although they are free to choose the most appropriate means to achieve these objectives. This obligation has been further elaborated within the framework of the Ramsar COP, where Parties committed not only to maintain the ecological character of their Ramsar sites, but also to take any necessary measures towards their restoration.<sup>195</sup> The Parties must also ensure that they are informed of any changes in the ecological character of their listed wetlands, and notify the Secretariat in this regard.<sup>196</sup>

World Heritage Sites are associated with similar obligations, as Parties are required to, inter alia, adopt general policies to give the heritage a function in the life of the community; integrate heritage protection into comprehensive planning programmes; establish services for the protection, conservation and presentation of the heritage; and foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the heritage and encourage scientific research in these fields.<sup>197</sup> Parties also have a duty not to take any deliberate measures that directly or indirectly damage their heritage or that of another State Party to the Convention.<sup>198</sup> Interestingly, the World Heritage Convention introduces intergenerational equity as an element of the Parties' legal obligations. Parties must therefore "[ensure] the identification, nomination, protection, conservation, presentation, and transmission to future generations of the cultural and natural heritage ... situated in

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<sup>194</sup> Ramsar Convention, art 3(1).

<sup>195</sup> Ramsar Resolution VIII.8, (2002), para 20.

<sup>196</sup> Ramsar Convention, art 3(2).

<sup>197</sup> These are some of the obligations mentioned in art 5 of the World Heritage Convention.

<sup>198</sup> World Heritage Convention, art. 6(3).

[their] territory”.<sup>199</sup> Furthermore, States Parties have an obligation to regularly prepare reports about the state of conservation<sup>200</sup> and the various protection measures put in place at their sites. These reports allow the World Heritage Committee to assess the conditions at the sites and, eventually, to decide on the necessity of adopting specific measures to resolve recurrent problems. One of such measures could be the inscription of a property on the List of World Heritage in Danger.<sup>201</sup>

Under the SPA/BD Protocol, once an area has been included in the List, the Parties “agree to recognise [its] particular importance (...) for the Mediterranean” and “to comply with the measures applicable to the [SPAMI] and not to authorise nor undertake any activities that might be contrary to the objectives for which the [SPAMI] were established”.<sup>202</sup> Similarly, under the SPAW Protocol, once an area has been included in the SPAW List, the Parties agree to recognise its particular importance to the Wider Caribbean Region; to accord it priority for scientific and technical research<sup>203</sup> and for mutual assistance;<sup>204</sup> and not to authorize or undertake activities that would undermine the purposes for which the area was created.<sup>205</sup> It has been argued that these provisions give protected areas and the measures adopted for their protection and management an *erga omnes* effect, at least as far as the Parties to the Protocols are concerned.<sup>206</sup>

Moreover, the SPA/BD Protocol requires Parties to invite third countries and international organisations to cooperate in its implementation, and to “adopt appropriate measures, consistent with international law, to ensure that no one engages in any activity contrary to [its] principles or purposes”.<sup>207</sup> It has been suggested<sup>208</sup> that this provision is based on the precedent set by the Convention for the Conservation of Antarctic Marine Living Resources (CAMLRL), which recognises “the prime responsibility of the Antarctic Treaty Consultative Parties for the protection and preservation of the Antarctic environment”.<sup>209</sup>

Another common feature of the SPA/BD and SPAW Protocols is that, in order to be eligible for designation, areas must be endowed by the proposing Party with a legal framework that guarantees their effective, long-term protection, as well as with adequate management measures and the means necessary for their implementation.<sup>210</sup> The latter include the determination of management objectives, the establishment of a management body, the elaboration of a management plan, and the development of a

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<sup>199</sup> World Heritage Convention, art. 4.

<sup>200</sup> UNESCO, WHS, State of Conservation Information System. Online: <http://whc.unesco.org/en/soc/> (last checked on 19 November 2017).

<sup>201</sup> UNESCO, WHS, List of World Heritage in Danger. Online: <http://whc.unesco.org/en/danger/> (last checked 19 November 2017).

<sup>202</sup> SPA/BD Protocol, art 8(3).

<sup>203</sup> See also SPAW Protocol, art 17.

<sup>204</sup> See also SPAW Protocol, art 18.

<sup>205</sup> SPAW Protocol, art 7(2).

<sup>206</sup> R Scovazzi and I Tani, ‘The Problems Posed by Marine Protected Areas having a Transboundary Character’ in P Mackelworth (ed.) *Marine Transboundary Conservation and Protected Areas* (Routledge 2016), 24.

<sup>207</sup> SPA/BD Protocol, art 28.

<sup>208</sup> T Scovazzi, ‘The Recent Developments in the “Barcelona System” for the Protection of the Mediterranean against Pollution’ (1996) 11 *The International Journal of Marine and Coastal Law* 95, at 99-100.

<sup>209</sup> Convention on the Conservation of Antarctic Marine Living Resources (adopted on 20 May 1980, entered into force on 7 April 1982) 1329 UNTS 48 (CAMLRL), Preamble.

<sup>210</sup> SPA/BD Protocol, art 9(3) and Annex I, paras C and D; SPAW Protocol Guidelines, paras C(13)-(14).

monitoring programme. The aim of these requirements is to avoid the designation of “paper areas”, which would not conform to the spirit of the Protocols.<sup>211</sup> The Operational Guidelines for the implementation of the World Heritage Convention also underscore the need for properties inscribed on the World Heritage List to have “adequate long-term legislative, regulatory, institutional and/or traditional protection and management to ensure their safeguarding”.<sup>212</sup> The nominating Party must demonstrate adequate protection at the national, regional, municipal, and/or traditional level. To this end, they are encouraged to append appropriate texts to the nomination with a clear explanation of the contribution of these measures to the protection of the property. As a result, SPAMIs, SPAW sites and World Heritage Sites are underpinned by a comprehensive legal and management framework from the outset.

The debate on the legal implications of PSSA designation is ongoing. As mentioned earlier, such areas are established on the basis of the PSSA Guidelines, which are laid down in an IMO resolution. IMO resolutions are soft-law instruments, although the Organization has noted that they are “normally adopted by consensus and accordingly reflect global agreement by all IMO Members”.<sup>213</sup> Even though this observation hints at the potential normative value of IMO resolutions, commentators have nevertheless cautioned that indiscriminately attaching legal implications to such acts would not correspond to the formal status of the rules and standards they embody.<sup>214</sup> It is therefore more appropriate to examine their normative value on a case-by-case basis, based on their law-making effect and their capacity to affect the way in which ‘hard law’ is understood and interpreted.<sup>215</sup>

For some, the fact that the PSSA Guidelines were adopted by consensus, as well as the fact that individual PSSAs are established through resolutions of the IMO Marine Environment Protection Committee, which are themselves adopted by consensus, make PSSAs “a reflection of what states consider to be the law in this area”.<sup>216</sup> In addition, IMO resolutions can be considered legally binding to the extent that they reiterate the obligations assumed by States under previous international agreements.<sup>217</sup> As discussed earlier, PSSAs can indeed be regarded as an elaboration of commitments assumed by States under legally binding international instruments pertaining to marine environmental protection (e.g., UNCLOS, MARPOL 73/78).

However, the legal value of PSSAs should also be discussed in the light of the restrictive approach adopted by the Guidelines with regard to the adoption of protective measures to prevent, reduce, or eliminate the adverse impacts of shipping activities in designated areas. More specifically, the IMO Member Government that proposes the designation of a PSSA is required to put forward so-called “associated protective measures”, to be approved or adopted by the IMO pursuant to an identified legal

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<sup>211</sup> T Scovazzi, ‘Marine Protected Areas in Waters Beyond National Jurisdiction’ in M Chantal Ribeiro (ed.) 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 (Coimbra Editora 2014), 221.

<sup>212</sup> WHC Operational Guidelines, para 97.

<sup>213</sup> IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc LEG/MISC/4 (adopted on 26 January 2005), 5.

<sup>214</sup> H Ringbom, European Union Maritime Safety Policy and International Law (Martinus Nijhoff 2008), 24.

<sup>215</sup> Ibid.

<sup>216</sup> M Detjen, ‘The Western European PSSA - Testing a Unique International Concept to Protect Imperilled Marine Ecosystems’ (2006) 30 Marine Policy 442, at 447.

<sup>217</sup> Ibid.



basis.<sup>218</sup> The legal basis can take three forms. First, the associated protective measure can be any measure that is already available under an existing IMO instrument.<sup>219</sup> Such measures are primarily those envisaged in MARPOL 73/78<sup>220</sup> and the International Convention for the Safety of Life at Sea (SOLAS),<sup>221</sup> and may include ships' routing measures, reporting requirements, discharge restrictions, operational criteria, and prohibited activities.<sup>222</sup> In this connection, it is important to note that PSSAs are often, if not always, much larger in extent than areas that contain similar measures. Using one or more criteria in the PSSA Guidelines allows one to establish an area, with buffer zones and containing a range of measures that would not ordinarily be approved by that pertinent IMO instrument. Each measure can target a specific threat from shipping, be it safety related or environmentally related.

Second, the nominating Member Government may propose a protective measure that does not yet exist, but could become available through amendments of an existing IMO instrument or adoption of a new IMO instrument.<sup>223</sup> The legal basis for the adoption of the protective measure will only be available after the IMO instrument has been amended or adopted. Although this is a more dynamic approach that encourages the evolution of the law of the sea through the adoption of new international rules and standards for shipping activities, it remains restrictive, insofar as the PSSA cannot be designated until the amendment or adoption of an IMO instrument has taken effect.

Finally, the protective measure that accompanies the designation of a PSSA may be any measure proposed for adoption in the territorial sea or, pursuant to UNCLOS Article 211(6), the EEZ, where existing measures or a generally applicable measure would not adequately address the particularised need of the proposed area.<sup>224</sup> It has been noted that this third category is where the benefits of PSSA designation become apparent.<sup>225</sup> While many measures in the territorial sea can be enacted by the coastal State without the need for IMO authorization, a coastal State may not enact provisions that would either impair or deny innocent passage or require changes in design, construction, equipment or manning of foreign vessels.<sup>226</sup> The effective implementation of the protective measures that accompany the designation of a PSSA, however, is a priority for the IMO,<sup>227</sup> while Member Governments have committed under the PSSA Guidelines to take all appropriate steps to ensure the compliance of the ships flying their flag.<sup>228</sup> By providing a platform for the development of multilateral approaches by consensus,

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<sup>218</sup> PSSA Guidelines, para 7.1.

<sup>219</sup> PSSA Guidelines, para 7.5.2.3(i).

<sup>220</sup> International Convention for the Prevention of Pollution from Ships (adopted on 2 November 1973, entered into force on 2 October 1983) 1340 UNTS 184 (MARPOL 73/78). See also 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 15 January 2002), Annex I.

<sup>221</sup> International Convention for the Safety of Life at Sea (adopted on 1 November 1974, entered into force on 25 May 1980) 1184 UNTS 278 (SOLAS). See also SOLAS Regulations V/10 on Ships' Routing Systems and V/11 on Ship Reporting Systems.

<sup>222</sup> PSSA Guidelines, para 7.5.2.4.

<sup>223</sup> PSSA Guidelines, para 7.5.2.3(ii).

<sup>224</sup> PSSA Guidelines, para 7.5.2.3(iii).

<sup>225</sup> K M Gjerde, 'Protecting Particularly Sensitive Sea Areas from Shipping: A Review of IMO's New PSSA Guidelines', in Proceedings of the 12 Biennial Coastal Zone Conference, Cleveland, OH, July 15-19, 2001, 3.

<sup>226</sup> UNCLOS, art 211(6)(c).

<sup>227</sup> PSSA Guidelines, para 8.5.

<sup>228</sup> PSSA Guidelines, para 9.3.

the IMO allows coastal States to use the PSSA procedure to push for the adoption and enforcement of measures that they would not have been able to adopt or enforce on a unilateral basis.

Even so, associated protective measures must lend themselves to adoption by the IMO within the general categories of rules, standards, and navigational practices designed to prevent pollution from shipping activities, since States have “already implicitly agreed that [the adoption of such measures] would not impede freedom of navigation”.<sup>229</sup> In terms of the practical implementation of the PSSA concept, the IMO has not departed from the restrictive approach that underlies the Guidelines. To the contrary, the Organization has proved reluctant to establish protective measures unless their necessity has been adequately demonstrated by the proposing Member Government.<sup>230</sup> These limitations of PSSAs have led some commentators to regard them as having little independent legal value,<sup>231</sup> as they depend directly on the protective measures that apply to the area.<sup>232</sup>

It is possible, however, for PSSAs to be taken into consideration within the context of different decision-making processes. For instance, the Nairobi Convention on the Removal of Wrecks explicitly requires that States take into account PSSAs in determining whether a wreck poses a hazard to the safety of navigation or the protection of the marine environment,<sup>233</sup> and in this sense they are used as a criteria for determining the hazard posed by wrecks under the Nairobi convention. Other benefits include the fact that Courts will come to expect a higher standard of conduct in such areas with tougher sanctions and penalties for contraventions. PSSAs also provide a platform for enhanced monitoring of the area by more stakeholders. Furthermore, the preparation and review of the PSSA proposal is undertaken by all stakeholders which results in greater ownership of the designation and uniformity in implementation. IMO also offers financial assistance to Member Governments preparing a PSSA proposal, as opposed to any other ‘protective’ measure.<sup>234</sup> It has also been suggested that the global recognition that accompanies the designation of an area as a PSSA produces certain “non-legal, intrinsic benefits”, including increased awareness of the vulnerability of the area within the international maritime community.<sup>235</sup> PSSAs may also be viewed as a “comprehensive management tool” that serves a similar function to risk assessment tools “used to identify areas of high risk and to select appropriate mitigation measures to treat that risk”.<sup>236</sup> Careful application of the criteria set forth by the PSSA Guidelines even in the course of preparing a proposal for designation “can provide a means of striking an adequate balance between

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<sup>229</sup> J Roberts, *Marine Environment Protection and Biodiversity Conservation: The Application and Future Development of the IMO's Particularly Sensitive Sea Area Concept* (Springer 2006), 102177.

<sup>230</sup> *Ibid.*, 184.

<sup>231</sup> I U Jakobsen, *Marine Protected Areas in International Law: An Arctic Perspective* (Brill Nijhoff 2016), 390.

<sup>232</sup> T Dux, *Specially Protected Marine Areas in the Exclusive Economic Zone (EEZ): The Regime for the Protection of Specific Areas of the EEZ for Environmental Reasons Under International Law* (LIT Verlag 2011), 313; J Harrison, *Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment* (Oxford, OUP 2017), 129-130; H Ringbom, *European Union Maritime Safety Policy and International Law* (Martinus Nijhoff 2008), 464.

<sup>233</sup> Nairobi International Convention on the Removal of Wrecks (adopted on 18 May 2007, entered into force on 14 April 2015), IMO Doc LEG/CONF.16/19, art 6(d). See also J Harrison (2017), 130.

<sup>234</sup> Interview with Edward Kleverlaan (9 November 2017)

<sup>235</sup> J P Roberts and J S H Pullen, ‘A Review of Global Experience with Particularly Sensitive Sea Areas (PSSAs)’ in N Oral and F Simard (eds.), *Maritime Traffic Effects on Biodiversity in the Mediterranean Sea*, Vol 2 (Legal Mechanisms to Address Maritime Impacts on Mediterranean Biodiversity) (IUCN 2008), at 56.

environmental protection and navigational rights, and ensure that measures taken eventually are proportionate to the risk and the level of sensitivity of the particular area”.<sup>237</sup> PSSA designation is therefore not so much a legal basis for the adoption of protective measures as much as an opportunity for their comprehensive justification.<sup>238</sup>

**Key finding:** While under most regimes, the Party in whose territory an area of international importance is situated has a legal duty to protect it (including through having a legal and management framework for it, having to abstain from damaging activities and/or taking measures to restore it) with a view to maintaining the features that led to its designation (notably, ecological character), the global recognition of area under soft-law instruments serves to increase the international community’s awareness of the vulnerability of the area, facilitate the development of multilateral approaches by consensus, and may provide a risk assessment tool. The latter can also be considered applicable to EBSAs, as it is independent from management measures.

#### 2.1.2.2. Beyond national jurisdiction

The legal implications of designating areas of international importance beyond the limits of national jurisdiction concern primarily the Parties to the relevant instrument. There are, however, some options under international law for broadening the normative scope of the designation to third countries.

Under the Antarctic Treaty, entry into ASPAs is prohibited unless a permit has been obtained.<sup>239</sup> Accordingly, Parties must appoint an appropriate authority to issue permits to enter and engage in activities within an ASPA in accordance with the requirements of the Management Plan adopted at the time of designation.<sup>240</sup> In turn, the Management Plan must provide a clear description of the conditions under which permits may be granted, including with connection to access to and movement within or over the area; activities which are or may be conducted within the area, including restrictions on time and place; the installation, modification, or removal of structures; restrictions on materials and organisms which may be brought into the area; and the taking of, or harmful interference with, native flora and fauna.<sup>241</sup>

Under CAMLR, on the other hand, conservation measures designating MPAs apply to vessels under the jurisdiction of the Parties within the meaning of the Convention, i.e. fishing vessels or vessels conducting scientific research activities on Antarctic marine living resources.<sup>242</sup> Although conservation measures establishing MPAs do not apply to ships used only on government non-commercial service (e.g., warships), Parties must adopt appropriate measures with a view to ensuring that “such ships act in a

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<sup>236</sup> Ibid., 57-8.

<sup>237</sup> T Dux, *Specially Protected Marine Areas in the Exclusive Economic Zone (EEZ): The Regime for the Protection of Specific Areas of the EEZ for Environmental Reasons Under International Law* (LIT Verlag 2011), 314.

<sup>238</sup> Ibid.

<sup>239</sup> Annex V to the Madrid Protocol, art 3(4).

<sup>240</sup> Annex V to the Madrid Protocol, art 7.

<sup>241</sup> Annex V to the Madrid Protocol, art 5(3)(i).

<sup>242</sup> CCAMLR, Conservation Measure 91-04 (2011), para 6.

manner consistent, so far as is reasonable and practicable, with this conservation measure”.<sup>243</sup> However, as will be further discussed below, it is possible for Parties to opt out of conservation measures designating MPAs.

Interesting insights may also be drawn from the draft approach developed by the Regional Activity Centre for Specially Protected Areas of the SP/BD Protocol to facilitate proposals for inclusion in the SPAMI List of areas located on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined.<sup>244</sup> The draft approach reiterates the obligation of the Parties proposing the designation to implement the necessary protection, planning and management measures.<sup>245</sup> It also recalls the Parties’ commitment to comply with the measures applicable to SPAMIs and not to authorise or undertake any activity that might be contrary to the objectives for which the sites were established.<sup>246</sup> The draft approach concludes that these provisions make the measures adopted for a SPAMI binding on all Parties.<sup>247</sup> Where the Parties do not adhere to these obligations, the compliance procedures and mechanisms available under the Barcelona Convention will apply.<sup>248</sup>

The draft approach notes that the issue of third States is often raised as an obstacle to the implementation of measures intended to be applied in marine areas beyond the limits of national jurisdiction. In these areas, jurisdiction is exercised according to the criterion of the nationality of the ship concerned, i.e. by the State that has granted the ship its flag. Consequently, it is not possible for a State to unilaterally establish a marine protected area on the high seas and enforce the relevant measures on foreign vessels.<sup>249</sup> In view of this limitation, the draft approach calls upon Parties to cooperate with the competent international organizations, with a view to catalysing the adoption of regulatory measures that would have normative implications for third countries (e.g., the designation of PSSAs under the IMO).<sup>250</sup> It is worth noting that, once an MPA has been established, the Commission for the Conservation of Antarctic Marine Living Resources is also expected to take action towards identifying which actions by the IMO and other competent international organizations should be pursued to support the specific objectives of the relevant conservation measure.<sup>251</sup>

Finally, the draft approach reaffirms the Parties’ obligation to invite third countries to cooperate towards the implementation of the Protocol and to take appropriate measures, consistent with international law, to ensure that no one engages in any activity contrary to its principles or purposes.<sup>252</sup> Accordingly, managing a SPAMI beyond national jurisdiction could be considered as a way to promote new forms of cooperation

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<sup>243</sup> CCAMLR, Conservation Measure 91-04 (2011), para 7.

<sup>244</sup> UNEP, Draft approach to facilitate proposals for inclusion in the SPAMI List of areas located on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined, UN Doc UNEP(DEPI)/MED WG.359/6 (adopted on 10 May 2011) (the draft approach).

<sup>245</sup> Draft approach, para 113; SP/BD Protocol, art 9(5).

<sup>246</sup> Draft approach, para 116; SP/BD Protocol, art 8(3).

<sup>247</sup> Draft approach, para 116.

<sup>248</sup> Decision IG 17/2: Procedures and mechanisms on compliance under the Barcelona Convention and its Protocols, UNEP Doc UNEP(DEPI)/MED IG.17/10 Annex V.

<sup>249</sup> Draft approach, para 120.

<sup>250</sup> Draft approach, paras 122-3.

<sup>251</sup> CCAMLR, Conservation Measure 91-04 (2011), para 10.

<sup>252</sup> Draft approach, para 124; SP/BD Protocol, art 28.

between the Parties involved in the SPAMI and the third countries that could assist with the enforcement of the relevant regulatory measures.<sup>253</sup>

Dissimilar to the EBSA process, which is global by nature, the identification of VMEs is conducted by the respective RFMOs or arrangements through their specific scientific processes. Another difference is that the identification of VMEs requires a direct management response in accordance to the UNGA Resolutions on Sustainable Fisheries.<sup>254</sup> Measures taken by RFMOs and flag states include bottom fishing closures, gear modification, development of encounter protocols with move on rules (the rules that require fishers to cease fishing and move a certain distance when they encounter a VME) and impact assessments to assess the likelihood of significant adverse impacts from bottom fishing on VMEs. Measures taken to protect VMEs are supposed to be made publically available by the RFMO in accordance with the respective UNGA resolutions. Flag states are also requested to identify VMEs and implement the conservation measures described by UNGA Resolution 61/105 *mutatis mutandis*, or cease to authorise fishing vessels flying their flag to conduct bottom fishing in ABNJ where there is no RFMO or arrangement competent to regulate such fisheries.<sup>255</sup>

Whilst recognizing important achievements, commentators have highlighted specific shortcomings, including VME areas that remain open to bottom fishing and insufficient move-on rules, and impact assessments.<sup>256</sup> It is also important to note that despite being targeted at impacts from bottom fishing activities, the 2016 Resolution noted “with concern that vulnerable marine ecosystems may also be impacted by human activities other than bottom fishing, and encourages in this regard States and competent international organizations to consider taking action to address such impacts”.<sup>257</sup>

### **Key findings:**

- The obligations arising from the designation of area-based management tools (ABMTs), including MPAs beyond national jurisdiction, concern primarily the Parties to the relevant legal instrument, although third countries may assume certain duties pursuant to the establishment of cooperative arrangements and the mobilisation of competent international organisations.
- Similar to EBSAs, the requirement to identify VMEs is enshrined in a soft-law instrument, but finds its legal basis in the general obligation of UNCLOS to protect the marine environment, including certain habitats and species, and on the obligation to take into account generally agreed standards for

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<sup>253</sup> Draft approach, para 125.

<sup>254</sup> Particularly UNGA Resolutions 61/105 (2006); 64/72 (2009); 66/68 (2011); and 71/123 (2016), which established the procedures to protect VMEs from significant adverse impacts from bottom fishing activities, followed by subsequent resolutions adopted by member states after conducting implementation reviews in 2009, 2011 and 2016 respectively.

<sup>255</sup> UNGA Resolution 61/105 (2007), para 86.

<sup>256</sup> M. Gianni, S. Fuller, D. Currie, K. Schleit, L. Goldsworthy, L. Pike, B. Weeber, S. Owen, A. Friedman, ‘How much longer will it take? A ten-year review of the implementation of United Nations General Assembly resolutions 61/105, 64/72 and 66/68 on the management of bottom fisheries in areas beyond national jurisdiction’ (Deep Sea Conservation Coalition, 2016). See also D Diz, D Johnson, M Riddell, S Rees, J Battle, K Gjerde, S Hennige, S & MJ Roberts, ‘Mainstreaming Marine Biodiversity into the SDGs: The Role of Other Effective Area-Based Conservation Measures (SDG 14.5)’ (2017) Marine Policy. In press. DOI: [10.1016/j.marpol.2017.08.019](https://doi.org/10.1016/j.marpol.2017.08.019) (last checked 19 November 2017).

<sup>257</sup> UNGA Resolution 71/123 (2017), para 184.

the long-term conservation of marine living resources on the high seas. Added normative value is conferred to VMEs once they are identified and protected by RFMOs through their respective scientific processes and regulations.

## 2.2. Trends and approaches of relevance to describe new areas meeting the EBSA criteria

Keeping in mind the distinctions mentioned in the previous sections, this section will identify trends and approaches related to i) criteria for selection of areas; ii) procedure for designation; and iii) caveats; distinguishing between processes and considerations that concern areas within national jurisdiction and those that concern areas beyond national jurisdiction.

### 2.2.2. Within national jurisdiction

#### 2.2.2.1. Criteria for selection

Each of the regimes discussed in this study has developed its own set of criteria to guide the identification and selection of areas of international importance. These criteria are predominantly ecological in nature, although growing importance is being assigned to socioeconomic considerations.

The Ramsar Convention is one of the treaties that prioritise ecological criteria: the Convention stipulates that areas should be selected for inclusion in the List of Wetlands of International Importance on account of their international significance in terms of ecology, botany, zoology, limnology or hydrology.<sup>258</sup> This broad formulation has been elaborated by the Ramsar COP, which has adopted a set of criteria for identifying wetlands of international importance. The criteria are divided into two overarching categories, namely, criteria relating to the existence within a site of representative, rare or unique wetland types; and criteria relating to the international importance of the site for conserving biodiversity.<sup>259</sup>

In a similar vein, the designation of SPAMIs is primarily guided by the imperative of conserving natural heritage.<sup>260</sup> In this connection, natural heritage has a strong regional dimension, since the geographical distribution of SPAMIs within as well as beyond national jurisdiction must reflect the particular characteristics of the Mediterranean Region and its biodiversity.<sup>261</sup> Accordingly, the SPAMI List shall include sites with “regional value”,<sup>262</sup> i.e. sites that are of importance for conserving components of biological diversity in the Mediterranean; that contain ecosystems specific to the Mediterranean area or the habitats of endangered species; or that are of special interest at the scientific, aesthetic, cultural or educational levels.<sup>263</sup> The criteria that should be used in determining the regional value of an area include

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<sup>258</sup> Ramsar Convention, art 2(2).

<sup>259</sup> Strategic Framework and guidelines for the future development of the List of Wetlands of International Importance of the Convention on Wetlands, 3rd edition, as adopted by Resolution VII.11 (COP 7, 1999) and amended by Resolutions VII.13 (1999), VIII.11 and VIII.33 (COP 8, 2002), IX.1 Annexes A and B (COP 9, 2005), and X.20 (COP 10, 2008) (Ramsar Strategic Framework).

<sup>260</sup> SPA/BD Protocol, Annex I, para A(a).

<sup>261</sup> SPA/BD Protocol, Annex I, para A(c).

<sup>262</sup> SPA/BD Protocol, Annex I, para B(2).

<sup>263</sup> SPA/BD Protocol, art 8(2).

uniqueness; natural representativeness; diversity; naturalness; presence of habitats that are critical to endangered, threatened or endemic species; and cultural representativeness.<sup>264</sup>

Regional importance is also a prominent consideration under the SPAW Protocol, which highlights the need to conserve, maintain and restore representative types of coastal and marine ecosystems of adequate size to ensure their long-term viability and to maintain biological and genetic diversity; habitats and their associated ecosystems critical to the survival and recovery of endangered, threatened or endemic species of flora or fauna; the productivity of ecosystems and natural resources that provide economic or social benefits and upon which the welfare of local inhabitants is dependent; and 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.<sup>265</sup> In order to be selected for designation, an area must meet at least one of the ecological criteria adopted by the Contracting Parties to the Protocol, which include representativeness; conservation value; rarity; naturalness; critical habitats; diversity; connectivity/coherence; and resilience.<sup>266</sup>

Despite these commonalities, the SPA/BD and SPAW Protocols include certain unique elements that set them apart from one another. More specifically, the SPA/BD Protocol stipulates that the pursuit of aims such as the conservation of cultural heritage, the promotion of scientific research, education, participation and collaboration, constitutes an additional factor in favour of an area being included in the SPAMI List.<sup>267</sup> Other characteristics and factors that are considered as favourable are the existence of threats that are likely to impair the ecological, biological, aesthetic or cultural value of the site; the involvement and active participation of the public in the process of planning and the management of the area; and the existence in the area of opportunities for sustainable development.<sup>268</sup> The guidelines adopted by the Parties to the SPAW Protocol, on the other hand, stipulate that the conformity of an area with certain socioeconomic and cultural criteria will also be taken into consideration.<sup>269</sup> These criteria comprise: productivity; cultural and traditional use; and socio-economic benefits.<sup>270</sup>

As for PSSAs, similar to EBSAs, an area must meet at least one of the criteria laid down in the guidelines adopted by the IMO Member Governments to facilitate the identification and designation process. The criteria are divided into three categories. The first is ecological in focus and includes uniqueness or rarity; critical habitats; dependency; representativeness; diversity; productivity; spawning or breeding grounds; naturalness; integrity; fragility; and bio-geographic importance.<sup>271</sup> The second category consists of three social-economic and cultural criteria, namely, social or economic dependency, human dependency, and

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<sup>264</sup> SPA/BD Protocol, Annex I, para B(2).

<sup>265</sup> SPAW Protocol, art 4(2).

<sup>266</sup> SPAW Protocol Guidelines, para B(12).

<sup>267</sup> SPA/BD Protocol, Annex I, para A(a).

<sup>268</sup> SPA/BD Protocol, Annex I, para B(4).

<sup>269</sup> SPAW Protocol Guidelines, para B(11).

<sup>270</sup> Ibid.

<sup>271</sup> PSSA Guidelines, paras 4.4.1 – 4.4.11.

cultural heritage.<sup>272</sup> The third and final category entails scientific and educational criteria relating to research; the suitability of the area as a baseline for monitoring studies; and its educational value.<sup>273</sup>

Since PSSAs are a predominantly sectoral instrument, the recognised attributes of areas considered for designation must be at risk from international shipping activities.<sup>274</sup> The vulnerability of the area is determined on the basis of hydrographical, meteorological and oceanographic factors, as well as the characteristics of vessel traffic.<sup>275</sup> It is worth noting that, according to the PSSA Guidelines, consideration should be given to the potential for a PSSA to be listed on the World Heritage List, declared a Biosphere Reserve, or included on a list of international, regional, or national importance. It may arguably be inferred from this provision that, at the time of drafting the guidelines, it was envisaged “that candidate sites for PSSA designation would also exhibit similar outstanding characteristics to those other international designations identified”.<sup>276</sup>

Despite the emphasis on vulnerability, as well as social and economic considerations, the PSSA criteria share similarities with the EBSA criteria. In this connection, the IMO Marine Environment Protection Committee has “suggested that, when considering potential PSSAs in future, interested parties should consider EBSAs as a valuable reference tool to support the use of the Revised PSSA Guidelines.”<sup>277</sup> In this context, it is important to note that the Banc d’Arguin PSSA proposal submitted by Mauritania has drawn data from the 2014 EBSA description by COP 12.<sup>278</sup>

First, in order for a site to be considered as part of the natural World Heritage, it must meet three conditions: first, it must fulfil at least one of the four natural selection criteria of Outstanding Universal Value. More specifically, the nominated property must contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance; be an outstanding example representing major stages of earth's history, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features; be an outstanding example representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals; or contain the most important and significant natural habitats for in-situ conservation of biodiversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation.<sup>279</sup>

Secondly, the site must satisfy the conditions of integrity, which is a measure of the wholeness and intactness of the natural heritage and its attributes. This requires an assessment of whether the nominated

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<sup>272</sup> PSSA Guidelines, para 4.4.12 – 4.4.14.

<sup>273</sup> PSSA Guidelines, para 4.4.15 – 4.4.17.

<sup>274</sup> PSSA Guidelines, para 5.1.

<sup>275</sup> PSSA Guidelines, para 5.1.1 – 5.1.7.

<sup>276</sup> J P Roberts and J S H Pullen, ‘A Review of Global Experience With Particularly Sensitive Sea Areas (PSSAs)’ in N Oral and F Simard (eds.), *Maritime Traffic Effects on Biodiversity in the Mediterranean Sea, Vol 2 (Legal Mechanisms to Address Maritime Impacts on Mediterranean Biodiversity)* (IUCN 2008), 81.

<sup>277</sup> MEPC 69/21 (2016), para 10.5.

<sup>278</sup> D Diz, D Johnson, M Riddell, S Rees, J Battle, K Gjerde, S Hennige, JM Roberts, ‘Mainstreaming Marine Biodiversity into the SDGs: The Role of Other Effective Area-Based Conservation Measures’ (2017) *Marine Policy*. In press. DOI: <https://doi.org/10.1016/j.marpol.2017.08.019> (last checked 19 November 2017).

<sup>279</sup> WHC Operational Guidelines, para 77. In addition, paragraph 77 includes six criteria for the identification of sites that are part of the cultural World Heritage.



property includes all elements necessary to express its outstanding universal value; is of adequate size to ensure the complete representation of the features and processes which convey its significance; and suffers from adverse effects of development and/or neglect.<sup>280</sup> In the case of natural World Heritage in particular, the imperative of integrity requires that bio-physical processes and landform features should be relatively intact. However, it is recognized that no area is totally pristine and that all natural areas are in a dynamic state, and to some extent involve contact with people. Human activities, including those of traditional societies and local communities, are considered to be consistent with the outstanding universal value of the area granted that they are ecologically sustainable.<sup>281</sup>

Thirdly, the property needs to meet the requirements for protection and management to ensure that the characteristics for which a site is recognized as World Heritage will be maintained.<sup>282</sup>

### **Key findings:**

- There is considerable overlap between the ecological criteria used for the identification of different types of areas of international importance, as well as between these criteria and the ones used to describe EBSAs. This overlap allows for concurrent designations in the same area or part of it.
- Non-ecological criteria are subject to a greater degree of divergence, and may relate to, among others, education and scientific research, public participation, sustainable development, economic dependency, and cultural and traditional use.

### 2.2.3. Procedure for designation

Under most of the regimes discussed in this study, the designation of areas of international importance entails the involvement of a specialised treaty body, which has either been established specifically for this purpose, or has had its mandate extended so as to allow it to take the necessary action. The designation process may also involve permanent or ad hoc advisory bodies, which may include organizations outside a certain international regime. The final decision usually lies with the primary governing body of the relevant legal instrument (e.g., the Conference of the Parties). It has been argued that this approach of “nomination subject to scrutiny” is an attempt to strike “a balance between the recognition of State sovereignty, on the one hand, and of the common interest, on the other”.<sup>283</sup>

A characteristic example is the World Heritage Convention. According to the Operational Guidelines for the implementation of the Convention,<sup>284</sup> a site is included in the World Heritage List pursuant to a two-tiered process, the first step of which is the preparation by the Parties of a Tentative List. The Tentative List serves as an inventory of properties located within the Parties’ territory, which they consider suitable

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<sup>280</sup> WHC Operational Guidelines, para 88.

<sup>281</sup> WHC Operational Guidelines, para 90.

<sup>282</sup> WHC Operational Guidelines, para 78 and 96-119.

<sup>283</sup> C Redgwell, ‘Protecting Natural Heritage and its Transmission to Future Generations’ in AA Yusuf (ed.), *Standard-Setting at UNESCO: Normative Action in Education, Science and Culture* (UNESCO/Martinus Nijhoff 2007), 271.

<sup>284</sup> UNESCO World Heritage Centre, *Operational Guidelines for the Implementation of the World Heritage Convention*, UNESCO Doc WHC.16/01 (adopted on 26 October 2016) (Operational Guidelines).

for inscription in the World Heritage List.<sup>285</sup> Parties are required to submit their Tentative List to the Secretariat at least one year prior to the submission of any nomination. Upon reception of the Tentative Lists, the Secretariat checks the conformity of the accompanying documentation with the format provided in the Operational Guidelines.<sup>286</sup> If all the necessary information has been provided, the Tentative List is transmitted to the Advisory Bodies for information. The role of Advisory Bodies for the purposes of the World Heritage Convention is played by external bodies, namely the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), the International Council on Monuments and Sites (ICOMOS), and the International Union for Conservation of Nature (IUCN).<sup>287</sup> The Guidelines encourage Parties to seek upstream advice from the Advisory Bodies as early as possible during the development of their Tentative Lists.<sup>288</sup> In particular, Advisory Bodies may assist Parties with harmonising their Tentative Lists at regional and thematic levels, with a view to identifying gaps and common themes, and fostering cooperation in the preparation of nominations.<sup>289</sup>

Nominations should be prepared in accordance with the format provided in the Guidelines, which includes sections on the identification of the property, its description, the reasons that justify its designation, the state of conservation, the factors affecting the property, measures relating to its protection and management, and monitoring.<sup>290</sup> Nominations tend to be submitted by individual Parties, although the Guidelines encourage the joint preparation and submission of transboundary nominations.<sup>291</sup> Nominations are submitted to the Secretariat, which checks their completeness and forwards them to the Advisory Bodies for evaluation.<sup>292</sup> The Advisory Bodies may make a positive or negative recommendation regarding the inscription of the property, or they may recommend that the nomination be referred back to the Party for further information or that it be deferred. Parties may withdraw their nomination at any time prior to the session of the World Heritage Committee at which it is scheduled to be examined and should inform the Secretariat in this regard.<sup>293</sup> The final decision on the inscription is made by the World Heritage Committee based on scientific considerations.<sup>294</sup> If the Committee decides to inscribe the Property on the List, it adopts a Statement of Outstanding Universal Value that identifies the criteria under which the property was inscribed, the protection and management measures in force and any requirements for protection and management for the future.<sup>295</sup>

There is also the possibility for the World Heritage Committee to process properties on an emergency basis. This is the case of properties which, according to the report of the competent Advisory Body, are unquestionably of Outstanding Universal Value, and which are at risk as a result of having suffered damage or facing serious and specific dangers from natural events or human activities. The relevant nomination will be processed on an emergency basis and the Committee may decide to simultaneously

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<sup>285</sup> WHC Operational Guidelines, para 62.

<sup>286</sup> WHC Operational Guidelines, Annex 2a.

<sup>287</sup> WHC Operational Guidelines, paras 30-7.

<sup>288</sup> WHC Operational Guidelines, para 71.

<sup>289</sup> WHC Operational Guidelines, para 73.

<sup>290</sup> WHC Operational Guidelines, paras 130-2 and Annex 5.

<sup>291</sup> WHC Operational Guidelines, paras 134-6.

<sup>292</sup> WHC Operational Guidelines, para 140.

<sup>293</sup> WHC Operational Guidelines, para 152.

<sup>294</sup> WHC Operational Guidelines, para 23.

<sup>295</sup> WHC Operational Guidelines, para 155.

inscribe the site in the World Heritage List and the List of World Heritage in Danger (discussed below, sub-section 2.3.1.2).<sup>296</sup> This is the case of the cultural site ‘Hebron/Al-Khalil Old Town’,<sup>297</sup> which was inscribed in the World Heritage List and List of World Heritage in Danger in 2017.

The SPA/BD Protocol also involves treaty bodies in the designation process, but in a way that reflects the instrument’s regional scope. More specifically, areas situated solely within the limits of a Party’s sovereignty or jurisdiction may be included in the SPAMI List following the submission of a proposal by the Party concerned.<sup>298</sup> The proposal must include information on the geographical location and the physical and ecological characteristics of the area, as well as a justification of its Mediterranean importance.<sup>299</sup> The proposal is submitted to the National Focal Points, which serve as a liaison between the States Parties to the Protocol and the Regional Activity Centre for Specially Protected Areas, established with a view to assisting Mediterranean countries with implementation. The National Focal Points examine the conformity of the proposal with the guidelines for the establishment and management of SPAMIs and the common criteria for the selection of areas that could be included in the List.<sup>300</sup> If the proposal is deemed to be consistent, the Regional Activity Centre for Specially Protected Areas transmits it to the Secretariat of the Barcelona Convention.<sup>301</sup> In turn, the Secretariat informs the Meeting of the Parties, which then decide to include the area in the List.<sup>302</sup>

The SPAW Protocol also provides for the inclusion of areas in the SPAW List following their nomination by the Party whose sovereignty, sovereign rights or jurisdiction they fall under.<sup>303</sup> The nomination is submitted to the Secretariat, which forwards it to the Scientific and Technical Advisory Committee along with the accompanying supporting documentation. The Committee consists of scientific experts appropriately qualified in the fields covered by the SPAW Protocol. Each Party appoints its own expert, who acts as its representative on the Committee, although it is possible for them to be accompanied by other experts and advisors appointed by that Party.<sup>304</sup> The Committee may also seek information from scientifically and technically qualified experts and organizations.<sup>305</sup> The documentation required for the purposes of an area being approved for inclusion in the SPAW List includes maps that clearly specify the area’s boundaries, a detailed presentation of the criteria for which the area is being nominated, and a completed nomination form.<sup>306</sup> Once the Committee has evaluated the nomination and the supporting documentation, it advises the Secretariat as to whether the nomination meets the requirements set out in the SPAW Guidelines. If it does, the Secretariat advises the Meeting of the Parties to include the nominated area in the List.<sup>307</sup>

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<sup>296</sup> WHC Operational Guidelines, para 161.

<sup>297</sup> UNESCO, Hebron/Al-Khalil Old Town: <http://whc.unesco.org/en/list/1565> (last checked 19 November 2017).

<sup>298</sup> SPA/BD Protocol, art 9(2).

<sup>299</sup> SPA/BD Protocol, art 9(3).

<sup>300</sup> SPA/BD Protocol, Annex I.

<sup>301</sup> SPA/BD Protocol, art 9(4)(a).

<sup>302</sup> SPA/BD Protocol, art 9(4)(b).

<sup>303</sup> SPAW Protocol, art 7(3)(a).

<sup>304</sup> SPAW Protocol, art 20(2).

<sup>305</sup> Ibid.

<sup>306</sup> UNEP, Annotated Format for Presentation Reports for the Areas Proposed for Inclusion in the SPAW List (2010); SPAW Protocol Guidelines, para D(20).

<sup>307</sup> SPAW Protocol, art 7(3)(b).

PSSAs are another example of a regime that involves a specialised body in the designation process. According to the PSSA Guidelines, the IMO is solely competent for designating such areas and for adopting the necessary protective measures.<sup>308</sup> It does so following an application submitted to the Organization's Marine Environment Protection Committee, either by an individual Member Government or by two or more Member Governments with a common interest in the area concerned. In the latter instance, the proposal should contain integrated measures and procedures for co-operation between the jurisdictions of the proposing Member Governments. In some areas, such as the Mediterranean and the Baltic, this cooperative approach has proven successful. In other cases, where communication has not been as effective, States might benefit from a certain degree of formalisation and institutional facilitation of relevant consultation procedures.<sup>309</sup>

The Marine Environment Protection Committee, which consists of all the IMO Member Governments, is empowered to consider any matter within the scope of the Organization concerned with prevention and control of pollution from ships. It is assisted in its work by a number of sub-committees, which are also open to all IMO Member Governments.<sup>310</sup> In considering the applications submitted by the Member Governments, the Committee may establish, as appropriate, a technical group, comprising representatives with appropriate environmental, scientific, maritime, and legal expertise.<sup>311</sup> Major shipping States and neighbouring coastal States will usually take part in the ad hoc group, which promotes the reconciliation of competing interests and the resolution of technical and political disagreements.<sup>312</sup> It is worth highlighting that the all-encompassing membership of the Committee and its sub-committees, together with the openness of the technical group, allow for a broad peer-review of PSSA nominations. If a nomination is found to fulfil the conditions laid down in the Guidelines, the Committee designates the proposed area "in principle" and informs the IMO body that is competent to adopt the relevant protective measures.<sup>313</sup> Once the measures have been put in place, the Committee will formally designate the PSSA.<sup>314</sup>

In contrast to the other regimes discussed in this section, the Ramsar Convention does not provide for nominations to be scrutinised by a specialised body. As mentioned earlier, the Convention requires Parties to designate at least one site for inclusion in the List of Wetlands of International Importance when signing the Convention or when depositing their instrument of ratification or accession.<sup>315</sup> Beyond this obligation, Parties have committed to establishing and maintaining inventories of the wetlands situated within their territory, with a view to facilitating the identification of additional sites meeting the

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<sup>308</sup> PSSA Guidelines, para 3.1.

<sup>309</sup> Interview with Edward Kleverlaan, former Head, Office for London Convention/Protocol & Ocean Affairs, Marine Environment Division, IMO, (9 November 2017).

<sup>310</sup> These are the Sub-Committee on Human Element, Training and Watchkeeping; the Sub-Committee on Implementation of IMO Instruments; the Sub-Committee on Navigation, Communications and Search and Rescue; the Sub-Committee on Pollution Prevention and Response; the Sub-Committee on Ship Design and Construction; the Sub-Committee on Ship Systems and Equipment; and the Sub-Committee on Carriage of Cargoes and Containers.

<sup>311</sup> PSSA Guidelines, para 8.3.1.1.

<sup>312</sup> Interview with Edward Kleverlaan, former Head, Office for London Convention/Protocol & Ocean Affairs, Marine Environment Division, IMO, (9 November 2017).

<sup>313</sup> PSSA Guidelines, para 8.3.2.

<sup>314</sup> PSSA Guidelines, paras 8.3.4 and 8.3.7.

<sup>315</sup> Ramsar Convention, art 2(4).

criteria for inclusion in the List.<sup>316</sup> Nominations are accepted automatically.<sup>317</sup> The main procedural requirement that Parties must comply with in this connection relates to completing and submitting to the Secretariat an ‘Information Sheet on Ramsar Wetlands’, which includes information on the designated site’s conformity with the Ramsar criteria.<sup>318</sup>

### **Key findings:**

- Most regimes require that nominations be scrutinised by a specialised body of a scientific and technical nature, which can either be established within the regime or be an external entity to the regime.
- The body tasked with evaluating the nomination may be aided by advisory bodies, which are either permanently attached to it or established in an ad hoc fashion.
- The body tasked with evaluating the nomination has a limited margin of discretion. Its assessment focuses on whether the nominated area satisfies the relevant ecological and/or socioeconomic criteria. If so, it is obligated to designate it or to recommend its designation to the body that is competent for making the final decision.
- In some instances, Parties may seek assistance from the specialised body in identifying possible areas of international importance situated within their territory and preparing their nominations.
- Proposals are often submitted by individual States or by two or more in cases where a common interest in the area concerned exists.

### 2.2.4. Caveats

Finally, it is common for legal or policy instruments that provide for the designation of areas of international importance to offer some form of recognition of the Parties’ permanent sovereignty over their natural resources. Another common occurrence relates to “without prejudice” clauses regarding any unresolved territorial disputes involving Parties.

With regard to VMEs, UNGA resolutions have indicated that “nothing in the paragraphs of (resolutions 61/105, 64/72, 66/68 and 71/123) addressing the impacts of bottom fishing on vulnerable marine ecosystems prejudices the sovereign rights of coastal States over their continental shelf or the exercise of the jurisdiction of coastal States with respect to their continental shelf under international law as reflected in the United Nations Convention on the Law of the Sea, in particular article 77 thereof.”<sup>319</sup> The Ramsar

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<sup>316</sup> Ramsar COP 6 (1996) Resolution VI.12, paras 4 and 5; Ramsar COP 7 (1999) Resolution VII.20, paras 11 and 12; Ramsar COP 8 (2002) Resolution VIII.6, paras 15-6 and 18; Ramsar COP 10 (2008) Resolution X.15.

<sup>317</sup> EJ Goodwin, ‘Broad-spectrum Efforts to Enhance the Conservation of Vulnerable Marine Ecosystems’ in M Bowman and others (eds), *Research Handbook on Biodiversity and Law* (Edward Elgar 2016), 177; PM Dupuy and J Viñuales, *International Environmental Law* (Cambridge, CUP 2015), 176; C Redgwell, ‘Protecting Natural Heritage and its Transmission to Future Generations’ in AA Yusuf (ed.), *Standard-Setting at UNESCO: Normative Action in Education, Science and Culture* (UNESCO/Martinus Nijhoff 2007), 271.

<sup>318</sup> Ramsar Strategic Framework, Appendix A. See also Ramsar COP 5 (1993) Resolution 5.3; Ramsar COP 6 (1996) Resolution VI.13.

<sup>319</sup> UNGA resolution 71/123 (2016), para 176.

Convention also provides that the inclusion of an area in the List of Wetlands of International Importance does not prejudice the exclusive sovereign rights of the Party in whose territory the wetland is situated.<sup>320</sup>

Similarly, the World Heritage Convention stipulates that its provisions are without prejudice to property rights provided under national legislation, and that Parties fully respect the sovereignty of the States on whose territory a property that qualifies as cultural and natural heritage within the meaning of the Convention is situated.<sup>321</sup> Moreover, inclusion of a property situated in a territory, sovereignty or jurisdiction over which is claimed by more than one State, shall in no way prejudice the rights of the parties to the dispute. Parties do, however, “recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate”.<sup>322</sup>

Due to the fact that a number of maritime zones (including exclusive economic zones, fishing zones, and ecological protection zones) have been proclaimed by the States bordering the Mediterranean Sea, as well as the fact that several maritime boundaries are still being contested, the SPA/BD Protocol clarifies that it does not prejudice “the rights, the present and future claims or legal views of any state relating to the law of the sea, in particular, the nature and the extent of marine areas, the delimitation of marine areas between states with opposite or adjacent coasts, freedom of navigation on the high seas, the right and the modalities of passage through straits used for international navigation and the right of innocent passage in territorial seas, as well as the nature and extent of the jurisdiction of the coastal state, the flag state and the port state”.<sup>323</sup> It further provides that “[n]o act or activity undertaken on the basis of this Protocol shall constitute grounds for claiming, contending or disputing any claim to national sovereignty or jurisdiction”.<sup>324</sup> These stipulations prevent pending issues of a political or legal nature from delaying or inhibiting cooperation among States towards the adoption of measures to protect the marine environment of the Mediterranean.<sup>325</sup>

A common caveat across the regimes discussed in this study is that the designation of a site and its inclusion in the corresponding list or network requires the consent of the Party concerned.<sup>326</sup>

**Key finding:** Most regimes stipulate that their provisions are without prejudice to the sovereignty and sovereign rights of Parties and that the designation of an area of international importance shall not prejudice the outcome of any dispute relating to the territory in which it is situated. This can be applied in the EBSA context.

### 2.2.5. Beyond national jurisdiction

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<sup>320</sup> Ramsar Convention, art 2(3).

<sup>321</sup> World Heritage Convention, art 6(1).

<sup>322</sup> Ibid.

<sup>323</sup> SPA/BD Protocol, art 2(2).

<sup>324</sup> SPA/BD Protocol, art 2(3).

<sup>325</sup> Scovazzi T, ‘Marine Protected Areas in Waters Beyond National Jurisdiction’ in M Chantal Ribeiro (ed), 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 (Coimbra Editora 2014) 225.

<sup>326</sup> SPAW Protocol Guidelines, para D(23); World Heritage Convention, art 11(3).

#### 2.2.5.1. Criteria for selection

The criteria used to identify areas of international importance beyond the limits of national jurisdiction are largely similar to those used to identify areas within national jurisdiction.

The criteria that underlie the identification of ASPAs established under the Antarctic Treaty include: representativeness, diversity, distinctiveness; ecological importance; degree of interference; and scientific and monitoring uses.<sup>327</sup> Parties must also take into account the actual and potential threats and risks facing the outstanding values contained in the area.<sup>328</sup> Risk criteria include human activities and impacts, natural processes, natural variability and viability, non-Antarctic threats, urgency, and scientific uncertainty.

Under the general framework for the establishment of MPAs under CAMLR, designation must contribute to the following objectives: 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; the protection of key ecosystem processes, habitats and species, including populations and life-history stages; 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; the protection of areas vulnerable to impact by human activities, including unique, rare or highly biodiverse habitats and features; the protection of features critical to the function of local ecosystems; and the protection of areas to maintain resilience or the ability to adapt to the effects of climate change.<sup>329</sup> Even though these elements are referred to as “objectives” rather than “criteria”, they arguably correspond to many of the criteria that guide designation under the other regimes discussed in this study (e.g., representativeness, vulnerability).

In adopting spatial protection measures in the Area, the ISA has followed a science-based approach, taking into account “generally accepted and widely applied principles for the design of marine protected area networks”, including in connection to EBSAs and VMEs.<sup>330</sup> Thus far, the design of protected areas has utilised geological, oceanographic and biological proxy data based on previous ISA workshops and reports, as well as peer-reviewed scientific literature and experience of international experts in deep-sea biology. Since the APEIs were designated after exploration licences had been granted to contractors, their design also took into account the location of license and reserved areas.

Within the framework of the SPA/BD Protocol, the Regional Activity Centre for Specially Protected Areas has elaborated a set of operational criteria for identifying areas on the open seas, including the deep sea, which could be considered for inclusion in the SPAMI List, with a view to enhancing the conservation of Mediterranean marine habitats in the pelagic, bathyal and abyssal fields.<sup>331</sup> In so doing, the Centre attempted to harmonise the criteria set out in the Protocol with regard to the designation of SPAMIs with those adopted within the framework of the CBD with regard to the identification of EBSAs.

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<sup>327</sup> SATCM XII - CEP III, Guidelines for implementation of the Framework for Protected Areas set forth in Article 3, Annex V of the Environmental Protocol, Resolution 1 (2000) Annex (ASPAs Guidelines), para 2.3.

<sup>328</sup> ASPA Guidelines, para 2.4.

<sup>329</sup> CCAMLR, Conservation Measure 91-04 (2011), para 2.

<sup>330</sup> EMP-CCZ, paras 26-9.

<sup>331</sup> UNEP-RAC/SPA, Identification of Potential Sites in Open Seas Including the Deep Sea That May Satisfy SPAMI Criteria, UN Doc UNEP(DEPI)/MED WG.348/3 rev.1 (adopted on 20 May 2010).

Based on this integrative approach, the Centre identified thirteen priority conservation areas, the majority of which are partially situated on the high seas.

The FAO International Guidelines for the Management of Deep-sea Fisheries in the High Seas<sup>332</sup> set generally agreed standards for deep-sea fishing on the high seas, including by defining criteria for identification of VMEs<sup>333</sup> and determining minimum environmental impact assessment (EIA) standards,<sup>334</sup> and other conservation and management measures. Criteria for identification of VMEs are: uniqueness or rarity, functional significance of the habitat, fragility, life-history traits of component species that make recovery difficult, and structural complexity.<sup>335</sup> Like the description of EBSAs, the identification of VME areas can meet one or multiple criteria. Commentators have noted that the “full spatial distribution of a species that meet the VME criteria does not necessarily constitute a VME, and (...) the presence of actual VME must possess a level of organization larger than the scale of a singular/individual presence. Another important consideration is that areas where VMEs are likely to occur should also be identified and protected. These VME elements are typically topographical, hydrophysical or geological features, including fragile geological structures, that potentially support species groups or communities that qualify as VMEs.”<sup>336</sup> The application of the FAO criteria to identify and protect VMEs is conducted by RFMOs/Arrangements with mandate to regulate deep sea fisheries and flag States in areas where no RFMO exists, through their own scientific and management procedures. To this end, RFMOs “have relied on scientific advice based on best available regional knowledge and expert judgement in this process.”<sup>337</sup>

#### **Key findings:**

- There is a great degree of overlap between the criteria used to identify areas of international importance within and beyond national jurisdiction.
- Emerging processes for the designation of areas of international importance beyond the limits of national jurisdiction affirm the relevance of the EBSA criteria in this connection.
- The overlap between different international criteria (e.g. EBSA, PSSA, VME) can help fill gaps of information and complement knowledge about a specific area. For instance, information contained in EBSA descriptions have proved important sources of information for NAFO regarding the establishment of conservation and management measures (gear modification and closures) of the

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<sup>332</sup> FAO, International Guidelines for the Management of Deep-sea Fisheries in the High Seas (Rome: FAO, 2009).

<sup>333</sup> Ibid, paragraph 42.

<sup>334</sup> Ibid, paragraph 47. See also D Diz, (2016) ‘The Seamounts of the Sargasso Sea: Adequately Protected?’ (2016) 31 IJMCL 359-370.

<sup>335</sup> FAO Guidelines, para 42.

<sup>336</sup> A Kenny, N Campbell, M Koen-Alonso, P Pepin, D Diz, ‘Achieving Sustainable Development Goals in Data Limited Situations through the Implementation of the Ecosystem Approach to Fisheries Management’ (2017) Marine Policy. In press. [10.1016/j.marpol.2017.05.018](https://doi.org/10.1016/j.marpol.2017.05.018), at 5 (last checked 19 November 2017).

<sup>337</sup> A Thompson, J Sanders, M Tandstad, F Carocci, J Fuller (eds.), Vulnerable Marine Ecosystems: Processes and Practices in the High Seas, FAO Fisheries and Aquaculture Technical Paper No. 595 (Rome: FAO, 2016), at 5.



Corner Rise Seamounts.<sup>338</sup> Conversely, EBSA information for the Indian Ocean has been highlighted as relevant for identification of VMEs.<sup>339</sup>

#### 2.2.6. Procedure for designation

The designation of areas of international importance beyond the limits of national jurisdiction presents some similarities, as well as some key differences, with the designation of areas of international importance within national jurisdiction, particularly with regard to the actors that may submit a nomination and the need for Parties to approve the designation by consensus.

The inclusion of an area in the SPAMI List is based on a proposal submitted by two or more neighbouring Parties, if the area is situated, either partly or wholly, on the high seas; and by the neighbouring Parties concerned in areas where the limits of national sovereignty or jurisdiction have not yet been defined.<sup>340</sup> The relevant provisions of the SPA/BD Protocol have been further elaborated within the framework of the Barcelona Convention COP: Parties are now encouraged to make, either individually or jointly, a preliminary declaration stating their intention to conduct consultation processes with neighbouring Parties, with a view to preparing a Presentation Report for the candidate area. This preliminary declaration allows other Parties to express their views on the SPAMI proposal and may serve as an invitation to the neighbouring Parties concerned to get involved in the consultation process. The Party or Parties submitting the declaration may request the Regional Activity Centre for Specially Protected Areas and the Secretariat of the Barcelona Convention to facilitate the consultation process, including with relevant international or regional organizations.<sup>341</sup>

The decision to include the nominated area in the List is taken by Parties by consensus, as are the relevant management measures.<sup>342</sup> Otherwise, the process for designating SPAMIs on the high seas is the same as in areas within national jurisdiction. Out of 33 SPAMIs designated to date, only one extends to the high seas, namely, the Pelagos Sanctuary for marine mammals, which was originally established through an agreement concluded by France, Italy and Monaco in 1999.<sup>343</sup> However, as mentioned earlier, the Regional Activity Centre for Specially Protected Areas has developed a draft approach to facilitate the preparation of joint proposals for inclusion in the SPAMI List, with a view to promoting the designation

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<sup>338</sup> D. Diz, 'The Seamounts of the Sargasso Sea: Adequately Protected?' (2016) 31 *International Journal of Marine and Coastal Law* 359.

<sup>339</sup> A Thompson, J Sanders, M Tandstad, F Carocci, J Fuller (eds.), *Vulnerable Marine Ecosystems: Processes and Practices in the High Seas*, FAO Fisheries and Aquaculture Technical Paper No. 595 (Rome: FAO, 2016).

<sup>340</sup> SPA/BD Protocol, art 9(2).

<sup>341</sup> Decision IG.20/7: Conservation of Sites of Particular Ecological Interest in the Mediterranean, UN Doc UNEP(DEPI)/MED IG 20/8, Annex I.

<sup>342</sup> SPA/BD Protocol, art 9(4)(c).

<sup>343</sup> Accord Relatif à la Création en Méditerranée d'un Sanctuaire Pour les Mammifères Marins (adopted on 25 November 1999, entered into force on 21 February 2002), available at <http://www.sanctuaire-pelagos.org/en/about-us/history> (last checked 19 November 2017). An unofficial translation can be found in Scovazzi T, (2001) The Mediterranean Marine Mammals Sanctuary 16 *The International Journal of Marine and Coastal Law* 132, 142-5.

of areas situated on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined.<sup>344</sup>

ASPAs and ASMAs may be nominated by any Party, as well as by the Scientific Committee on Antarctic Research, the Commission for the Conservation of Antarctic Marine Living Resources, and the Committee for Environmental Protection established under the Environmental Protocol to the Antarctic Treaty to provide advice and formulate recommendations to the Parties with regard to implementation.<sup>345</sup> To this end, a Management Plan is submitted to the Antarctic Treaty Consultative Meeting. The Management Plan must include, among others, a description of the value or values for which special protection or management is required; a statement of the aims and objectives of the Management Plan for the protection of those values; a period of designation, if any; and a description of the area.<sup>346</sup> The Management Plan is forwarded to the Scientific Committee on Antarctic Research, the Commission for the Conservation of Antarctic Marine Living Resources, and the Committee for Environmental Protection.<sup>347</sup> The latter, taking into account any comments it has received from the other bodies, formulates its advice to the Antarctic Treaty Consultative Meeting, which is competent for approving the Management Plan. In certain instances, the prior approval of the Commission for the Conservation of Antarctic Marine Living Resources will be required.<sup>348</sup>

Under CAMLR, MPAs are designated by the Commission for the Conservation of Antarctic Marine Living Resources, following advice from the Scientific Committee.<sup>349</sup> It is worth noting that Decisions of the Commission on matters of substance are taken by consensus.<sup>350</sup> The Commission adopts the necessary conservation measures, including the spatial boundaries and specific objectives of the MPA; the activities that are restricted, prohibited, or managed in the MPA or parts thereof, and any temporal (seasonal) or spatial limits on those activities; and priority elements for a management plan, including administrative arrangements, and for a research and monitoring plan, and any interim management, research and monitoring arrangements required until those plans are adopted.<sup>351</sup> The Commission must notify conservation measures to all of its Members.<sup>352</sup> As a rule, conservation measures become binding 180 days after such notification. To date, the only marine protected areas that has been designated by the Commission on the high seas are the South Orkney Islands southern shelf and the Ross Sea MPA. The former was selected for its high conservation importance and its representativeness of key environmental and ecosystem characteristics in the region,<sup>353</sup> and the latter was selected due to its high ecological and productivity value.<sup>354</sup> The conservation measures adopted by the Commission include the prohibition of

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<sup>344</sup> UNEP, Draft approach to facilitate proposals for inclusion in the SPAMI List of areas located on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined, UN Doc UNEP(DEPI)/MED WG.359/6 (adopted on 10 May 2011).

<sup>345</sup> Annex V to the Madrid Protocol, art 5(1).

<sup>346</sup> Annex V to the Madrid Protocol, art 5(2).

<sup>347</sup> Annex V to the Madrid Protocol, art 6(1).

<sup>348</sup> Annex V to the Madrid Protocol, art 6(2); ATCM XXVIII - CEP VIII, Marine Protected Areas and Other Areas of Interest to CCAMLR, Decision 9 (2005).

<sup>349</sup> CAMLR, art IX (1)(f) and (2)(g); CCAMLR, Conservation Measure 91-04 (2011), para 3.

<sup>350</sup> CAMLR, art XII(1).

<sup>351</sup> CCAMLR, Conservation Measure 91-04 (2011), para 3.

<sup>352</sup> CCAMLR, art IX(6)(a) and (b).

<sup>353</sup> CCAMLR, Conservation Measure 91-03 (2009), preamble.

<sup>354</sup> CCAMLR, Conservation Measure 91-05 (2016), preamble.

all types of fishing activities; of discharges and of all types of waste by fishing vessels; and of any transshipment activities involving fishing vessels. The Ross Sea MPA will come into force in December 2017.

The ISA has thus far designated areas area-based management tools on an ad hoc basis, specifically in the context of its Environmental Management Plan for the Clarion-Clipperton Zone (EMP-CCZ). The Zone is expected to be the first area to undergo commercial development of seafloor polymetallic nodules. In anticipation of future extraction activities, the Authority adopted the Environmental Management Plan in the aim of protecting biodiversity and ecosystem functions in the Clarion-Clipperton Zone, particularly through a system of representative seafloor areas that would be closed to mining activities, but open to scientific research.<sup>355</sup> These areas, referred to as ‘areas of particular environmental interest’ (APEIs), were designed to include a wide range of the habitats present in the Zone and to avoid overlap with areas where licenses have been granted. They were selected based on the recommendations of expert workshops held by the ISA in 2007 and 2010. The 2007 workshop divided the Clarion-Clipperton Zone into nine distinct biogeographic regions, each requiring the designation of an APEI.<sup>356</sup> A draft environmental management plan was developed at a subsequent workshop attended by members of the Legal and Technical Commission, scientists and contractors. It is worth noting that the location of the APEIs was adjusted by the Commission, in order to avoid conflict with existing contract areas – an action that has been criticised for undermining the effectiveness of the APEIs and their contribution towards implementing precaution.<sup>357</sup> The plan was eventually adopted by the Council of the Authority, whose decision precluded the granting of any application for approval of a plan of work for exploration or exploitation in APEIs for a period of five years.<sup>358</sup> The APEIs have therefore been “adopted on a ‘provisional basis’ and, thus, do not yet ensure long-term protection”.<sup>359</sup> It remains to be seen if environmental management plans will be developed for other areas and whether they will include spatial protection measures analogous to APEIs.

Since no PSSAs have been designated in areas beyond national jurisdiction, the appropriate procedure for their establishment is a matter of speculation, but the Revised Guidelines does not distinguish the procedures between within or beyond national jurisdiction. In theory, the IMO Member Governments could agree to the designation, since such a decision would not in itself violate international law. Some commentators have argued that “the most appropriate and arguably the only possible way” to approach the establishment of PSSAs on the high seas, is for interested States to negotiate a cooperation agreement aimed at setting up an administering body to govern the area.<sup>360</sup> Such a body would be subject to consensual appointment by the IMO Member States. Other commentators maintain that, although possible, the establishment of a separate administrative body is not necessary.<sup>361</sup> If a PSSA was in fact

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<sup>355</sup> EMP-CCZ, para 39.

<sup>356</sup> ISA - LTC, Rationale and recommendations for the establishment of preservation reference areas for nodule mining in the Clarion-Clipperton Zone, ISA Doc ISBA/14/LTC/2\* (adopted on 28 March 2008).

<sup>357</sup> AL Jaeckel, The International Seabed Authority and the Pre-Cautious Principle: Balancing Deep Seabed Mineral Mining and Marine Environmental Protection (Martinus Nijhoff 2017), 206.

<sup>358</sup> ISA Council, Decision of the Council relating to an environmental management plan for the Clarion-Clipperton Zone, ISA Doc ISBA/18/C/22 (adopted on 26 July 2012), para 6.

<sup>359</sup> AL Jaeckel, The International Seabed Authority and the Pre-Cautious Principle: Balancing Deep Seabed Mineral Mining and Marine Environmental Protection (Martinus Nijhoff 2017), 208.

<sup>360</sup> Ibid, 326.

<sup>361</sup> T Dux, Specially Protected Marine Areas in the Exclusive Economic Zone (EEZ): The Regime for the Protection of Specific Areas of the EEZ for Environmental Reasons Under International Law (LIT Verlag 2011)281.

designated on the high seas by virtue of a decision taken by the IMO General Assembly, the IMO Member States and their vessels would be bound by the relevant protective measures. Accordingly, enforcement would be governed by the provisions of UNCLOS on flag and, as far as discharge standards are concerned, port State jurisdiction.<sup>362</sup>

### **Key findings:**

- Under most regimes, the development of procedures and guidance for the designation of areas of international importance beyond national jurisdiction is ongoing.
- A common requirement for designation is that the relevant decision must be taken by Parties by consensus, except in regional contexts such as RFMOs in the case of VMEs, where majority vote is allowed under specific RFMO Conventions.
- In regional regimes, such as the Mediterranean, the initiative for designation can be taken by the Parties bordering the relevant area, which can submit a joint nomination to this end.
- In contrast to areas within national jurisdiction, the designation of areas of international importance beyond the limits of national jurisdiction may, under certain regimes, be instigated by treaty bodies.
- Similarly to areas within national jurisdiction, the designation of areas of international importance beyond the limits of national jurisdiction is often accompanied by the adoption of environmental management measures.
- The procedures for establishment of areas of international importance in areas beyond national jurisdiction does not differ from within national jurisdiction for PSSAs. For SPAMIs, the only difference concerns required consultations required as well as the submission of joint proposals as opposed to individual proposals (for areas within national jurisdiction).

## 2.3. Trends and approaches of relevance to modify the description of areas meeting the EBSA criteria

Keeping in mind the distinctions between the EBSA process and other international processes discussed in this report, this section will identify trends and approaches related to i) grounds for modification; ii) the process leading up to the modification; and iii) its outcomes. A distinction will be made between processes and considerations that concern areas within national jurisdiction and those that concern areas beyond national jurisdiction.

### 2.3.1. Within national jurisdiction

#### 2.3.1.1. Grounds for modification

In most international processes identified in this report, much attention is devoted, among possible modifications to areas of international importance, to de-listing and boundary restriction (or alteration). The most common ground for modification is the loss of the distinguishing features that led to the

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<sup>362</sup> UNCLOS, arts 217(2) and 218(1).

designation of the area, although some regimes permit modification for reasons relating to urgent national interests, as well as in cases where a site was listed either wholly or partly by error.

The SP/BD Protocol foresees the possibility of the SPAMIs being revised<sup>363</sup> based on an evaluation of their continuing conformity with the mandatory criteria for inclusion in the SPAMI List.<sup>364</sup> More specifically, SPAMIs are appraised in terms of their conservation status, their legal status, the applicable management methods, and the availability of resources and information. The evaluation places particular emphasis on any changes in the status of protected species inside the SPAMI, the status of its habitats and the functioning of its ecosystems; any changes in the official management plan, the legal and institutional framework, and the applicable management and protection measures; and any change in the management body, its powers, means and human resources.<sup>365</sup> De-listing will be considered when the adverse change to the site's status and features is irremediable, or in cases where the corrective measures that the Party concerned was requested to take were not implemented within the specified time period.

A World Heritage Sites may be de-listed if it has deteriorated to the point of irretrievably losing those characteristics which determined its inclusion in the World Heritage List, or where its intrinsic qualities were already threatened at the time of its nomination by human action and the corrective measures outlined by the nominating Party were not taken within the time proposed.<sup>366</sup> To date, only two sites have been de-listed: one natural<sup>367</sup> and one cultural.<sup>368</sup>

Similarly, under the Ramsar Convention, the possibility of modifying a listed wetland is foreseen, among others, in cases where the site appears to have lost the wetland ecosystem components, processes and/or services for which it was originally designated. Depending on whether the loss of these features concerns the entire site or only a part thereof, Parties may consider deleting it from the List of Wetlands of International Importance or restricting its boundaries. The guidelines elaborated by the Ramsar COP in this connection clarify that the deletion or restriction of the boundaries of a listed site may only be contemplated when the loss of its ecological character is unavoidable; in any other instance, the Party must take action towards restoration.<sup>369</sup> Accordingly, deletion and boundary restriction are not acceptable if the aim is simply to permit or facilitate future developments or other land use change that is not justified as an 'urgent national interest', which, as will be further discussed below, is an exceptional ground for modification under the Ramsar Convention.<sup>370</sup>

The Convention lays down some additional scenarios for the deletion or the modification of boundaries of listed sites. First, Ramsar Parties may de-list a site that never met the criteria for designation. This

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<sup>363</sup> SPA/BD Protocol, art 9(6).

<sup>364</sup> Decision IG 17/12: Procedure for the revision of the areas included in the Specially Protected Areas of Mediterranean Interest (SPAMI) List, UN Doc UNEP(DEPI)/MED IG.17/10 Annex V, Annex.

<sup>365</sup> UNEP-MAP-RAC/SPA, 'Format for the Periodic Review of SPAMIs' (RAC/SPA 2008). [http://www.rac-spa.org/sites/default/files/doc\\_spamis/spami\\_reveiw\\_ord\\_form\\_eng.pdf](http://www.rac-spa.org/sites/default/files/doc_spamis/spami_reveiw_ord_form_eng.pdf) (last checked 19 November 2017).

<sup>366</sup> WHC Operational Guidelines, para 192.

<sup>367</sup> UNESCO, Oman's Arabian Oryx Sanctuary: First Site Ever to be Deleted from UNESCO's World Heritage List (28 June 2007): <http://whc.unesco.org/en/news/362> (last checked 19 November 2017).

<sup>368</sup> UNESCO, Dresden is Deleted from UNESCO's World Heritage List (25 June 2009): <http://whc.unesco.org/en/news/522/> (last checked 19 November 2017).

<sup>369</sup> Ramsar Resolution IX.6 (2005), para 12. See also COP 8 (2002) Resolution VIII.22, para 6(b).

<sup>370</sup> Ramsar Resolution IX.6 (2005), para 13.

includes cases where a site has been designated based on inadequate or incorrect information being available at the time of preparation of the ‘Information Sheet on Ramsar Wetlands’, and it subsequently becomes apparent that the site as a whole does not fulfil any of the criteria for designation.<sup>371</sup> It is also possible to de-list or restrict the linear boundaries that have been used to define a site do not relate directly to the eco-geography of the wetlands or their associated catchments.<sup>372</sup>

Second, Ramsar Parties may delete or restrict the boundaries of listed wetlands for reasons pertaining to urgent national interests.<sup>373</sup> Since the inclusion of a wetland in the List is not meant to prejudice the sovereign rights of the Party in whose territory the wetland is situated,<sup>374</sup> the determination of what constitutes an urgent national interest “lies solely with the Party”.<sup>375</sup> However, the guidance elaborated within the framework of the Ramsar COP provides some clarity as to the factors that Parties may take into account in this regard. These include the national benefits of maintaining the integrity of the wetlands system and its related benefits; whether maintaining the status quo threatens a national interest; the existing functions and economic, social and ecological values of the site in question; the particular value of habitats harbouring endemic, threatened, rare, vulnerable or endangered species; whether the proposed action provides benefits to a large base of recipients; and any transboundary effects.<sup>376</sup> Importantly, Parties are encouraged to take into consideration all reasonable alternatives to the proposed action (e.g., the “without project” option, finding an alternative location, introducing buffer zones).<sup>377</sup> More broadly, the Convention requires Parties to take into consideration their “international responsibilities for the conservation, management and wise use of migratory stocks of waterfowl”.<sup>378</sup>

Finally, Ramsar Parties have the right to extend the boundaries of wetlands included in the List of Wetlands of International Importance.<sup>379</sup> The few procedural requirements attached to boundary extension pertain primarily to the provision of relevant information in the ‘Information Sheet on Ramsar Wetlands’, which, as will be further discussed below, is periodically updated and submitted to the Ramsar Secretariat as part of the Parties reporting obligations.

### **Key findings:**

- The main reason for the modification of areas of international importance relates to irremediable changes to their ecological status. This could also occur with EBSAs, but Parties would benefit from the development of scientific guidelines to guide the application of such a criteria to be adopted by CBD COP for EBSA modification.
- The other reason for modification relates to loss of the distinguishing features that originally led to their designation. Like EBSAs, these features entail a set of different ecological and biological characteristics, which makes it difficult in practice to have them all lost by a single event.

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<sup>371</sup> Ramsar Resolution IX.6 (2005), para 6(ii).

<sup>372</sup> Ramsar Resolution IX.6 (2005), para 6(v).

<sup>373</sup> Ramsar Convention, art 2(5).

<sup>374</sup> Ramsar Convention, art 2(3).

<sup>375</sup> Ramsar Resolution VIII.20 (2002), para 1.

<sup>376</sup> Ramsar Resolution VIII.20 (2002), para 3.

<sup>377</sup> Ramsar Resolution VIII.20 (2002), para 3.6.

<sup>378</sup> Ramsar Convention, art 2(6).

<sup>379</sup> Ramsar Convention, art 2(5).

Nonetheless, such criterion could also provide a model for the development of scientific criteria for modification of EBSAs.

- In the case of Ramsar sites, it is also possible for modification to be based on urgent national interests. This is stipulated under the Ramsar Convention and a Party must justify such categorization according to a set of criteria.<sup>380</sup> In practice, this possibility has not been invoked yet.
- Erroneous designations can also lead to de-listing. This includes cases where a site has been designated based on inadequate or incorrect information being available at the time of the preparation of the nomination, and it subsequently becomes apparent that the site as a whole does not fulfil any of the criteria for designation. This could also be applicable to EBSAs.

### 2.3.1.2. Process leading to modification

In most instances, the modification of an area of international importance is linked to monitoring and review processes. The review process may be automatic and periodic, i.e. the listed areas may be reviewed at a set time period. Alternatively, the review process may be selective, i.e. the listed areas may be reviewed only if certain conditions are fulfilled (e.g., there is a perceived risk to the ecological character of the site).

The Ramsar Convention is one example of the latter approach. Parties to the Convention have a duty to put in place the necessary arrangements for being informed of any changes in the ecological character of their listed wetlands that have occurred, are occurring, or are likely to occur as a result of technological developments, pollution or other human interference.<sup>381</sup> This information must be communicated to the Secretariat without delay.<sup>382</sup> Moreover, when the Secretariat has been notified by a third party (e.g., a national or local NGO) of such a change or potential change, it contacts the Administrative Authority of the Party involved, seeking clarification of the situation and offering advice if needed. The Secretariat also reports back to the original informant, as appropriate, about the responses received from and actions taken by the Administrative Authority.<sup>383</sup>

The Secretariat shall also notify the other Parties of any alterations to the List, or any changes in the ecological character of the listed wetlands, and arrange for these matters to be discussed at the next COP.<sup>384</sup> The COP may make any recommendations it deems necessary in this regard. The content of these provisions has been further elaborated within the framework of the Ramsar COP. First, the COP has urged Parties to verify the data included in the 'Information Sheet on Ramsar Wetlands' at least every six years (i.e., in the run-up to every other COP), and to provide the Secretariat with updated information sheets if necessary.<sup>385</sup> The COP has further recommended that Parties submit national reports to the Secretariat on a triennial basis, with a view to facilitating the continuous monitoring of the implementation of the Convention.<sup>386</sup> These reports provide Parties with an opportunity to flag any

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<sup>380</sup> Ramsar Resolution VIII.20 (2002), para 3.

<sup>381</sup> Ramsar Convention, art 3(2).

<sup>382</sup> See also Ramsar Convention, art 8(2).

<sup>383</sup> For further details, see Ramsar Resolution VIII.8 (2002).

<sup>384</sup> Ramsar Convention, art 8(2)(d). See also art 6(2).

<sup>385</sup> Ramsar Resolution VI.1 (1996), para 2.3.

<sup>386</sup> Ramsar Recommendation 2.1 (1984).

changes to the ecological character of listed wetlands in the period between each revision of the Information Sheets.<sup>387</sup>

The Ramsar COP has clarified that boundary restriction should be considered first and de-listing should be regarded as an option only in exceptional circumstances.<sup>388</sup> Parties are encouraged to consult with the Ramsar Secretariat at an early stage in their contemplation of any deletion or restriction of a listed site.<sup>389</sup> They should also consider whether it would be helpful to seek the advice of the Scientific and Technical Review Panel; whether adding the site to the Montreux Record (discussed below) would be a helpful step; whether an advisory mission should be requested; and whether requesting emergency assistance under the Ramsar Small Grant Fund is appropriate.<sup>390</sup> Another possibility that should be taken into account is whether the changed character of the site has led it to qualify as a Wetland of International Importance under criteria other than those for which it was originally listed.<sup>391</sup> Importantly, the Party must examine whether the change is reversible, in which case it must define the conditions under which it may be reversed, and the management actions needed to secure this.<sup>392</sup> In any case, it is worth noting that the rigorous follow-up procedure employed by the Ramsar Secretariat tends to discourage Parties from proceeding with the restriction of a site's boundaries or its deletion from the List of Wetlands of International importance.<sup>393</sup> In practice, only a handful of boundary restrictions have occurred, while the few instances of de-listing pertain to sites that were designated prior to the adoption of the Criteria and were later found not to fulfil any of them.<sup>394</sup>

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<sup>387</sup> Ramsar Resolution VI.1 (1996), paras 2.3 and 2.9.3.

<sup>388</sup> Ramsar Resolution IX.6 (2005), para 18.

<sup>389</sup> Ramsar Resolution IX.6 (2005), para 20.

<sup>390</sup> Ramsar Resolution IX.6 (2005), para 23(ii).

<sup>391</sup> Ramsar Resolution IX.6 (2005), para 24.

<sup>392</sup> Ramsar Resolution IX.6 (2005), para 25.

<sup>393</sup> Interview with Maria Rivera, Senior Advisor for the Americas, Ramsar Convention Secretariat (9 November 2017).

<sup>394</sup> Ramsar Secretariat, *The Ramsar Convention Manual: A Guide to the Convention on Wetlands* (6<sup>th</sup> edn., Ramsar Secretariat 2013), 51.



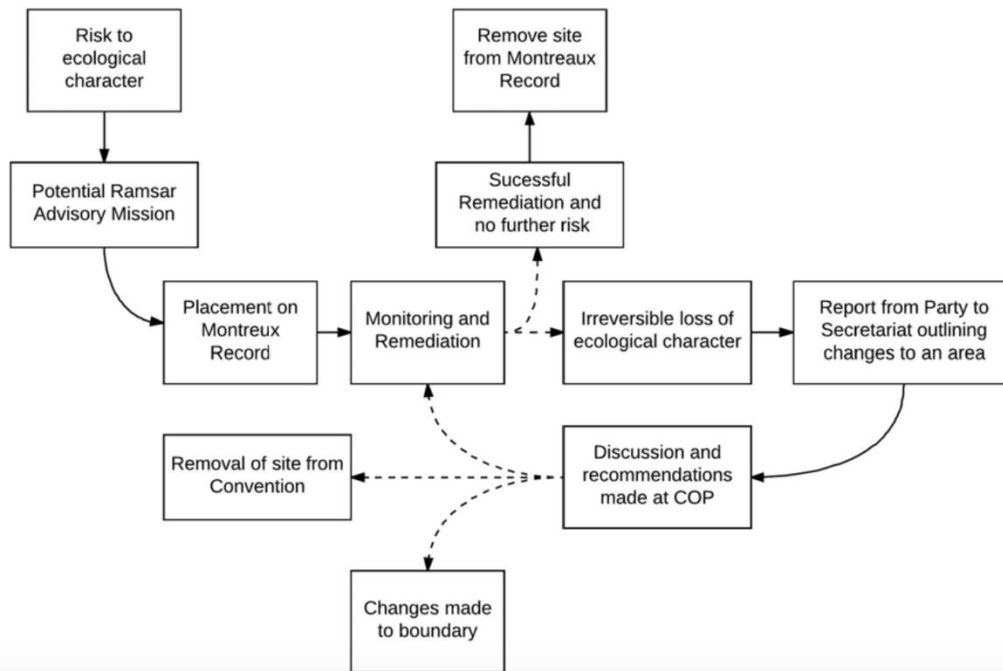


Fig 2: Process for modification of Ramsar Sites (© Turner, 2017)<sup>395</sup>

The World Heritage Convention also employs the selective review approach. The Operational Guidelines use the term “Reactive Monitoring” to refer to the reporting by the Secretariat, other sectors of UNESCO and the Advisory Bodies to the World Heritage Committee on the state of conservation of listed properties that are under threat.<sup>396</sup> In this connection, Parties are required to submit reports and impact studies each time exceptional circumstances occur or work is undertaken which may have an impact on the Outstanding Universal Value of the property or its state of conservation. The Committee should be notified as soon as possible and before any decisions are made that would be difficult to reverse, in order to assist the Party concerned in seeking appropriate solutions to ensure that the Outstanding Universal Value of the property is fully preserved.<sup>397</sup> When the Secretariat receives information that a listed property has seriously deteriorated, or that the necessary corrective measures have not been taken within the specified time period, from a source other than the Party concerned, it endeavours to verify the source and the contents of the information in consultation with the Party concerned.<sup>398</sup> It also seeks comments from the relevant Advisory Bodies.<sup>399</sup>

The information received, together with the comments of the Party concerned and the Advisory Bodies, must be brought to the attention of the World Heritage Committee. If the Committee considers that the property has not seriously deteriorated, it may decide that no further action should be taken; if it considers

<sup>395</sup> P Turner, Report on potential mechanisms through which areas recognised for their conservation value may be downsized or degazetted that may be of relevance for Ecologically or Biologically Significant Areas (EBSAs) (GOBI, 2017).

<sup>396</sup> WHC Operational Guidelines, para 169.

<sup>397</sup> WHC Operational Guidelines, para 172.

<sup>398</sup> WHC Operational Guidelines, para 174.

<sup>399</sup> WHC Operational Guidelines, para 175.

that the property has seriously deteriorated, but not to the extent that its restoration is impossible, it may decide that the property be maintained on the List, provided that the State Party takes the necessary measures to restore the property within a reasonable period of time.<sup>400</sup> If the information available is not sufficient, the Committee may also authorise the Secretariat to take the necessary action to ascertain, in consultation with the Party concerned, the present condition of the property, the dangers it is faced with, and the feasibility of its restoration.<sup>401</sup>

An elaborate process for monitoring and reviewing listed sites has also been developed under the SP/BD Protocol. As mentioned earlier, this process entails a detailed evaluation of whether SPAMIs meet the mandatory criteria for inclusion in the List.<sup>402</sup> This evaluation may be ordinary or extraordinary in nature. In the first instance, the evaluation is based on two different sources of information regarding the status of the SPAMI: the Periodic Review of the area and the biannual reports prepared by the National Focal Points.

Under the Periodic Review procedure, a Technical Advisory Commission with a mixed membership of national and independent experts conducts an in-depth evaluation of the area every six years, beginning with the date of its inclusion in the List. The SPAMI is appraised in terms of its conservation status, its legal status, the applicable management methods, and the availability of resources and information.<sup>403</sup> Also considered are the features that provide an added value to the area, including any threats to its ecological, biological, aesthetic and cultural values (e.g., unregulated exploitation of natural resources, pollution); the applicable legal regulations (e.g., legislation on environmental impact assessment); management measures (e.g., extent of public participation); protective measures (e.g., adequacy of enforcement modalities); human resources (e.g., presence of a field administrator); financial and material means (e.g., condition of administrative premises); information and knowledge (e.g., adequacy of data collection program); and cooperation and networking (e.g., level of cooperation and exchange with other SPAMIs). The results of the Periodic Review are forwarded to the Regional Activity Centre for Specially Protected Areas, which presents them at the biannual meeting of the National Focal Points for endorsement.

The Parties must also report on the implementation of the Protocol on a biannual basis.<sup>404</sup> This reporting obligation refers to, among others, the state of the areas included in the SPAMI List and any changes in their delimitation or legal status. The reports serve as an early warning of any adverse changes to the status of a SPAMI. In addition, the Parties must communicate any situation that might endanger the ecosystems of SPAMIs or the survival of protected species to the other Parties, the States that may be affected, and the Centre.<sup>405</sup> In case of an ecological catastrophe, a serious adverse event or an emergency occurring within a SPAMI, the National Focal Point concerned may request the Centre to proceed with an Extraordinary Review of the area.

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<sup>400</sup> WHC Operational Guidelines, para 176(a)-(b).

<sup>401</sup> WHC Operational Guidelines, para 176(e).

<sup>402</sup> Decision IG 17/12: Procedure for the revision of the areas included in the Specially Protected Areas of Mediterranean Interest (SPAMI) List, UN Doc UNEP(DEPI)/MED IG.17/10 Annex V, Annex.

<sup>403</sup> UNEP-MAP-RAC/SPA, 'Format for the Periodic Review of SPAMIs' (RAC/SPA 2008). [http://www.rac-spa.org/sites/default/files/doc\\_spamis/spami\\_reveiw\\_ord\\_form\\_eng.pdf](http://www.rac-spa.org/sites/default/files/doc_spamis/spami_reveiw_ord_form_eng.pdf) (last checked 19 November 2017).

<sup>404</sup> SPA/BD Protocol, art 23.

<sup>405</sup> SPA/BD Protocol, art 21(2).

Any significantly adverse changes reported by the Parties are presented at the Meeting of the National Focal Points, which, based on the gravity of the situation, may decide to inform the Meeting of the Parties, and/or request other Parties or the Centre for support in taking any possible measures to solve the detected deficiencies. The Meeting of the National Focal Points may also decide to initiate an extraordinary review of the SPAMI.

A common element among the Ramsar Convention, the World Heritage Convention and the SP/BD Protocol is that they provide for sites that have been found to be under threat, or the condition of which appears to have deteriorated, to be placed under a temporary remedial regime, to allow for more concerted action to be taken towards their recovery or restoration. This serves several purposes: it raises awareness, catalyses cooperation, and allows the Party concerned to access various financial or technical support mechanisms available under the relevant regime.

Under the Ramsar Convention, when a change to the ecological character of a listed wetland has occurred or is anticipated, the site may be included in the Montreux Record, which is the primary tool for highlighting which wetlands are under pressure and, by consequence, in need of priority conservation attention.<sup>406</sup> Parties may request inclusion of a site in the Record in order to draw attention to the need for action or support.<sup>407</sup> Alternatively, the Secretariat, upon receipt of information on actual or possible adverse changes from partner organizations, other international or national NGOs, or other interested bodies, may draw the attention of the Party concerned to this information and enquire whether the site should be included in the Record.<sup>408</sup> In the latter instance, the Secretariat will also provide the Party with a concise, voluntary questionnaire, to facilitate the provision of information relating to the adverse changes.<sup>409</sup> Once completed, the questionnaire is submitted to the Secretariat, which forwards it, with the agreement of the Party, to the Scientific and Technical Review Panel for advice.<sup>410</sup> The Secretariat will discuss the Panel's comments and advice with the Party concerned, in order to determine what steps might be taken, including a decision as to whether the site should be included in the Montreux Record.<sup>411</sup> It should be noted that a site can only be included in the Record with the approval of the Party concerned.<sup>412</sup> A wetland may be removed from the Montreux Record based on a similar procedure.<sup>413</sup>

In turn, the World Heritage Convention provides for the inscription of a property on the List of World Heritage in Danger.<sup>414</sup> This measure may be taken when the following conditions are met: a listed property is threatened by serious and specific danger; major operations are necessary for its conservation; and assistance has been requested.<sup>415</sup> The danger may be ascertained, i.e. the property is faced with

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<sup>406</sup> Ramsar Resolution VI.1 (1996), Annex, para 3.1.

<sup>407</sup> Ramsar Resolution VI.1 (1996), Annex, para 3.2.1.

<sup>408</sup> Ibid.

<sup>409</sup> Ramsar Resolution VI.1 (1996), Annex, para 3.2.2.

<sup>410</sup> Ramsar Resolution VI.1 (1996), Annex, para 3.2.3.

<sup>411</sup> Ramsar Resolution VI.1 (1996), Annex, para 3.2.5.

<sup>412</sup> Ramsar Resolution VI.1 (1996), Annex, para 3.2.1.

<sup>413</sup> Ramsar Resolution VI.1 (1996), Annex, para 3.3.

<sup>414</sup> The List of World Heritage in Danger is available at: <http://whc.unesco.org/en/danger> (last checked 19 November 2017).

<sup>415</sup> WHC Operational Guidelines, para 177.

specific and proven imminent danger, or potential, i.e. the property is faced with major threats which could have deleterious effects on its inherent characteristics.<sup>416</sup> In any case, the threat and/or its detrimental impact on the integrity of the property must be amenable to correction by human action, including action of an administrative or legal nature.<sup>417</sup> When considering the inscription of a property on the List of World Heritage in Danger, the Committee shall develop, and adopt, as far as possible, in consultation with the State Party concerned, a desired state of conservation for the removal of the property from the List of World Heritage in Danger, and a programme for corrective measures.<sup>418</sup> The Committee shall review annually the state of conservation of properties inscribed on the List of World Heritage in Danger.<sup>419</sup>

Finally, under the SP/BD Protocol, based on the outcome of the Periodic Review, the biannual reports prepared by the National Focal Points, the notification by a National Focal Point of an emergency, or input provided by external sources (e.g., NGOs), the Meeting of the Parties to the Barcelona Convention may request the responsible authorities to take any appropriate corrective measures. At the same time, the SPAMI enters a provisional period of three years, in which the necessary recommendations and measures must be adopted and implemented. The duration of the provisional period may be extended, but cannot exceed six years. SPAMIs in a provisional period constitute a priority for cooperation and sponsorship from other Parties, other SPAMIs, and any tools specifically established for this purpose (e.g., access to expert commissions, financial support from a SPAMI fund). Before the end of the provisional period, an extraordinary review shall be carried out. If the review concludes that the situation has improved, the SPAMI will exit the provisional period.

Also worth highlighting, is the guidance elaborated within the framework of the Ramsar COP with regard to the invocation of urgent national interests as a justification for deleting or restricting the boundaries of a listed wetland.<sup>420</sup> Although the Convention requires Parties to simply inform the Secretariat “at the earliest possible time”,<sup>421</sup> the guidance encourages them to request advice before any irreversible action is taken, including from the Scientific and Technical Review Panel and the Standing Committee.<sup>422</sup> The guidance further identifies environmental assessment as an appropriate first step prior to the deletion or boundary restriction,<sup>423</sup> and urges Parties to adopt a precautionary approach, taking into account that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.<sup>424</sup>

As a final consideration, it should be noted that the PSSA Guidelines do not lay down a process for revoking the status of an area as a PSSA. Rather, the Guidelines stipulate that “the IMO should provide a forum for the review and re-evaluation of any associated protective measures, taking into account

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<sup>416</sup> WHC Operational Guidelines, para 180.

<sup>417</sup> WHC Operational Guidelines, para 181.

<sup>418</sup> WHC Operational Guidelines, para 183.

<sup>419</sup> WHC Operational Guidelines, para 190.

<sup>420</sup> Ramsar Resolution VIII.20 (2002).

<sup>421</sup> Ramsar Convention, art 2(5).

<sup>422</sup> Ramsar Resolution VIII.20 (2002), Annex, para 7.

<sup>423</sup> Ramsar Resolution VIII.20 (2002), Annex, para 5.

<sup>424</sup> Ramsar Resolution VIII.20 (2002), Annex, para 6.

pertinent comments, reports, and observations”.<sup>425</sup> To this end, Member Governments that have ships operating in the area of the designated PSSA are encouraged to bring any concerns they may have about the associated protective measures to the IMO so that necessary adjustments may be made. The Member Governments that originally submitted the application for designation should also bring any concerns and proposals for additional measures or modifications to any protective measure or the PSSA itself to the IMO. Given that proposing governments, when applying for a new protective measure or an amendment to an existing protective measure, should direct a proposal to the appropriate IMO body in order to obtain approval, a review of a protective measure will also be carried out by the (sub)committee responsible for addressing the underlying instrument.<sup>426</sup> In this regard, several examples exist where changes were made to the associated protective measures due to experience or the need to strengthen these measures.<sup>427</sup>

In practice, PSSAs tend not to have their status revoked. This is largely attributed to the fact that any disagreements or concerns among the Member Governments tend to be resolved within the context of the IMO governing body during the designation process.<sup>428</sup> The amendment or adjustment of associated protective measures is a likelier scenario, although practical experience is still very limited in this regard. It has been argued, however, that the relevant provisions of the PSSA Guidelines do not readily lend themselves to a concerted, adaptive approach due to the absence of a clearly defined process for amending associated protective measures (e.g., guidelines for monitoring change, thresholds of change to qualify for an amendment, or an amendment timeline).<sup>429</sup> Although possible in principle, the complete withdrawal of protective measures has not yet occurred.<sup>430</sup>

### **Key findings:**

- The modification of areas of international importance tends to be the outcome of monitoring and review processes, aimed at determining whether the listed site continues to conform with the criteria that led to its designation or, conversely, whether its distinguishing features have been irretrievably lost. The EBSA process could consider a periodic review process or an ad hoc/upon-demand one.
- In the case of Ramsar and the World Heritage Conventions, risks to the integrity of the site that could result in irreversible loss of the respective ecological features trigger their placement in ‘at risk’/‘endangered’ sites lists. Similar approaches could be taken by CBD COP to assist Parties in preventing such situations, in accordance with the precautionary approach.
- The remedial measures that have been put in place under some instruments are key for ensuring that Parties receive technical assistance in adopting the measures necessary to improve the condition of threatened sites, as well as for providing a more concerted approach to their monitoring and review. Arguably, similar remedial measures could also be developed for areas meeting the EBSA criteria, since remediation is associated with the loss of biodiversity per se, and not necessarily with the

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<sup>425</sup> PSSA Guidelines, para 8.4.

<sup>426</sup> J Roberts, *Marine Environment Protection and Biodiversity Conservation: The Application and Future Development of the IMO's Particularly Sensitive Sea Area Concept* (Springer 2006), 216.

<sup>427</sup> Interview with Edward Kleverlaan (9 November 2017).

<sup>428</sup> Interview with Edward Kleverlaan (9 November 2017).

<sup>429</sup> K Hillmer-Pegram and MD Robards, ‘Relevance of a Particularly Sensitive Sea Area to the Bering Strait Region: A Policy Analysis Using Resilience-Based Governance Principles’ (2015) 20 *Ecology and Society* 302.

<sup>430</sup> Interview with Edward Kleverlaan (9 November 2017).

respective conservation measure. The adoption of remedial measures for EBSAs may find support in Article 14(2) of the Convention regarding liability and redress, including restoration and compensation for damage to biological diversity, which is to be examined by COP, “expect when such liability is a purely internal matter”. COP last considered this issue in 2008, when it welcomed a synthesis report prepared by the Secretariat on technical information relating to damage to biodiversity and approaches to valuation and restoration, and information on national measures and experiences.<sup>431</sup> The synthesis concluded that further guidance should be conducted on the issue of thresholds of significance of the damage.<sup>432</sup>

### 2.3.1.3. Outcomes

The final decision on boundary restriction may be taken by the governing body of the relevant treaty, a specialized treaty body, or the Party concerned, granted that certain procedural conditions have been fulfilled.

If the damage suffered by the SPAMI is irremediable or the necessary measures have not been implemented within the provisional period, the Parties may suggest that the State concerned remove the site from the List, granted that there are important reasons for doing so, taking into account the need to safeguard the environment and comply with the obligations laid down in the Protocol.<sup>433</sup> If the Party concerned suggests the deletion of a site that has suffered irremediable damage from the SPAMI List, there are two possible ways forward: first, the Party concerned can compensate the loss of the SPAMI by nominating another site within its jurisdiction for inclusion in the List. Alternatively, the Meeting of the Parties can decide to withdraw the SPAMI by a two-thirds majority.<sup>434</sup> The process for removing an area from the SPAMI List has not yet been implemented.<sup>435</sup> In principle, States do not wish for SPAMIs situated within their jurisdiction to be revoked for two mutually reinforcing reasons: first, the designation of an area as a SPAMI is a prestige issue for Mediterranean States; and, second, the attitude of the region towards conservations is that it constitutes an irreversible process and that efforts should be undertaken to improve the management of degraded areas rather than de-list them.<sup>436</sup>

Under the World Heritage Convention, the monitoring process described in the previous section was adopted with a view to allowing for every possible measure to be taken to avoid the deletion of a property from the World Heritage List, including the provision of technical cooperation and assistance to the Party concerned.<sup>437</sup> When, despite these measures, there is evidence that a World Heritage Site has deteriorated to the point where it has irretrievably lost those characteristics which determined its inscription on the

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<sup>431</sup> CBD Decision IX/23 (2008), para 1.

<sup>432</sup> UNEP/CBD/COP/9/20/Add.1 (2008), para 17.

<sup>433</sup> SPA/BD Protocol, art 10.

<sup>434</sup> Decision IG 17/12: Procedure for the revision of the areas included in the Specially Protected Areas of Mediterranean Interest (SPAMI) List, UN Doc UNEP(DEPI)/MED IG.17/10 Annex V, Annex.

<sup>435</sup> It should further be noted that the process for reviewing and revising SPAMIs is currently being updated: Decision IG.22/14: List of Specially Protected Areas of Mediterranean Importance (SPAMI List), UN Doc UNEP(DEPI)/MED IG.22/28.

<sup>436</sup> Interview with Daniel Cebrián-Menchero, Strategic Action Programme for Biological Diversity (SAP BIO) Programme Officer, Regional Activity Centre for Specially Protected Areas (RAC/SPA) (10 November 2017).

<sup>437</sup> WHC Operational Guidelines, para 170.

List, i.e. when its Outstanding Universal Value is destroyed, the Committee considers deleting the property from the World Heritage List.<sup>438</sup> The final decision of the Committee is taken by a majority of two-thirds of its members present and voting,<sup>439</sup> granted that the Party concerned has been consulted on the question.

Under the Ramsar Convention, if the loss of part or all of the listed site is irreversible, and the attempts at recovery or restoration have failed, the Party must prepare a report on the restriction of the site's boundary or its removal from the List, as appropriate.<sup>440</sup> Parties wishing to delete or restrict the boundaries of a listed wetland for reasons of urgent national interest are encouraged to compensate, as far as possible, for any loss of wetland resources, particularly through the establishment of additional nature reserves for waterfowl and for the protection, either in the same area or elsewhere, of an adequate portion of the original habitat.<sup>441</sup> In so doing, Parties may take into account, among other considerations, the maintenance of the overall value of their listed wetland area at the national and global level; the availability of compensatory replacement; and the relevance of the compensatory measure to the ecological character, habitat, or value of the affected Ramsar sites.<sup>442</sup> To date, practical experience with compensation has been limited, since Parties do not tend to invoke urgent national interests as a reason for removing sites from the List of Wetlands of International Importance or restricting their boundaries.<sup>443</sup>

Key finding: De-listing tends to be regarded as a measure of last resort, to be adopted only when other, less drastic options have been exhausted (e.g., boundary modification, listing under different criteria). Boundary modification and de-listing may be linked to the adoption of compensatory measures. This, however, will most likely be phrased as a recommendation towards Parties, rather than as a legally binding obligation.

## 2.3.2. Beyond national jurisdiction

### 2.3.2.1. Grounds for modification

Because areas of international importance beyond the limits of national jurisdiction are often designated pursuant to management measures, their modification is contingent upon the expiration, revision or revocation of the relevant measure. This is the case of area-based measures adopted in the context of the Antarctic Treaty and the ISA. As for VMEs, the UNGA Resolutions and the FAO Guidelines do not provide for a modification procedure. The Guidelines, however, request RFMOs to develop appropriate mechanisms to review impact assessments and management measures, “including evaluation and advice by a scientific committee, other appropriate body or, as appropriate, a relevant multi-lateral body, including on whether the deep-sea fishing activity would have significant adverse impacts on VMEs and, if so, whether proposed or additional mitigation measures would prevent such impacts.”<sup>444</sup> EIAs are to be

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<sup>438</sup> WHC Operational Guidelines, paras 9 and 176(d).

<sup>439</sup> World Heritage Convention, art 13(8); Operational Guidelines, para 196.

<sup>440</sup> Ramsar Resolution IX.6 (2005), para 29.

<sup>441</sup> Ramsar Convention, art 4(2).

<sup>442</sup> Ramsar Resolution VIII.20 (2002), para 4.

<sup>443</sup> Ramsar Secretariat, *The Ramsar Convention Manual: A Guide to the Convention on Wetlands* (6<sup>th</sup> edn., Ramsar Secretariat 2013).

<sup>444</sup> FAO Guidelines, para 50.

conducted regularly (e.g. every 5 years) or if changes to the fishery occur. Some RFMOs have scientific procedures in place to review VME protection measures (e.g. every 5 or 6 years (NAFO) or in the case of new relevant scientific information being brought to light that could affect the designation (NEAFC)).

It may reasonably be assumed that the grounds for modification of areas designated under the SP/BD Protocol in areas beyond national jurisdiction will be similar to the grounds that justify modification within national jurisdiction. In the absence of more detailed guidance and State practice, however, this comment is only speculative.

#### 2.3.2.2. Process leading to modification

The de-listing of areas of international importance situated beyond the limits of national jurisdiction tends to follow a similar procedure to designation and is often linked to review processes.

The Antarctic Treaty provides that the designation of ASPAs and ASMAs is for an indefinite period, unless the Management Plan adopted by the Antarctic Treaty Consultative Meeting provides otherwise.<sup>445</sup> Management Plans shall be reviewed at least every five years and updated as necessary. As for HSMs, Parties bear the responsibility to review the designated sites, with a view to assessing whether they still exist, either in whole or in part; whether they continue to meet the guidelines for proposing new HSMs;<sup>446</sup> whether the description of a site should be amended and updated; whether boundaries need to be identified; whether a site requires special protection or management and, if so, whether it should be also designated as, or included in, an ASPA or an ASMA; and whether, in the light of this review, the site should be de-listed.<sup>447</sup>

As mentioned earlier, CAMLR conservation measures become binding 180 days after being notified to the Members of the Commission for the Conservation of Antarctic Marine Living Resources. However, a Member may notify the Commission within 90 days of such notification that it is unable to accept the conservation measure, either in whole or in part.<sup>448</sup> In this case, the Member will not be bound by the relevant measure. If this procedure is invoked, the conservation measure may be reviewed by the Commission, following which any Member will have the right to declare that it is no longer able to accept the conservation measure.<sup>449</sup> Beyond these general provisions, the framework for the establishment of MPAs adopted by the Commission allows for the designation of areas for a specific period of time.<sup>450</sup> In fact the Ross Sea MPA was established for a period of 35 years,<sup>451</sup> something atypical for protected areas. In addition, and unless otherwise provided, the conservation measure establishing the MPA is reviewed by the Commission every 10 years or as agreed when advised by the Scientific Committee.<sup>452</sup> The aim of this review is to evaluate if the specific objectives of the MPA are still relevant or being achieved, and whether the relevant research and monitoring plan is being delivered.

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<sup>445</sup> Annex V to the Madrid Protocol, art 6(3).

<sup>446</sup> ATCM XIX, Guidelines for proposing new Historic Sites and Monuments, Resolution 8 (1995).

<sup>447</sup> ATCM XXIV - CEP IV, Historic Sites and Monuments, Resolution 4 (2001).

<sup>448</sup> CAMLR, art IX(6)(c).

<sup>449</sup> CAMLR, art IX(6)(d).

<sup>450</sup> CCAMLR, Conservation Measure 91-04 (2011), para 3(v).

<sup>451</sup> CCAMLR, Conservation Measure 91-05 (2016), para 20.

<sup>452</sup> CCAMLR, Conservation Measure 91-04 (2011), para 8.



With regard to APEIs, the Environmental Management Plan for the Clarion-Clipperton Zone (CCZ) notes that:

Areas of special significance for their uniqueness, biological diversity or productivity, as well as areas of special importance to the life histories of non-fish species referred to in the criteria of the Convention on Biological Diversity have not been incorporated in the scientific design. As more information becomes available, the spatial management of mining activities may have to reflect such factors. Until then, the representative approach described here provides the best way of capturing those values in undisturbed areas in order to preserve and conserve marine biodiversity and ecosystem structure and function in the context of seabed nodule mining activities based on the best available scientific information.<sup>453</sup>

EBSAs were mentioned during the ISA Council meeting in 2017 in connection with the approval of the exploratory license for polymetallic sulphides on the Lost City Hydrothermal Vent field EBSA. Certain Parties proposed to include EBSAs for future consideration in exploratory licensing, but consensus was not reached in this connection.<sup>454</sup>

The CCZ Plan further stipulates that the design of APEIs allows for the ability to modify the location and size of such areas, based on improved information about the location of mining activity, measurement of actual impacts from mining operations, and more biological data.<sup>455</sup> To this end, the Legal and Technical Commission will keep APEIs under review in order to determine their suitability or need for amendment.<sup>456</sup> This will involve holding a workshop of scientific/marine reserve/management specialists to peer-review and critique the existing proposal and any new data and information submitted by the contractors. In this connection, the Council has encouraged the conduct of marine scientific research in APEIs, and the full and effective dissemination of the results of such research through the Authority.<sup>457</sup> In developing recommendations for the implementation of the APEIs, the Legal and Technical Commission will consider, among others, the process to review and, where necessary, to amend the location, size and characteristics of these areas at regular intervals, taking into account the views of recognised experts.<sup>458</sup> Any proposal to alter the location or nature of an APEI will require information on any suggested alternative to ensure that the strategic and operational objectives are maintained.<sup>459</sup> Also worth noting is that the Environmental Management Plan as a whole is subject to periodic external review by the Legal and Technical Commission.<sup>460</sup> The Authority is expected to dedicate a workshop to the review of the status of implementation of the Plan in the first half of 2018.

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<sup>453</sup> EMP-CCZ, para 29.

<sup>454</sup> E Morgera, T Kantai, P Pomakis, A Tsioumanis, 'Summary of the twenty third annual session of the International Seabed Authority (8-18 August 2017)' 25(1) Earth Negotiations Bulletin 1-18. Online at: <http://enb.iisd.org/isa/2017/> (last checked 19 November 2017).

<sup>455</sup> EMP-CCZ, para 30.

<sup>456</sup> EMP-CCZ, para 42.

<sup>457</sup> ISA Council, Decision of the Council relating to an environmental management plan for the Clarion-Clipperton Zone, ISA Doc ISBA/18/C/22 (adopted on 26 July 2012), para 8.

<sup>458</sup> EMP-CCZ, para 43(a).

<sup>459</sup> EMP-CCZ, para 43(g).

<sup>460</sup> EMP-CCZ, para 46.

### 2.3.2.3. Outcomes

The decision to modify area-based management measures beyond national jurisdiction is typically taken by the body that adopted them. For instance, the Management Plans that underpin ASPAs and ASMAs may be amended or revoked by the Antarctic Treaty Consultative Meeting,<sup>461</sup> while MPAs established under CAMLR may be amended or revoked by the Commission for the Conservation of Antarctic Marine Living Resources, and VME polygons and respective management measures can be reviewed by RFMOs or arrangements. Different RFMOs have different procedures for reviewing these measures, but these procedures should always be based on scientific advice and use of best available science. Under instruments such as the SP/BD Protocol, which provide for the designation of areas of international importance beyond the limits of national jurisdiction pursuant to a decision adopted by the Parties by consensus, de-listing will presumably have to adhere to strict procedural requirements.

#### **Key findings:**

- It is common for the management and conservation measures establishing areas of international importance beyond the limits of national jurisdiction to be subject to periodic review by the treaty body competent for their adoption.
- Expert workshops may be organised for the purposes of reviewing and revising such measures.

## **3. STRENGTHENING THE EBSA PROCESS**

### 3.1. Trends and approaches of relevance to strengthening the scientific credibility, including by enhancing the scientific peer review by Parties, other Governments and relevant organizations

As is evident from the previous section, the identification of areas of international importance is largely a technical and scientific exercise. This subsection will distil key features on the basis of the analysis of experiences from other international scientific processes, including peer-review practices, monitoring and review of procedures previously adopted. Under most regimes, specialised bodies have been developed to guide cooperation among experts and enhance the scientific credibility of relevant decision-making processes.

The Scientific and Technical Review Panel of the Ramsar Convention is a noteworthy case study. The framework that underpins the delivery of specialised advice by the Panel underwent a comprehensive revision as recently as 2015, allowing for the incorporation of several innovative elements. The Panel has been established as a subsidiary body of the Convention<sup>462</sup> with the purpose of providing scientific and technical guidance and advice to the Contracting Parties, the COP, the Standing Committee and the

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<sup>461</sup> Annex V to the Madrid Protocol, art 6(4).

<sup>462</sup> Ramsar Resolution 5.5 (1993).

Secretariat, and to other wetland users working on wetlands issues, in order to foster implementation.<sup>463</sup> Interestingly for present purposes, the Panel is among the bodies that a State Party to the Ramsar Convention may request advice from before notifying the Secretariat of its decision to delete or restrict the boundaries of listed wetlands situated within their territory.<sup>464</sup>

The Panel consists of 18 members with appropriate scientific and technical knowledge, plus observers representing the International Organization Partners to the Convention,<sup>465</sup> scientific and technical experts recommended by the Contracting Parties and other organizations recognized by the COP.<sup>466</sup> Among the 18 appointed members of the Panel are six ‘scientific members’ (academic community), tasked with providing advice on the strategic direction of scientific work and ensuring the scientific quality of the final outputs; and 12 technical expert members (practitioners), responsible for the preparation of technical products (e.g., guidelines, technical briefing notes, Ramsar Technical Reports) and for soliciting input and feedback from stakeholders and partners in all the Ramsar regions. The collective responsibilities of the Panel’s members include ensuring peer-review of draft materials and consulting with peers on how best to ensure their effective implementation; and encouraging their own national and international networks of wetland experts to contribute more widely to the work of the Panel and disseminate its outputs.<sup>467</sup> In addition, National Focal Points<sup>468</sup> have been appointed in each Party to act as a liaison between their national wetland practitioners, other Ramsar Focal Points and the Panel.<sup>469</sup>

The members of the Panel are selected for each triennium by the Management Working Group of the Standing Committee,<sup>470</sup> following a call for nominations issued by the Secretariat immediately after the COP.<sup>471</sup> Administrative Authorities from each of the six Ramsar regions (i.e., Africa, Asia, Europe, Neotropics, North America, and Oceania) reach agreement internally and nominate one technical expert for the respective region, who will be appointed automatically.<sup>472</sup> Administrative Authorities also make nominations for the remaining technical members and the scientific members,<sup>473</sup> as do the Convention’s International Organization Partners and observer organizations.<sup>474</sup> The members of the Panel are appointed in their personal capacity for their scientific and technical expertise, and do not represent any organization or government in their interaction with the Panel.<sup>475</sup> Selections are made to secure the scientific and technical expertise required for the Panel’s work during the relevant triennium, and ensure

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<sup>463</sup> Ramsar Resolution XII.5 (2015), Annex 1, para 1.

<sup>464</sup> Ramsar Resolution VIII.20 (2002), para 7.

<sup>465</sup> International Organization Partners are international NGOs that have been formally recognised by the Parties as official partners of the Convention. They are BirdLife International, the International Water Management Institute (IWMI), Wetlands International (WI), the International Union for the Conservation of Nature (IUCN) and WWF International.

<sup>466</sup> Ramsar Resolution XII.5 (2015), Annex 1, para 7.

<sup>467</sup> Ramsar COP 12 (2015) Resolution XII.5, Annex 1, para 12.

<sup>468</sup> STRP Focal Points are committed scientists with acknowledged expertise in wetland-related subjects, who provide advice to the STRP and act as a liaison between the Panel’s regional members and the national networks of relevant experts.

<sup>469</sup> Ramsar Resolution XII.5 (2015), Annex 1, para 18.

<sup>470</sup> Ramsar Resolution XII.5 (2015), Annex 1, para 20.

<sup>471</sup> Ramsar Resolution XII.5 (2015), Annex 1, para 19.

<sup>472</sup> Ramsar Resolution XII.5 (2015), Annex 1, para 21.

<sup>473</sup> Ramsar Resolution XII.5 (2015), Annex 1, para 23.

<sup>474</sup> Ramsar Resolution XII.5 (2015), Annex 1, para 24.

<sup>475</sup> Ramsar Resolution XII.5 (2015), Annex 1, para 25.

regional and gender balance. International Organization Partners and observer organizations nominate their own representatives.<sup>476</sup> The Secretariat forwards all nominations and makes recommendations for appointments for consideration by the Management Working Group of the Standing Committee.<sup>477</sup>

An important feature of the Panel's modus operandi is that it recognises that the traditional and local knowledge of indigenous peoples and local communities is one of the knowledge bases of the Panel's work.<sup>478</sup> Accordingly, the Panel's priority thematic work areas for the 2016-2018 triennium include the development of "best practice methodologies/tools to monitor Ramsar Sites, including surveying, mapping, and inventorying recognizing traditional practices of indigenous peoples and local communities".<sup>479</sup>

Such efforts to integrate indigenous and local knowledge into the work of technical and/or scientific bodies established under environmental regimes could draw inspiration from the approach developed in this connection by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES).<sup>480</sup> The overall framework of the IPBES approach provides that it will be undertaken in line with the rules of procedures of IPBES and in accordance with internationally recognized rights of indigenous peoples and relevant commitments related to local communities.<sup>481</sup> In addition, the overall framework puts forward best practices for engaging indigenous and local knowledge in a dialogue with other knowledge systems.<sup>482</sup> These relate to trust-building; collaboration between IPBES members and existing networks of indigenous peoples and local communities and of experts on indigenous and local knowledge; acknowledgment of the time needed for decision-making by customary and traditional institutions through dialogues at different levels; engagement within culturally appropriate environments; participatory and empowering dialogue based on non-discrimination, inclusiveness and recognition of social, cultural, economic and political plurality in the world; recognition, strengthening and promotion of the conservation of the in situ knowledge systems of indigenous peoples and local communities, and, finally, delivery of policy-relevant knowledge and policy options in meaningful and useful forms.

The IPBES approach is based on three overarching elements: the approach will apply across the four functions of IPBES; within the approach, free, prior and informed consent will be sought, as appropriate, for accessing indigenous and local knowledge, while the activities should not occur where they would prejudice the internationally recognized rights of indigenous peoples and interests of local communities; and best practices and ethical guidelines, as appropriate, should be consulted to make decisions regarding the use of indigenous and local knowledge.<sup>483</sup> At the heart of the approach is the assessment of available knowledge, which in turn entails the collaborative definition of problems and goals; the synthesis and incorporation into the assessment of a wide array of evidence and data from multiple sources of indigenous and local knowledge; the appropriate engagement of indigenous peoples and local communities; and the sharing of knowledge and insights gained through an assessment with indigenous

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<sup>476</sup> Ramsar Resolution XII.5 (2015), Annex 1, paras 26 and 27.

<sup>477</sup> Ramsar Resolution XII.5 (2015), Annex 1, para 30.

<sup>478</sup> Ramsar Resolution XII.5 (2015), Annex 1, para 13.

<sup>479</sup> Ramsar Resolution XII.5 (2015), Annex 3.

<sup>480</sup> IPBES, Knowledge Foundations, IPBES Doc IPBES/5/L.6 (adopted on 10 March 2017), Annex.

<sup>481</sup> IPBES/5/L.6, Annex, para 1bis.

<sup>482</sup> IPBES/5/L.6, Annex, para 6.

<sup>483</sup> IPBES/5/L.6, Annex, paras 9-9 bis.

peoples and local communities once the assessment is concluded.<sup>484</sup> This requires the identification, in coordination with indigenous and local knowledge holders, indigenous and local knowledge experts, and experts on indigenous and local knowledge, of a set of practices to help manage evidence and data which will be collected in the assessments.<sup>485</sup> Moreover, IPBES shall identify, describe and facilitate the use of appropriate tools and methodologies, and ensure that policy responses, decision-making instruments and processes relevant to indigenous and local knowledge and indigenous peoples and local communities are reflected in Platform assessments.<sup>486</sup> IPBES will also undertake capacity-building activities, both with regard to the implementation of the overall approach and the fulfilment of broader capacity needs.<sup>487</sup>

Finally, the IPBES approach establishes a participatory mechanism to facilitate the effective and meaningful engagement of indigenous and local knowledge holders, indigenous and local knowledge experts and their organizations or networks in order to strengthen their ability to contribute to and benefit from IPBES at all scales.<sup>488</sup> This will be achieved by, inter alia, the provision of a web-based platform to facilitate effective and meaningful engagement and the development of new, potentially self-organising networks; consultations; discussion forums; and strategic partnerships to promote and catalyse activities by appropriate partners that build the capacity of indigenous peoples and local communities to engage effectively and meaningfully in IPBES.<sup>489</sup>

Beyond the issue of engaging indigenous peoples and local communities, some broader considerations regarding the scientific credibility of the EBSA process may be drawn from the World Heritage Convention, particularly with regard to the recruitment of external organisations as advisory bodies. The Operational Guidelines for the implementation of the Convention require that decisions of the World Heritage Committee be based on “objective and scientific considerations” and that any appraisal made on its behalf be “thoroughly and responsibly carried out”.<sup>490</sup> The Committee has acknowledged that such decisions depend upon carefully prepared documentation; thorough and consistent procedures; evaluation by qualified experts; and, where necessary, the use of expert referees.<sup>491</sup> The Guidelines further provide that the evaluations and presentations of the Committee’s Advisory Bodies must be objective, rigorous and scientific, and involve regional experts familiar with the subject.<sup>492</sup>

The procedure followed by IUCN for the evaluation of nominations of natural properties involves five elements: 1) data assembly through the World Database on Protected Areas and other IUCN global databases and thematic studies; 2) external review by independent experts knowledgeable about the property and/or the values that are the subject of the nomination, who are primarily members of IUCN’s specialist Commissions and networks, or expert members of partner organisations of IUCN; 3) evaluation mission to the property by one or two appropriately qualified IUCN experts, with a view to clarifying details about the area, evaluating site management and discussing the nomination with relevant authorities

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<sup>484</sup> IPBES/5/L.6, Annex, paras 10-4.

<sup>485</sup> IPBES/5/L.6, Annex, para 16.

<sup>486</sup> IPBES/5/L.6, Annex, para 17.

<sup>487</sup> IPBES/5/L.6, Annex, para 18.

<sup>488</sup> IPBES/5/L.6, Annex, para 24.

<sup>489</sup> IPBES/5/L.6, Annex, para 25.

<sup>490</sup> WHC Operational Guidelines, para 23.

<sup>491</sup> Ibid.

<sup>492</sup> WHC Operational Guidelines, para 148.

and stakeholders; 4) consultation of additional literature and consideration of information submitted by local NGOs, communities, indigenous peoples and other interested parties in the nomination; and 5) review by the IUCN World Heritage Panel.<sup>493</sup> The membership, terms of reference and working methods of the IUCN World Heritage Panel are publicly available on the IUCN website. The names of all experts involved in the evaluation process are included in the final evaluation report, except in the case of reviewers who have provided confidential reviews.

In its evaluations, IUCN uses widely accepted biogeographic classification systems and the more recent terrestrial, freshwater and marine ecoregions of the world as a central element of its approach to the global comparative analysis. These systems provide an objective means of comparing nominated properties with sites of similar climatic and ecological conditions. IUCN also uses systems which identify priority areas for conservation such as the World Wide Fund for Nature's (WWF) Global 200 Ecoregions, WWF/IUCN's Centres of Plant Diversity, Conservation International's Biodiversity Hotspots and High-Biodiversity Wilderness Areas, Birdlife International's Endemic Bird Areas and Important Bird Areas, and other Key Biodiversity Areas such as Alliance for Zero Extinction sites. These systems provide additional information on the significance of the nominated properties for biodiversity conservation. The evaluation process also includes consideration of key reference publications on the world's protected areas published by IUCN and a range of international conservation organisations.

Another example of how international organisations can serve as advisory bodies within the framework of multilateral environmental agreements is the International Council for the Exploration of the Sea (ICES). ICES is a global organization that develops science and advice to support the sustainable use of the oceans, particularly in relation to their living resources. To this end, it organises such research and investigations as may appear necessary and publishes and disseminates the results, often collaborating with other international organisations having related objectives. The recipients of ICES' scientific advice are public authorities with competence for marine management, including the governments of the Council's member countries; the European Commission; the Helsinki Commission (HELCOM); the North Atlantic Salmon Commission (NASCO); the North East Atlantic Fisheries Commission (NEAFC); and the OSPAR Commission (OSPAR). The basis for the advice is a compilation of relevant data and analysis by experts in the field. The analysis is normally carried out by an expert group and peer reviewed by independent scientists. This process is fully documented and made public through the ICES web page. Each step in the process is open to observers from competent authorities, while observers from stakeholder organisations are invited to all workshops, peer-review groups and relevant deliberations in the ICES Advisory Committee. The advice "has international legitimacy as it has been agreed in a committee of scientists which includes scientists appointed by all governments of the ICES member States".<sup>494</sup>

The area of the North-East Atlantic provides an illustration of how the scientific advice provided by ICES is utilised in practice, including with regard to the EBSA process. ICES has signed Memoranda of

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<sup>493</sup> Operational Guidelines, Annex 6.

<sup>494</sup> ICES, Basis for ICES Advice, <http://www.ices.dk/community/advisory-process/Pages/Basis-for-ICES-Advice.aspx> (last checked 19 November 2017).

Understanding with both OSPAR<sup>495</sup> and NEAFC.<sup>496</sup> The OSPAR-ICES MoU stipulates that ICES will provide the OSPAR Commission with scientific advice and that the ICES Secretariat will serve as data centre for data collected under the Commission's Co-ordinated Environmental Monitoring Programme (CEMP). These include, among others, data on contaminants observed in the compartments waters, sediment and biota of the marine environment; data resulting from biological monitoring; and data on nutrients and eutrophication effects. The NEAFC-ICES MoU, on the other hand, stipulates that ICES will provide NEAFC with recurring advice comprising information on the state of marine ecosystems and human impacts, including historical developments in main parameters and information on the present state and recent development of fish stocks. NEAFC may also request ICES for non-recurring or extraordinary advice on specific issues. It is worth noting that NEAFC and the OSPAR Commission have also concluded a MoU, which acknowledges their "complementary competences and responsibilities" for fisheries management and environmental protection in the North-East Atlantic, and seeks to promote mutual cooperation towards the conservation and sustainable use of marine biodiversity, including in areas beyond national jurisdiction.<sup>497</sup> Accordingly, the two bodies joined efforts towards the description of EBSAs in a workshop held in collaboration with the CBD.<sup>498</sup> As a common scientific advisory body to NEAFC and the OSPAR Commission, ICES was subsequently called upon to evaluate the description and delineations of the areas identified in the workshop.<sup>499</sup> The establishment of a dedicated marine national focal points may also serve as a useful mechanism for linking local expert networks with treaty bodies and intergovernmental organisations, and allowing for cooperation, coordination and peer-review among Parties. Under the SPA/BD Protocol, for instance, each Party designates a National Focal Point to serve as liaison with the Regional Activity Centre for Specially Protected Areas on the technical and scientific aspects of implementation.<sup>500</sup> More broadly, the Centre serves as a platform for Parties to exchange scientific and technical information concerning current and planned research and monitoring programmes, and to define and standardise their procedures.<sup>501</sup>

In addition, the significance of online databases for enhancing the credibility of environmental decision-making processes has been steadily increasing over the past few years. The recent efforts by the ISA to establish such a database and to streamline its data management practices are a case in point. In the past,

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<sup>495</sup> OSPAR - ICES, Memorandum of Understanding Between the North-East Atlantic Fisheries Commission and the International Council for the Exploration of the Sea (2007).

<sup>496</sup> NEAFC - ICES, Memorandum of Understanding Between the OSPAR Commission and the International Council for the Exploration of the Sea (2006).

<sup>497</sup> OSPAR - NEAFC, Memorandum of Understanding between the North East Atlantic Fisheries Commission (NEAFC) and the OSPAR Commission (2008).

<sup>498</sup> CBD SBSTTA, Report of Joint OSPAR/NEAFC/CBD Scientific Workshop on EBSAs, UN Doc UNEP/CBD/SBSTTA/16/INF/5 (adopted on 21 April 2012).

<sup>499</sup> See ICES, OSPAR/NEAFC special request on review of the results of the Joint OSPAR/NEAFC/CBD Workshop on Ecologically and Biologically Significant Areas (EBSAs) (June 2013): <https://www.ices.dk/sites/pub/Publication%20Reports/Advice/2013/Special%20requests/OSPAR-NEAFC%20EBSA%20review.pdf> (last checked 19 November 2017); ICES, OSPAR/NEAFC special request on existing and potential new management measures for ecologically and biologically significant areas (EBSAs) (June 2013): <https://www.ices.dk/sites/pub/Publication%20Reports/Advice/2013/Special%20requests/OSPAR-NEAFC%20EBSA%20management.pdf> (last checked 19 November 2017).

<sup>500</sup> SPA/BD Protocol, art 24.

<sup>501</sup> SPA/BD Protocol, art 20(3).

the Legal and Technical Commission of the Authority had noted that the management, assembly, display and availability of data, information and knowledge is fundamental to its credibility and its ability to cooperate broadly with other agencies.<sup>502</sup> It also stated that in terms of internal procedures, including data-handling processes and verification, the Authority lacks a centralized application that adequately displays data and allows interrogation. This was a matter of urgent concern, insofar as proper documentation and quality control of data-handling arrangements are necessary for developing comparable datasets and making them available to the relevant stakeholders.<sup>503</sup>

The data referred to by the Authority are primarily the baseline data that contractors are required to provide under the standard clauses of their exploration contracts, i.e. data documenting natural conditions in the exploration area prior to test mining. Such data are essential for the purposes of monitoring changes resulting from test mining impacts and predicting impacts of commercial mining activities.<sup>504</sup> These data are subject to two basic requirements: first, they need to be submitted in a format that allows comparison and, second, contractors must use a common language for identifying new organisms within their exploration areas. With regard to the Clarion-Clipperton Environmental Management Plan in particular, the Commission had previously noted that implementation was hindered by the “lack of a comprehensive environmental database with raw tabular data, given that such data are essential for the assessment of potential cumulative and regional impacts on the marine environment”.<sup>505</sup> Moreover, the Commission had remarked that, although a significant number of samples had been collected by the contractors, the taxonomy used to name their findings was not standard, making the data contained in the database impossible to compare and combine.

Accordingly, the Commission issued a set of recommendations for contractors in relation to the content, format and structure of their annual reports.<sup>506</sup> The recommendations note that “all environmental and geological data should be submitted in a digital and spatially georeferenced format that is compatible with the Authority’s requirements”.<sup>507</sup> The Authority has also convened workshops for the purposes of fostering standardisation in taxonomy and sampling methods. Ultimately, the goal is to integrate the contractors’ data, other GIS data and standardized taxonomic data into an environmental information system in support of the Environmental Management Plan.<sup>508</sup> It is envisaged that such a system will reveal geographic patterns of species distribution and other biological and physical factors beyond those already available in global databases. The Commission has observed that its recommendations and the

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<sup>502</sup> ISA Council, Summary report of the Chair of the Legal and Technical Commission on the work of the Commission during the nineteenth session of the International Seabed Authority, ISA Doc ISBA/19/C/14 (adopted on 9 July 2013) para 9.

<sup>503</sup> Ibid.

<sup>504</sup> ISA LTC, Recommendations for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area, ISA Doc ISBA/19/LTC/8 (adopted on 1 March 2013), 14.

<sup>505</sup> ISA LTC, Implementation of the environmental management plan for the Clarion-Clipperton Fracture Zone and development of other environmental management plans in the Area, ISA Doc ISBA/21/LTC/9/Rev.1 (adopted on 3 March 2015).

<sup>506</sup> ISA LTC, Recommendations for the guidance of contractors on the content, format and structure of annual reports, ISA Doc ISBA/21/LTC/15 (adopted 4 August 2015).

<sup>507</sup> Ibid., para 4.

<sup>508</sup> ISA Assembly, Report of the Secretary-General of the International Seabed Authority under article 166, paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc ISBA/19/A/2 (adopted on 22 May 2013), para 82.



workshops it convened have already led to improved taxonomic standardization, increased collaboration, linkages between contractors and international research programmes, sampling in APEIs as well as contract areas, and several joint contractor voyages.<sup>509</sup>

An interesting, but still nascent,<sup>510</sup> development is the adoption by the Commission of a data management strategy.<sup>511</sup> At the most recent session of the ISA Assembly, the development of a fit-for-purpose approach, together with transparent data-sharing mechanisms, including data standardisation, were seen as being of paramount importance.<sup>512</sup> These elements are expected to facilitate the peer-review of data, including data provided in the context of environmental impact assessment processes, with a view to enhancing credibility and preventing bias.<sup>513</sup>

Another example of a regime that has benefited from the establishment of an online database is the Environmental Protocol to the Antarctic Treaty. The Antarctic Environment Portal<sup>514</sup> provides the Committee for Environmental Protection with a source of “independent, relevant and up to date scientific advice” on the Antarctic environment and relevant human activities. This allows the Committee to better fulfil its role of making recommendations to the Antarctic Treaty Parties on the implementation of the Protocol and, more broadly, the environmental management of Antarctica.<sup>515</sup> The information available through the Portal is thoroughly peer-reviewed before being published. The review process is overseen by an Editor, supported by an Editorial Group. The Portal includes summarised information on the state of knowledge on issues that are of current concern to the Committee for Environmental Protection, the management of those issues, and environmental pressures likely to cause change into the future. These summaries present the key policy-relevant information arising from the best available science and are intended to be concise, technically accurate, politically neutral and accessible to a broad audience. Anyone can comment on the information available through the Portal. Comments that are submitted on content will be reviewed and synthesized by the Editor before they are made public. The Portal receives support from, among others, the Scientific Committee on Antarctic Research, an inter-disciplinary committee of the International Council for Science (ICSU), which provides advice to the Antarctic Treaty Consultative Meetings.

### **Key findings:**

- The membership of the specialised technical and/or scientific bodies established under environmental regimes may include members of the academic community as well as practitioners. Representatives of

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<sup>509</sup> ISA Council, Report of the Chair of the Legal and Technical Commission on the work of the Commission at its session in 2017, ISA Doc ISBA/23/C/13 (adopted on 9 August 2017), para 15(i).

<sup>510</sup> ISA Council, Implementation of the decision of the Council in 2016 relating to the summary report of the Chair of the Legal and Technical Commission, ISA Doc ISBA/23/C/8(adopted on 5 July 2017), para 26.

<sup>511</sup> ISA LTC, Data management strategy of the International Seabed Authority, ISA Doc ISBA/22/LTC/15 (adopted on 24 June 2016).

<sup>512</sup> ISA Assembly, Statement by the President of the Assembly of the International Seabed Authority on the work of the Assembly at its twenty-third session, ISA Doc ISBA/23/A/14 (adopted on 25 August 2017).

<sup>513</sup> AL Jaeckel, The International Seabed Authority and the Pre-Cautionary Principle: Balancing Deep Seabed Mineral Mining and Marine Environmental Protection (Martinus Nijhoff, 2017), 267.

<sup>514</sup> <https://www.environments.aq/> (last checked 19 November 2017).

<sup>515</sup> <https://www.environments.aq/about/> (last checked 19 November 2017).

intergovernmental and non-governmental organisations, as well as experts recommended by the States Parties to the relevant legal instrument, may be invited for increased transparency.

- It is common for the members of such specialised bodies to be appointed by the States Parties to the relevant legal instrument, although certain regimes allow for intergovernmental and non-governmental organisations to submit nominations.
- Considerations relating to equitable and balanced geographic representation are important when deciding on the modalities for appointing the members of specialised bodies.
- The establishment of national focal points is a useful tool for enhancing scientific cooperation, in the case of EBSAs, a dedicated marine focal point<sup>516</sup> could perform an enhanced role in the process addition to ad hoc advisory groups.
- Online databases, such as the EBSA repository and information-sharing mechanism, can contribute to the production of relevant knowledge and enhance the credibility of scientific processes by facilitating peer-review, archiving baseline information, connecting with other relevant databases (e.g. OBIS).

### 3.2. Trends and approaches of relevance to strengthening the transparency of the EBSA process

Different approaches have been put in place to strengthen the transparency of processes relating to the identification, designation and modification of areas of international importance. This relates primarily to modalities geared towards enhancing public engagement, the participation of observers, and the cultivation of institutional linkages.

As mentioned earlier, the involvement and active participation of the public in general, and of local communities in particular, in the process of planning and managing an area, is one of the factors that advocate its inclusion in the SPAMI List.<sup>517</sup> Accordingly, States Parties to the SPA/BD Protocol have a duty to give appropriate publicity to the establishment of SPAMIs, their boundaries, and applicable regulations, and to promote the participation of their public and their conservation organisations in relevant protective measures, including environmental impact assessments.<sup>518</sup> On a related note, States Parties to the Ramsar Convention are encouraged to undertake an environmental assessment as a first step to invoking their right to delete or restrict the boundaries of a listed wetland situated within their territory, taking into account the full range of functions, services and benefits offered by the site.<sup>519</sup> Whenever possible, the assessment should be made in full consultation with all stakeholders.<sup>520</sup> Parties to the World Heritage Convention are also encouraged to ensure the participation of a wide variety of stakeholders, including site managers, local and regional governments, local communities, non-governmental organizations (NGOs) and other interested parties and partners in the identification, nomination and protection of World Heritage properties,<sup>521</sup> with a view to fostering a shared responsibility between these actors and the States Parties in the maintenance of listed properties.<sup>522</sup> To this end, Parties should

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<sup>516</sup> As per CBD Decision XIII/12 (2016), para 15.

<sup>517</sup> SPA/BD Protocol, Annex I, para A(a).

<sup>518</sup> SPA/BD Protocol, art 19.

<sup>519</sup> Ramsar Resolution VIII.20 (2002), para 5.

<sup>520</sup> Ibid.

<sup>521</sup> Operational Guidelines, para 12.

<sup>522</sup> Operational Guidelines, para 123.

endeavour to demonstrate, as appropriate, that the free, prior and informed consent of indigenous peoples has been obtained prior to the nomination of an area for inscription on the World Heritage List.

Finally, transparency is one of the guiding principles for the Environmental Management Plan of the Clarion-Clipperton Zone.<sup>523</sup> The Plan stipulates that the Authority shall enable public participation in environmental decision-making procedures in accordance with the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),<sup>524</sup> and its own rules and procedures. The Plan also includes the participation of developing countries and multilateral exchange of views on environmental management issues among its overarching objectives.<sup>525</sup>

The cultivation of institutional linkages is another important component of transparency. Many environmental treaties mandate their decision-making bodies to seek cooperation and use information provided by competent bodies or agencies, to strengthen their relationship with other relevant regimes, and to exchange information.<sup>526</sup> The World Heritage Committee, for instance, is required to ensure appropriate co-ordination and information-sharing between the World Heritage Convention and other Conventions, programmes and international organizations related to the conservation of cultural and natural heritage. The Committee may also invite representatives of intergovernmental bodies established under related Conventions to attend its meetings as observers and appoint a representative to observe meetings of the other intergovernmental bodies upon receipt of an invitation.<sup>527</sup> Another example can be found in the Scientific Committee to the Commission for the Conservation of Antarctic Marine Living Resources: in carrying out its functions, the Committee must have regard to the work of other relevant technical and scientific organisations and to the scientific activities conducted within the framework of the Antarctic Treaty.<sup>528</sup> The Commission and the Scientific Committee shall seek to develop co-operative working relationships with intergovernmental and non-governmental organisations which could contribute to their work. To this end, the Commission may enter into agreements with such organisations, while both the Commission and the Scientific Committee may invite such organisations to send observers to their meetings and to meetings of their subsidiary bodies.<sup>529</sup> The Ramsar Secretariat, on the other hand, facilitates the work of the Scientific and Technical Review Panel by fostering opportunities for collaboration with other conventions, international organizations, intergovernmental institutions and national and international NGOs; facilitating linkages between potential experts within countries, regions and globally, including indigenous peoples and local communities; and identifying the needs of potential audiences and thematic priorities in different countries or regions to suggest to the Parties for their consideration.<sup>530</sup> This is a particularly important function, insofar as it allows the Secretariat to guide and

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<sup>523</sup> EMP-CCZ, para 13(f).

<sup>524</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted on 28 June 1996, entered into force on 30 October 2001) 2161 UNTS 447.

<sup>525</sup> EMP-CCZ, para 35(i).

<sup>526</sup> L Dagmar, 'A Framework for Assessing the Input of Scientific Information into Global Decision Making' (2006) 17 Colorado Journal of International Environmental Law and Policy 1, at 16.

<sup>527</sup> WHC Operational Guidelines, para 43.

<sup>528</sup> CAMLR, art XV(3).

<sup>529</sup> CAMLR, art XXIII(3) and (4).

<sup>530</sup> Ramsar Resolution XII.5 (2015), Annex 1, para 6.

prioritise the work of the Panel in a way that fosters the production of policy-relevant scientific knowledge, leading to better integration of expertise into the decision-making process.<sup>531</sup>

Another important element relating to transparency is communication between technical and/or scientific bodies and decision-making bodies. Communication channels can be created by “(1) inviting representatives of the scientific advisory body to present their findings at meetings of the decisionmaking body, (2) giving policymakers the opportunity to question representatives of the advisory body on their work, and (3) ensuring that the latter is willing to accept specific requests for information coming from the decisionmaking body”.<sup>532</sup> For instance, the Environmental Protocol to the Antarctic Treaty requires the Antarctic Treaty Consultative Meeting to review the work of the Committee for Environmental Protection and draw fully upon its advice and recommendations in carrying out its tasks.<sup>533</sup> In turn, the Committee must report on each of its sessions to the Antarctic Treaty Consultative Meeting. The report “shall be circulated to the Parties and to observers attending the session, and shall thereupon be made publicly available”.<sup>534</sup>

Also crucial is the need to reflect all views in the outcome document of decision-making processes relating to areas of international importance. This has been highlighted as a way to enhance transparency by allowing “policy-makers to make decisions based on information that accurately reflects the state of scientific knowledge”.<sup>535</sup> For instance, the Rules of Procedure of the Scientific Committee to the Commission for the Conservation of Antarctic Marine Living Resources provide that, in cases where it was not possible to adopt scientific advice by consensus, the Committee shall set out in its report all views advanced on the matter under consideration. Reports of the Scientific Committee to the Commission shall reflect all the views expressed at the Committee on the matters discussed.<sup>536</sup>

The review of implementation of respective UNGA resolutions on VMEs under the General Assembly also included the organization of a two-day workshop by the UN Division for Oceans Affairs and the Law of the Sea (DOALOS) with the participation of “States, the FAO and other relevant specialized agencies, funds and programmes, subregional and regional fisheries management organizations and arrangements, other fisheries bodies, other relevant intergovernmental bodies, and relevant non-governmental organizations and stakeholders, in accordance with United Nations practice”.<sup>537</sup> The review process has also included the examination by UNGA of Secretary-General reports on the implementation of the resolutions’ requirements on VMEs. In this connection, the Secretary-General has been requested to prepare a report on the actions taken by States and regional fisheries management organizations and

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<sup>531</sup> L Dagmar, ‘A Framework for Assessing the Input of Scientific Information into Global Decision Making’ (2006) 17 Colorado Journal of International Environmental Law and Policy 1, at 17.

<sup>532</sup> Ibid, at 32.

<sup>533</sup> Madrid Protocol, art 10(2).

<sup>534</sup> Madrid Protocol, art 11(5).

<sup>535</sup> L Dagmar, ‘A Framework for Assessing the Input of Scientific Information into Global Decision Making’ (2006) 17 Colorado Journal of International Environmental Law and Policy 1, 22.

<sup>536</sup> Rules of Procedure of the Scientific Committee, as adopted at SC-CAMLR-II (paragraph 8) and approved at CCAMLR-II (paragraph 10); amended at SC-CAMLR-III (paragraph 4.3) and approved at CCAMLR-III (paragraph 65); amended at SC-CAMLR-X (paragraph 2.2) and approved at CCAMLR-X (paragraph 4.6); amended at SC-CAMLR-XXV (paragraph 15.18) in accordance with CCAMLR-XXIV, paragraph 20.6, and subject to the decision of SC-CAMLR-XXIV (paragraph 13.56) (Rules of Procedure of the Scientific Committee), Rule 3.

<sup>537</sup> UNGA Resolution 64/72 (2009), para 128; and UNGA res. 70/75 (2015), para 170.

arrangements in response to the respective paragraphs of the UNGA resolutions on bottom fishing prior to the review for the Assembly's consideration. The 2016 report<sup>538</sup> was prepared in cooperation with FAO and with the assistance of an expert consultant hired by DOALOS to provide information and analysis on relevant technical and scientific issues covered regarding the actions taken by States and RFMOs and other arrangements, which were also invited to consider making such information publicly available.<sup>539</sup> Furthermore, Parties to UNCLOS and the UN Fish Stocks Agreement are obliged to ensure that conservation and management measures for living resources on the high seas, and within their EEZs, are based on best available science.<sup>540</sup> Accordingly, conservation measures to protect VMEs, including EIAs, should be made publicly available.<sup>541</sup>

**Key findings:**

- States are often required to take measures to allow for public participation and access to information in processes relating to the identification, designation and modification of areas of international importance. Similar procedures can be developed for the modification of EBSAs.
- Environmental impact assessment can be used as a tool to support the involvement of the public and to prevent significant adverse impacts to areas meeting the EBSA criteria, as used by Ramsar.
- Relevant instruments on access to information, such as the UNEP principles on access to information in environmental matters,<sup>542</sup> could be incorporated by reference into the EBSA process for enhanced transparency.
- Depending on the nature of the regime, intergovernmental bodies, States and non-State actors may be invited to processes held under specialised technical and/or scientific bodies as observers.

## 4. ELEMENTS FOR CONSIDERATION

In light of the findings from the previous sections, this final section draws together elements for consideration regarding the: (A) incorporation of scientific information related to EBSA or EBSA-like areas described by national exercises into the repository or information-sharing mechanism; (B) description of new areas; and (C) the updating of the scientific descriptions of the areas that meet the EBSA criteria. In discussing these elements, scientific credibility and transparency will be addressed as cross-cutting issues.

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<sup>538</sup> A/71/351. See also paragraph 164 of UNGA Resolution 69/109.

<sup>539</sup> UNGA Resolution 69/109, para 164.

<sup>540</sup> UN Fish Stocks Agreement, art. 5 (b).

<sup>541</sup> UNGA Resolution 61/105, para 83. See also UNCLOS, arts. 204-206.

<sup>542</sup> UNEP, Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters, adopted by the Governing Council of the United Nations Environment Programme in decision SS.XI/5, part A, (26 Feb 2010).

A. Submission of EBSA or EBSA-like information from national exercises for inclusion in the global repository or information-sharing mechanism:

As seen in Section 1 above, the current process for submission of national exercises regarding areas that meet the EBSA or similar criteria may benefit from further procedural clarification. For instance, the current process does not distinguish between information sent to the global repository and the information-sharing mechanism. Currently, there is no CBD peer-review process for assessing the national submissions, which could result in different standards with the potential to affect the scientific rigour of the process as a whole, if these descriptions are taken together with the EBSAs considered by CBD COP, which go through rigorous peer-reviews by regional workshops, SBSTTA and COP. As discussed in section 1, the CBD EBSA process is a global scientific and technical process by nature. It was seen that the CBD EBSA workshops have served as a peer-review process, which allows a plenary/subgroup review by all scientific experts present of all proposed areas before their adoption of the workshop report. This is followed by consideration by SBSTTA and COP before the inclusion of the respective EBSA information and polygon in the CBD repository, linked to CBD's EBSA website ([www.cbd.int/ebsa](http://www.cbd.int/ebsa)) and hosted by the CBD Clearing-House Mechanism.

To address potential inconsistencies between national submissions and the CBD descriptions, the submission of national exercises concerning areas that meet the EBSA or similar criteria could follow a number of different procedures, including:

1. States could send information on their national exercises to the information-sharing mechanism with respective links to their institutional websites (where the full description, polygons, etc would be available). In case of areas under overlapping jurisdictional claims, or transboundary areas between two or more States, a joint submission from these States would be necessary. This option aligns with the practice described in section 2 above regarding SPAMIs and PSSAs; or
2. A Party may choose to have their respective national exercises considered by SBSTTA and/or COP for inclusion of the areas in the global repository. This could require a CBD peer-review process, including the one currently utilized during the regional workshops (for consistency) or by a group of scientific experts, prior to being considered by SBSTTA and COP. As seen in section 2 above, the World Heritage Convention and other processes rely on external bodies for scientific review, while others utilise ad hoc expert advisory groups on a regular basis. A similar approach could be undertaken by the CBD. In case of areas under overlapping jurisdictional claims, or transboundary areas between two or more States, a joint submission from the States involved could also be required. This option aligns with the practice described in section 2 above regarding SPAMIs and PSSAs.

B. Describing new areas that meet the EBSA criteria:

The current process for describing new areas in new regions and in regions already covered by the CBD regional or subregional workshops where new scientific information becomes available is through

additional CBD regional or subregional workshops, subject to availability of resources. This procedure is still applicable and can remain an existing alternative. However, it is important to note that the Secretariat might not have the resources in place to organise workshops on a regular basis. In addition, questions remain concerning the appropriate frequency for such workshops, or whether a threshold should be established concerning a minimum number of areas with the potential to meet the EBSA criteria to trigger further workshops in areas where these have already been taken place. COP could request that workshops be held every five or six years for instance, if a regular process is desirable.

Furthermore, thematic workshops (e.g. on seamounts, deep pelagic areas, etc) have also been proposed in addition to regional workshops to fulfil scientific gaps<sup>543</sup> identified in previous workshops. Thus, thematic workshops could be included as a new approach for describing areas in addition to the regional and sub-regional ones if Parties decide to do so.

Workshops have a number of advantages. For instance, they provide a consistent platform for the EBSA description, while also providing capacity building for participants (even in cases where pre-workshop training is not available) for the description of areas through information and knowledge exchange and interactive group dynamics. Their limitations, on the other hand, include instances when relevant experts are not available to attend the workshops or do not make relevant data available.

Parties may consider establishing additional peer-review procedures (besides workshops) that may not be as dependent on availability of considerable resources and time, for describing new areas. A few examples are described below.

i. Within national jurisdiction

Additional procedures for describing new areas within national jurisdiction could be similar to the ones for the inclusion of information from national exercises to the repository or information-sharing mechanism, as discussed above.

ii. Beyond national jurisdiction

For areas beyond national jurisdiction, an additional procedure could entail steps such as:

1. Submission to the Secretariat by any Parties, other government, and competent organisations, individually or collectively, of proposals utilizing the same EBSA template and description methodology. Consideration could also be given to submissions from IPLCs, civil society and the scientific community.

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<sup>543</sup> See N J Bax, J Cleary, B Donnelly, D C Dunn, P K Dunstan, M Fuller, P N Halpin, 'Results of Efforts by the Convention on Biological Diversity to Describe Ecologically or Biologically Significant Marine Areas' (2015) 30 Conservation Biology 571.

2. The Secretariat screens the templates for accuracy and then submit the template(s) to a group of experts for review against the criteria and utilising the same methodologies of the workshops.<sup>544</sup> Communication between the original proponents of the described EBSA and the group of experts would be anticipated for possible needed clarification and adjustments. The group of experts would be identified in the respective COP decision establishing the additional procedure. For instance, the recently established Informal Advisory Group could play this role if COP decides to do so.
3. The group of experts submit the revised template with an assessment of whether the respective area meets the EBSA criteria to the Secretariat.
4. Such analysis could be made available to SBSTTA for its review in an information document prior to the relevant SBSTTA meeting.
5. Summary Reports could then be prepared by SBSTTA for COP consideration, similarly to the current procedure.
6. COP considers the Summary Reports and requests the Secretariat to include the considered summary reports into the repository and information-sharing mechanism similarly to the current practice.

For both areas within and beyond national jurisdiction, COP may consider adopting operational guidelines for the description of EBSAs in addition to the guidance available, to further guide the application of the criteria in a robust manner in the absence of workshops.

### C. Updating existing and future descriptions in light of best available science:

As discussed in Section 1, the description of areas that meet the EBSA criteria is a scientific and technical process that assists Parties in the achievement of the objectives and purposes of the Convention and other related international instruments. For this purpose, the scientific and technical information contained in the descriptions would benefit from updating and monitoring for the purposes of CBD Article 7. This leads to two important considerations, namely, that any updating of such information needs to be based on best available science and be conducted in a transparent manner, which is in line with State practice under other processes (see Sections 2 and 3 above). Another consideration is that baseline information

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<sup>544</sup> This is aligned with the practice by the World Heritage Convention with respect to the ‘tentative list’. As seen in section 2 *supra* the Tentative List serves as an inventory of sites located within the Parties’ territory, which they consider suitable for inscription in the World Heritage List.<sup>544</sup> Parties are required to submit their Tentative List to the Secretariat at least one year prior to the submission of any nomination. Upon reception of the Tentative Lists, the Secretariat checks the conformity of the accompanying documentation with the format provided in the Operational Guidelines. If all the necessary information has been provided, the Tentative List is transmitted to the external Advisory Bodies for information. The Guidelines encourage Parties to seek upstream advice from the Advisory Bodies as early as possible during the development of their Tentative Lists. In particular, Advisory Bodies may assist Parties with harmonising their Tentative Lists at regional and thematic levels, with a view to identifying gaps and common themes, and fostering cooperation in the preparation of nominations.



contained in the original described areas should not be lost, as it can still be helpful for a number of reasons, including monitoring effects of climate change and ocean acidification on marine biodiversity and respective ecosystems, for instance. Accordingly, the original descriptions (including their respective polygons) should be archived in the repository and information-sharing mechanism.

A scientific and transparent process also requires the development of scientific criteria for any resulting modification of the original descriptions. These set of criteria should be developed prior to the establishment of a process for updating the information is instituted to ensure consistency, scientific robustness and the transparency of the process throughout and all in accordance with the precautionary approach and the common concern.

Furthermore, a transparent process would also require that the scientific rationale for resulting modifications be provided and a peer-review process (through any means decided by COP)<sup>545</sup> be established. The rationale for eventual modification should also be made publically available through the global repository.

It is important to note that updating the EBSA descriptions may entail:

1. updating the ranking of one or more criterion in the EBSA template. The ranking of the EBSA features against the criteria is listed in the repository and in the COP decisions. This may be a more desirable choice than de-listing – which is largely perceived under other international processes as a measure of last resort, unless the area has been listed erroneously.
2. updating the description. This can entail adding or subtracting ecological or biological features described in an EBSA (for one or more criterion), which can also lead to expanding or contracting the area where these features occur with possible alteration of the EBSA polygon contained in the EBSA repository and information-sharing mechanism.

To prevent significant biodiversity loss in areas described as EBSAs, which could lead to eventual modifications, procedural measures could be adopted by COP with a view to categorise the respective EBSA as “under risk” to facilitate the adoption of necessary measures by the competent authority, as well as to mobilise resources and streamline any required assistance to avoid such loss. This would be a similar procedure as the one used for Ramsar sites under risk and World Heritage Convention sites at danger (see Section 2 above).

Erroneous listings may occur and the procedure established under the Ramsar Convention is noteworthy for present purposes. Ramsar Parties may de-list a site that never met the criteria for designation. This includes cases where a site has been designated based on inadequate or incorrect information being available at the time of preparation of the ‘Information Sheet on Ramsar Wetlands’, and it subsequently becomes apparent that the site as a whole does not fulfil any of the criteria for designation.<sup>546</sup>

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<sup>545</sup> By CBD Workshops, pre-determined group of experts, etc.

<sup>546</sup> Ramsar Resolution IX.6 (2005), para 6(ii).

In establishing a process for updating the EBSA information considered by COP, consideration could be given to different procedures concerning areas within and beyond national jurisdiction although, as seen in Section 2 above, other processes do not tend to distinguish significantly between processes for areas within and beyond national jurisdiction. For instance, while the adoption of associated protective measures for PSSAs might have to follow different procedures, the process for designation of PSSAs in areas within and beyond national jurisdiction is the same. In the case of SPAMIs, the only difference is the number of Parties proposing the designation: for areas within national jurisdiction, it would be the coastal State unless the area is transboundary between two or more States or contested, where joint submissions would then apply; for high seas areas in the Mediterranean, two or more States can propose an area.

In any case, as noted in Section 1 above, the interpretation of the EBSA criteria and process in light of the object and purpose of the Convention, as well as the consideration that modifications to EBSAs may have legal implications when EBSAs have been linked to the implementation of other international legally binding obligations, suggest that modification of areas described as meeting the EBSA criteria by the CBD COP would require a new COP decision superseding the correspondent paragraph/section of the previous decision in light of COP guidance on the retirement of decisions.

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