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► **To cite this version:**

François Féral, Serge Michel Garcia. Prologue: Space, Humans and Nature - A Shortcut through Centuries. UCN-CEM-FEG; EBCD. Area-based management tools and marine fisheries History, Definitions, Roles, Typologies, Tensions, Synergies, Trade-offs and Effectiveness, European Bureau for conservation and development, pp.17-33, 2023. hal-04646955

HAL Id: hal-04646955

<https://hal.science/hal-04646955v1>

Submitted on 12 Jul 2024

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PROLOGUE

SPACE, HUMANS AND NATURE - A SHORTCUT THROUGH CENTURIES

By Francois Feral² and Serge M. Garcia

It is easier to legalize than to legitimize (Champfort. Maximes et pensées, 1795)

Space is not found. It must always be constructed (Bachelard. Le nouvel esprit scientifique,

SUMMARY

The Prologue considers the marine space from the perspective of fisheries and biodiversity conservation, considering their legal, environmental and socio-political dimensions. Though centuries, the antique, mysterious and mystic conception of the ocean space has been progressively replaced by communities' and States' jurisdictions. The modern fishery and ecological visions of the marine space rests on a political-economy representation of space which, through the strong influence of "the West" over the seas and oceans, has gradually become "universal". The most striking phenomenon since the 17th century has been the growing influence of States on marine and oceanic spaces. The early customary maritime law, and then the recent Law of the Sea, are the political and normative expressions of that historical ocean "appropriation" process. However, the modern evolution of fishery and environmental regulations –particularly through area-based management tools –indicate a new step in the conception of marine space that the prologue describes as a background to Part I and II.

The Prologue is structured around the following themes: (i) Evolution from the antique representation of the ocean space to its modern legal construction; (ii) From gods' space to human's space; (iii) Prominence of the modern State in the constitution of marine space; (iv) States' control of marine spaces by maritime law and the Law of the Sea; and (v) A new page in international management of marine spaces: nature protection, knowledge, and marine protected areas.

1. From the antique marine space to its modern legal construction

This prologue opens a comprehensive report on area-based management (ABM), on its broadest sense, and on area-based management tools (ABMTs) in the ocean. It provides a historical background on the subject, starting from the Antiquity and the 15th century splitting of the Earth in two equal parts between Spain and Portugal. It also describes the historical evolution of this space allocation during more than five centuries, to better understand the forces at play in the past and the implications today, when dividing the

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dynamic, interconnected ocean into delimited areas. The authors review very rapidly the concept of space and its evolution with time, from (i) an antique scaring space full of Gods and mystic creatures to (ii) centuries of navigation, trade, discoveries, competition and colonisation; (iii) a framework of spaces shared and controlled by States through the Law of the Sea; and (iv) a huge economic resource for the expansion of the Blue Economy. In the process, the role of States is essential, ocean zoning is progressing; communities are better recognized and involved, and the concern about biodiversity keeps increasing.

The seas and oceans make up most of our planet's space with deceptive physical unity and plural representations. These representations are in fact available in the form of infinity, cornucopia and freedom, but also in the form of danger, unknown, vacuum, last frontier. "Terrestrial people" have often and for a long time considered the sea as an insurmountable barrier filled with threats even though many have learned to enjoy it as a temporary source of recreation. More "aquatic people", like sailors, fishermen, ship-owners, many merchants, and some specialized industries (like oil and gas companies) look to it and use it as the most effective means of communication and as a source of livelihoods and revenues. In these confused and contradictory representations, the notion of *marine space* raises questions of definition and content to facilitate communication between "terrestrial" and "aquatic" people, exchange hypotheses and link reliable data on the subject.

Defining and conceptualizing are always delicate operations because the vision of those involved is inevitably charged with subjectivity and presumptions linked to their culture, background and interests? In these conditions, as Bruno Latour invites us to do, we can say that there are "*several truths*"_of the marine space i.e., *different representations* by different actors (Latour, 2006). During centuries the representations of the sea have been nourished by navigation, exploration, fisheries, battles and piracy, as well as by geography, oceanography, myths and religions, from village economy to global maritime trade and to the outer space vision of a blue planet. More recently, these representations have been by influenced tourism, recreation, sailing competitions, growing industrial development (Last Frontier; Blue Economy) and the continuous geopolitical race of States aiming to strengthen their jurisdictions and technocratic governance. In parallel, a more ecological conception of marine space –that we will examine- has been emerging.

The Prologue deals with the marine space from the perspective of fisheries and biodiversity conservation, considering their legal, environmental and socio-political dimensions. The modern fishery and ecological visions of the marine space rests on a political-economy representation of space which, through the strong influence of "the West" over the seas and oceans, has gradually become "universal". The most striking phenomenon since the 17th century has been the growing influence of States on marine and oceanic spaces. The early customary maritime law, and then the recent Law of the Sea, are the political and normative expressions of that historical ocean appropriation process. However, the modern evolution of fishery and environmental regulations – particularly through protected areas –indicate a new step in the conception of marine space that we will examine.

This Chapter is structured around the following themes: (i) the ocean: from Gods' space to a human space; (ii) In modern times, the preeminent place of the modern State in the constitution of marine space; (iii) The States' control of marine spaces by maritime law

and the Law of the Sea; and (iv) Improvement and increase of marine zoning in the 20th century for conflict reduction and protection of nature.

2. From Gods' space to human space

2.1 *Space is the container of human productions*

During Antiquity and the Middle Ages, space exists including the representation of myths and gods of the forests, of the sea and the oceans, of the mountains and of the Earth. This non-human space is also filled with mysteries, monsters and personified animals. For the Greeks of the archaic period, in the Mediterranean marine space they surveyed, explored and colonized, Ulysses is the object of the fury of Neptune and the seduction of the sirens. If in the 8th and 7th centuries BC, the sea described by Homer and Hesiod is the gods' domain. However, despite its myths and its gods, and nourished by its mysteries, the marine space has existed also for many centuries as a socialized space, for example as a circulation route: by the thousands, antique ships used the sea as a means of transport, discovery and trade; a battlefield; an area of ethnic mixture, and colonization; and of course, as fishing grounds.

Closer to us, in pre-colonisation civilisations of the so-called primitive peoples or Prime Nations, nature "fills" the space and is a mighty power that is deified and worshiped (e.g., mountains, rivers, lakes, rain, thunder, other atmospheric powers, animals)³. This nature deserved to be feared and respected, but could also be used –with appropriate rituals– for food and other human needs (Guthrie, 1971)⁴. Johannes (1978) describes traditional management of marine resources in Polynesian traditional societies based on a system of values that determines preferences in the satisfaction of needs. The description illustrates a sophisticated village-based utilitarian conservation system of marine resource. These systems combined technical measures comparable to what was considered as state-of-the-art fisheries management measures in Europe, at that time, including tenure systems, closed areas and season, and protected areas, but few gear or fish size regulations. Measures were also taken based on religious or other ritual grounds with potential ecological consequences. The nutritional needs, albeit fundamental, were superseded by transcendental obligations to meet social relationships, kinship responsibilities and other rituals (including animism and totemism)⁵. Economic value was secondary at best. However, that this did not necessarily mean that these peoples lived "In harmony with nature". They also wasted resources and environmentally destructive practices coexisted, as in most societies, with efforts to conserve natural resources (Guthrie, 1971: 355; Johannes, 1978). Following colonization, marine resources dwindled, due to Several interrelated causes including: (i) the introduction of cash economies, (ii) the breakdown of traditional authority and social bond, and (iii) the imposition of new

³ See for instance <https://www.britannica.com/topic/nature-worship>

⁴ <https://www.britannica.com/topic/nature-worship>

⁵ **Animism**: the belief that all natural phenomena, including human beings, animals, and plants, but also rocks, lakes, mountains, weather, and so on, share one vital quality—the soul or spirit that energizes them. It is at the core of most Arctic belief systems (Wikipedia) and was common in West Africa. **Totemism**: system of belief in which humans are said to have kinship or a mystical relationship with a spirit-being, such as an animal or plant, such as bears, birds, frogs, sharks, cetaceans, turtles, and various supernatural beings

laws and practices by colonial powers that redistributed authority on spaces and resources (Johannes, 1978).

The spatial conception of the Enlightenment era in the 18th century, and of the 19th century society, is built on a preconception established by geographers (inspired by political economy) of a planetary space which exists only when it is filled by the whole system of social relations, including the economy and conflicts, and does not exist otherwise. We refer to this concept below (Section 2.1) as the “presumption of vacuity”. Space thus becomes explicitly a product constructed by human societies which can thus interact with its content.

“Space is not found. It has to be constructed” (Bachelard, 1934).

“Economic thought integrates the spatial factor into the study of the formation and circulation of wealth” (Rallet, 1984).

Therefore, social sciences distinguish, on the one hand, a terrestrial reality of space with its material productions and content of human activities and, on the other hand, a societal representation of space based on the values and dynamics of its main actors. Thus, for centuries, sailors, crews, fishermen, explorers and merchants have jointly “constructed” the marine space, its values and dynamics. However, in modern times, with the progress of capitalism within social sciences, economics and geography have taken over the representation of space. More recently, this space has been invested also by scientists, conservationists, industrial operators and recreational users. In this process, the liberal economic thought, which feeds on abstraction, promotes the vision of a space made up of natural goods for mankind.

“This is the time of the fusion of space and economy” (Rallet, 1984).

The fallacious dimension and deleterious scope of this political-economic approach to space, particularly when applied to the marine space, is examined below.

2.2 The primacy of geographical and economic conceptions of terrestrial space

How did we arrive at this immanent political-economic conception of space and what lessons can we draw from it, for the protection of marine space?

We mentioned above how the archaic thought of the Greeks, for example, filled space with gods, monsters and mysteries, even though, at that time, the sea was already a source of wealth and the most important means of circulation for them and many others (Lefebvre, 2007). Therefore, the non-natural, politico-economic conception of the space does not originate in the proto-science of the Greeks, Arabs and Christians of the Middle Ages, deeply dominated by mythology and Sacred Books. It emerged centuries later, establishing a privileged relation between human and space to the detriment of the ancient natural and mythological dimensions. In the last page of his Discourse on Method, René Descartes (1637) refers to Man, with his reason and scientific knowledge, as *“the master and possessor of nature”*.

Nature, however, will later be paradoxically evacuated from the modern political-economy paradigm as not constitutive of space. In the 18th century, in a scientist

atmosphere illustrated by the “Encyclopaedists”⁶, Jean-Jacques Rousseau was the only philosopher who reflected about the relations of Man and Nature in a political movement centred on liberalism, bourgeoisie, science, questioning the nobility privileges, and absolute authority. Within the Enlightenment movement, he appears as an exception, raising awareness of the ongoing transformations of natural space into a human endeavour. However, Rousseau does not specifically address the question of space except in his analysis of “proprietaryism”⁷ including the question of fences and borders as a factor of conflict and violence (Rousseau, 1755).

It is with the political economy thought of the 19th century that the exclusion of nature from space is the most obvious and becomes definitive. Marx, in his analysis of the accumulation of capital and the colonial phenomenon, discusses the use of space by capitalist society, both in microeconomics⁸ and in projecting its overseas conquests (Rallet, 1984). However, he only refers to space as inducing the existence of spatial relationships in capitalistic economy. Thus, for (Lefebvre (1970, 1997), "Real space is that of social practice (...) produced, from social relations". This is why some geographers accuse Marx of having no approach to the concept of space: “Marx's essentialist thought always begins with an elimination of space” (Claval, 1977). Paradoxically, Adam Smith (1776) joins the Marxist analysis for which space is only the container of social relations because the English economist conceives space only in terms of production of values, without any consideration other than the relationships of interest and the mechanisms of wealth circulation (Dubeuf, 1991). Thus, liberal economics and Marxist doctrines come together in considering that space is essentially commoditized because it is where people satisfy their needs, particularly in the form of a market or a State. In that process, the public space or the commons –the “land without a master”– inevitably falls into the commercial and capitalist sphere in a process often referred to as “commodification”⁹. Urban planning or the integration of rural space into the city, measures demographic goods, services and financial flows to qualify and model space transformation. However, these approaches are not interested in anything constituting that space, except these flows. In particular, they exclude the space’s ecological content and, sometimes, its historical dimension.

At this stage of our observation of the concept of space in economics and geography, there appears to be an almost universal representation of “space”, advocated by the “West”, only interested in the social (mainly economic and commercial) relations that occur in that space, as consumer good, following the law of supply and demand (Harvey, 2010). This dominant capitalistic thinking inspires not only corporate strategies, but also

⁶ The French writers' society, who contributed to the development of the Encyclopaedia (from June 1751 to December 1765), including Voltaire, D'Alembert, Diderot and many others.

⁷ Translated from French “propriétéisme”: For those theoreticians, property is not a social fact to be defined by society but it derives solely from individual will. It has been defined also as *a political ideology placing at the heart of its project the absolute protection of the right to private property*” (Piketty, 2019)

⁸ In the spatial deployment of capitalism on markets and the industrial and urban expansion

⁹ « Commodification » is the extension of the market space (and reference to economic value) at the expense of collective or common spaces (and other social and societal values). It implies a dynamic, illustrated by the “enclosures” which “devoured” the villages’ common spaces in England, already in the 15th century.

public policies of order and wealth. It is the dominant conception of Western society, in which weak discordant voices are heard¹⁰, or are confronted with traditional conceptions. The ecological approach and thought which --contrary to the political economic thought-- integrates the human/nature dimension, is still present in many traditional communities and has been growing in science, most international institutions and policy agreements, and in the media for over three decades, but is not yet fully mainstreamed, in practice, in development policies.

3. The prominent place of the modern State in the marine space

3.1 The singularity of marine space in modern times: a presumption of vacuity

To analyse the concept of "marine space" and to bring out the socio-political issues that emerge in protected areas, it is necessary to examine how the presumption of vacuity, now accepted in modern market society, applies. Compared to this presumption, the situation of the marine space appears singular, is scarcely documented in geographical and economic disciplines, and deserves careful consideration.

Market relations do not exhaust the content of the modern space concept because capitalism and the market exist in their universal form only within the State framework. In modern nations, space is not only a set of social relations, but also the container of the relations within and between States. Through the production of norms, policies, domestic and international public laws, which are consubstantial with it, the State participates in the definition of the content of space and its commodification, particularly with respect to marine space. To illustrate this notional approach, we could say that the terrestrial space (the land) is "filled with social relations" while the modern marine space is "filled with State interventionism". The reason is that the quasi-impossibility of physical human settlements, cadastres, control, protection, and fences in the ocean, if not at short distances from the coast, feeds the presumption of vacuity of the sea and of its free access.

3.2 The marine space "anthropication"¹¹ through its State control

Since the fifteenth century, as navigation capacity evolved rapidly from coastal to transoceanic, a first scheme of the law of the sea is driven by the colonial adventure of the West in search of a marine route towards the "Indies". The treaties of Tordesillas (1494) and Zaragoza (1529) between Portugal and Spain, drew lines on the ocean but were really claiming land-based present and future colonial properties, and trying to ensure safer navigation of these two countries to and from these colonies. More than a century later, the *Mare Liberum* paradigm (Hugo Grotius, 1609) openly questioned the Portuguese *Mare Clausum* policy, and claimed a freedom to navigate and trade across oceans for all nations (a claim favouring particularly those having powerful navies). By

¹⁰ For example, Thomas Malthus (1766-1834) in "An essay on the Principle of Population", looks at its past and present effects of demography on human happiness, and enquires on our prospects regarding the future removal or mitigation of the evils it generates. Malthus stresses the tension between demography and available space and natural resources, arguing the power of population is indefinitely greater than the power in the earth to produce subsistence for man.

¹¹ Anthropic, or anthropocentric, means concerned primarily with humans. By analogy, "anthropication" refers to a process of increasing focus on human concerns and interests.

interstate customary developments in European nations, it made the ocean a common space contrary to the appropriation process going on terrestrial spaces and resources through wars and colonization. What remained under exclusive control of the coastal States was a 3-miles wide zone, according to the “canon rule”. Thus, this early evolution of the law of the sea provided the legal foundations for the development of area-based management in the ocean both at national and international levels, in areas under national jurisdiction and beyond.

Logically, the western States’ control is the bridgehead of their anthropocentric spatial expansion and it conditions the development of a modern marine market space, in contrast with traditional marine societies. Since antiquity on land, the legal reality of terrestrial space is that the foundations of space governance are constituted by land ownership, conventions and responsibility and these three institutions are guaranteed and ordered by city or state powers. By contrast, in the Ocean, since the 15th century, the “free” sea space appears singular with the primacy of inter-State order, and by the apparent weakness of the societal laws of property, responsibility and conventions. However, within the different States, the merchant society has developed a private, criminal and disciplinary maritime law developed, regulating in particular the status of crews, harbours and ships.

The inter-State competition for maritime spaces that opened up during the European Renaissance (in the 15th and 16th century) and the modern confiscation of marine spaces had been preceded by other ways of appropriation and zoning. For millennia, traditional maritime societies have very intimately recognized marine spaces, maritime routes, named places, respected taboos, and their access rules have largely spread across these areas (Bambridge & D’Arcy, 2014), close to the coast but also over considerable distances, as in Oceania (Buck, 1952; Lagarde, 2021). However, their legitimacy, their anteriority and therefore their legality have not always been recognized by the law of the contemporary States which have taken possession of these traditional territories during and often after colonization: the spoliation of the ancestral marine rights of the indigenous peoples still constitutes one of the opprobrium of the colonization process (Féral, 2021).

It is easier to legalize than to legitimize (Champfort. Maximes et pensées, 1795)

4. The State control of marine spaces by maritime law and the Law of the Sea

4.1 International State control by maritime law in the 16th century

a. The freedom of the sea principle

Since the 17th century, the rules derived from the *Mare Liberum* principles constitute the essential of the framework of marine spaces. These rules are based on the consensus of the great European maritime powers which set out to conquer the “new world”. Hugo Grotius in his 1609 thesis (anonymous, 2013), establishes (i) a general principle of freedom of the seas which excludes the monopolization of marine space beyond a 3 miles zone ; and (ii) the principle of the free disposal of its resources, whatever they may be. In reality his claim was for free access to any territory and free trade with them. “Every nation is free to travel to every other nation, and to trade with it.(...) the sea is common

to all, because it is so limitless that it cannot become a possession of anyone, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries”¹² (Brown Scott, 1916). As noted above, the first significant step in the appropriation of colonizable land and access overseas markets was the 1494 the Treaty of Tordesillas between Portugal and Spain under the aegis of the Papacy, which divided the ocean and its coasts in two areas. Shortly afterwards, John Selden's theory of the *Mare Clausum* (1635)¹³ develops the thesis that the sea can be appropriated, in particular by States, and therefore be the subject of territorialization and heritage. This British claim on the maritime spaces surrounding England could not be imposed to the rest of Europe considering the ongoing development of large national fleets in that region (Theutenberg, 1984).

The victory of the principle of ocean freedom over that of ocean closures, was the foundation of the principle of an international marine space, enshrined in the right for any ship to navigate and trade throughout the world. This idea was organized in maritime law, institutionalizing the *internationalization of the seas* which became the foundation of the concept of marine space. In this approach, the coastal State was left with an exclusive authority on only a three-mile territorial sea to guarantee its security¹⁴.

b. The freedom of the seas for the benefit of the most powerful fleets

In fact, this principle of freedom of the seas has benefited the European nation States with the most powerful military, commercial and fishing fleets, opening them the paths of colonization and the exploitation of natural resources. The freedom Grotius defended was that to navigate and trade freely. This, *de facto* gave fisheries free access to the open sea and to harvest fish as *res nullius* resource.

The purpose of the maritime law was to regulate maritime transport, access and regulation of ports and, incidentally the measures relating to the status of ships and seafarers. Indeed, it was then recognized that the ships of a nation State, flying its flag, are part of its territory. The notion of "piracy" expresses that any attack on the ship is an attack on the territory of its Flag State. Ships are thus the main actors in the occupation and defence of marine spaces. Thus, the navy appears as the basis of maritime sovereignty, and of the defence of and economic, strategic and commercial interests of the State. Considering that, in the sea, access, navigation and exploitation are free, the inter-state cohabitation is more important in the ocean than on land, because each ship represents a moving portion of its flag State and its borders. This is why the State's pressure over marine space and maritime activities appears stronger than on land. This is also why in most developed States, the fishing and navigation professions are so much regulated and subject to authorizations and controls (Fitzpatrick & Anderson, 2022)¹⁵. For example, in France, in the 17th century, under the absolute Royalty of Louis XIV, a

¹² Extract from Hugo Grotius *The Freedom of the Seas*, New York: [Oxford University Press](#), p. vi

¹³ Cf. <https://nubis.univ-paris1.fr/web/kenelm-digby/john-selden.html>

¹⁴ The formula proposed by Cornelius Bynkershoek in his “De dominio maris” in 1702, limiting the maritime domination of the coastal state to a distance of effective control, was universally adopted and resulted in the adoption of a zone of 3 and then 12 nautical miles as the land-based firepower of the coastal states increased.

¹⁵ Cf. specially the chapters related to the maritime status of seafarers in UK and USA (<https://seafarersrights.org/sri-resources/publications/seafarers-rights-book/>) and the legal framework of the qualifications and boarding of seafarers (<https://www.gov.uk/seafarer-working-and-living-rights>).

statute, inspired by the Navy, was applied to marine goods, navigation, fishing, trade, ports, and to the status of the related people (Louis XIV, 1681)¹⁶. These regulations gave to the administration of the sea and of maritime social relations a unilateral and quasi-hierarchical and tutelary dimension.

c. The State control of marine and oceanic spaces

The dynamics of appropriation and attribution of the Pacific Ocean space by developed States in the 19th century illustrates some aspect of the ocean space State control. *“Cetacean hunting marks the eruption of the world economy in Oceania. It started at the beginning of the 19th century when 193,000 whales were captured between 1804 and 1817. Whale-hunting reached its peak between 1830 and 1840, and declined rapidly after 1860 with the collapse of whale populations and the generalization of petroleum oils. From the 1830s, the exploitation of wealth moved from the ocean to the islands. We are looking for sandalwood, trepang and various mother-of-pearl products, all of which are in great demand”*¹⁷

In 1919, 63 years before the Montego Bay Convention, the European nations carried out the State-driven zoning of a Pacific Ocean space considered as previously empty (devoid of jurisdiction), filling it with the mandates of the colonizing States from their respective coastal and island possessions (Figure 1). These areas of influence underline the true scope of the “freedom of the seas” which actually organized the primacy of the Western maritime powers by the domination of their gunboats able to navigate freely on all open waters. However, it is through the appropriation of terrestrial spaces (from the coastlines or colonized islands) that domination over related marine spaces is recognized by the other States’ community.

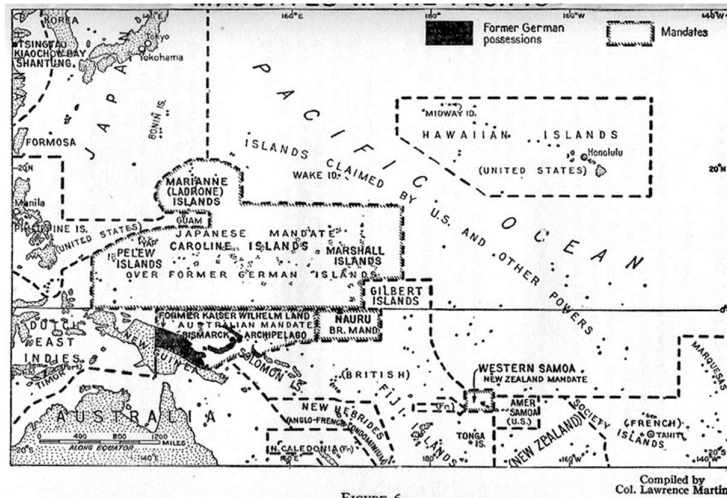


FIGURE 6

Compiled by Col. Lawrence Martin

¹⁶ The Marine Ordinance of Colbert, enacted by King Louis XIV in 1681,

¹⁷ Cf. *Le partage colonial dans le Pacifique au XIX^e siècle* at <https://histoire-geo.ac-noumea.nc/spip.php>

(article 125) *Le fait colonial dans l’Océanie insulaire* at <https://histoire-geo.ac-noumea.nc/IMG/pdf/faitcolonialpacifique.pdf>

Figure 1: Zones of colonial maritime influence in the Pacific in 1919 (map annexed to the Treaty of Versailles)¹⁸

It is important to stress that *Mare Liberum* was intended to give free access to colonies and their spices, gold, slaves, etc. Although expressly quoted by Grotius the priority was not the exploitation of the marine resources. However, the strategic freedom to navigate and to trade opened the way for a global expansion of fisheries, as a co-benefit of colonisation. Moreover, the free access to common marine resources it implied (by default) led to the serial overfishing characterizing the 20th century (Garcia and Newton, 1997).

4.2 The national state control by the Law of the Sea in the 20th century

The State control of marine space grew progressively, especially during colonization, but it increased considerably in the 20th century in a context of competition between European States to appropriate coasts and archipelagos. The colonial phenomenon is therefore the basis for the establishment of zones of maritime influence, connected to appropriation of coastal spaces. The United Nations Convention for the Law of the Sea intended to order the phenomenon, based on a dualist conception of marine space: maintaining freedom while establishing clear jurisdictions.

a. The first maritime claims of the new world states

The first maritime claims are the result of unilateral declarations of extension of sovereignty by the United States and South American countries. Thus in 1945, President Truman issues a proclamation affirming the right to explore and exploit oil and gas resources on the continental shelf outside the three nautical miles territorial sea. In 1953, the U.S. Congress enacts a Federal and State Control of the Continental Shelf Act. The concept of a fisheries conservation area originates in another Truman Proclamation, but the Congress does not enact legislation regarding a 200 nm fishery conservation area until 1976, six years before the 1982 United Nations Convention on the Law of the Sea (UNCLOS). In 1952, a treaty in the form of a unilateral declaration by Chile, Peru and Ecuador unilaterally extends to 200 miles their oceanic jurisdictions, including from the islands¹⁹. This pressure, which opened the door to many conflicts, led the United Nations to engage in lengthy negotiations to establish UNCLOS to reconcile conflicting interests.

UNCLOS marked a fundamental step in increasing the influence of coastal States benefiting from economic zones placed under their jurisdiction (Apollis, 1981). It brought to light again, as in the 17th century in Europe, the two opposing conceptions of *Mare Liberum*, for the benefits of powerful maritime nations, and *Mare Clausum* for the benefit of coastal States and attempted to resolve it. On the one hand, UNCLOS confirmed the freedom of the seas, empowering the long-range fleets of military powerful, fishing and trading nations. On the other hand, in the wake of the third world decolonisation

¹⁸ Peace Treaty of Versailles: Mandates in the Pacific 1919 by World war I. Archive Maps & Charts net.lib.byu.edu. This map was annexed to the Treaty of Versailles of 1919 which establishes the colonial rights of Germany and on this occasion strengthens the "Mandates" exercised by the other great maritime powers. It illustrates a political "zoning" of States' influence" more than sixty years before the EEZs of Montego Bay. On this map Kiribati or the Cook or Marshall islands do not exist as legal entities.

¹⁹ Cf. <https://jusmundi.com/en/document/pdf/treaty/fr-declaration-sur-la-zone-maritime-1952-declaration-sur-la-zone-maritime-1952-monday-18th-august-1952>

movement, it established the economic jurisdiction and sovereign rights of coastal States concerned by the looting of their coastal resources by empowered foreign fleets.

b. A new zoning of the marine space based on an international convention

Zoning of the marine space, as developed since the 15th century, and improved and complicated in the 19th and 20th century reflects the State and inter-State nature of marine Space. Maritime zoning has a legal nature. It circumscribes a space over which one State or a group of States has jurisdiction and applies a system of law it determines. However, the established zones do not become proper national “territories” despite the set of policing, use and protection rules that States can decide to implement there, in the domains agreed under the Law of the Sea treaty, and in agreement with the other States. This comment applies to the areas defined in UNCLOS (see below) as well as to the smaller areas like ABMTs defined States within the UNCLOS zones. UNCLOS established the zonal rules for the determination of baselines and new maritime boundaries, as well as the international law regime of these different spaces, mandatory for the signatories of the Convention as a framework for the exercise of their jurisdiction. It established a succession of zones in which the legal power of the coastal States decrease as the distance from the coast increases²⁰.

After determining the *baseline* (from which distances are measured) the framework distinguishes: (i) *internal waters*, between the coast and the baseline; (ii) a *territorial sea*, with a territorial sovereignty comparable to that exercised over land: 12 miles from the baseline; (iii) a *contiguous zone* in which some of the rights granted in territorial waters may be extended: between 12 and 24 miles from the baseline; (iv) an *Exclusive Economic Zone* (EEZ) extending up to 200 miles from the baseline, in which the state has conditional sovereign rights on the exploitation and conservation of all the resources of the waters, the seabed and its subsoil, either directly or through agreements with third parties; and (v) an *extended continental shelf* between 200 and 350 miles from the baseline, in which the bottom and suprajacent waters is under the coastal state jurisdiction but the rest of the water column is part of the High Sea. Beyond 200 miles (or 350 miles in case of an extended continental shelf) the bottom, referred to as the *Area* and the water column (referred to as the *High Sea*) are beyond the exclusive national jurisdiction and the resources may be managed by international institutions (cf. Figure 3.2).

c. The extension of riparian States' control over the marine space

With this zoning, all the areas under national jurisdiction become administrative districts whose legal system is divided between the UNCLOS principles and the laws and regulations of the coastal State. Within the jurisdictions recognized by the Convention, the resource exploitation regime is determined by the policing rules and public policies of the coastal State, including closed areas. Thus, the legal footprint of the State appears more omnipresent on marine areas and activities than it is on land and reflects its strategic and political stakes.

From this perspective, and as a counterpoint to the freedom of navigation, the sea still constitutes for the State a permeable “border” and a space that is loosely regulated beyond national jurisdiction. It provides climatic regulation, recreation, and economic opportunities, and

²⁰ Cf. The illustration of these successive zonings and the question of their problematic cartographic representation in South Pacific where the author notes many inconsistencies and the existence of holes in the Oceania mesh (Vacher, 2014)

facilitates exchanges, but is also a potential source of pollution, meteorological threats, illicit traffic, smuggling, irregular immigration, and military threat. The “law of the flag” leads to the fact that, in the marine space, including in the space under national jurisdiction, numerous vessels, and hence the different territories they represent through their flag, with the related sovereign rights, must cohabit. The intricate presence of foreign vessels in the ports and areas under the jurisdiction of the coastal State explains the complexity of the legal regimes as the State regulation of trade, navigation, and fisheries, as well as the defence authorities play hide-and-seek with the principle of freedom of the seas and the territoriality of foreign ships. This situation is exceptional because, on land, such situations exist only in limited to narrow consular spaces, whereas it is common in marine and air spaces. The incentive for more State intervention and more area-based management is therefore pressing.

4.3 *The importance of the EEZ and the inter-State race for maritime borders*

The exclusive economic zone (EEZ) has upset the very conception of the marine space by a riparian nationalization extended to 200 miles for the water column or 350 miles on the continental shelf. However, the increased jurisdiction over these new areas is not an increase in coastal sovereignty *sensu stricto* : the freedom of international commercial and military navigation is maintained, as well as the right to lay communication cables and pipelines for gaseous or liquid fluxes. The EEZ appears as a new space in which additional new human developments thrive under new spatial names: exclusive fishing zones (EFZs), military security zones, navigation lanes, and ecological protection zones such as fishery closures, marine parks, Marine Protected Areas (MPAs), Particularly Sensitive Areas (PSSAs) etc., cf. Annex 1).

Particularly since the Adoption of UNCLOS in 1982, the ensuing zoning process –which could be referred to as *zoning policy* considering its history and dynamics– reflects an additional progressive “appropriation” of marine spaces initiated by coastal States which contrived to establish their jurisdictions around the smallest habitable island to benefit from territorial waters, EEZs, and continental shelves (Ros, 2014).

a. *Spatial claims beyond the EEZs*

In Oceans areas, the opening of the right to an EEZ has enabled Small Island or archipelagic states to set up huge jurisdictions whose size often far exceeds their control capacities (Vacher, 2014). On the other hand, developed and emerging countries have been increasingly claiming for greater controls in the areas under their exclusive jurisdiction and sometimes beyond (see below).

Thus, the *Presential Sea* proposal developed in 1994 by Chile and then by Argentina, claimed to significantly extend the jurisdiction of the coastal State beyond the EEZ to protect and conserve marine resources, particularly straddling and migratory fish stocks, and provide a buffer against contaminations originating outside the EEZ (Silva Vilagra, 2012). Just as the Contiguous Zone in the EEZ extends the territorial powers the coastal State has in the Territorial Sea, the Presential Sea intended to extend State territorial powers to the High Sea²¹. The same approach has been implicitly used off Newfoundland by Canada (in the context of the North Atlantic Fisheries Organization), extending its fisheries enforcement zone beyond the 200-mile EEZ (Sullivan, 1997). This claim follows a tradition of international law of the sea regarding historical rights

²¹ The proposal would have increased the area under jurisdiction of Chile from 1.3 to 9.2 million square miles.

recognized to States present in maritime region close to their coasts or in which they have traditionally deployed means and activities. Not recognized by the UNCLOS signatories and by the courts, but largely integrated in the 1995 UN Fish Stock Agreement, the Presential Sea claim illustrates the “hunger” of coastal States for influence in the ocean space.

We observe the same approach to regulation and control of high seas areas by island and coastal States, based on the strengthening of fisheries management standards in bordering fishing zones and including their own EEZs (CMS & SPREP, 2006; Vacher, 2014). For example, the Nauru Agreement²², establishes among several Polynesian States, a Cooperation in the Management of Fisheries of Common Interest to coordinate and harmonise the management of fisheries with regard to common stocks within the Fisheries Zones (particularly tuna). Regarding the conditions of access to the fisheries zones of the Parties, it was agreed that no fishing will occur in the 4 interstitial High Sea zones between EEZs of the Parties, creating de facto no-Take Zones in the High Sea^{23,24} (Figure 2).

Similarly, the mapping, exploration, and identification of the seabed resources revived this desire to control as much of that space as possible, increasing the breadth of coastal jurisdictions on the extended continental shelf. For the same reason, non-riparian States participate in the Regional Fisheries Management Organisations (RFMOs), to exert authority and benefit from resources beyond their national jurisdiction.

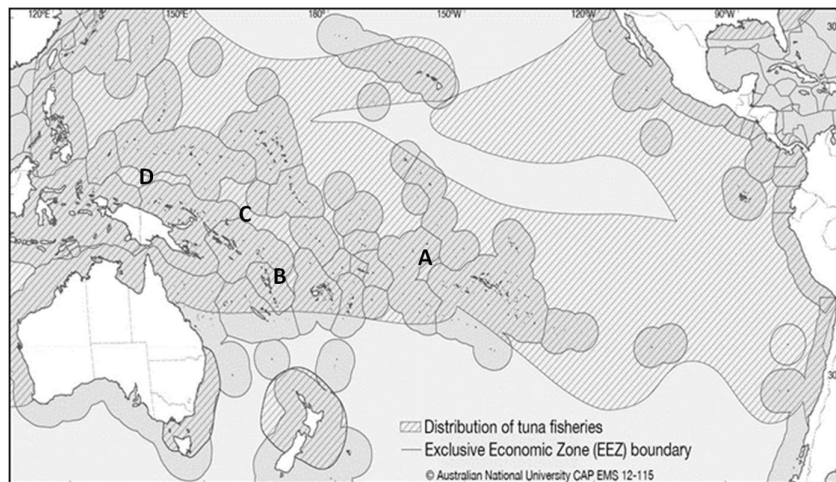


Figure 2: Distribution between EEZs and high seas areas of tuna fisheries in the South Pacific. The map shows the High Sea enclaves in the middle of the EEZs. A to D = Interstitial areas referred to in the 3rd agreement (letters A to D added) (Courtesy Bambridge and D’Arcy, 2014)

Although these initiatives by States bordering the High Sea are carried out through international cooperation and often affect also areas under national jurisdiction, the coastal States strategy is to communicate their capacity for intervention on areas

²² between Federated States of Micronesia, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea, Solomon Islands and Tuvalu plus Tokelau

²³ Source: <http://www.intfish.net/treaties/nauru.htm>

²⁴ Cf. NAURU agreement. Third arrangement implementing the Nauru Agreement setting additional terms and conditions of access to the fisheries (4 p.) https://www.ffa.int/nauru_agreement

adjacent to their established claims, based on theses that legitimize rights for their benefit²⁵. The result of all these initiatives is that the marine space has been “filled with nationalization” within the framework of an interstate “competitive collaboration” the political nature of which only precedes its economic intent

b. The increase of conflicts on maritime boundaries

Nowadays, marine territories (used for industrial development, navigation, communication and fisheries) constitute a major political stake that builds in the wake of developments in the Law of the Sea. UNCLOS regulated practices and claims that infringe on the freedom of the seas to order marine space. It has set new rules for access to marine resources but in doing so, has opened the Pandora Box of establishing new maritime boundaries, as illustrated by the many open disputes, particularly in semi-enclosed seas, to determine the limits of EEZs, baselines and even territorial seas e.g., in the Mediterranean, Caribbean, Southeast Asia, South America, and the Persian Gulf (Ros & Galetti, 2016).

In this new legal framework, stimulated by progress in the exploration and exploitation of the seabed, the State’s footprint has been asserted, grounded on unilateralism and the strategy developed in Chile and Argentina (Calderon, 1998). Thus, the *Presential* principle is also supported by China which has implemented in the South China Sea a “fait accompli” strategy based on the Chinese Historical Presence in the region. The conflict is still open between four States in spite of the decision of the International Court of Justice of The Hague in favour of an opponent State (Cataldi & Féral, 2016).

5. A new page: nature protection, knowledge, and protected areas

5.1 New actors and new marine spaces representations

a. Importance of new actors in marine areas

We underlined that the representation of marine space is in relation to the main social and economic actors who exploit and use it. For centuries this representation, peddled by coastal dwellers, seafarers, explorers, fishermen, commercial navigators, merchants, naval officers was a set of trades and know-how grounded mainly in coastal traditions. These representations have largely inspired the 19TH and 20th centuries’ novelists, artists and painters. They have amplified with stories and aesthetic emotions the perception that had for a long time the whole society.

Other, more environmental representations of space, like the nature conservation one, advocated by IUCN since 1948, were not really concerned by the ocean until the 1970s. In 1982, the ocean zoning by UNCLOS which established a new order of the Ocean was based on the idea of a more equitable sharing the sea wealth while maintaining the freedom of navigation and fishing on the high seas. Since the 1972 UN Conference on the Human Environment, in Stockholm, and certainly since the 1992 UN Conference on Environment and Development, in Rio de Janeiro, the political-economic representation of space has been progressively transformed, first on land and then in the ocean. The key

²⁵ In the same spirit of extension of international competences in 2009 during the World Oceans Day, Greenpeace proposed to classify as marine reserves the interstitial high seas spaces between the EEZs of Oceania countries (Vacher & Argounes, 2011)

actors are environmental experts, conservation and fishery scientists, environmental lobbyists, recreational economy actors, nature conservation NGOs, and international financial institutions like the Global Environment Facility (GEF), and the 1992 Convention on biological Diversity (CBD). The attention has been always focussed first on land, and later on the ocean. International ocean policies started getting more traction in 1992 e.g., with the increased attention given to oceans by the UNGA since 1994²⁶; the 1995 FAO Code of Conduct for Responsible Fisheries; the 1995 UNFSA, etc. These new developments, actors, and policy orientations challenged many traditional practices including in coastal development, fishing, tourism, navigation and environmental management of the coastline. The adoption of global conservation targets at the CBD (2010, 2022), the perspective of a booming ocean development under the “Blue Economy” banner²⁷, and the intrusion of the new actors involved and their expectations, make the zoning system more necessary and more complex than ever, and increases the protective normativity²⁸.

b. An ambivalent evolution of the representation of marine space

Historically and anthropologically, access to marine resources had been regulated by Indigenous People, communities, clans or village organizations, using area-based multiple-objective frameworks as well as specific fisheries or biodiversity protection measures, and giving priority to local populations and their basic needs. These ancestral rights are illustrated, in Europe, by Lords’ patrimonial maritime rights²⁹ and, in the traditional societies of the Pacific island, by various forms of appropriation at village, clan or tribal levels (Bambridge & al, 2019; Herrenschildt & Le Meur, 2016).

As mentioned before, in the 19th century colonial conquests, the misguided valueless nature of marine resources, based on the principle of freedom of the seas, was a legal fiction facilitating oceans and coastal areas discovery and colonisation, and enhancing the free access to fish stocks. The process also allowed a “confiscation” of marine space by military, economic and fishing fleets of powerful nations. In the States and in their colonies the freedom principle led to the transformation of the littoral part of coastal zones into a public domain, a process through which States confiscated the ancestral

²⁶ In 1994, UNGA 49 decided to undertake an annual review and evaluation of the implementation of the Convention on the Law of the Sea and other relevant developments and requested the Secretary-General to report annually to the Assembly. Later on, UNGA 54 decided to establish an open-ended informal consultative process in order to facilitate the annual review by UNGA of developments in ocean affairs (resolution 54/33).

²⁷ “Blue economy” is a term in economics relating to the exploitation, preservation and regeneration of the marine environment. Its scope of interpretation varies among organization (https://en.wikipedia.org/wiki/Blue_economy) Cf. also https://oceans-and-fisheries.ec.europa.eu/ocean/blue-economy/sustainable-blue-economy_en

²⁸ i.e., the impetus to make decisions about what is good, desirable, or otherwise.

²⁹ The naval Ordinance promulgated by Colbert, in France (Louis XIV, 1681), is emblematic of this hold of the State delimiting a coastal public domain. It’ eradicated the feudal Lords’ fishing infrastructures encumbering the coastal areas (e.g., tuna traps; lift-nets) and brackish waters (e.g., fyke-nets). It established a freedom of fishing regulated by the State In this way State liberated the sea from its Lords’ appropriations and especially those relating to resources(cf. Title I, Book IV of the ordinance "De la liberté de la pesche" p. 452 et seq. & Title IV on “Madragues et bordigues” p. 475). However it was in France in a centuries-long legal battle for its effective implementation (Torquebiau, 1965).

coastal tenure³⁰ and use rights of marine communities. The process led to inequitable redistribution of resources and economic opportunities and a State-supported modernization of fisheries, leading to the progressive commodification of the marine resources (Teulières-Preston, 2015; Féral 2021)³¹. In many island countries (e.g., in the Pacific Ocean) the tensions between centralized State control and traditional local governance of coastal areas and their resources are still strong (Govan and Jupiter, 2013).

Thus, for half a century, the political discourse on marine areas has been ambivalent. On the one hand, biodiversity is rapidly being degraded, many stocks are depleted, and ecosystem restoration is strongly advocated. On the other hand, the sea is still apparently perceived by many States and institutions, including environmental institutions as an area of freedom, allegedly of inexhaustible precious resources³², likely to provide invaluable wealth for industrial activities (e.g., in the Blue Economy paradigm)³³. For example, only a decade ago, the French government perception and message regarding the economic development of the huge French maritime jurisdictions was that *“At the beginning of the twenty-first century, the sea is more than ever a major source of economic growth for States, a reservoir of wealth whose exploitation is just beginning, a formidable source of jobs for our country.”* (CESM, 2012).

The progress in fisheries management in well-managed countries is recognised and praised while recognizing the problems persisting elsewhere (e.g., in FAO SOFIA, 2022). At the same time, the media and protectionist activists raise alarm about environmental destruction and resources overexploitation while conservation organisations (like the CBD and IUCN) apparently support commodification concepts like ecosystem services, biodiversity offsets, nature-based solutions and blue economy. This does not happen without controversies within and between institutions. In this context, the policies of marine protected areas and the increasing recognition of social and ecological values of that marine space, place ABMTs on the razor's edge of an equivocal marine space facing protection, sustainable use, or their problematic combination. This new concept of *protected sea* is torn between the anthropocentric conception of efficiency (“space is constructed by human for themselves”) and its ecocentric conception aiming to enshrine natural resources for their intrinsic value (space was shape by nature for itself).

5.2 Do these new representations anticipate a new Law of the sea?

Here we have the illustration of the State figure of Janus³⁴, attached both to exploiting the sea and anxious to protect it. Indeed conversely, the will to protect the marine environment and the international management of fisheries constitute the background of a new (or renewed) way of seeing the marine space and its relationship with humanity.

³⁰ These tenures were often an extension of terrestrial individual or collective properties

³¹ Teulière-Preston (2015) gives an example of confiscation of traditional maritime rights in New Caledonia through the creation of the coastal public domain. Torquebiau (1965) shows, on the contrary, that in the French southern metropolitan area, real estate rights preceding the creation of the public domain were respected by the State.

³² Fisheries have illustrated the fallacy of that thought, but the “dream” is being transferred to other living resources.

³³ in <https://www.defense.gouv.fr/sites/default/files/cesm/bm-142-colloque-ocean-de-richesses.pdf>

³⁴ In the ancient Rome, Janus, the god of beginnings, gates, transitions, time, duality, doorways, passages, frames, and endings, is depicted as having two faces, back to back.

The policies of Marine Protected Areas (MPAs *sensu lato*) are part of the new tension on the Law of the sea disrupted by the increasing demands of coastal States or maritime powers. But it's also coming from new actors involved in the protection of the sea for improved biodiversity conservation and sustainable uses. Consequently, marine conservationism is not the exclusive playground of the social group of scientists or of NGOs: it is also a new instrument of assertion of coastal States sovereign rights. This protective zoning, where the sovereignty of the coastal State is asserted, is part of a more general movement to claim jurisdiction which has developed since the beginning of the 21st century (cf. Section 3.3)³⁵. The Law of the sea and its spatial distribution and nature of powers are therefore in full mutation. The Law of the sea and its spatial distribution and nature of powers are therefore in full mutation. No modification of the 1982 treaty is plausible today, but the new implementation agreements of UNCLOS on biodiversity in areas beyond national jurisdiction (BBNJ), following the 1995 UN Fish Stock Agreement (UNFSA) seem to be one of the solution States can use for a smooth adaptation. In case of failure, States may resort to unilateral affirmation with all the potential and caveats of this approach.

The establishment of area-based management tools (including MPAs and OECMs) which became significant since the 1970s and accelerated since) is a significant step in zoning marine space. The zoning "innovation" has been the incorporation of broad biodiversity data, objectives and criteria, complementing the modern socioeconomic and political contents, and related narrow concern about strict economic resources. Admittedly, in the conquest of the seas, the assessment of the presence and state of natural resources is not new. Their exploration and the related scientific knowledge have been the bridgehead for the exploitation of biological and mineral marine resources and development of related economies. The new protectionist discourse is that the purpose of collecting data is not only resources valorisation through use but also their better knowledge and inventory, for improved protection for their intrinsic value, rebalancing the exclusively anthropocentric conception of space.

6. Discussion and conclusion

In the liberal economies' tradition, the principles of which are inherited from the 19th century political economy, the conception of terrestrial and marine space and its zoning remains today still strongly impregnated with commodification. If the international community of States is bound by numerous international agreements for the sharing of the sea, it participates in this conception because the States are in competition and adhere to this same development and speculation politico-economic model. This competitive inclination of States, which has become almost universal, raises questions regarding the impact of the conception of space on protection of marine spaces and resources. However, this overly economic approach is today being challenged by national and international public opinion, by traditional maritime populations (whether

³⁵ Cf. the case of the Arctic and the Illulissat Declaration adopted on 28/05/2008 by the five riparian States, affirming their rights, competence, and jurisdiction around an ice-free ocean which previously appeared at first as a space of freedom comparable to the open sea. The exploitability of the area in relation to its partial thawing due to climate change has aroused this claim of sovereignty. (Cinelli, 2014). See also (Beurier, 2016) about the theory of sectors in Arctic Ocean.

indigenous or simply artisanal) and their NGOs, and by environmental NGOs acting for protection of nature and the oceans³⁶. The United Nations have largely accompanied this protection movement and its bodies and collaborative initiatives are the place where these representations are confronted (e.g., in UNEP, CBD, IOC, FAO, UNESCO, IPBES, etc.).

The place of the States in this evolution is essential because of the growing geostrategic and economic stakes which are now attached to the marine space and the perspective of its increased development under Blue Economy. In any case, nothing can be done without their policies because the law of the sea regime is essentially grounded on States and inter-State cooperation. Contrary to the old 3- and 12-miles territorial zones, the areas now controlled by States under UNCLOS are not based on their coastal defensive capacity –but on their desire for an extension of the national jurisdiction to an agreed limit, allocating *de facto* former common coastal resources to coastal States. States also manage High Sea resources within the management competence areas of RFMOs. If, as expected, the oceans are the place of creation and development of immense private wealth, State interventionism will never be far from the related activities³⁷.

This State presence occurs either in a unilateral initiative, or in a cooperative or conventional form, under international law. Examples of unilateralism include China's occupation policy in the South China Sea (Cataldi and Féral, 2016) or the extension of Canadian fishery policy beyond its jurisdiction (Sullivan, 1997). On the contrary, the Galapagos Agreement for the Conservation of the High Sea Marine Resources of the Southeast Pacific was signed in 2000 between the coastal States of the Southeast Pacific, members of the Permanent Commission for the South Pacific (CPPS) and open to other interested States³⁸. Similarly, the Nauru Agreement emphasizes the capacity of States to agree and strengthen their control over the High Sea by international cooperation.

UNCLOS established the principles of new maritime boundaries thanks to an unprecedented and probably exceptional inter-State agreement. All strategies, policies and initiatives, as well as the jurisdictions responsible for its application, necessarily refer to it and its rules. Once the core jurisdictions are established, the creation of smaller, more activity-specific ABMTs may be developed as needed to complement non-spatial measures. The difficulties and the freeze on negotiations for the BBNJ Agreement³⁹ in the summer of 2022 are not encouraging signal for a positive completion of the international process. Pending such agreement, the practices and new initiatives of the States to increase their maritime holdings, pushed by public opinion and economic lobbies will

³⁶ The same liberal economy approach is also questioned in some parts of the fishery sector and particularly in the small-scale fisheries.

³⁷ Offshore drilling for fossil fuels, for example, received massive investments from the States, in the order of 100 billion dollars per year. Surfrider (2022) <https://surfrider.eu/en/learn/blog/offshore-drilling-worrying-development-121415192167.html>

³⁸ in <https://legislacionanp.org.pe/acuerdo-marco-para-la-conservacion-de-los-recursos-vivos-marinos-en-la-alta-mar-del-pacifico-sudeste/>

³⁹ In full, the Intergovernmental Conference on an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (<https://www.un.org/bbnj/>)

probably continue reshaping the very conception of the marine space. As part of a dialectical construction integrating these new practices and opinions, new environmental values participate in transforming the societal image and the law of the marine space. In that endeavour, protected and conservation areas have a role to play, together with non-spatial measures.

We have seen in this chapter that the place of the boundaries, the size of the areas, the management and control capacity of the legitimate authority, the relation with neighbouring areas and the cooperation between authorities, the equitable sharing of the space, the overlapping claims of the same area by different interests, etc., are fundamental for the achievements of objectives in the UNCLOS zoning process.

It is intriguing to think that at lower institutional levels, in community area-based managed areas, or in single fisheries, ABMTs will face exactly the same issues and factors of failure or success. The tension between unilateralism and international collaboration is, to some extent, mirrored in the tension between single management or cross sectorial management of ABMTs.