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The Regime of Enclosed or Semi-Enclosed Seas with Special Regard for the Mediterranean Sea

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Abstract

UNCLOS Part XI, relating to "enclosed or semi-enclosed" seas, is composed of only two provisions. Art. 122 provides for a definition that lends itself to some perplexities from the logical and terminological point of view. Art. 123 invites the States bordering such seas to coordinate their activities in certain subject matters, namely fisheries, protection of the marine environment and scientific research. In fact, Art. 123 invites bordering States to do something that, in most cases, is already mandatory under other UNCLOS provisions. The poor substantive content of Part IX may be explained considering that it is a compromise result between the position of those States that proposed a special regime for enclosed or semi-enclosed seas and those that preferred to avoid the creation of a new category of seas. While the purpose of Art. 123 is only "promotional", States bordering some enclosed or semi-enclosed seas have already put in place various forms of regional co-operation. This is the case of cooperation established in the Mediterranean Sea in the fields of protection of the environment (so-called Barcelona Convention system and ACCOBAMS) and fisheries (General Fisheries Commission for the Mediterranean). Gaps remain in other fields, such as the protection of underwater cultural heritage, and some questions relating to navigation in certain environmentally sensitive areas still need to be addressed at the world level.

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Keywords

enclosed or semi-enclosed seas – definition – fisheries – protection of the environment – navigation – UNCLOS negotiations – underwater cultural heritage – particularly sensitive sea areas

1 A Questionable Definition

Part XI of the United Nations Convention on the law of the sea (Montego Bay, 1982)[1] is devoted to "enclosed or semi-enclosed seas",[2] a notion that was unknown to the four 1958 Geneva conventions of codification of international law of the sea.[3] UNCLOS Art. 122 provides for the following definition:

> For the purposes of this Convention, 'enclosed or semi-enclosed sea' means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

1 Hereinafter: UNCLOS. For the UNCLOS negotiations on this subject see NANDAN, ROSENNE & GRANDY (eds.), *United Nations Convention on the Law of the Sea 1982 – A Commentary*, III, The Hague, 1995, p. 346; WINKELMANN, *Article 122* and *Article 123* in PROELSS (ed.), *United Nations Convention on the Law of the Sea – A Commentary*, München, 2017, p. 881 and 886.

2 See ALEXANDER, *Regional Arrangements in the Oceans*, in *American Journal of International Law*, 1977, p. 84; VUKAS, *Enclosed and Semi-Enclosed Seas*, in *Iranian Review of International Relations*, 1978, p. 171; SYMONIDES, *The Legal Status of the Enclosed and Semi-enclosed Seas*, in *German Yearbook of International Law*, 1984, p. 315; VUKAS (ed.), *The Legal Regime of Enclosed or Semi-Enclosed Seas: The Particular Case of the Mediterranean*, Zagreb, 1988; p. 49; LEANZA, *Le régime juridique international de la Mer Méditerranée*, in Académie de Droit International, *Recueil des cours*, t. 236, 1992, p. 127; GRBEC, *Extension of Coastal State Jurisdiction in Enclosed and Semi-enclosed Seas – A Mediterranean and Adriatic Perspective*, London, 2014; ORAL, *Regional Co-operation in Enclosed and Semi-enclosed Seas for the Protection of the Marine Environment under Article 123 of the 1982 UN Law of the Sea Convention: An Assessment*, in RIBEIRO (ed.), *30 anos da assinatura da Convenção das Nações Unidas sobre o direito do mar: protecção do ambiente e o futuro do direito do mar*, Coimbra, 2014, p. 419; ROS & GALLETTI (eds.), *Le droit de la mer face aux "Méditerranées"*, Napoli, 2016.

3 A remote precedent is a proposal submitted by Romania and Ukraine, according to which "for certain seas a special regime of navigation may be established for historical reasons or by virtue of international agreements" (doc. A/CONF.13/C.2/L.26 of 21 March 1958, in United Nations Conference on the Law of the Sea, *Official Records*, VI, Geneva, 1958, p. 123). However, the proponent States did not insist upon it being put to vote (*ibidem*, p. 53).

The definition lends itself to some perplexities from the logical and terminological point of view.[4]

Art. 122 regulates bodies of water that are referred to as "a gulf, basin or sea" and, as such, cannot be identified with geographical or legal precision. While the term "sea" generically qualifies everything that can be regulated by a treaty on the "law of the sea", the terms "gulf" ("golfe" or "golfo", according to the French and Spanish official texts) and "basin" ("basin" or "cuenca marítima") are not defined in the UNCLOS and should be understood in accordance with their ordinary meaning.[5] Notably Art. 122 avoids the term "bay" ("baie" or "bahía") that, instead, is defined by UNCLOS Art. 10, paras. 2 and 4.[6]

The first condition required by Art. 122 is that the body of water is "surrounded by two or more States". In this regard, instances of bodies of waters that cannot be considered enclosed or semi-enclosed seas are the Hudson Bay, surrounded only by Canada, or the Gulf of California, surrounded only by Mexico. It remains open to question how much the waters of a semi-enclosed sea should be surrounded by land. To follow the Latin prefix "semi", the land should surround at least half of the body of waters.

The second condition required by Art. 122 is that the body of water is connected to another sea or the ocean by a narrow outlet or, alternatively, consists entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.[7] It seems that, in Art. 122, the alternative in the terms to be defined corresponds to the alternative in the definitions and, consequently, the enclosed sea is the gulf, basin or sea "connected to another sea or the ocean by a narrow outlet",[8] while the semi-enclosed sea is the gulf, basin or sea "consisting entirely or primarily of the territorial seas and exclusive

4 "La definition donnée n'est pas claire, car elle est le fruit d'un compromis diplomatique": LEANZA, *Le régime* (*supra*, note 1), p. 141. "(…) the adopted definition is far from precise and the number of seas which may be qualified as semi-enclosed is hard to determine. It was estimated during the discussion at the Second Committee that they may range from forty to fifty": SYMONIDES, *The Legal Status* (*supra*, note 1), p. 325.

5 See Art. 31, para. 1, of the Vienna Convention on the law of treaties (Vienna, 1969). The ordinary meanings can respectively be "portion of sea, proportionally narrower at mouth than bay, partly surrounded by coast" and "formation with strata dipping towards centre", as the terms "gulf" and "basin" are defined in H. W. FOWLER & F. G. FOWLER (eds.), *The Concise Oxford Dictionary*, 5th ed., Oxford, 1964, p. 548 e p. 97.

6 A bay is identified by the UNCLOS according to the two concurring criteria of the so-called semi-circle rule and of the length of the closing line not exceeding 24 n. m.

7 "(…) there are two broad categories of semi-enclosed or enclosed seas: those that have geographically restricted access to other seas and those that have been jurisdictionally apportioned among two or more coastal States": ORAL, *Regional* (*supra*, note 1), p. 426.

8 If this is the case, it follows that an "enclosed sea" is not completely enclosed, as it has a narrow outlet to another sea or the ocean. A more precise term would be "quasi-enclosed".

economic zones of two or more coastal States". However, the distinction is devoid of any practical consequence, as the UNCLOS regime is the same for both categories of seas.

As regards the first requirement, by resorting to the notion of "narrow outlet" ("passage étroit", "salida estrecha"), Art. 122 avoids the term "strait" ("détroit", "estrecho"), in order not to create any confusion with the "straits used for international navigation", falling under Part III of the UNCLOS. The notion of "narrow outlet" includes also artificial watercourses, such as the Suez or the Panama Canals. The "narrow outlet" may be more than one: for example, the Mediterranean Sea has three narrow outlets that link it to, respectively, the Atlantic Ocean (the Strait of Gibraltar), the Red Sea (the Suez Canal) and the Black Sea (the Straits of Dardanelles and Bosporous); the Red Sea has two narrow outlets that link it to, respectively, the Mediterranean Sea (the Suez Canal) and the Indian Ocean (the Strait of Aden). However, the notion of "narrow outlet" lacks geographical precision: what should be the maximum width of a narrow outlet?.

As regards the second requirement, the adverb "primarily" lacks geographical precision as well: what should be the maximum ratio between high seas areas and exclusive economic zone areas inside an enclosed or semi-enclosed sea?. Nor is it clear whether the exclusive economic zones, to which Art. 122 refers, should be understood in a concrete sense, as zones effectively established by the coastal States concerned,[9] or in an abstract sense, as zones that could in the future be established by them. The former solution seems more in conformity with the wording of the provision, the latter with its spirit. Moreover, it remains uncertain whether those "seas" that are totally encircled by land, such as the Caspian Sea, fall under Art. 122. Although a positive answer would correspond to the literal reading of the provision, giving to the term "surrounded" also the meaning of totally encircled, a negative conclusion seems preferable according to the object and purpose of a convention on the "law of sea", being the "sea" generally understood as composed of interconnected bodies of water (oceans and seas).

It is clear that the two above mentioned requirements are alternative and that, consequently, it is sufficient to meet one of them to qualify as an enclosed or semi-enclosed sea. For example, the Baltic Sea satisfies both requirements. The Mediterranean – a sea of about 2,505,000 km^2 of surface – meets the first requirement, having the Strait of Gibraltar the minimal width of about 32 km, while it may be uncertain whether the exclusive economic zones established until now by some of its bordering States allow to satisfy the

9 The exclusive economic zone does not exist *ipso iure*, but must be proclaimed by the coastal State.

second requirement. They will, as soon as all (or almost all) of them establish such a zone, as there is no point in the Mediterranean Sea that is located at a distance of more than 200 n. m. from the nearest land or island. In the case of other seas of considerable extension, such as the Greenland Sea or the Tasman Sea, while the first requirement is not satisfied, the second probably is.[10] In the case of the Arctic Sea, also called Arctic Ocean,[11] the first requirement is not met, due to the width of the waterways that connect it to the Atlantic Ocean, and it is doubtful whether the second can be met.[12]

Incidentally, Art. 122 offers an implicit confirmation of the fact that also States bordering enclosed or semi-enclosed seas are entitled to establish an exclusive economic zone.[13] One question is entitlement, another question is delimitation of such zones with States having opposite or adjacent coasts, which needs to be effected through agreements between the States concerned (UNCLOS Art. 74, para. 1). The point is fully confirmed by international practice, showing the establishment of exclusive economic zones in enclosed or semi-enclosed seas (for example, the Baltic, the Caribbean, the Mediterranean Seas).

Nothing prevents that, inside an enclosed or semi-enclosed sea, other enclosed or semi-enclosed seas are located:[14] for example, the Adriatic[15] or Aegean Seas inside the Mediterranean Sea.

In conclusion, the UNCLOS attaches a rather imprecise definition to enclosed or semi-enclosed seas. However, the fundamental message transmitted by Part IX of the UNCLOS is sufficiently clear: if international co-operation is always recommendable in international law of the sea, the typical situation in which it is even more recommendable is that of enclosed or semi-enclosed seas.

In international adjudication, some decisions recall the existence of enclosed or semi-enclosed seas. In the judgment of 3 June 1985 on the *Continental Shelf* case (Libya v. Malta), the International Court of Justice qualified the

10 It remains to be seen whether such seas are sufficiently surrounded by land.

11 In this case, the choice of terminology has some repercussions also at the legal level. If enclosed or semi-enclosed seas do exist in the UNCLOS, enclosed or semi-enclosed oceans do not.

12 In fact, the five bordering States have not taken the position that the Arctic Sea is an enclosed or semi-enclosed sea. See WINKELMANN, *Article 122* (*supra*, note 1), p. 886.

13 See ŠKRK, *Exclusive Economic Zones in Enclosed or Semi-Enclosed Sea*, in VUKAS, *The Legal Regime* (*supra*, note 2), p. 159.

14 “Tant la mer Méditerranée que les mers plus petites qui la composent pourraient en effet être considérées comme des mers fermées ou semi-fermées aux termes de la partie IX de la Convention”: LEANZA, *Le régime* (*supra*, note 1), p. 151.

15 See SERŠIĆ, *The Adriatic Sea: Semi-enclosed Sea in a Semi-Enclosed Sea*, in CATALDI (ed.), *The Mediterranean and the Law of the Sea at the Dawn of the 21st Century*, Bruxelles, 2002, p. 329.

Mediterranean as a semi-enclosed sea.[16] In the award of 12 July 2016 on the *South China Sea* (Philippines v. China), the arbitral Tribunal considered the South China Sea as a semi-enclosed sea inside the western Pacific Ocean.[17] In 2001, during the discussion before the International Tribunal for the Law of the Sea on provisional measures in the *MOX Plant* case, Ireland put forward the semi-enclosed sea condition of the Ireland Sea.[18]

2 An Invitation to Co-Operation

It is surprising that Part IX of the UNCLOS, devoted to enclosed or semi-enclosed seas, is composed of only two articles. Besides Art. 122, which, as already remarked,[19] provides the definition of such seas, there is Art. 123, which invites the States bordering them to coordinate their activities in certain subject matters. In all the rest of the UNCLOS, only in another provision, that is Art. 70, para. 2, the enclosed or semi-enclosed seas are incidentally recalled.[20]

Even more surprising is the substance of Art. 123. Nothing more than an invitation, expressed in the conditional mood,[21] to States bordering enclosed

16 International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders*, 1985, para. 47 of the judgment. In fact, according to the definition given by Art. 122 of the UNCLOS, the Mediterranean seems more an enclosed than a semi-enclosed sea.

17 Para. 3 of the award. It recalls the cooperation for the protection of the environment provided for in UNCLOS Art. 123 (para. 984), adding that "with respect to China's island-building program, the Tribunal has before it no convincing evidence of China attempting to cooperate or coordinate with the other States bordering the South China Sea" (para. 986).

18 In the order of 3 December 2001, the Tribunal did not take a position on the question. According to the separate opinion of judge Anderson, "it is common ground that the Irish Sea satisfies the definition of a 'semi-enclosed sea' contained in article 122 of the Convention" (International Tribunal for the Law of the Sea, *Reports of Judgments, Advisory Opinions and Orders*, 2001, p. 128).

19 *Supra*, para. 1.

20 Art. 70, para. 2, provides that also States bordering enclosed or semi-enclosed seas may be included in the category of "geographically disadvantaged States": "For the purposes of this Part [= Part V – Exclusive economic zone], 'geographically disadvantaged States' means coastal States, including States bordering enclosed or semi-enclosed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive economic zones of other States in the subregion or region for adequate supplies of fish for the nutritional purposes of their populations or parts thereof, and coastal States which can claim no exclusive economic zones of their own".

21 The conditional mood ("should cooperate") used in the first sentence of the *chapeau* is substantively confirmed, in the second sentence, by the indicative mood of a verb having a hortatory meaning ("shall endeavour to", corresponding to "s'efforcent de" in the French official text and to the less nuanced "procurarán" in the Spanish official text).

or semi-enclosed seas to co-ordinate themselves, directly or through regional organizations, in the exercise of the rights and in the performance of the duties under the UNCLOS related to exploitation of marine living resources, protection of the marine environment and scientific research, as well as to involve, if appropriate, other interested States and international organizations:

> States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:
> (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
> (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
> (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
> (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

The co-operation envisaged by Art. 123 takes the form of the coordination of policies and actions, which implies the conclusion of agreements, but also less formal and prescriptive means, such as information and consultation.[22]

The invitation addressed to States bordering enclosed or semi-enclosed seas relates to three subject matters, to which, at least according to the literal wording of Art. 23, no additional matters could be added. In this provision, the Latin expression *inter alia*, which is frequently used in legal English, is notable for its absence.

For instance, there is no invitation to co-operate as regards the exploitation of the mineral resources of the continental shelf. This omission can be explained by the exclusive character of the exploitation of such resources, in the sense that "if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State" (Art. 77, para. 2). Nor can be found in Art. 123 an invitation to co-operate in the field of protection of the underwater

22 "Suffice it to mention that the convention neither lists nor requires the coastal States to conduct cooperation in any special way such as by means of agreements, accords or regional organizations. Coordination of activities under Article 123 may be achieved through such informal measures as consultation, exchange of information and unification of laws": SYMONIDES, *The Legal Status* (*supra*, note 2), p. 332.

archaeological and historical heritage or in the field of prevention of natural disasters. These omissions can hardly be explained.

However, if regional co-ordination in other matters is not mentioned in Art. 123, it is not prohibited either. The broadest co-ordination would be in conformity with the object and purpose of a treaty that has been drafted in the "desire to settle, in a spirit of mutual understanding and co-operation, all issues relating to the law of the sea" (UNCLOS preamble).

In fact, Art. 123 invites States bordering enclosed or semi-enclosed to do something that, in most cases, is already mandatory under other UNCLOS provisions that are addressed to all States parties to this convention.[23] In particular, the obligation to co-operate in the conservation and management of marine living resources is already provided for in Arts. 118 and 119, as regards the resources of the high seas, and can be inferred from Art. 62, para. 2, as regards the resources of the exclusive economic zone. Moreover, Art. 15 of the Agreement on the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 1995) provides that, in implementing the agreement in an enclosed or semi-enclosed sea, States are bound to take into account the natural characteristics of that sea and to act in a manner consistent with UNCLOS Part IX and other relevant provisions thereof. The obligation to co-operate for the preservation and protection of the marine environment is already provided for in UNCLOS articles from 197 to 201. The obligation to co-operate in marine scientific research is already provided for in UNCLOS articles from 242 to 244.

It is thus substantively correct to conclude that "the general law of the sea set out in the remainder of the Convention applies in enclosed and semi-enclosed seas" and that "no additional rights or jurisdiction are granted to the States bordering those seas".[24] If an added value were to be attributed in Art. 123, it could be found as regards the coastal State's right to unilaterally determine the allowable catch of the living resources in its exclusive economic zone (Art. 61, para. 1) and its capacity to harvest them (Art. 62, para. 1). In the case of enclosed or semi-enclosed seas, the coastal States is invited to co-ordinating itself with other bordering States. It is in any case evident that bordering States

23 "While strictly speaking there is a different level of legal obligation between the languages of 'shall' and 'should', nonetheless when examined within the totality of the 1982 LOSC [= Law of the Sea Convention] it makes little sense to subject enclosed or semi-enclosed seas to a lower standard of protection than other areas of marine protection": ORAL, *Regional* (*supra*, note 2), p. 440.

24 NANDAN, ROSENNE & GRANDY, *United Nations Convention* (*supra*, note 1), p. 365.

cannot deny or restrict the rights granted by the UNCLOS to other States. For instance, bordering States cannot reserve for themselves fishing activities in high seas "pockets" located inside an enclosed or semi-enclosed sea, excluding other States from such activities.

In conclusion, with or without Part IX, the legal content of the UNCLOS would not change very much. However, the fundamental message transmitted by Part IX of the UNCLOS is sufficiently clear again: if international co-operation is always recommendable in international law of the sea, the typical situation in which it is even more recommendable is that of enclosed or semi-enclosed seas.

3 Reasons for the Poor Substantive Content of Art. 123

Perhaps the poor substantive content of Part IX may be explained considering what the relevant articles could have provided, but finally did not. The UNCLOS negotiations document that Part IX is a compromise result between the position of those States that proposed a special regime for enclosed or semi-enclosed seas and those that preferred to avoid the creation of a new category of seas.

The initial phases of the negotiations show how the notion itself of enclosed or semi-enclosed seas could raise the concerns of the major maritime powers, traditionally linked to the principle of freedom of the sea, in particular freedom of navigation for commercial and military purposes. The discussion held during the meeting of 13 August 1974 in relevant in this regard.

Algeria proposed a set of draft articles that subordinated to the interest of bordering States relating to national security and safety of navigation the passage of warships through straits giving an oceanic access to a semi-enclosed sea (the reference to the Strait of Gibraltar was implicit, but evident):

1. Warships and government ships operated for non-commercial purposes which are passing through straits under the conditions provided for in article 1, paragraph 1, shall enjoy the right of innocent passage.
2. The regime of innocent passage must be established in such a way as to safeguard the legitimate rights and interests of coastal States with regard, inter alia, to national security and safety of navigation.[25]

25 Doc. A/CONF.62/C.2/L.20 of 23 July 1974 (United Nations, *Third United Nations Conference on the Law of the Sea*, III, New York, 1975, p. 198). The expression "coastal States", used in para. 2, appears ambiguous (coastal States of the strait or of the semi-enclosed sea?).

A reference to bilateral or regional agreements regulating various activities, including navigation, in enclosed and semi-enclosed seas was made in the intervention by the Algerian delegate:

> At the same time, the convention should leave the door open for bilateral and regional agreements – to be concluded in accordance with equitable principles between the coastal States concerned – which would solve any problems generated by enclosed and semi-enclosed seas, whether they related to the delimitation of maritime space, the management of resources, the preservation of the marine environment or navigation.[26]

Also Iran envisaged a special regime for enclosed or semi-enclosed seas relating, *inter alia*, to navigation:

> The problems raised by the semi-enclosed seas with regard to the management of their resources, international navigation and the preservation of the marine environment justified granting them a particular status constituting an exception to the general rule. When worked out on a regional basis, that status would obviously have to take into account the needs and interests of all the coastal States in the region. (…)
>
> With regard to international navigation in semi-enclosed seas, there was of course a marked difference between the coastal States of those seas for which freedom of passage through straits connecting those seas to the oceans was vital to their trade and communications on the one hand, and all other States on the other hand. Such freedom of passage must exist for the former category of States. However, a different regime should apply to the navigation of other States whose ships could pass through straits connecting the oceans with semi-enclosed seas only for the purpose of calling at one of the ports of the semi-enclosed sea. As a matter of fact, semi-enclosed seas such as the Persian Gulf were seas of destination rather than transit.[27]

Even though this was not explicitly mentioned in the draft articles on enclosed or semi-enclosed seas submitted by Iran, the possibility of a special regime for navigation was implied in it:

26 Intervention by the Algerian delegate, Mesloub (*ibidem*, II, p. 277).
27 Intervention by the Iranian delegate, Kazemi (*ibidem*, II, p. 273).

> The general rules set out in this Convention shall apply to an enclosed or semi-enclosed sea in a manner consistent with the special characteristics of these seas and the needs and interests of their coastal States.[28]

The draft submitted by Turkey envisaged a special regime, based on equity and on consultations among the bordering States, for the application of the provisions of the future convention to enclosed or semi-enclosed seas:

> The general rules set out in chapters … (chapters relating to territorial sea and economic zone) of this Convention shall be applied, in enclosed and semi-enclosed seas, in a manner consistent with equity. States bordering enclosed and semi-enclosed seas may hold consultations among themselves with a view to determining the manner and method of application, appropriate for their region, for the purposes of this article.[29]

On the contrary, other States were strongly oriented towards freedom of navigation and against the very notion of enclosed or semi-enclosed seas that could endanger it.[30] France warned against a new concept that presented an ambiguous content and was liable to lead to an inconceivable result:

> (…) the expression 'enclosed or semi-enclosed seas' was not a traditional concept of international law. The notion of 'enclosed seas' seemed rather to be a purely geographically one; the legal rules applicable to them were not part of international public maritime law and the Conference should not concern itself with them. The idea of 'semi-enclosed seas' was extremely vague. The inclusion of the item in the agenda tended to give an ambiguous formula legal status. (…)
>
> It was inconceivable that the idea was to restrict the freedom of navigation and overflight in areas considered to be semi-enclosed seas. The institution of 200-mile economic zones would place all the renewable and non-renewable resources of the maritime areas concerned under the

28 A/CONF.62/C.2/L.72 of 21 August 1974 (*ibidem*, III, p. 237).

29 A/CONF.62/C.2/L.56 of 13 August 1974 (*ibidem*, III, p. 230).

30 "De fait, et dans une large mesure, pour l'U.R.S.S. comme pour les U.S.A., mais également pour l'Espagne, la France ou l'Italie, il ne paraît pas possible de lier leurs activités, notamment militaires, dans le basin méditerranéen aux résultats d'une coopération où s'exprimeraient les intérêts des autres Etats de la région. Du point de vue de ces puissances la notion de mer semi-fermées peut, en évoluant, déboucher sur une autre sorte d'appropriation des mers étroites par les Etats riverains": BENCHIKH, *La Mer Méditerranée, mer semi fermée*, in *Revue Générale de Droit International Public*, 1980, p. 290.

> jurisdiction of the coastal States and there was thus no need for those coastal States to demand special provisions for semi-enclosed seas in the convention; regional agreements should suffice. As far as preservation of the marine environment was concerned, the maritime areas in question were, like others, covered by general international rules, although specific rules might be necessary in certain special circumstances, such as those recognized in a number of international conventions. In that case, too, there was no need to establish a new legal category to solve the problems that might arise.[31]

Israel stressed the crucial character of freedom of waterways and of passage through international straits, including their overflight:

> Above all, the semi-enclosed seas which had been mentioned at the Conference and their related straits and waterways played a vital role for the whole world in the system of communications by sea and air. Accordingly the freedoms of navigation and overflight must retain their priority in those semi-enclosed seas, especially as they did not affect the consumptive use of the sea and its resources. Those freedoms were indivisible: they would survive only when available to all States in all the waterways of a given system on an equal basis and without discrimination. Any interference, however petty, would disturb the equilibrium of the system as a whole, on which the rights of all hung. (…) the States bordering on enclosed and semi-enclosed seas were aware of the delicacy of the position.[32]

The Soviet Union, besides considering unacceptable the establishment of a special regime addressing States bordering enclosed or semi-enclosed seas and affecting States traditionally using them as international waterways, put in question the fact that the Mediterranean could be included into this category of seas:

> The question of enclosed seas had both a geographical and a juridical aspect. Was the Mediterranean, for example, an enclosed or semi-enclosed sea? He would say it was neither. It contained many other seas and could

31 Intervention of the French delegate, Queneudec, in United Nations, *Third United Nations Conference* (*supra*, note 25), II, p. 276.

32 Intervention of the Israeli delegate, Rosenne (*ibidem*, II, p. 274).

> be compared to an ocean. It was an immense body of water used as a high sea by all countries for international shipping.[33]

Also a draft presented by Iraq stressed freedom of navigation through enclosed or semi-enclosed seas.[34]

Besides potentially affecting navigation,[35] the notion of enclosed or semi-enclosed seas could affect other sensitive subject matters that were being negotiated, such as the width of the territorial sea, the right to establish an exclusive economic zone or the rules on maritime delimitations. Turkey took the position that States bordering a semi-enclosed sea should not be granted the right to establish an exclusive economic zone:

> His delegation thought that the economic zone concept could not possibly apply to semi-enclosed seas, because of the small size of the latter. While his delegation could accept the establishment of economic zones, it would require reciprocal concessions. The economic zone concept was a regional one and did not apply to States bordering on semi-enclosed seas, which should have a territorial sea and an area subject to a continental shelf regime; the possibility of an economic zone should be the last one to be considered.[36]

Other drafts presented by Turkey and relating to enclosed or semi-enclosed seas aimed at subjecting the width of the territorial sea inside such seas to an agreement among interested States or at establishing a special regime for the delimitation of the maritime spaces of islands located inside such seas (the reference to the problems, persisting also today, between Greece and Turkey inside the Aegean Sea was implicit, but evident):

33 Intervention of the Soviet delegate, Barabolya (*ibidem*, II, p. 277).

34 A/CONF.62/C.2/L.71 of 21 August 1974 (*ibidem*, III, p. 236).

35 "Diverses raisons expliquent la portée internationale considérable de la notion de mer semi-fermée appliquée à la Méditerranée: la plus décisive est certainement l'importance stratégique de cette mer notamment pour les grandes puissances. Il en résulte que la liberté de navigation ne saurait souffrir dans cette région aucune limite ou contrainte puisque la Méditerranée, plus que toute autre mer, est un lieu de passage obligé pour atteindre certains rivages. On comprend alors pourquoi la notion de mer semi-fermée fait peur. Elle fait peur non pas par ce qu'elle contient, mais par ce qu'elle risque de développer": BENCHIKH, *La Mer Méditerranée* (*supra*, note 30), p. 290.

36 Intervention of the Turkish delegate, Tuncel, in United Nations, *Third United Nations Conference* (*supra*, note 25), II, p. 277. For a different position, see the intervention of the Greek delegate, Theodoropoulos (*ibidem*, II, p. 277).

> In areas of semi-enclosed seas, having special geographical characteristics, the breadth of the territorial seas shall be determined jointly by the States of that area.[37]
>
> In areas of semi-enclosed seas, having special geographic characteristics, the maritime spaces of islands shall be determined jointly by the States of that area.[38]

The inclusion in the future convention of a special regime for enclosed or semi-enclosed seas was likely to open a Pandora box that put at risk the very conclusion of a convention on the law of the as a whole.[39] This explains why the "negotiating texts" presented by the chairman of Commission 2 of the third United Nations Conference on the Law of the Sea retained a few provisions relating to this kind of seas, on the one hand, and watered them down by excluding any conflictual contents on the other. What was, in the 1975 draft, an obligation to co-operate,[40] became in 1976 an invitation[41] to basically do what was already mandatory according to other provisions of the (future) convention.[42] As stated by Andrés Aguilar, chairmen of Commission 2,

> on the issue of enclosed or semi-enclosed seas, I have responded to expressions of dissatisfaction with the provisions in the single negotiating

37 A/CONF.62/C.2/L.8 of 15 July 1974 (*ibidem*, III, p. 188).

38 A/CONF.62/C.2/L.55 of 13 August 1974 (*ibidem*, III, p. 230).

39 In 1980 Germany submitted a proposal to delete Part IX. See WINKELMANN, *Article 122* (supra, note 1), p. 883.

40 The basis of present UNCLOS Art. 123 was Art. 134 of the 1975 informal single negotiating text, doc. A/CONF.62/WP.8, in United Nations, *Third United Nations Conference* (*supra*, note 25), IV, New York, 1975, p. 171, where the indicative mood ("shall cooperate") e and the wording "shall co-ordinate" were used.

41 The change from the indicative to the conditional mood and the use of the wording "shall endeavour to co-ordinate" appeared in Art. 130 of the 1976 revised single negotiating text (doc. A/CONF.62/WP.8/Rev.1, *ibidem*, V, New York, 1976, p. 172).

42 If to an obligation to co-operate a procedural content can be given, consisting in an obligation to behave in good faith in informing the other interested States and in participating to negotiations with a view to reaching an agreement (see, *inter alia*, the judgment of 20 February 1969 by the International Court of Justice on the *North Sea Continental Shelf* case, in International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders*, 1969, para. 85), an invitation to co-operate seems devoid of concrete legal meaning. For a less pessimistic view, see GRBEC, *Extension* (*supra*, note 2), p. 42: "It is therefore possible to assert that States bordering enclosed and semi-enclosed seas are under an obligation to exercise and perform their duties under UNCLOS in the light of the general duty (policy) of co-operation embodied *inter alia* in the first element of Article 123. The latter may be qualified as synonymous with a good faith duty to endeavour to co-operate in the exercise of the rights and duties under UNCLOS".

text by making less mandatory the co-ordination of activities in such seas.[43]

While the notion of enclosed or semi-enclosed seas appears in the UNCLOS, any misunderstanding on a special regime is avoided: it is implicitly, but radically, excluded.

4 Instances of Co-Operation Frameworks in Enclosed or Semi-Enclosed Seas

While the purpose of Art. 123 is only "promotional",[44] States bordering some enclosed or semi-enclosed seas have already put in place various forms of regional co-operation,[45] in certain cases through treaties concluded even before the adoption of the UNCLOS.[46]

A number of treaties aiming at the protection of the environment in "regional" seas may be recalled in this regard, such as, besides the case of the Mediterranean Sea:[47] the Convention on the Protection of the Marine Environment in the Baltic Sea Area (Helsinki, 1974), subsequently replaced by the homonymous convention concluded in Helsinki in 1992, with seven annexes; the Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (Kuwait, 1978),[48] with four protocols; the Regional Convention for the Conservation of the Red Sea and of the Gulf of Aden Environment (Jeddah, 1982), with three protocols; the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena de Indias, 1983), with three protocols; the Convention on the Protection of the Black Sea Against Pollution (Bucharest, 1992), with four protocols. In the case of the Arctic Sea, assuming that it can be considered as a semi-enclosed sea,[49] a framework convention for the protection of the marine environment is lacking. Nevertheless, three specific

43 United Nations, *Third United Nations Conference* (*supra*, note 25), V, p. 154.
44 See VUKAS, *The Mediterranean: An Enclosed or Semi-Enclosed Sea?*, in VUKAS (ed.), *The Legal Regime* (*supra*, note 2), p. 64.
45 "En effet, les mers fermées ou semi-fermées sont aujourd'hui les milieux privilégiés où la tendance au régionalisme se manifeste le plus clairement": LEANZA, *Le régime juridique* (*supra*, note 2), p. 159.
46 See DIMENTO & HICKMAN (eds.), *Environmental Governance of the Great Seas*, Cheltenham, 2012.
47 *Infra*, para. 5.
48 The convention applies to the Arab or Persian Gulf.
49 See *supra*, para. 2.

agreement have been concluded within the Arctic Council – the Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic (Nuuk, 2011), the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (Kiruna, 2013) and the Agreement on Enhancing International Arctic Scientific Cooperation (Fairbanks, 2017) – and an Agreement to Prevent Unregulated High Seas Fisheries in the central Arctic Ocean (Ilulissat, 2018) has been adopted also with the participation of some non-Arctic States.

5 Regional Co-Operation in the Mediterranean Sea

5.1 *The Achievements*

The present picture of regional co-operation in the Mediterranean Sea[50] is based on a framework treaty – the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona, 1976; amended in 1995) –, with seven protocols, relating, respectively, to: Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea (Barcelona, 1976; amended in 1995); Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea (Valletta, 2002);[51] Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities (Athens, 1980; amended in 1996); Specially Protected Areas and Biological Diversity in the Mediterranean (Barcelona, 1995);[52] Pollution Resulting from Exploration and Exploitation of the Continental Shelf, the Seabed and its Subsoil (Madrid, 1994); Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal (Izmir, 1996); Integrated Coastal Zone Management in the Mediterranean (Madrid, 2008). The so-called "Barcelona system" includes also a non-binding instrument adopted in 2008, that is the Guidelines on Liability and Compensation for Damage Resulting from Pollution of the Marine

50 See RAFTOPOULOS, *Studies on the Implementation of the Barcelona Convention: The Development of an International Trust Regime*, Athens, 1997; SCOVAZZI, *International Cooperation as regards Protection of the Environment and Fisheries in the Mediterranean Sea*, in *Anuario Español de Derecho Internacional*, 2018, p. 301.

51 The protocol replaces the previous protocol concluded in 1976.

52 The protocol replaces the previous protocol concluded in 1982.

Environment in the Mediterranean Sea Area.[53] The picture covers almost all forms of pollution of the marine environment, with the exception of pollution from noise.

Adopted while the UNCLOS was being negotiated, the Barcelona Convention was amended in 1995 in order to reflect the main principles embodied in the Declaration on Environment and Development (Rio de Janeiro, 1992), such as the principle of sustainable development and the precautionary approach. Besides this general aspect, with the passing of time the Barcelona system has shown an appreciable degree of flexibility, as all the new or amended protocols contain rules or mechanisms addressing in a constructive way emerging environmental concerns. For instance, the new Protocol on specially protected areas enlarges its geographical scope of application to the waters beyond the external limit of the territorial sea[54] and establishes the List of Specially Protected Areas of Mediterranean Importance ("SPAMI List"), which includes sites that are of importance for conserving the components of biological diversity in the Mediterranean, contain ecosystems specific to the Mediterranean area or the habitats of endangered species or are of special interest at the scientific, aesthetic, cultural or educational levels.[55] The List is intended as a means to ensure the effective implementation by States parties of the protection and conservation measures specified in their proposal for inscription of a site on it.[56] The Protocol on integrated coastal zone management not only is the first and, up to now, the only international treaty (error excepted) specifically devoted to this subject matter, but can also greatly influence domestic territorial policies by harmonizing them at high standard of environmental protection.

To achieve environmental conservation objectives is directed also the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (Monaco, 1996; ACCOBAMS), adopted within the framework of the Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 1979).[57]

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53 See SCOVAZZI, *The Mediterranean Guidelines for the Determination of Environmental Liability and Compensation: The Negotiations for the Instrument and the Question of Damage that Can Be Compensated*, in *Max Planck Yearbook of United Nations Law*, 2009, p. 183.

54 That is beyond 12 n. m. for most Mediterranean States.

55 Art. 8, para. 2.

56 See Art. 9, para. 5.

57 See SCOVAZZI, *The Agreement on the Conservation of Cetaceans of the Black Sea, the Mediterranean Sea and the Contiguous Atlantic Area*, in MEKOUAR & PRIEUR (coord.), *Droit, humanité et environnement – Mélanges en l'honneur de Stéphane Doumbé-Billé*, Bruxelles, 2020, p. 589.

In the field of marine living resources, the General Fisheries Commission for the Mediterranean (GFCM) was established by an agreement concluded in 1949 within the framework of the Food and Agriculture Organization of the United Nations (FAO) and subsequently amended several times. The GFCM Agreement has the objective "to ensure the conservation and sustainable use, at the biological, social, economic and environmental level, of living marine resources, as well as the sustainable development of aquaculture in the area of application".[58] Particularly interesting, among the measures that the GFCM may adopt, is the establishment of "fisheries restricted areas" for the protection of vulnerable marine ecosystems, including but not limited to nursery and spawning areas.[59]

As regards marine scientific research, the regional organization operating in the Mediterranean Sea is the Mediterranean Science Commission (*Commission Internationale pour l'Exploration Scientifique de la Méditerranée*, CIESM), whose first constitutive assembly was held in 1919 in Madrid and has today its headquarters in Monaco. Specific project of scientific research are being carried out under the sponsorship of the secretariats of the agreements relating to the protection of the environment or fisheries (Barcelona Convention, ACCOBAMS, GFCM).

5.2 *The Gaps*

As already remarked,[60] UNCLOS Art. 123 cannot be understood as preventing co-operation in subject matters not explicitly listed in it, if such co-operation is desirable.

A gap in regional co-operation can be noticed as regards the preservation of historical or archaeological objects, despite the particularly rich cultural heritage present on the Mediterranean seabed. As pointed out in the Declaration on the Submarine Cultural Heritage in the Mediterranean Sea, adopted on 10 March 2001 by experts participating in a conference held in Syracuse,

> the Mediterranean basin is characterized by the traces of ancient civilizations which flourished along its shores and, having developed the first seafaring techniques, established close relationships with each other.

58 Art. 2, para. 2.

59 Art. 8, b, iv. For example, Recommendation 44/2021/3 provides for the establishment of a fisheries restricted area in the Bari Canyon in the southern Adriatic Sea.

60 *Supra*, para. 2.

> The Mediterranean cultural heritage is unique in that it embodies the common historical and cultural roots of many civilizations. It is also an integral part of the cultural heritage of humanity and an important element in the history of peoples and societies.[61]

Art. 6 of the Convention on the Protection of the Underwater Cultural Heritage (Paris, 2001), concluded within the framework of the United Nations Educational, Scientific and Cultural Organization (UNESCO),[62] encourages States parties to enter into regional agreements fthat would ensure better protection of underwater cultural heritage than the protection granted by that convention. During an intergovernmental conference held in Syracuse in 2003, Italy presented a draft Agreement on the Protection of the Underwater Cultural Heritage in the Mediterranean Sea. Regrettably, since 2003, no further steps towards the negotiation and finalization of the agreement have been taken by Italy or the other countries concerned.[63]

An important aspect of regional co-operation that should be developed in the Mediterranean Sea relates to the thorny subject matter of navigation,[64] in particular the prevention of pollution from vessels. Here co-operation at the regional level needs to be supported by consistent rules adopted also at the world level. Technical rules, such as those relating to design, construction, equipment and manning of ships, require to be established at a uniform level, as navigation would be difficult, if not impossible, if different or conflicting provisions on characteristics of ships or modalities of navigation were adopted at the domestic or regional level. UNCLOS Art. 211, para. 1, binds States, "acting through the competent international organization or general diplomatic conference", to establish international rules and standards to prevent, reduce and control pollution from vessels, as well as to set forth routeing systems designed to minimize the threat of accidents which might cause pollution of the marine environment.

The relevant means in this regard is the creation of a Particularly Sensitive Sea Area (PSSA), where the International Maritime Organization (IMO), according to the revised PSSA Guidelines (Resolution A.982(24) of 1 December

61 Paras. 1 and 2. Text in CAMARDA & SCOVAZZI (eds.), *The Protection of the Underwater Cultural Heritage – Legal Aspects*, Milano, 2002, p. 448. See BEURIER, *Commentaire de la Déclaration de Syracuse sur le patrimoine culturel sous-marin de la Mer Méditerranée*, *ibidem*, p. 279.

62 Sixteen Mediterranean coastal States are today parties to the convention.

63 See SCOVAZZI, *The Protection of Underwater Cultural Heritage in the Mediterranean Sea*, in *Italian Yearbook of International Law*, 2021, p. 73.

64 The adjective "thorny" is justified by what has been remarked *supra*, para. 3.

2005, as amended by Resolution MEPC.267(68) of 15 May 2015), can establish special measures to prevent pollution from vessels. A PSSA is defined as

> an area that needs special protection through action by IMO because of its significance for recognized ecological or socio-economic or scientific reasons and which may be vulnerable to damage by international maritime activities.[65]

The first PSSA established in the Mediterranean is the Strait of Bonifacio, an international strait between the islands of Corsica (France) and Sardinia (Italy), where the risk of damage from ships groundings and consequent pollution of the unique coastal ecosystem is particularly high. For this reason, since 1993, both bordering States have adopted a number of measures, including the prohibition of transit in the strait for tankers and ships carrying dangerous chemical substances or substances in bulk liable, in the event of a casualty, to pollute the sea or the coasts and flying their respective flag,[66] However, IMO Marine Environment Protection Committee Resolution MEPC.204(62) of 15 July 2011, which designates the Strait of Bonifacio as a PSSA and recognizes "the ecological, socio-economic, and scientific attributes of the area (…), as well as its vulnerability to damage by international shipping activities", only recommends masters of vessels passing through the strait to avail themselves of the services of a qualified pilot[67] and informs them that, on the basis of the French and Italian decrees,

> the prohibition of navigation in the Strait does not apply to merchant ships flying flags of third countries (…). This ban has led to a reduction of marine traffic, but at the same time, it leaves the possible passage of ships flying other flags and often these ships are in unsafe conditions (especially the lack of double hull of similar technologies) and poor maintenance.[68]

The picture is, frankly speaking, rather disappointing. The two bordering States have adopted measures limiting the risk of pollution caused by vessels

65 Annex to Resolution A.982(24), para. 1.2.

66 French Prefectorial Decrees No. 1/1993 and No. 147/2018; Italian Ministerial Decrees of 26 February 1993 and 27 November 1998.

67 It is unclear from the wording of Annex 4 to Resolution MEPC.204(62) whether the IMO mandates, or recommends to, vessels flying the flag of other States the use of the ships' routeing and the ship reporting measures established by France and Italy.

68 Annex 4 to Resolution MEPC.204(62).

flying their flag and have refrained from affecting the rights of vessels flying the flag of third States, in compliance with the provisions on transit passage through international straits (UNCLOS Part III). However, the international organization that should take care of limiting the risk caused by global navigation confines itself to acknowledging the environmental vulnerability of the Strait of Bonifacio, as well the unsafe condition and poor maintenance of several transiting ships, without adopting for all vessels measures equivalent to those that the bordering States have adopted for the ships flying their flag. It is true that navigation through international straits is an important concern for many States, but it is also true that straits, and especially certain straits, are waterways where navigation is particularly dangerous and requires effective preventive measure adopted at the global level on a non-discriminatory basis. The competent international organization should be in a position to strike a fair balance between the two potentially conflicting interests of navigation and protection of the environment – what does not seem the case for the recommended measures for the Strait of Bonifacio that, in fact, could be seen as an incentive for French and Italian shipowners to reflag their vessels in order not to be burdened by the national measures of the two bordering States. Sub-regional initiatives in the field of navigation deserve, if they are reasonable, to be better supported by action taken by the appropriate global forum.

IMO will have in the near future another opportunity to strike a (hopefully better) balance between navigation and protection of the environment, due to the proposal submitted in 2022 by France, Italy, Monaco and Spain to designate another PSSA in the North-Western Mediterranean Sea to protect cetaceans from international shipping. The proposed PSSA encompasses waters that have been established as two SPAMIs under the already mentioned 1995 Barcelona Protocol on specially protected areas,[69] namely the "Pelagos sanctuary for the conservation of marine mammals" (France, Italy and Monaco, 2001) and the "Cetaceans Migration Corridor in the Mediterranean" (Spain, 2019). It seems that the proposed measures should not be overly conflictual, being they limited to a number of recommendations towards reducing the speed of vessels, keeping lookout and reporting cetaceans' sightings and collisions with them. The IMO Marine Environment Protection Committee agreed in principle to the designation of the future PSSA, subject to the further development and approval of the proposed associative protective measures by the appropriate IMO Sub-Committee or Committee, and agreed to set a technical group to further review the proposal.[70] The PSSA was in fact designated in 2023 (Resolution MEPC 380 (80)).

69 *Supra*, para. 2.A.

70 Doc. MEPC 79/15 of 8 February 2023, paras. 10.6 and 10.10.

6 Conclusive Considerations

If the few UNCLOS provisions on enclosed or-semi-enclosed seem hardly to have any prescriptive content by themselves, they encourage co-operation[71] in a situation where the reasonableness of forms of co-operation is already self-evident. With or without the UNCLOS, in some enclosed or semi-enclosed seas the States concerned have concluded various instruments to put in effect such co-operation. The thorny question for the future is likely to be how to strike a fair balance between the world interest in navigation and the regional interest in the protection of the environment in some areas of enclosed or semi-enclosed seas where the risk of accidents is particularly high.

71 "(…) Art. 123 cannot be considered irrelevant. What it offers is a kind of a boost toward making further improvements in cooperation between states bordering the enclosed and semi-enclosed seas: SYMONIDES, *The Legal Status* (note 2), p. 333.