Forthcoming in Natalie Klein (ed), *Unconventional Lawmaking in the Law of the Sea: Current Practice and Future Prospects* (Oxford University Press, Oxford, 2021)

# Unconventional Law-making in the Law of the Sea and Area-based Conservation Measures

Karen N. Scott

## 1. Introduction

Area-based conservation in the marine environment is an important tool for implementing an ecosystem approach to protecting the marine environment and managing activities on an integrated, holistic basis. Area-based measures are now employed by institutions at all levels to support marine spatial planning, to protect species and ecosystems and to manage activities such as fishing, minerals extraction and even navigation. As will be demonstrated in this chapter, informal or unconventional law-making processes have been particularly significant in the context of area-based conservation in terms of both the development and implementation of the law in this field. This chapter begins with a discussion of how 'unconventional' or 'informal' law-making is defined for the purposes of subsequent analysis, before going onto define marine protected areas (MPAs) and area-based conservation more generally. Six categories of unconventional or informal law-making are identified, focusing on instruments that are characterised by informality with respect to actors, processes or outputs but which are nevertheless normative in purpose and effect. This chapter briefly considers the role played by these instruments in developing and implementing the law relating to area-based conservation and its relationship with formal law. The chapter concludes with a short analysis of the potential impact of a new formal instrument, the international legally binding instrument under the 1982 United Nations Convention on the Law of the Sea (LOSC) on the conservation and sustainable use of marine biodiversity beyond national jurisdiction (the ILBI), on current and future informal or unconventional law-making processes related to area-based conservation.

## 2. 'Unconventional' or 'Informal' Law-making and the Law of the Sea

'Unconventional' or 'informal' law-making is an inherently relational concept, contrasted with conventional or formal sources of law. At its most basic definition, unconventional law can be defined as including any 'law' not categorised as such by Article 38 of the 1945 Statute of the International Court of Justice (namely, treaties, custom, general principles, judicial decisions and the writings of eminent publicists). Joost Pauwelyn, in his seminal work (with Rameses Wessel and Jan Wouters) on informal international law-making, takes a more sophisticated approach and focuses on law that 'dispenses with certain formalities' in relation to process, actors or output.[1] Much work on unconventional law-making concerns so-called 'soft law', defined by Alan Boyle as 'a convenient description for a variety of non-legally binding but normatively worded instruments used in contemporary international relations by States and international organizations.'[2] Soft law may be informal in terms of the actors and/ or processes involved in its creation, but is principally characterised by informality in respect of its output. By contrast, unconventional law-making also

[1] Joost Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions' in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds), *Informal International Lawmaking* (OUP, 2012) 13, 15.
[2] Alan Boyle, 'Soft Law in International Law-making' in Malcolm D. Evans (ed), *International Law* (5th edn, OUP, 2018), 119, 121.

encompasses legally binding – formal – outputs created by informal actors or processes such as treaty bodies or international organisations.[3]

Boyle's reference to 'norms' in his definition of soft law raises an important question as to the relationship between 'norms' and 'law'. Normative intent and/ or normative effect is an integral component of unconventional *law-making* for the purposes of this volume.[4] But while norms and law are both designed to influence the behaviour of legal actors, not all norms are law: '[t]he universe of norms is larger than the universe of law.'[5] Joost Pauwelyn helpfully distinguishes between 'legal acts' and 'legal facts', both of which may have 'legal effects'.[6] He defines a legal act as having formalities and emanating from an entity with the capacity to act whereas a legal fact can 'emanate from anyone and from anywhere'.[7] The legal effect of a legal act stems 'directly and independently from the legal act' whereas 'the legal effects of a legal fact stem not from the fact as such but from the application of a separate legal act whose application is triggered by this fact.'[8] Applied to area-based conservation measures, CCAMLR Conservation Measure 91-05 (2016), which established the Ross Sea region marine protected area (MPA)[9] is a legal act whereas Sustainable Development Goal (SDG) 14.5, which establishes the target of protecting 10 percent of the marine and coastal environment by 2020[10] is a legal fact. Both instruments are normative, and both have legal effects, but neither are necessarily 'law' as defined by conventional or even unconventional means.

The distinction between 'law' and 'non-law' has long exercised both academics and practitioners of international law. For commentators such as Prosper Weil and Jan Klabbers, there is a bright line between law and non-law, and the concepts of 'soft law' and, more generally, relative normativity, are roundly rejected.[11] Kal Raustiala similarly argues: '[t]hat many nonbinding commitments ultimately influence state behavior illustrates the complexity of world politics, not the character of those commitments.'[12] Other scholars, by contrast, recognise the legal effects of unconventional instruments expressly[13] or implicitly. Kenneth Abbot and Duncan Snidal for example, assert that '[c]ontemporary international relations are legalized to an impressive extent, yet international legalization displays great variety.'[14] This pluralization of international law may arise from a desire to recognise that unconventional instruments have, in practice, legal effect,[15]

---

[3] See Jutta Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15 LJIL 1 and Robin R Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 AJIL 623.
[4] See Natalie Klein, Chapter 1, this volume.
[5] Joost Pauwelyn, 'Is It International Law or Not, and Does It Even Matter?' in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds), (n 1), 125, 125.
[6] Ibid, 153 – 154.
[7] Ibid, 154.
[8] Ibid.
[9] Discussed in section 5(a)(ii), below.
[10] General Assembly Resolution 70/1, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1 (15 September 2015) available at undocs.org. SDG 14.5 is discussed in section 5(d)(i), below.
[11] Prosper Weil, 'Towards Relative Normativity in International Law' (1983) 77 AJIL 441; Jan Klabbers, 'The Redundancy of Soft Law' (1996) 65 Nordic JIL 167. See also Jean D'Aspremont, *Formalism and the Sources of International Law* (2011, OUP).
[12] Kal Raustiala, 'Form and Substance in International Agreements' (2005) 99 AJIL 581, 590.
[13] See for example, Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 ICLQ 850.
[14] Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 53 International Organization 421, 421.
[15] See for example, Anthony Aust, 'The Theory and Practice of Informal International Instruments' (1986) 35 ICLQ 787.

from a critique or dissatisfaction with conventional international law-making processes,[16] or from ideology, such as the New Haven School of International Law, which defines international law broadly as a process of authoritative decision-making.[17]

For the purposes of this book, informal or unconventional law-making is defined by Natalie Klein in the Introduction as 'the process of international cooperation to reach agreements (other than treaties) between public authorities, with or without the participation of private actors or international organizations, in varied institutions and networks. This cooperation typically entails 'norm-setting or public policy making by public authorities' and on this basis warrants the description of 'law-making".[18] Bearing in mind that informality may arise with respect to actors, process and/ or outputs and that unconventional law is characterised by normative intent or normative effect or both, this chapter identifies the following categories of unconventional law-making in relation to area-based conservation measures. First, binding measures that are adopted by regional fisheries management organisations (RFMOs) and regional seas organisations. Examples are drawn from the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the OSPAR Commission (established by the 1992 Convention for the Protection of the marine Environment of the North-East Atlantic). Second, binding measures that are adopted by the International Maritime Organisation (IMO) and International Seabed Authority. Third, non-binding 'pledges' – to use Kal Raustalia's term[19] – adopted by states through the United Nations General Assembly (UNGA), the 1992 Biological Diversity Convention (CBD) and on a regional basis. In respect of the latter, the 2014 Declaration for the Conservation of the Sargasso Sea provides a contemporary, pertinent example. Fourth, non-binding guidelines or other initiatives adopted by international treaty bodies other organisations. Relevant examples in this section include the work of the CBD, particularly in relation to ecologically or biologically significant areas (EBSAs) and the UN Food and Agricultural Organisation (FAO) and vulnerable marine ecosystems (VMEs). Finally, this chapter will examine non-binding guidelines and other initiatives adopted by a (quasi) NGO, the IUCN. Examples in this section comprise the IUCN guidelines on protected areas and MPAs, the identification of Important Marine Mammal Areas (IMMAs) and the IUCN Global Standard for the Identification of Key Biodiversity Areas. It is acknowledged that this final category stretches the term 'public authorities' as set out by Natalie Klein in chapter 1 of this volume, but the IUCN is a hybrid organisation involving both states and NGOs and its standards have had undeniable legal effects on the law relating to area-based conservation.[20]

The order in which these unconventional or informal examples of law-making are listed demonstrates a continuum of both conventionality (or informality) and law-making. Decisions establishing area-based conservation measures taken by institutions such as the IMO, RFMOs, regional seas organisations and the ISA are unconventional in so far as they do not constitute treaties or custom or are otherwise covered by Article 38 of the ICJ Statute. But the role of these organisations in developing the law of the sea is far from unconventional in 2021. As noted by James Harrison a decade ago, 'the creation of a universal legal order of the oceans has been significantly facilitated by the use of increasingly sophisticated law-making procedures involving

[16] See for example, Geoffrey Palmer, 'New Ways to Make International Environmental Law' (1992) 86 AJIL 259.
[17] See for example, Rosalyn Higgins, *Problems & Process. International Law and How We Use It* (Clarendon Press, 1994), 2.
[18] Natalie Klein, chapter 1, this volume (footnotes omitted).
[19] Kal Raustiala, 'Form and Substance in International Agreements' (2005) 99 AJIL 581, 581.
[20] See further, section 5(f), below.

international institutions.'[21] The status of pledges and non-binding targets is more complex. These are clearly normative in intent in that they are designed to influence the behaviour of legal actors and normative in effect (in that legal actors have changed their behaviour in response to these targets). They have legal effects so might be described as 'law-making', but they are arguably not in of themselves, 'law'. A similar conclusion might be reached in relation to non-binding measures and initiatives developed by both treaty and international organisations and by other non-state actors. The role played by these informal outputs may vary however, depending on the formality of the actor and the process of norm creation. Pledges adopted by states collectively or acting through an international organisation often seek to fill gaps in the law; to create standards – in relation to area coverage for example – where none previously exist. Measures adopted by more informal actors, such as the CBD and the IUCN largely serve to strengthen or to 'thicken'[22] existing law through the clarification of terms (such as a MPA) and the development of standards relating to the establishment and management of MPAs and other area-based conservation measures.

What cannot be denied however, is that area-based conservation measures have been largely developed by informal or unconventional law-making processes. While treaty-based measures have been used in some fields, such as in relation to mitigating ship-based pollution and whale conservation, it is institutions – state and non-state based – that have largely driven and developed the law and norms of area-based conservation to date. There is, however, no bright line distinction between formal and informal law and both exist side by side. Their relationship may be complementary or occasionally antagonistic,[23] but it is indubitably symbiotic. It is also not static. Whilst informal law-making has dominated area-based protection over the last decade or so, this may change if the negotiations for an internationally legally binding instrument for the conservation of biodiversity beyond national jurisdiction (ILBI) are successful. Area-based protection is one of five substantive areas slated to be included within the ILBI, and the instrument may set out binding detailed standards and processes for the establishment and management of MPAs beyond national jurisdiction. As will be demonstrated in the final section of this chapter, however, informal or unconventional processes and instruments are contributing to the development of the ILBI regime and are unlikely to be entirely replaced by it.

## 3. Defining Area-based Conservation Measures

There is no one definition of a marine protected area (MPA) or an area-based conservation measure.[24] The most widely applied definition of an MPA was developed by the IUCN and defines a protected area as 'a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.'[25] The IUCN has more recently clarified that 'only those sites where the main goal or outcome is conserving nature should be considered

[21] James Harrison, *Making the Law of the Sea* (CUP, 2011), 3.
[22] The term 'thicken' was identified by Rosemary Rayfuse at the 2019 workshop associated with this project.
[23] Mark A Pollack and Gregory C Shaffer, 'The Interaction of Formal and Informal International Lawmaking' in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds) (n 1), 241, 241
[24] See generally, Petra Dranker, 'Marine Protected Areas in Areas beyond National Jurisdiction' (2012) 27 International Journal of Marine and Coastal Law 291; Kristina M Gjerde and Anna Rulska-Domino, 'Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead' (2012) 27 International Journal of Marine and Coastal Law 351; Karen N. Scott, 'Conservation on the High Seas: Developing the Concept of the High Seas Marine Protected Area' (2012) 27 International Journal of Marine and Coastal Law (Special Issue: The 1982 Law of the Sea Convention at 30) 849; Tullio Scovazzi, 'Marine Protected Areas on the High Seas: Some Legal and Policy Considerations' (2004) 19 International Journal of Marine and Coastal Law 1.
[25] Nigel Dudley (ed) *Guidelines for Applying Protected Area Management Categories* (IUCN, 2008), 8.

MPAs.'[26] The parties to the 1992 Convention on Biological Diversity (CBD)[27] have adopted a similar definition of an MPA as 'any defined area within or adjacent to the marine environment, together with its overlaying waters and associated flora, fauna and historical and cultural features, which has been reserved by legislation or other effective means, including custom, with the effect that its marine and/or coastal biodiversity enjoys a higher level of protection than its surroundings.'[28] The broader notion of 'other effective area-based conservation measure' (OECM), which was inserted into Aichi Biodiversity Target 11 in the final stages of negotiations,[29] has been recently defined by the parties to the CBD as 'a geographically defined area other than a Protected Area, which is governed and managed in ways that achieve positive and sustained long-term outcomes for the in situ conservation of biodiversity, with associated ecosystem functions and services and where applicable, cultural, spiritual, socio-economic, and other locally relevant values.'[30] The IUCN has recently opined that fishery management areas with no wider conservation aims, large areas protecting a particular species across a region and areas that incidentally protect biodiversity while serving another purpose (such as managing offshore windfarm development) should be classified as OECMs.[31]

Applying these definitions, which, incidentally, were developed through informal or unconventional law-making processes but which are widely accepted, this chapter will discuss MPAs and OECMs established for conservation purposes. These include MPAs proper (such as the network developed by OSPAR), protected areas established for fisheries management purposes with a strong conservation objective (e.g. the Ross Sea MPA established by CCAMLR), particularly sensitive sea areas (PSSAs) established under the auspices of the IMO and areas of particular environmental interest identified by the ISA. This chapter will also include a brief discussion of guidelines and other processes associate with area-based conservation areas as developed by the CBD, FAO and IUCN. This chapter will not address broader area-based processes such as spatial planning and integrated coastal zone management.

## 4. 'Conventional' Sources of Area-based Conservation Measures

The 1982 United Nations Convention on the Law of the Sea (LOSC)[32] does not expressly provide for area-based protection. Nevertheless, parties to the Convention are subject to a general obligation to 'protect and preserve the marine environment'[33] and must take measures to 'protect and preserve rare and fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.'[34] A LOSC Annex VII Tribunal has recently confirmed that the designation of an MPA is a 'measure' for the purposes of Article 194(5) of the

[26] Jon Day, Nigel Dudley, Marc Hockings (eds) *Guidelines for applying the IUCN protected area management categories to marine protected areas* (second edition, 2019), 8.
[27] Convention on Biological Diversity, adopted 5 June 1992, entered into force 29 December 1993, 1760 UNTS 79 (CBD).
[28] Report of the Ad Hoc Technical Expert Group on Marine and Coastal Protected Areas, of 13 February 2003 (doc. UNEP/CBD/SBSTTA/8/INF/7), [30].
[29] Dan Laffoley, Nigel Dudley, Harry Jonas et al, 'An introduction to 'other effective area-based conservation measures' under Aichi Target 11 of the Convention on Biological Diversity: Origin, interpretation and emerging ocean issues' (2017) 27(S1) Aquatic Conservation: Marine and Freshwater Ecosystems 130, 131.
[30] CBD Decision 14/8 *Protected areas and other effective area-based conservation measures* (2018), [2].
[31] Jon Day, Nigel Dudley, Marc Hockings (eds) (n 26), 11.
[32] United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397 (LOSC).
[33] 1982 LOSC, Art 192.
[34] 1982 LOSC, Art 194(5).

LOSC.[35] The LOSC is complemented by the 1992 CBD, which, in Article 8, requires parties, as far as possible and appropriate, to establish a system of protected areas, and to manage those areas consistent with the aims of conservation.

A number of global and regional instruments provide for the designation of MPAs and other area-based conservation measures within their treaty text. For example, Special Areas may be designated under MARPOL 73/78, within which there are operational constraints on vessels in respect of the discharge of oil, noxious liquid substances, sewage, garbage and air pollution.[36] Twenty-four such Special Areas have been designated to date.[37] Under the 1946 International Convention on the Regulation of Whaling,[38] whale sanctuaries have been designated in the Southern and Indian Oceans.[39] The 1972 World Heritage Convention[40] provides for a detailed process for listing sites of natural heritage under the Convention[41] and fifty listed sites currently comprise MPAs,[42] with the Great Barrier Reef in Australia being listed as early as 1981.[43] The 1971 Ramsar Convention[44] similarly provides for a listing process for Ramsar sites, which may include 'areas of marine water the depth of which at tide does not exceed six metres.'[45]

At the regional level, the 1995 SPA Protocol[46] to the 1995 Barcelona Convention[47] explicitly provides for the designation of Specially Protected Areas of Mediterranean Importance (SPAMI)[48] with detailed criteria and processes for designation being set out in Annex I to the Protocol. There are 39 SPAMIs currently listed under the Protocol with one, the Pelagos Sanctuary for the Conservation of Marine Mammals, including an area of high seas.[49] In the Antarctic, Annex V of the 1991 Environmental Protocol[50] to the 1959 Antarctic Treaty[51] provides for the creation of Antarctic Specially Protected Areas (ASPAs) and Antarctic Specially Managed Areas (ASMAs) in the Antarctic Treaty Area, which extends south of 60° South Latitude.[52] Annex V expressly

---

[35] *In the matter of the Chagos Marine Protected Area Arbitration (Mauritius v. UK)* before an Arbitral Tribunal Constituted under Annex VII of the United Nations Convention on the Law of the Sea (Award 18 March, 2015), [538].
[36] International Convention for the Prevention of Pollution from Ships, adopted 2 November 1973 as modified by the Protocol of 1978 Relating Thereto, adopted 17 February 1978, entered into force 2 October 1983 (MARPOL 73/78), Annexes I to VI respectively.
[37] Source: https://www.imo.org/en/OurWork/Environment/Pages/Special-Areas-Marpol.aspx (accessed 7 January 2021).
[38] International Convention on the Regulation of Whaling, adopted 2 December 1946, entered into force 10 November 1948, 161 UNTS 72 (ICRW).
[39] 1946 ICRW Schedule, [7(a)] and [7(b)]. The Schedule is an integral part of the Convention (ICRW, Art 1(1)).
[40] Convention on the Protection of the World Cultural and Natural Heritage adopted 16 November 1972, entered into force 17 December 1975, 1037 UNTS 151 (WHC).
[41] 1972 WHC, Arts 2 and 11
[42] Source: https://whc.unesco.org/en/list/?search=&themes=7 (accessed 7 January 2021).
[43] Source: https://whc.unesco.org/en/list/154 (accessed 7 January 2021).
[44] Convention on the Wetlands of International Importance, adopted on 2 February 1971, entered into force 21 December 1975, 96 UNTS 245 (Ramsar Convention).
[45] Ibid, Art 1(1).
[46] Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, adopted 10 June 1995, entered into force 12 December 1999, (1995) 6 Yearbook of International Environmental Law 887 (1995 SPA Protocol).
[47] Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, adopted 10 June 1995, entered into force 9 July 2004, 1102 UNTS 27 (1995 Barcelona Convention).
[48] 1995 SPA Protocol, Art. 8.
[49] Source: https://www.rac-spa.org/spami (accessed 5 January 2021).
[50] Protocol on Environmental Protection to the Antarctic Treaty, adopted 4 October 1991, entered into force 14 January 1998, (1991) 30 ILM 1461 (1991 Environmental Protocol).
[51] Antarctic Treaty, adopted on 1 December 1959, entered into force 23 June 1969, 402 UNTS 71.
[52] 1959 Antarctic Treaty, Art. VI.

stipulates that protected areas may be established in any marine area[53] although the designation of MPAs under the Environmental Protocol has been slow, with fewer than 20 percent of ASPAs established having a marine component.[54] Although ASPAs and ASMAs are designated by separate Measures, decisions are taken on the basis of consensus and Annex V to the Protocol sets out detailed criteria and process for designation.

## 5. 'Unconventional' Sources of Area-based Conservation Measures

As noted above, there is no bright line distinction between conventional and so-called unconventional law-making. Where area-based conservation measures or very detailed guidelines and processes are set out within a treaty, as illustrated by the examples in the previous section, these can uncontroversially be categorised as conventional or formal law. Similarly, a non-binding pledge adopted through the UN with normative intent and normative effect can be considered an example of informal or unconventional law-making. But is the development of area-based conservation through decision-making within an international institution unconventional, and does it matter whether decisions are taken by consensus or whether they build on a clear formal law base? For the purpose of this chapter, this author has, for example, distinguished between the 1991 Environmental Protocol to the Antarctic Treaty, which sets out detailed criteria and processes for the establishment of protected areas within an Annex to the Protocol (an example of formal law-making) and the 1982 Convention for the Conservation of Antarctic Marine Living Resources (CAMLR Convention),[55] which provides a bare reference to measures that may be area-based, but which has developed a detailed set of criteria and processes for MPA designation through decisions of the Commission (an example of informal or unconventional law-making). But this distinction might be legitimately critiqued as arbitrary with the difference between the two regimes being one of degree rather than one of kind.

Nevertheless, using the criteria identified by Joost Pauwelyn, Rameses Wessel and Jan Wouters, noted above, namely, informality associated with actors, processes and/ or outputs as well as the requirement of normative intent or normative effect (or both), six categories of unconventional law-making in the context of area-based conservation have been identified for the purpose of this chapter. These range from binding (formal) outputs resulting from unconventional actors and processes (international institutions) to non-binding (informal) outputs created by formal actors (states) and informal actors (international and non-state institutions). All categories are characterised by both normative (although not necessarily law-making) intent and, to a greater or lesser extent, normative effect.

*(a) Binding Area-based Conservation Measures Adopted by RFMOs and Regional Seas Organisations*

(i) OSPAR

Annex V of the 1992 Convention for the Protection of the marine Environment of the North-East Atlantic (OSPAR Convention)[56] permits the Commission to 'develop means, consistent with

[53] 1991 Environmental Protocol, Annex V, Art. 2.
[54] Karen N. Scott, 'Marine Protected Areas in the Southern Ocean' in Alex Oude Elferink, Erik Molenaar and Donald R. Rothwell (eds), *The Law of the Sea and Polar Regions: Interaction between Global and Regional Regimes*, (Martinus Nijhoff, 2013), 113, 128.
[55] Convention on the Conservation of Antarctic marine Living Resources, adopted on 20 May 1980, entered into force 7 April 1982, 1329 UNTS 47 (CAMLR Convention).
[56] Convention for the Protection of the Marine Environment of the North-East Atlantic, adopted on 22 September 1992, entered into force 25 March 1998 (OSPAR Convention).

international law, for instituting protective, conservation, restoration or precautionary measures related to specific areas or sites or related to particular species or habitats.'[57] On the basis of this spare provision, the Commission has established a network of MPAs that cover seven percent of the total OSPAR area and eight percent of the OSPAR area beyond national jurisdiction (ABNJ).[58] The law-making mechanisms on which this MPA network was established comprises a combination of binding and non-binding decisions and recommendations. Recommendation 2003/3 (amended in 2010)[59] has no binding force,[60] but defines an MPA for the purposes of OSPAR[61] and aims to develop an ecologically coherent network by 2012 that is well managed by 2016. Detailed criteria and the process for establishing MPAs is set out in the Guidelines for the Identification and Selection of Marine Protected Areas in the OSPAR Maritime Area (OSPAR Agreement: 2003-17),[62] which is also a non-binding instrument. The network of (currently) seven high seas MPAs was established by virtue of binding decisions[63] but the management plans associated with each MPA are set out in non-binding recommendations.[64] Non-state actors were heavily involved in developing the MPA network with the WWF and the Netherlands co-supporting a proposal for a pilot MPA to be established for the Charlie-Gibbs Fracture Zone (in ABNJ) as early as 2000.[65] The OSPAR Commission has not only been a pioneer in establishing MPAs beyond national jurisdiction, but has also developed innovative formal (but not binding) collaborative arrangements with relevant RFMOs (such as the North East Atlantic Fisheries Commission, NEAFC) as well as the ISA.[66]

Although the OSPAR MPA network has a clear formal legal basis in a treaty provision, the MPA regime has been developed by actors and through processes that are informal or unconventional, at least compared with 'conventional' sources of international law. Moreover, the outputs establishing the MPAs and associated measures are also informal, comprising decisions and recommendations. The decisions establishing the MPAs in ABNJ are clearly binding but the criteria and process are set out in non-binding instruments. The intent however, of all instruments, is normative, as is their effect. In practice, the OSPAR process for area-based conservation can be legitimately described as 'law-making' albeit of an informal or unconventional kind.

(ii) CCAMLR

CCAMLR is authorised to adopt conservation measures for the CAMLR Convention area including the 'opening and closing of areas, regions or sub-regions for the purpose of scientific study or conservation, including special areas for protection and scientific study' by the

[57] Ibid, Annex V, Art 3(1)(b)(ii).
[58] Source: https://mpa.ospar.org/home-ospar/key-figures (accessed 5 January 2021).
[59] Recommendation 2003/3 on a network of marine protected areas adopted by OSPAR 2003 (OSPAR 03/17/1, Annex 9), amended by OSPAR Recommendation 2010/2 (OSPAR 10/23/1, Annex 7).
[60] 1992 OSPAR Convention, Art 13(5). Decisions and recommendations must be adopted on a unanimous vote unless unattainable, in which case, they may be adopted on a three-quarters majority (Art 13(1)).
[61] An MPA is defined as 'an area within the maritime area for which protective, conservation, restorative or precautionary measures, consistent with international law have been instituted for the purpose of protecting and conserving species, habitats, ecosystems or ecological processes of the marine environment'.
[62] As amended by BDC 2007 (BDC 2007 Summary Record (BDC 07/12/1) § 3.43b), and BDC 2016 (BDC 16/9/1, §5,27 and Annex 13).
[63] OSPAR Decisions 2010/1 to 2010/6 and 2012/1. Decisions are binding by virtue of Article 13(2) of the 1992 OSPAR Convention although states may opt out provided they do so in writing.
[64] OSPAR Recommendations 2010/12 to 2010/17 and 2012/1.
[65] B O'Leary, R. Brown, D. Johnson et al., 'The First Network of Marine Protected Areas (MPAs) in the High Seas: The Process, the Challenges and Where Next' (2012) 36 Marine Policy 598, 599.
[66] See OSPAR Agreement 2014-09, updated in 2018.

Convention.[67] In contrast to the 1991 Environmental Protocol to the 1959 Antarctic Treaty, detailed provisions relating to the criteria for and process of area-based protection are not set out in the Convention itself. Rather, area-based conservation measures have been developed through a series of binding conservation measures.[68]

The general framework measure for the establishment of CCAMLR MPAs was adopted in 2011.[69] It endorsed area-based protection as an important tool to sustain ecosystem function, particularly in light of climate change while recognising that rational use of marine resources is an objective of CCAMLR. CM 91-04 (2011) surprisingly does not define an MPA for the purposes of CCAMLR, but it sets out the purposes for which an MPA may be established by the Commission.[70] It also requires that any MPA measure must include specific objectives, clear spatial boundaries and identify activities that are restricted, prohibited or managed, including any temporal or spatial limits on activities.[71] A skeleton management plan must be included in any measure establishing an MPA as well as an outline of any administrative arrangements. There is no need for an MPA to be designated for a defined period. The general framework measure sets out the process for adopting a research and monitoring plan for the MPA and the obligations of all parties associated with research, monitoring and review.[72] Provision for cooperation with other institutions including the 1991 Environmental Protocol and the IMO are provided for within the measure,[73] although the scope of CCAMLR measures are largely restricted to fishing and fishing research vessels.

In contrast to OSPAR, the process of designating MPAs or, perhaps more accurately, area-based conservation measures under CCAMLR, has been thus far politically (and legally) fraught. Currently, only two MPAs have been established.[74] The first CCAMLR MPA, and indeed the first MPA to be designated on the high seas, was established in 2009 as the South Orkney Islands Southern Shelf (SOISS) MPA.[75] The SOISS MPA covers 94,000 km$^2$ and is designed to establish a scientific reference area, conserve important predator foraging areas and include representative examples of pelagic and benthic bioregions.[76] All types of fishing other than scientific research as agreed by the Commission are prohibited within the MPA, and discharges and dumping from fishing vessels are also prohibited. Vessels transiting the MPA are encouraged to inform CCAMLR. The SOISS MPA has been designated for an indefinite duration but is reviewed every five years. Notwithstanding its pioneering status as the first high seas MPA, the SOISS MPA has been subject to trenchant critique. Most significantly, the boundaries of the SOISS MPA were adjusted during negotiation to exclude a valuable commercial fishery[77] and, moreover, the 'MPA was adopted without management, research or monitoring plans, leaving no mechanisms for

[67] 1982 CAMLR Convention, Art IX(2)(g).
[68] Ibid, Art IX(6)(b). The Convention provides for a process whereby a member may object to and thus be exempt from binding conservation measures (Art 6(c) and (d)).
[69] CCAMLR Conservation Measure 91-04 (2011) *General Framework for the establishment of CCAMLR Marine Protected Areas.*
[70] Ibid, [1].
[71] Ibid, [3(i), (ii) and (iii)].
[72] Ibid, [5].
[73] Ibid, [10].
[74] CCAMLR's early spatial management initiatives focused on designating CCAMLR Monitoring Program (CEMP) sites in order to gather data comparing fishing and non-fished areas and cannot be considered as operating for primarily conservation purposes. See CCAMLR Conservation Measure 91(01) (2004) *Procedure for according protection to CEMP sites.*
[75] CCAMLR Conservation Measure 91-03 (2009) *Protection of the South Orkney Islands Southern Shelf.*
[76] Ibid.
[77] *Report of the Twenty-Eighth Meeting of the Commission,* Hobart, Australia, 26 October – 6 November 2009, [7.4] and [7.5].

implementation.'[78] The SOISS MPA was of course established prior to the adoption of the general framework conservation measure on MPAs, but subsequent attempts to harmonise CM 91-03 (2009) with CM 91-04 (2011) have proven unsuccessful. A draft Research Monitoring Plan (RMP) for the SOISS MPA has been developed to strengthen harmonisation between these two measures but, even though such a Plan is not required under CM 91-03 (2009) (the general framework instrument), this has not been adopted by the Commission as of 2020.[79]

The second CCAMLR MPA, adopted for the Ross Sea region in 2016,[80] has proven no less controversial. It took five years to negotiate[81] and significant compromises were made, reducing its area coverage by almost 40 percent, introducing a krill research zone and inserting a clause limiting its duration to 35 years (subject to renewal). Nevertheless, at 1.55 million km$^2$ the Ross Sea region MPA comprises the largest high seas MPA and 72 percent of its waters are closed to commercial fishing although research fishing is permitted in the 'no take' zone.[82] CM 91-05 (2016) divides the Ross Sea MPA into three zones (the General Protection Zone, the Special Research Zone and the Krill Research Zone)[83] within which fishing is prohibited or restricted,[84] and sets out 11 objectives for the MPA ranging from providing reference areas to monitor environmental (including climate) change to protecting pelagic prey species and ecosystem processes.[85] In 2017, the Ross Sea region MPA (RSRMPA) Research and Monitoring Plan (RMP) was endorsed by the CCAMLR Scientific Committee.[86] Nevertheless, there was disagreement among the CCAMLR members as to whether the RSRMPA RMP needed to be specifically adopted by the Commission (as advocated by China and Russia) or whether its endorsement by the Scientific Committee meant that it was in effect with no further action by the Commission required (as asserted by the US).[87] Moreover, China and Russia criticised the extent to which the Scientific Commission had provided 'advice' as required by CM 91-04[88] and Russia also questioned the level of scientific information available to develop 'a scientifically based RMP in accordance with the aims and objectives of the MPA.'[89] This disagreement has yet to be resolved.

There are three other MPAs under advanced negotiation within CCAMLR, but all are struggling to achieve the consensus needed for adoption.[90] More significantly, this process of informal law-making in order to establish an MPA network has arguably damaged the efficacy of CCAMLR as

---

[78] Cassandra M. Brooks, Larry B. Crowder, Henrik Österblom et al, "Reaching consensus for conserving the global commons: The case of the Ross Sea, Antarctica" *Conservation Letters* 2019e12676, 1, 3.
[79] See the *Report of the Thirty-Eighth Meeting of the Commission,* Hobart, Australia, 21 October – 1 November 2019, [6.31 – 6.32]. There was no discussion of this proposal at the 2020 meeting, which was truncated and held online owing to the COVID-19 pandemic.
[80] CM 91-05 (2016) *Ross Sea region marine protected area.*
[81] For an overview of this process see Karen N. Scott, 'Protecting the Commons in the Polar South: Progress and Prospects for Marine Protected Areas in the Antarctic' in Keyuan Zou (ed), *Global Commons and the Law of the Sea* (Brill Nijhoff, Leiden) (2018) 326.
[82] Julia Jabour and Danielle Smith, 'The Ross Sea Region Marine Protected Area: Can it be Successfully Managed?" 32 (2018) *Ocean Yearbook* 190 – 205, 192.
[83] CM 91-05 (2016) *Ross Sea region marine protected area*, [5].
[84] Ibid, [6] – [8].
[85] Ibid, [3].
[86] *Report of the Thirty-sixth Meeting of the Scientific Committee* (SC-CCAMLR XXXVI), Hobart, Australia, 16 – 20 October 2017 [5.45(iii)].
[87] *Report of the Thirty-sixth Meeting of the Commission*, Hobart, Australia, 16 – 27 October 2017 [5.76 – 5.82].
[88] Ibid, [5.76 – 5.79].
[89] Ibid, [5.80].
[90] For an overview of the progress (or lack thereof) in establishing MPAs under CCAMLR, see Karen N. Scott, "MPAs in the Southern Ocean under CCAMLR: Implementing SDG 14.5" (2021) *Korean Journal of International and Comparative Law* (*forthcoming).*

a fisheries conservation institution. In a recent article, Brooks, Crowder and Curran et al. have concluded that the institutional conflict over MPAs has caused 'CCAMLR member states to disregard the best available science, distort the foundational rules of their convention, break trust, and threaten the integrity of one of the world's most well-regarded science-based multinational governance efforts.'[91] Some (although by no means all) of the conflict has arisen from disputes as to the legal basis for MPA designation under CCAMLR (and indeed more generally) and to the processes associated with informal law-making.[92] However, it would be a mistake to attribute the MPA conflict within CCAMLR solely to the fact that it has been developed through informal as opposed to formal law-making processes and it is worth noting that CCAMLR is far more functional than the International Whaling Commission notwithstanding that the latter's rules relating to whaling are adopted through conventional treaty law mechanisms. Nevertheless, this is an example of informal law-making that appears more functional in legal as opposed to practical terms.

*(b) Binding Area-based Conservation Measures Adopted by the IMO*

The IMO makes a significant contribution to developing the law of the sea through formal law, primarily through facilitating the negotiation of treaties on shipping and associated environmental matters.[93] It has contributed to area-based conservation through the formal designation of Special Areas under MARPOL 73/78 as noted, above. However, area-based conservation has been further developed by the IMO through unconventional means: the designation of particularly sensitive sea areas (PSSAs).[94] A PSSA is defined as 'an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities.'[95] The IMO began work on PSSAs in 1978[96] but it is generally agreed that the legal basis for their designation can be found in Articles 194(5) and 211(6) of the 1982 LOSC. Nevertheless, the detailed criteria for and process associated with designating a PSSA are set out in non-binding IMO guidelines, originally adopted in 1991 and revised in 2005.[97] At the time of designation, an associated protective measure must be adopted and approved by the IMO in order to prevent,

---

[91] Cassandra M. Brooks, Larry B. Crowder, Lisa M. Curran et al, 'Science-based management in decline in the Southern Ocean' 364 (issue 6309) (14 October 2016) Science 185, 185.

[92] For example, during the negotiations for the Ross Sea region MPA the Ukraine stated, in 2013, that '[t]he UN Convention on the Law of the Sea (ratified by Ukraine) provides the opportunity for establishing MPAs only within the coastal waters in the areas of jurisdiction of those countries. Therefore, at this stage we cannot see any legal possibility for establishing MPAs in the high seas of the World Ocean containing areas for which CCAMLR is responsible.' See *Report of the Second Special Meeting of the CCAMLR Commission* (Bremerhaven, 2013) at [3.26]. Russia has also disputed whether CCAMLR has a legal basis to establish MPAs. See V. V. Lukin, 'Russia's current Antarctic policy' (2014) 4 The Polar Journal 199, 219.

[93] See generally, James Harrison, *Making the Law of the Sea* (CUP, 2011), chapter 6.

[94] See generally, See J. Roberts, A. Chircop and S. Prior 'Area-based Management on the High Seas: Possible Application of the IMO's Particularly Sensitive Sea Area Concept' (2010) 25 International Journal of Marine and Coastal Law 483.

[95] IMO Resolution A. 982(24), *Revised Guidelines for the identification and designation of Particularly Sensitive Sea Area*, 1 December 2005, [1.2].

[96] Ibid, [1.1].

[97] IMO Resolution A. 720(17), *Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Area*, 6 November 1991, consolidated and revised by IMO Resolution A. 982(24), *Revised Guidelines for the identification and designation of Particularly Sensitive Sea Area*, 1 December 2005; and IMO Resolution. 927(22), *Guidelines for the Designation of Particularly Sensitive Sea Areas*, 29 November 2001. See also IMO Resolution A. 885(21), *Procedures for the Identification of Particularly Sensitive Sea Areas and the Adoption of Associated Protective Measures and Amendments to the Guidelines contained in Resolution A.720(17), 25 November 1999.*

reduce or eliminate the threat or identified vulnerability of the PSSA.[98] PSSAs are established by IMO binding resolution[99] although the legal effect of the PSSA on shipping results from the protective measure associated with the PSSA, adopted under relevant conventions such as SOLAS[100] or MARPOL, rather than the PSSA itself. Associated measures may include a routing system, area to be avoided or compulsory pilotage. Sixteen PSSAs have been designated to date,[101] with the Great Barrier Reef being the first PSSA designated in 1990 (extended in 2005 to include the Torres Strait) and the most recent, the Tubbataha Reefs Natural Park in the Sulu Sea, being designated in 2017.

The process of PSSA designation is informal as it operates outside of conventional treaty processes and involves state actors (who propose the PSSA) and the IMO, which approves both the PSSA and associated protective measures. The guidelines, which set out the substantive standards and processes as applied to PSSAs are, as their nomenclature implies, non-binding, but the PSSA is designated by a binding IMO resolution. Both the guidelines and associated resolutions are clearly normative in both intent and effect.

*(c) Binding Area-based Conservation Measures Adopted by the ISA*

The designation of a representative network of areas of environmental interest by the ISA in the Clarion Clipperton zone is notable for the unconventionality of the law-making process. Under Article 145 of the 1982 LOSC, the ISA has a mandate to take necessary measures for the protection of the environment of the Area,[102] including the prevention of damage to flora and fauna of the marine environment.[103] The ISA has implemented this mandate primarily through the development of the Mining Code, which regulates prospecting, exploring and exploitation of mineral resources in the Area.[104] Environmental protection is principally effected through environmental impact assessment and the development of regional environmental management plans (REMP). It is through the latter that the ISA has begun the process of developing a network of protected areas. The first (and thus far, only) REMP has been adopted for the Clarion-Clipperton Zone[105] and the plan sets out in detail the location of and justification for a network of protected areas closed to mining in order to protect and preserve the marine environment.[106] The ISA is in the process of adopting REMPs for other regions,[107] and the guidance to facilitate the development of REMPs, adopted by the ISA in 2019,[108] includes the objective: 'to provide the ISA

[98] IMO Resolution A.982(24), [1.2].
[99] For example, the most recent PSSA, Tubbataha Reefs Natural Park in the Sulu Sea (Philippines) was designated by Resolution MEPC.294 (71) (adopted on 7 July 2017) *Designation of the Tubbataha Reefs Natural Park as a Particularly Sensitive Sea Area.*
[100] International Convention for the Safety of Life at Sea, adopted 1 November 1974, entered into force 25 May 1980, 1184 UNTS 278 (SOLAS).
[101] Source: https://www.imo.org/en/OurWork/Environment/Pages/PSSAs.aspx (accessed 8 January 2021).
[102] The Area is defined as the 'seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction' under Article 1(1) of the 1982 LOSC.
[103] 1982 LOSC, Art. 145 and, in particular, paragraph (b).
[104] See https://www.isa.org.jm/mining-code (accessed 9 January 2021).
[105] Environmental Management Plan for the Clarion-Clipperton Zone (adopted 13 July 2011), IBSA 17/LTC/7, [21] formally endorsed by IBSA/18/C/22 *Decision of the Council relating to an environmental management plan for the Clarion-Clipperton Zone* (adopted at the Eighteenth Session of the ISBA, 16 – 27 July 2012. See generally, Michael Lodge, David Johnson, Gwenaëlle Le Gurun et al., 'Seabed mining: International Seabed Authority environmental management plan for the Clarion-Clipperton Zone. A Partnership Approach' (2014) 49 Marine Policy 66.
[106] Environmental Management Plan, ibid, [21 – 42].
[107] See Aline Jaeckel, 'Strategic environmental planning for deep seabed mining in the area' (2020) 114 Marine Policy 103423.
[108] See: https://www.isa.org.jm/files/files/documents/remp_guidance_.pdf (accessed 9 January 2021).

with a clear and consistent mechanism to identify particular areas thought to be representative of the full range of habitats, biodiversity and ecosystem structures and functions within the relevant management areas and/ or sites in need of protection to preserve ecological balance of the marine environment in the Area [and] to provide those areas with appropriate levels of protection.'[109]

On the basis of Pauwelyn, Wessel and Wouters' criteria for informal law-making, discussed above, the network of areas of particular environmental interest developed by the ISA involves informal actors, informal processes and informal outputs. The principal actor is the ISA, comprising largely the Legal and Technical Commission and the Council, but the impetus for developing REMP actually derives from the work of scientists who, in 2007, proposed the development of a network of protected areas for conservation purposes.[110] The process of developing the plan is undoubtedly informal as is the plan itself, notwithstanding that the plan is binding on LOSC parties and contractors by virtue of Article 162(o)(ii) of the Convention. The REMP nevertheless is normative in both intent and effect and the process can undoubtedly be defined as law-making, albeit of an unconventional kind.

*(d) Non-binding 'Pledges' to Establish MPAs and other Area-based Conservation Measures*

Whereas the previous section focused on area-based conservation effected through binding or partially binding instruments, the following sections highlight instruments and mechanisms which are not binding, but which nevertheless are normative in both intent and effect and which contribute, to varying extents, to law-making processes in the field of area-based conservation.

(i) UN and CBD Targets to Protect 10 percent of the Oceans by 2020

One of the most visible initiatives in international environmental governance over the last decade has been the contribution of binding and non-binding global goals or targets to law-making processes. For example, the 2015 Paris Agreement commits parties to hold 'the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.'[111] Also in 2015, the United Nations General Assembly adopted the Sustainable Development Goals (SDGs),[112] which establish 17 goals and 169 targets across the areas of environment, development and social equality. Both instruments, (notwithstanding that one is a binding treaty obligation and the other is a non-binding resolution) 'utilise goal-based targets, which provide states with significant flexibility in deciding how to meet those targets.'[113] This approach has been described as a 'novel' type of global governance'[114] but can also be categorised as an example of unconventional or informal law-making.

In the context of area-based conservation, the most influential target (or pledge) is the commitment to protect ten percent of the marine environment by 2020. Originally adopted by the parties to the World Summit on Sustainable Development in 2002 (with a target date of 2012)[115]

[109] Ibid.
[110] Michael Lodge, David Johnson, Gwenaëlle Le Gurun et al. (n 105), 68.
[111] Paris Agreement, adopted 16 March 2015, entered into force 16 March 2020, Decision 1, 1/CMA.2 in FCCC/PA/CMA/2019/6.ADD.1, Art 1(1)(a).
[112] UNGA Res. 70/1 *Transforming our world: the 2030 Agenda for Sustainable Development* (25 September 2015).
[113] Karen N. Scott, Jade Lindley, Erika Techera et al., 'An introduction to international environmental law' in Erika Techera, Jade Lindley, Karen N. Scott et al., (eds), *Routledge Handbook of International Environmental Law* (2nd edition, Routledge, 2021) 1, 6.
[114] Frank Biermann, Norichika Kaine and Rakhyun E Kim, 'Global governance by goal-setting: the novel approach of the UN Sustainable Development Goals' (2017) 26 Current Opinion in Environmental Sustainability 26, 26.
[115] WSSD, *Plan of Implementation* (2002) [31(c)].

and endorsed by the parties to the CBD,[116] the target was revised in 2010 with a new target date of 2020 under the CBD Aichi Biodiversity Targets.[117] Aichi Biodiversity Target 11 also broadened the notion of protection to include 'other effective area-based conservation tools' in addition to MPAs. This target was repeated in SDG 14.5 as part of SDG 14, which seeks to achieve the conservation and sustainable use of the oceans, seas and marine resources.[118]

This target, to use the typology of Joost Pauwelyn referred to above, constitutes a legal fact rather than a legal act, but it has undoubtedly had a legal (and normative) effect. It has galvanised states, international institutions and other actors into taking action to increase protected area coverage in the oceans, and the normative impact of this target can be assessed by its incorporation into and providing the impetus for numerous instruments issued by states and international organisations, including all of those surveyed in this chapter.[119] In the context of law-making, it is significant that this target has been repeated and cross referred to among multiple institutions. As asserted by Pierre-Marie Dupuy, '[c]ross-references from one institution to another, the recalling of guidelines adopted by other apparently concurrent international authorities, recurrent invocation of the same rules formulated in one way or another to the universal, regional and more restricted levels, all tend progressively to develop and establish a common international understanding.'[120] This common understanding of the behavioural norm is integral to the to the process of law-making.

SDG 14 is notable in that notwithstanding its non-binding status, it has been subject to development and even review through international fora. First, the High-level Political Forum on Sustainable Development, which was established in 2012 under the auspices of the UN Economic and Social Council[121] and second, the 2017 United Nations Conference to Support the Implementation of Sustainable Development Goal 14 (Oceans Conference). The Oceans Conference was particularly significant for two reasons. First, it adopted a declaration 'Our Ocean, Our Future: Call for Action' (subsequently endorsed by the UN General Assembly[122]), which, among other things, added 'conceptual clarity to the interpretation of SDG 14 targets by including reference to terms and instruments not previously incorporated into SDG 14.'[123] With respect to SDG 14.5, the Call for Action added precaution and ecosystem-based approaches to the scope of Target 14.5, and expanded the target to include other area-based management tools including integrated, cross-sectoral approaches, marine spatial planning (MSP) and integrated coastal zone management (ICZM).[124] Second, the 2017 Oceans Conference instituted a novel process whereby any stakeholder could register a voluntary commitment to support the implementation of SDG 14. As of 31 December 2020, of the 1,633 commitments made by governments, international organisations, NGOs and scientific groups across all ten SDG 14 targets, 449 relate specifically to

---

116 CBD COP 7 Decision VII/28 *Protected Areas (Articles 8(a) to (e))* [18]; CBD COP 7 Decision VII/5 *Marine and coastal biodiversity* [18 – 31].
117 CBD Decision X/2 (2010) *The Strategic plan for biodiversity 2011 – 2020 and the Aichi Biodiversity Targets*, Target 11.
118 UNGA Res. 71/312 *Our Ocean, our future: call for action* (6 July 2017).
119 There is insufficient space to provide a thorough survey of relevant instruments that refer to one of more of these targets. One illustrative example is the reference to the WSSD target and the aim to establish a representative system of Antarctic MPAs in the preamble to CCAMLR CM 91-04 *General framework for the establishment of CCAMLR Marine Protected Areas* (2009).
120 Pierre-Marie Dupuy, 'Soft Law and the International Law of the Environment' (1991) 12 Mich J Int'l L 420, 424.
121 The High Level Political Forum on Sustainable Development replaced the UN Commission on Sustainable Development and it reviewed SDG 14 in 2017 (in addition to SDGs 1, 2, 3, 5 and 9). See https://sustainabledevelopment.un.org/hlpf/2017 (accessed 9 January 2021).
122 UNGA Res. 71/312 *Our Ocean, our future: call for action* (6 July 2017).
123 Daniela Diz, Elisa Morgera and Meriwether Wilson, 'Marine policy special issue: SDG synergies for sustainable fisheries and poverty alleviation' 110 (2019) Marine Policy 102860, 2.
124 UNGA Res. 71/312 *Our Ocean, our future: call for action* (6 July 2017), [13(j)].

SDG 14.5. Of these, 177 have been made by governments, 177 by NGOs, scientific/academic/philanthropic institutions and 17 have been made by the private sector.[125]

The extent to which these targets are law-making (as distinct from having legal and normative effects) is debatable. It is also worth noting, that despite the apparent activity relating to SDG 14.5, as of January 2021, just 7.65 percent of the marine environment is subject to area-based protection.[126] Moreover, much of the area protected comprises very large scale MPAs, which are not necessarily well-managed. It is estimated that 10 large MPAs cover more than 50 percent of the total area protected[127] and that international commitments are leading to a 'race' towards MPA designation, with many MPAs established in remote locations, without management plans or monitoring and which permit a variety of extractive activities.[128] Bárbara Horta e Costa et al. argue that this leads 'to a false sense of protection by society at large'[129] and undermines the efficacy of assessing 'conservation targets centred on area coverage alone.'[130] The development of targets through informal processes could therefore actually undermine formal law if they are insufficiently or poorly developed although such deficiencies are by no means confined to informal processes of law-making.

These reservations notwithstanding, pledges of this kind have clearly made an important contribution to the process of norm-creation with respect to area-based conservation. The CBD/SDG 14.5 targets are not binding (or law-making) in of themselves, but they have provided the catalyst or the motivation for action, including law-making, at all levels of governance. Moreover, they can provide a platform from which to develop more sophisticated or more ambitious targets. Notwithstanding the fact that the international community has not protected 10 percent of the marine environment by 2020, a new target – 30 percent protected areas by 2030 – was announced in December 2020 by the High Level Panel for a Sustainable Ocean Economy (Ocean Panel).[131] The target is a global goal and is not binding on states individually, [132] but is intended to be normative and may yet have normative effect.

(ii) 2014 Hamilton Declaration for the Conservation of the Sargasso Sea

The 2014 Hamilton Declaration for the Conservation of the Sargasso Sea[133] demonstrates the value and significance of instruments that can be described as informal and unconventional, normative but not law-making. The Declaration is unequivocally non-binding but nevertheless establishes a Commission and a framework for cooperation in conserving the Sargasso Sea (beyond national

[125] Source: https://oceanconference.un.org/commitments/ (accessed 31 December 2020).
[126] Source: https://www.protectedplanet.net/en/thematic-areas/marine-protected-areas (accessed 9 January 2021).
[127] Bárbara Horta e Costa, Joachim Claudet, Gustavo Franco et al., 'A regulation-based classification system for Marine Protected Area (MPAs)' (2016) 72 Marine Policy 192, 192.
[128] Ibid.
[129] Ibid.
[130] Ibid.
[131] Source: https://www.oceanpanel.org/ocean-action/files/transformations-sustainable-ocean-economy-eng.pdf (accessed 8 January 2021). The Ocean Panel is an initiative of 14 world leaders working with business, financial institutions as well as the science community and civil society, which have launched an ambitious yet practical oceans agenda.
[132] Ibid.
[133] The text of the Declaration is available at: http://www.sargassoseacommission.org/storage/Hamilton_Declaration_with_signatures_April_2018.pdf (accessed 8 January 2021).

jurisdiction) designed to guide the actions of the 10 signatory states.[134] The Commission is built on the work of the Sargasso Sea Alliance, led by Bermuda, and the process has involved significant NGO and other non-state participation. The aim of the Declaration and the Commission is to protect the Sargosso sea using existing institutions and mechanisms and therefore the Declaration deliberately refrained from any form of law-making. Nevertheless, it might be described as strengthening or 'thickening' existing law in developing its application and potential extension to the Sargasso Sea.[135]

*(e) Non-binding Guidelines and other Measures Adopted by International Organisations and Institutions*

The fifth category of unconventional or informal law-making in the context of area-based conservation focuses on non-binding guidelines and other measures adopted by international organisations or treaty regimes. These measures are non-binding but are nevertheless normative in both intent and effect and are designed to develop and 'thicken' the law relating to area-based conservation. Two examples are highlighted below: the work of the CBD, particularly in relation to ecologically or biologically significant marine areas (EBSAs); and the work of the UNFAO and vulnerable marine ecosystems (VMEs).

(i) The CBD, Area-based Protection and Ecologically or Biologically Significant Marine Areas (EBSAs)

As noted above, Article 8(a) of the 1992 CBD requires contracting parties, as far as possible and appropriate, to 'establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity.' Unsurprisingly, the CBD has been active in developing and promoting a range of initiatives relating to area-based protection under the CBD including developing valuable definitions of MPAs and other effective area-based conservation measures.[136] In 2008, the CBD adopted scientific guidance for establishing a network of MPAs in open-water and deep-sea habitats.[137]

One of the most influential developments, which was also initiated in 2008, was the adoption of criteria for the identification of Ecologically or Biologically Significant Marine Areas (EBSAs).[138] EBSAs are not in of themselves MPAs and there is no obligation to turn an EBSA into an MPA,[139] but they constitute 'a scientific process aiming, notably, to give support to and facilitate the

[134] The signatory states are the Azores, Bermuda, Monaco, UK, US, British Virgin Islands, the Bahamas, Canada, the Cayman Islands and the Dominican Republic. Source: http://www.sargassoseacommission.org/about-the-commission/hamilton-declaration (accessed 3 January 2021).
[135] See further, David Freestone and Kate Killerlain Morrison, 'The Sargasso Sea Alliance: Seeking to Protect the Sargasso Sea' (2012) 27 International Journal of Marine and Coastal Law 647 and David Freesone and Faith Bulger, 'The Sargasso Sea Commission: An Innovative Approach to the Conservation of Areas beyond National Jurisdiction' (2016) 30 Ocean Yearbook 80.
[136] See CBD Decision VII/5 *Marine and Coastal Biodiversity* (2004); Doc.UNEP/CB/SBSSTA/8/INF/7; CBD Decision XIV/8 *Protected areas and other effective area-based conservation measures* (2018).
[137] CBD Decision XI/20 *Marine and Coastal Biodiversity* (2008), Annex II.
[138] CBD Decision XI/20 *Marine and Coastal Biodiversity* (2008), Annex I.
[139] DC Dunn, J Ardron, N Bax et al, 'The Convention on Biological Diversity's Ecologically or Biologically Significant Areas: Origins, Development and Current Status' (2014) 49 Marine Policy 137, 143.

designation of MPAs in ABNJ'.[140] Seven scientific criteria[141] have been established by the CBD as key to identifying EBSAs and, through 15 regional workshops, over 250 million km$^2$ of ocean area (around two-thirds of the oceans) has been assessed and 204 EBSAs described.[142] Thirty-one lie solely within ABNJ and a further 35 straddle areas within and beyond national jurisdiction.[143]

While EBSAs are not solely focused on ABNJ, the tool has been very much designed to support the BBNJ process and the development of area-based conservation under the ILBI in ABNJ.[144] Moreover, EBSAs have contributed to area-based conservation law-making within a number of other global and regional institutions.[145] For example, the ISA environmental management plan for the Clarion-Clipperton zone references EBSAs and the work of the CBD on area-based conservation more generally.[146] The IMO has deemed the EBSA guidelines as a valuable reference tool to support the use of the revised PSSA guidelines[147] and the Banc D'Arguin PSSA proposal from Mauritania (currently under discussion at the IMO) draws data from the EBSA described for the area.[148] The Sargasso Sea was officially described as an EBSA in 2012[149] and this description underpins the aims and objectives of the 2014 Hamilton Declaration.

The EBSA process is undoubtedly informal or unconventional with respect to actors (international institutions with significant input from scientific experts), process (a quasi-scientific description of an area) and output (a non-binding, non-normative description that can be used to support future normative measures). It is not law-making per se, but rather, contributes to law-making processes in other institutions; a legal fact rather than a legal act to use the terminology developed by Joost Pauwelyn.

(ii) FAO and Vulnerable Marine Ecosystems (VMEs)

The status attributed to EBSAs applies similarly to the concept of the vulnerable marine ecosystem (VME) as developed by the UNGA and the UNFAO. A VME is, similar to the EBSA, a quasi-scientific process, whereby vulnerable marine ecosystems are identified and may, subsequently, become subject to area-based conservation measures such as closure to bottom trawling. Initially developed by the UNGA,[150] the concept of the VME was advanced and implemented by the

---

140 Marta Chantal Ribeiro, 'South Atlantic Perspectives on the Future International Legally Binding Instrument under the LOSC on Conservation and Sustainable Use of BBNJ' (2017) 32 The International Journal of Marine and Coastal Law 733, 760.

141 The criteria comprise: uniqueness or rarity; special importance for life history stages of species; importance for threatened, endangered or declining species or habitats; vulnerability, fragility, sensitivity or slow recovery; biological productivity; biological diversity; and naturalness.

142 N J Bax, J Cleary, B Donnelly et al, 'Results of Efforts by the Convention on Biological Diversity to Describe Ecologically or Biologically Significant Marine Areas' (2015) 30 Conservation Biology 571, 572.

143 Ibid, 574.

144 See Elisabeth Druel, *Ecologically or Biologically Significant Marine Areas (EBSAs): the identification process under the Convention on Biological Diversity (CBD) and possible ways forward* (Working Paper No. 17/12, IDDRI, Paris, France, 24p) (2012), 19.

145 See Piers K. Dunstan, Nicholas J. Bax, Jeffrey M. Dambacher et al., 'Using ecologically or biologically significant marine areas (EBSAs) to implement marine spatial planning' (2016) 121 Ocean & Coastal Management 116.

146 Environmental Management Plan for the Clarion-Clipperton Zone (adopted 13 July 2011), IBSA 17/LTC/7 [27]. The Plan acknowledges that the EBSA criteria was not fully developed at the time of the adoption of the Plan 'but the design [of the network] covers the key elements currently applicable to the Clarion-Clipperton Zone' [27] and that as more information becomes available, 'the spatial management of mining activities may have to reflect' other EBSA factors [29].

147 MEPC, Report of the 69th Session, MEPC 69/21 (2016) [10.5 – 10.6].

148 Daniela Diz, David Johnson, Michael Riddell et al., 'Mainstreaming marine biodiversity into the SDGs: The role of other effective area-based conservation measures (SDG 14.5)' (2018) 93 Marine Policy 251, 255.

149 David Freesone and Faith Bulger (n 135), 84.

150 See UNGA Res. 59/ 25 (2004) [67 – 69]; UNGA Res. 61/105 (2006) [80 – 81].

UNFAO in the 2009 International Guidelines for the Management of Deep-Sea Fisheries in the High Seas.[151] Although non-binding, these guidelines are normative in intent and effect and have led to significant areas of the seabed being closed to bottom trawling.[152] In addition to contributing to the law-making processes of states and RFMOs, the concept of the VME has also been referred to by other international institutions, including the ISA, for example, in the Clarion-Clipperton environmental management plan.[153]

*(f) Non-binding Guidelines and other Measures Adopted by the IUCN*

The final category of unconventional or informal law-making comprises a range of initiatives associated with area-based conservation by the International Union for the Conservation of Nature (IUCN). This category takes an expansive view of the term 'public authority' as set out in the introduction to this volume, but the IUCN is a private actor with public elements. Over 200 states and governments are IUCN members in addition to the more than 1200 NGOs and Indigenous peoples groups.[154] Moreover, the IUCN Protected Area Guidelines in particular, have had legal effects equivalent to many formal law examples, notwithstanding that they are clearly neither law nor law-making. Three IUCN initiatives developing formal and informal law-making in the context of area-based conservation are very briefly highlighted below.

(i) IUCN Protected Area Guidelines

The current IUCN Guidelines for Applying Protected Area Management Categories were adopted in 2008[155] and, as described above, set out a definition of a protected area and six related management categories. Guidelines clarifying the application of those categories to marine protected areas were more recently adopted, in 2019.[156] These guidelines are clearly neither binding nor law as such, but they have been widely adopted by states and by international institutions in their law-making processes. Most significantly, the IUCN definition and categories of MPAs have been recognised by the parties to the CBD as a basis for defining an MPA and types of management objectives.[157] The categories have also been adopted by the UN in respect of the UN List of Protected Areas,[158] and have been used in a more limited way by the Intergovernmental Forum on Forests and in respect of biosphere reserves.[159] They have been applied in the Conservation of Arctic Flora and Fauna (CAFF) Circumpolar Protected Areas network (CPAN) Strategy and Action Plan 1996 and the 2003 revised African Convention on the Conservation of Nature and Natural Resources.[160] Controversially, CCAMLR categorised the entire CAMLR

[151] Available at: http://www.fao.org/documents/card/en/c/b02fc35e-a0c4-545a-86fb-4fc340e13b52 (accessed 10 January 2021). These were endorsed in UNGA Res. 67/79 (2009) [134].
[152] Daniela Diz, David Johnson, Michael Riddell et al. (n 148), 256.
[153] Environmental Management Plan for the Clarion-Clipperton Zone (adopted 13 July 2011), IBSA 17/LTC/7 [27(a)].
[154] Source: https://www.iucn.org (accesed 9 January 2021).
[155] Nigel Dudley (ed), *Guidelines for Applying Protected Area Management Categories* (2008) available at: https://portals.iucn.org/library/sites/library/files/documents/2008-106.pdf (accessed 9 January 2021) (herein after, IUCN 2008 Protected Area Guidelines). The first set of guidelines were adopted by the IUCN in 1994.
[156] Jon Day, Nigel Dudley, Marc Hockings (eds) *Guidelines for applying the IUCN protected area management categories to marine protected areas* (second edition, 2019) available at: https://www.iucn.org/content/guidelines-applying-iucn-protected-area-management-categories-marine-protected-areas-0 (accessed 9 January 2021).
[157] CBD Decision VII/5 *Marine and coastal biological diversity* (2004) [10].
[158] Deguignet M., Juffe-Bignoli D., Harrison J. et al., (2014) *2014 United Nations List of Protected Areas* (UNEP-WCMC: Cambridge, UK, 2014), 19.
[159] IUCN 2008 Protected Area Guidelines, 48.
[160] Ibid.

Convention area as an IUCN Category IV MPA in 2011,[161] although the authors of the IUCN protected area guidelines dispute whether the entire area meets the Category IV criteria.[162] The endorsement of the IUCN categories by CCAMLR has also had the unexpected effect of making the designation of MPAs within the CAMLR Convention area harder, as states opposed to further MPA initiatives challenge their necessity on the basis of the IUCN category IV designation.[163] Finally, the categories and definitions have been adopted in 10 percent of national protected area legislation since 1994 including in Australia, Brazil, Bulgaria, Cambodia, Cuba, Georgia, Hungary, Kuwait, Mexico, Niger, Slovenia, Uruguay and Viet Nam.[164]

(ii) Important Marine Mammal Areas (IMMAs) and the IUCN Global Standards for the Identification of Key Biodiversity Areas (KBAs)

Two less well-known IUCN initiatives are directed at identifying areas important for biodiversity and, more particularly, marine mammals, in order to inform policy-makers engaged in area-based conservation. The Important Marine Mammal Areas (IMMAs) is an initiative led by the Marine Mammal Protected Areas Task Force (MMPATF), which was created in 2013 by the International Committee on Marine Mammal Protected Areas, the IUCN World Commission on Protected Areas Vice Chair and members of the IUCN Species Survival Commission.[165] Like EBSAs, IMMAs are not MPAs but are areas identified on the basis of selection criteria and regional workshops. One workshop, for the Mediterranean, has been held to date.[166] The IUCN Global Standard for the Identification of Key Biodiversity Areas (KBAs)[167] was adopted in 2016 and again, operates a little like an EBSA in that KBAs are not protected areas but are identified in order to inform protected area policy and frameworks. A key question, on which there is currently little research, is how these various processes (EBSAs, VMEs, IMMAs, KBAs) support and/ or undermine one another and how they relate to other processes (such as IMO PSSAs, ISA areas of particular environmental interest and other MPA networks such as those established under the auspices of OSPAR and CCAMLR).

## 6. 'Unconventional' Area-based Conservation Measures and the International Legally Binding Instrument for the Conservation and Sustainable Use of Biodiversity Beyond National Jurisdiction (ILBI)

Two important themes have emerged from the discussion of unconventional law-making in the context of area-based conservation measures in this chapter thus far. First, that in contrast to many other areas of marine environmental protection, such as vessel-source pollution or dumping waste at sea, area-based conservation has been largely developed and implemented through

[161] CCAMLR CM 91-04 *General framework for the establishment of CCAMLR Marine Protected Areas, preamble.*
[162] Rob Nicoll and Jon C Day, 'Correct application of the IUCN protected area management categories to the CCAMLR Convention Area' (2017) 77 Marine Policy 9. The authors assert that the CAMLR Convention area does not meet the criteria of an IUCN Category IV MPA as the area is not 'recognised, dedicated and managed to achieve the long term conservation of nature' (p. 11). The authors also argue that the Ross Sea MPA is not an MPA under the IUCN guidelines as it is not managed in perpetuity but the SOISS MPA is an MPA according to the guidelines (p. 11).
[163] For example, at the 2018 CCAMLR Meeting, China recalled that the CCAMLR Scientific Committee had advised that the CAMLR area was an IUCN Category IV MPA and asserted that '[t]hus, the special consideration of establishing additional MPAs within the Convention Area shall be further discussed and justified.' See *Report of the Thirty-seventh Meeting of the Commission*, Hobart, Australia, 22 October – 2 November 2018 [6.21].
[164] IUCN 2008 Protected Area Guidelines, 48.
[165] Source: https://www.marinemammalhabitat.org/immas/ (accessed 8 January 2021).
[166] Ibid.
[167] See https://portals.iucn.org/library/node/46259 (accessed 9 January 2021).

informal rather than formal law-making mechanisms. Second, that there is a close and symbiotic relationship between formal and informal law-making in respect of area-based conservation with the latter regularly expanding upon and implementing the former. In part, this is a consequence of a relative absence of formal law-making in the field of area-based conservation.

This, however, is set to change in respect of ABNJ, on the assumption that the negotiations for the ILBI are successful. The ILBI will be a treaty, a legally binding instrument resulting from a formal law-making process[168] and the final formal negotiating round was due to take place in 2020 but has been postponed owing to the COVID-19 pandemic. Area-based conservation measures comprise one of five substantive areas slated to be covered by the ILBI,[169] and, for the first time, detailed criteria and processes for general area-based protection in ABNJ are likely to be included within a formal law-making instrument. This raises interesting questions in respect of the relationship between informal (and indeed formal) MPA processes and the ILBI, and the future prospects for informal law-making in respect of area-based conservation.

The relationship between the ILBI, its institutions and processes and existing global and regional institutions is proving challenging to negotiate, but the agreed upon over-arching principle is that the IBLI will be interpreted and applied in a manner that does not 'undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies.'[170] This issue is particularly pressing with regards to area-based conservation given the number of institutions and regimes already engaged in MPA and other related measures. In 2017, three approaches to the designation of area-based conservation measures were put forward.[171] The 'global model' whereby the ILBI would create a global, overarching framework for the identification, designation, management and enforcement of area-based management tools, including MPAs.[172] By contrast, the 'regional and/ or sectoral model' would largely leave the development of area-based conservation measures to existing institutions with the role of the ILBI confined to providing global level general policy guidance to promote cooperation.[173] The 'hybrid model' attempted to provide a compromise between these two positions, and promoted a model under which regional and sectoral institutions would remain the principal actors in implementing

[168] In 2015, the UNGA took the decision to establish a formal preparatory committee for the purpose of developing a binding instrument under the auspices of UNCLOS on the conservation and sustainable use of biodiversity beyond national jurisdiction and formal negotiations were instituted in December 2017. See General Assembly Resolution 69/292, *Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, A/RES/69/292 (19 June 2015) and General Assembly Resolution 72/249, *International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, A/RES/72/249 (24 December 2017).

[169] The other issues comprising: marine genetic resources including questions on the sharing of benefits; environmental impact assessment; capacity building and transfer of technology. See General Assembly Resolution 66/231, *Oceans and the law of the sea*, A/RES/66/231 (24 December 2011), [167].

[170] *Revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction* A/CONF.232/2020/3 (18 November 2019), Art 4(3) (Hereinafter, November 2019 Revised Draft Text).

[171] Chair's streamlined non-paper on elements of a draft text of an international legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (2017), [94 – 97] available at: http://www.un.org/depts/los/biodiversity/prepcom_files/Chairs_streamlined_non-paper_to_delegations.pdf.

[172] Ibid, [94].

[173] Ibid, [96].

area-based conservation measures, but the ILBI would provide oversight in addition to general guidance.[174]

As of December 2020, the negotiating states have yet to determine which version of the model will be adopted. The current draft text (from November 2019) permits states under the ILBI to adopt conservation and, possibly, management measures to complement measures adopted under existing instruments but it seems clear that the measures envisaged will not amount to area-based conservation per se.[175] Where there are no regional or relevant global instruments, the draft text provides two options. The first would permit ILBI parties to establish area-based conservation tools[176] but the second merely encourages states to cooperate to establish relevant regional or global instruments.[177] The extent to which the ILBI will provide a framework for the substantive designation of MPAs and other area-based conservation measures has thus yet to be agreed.

This notwithstanding, much of the draft text of Part III of the ILBI appears to proceed on the assumption that parties to the ILBI *will* have a role in establishing area-based conservation measures directly under the agreement. Draft Article 17, for example, sets out a process whereby states (and only states) may submit proposals for area-based management tools. Extensive guidance relating to consultation is provided for under draft Article 18 and the process of decision-making by the conference of the parties on area-based management tools is articulated in draft Article 19. Draft Article 16 stipulates that 'Areas requiring protection through the establishment of area-based management tools, including marine protected areas, shall be identified on the basis of the best available [science] [scientific information and relevant traditional knowledge of indigenous peoples and local communities], the precautionary [approach] [principle] and an ecosystem approach.'[178] The indicative criteria for the identification of areas is set out in Draft Annex I and the seven criteria developed by the CBD in the context of EBSAs are included verbatim in addition to 14 other potential criteria. A number of the EBSA criteria, however, are currently in square brackets so remain under negotiation in terms of their potential inclusion.[179] The draft definition of an MPA draws significant inspiration from the IUCN definition of a protected area in that it refers to an 'area that is designated and managed to achieve specific [long term biodiversity] conservation and sustainable use objectives [and that affords higher protection than the surrounding areas].'[180] This is a narrower definition than that adopted by the CBD, and arguably implies that MPAs should be established in perpetuity (as required by the IUCN definition) although the relevant phrase is currently in square brackets indicating that the parties have yet to finally agree on this. The draft definition of an 'area-based management tool' under the ILBI is currently rather different from the text (although not the spirit) of the CBD OECM in that it includes an MPA and refers to 'a geographically defined area through which one or several sectors or activities are managed with the aim of achieving particular conservation and sustainable use objectives [and affording higher protection than that provided in the surrounding areas].[181] This also appears to draw inspiration from the 2019 IUCN MPA guidelines clarifying the definition

[174] Ibid, [95].
[175] November 2019 Revised Draft Text, Draft Art 15(1)(b)(i).
[176] November 2019 Revised Draft Text, Draft Art 15(1)(b)[(ii)].
[177] November 2019 Revised Draft Text, Draft Art 15 [2. Alt. to para. 1. (b) (ii)].
[178] November 2019 Revised Draft Text, Draft Art 16(1). The text in square brackets indicates alternative phrases still under negotiation.
[179] November 2019 Revised Draft Text, Draft Annex I. The EBSA criteria currently (as of December 2020) in square brackets comprise uniqueness, rarity, biological productivity and naturalness.
[180] November 2019 Revised Draft Text, Draft Art 1(10).
[181] November 2019 Revised Draft Text, Draft Art 1(3).

of MPAs and other area-based conservation measures for the purposes of the IUCN protected area categories.

The negotiators of the ILBI are thus using informal (non-binding) instruments in order to develop definitions and standards and are not merely deriving inspiration from the work of the CBD but also the unambiguously non-binding standards developed by the IUCN. Nevertheless, it is clear that states do not regard these instruments as binding or setting standards that must be followed or otherwise engaged with by the ILBI, and it is notable that the IUCN categories that have been adopted by other parts of the UN, are not referred to or otherwise included in the ILBI draft text. Moreover, it is clear from the negotiations that states regard the principle relating to not undermining 'relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies'[182] as applying to informal law-making instruments such as PSSAs, ISA areas of particular environmental interest and the MPA networks developed by OSPAR, CCAMLR and other regional bodies. While these area-based conservation measures may have been created by unconventional processes (outside of the categories listed in Article 38 of the ICJ Statute) they are nevertheless undoubtedly 'law-making' and thus must not be undermined for the purposes of the ILBI. It is therefore clear that the ILBI will complement rather than replace existing informal law-making processes in the context of area-based conservation. Whether the locus of developing the future law of area-based conservation shifts from informal bodies and processes to the more formal treaty bodies of the ILBI remains to be seen and will depend, in part, on the powers ultimately granted to the parties and institutions under the ILBI.

## 7. Concluding Remarks

This chapter has demonstrated the fundamental importance of informal or unconventional law-making to area-based conservation in the marine environment. Using the typology of Puawelyn, Wessel and Wouters, six categories of informal or unconventional law-making were identified on the basis of their normative intent and or effect, and their informality in relation to actors, processes and/ or outputs. The distinction between legal acts and legal facts adopted by Pauwelyn was employed to distinguish between instruments that have legal effects as a consequence of the act itself (such as a binding resolution) and instruments that have indirect legal effect through their adoption in other law-making processes (such as pledges and guidelines). In other words, whereas the former can be described as directly law-making the latter are indirectly law-making or possibly, not law making at all. However these instruments are categorised there is no doubt that, to date, area-based conservation has largely been developed through informal as opposed to formal processes. Thus, informal or unconventional law-making has served a valuable purpose in addressing gaps in the formal regime (such as providing definitions of MPAs and other forms of area-based conservation), creating new commitments (in relation to area coverage, for example) and developing or 'thickening' existing laws (for example, in respect of modes of managing conservation areas).

There are, nevertheless, risks that come with informal or unconventional law-making processes. It is possible that states may view informal, particularly non-binding commitments, as a replacement for more formal law notwithstanding that such commitments may effectively be unenforceable leading to an accountability gap. Less thought may be given to instruments adopted through informal processes leading to commitments that may undermine formal law or which are not adequate in terms of the risk or threat. As noted above, the various pledges to extend area

[182] November 2019 Revised Draft Text, Draft Art 4(3).

coverage of MPAs to 10 percent of the ocean environment has been criticised for promoting a 'race' to establish large MPAs with little thought to their effective management or enforcement. Where informal law is misapplied or inappropriately used there may be an absence of appropriate mechanisms to correct the error. In the case of CCAMLR, for example, the designation of the entire CAMLR Convention area as an IUCN Category IV MPA has been disputed, but the description has yet to be reversed and, in fact, has been used by some states to resist the development of more appropriate MPA measures by the Commission. The proliferation of similar processes such as those associated with the identification of areas to be protected may lead to confusion and an inefficient deployment of valuable scientific resources.

This notwithstanding, the advantages of unconventional or informal law-making processes for area-based conservation clearly outweigh the risks. Moreover, the ubiquitous nature of many of these processes is arguably challenging the categories of 'conventional' and 'unconventional' law-making more generally. While decisions and resolutions of international organisations and treaty institutions clearly fall outside the parameters of Article 38 of the ICJ Statute, should they really be categorised as 'unconventional' sources of law-making in 2021? In the law of the sea, the initiation of negotiations for the ILBI is an increasingly rare example of formal law making. Today, law is more commonly created through these 'unconventional' processes, which are, as a consequence, regarded as increasingly, 'conventional'.