

Problems and Processes of Restricting Navigation in Particularly Sensitive Sea Areas

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Abstract

Particularly Sensitive Sea Areas (PSSAs) are a form of marine conservation measure established by the International Maritime Organization (IMO) to protect the marine environment against damage caused by navigation. The politicisation of the PSSA designation process and the shortcomings of the 2015 IMO Revised Guidelines for the Identification and Designation of PSSAs have been inimical to improving the PSSA regime. This article first examines the law and practice of PSSAs and discusses the shortcomings of the 2005 Guidelines. It then explores how politicisation outside and inside the IMO has aggravated the institutional weaknesses of the PSSA regime in three aspects: the relationships between Associated Protective Measures (APMs) and existing navigational measures; the links between the ecosystems and PSSAs; and the lack of stringent APMs.

Keywords

Particularly Sensitive Sea Areas (PSSAs) – International Maritime Organization (IMO) – shipping – environmental protection

Introduction

In the Philippines, there is a beautiful coral reef area with extensive lagoons and coral islands: the Tubbataha Reefs Natural Park (the Park).¹ It is a habitat for internationally threatened and endangered marine species, supporting 374 species of coral reef that amount to 90 per cent of the coral species in the Philippines.² The Park has been preserved to a near-pristine status, providing a crucial source of fish reproduction and dispersal within the marine ecosystem.³ The Park is also known to be the eighth best diving location in the world, generating tourism revenues for the local and national economies.⁴ The Park supports the fisheries industry as it is a crucial source of coral and fish larvae on which nearly 2 million Filipinos depend for their livelihood. Hence, small ecological changes in the Park by international shipping translate into substantial effects for the Filipino population.

In spite of this, navigation has always threatened the marine ecosystem of the Tubbataha Reefs Natural Park. Located in the Sulu Sea, the Park is situated in the navigation route connecting the South China Sea to the Celebes Sea and the Pacific Ocean.⁵ The Park is vulnerable to both operational and accidental impacts of vessel traffic, particularly ship groundings and collisions.⁶ In 1988, the Philippines government adopted a buffer zone to protect the Park through administrative fines and criminal penalties, but it has been difficult to protect the area from the increased number of foreign vessels navigating through the

1 This research builds on the author's Master of Laws dissertation at the University of Edinburgh. I greatly appreciate Dr Surabhi Ranganathan, Professor Hyun Jung Kim and Yan Kai (Tony) Zhou for their insightful comments on an earlier draft of this article. I thank Professor James Harrison for his support and guidance throughout the dissertation writing process. All mistakes are mine alone.

2 UNESCO World Heritage Centre, 'Tubbataha Reefs Natural Park' available at <https://whc.unesco.org/en/list/653/>. All websites accessed on 17 December 2020, unless otherwise mentioned.

3 JL Batongbacal, 'Designation of the Tubbataha Reef Natural Park as a Particularly Sensitive Sea Area: The Philippine experience' (2019) 33(1) *Ocean Yearbook Online* 163-186, at p. 167.

4 J Bremner, 'Into the deep: World's 50 best dive sites' (CNN, 6 April 2012), available at <http://travel.cnn.com/explorations/escape/outdoor-adventures/worlds-50-best-dive-sites-895793/>; accessed 6 January 2021.

5 Identification and protection of Special Areas and PSSAs: Designation of the Tubbataha Reefs Natural Park as a Particularly Sensitive Sea Areas, Submitted by the Philippines, IMO Doc MEPC 69/10/1 (15 January 2016), Annex 10, para 37.

6 *Ibid.*, para 4.

area.⁷ The Park has been threatened by non-compliance with park regulations of foreign vessels.⁸

To tackle these difficulties in raising publicity and ensuring compliance of foreign vessels with these regulations, a Particularly Sensitive Sea Area (PSSA) was suggested to protect the Tubbataha Reefs Natural Park in 2011.⁹ Designated by the International Maritime Organization (IMO), a PSSA is put in place to protect vulnerable marine ecosystems by tackling threats from international shipping activities. The PSSA designation does not itself provide any legal protection for the area, but the IMO requires that legally binding associated protective measures are agreed to at the time of the PSSA designation. These measures are known collectively as Associated Protective Measures (APMs). APMs can regulate shipping in PSSAs and take a tailor-made approach to each PSSA based on the threat each PSSA is facing. After the Philippines proposed the Tubbataha Reefs Natural Park as a PSSA on 15 January 2016, the IMO designated it as a PSSA on 7 July 2017 with an Area To Be Avoided (ABTA) as its APM.¹⁰

The case of the Tubbataha Reefs Natural Park demonstrates that PSSAs have considerable environmental and legal significance in an era of increased shipping activity. Ocean shipping is responsible for carrying 90 percent of international trade.¹¹ As such, PSSAs are environmentally significant as the IMO can adopt more stringent measures than national measures in restricting navigation and upgrading navigational measures. Hence, this article focuses on PSSAs as an environmental and institutional tool and their institutional processes and problems.¹²

7 *Ibid.*, Annex 10, paras 61–63.

8 Batongbacal (n 3), at pp. 171–172.

9 *Ibid.*, at p. 172.

10 Designation of the Tubbataha Reefs Natural Park as a Particularly Sensitive Sea Area, IMO Resolution MEPC.294(17), adopted 7 July 2017, IMO Doc MEPC 71/17/Add.1 (18 August 2017), Annex 18, p. 20.

11 Organisation for Economic Co-operation and Development, 'Ocean shipping and ship-building' available at <https://www.oecd.org/ocean/topics/ocean-shipping/>.

12 The following publications have dealt with the institutional aspect of PSSAs, D Freestone and K Gjerde (eds), 'Particularly Sensitive Sea Areas: An important environmental concept at a turning point' (1994) 9(4) *International Journal of Marine and Coastal Law* Special Issue 426–468; J Roberts, *Marine Environment Protection and Biodiversity Conservation: The Application and Future Development of the IMO's Particularly Sensitive Sea Area Concept* (Springer, Cham, 2006); M Kachel, *Particularly Sensitive Sea Areas: The IMO's Role in Protecting Vulnerable Marine Areas* (Springer, Cham, 2008); H Ringbom, *The EU Maritime Safety Policy and International Law* (Martinus Nijhoff Publishers, Leiden, 2008); D Freestone and V Harris, 'Particularly Sensitive Sea Areas beyond national jurisdiction: Time to chart a new course?' in MH Nordquist, JN Moore and R Long (eds), *International Maritime Economy: Law and Policy* (Brill, Leiden, 2017) 322–361; J Kraska, 'Particularly

Drawing from all PSSAs, it is clear that there is a gap between the practice of the PSSA regime and the potential the regime holds. This article seeks to shed light on the following questions: have States utilised the PSSA regime to its full potential? If not, what are the reasons for underutilisation of the PSSA regime? It will be argued that the PSSA regime is underutilised due to the politicisation of the PSSA designation process and the shortcomings of the Revised Guidelines for the Identification and Designation of PSSAs (the 2005 Guidelines).¹³ ‘Underutilised’ means that the practice of the PSSA regime has not met the regime’s potential of advancing environmental measures. The politicisation outside and inside the IMO has widened the gap made by the institutional weakness of the PSSA regime. This institutional weakness stems from the 2005 Guidelines.

The IMO’s decision-making process for PSSAs and APMS is an arena of *justified politics*; with the IMO pursuing the promotion of international shipping as well as the protection of the marine environment, the IMO committees seek to strike a balance between ensuring the accessibility of commercial shipping and protecting the environment from vessel-based activities and pollution. In this vein, the IMO institutionally justifies the politicisation of the IMO committees. ‘Politicisation’ occurs when a Member State or a group of Member States advances and prioritises an issue based on their governmental or communal interests. The politicisation in an international institution helps the agenda develop and sheds light on any potential obstacles. However, if politicisation is not delimited properly by international instruments, it may lead to incoherent development of marine protected areas (MPAs) in both the legal and environmental sense. This unfortunate scenario is found in the PSSA regime.

To argue that the underutilisation of the PSSA regime is due to the politicisation of the PSSA designation process and the shortcomings of the 2005 Guidelines, one must first examine the concept of PSSAs and then explain what ‘politics’ and ‘politicisation’ means in the context of the PSSA. This will help us understand the legal scope of the PSSA regime and its inherent weaknesses. The discussion then turns to evaluating the practice of PSSAs, focusing on three aspects that illustrate the politicisation of the PSSA designation process: the relationship between APMS and existing navigational measures; the links between ecosystems and PSSAs; and the lack of stringent APMS. These

Sensitive Sea Areas and the law of the sea’ in MH Nordquist, TTB Koh and JN Moore, *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Brill, Leiden, 2008) 511–572.

13 Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, IMO Resolution A.982(24), adopted 1 December 2005, para 1.2 [2005 Guidelines].

three aspects reveal the gaps between PSSA practice and the PSSA regime's potential. These gaps are unbridged as the politicisation outside and inside the IMO has aggravated the institutional weakness of the PSSA regime, which stems from the 2005 Guidelines.

Particularly Sensitive Sea Areas of the International Maritime Organization

The 2005 Guidelines define a PSSA as 'an area that needs special protection through action by IMO because of its significance for recognized ecological, socioeconomic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities'.¹⁴ The 2005 Guidelines set out the criteria for the IMO and States in designating the PSSA. The IMO designates the PSSA based on a proposal submitted by a Member State or a group of Member States. As a 'competent international organisation' under the United Nations Convention on the Law of the Sea (LOSC)¹⁵ and as a UN specialised agency, the IMO is responsible for ensuring the safety of vessels, regulating international shipping, and preventing the marine and atmospheric pollution from vessels. With 174 Member States,¹⁶ the wide membership of IMO ensures the public awareness of the PSSAs and legal enforcement of the APMS.

PSSAs aim to tackle a wide variety of environmental threats; the 2005 Guidelines target the international shipping activities that incur environmentally harmful effects, including operational discharges, accidental or intentional pollution, and physical damage to marine organisms.¹⁷ The Guidelines recognise the harmful effects of substances, including 'oil and oily mixtures, noxious liquid substances, sewage, garbage, noxious solid substances, anti-fouling systems, harmful aquatic organisms and pathogens, and even noise'.¹⁸ Vessels can cause physical harm to marine organisms and their habitats through anti-fouling systems, anchors, or ship strikes.

In order to be designated as a PSSA, the proposed area has to meet the following three requirements: (1) recognised significance for its ecological, socioeconomic, or scientific attributes; (2) vulnerability to damage from international

¹⁴ *Ibid.*

¹⁵ United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 3.

¹⁶ IMO, 'Member States, IGOs and NGOs' available at <http://www.imo.org/en/About/Membership/Pages/Default.aspx>.

¹⁷ 2005 Guidelines (n 13), para 2.1.

¹⁸ *Ibid.*, para 2.2.

shipping activities; and (3) APMS with an identified legal basis that can be approved or adopted by the IMO.¹⁹ The IMO can designate PSSAs within and beyond the limits of the territorial sea.²⁰ In the territorial sea, where coastal States exercise sovereignty, the coastal State has a high degree of autonomy in adopting restrictive navigation measures such as routeing measures and reporting systems. As such, there is no great merit for a PSSA to be designated solely in the territorial sea in terms of advancing navigational measures.²¹

The designation of PSSAs is legally based on Articles 192 and 194 of the LOSC,²² which impose a general obligation to protect and preserve the marine environment and take measures necessary to prevent, reduce and control pollution of the marine environment. The designation of PSSAs can be seen as giving effect to Article 211(1) of the LOSC, which obliges States to establish 'rules and standards to prevent, reduce and control pollution of the marine environment from vessels'.²³ The 2005 Guidelines also explicitly refer to Article 211(6) of the LOSC as a possible legal basis of the proposed APM.²⁴ Article 211(6) prescribes that coastal States can establish a clearly defined area in the exclusive economic zone (EEZ) and adopt special mandatory measures to prevent vessel-source pollution. The PSSA regime, however, does not solely depend on Article 211(6) for its legal basis and can potentially expand from the measures prescribed in the LOSC. As the Division for Ocean Affairs and the Law of the Sea of the United Nations noted, the PSSA regime can be more 'detailed and liberal' than the LOSC by adopting a broader spectrum of protective measures under the competence of the IMO.²⁵

The PSSA designation process enables the IMO to undertake a comprehensive assessment of the shipping threats to an area and devise the most appropriate protective measure to tackle the threats.²⁶ The first step of the designation process is the PSSA and APM proposal submitted by a Member State.²⁷

19 *Ibid.*, para 1.2.

20 *Ibid.*, para 4.3.

21 RC Beckman, 'PSSAs and transit passage: Australia's pilotage system in the Torres Strait challenges the IMO and UNCLOS' (2007) 38(4) *Ocean Development and International Law (ODIL)* 325–357, at pp. 327–328.

22 J Roberts, 'Compulsory pilotage in international straits: The Torres Strait PSSA proposal' (2006) 37(1) *ODIL* 93–112, at pp. 94–95.

23 LOSC (n 15), Article 211(1).

24 2005 Guidelines (n 13), para 7.5.2.3(iii).

25 Report of the Legal Committee on the Work of its Eighty-seventh Session, IMO Doc LEG 89/17 (23 October 2003), Annex 7.

26 J Harrison, *Saving the Oceans Through the Law: The International Legal Framework for the Protection of The Marine Environment* (Oxford University Press, Oxford, 2017) 129.

27 2005 Guidelines (n 13), para 7.1.

Within the IMO, the Marine Environment Protection Committee (MEPC) considers the application and establishes an informal technical group if no objections to the proposal are raised.²⁸ The MEPC considers proposals for PSSAs on a case-by-case basis, considering whether or not the area fulfils at least one criterion amongst ecological, socioeconomic, or scientific attributes.²⁹ The informal technical group then assesses the scientific and technical aspects of the proposal and recommends that the application be adopted by the MEPC if the Guidelines' criteria are satisfied.³⁰ After adoption by the MEPC, the APMS are referred to a competent committee, which may be the Maritime Safety Committee, the Sub-Committee on Navigation, Communications and Search and Rescue (NCSR), or the Assembly, depending on where the responsibilities of the relevant instruments of the APM lies.³¹

The aim of the APMS is 'to prevent, reduce, or eliminate the threat or identified vulnerability' from vessel-source traffic.³² This wide scope for regulating substances and threats, however, is curtailed by the legal basis of the APMS; the IMO can only adopt APMS that are actions to be, or have been, approved or adopted by the IMO.³³ In this vein, Harrison describes the PSSA to be a 'concept [that] does not itself offer any additional protection than would already be available under the existing legal framework'.³⁴

The 2005 Guidelines state that the legal basis of the APMS should be one of the following: (1) existing IMO instrument; (2) measures possible through amendment or adoption of an IMO instrument; and (3) measures proposed for adoption in the territorial sea or pursuant to Article 211(6) of the LOSC.³⁵ As such, the PSSA itself does not provide the legal basis for the enforcement of APMS; rather, the APMS require a separate approval process in the relevant sub-committee of the IMO. This raises the hurdle of adopting new APMS in the PSSA, as the APM approval process is required in addition to the PSSA adoption process. After examining the IMO instrument's prerequisites, the competent committee takes decisions and informs the MEPC. The MEPC designates the PSSA after the proposed APMS are approved by the competent committees.³⁶

28 *Ibid.*, para 8.3.1.1; Kachel (n 12), at p. 170.

29 2005 Guidelines (n 13), para 8.1.

30 *Ibid.*, para 8.3.1.3.

31 *Ibid.*, para 8.3.2.

32 *Ibid.*, para 1.2.

33 *Ibid.*, para 6.1.

34 Harrison (n 26), at p. 129.

35 2005 Guidelines (n 13), para 7.5.2.

36 *Ibid.*, para 8.3.7.

In sum, the designation procedure essentially involves the proposing Member States, the MEPC, an informal technical group, and the competent committees such as the Marine Safety Committee, the NCSR, or the Assembly. Decisions to designate the PSSA are made by the MEPC, which holds the primary responsibility in considering PSSA applications.³⁷ The whole designation procedure of a PSSA takes more than a year, as the duration between application and APM approval from the competent committees takes at least one year.³⁸ The IMO has designated 17 PSSAs to date: Great Barrier Reef (Australia, 1991), Sabana-Camagüey Archipelago (Cuba, 1998), Malepelo Islands (Colombia, 2002), Florida Keys (United States, 2002), Wadden Sea (North Sea, 2002), Paracas National Reserve (Peru, 2003), Western European Waters (Belgium, France, Ireland, Portugal, Spain and United Kingdom, 2004), Torres Strait (Australia and Papua New Guinea, 2005), Canary Islands (Spain, 2005), Galapagos Islands (Ecuador, 2005), Baltic Sea (Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland and Sweden, 2005), Papahānaumokuākea Marine National Monument (United States, 2008), Strait of Bonifacio (France and Italy, 2011), Saba Bank (Netherlands, 2012), extension of Great Barrier Reef and Torres Strait to encompass the southwest part of the Coral Sea (Australia, 2015), Jomard Entrance (Papua New Guinea, 2016), and Tubbataha Reef Natural Park (Philippines, 2017).

Politicised Decision-making of Particularly Sensitive Sea Areas

With all Member States of the IMO participating, the PSSA designation process is crafted to be an arena of *justified politics* that is designed to balance environmental and shipping interests.³⁹ Likewise, the 2005 Guidelines state that their purpose is to ‘ensure that in the process all interests – those of coastal State, flag State, and the environmental and shipping communities – are thoroughly considered’.⁴⁰

David Easton defines ‘politics’ as the process of authoritative distribution of values in a society.⁴¹ Using this definition in the context of the PSSA regime, politics would mean the authoritative process of deciding how much protection (i.e., the size of the PSSA, the range of APMS, etc.) is given to the proposed

37 *Ibid.*, para 8.3.1.1.

38 Kachel (n 12), at p. 173.

39 Kraska (n 12), at p. 523.

40 2005 Guidelines (n 13), para 1.4.2.

41 D Easton, *A Systems Analysis of Political Life* (John Wiley & Sons, New York, 1965) 21.

PSSA area. It is *authoritative* because the PSSA regime is decided under both the legal competence of IMO and the authority of Member States.

Whilst politics is a term used to illustrate the general picture of the distribution of values, politicisation is carried out by a State or a group of States. If a State or a group of States *politicises* the decision-making process, it means that the State or the group regards the issue as a part of their policies and tries to advance their national or communal interests in the distribution of values. Considering the issue as a part of their policies entails 'government decision and resource allocations or, more rarely, some other form of communal governance'.⁴² In contrast, non-politicisation occurs when a State does not find an issue significant enough to seek more values in the distribution process. When a State is not politicising the issue, it would not opine on the matter.

When applied to the PSSA regime, *politicisation* may be defined as when a Member State or a group of Member States prioritises an issue and advances their interests based on governmental or communal decisions. In this sense, the act of proposing a PSSA can also be an instance of politicisation, as it is steered by the interests and planned actions of the Member State(s). Likewise, a parallel comment can be made about an act of actively opposing a PSSA proposal. In contrast, when a Member State does not deem the issue to be important and posits no opinion on the matter, the State is not politicising the issue. For example, when a State proposes a PSSA site and all the other States are not interested in the proposal, the proposing State is *politicising* the proposal whereas all other States are not politicising it. Hence, politicisation and non-politicisation can occur on an issue simultaneously.

The IMO designed the PSSA designation process as an arena of justified politics; all Member States of the IMO, regardless of being a proposing State for the PSSA or not, are eligible to vote for a new PSSA candidate site. This means that States with not only environmental interests in the proposed PSSA area, but also those with shipping and navigational interests, influence the PSSA designation process. Moreover, not only States but also non-governmental organisations participate actively in the MEPC to advance an agenda. Environmental organisations such as the World Wildlife Fund and the International Union for Conservation of Nature submit documents to the MEPC to improve the PSSA review process.⁴³ In contrast, shipping organisations such as the International

42 This article borrows the definition of politicisation from the Copenhagen School of International Relations: B Buzan, O Wæver and J de Wilde, *Security: A New Framework of Analysis* (Lynne Rienner Publishers, Boulder, 1998) 23.

43 Identification and protection of Special Areas and Particularly Sensitive Sea Areas: The need to evaluate the effectiveness of PSSAs and their APMS, the case study of the Great

Chamber of Shipping and the Baltic and International Maritime Council submit documents to dissuade Member States from adopting more stringent navigational measures.⁴⁴ Although one may view the politicisation of the IMO itself to be undesirable, this is not necessarily the case. A healthy political process helps the agenda to develop and the participants to shed light on possible obstacles. Considering that the PSSA concept itself is a positivist outcome, the PSSA designations are the outcome of political bargaining.

For the PSSA regime to retain its legitimacy, consistency in the IMO's decisions is necessary. It is important to ensure that PSSAs and APMS are not swayed purely by the interests of powerful States. For this, the PSSA regime needs to be consistent in adopting environmental measures. This consistency can be guaranteed through the 2005 Guidelines, which sets the limits of the degree of autonomy in the decision-making process. Such limits include the application criteria, such as geographical scope, ecological and biological criteria, and threats to the marine environment. Moreover, the legal strength of the PSSA regime lies in the stricter environmental measures to meet the very founding purpose of the PSSA regime: to protect the marine environment against the threats posed by shipping.

Unfortunately, the 2005 Guidelines have not fulfilled their role in trying to maintain a coherent approach to PSSAs. With the weak legal basis provided by the 2005 Guidelines, the more stringent APMS are often 'watered-down' in the political process.⁴⁵ As discussed below, the PSSA regime in practice has rendered the 2005 Guidelines not as genuine guidelines. What is worse, this may lead to politics solely deciding the PSSA designation process and undermining the legitimacy of the PSSA regime.

This is unfortunate when the PSSA regime has such great potential for protecting and preserving the marine environment; the PSSA regime provides a single platform for States aiming to promote their MPAs and to adopt environmental measures. States can also adopt more stringent measures in the EEZ through the PSSA. PSSAs have the potential to be designated in the high seas, as the 2005 Guidelines merely state that PSSAs can be designated 'beyond the

Barrier Reef, Submitted by the World Wildlife Fund and the International Union for Conservation of Nature, 8 March 2013, IMO Doc MEPC 65/9 (8 March 2013).

44 Identification and protection of Special Areas and Particularly Sensitive Sea Areas: Torres Strait, Submitted by International Chamber of Shipping (ICS), BIMCO, INTERCARGO and INTERTANKO, IMO Doc MEPC 55/8/3 (10 August 2006).

45 Harrison (n 26), at p. 129. Examples of this situation are the PSSAs in the Torres Strait and the Strait of Bonifacio, which will be examined below in the section entitled 'Adopting Stringent Associated Protective Measures'.

territorial sea.⁴⁶ The PSSA regime can also modify the legal norms on navigation and environmental protection in the LOSC. As the IMO is delegated as the 'competent international organisation' under the LOSC, PSSAs can be a means to fill the gaps in the LOSC by addressing contemporary environmental concerns without going through complicated amendment procedures. APMS in the PSSAs can be a promising alternative to adopt unprecedented environmental measures and strengthen the enforcement jurisdiction of the coastal State in both the territorial sea and the EEZ.⁴⁷ In this vein, Ringbom defines the PSSA to be 'a curious concept, the full implications of which have yet to be ascertained'.⁴⁸

Despite the potential it holds, the IMO has underutilised the PSSA regime. This is due to the shortcomings of the 2005 Guidelines and the politicisation of the PSSA designation process. The 2005 Guidelines do not provide any detailed guidance to prevent this politicisation and therefore leads to misuse of the PSSA regime. How much has the politicisation dominated the PSSA practice and rendered the decision-making process inconsistent? What interests have made the IMO miss the opportunity to develop the PSSA regime? The following section discusses these issues by exploring all the adopted PSSAs and APMS.

Evaluations of Particularly Sensitive Sea Areas in Practice

Existing PSSAs are evaluated in three aspects: the relationships between APMS and existing navigational measures, PSSAs and ecosystems, and the adoption of stringent APMS. Largely, these three aspects can be divided into politicisation outside and inside the IMO; the first aspect involves how the motives of States and other international organisations have shaped the outcome of the PSSAs and APMS. These political motives were formed outside the forum of the IMO and affected the outcome in the IMO's decision-making process. The latter two aspects, on the lack of links between the PSSAs and ecosystem and lack of stringent APMS, show the politicisation within the IMO; they involve the politicised decision-making process of PSSA designation inside the committee room of the IMO. Taken together, these factors have led to the underutilisation of the PSSA's potential and practical function.

46 2005 Guidelines (n 13), para 4.3. See also Freestone and Harris (n 12).

47 Ringbom (n 12), at pp. 470–471; Kachel (n 12), at p. 268.

48 Ringbom (n 12), at p. 469.

*The Relationships between Associated Protective Measures
and Existing Measures*

As a significant number of APMS echo existing measures, some view this as a critical defect in the practical function of a PSSA, even commenting that the concept of a PSSA is becoming ‘a tool for reiteration of rules already put in place by the LOSC and MARPOL 73/78 [the International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978]’.⁴⁹ On the other hand, others view this as an efficient way to improve the cooperation between international shipping authorities.⁵⁰ It is argued here that the IMO and the proposing States are underutilising the PSSA regime, despite the potential it holds in adjusting the balance between navigation and environmental protection. By revealing that many PSSAs simply mirror existing national environmental measures, it is suggested that States have underutilised the practical function of the PSSA due to their motives of promoting their national MPAs at the international level.

Before delving into the relationships between APMS and existing measures, this section first briefly explores how PSSAs have mirrored existing national measures establishing MPAs. Out of fifteen designated PSSAs, only the Jomard Entrance PSSA was not designated as a national or international MPA before it was designated as a PSSA. All other PSSAs were either a national or international MPA at the time of designation. With regard to national MPAs, the following six MPAs were already established under national law: the Great Barrier Reef, Sabama-Camagüey Archipelago,⁵¹ Malpelo Island,⁵² the Florida Keys,⁵³ the Paracas National Reserve, and the Canary Islands.⁵⁴

49 Y Uggla, ‘Environmental protection and the freedom of the high seas: The Baltic Sea as a PSSA from a Swedish Perspective’ (2007) 31(3) *Marine Policy* 251–257, at p. 257; International Convention for the Prevention of Pollution from Ships (London, 2 November 1973, in force 10 February 1983) 1340 *UNTS* 184; Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships (London, 17 February 1978, in force 2 October 1983) 1340 *UNTS* 61 [MARPOL 73/78].

50 B Reineking, ‘The Wadden Sea designated as a PSSA’ (2002) 2 *Wadden Sea Newsletter* 12.

51 Kachel (n 12), at p. 225.

52 UNESCO World Heritage Centre, ‘Malpelo Fauna and Flora Sanctuary’ available at <https://whc.unesco.org/en/list/1216>.

53 T Dux, *Specially Protected Marine Areas in the Exclusive Economic Zone (EEZ)* (LIT Verlag, Münster, 2011) 295.

54 R De la Cruz Modino and JJ Pascual-Fernández, ‘Marine protected areas in the Canary Islands: Improving their governability’ in M Bavinck, R Chuenpagdee, S Jentoft and J Kooiman (eds), *Governability of Fisheries and Aquaculture* (Springer, Cham, 2013) 219–240, at pp. 231–232.

Moving on to previously established international MPAS, nine out of a total fifteen PSSAS were already inscribed as World Heritage Sites or listed under the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat (the Ramsar Convention).⁵⁵ Six out of fifteen PSSAS were inscribed as World Heritage Sites before their designation as PSSAS. These are the Papahānaumokuākea Marine National Monument (2010), the Galápagos Islands (1978), the Florida Keys within the Everglades National Park (1979), the Great Barrier Reef (1981), the Strait of Bonifacio (2002), and the Tubbataha Reefs (1993).⁵⁶ Moreover, the Ramsar Convention listed five out of fifteen PSSAS before these were designated as PSSAS. The Paracas National Reserve (1992),⁵⁷ the Florida Keys included with the Everglades National Park (1987),⁵⁸ Tubbataha Reef Natural Park (1999),⁵⁹ parts of the waters of Western Europe, and the Baltic Sea were listed as wetlands of international importance.⁶⁰

One may argue that although the PSSAS mirror existing national and international MPAS, it is environmentally useful as long as the PSSAS adopt new APMS in the area. However, this is not the picture we see in the PSSA regime. The institutional dynamic of MPAS mirroring the PSSAS is repeated in the existing measures mirroring the APMS. A prominent example of PSSAS echoing existing measures is the Special Areas under MARPOL 73/78. Four out of fifteen

55 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar, 2 February 1971, in force 21 December 1975) 996 *UNTS* 245.

56 UNESCO World Heritage Centre, 'Tubbataha Reefs protected from international shipping impacts' available at <https://whc.unesco.org/en/news/1696/>.

57 Y Tanaka, *International Law of the Sea* (Cambridge University Press, Cambridge, 2012) 325; Ramsar Convention Secretariat, 'The list of wetlands of international importance: published 11 December 2020', 39, available at <https://www.ramsar.org/sites/default/files/documents/library/sitelist.pdf>.

58 Ramsar Convention Secretariat (n 57), at p. 54.

59 *Ibid.*, at p. 39.

60 Designation of the Western European Waters as Particularly Sensitive Sea Area, IMO Resolution MEPC.121(52), adopted 15 October 2004, IMO Doc MEPC 52/24/Add.1 (1 November 2004), Annex 10, p. 4, para 2.1.9. It should be noted that there is debate as to whether World Heritage Sites and Ramsar sites are MPAS, as they do not impose multi-sector restrictions. Nevertheless, adhering to the definition of MPA used in the ongoing negotiations on the international legally binding instrument under the LOSC on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (the BBNJ negotiations), this article deems both as MPAS: 'a geographically defined marine 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].' United Nations General Assembly, *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*, UN Doc A/CONF.232/2020/3, 18 November 2019, a p. 5.

PSSAs, prior to their designation, were already regulated as MARPOL Special Areas. The Sabana-Camagüey Archipelago and Saba Bank were included in the Special Area of the Wider Caribbean Region under MARPOL Annex V.⁶¹ The Wadden Sea was listed as a Special Area under MARPOL Annexes I and V,⁶² with the Baltic Sea being included in a Special Area under Annexes I, IV, V, and V.⁶³

The cases of the Wadden Sea and the Strait of Bonifacio are interesting because their APMS echo existing national and international measures. Even before its designation, the Wadden Sea was managed as a national MPA in Germany and as the Trilateral Cooperation Area together with the Netherlands and Denmark.⁶⁴ The area was also a Special Area under Annexes I and V of MARPOL 73/78, regulating the discharge of oil and garbage.⁶⁵ The Wadden Sea PSSA also represents the supporting role of a PSSA to other national or international MPAs, as the designation was not accompanied by any new APMS.⁶⁶ Rather, the MEPC resolution designating the Wadden Sea PSSA lists the existing measures by dividing them into IMO measures, European Community measures, other regional measures, and national measures.⁶⁷ The existing measures were mandatory reporting, routing systems including mandatory deep-water routes, and MARPOL 73/78 Special Areas. In this case, the PSSA designation of the Wadden Sea was intended for international recognition of the environmental significance of the area by globalising the existing national measures. The proposing States expected the designation to raise awareness about enforcement authorities and enhance cooperation between shipping authorities.⁶⁸

The case of the Strait of Bonifacio PSSA also shows the supplementary function of a PSSA. Existing measures of ship routing and a mandatory reporting

61 Identification of Archipelago of Sabana-Camagüey as Particularly Sensitive Sea Area, IMO Resolution MEPC.74(40), adopted 25 September 1997, IMO Doc MEPC 40/21 (27 October 1997), Annex 3, at p. 1.

62 Identification of Wadden Sea as Particularly Sensitive Sea Area, IMO Resolution MEPC.101(48), adopted 11 October 2002, IMO Doc MEPC 48/21 (24 October 2002), Annex 5, at p. 17.

63 IMO, 'Special Areas under MARPOL' available at <https://www.imo.org/en/OurWork/Environment/Pages/Special-Areas-Marpol.aspx>.

64 Identification and protection of Special Areas and Particularly Sensitive Sea Areas: Designation of the Wadden Sea as a Particularly Sensitive Sea Area, Submitted by Denmark, Germany, and the Netherlands, IMO Doc MEPC 48/7/2 (28 June 2002), para 2.1.

65 *Ibid.*, para 5.6.

66 *Ibid.*, para 5.3.

67 IMO Resolution MEPC.101(48) (n 62), Annex 5, at p. 11.

68 IMO Doc MEPC 48/7/2 (n 64), para 1.2.

system governed the Strait prior to the PSSA designation, along with an IMO resolution recommending oil tankers and ships carrying hazardous cargoes avoid transit of the Strait.⁶⁹ Apart from the designation of national parks under French and Italian law, the two bordering States bilaterally agreed to prohibit navigation by French and Italian merchant ships carrying oil and hazardous and noxious cargoes in 1993.⁷⁰ The Strait of Bonifacio already enforced routeing and a mandatory ship reporting system and a precautionary area under MARPOL 73/78 and European Directive 2002/59/EC.⁷¹ Whereas France and Italy initially proposed a mandatory traffic separation scheme, an ABTA, a vessel traffic system under the SOLAS Convention, and a mandatory pilotage system,⁷² the new APM only recommended pilotage and a two-way route.⁷³ The resolution designating the Strait of Bonifacio PSSA merely emphasized existing routeing measures and the mandatory reporting system, with a lengthy description of existing national and international measures.⁷⁴

The APMS' mirroring of existing measures suggests that States have used the PSSA as a means to publicise the special status of the area and existing measures, rather than using the function of introducing stronger navigational measures. Both the Wadden Sea and the Strait of Bonifacio PSSAs were already heavily regulated with multiple layers of regulations at the national, regional, and international levels. In the case of the Strait of Bonifacio, with only one APM proposed, the proposal of France and Italy seems to hold a symbolic significance rather than a practical purpose. The Wadden Sea PSSA was adopted without any new APMS, as its designation was for the purpose of international recognition and administrative efficiency. Moreover, in the Western European PSSA, the introduction of the Western European Tanker Reporting System was the only new APM adopted. A similar instance can be also found with the Great Barrier Reef, as its identification as a PSSA was seen as a way for the Australian

69 Navigation in the Strait of Bonifacio, IMO Resolution A.766(18), adopted 4 November 1993, para 1.

70 Designation of the Strait of Bonifacio as a Particularly Sensitive Sea Area, IMO Resolution MEPC.204(62), adopted 15 July 2011, IMO Doc MEPC 62/24/Add.1 (26 July 2011), Annex 22, at p. 17.

71 A Olita, A Cucco, S Simeone *et al.*, 'Oil spill hazard and risk assessment for the shorelines of a Mediterranean coastal archipelago' (2012) 57 *Ocean & Coastal Management* 44–52, at p. 51.

72 Identification and protection of Special Areas and Particularly Sensitive Sea Areas: Designation of the Strait of Bonifacio a Particularly Sensitive Sea Area, Submitted by France and Italy, IMO Doc MEPC 61/9 (25 June 2010), Annex, at p. 11.

73 IMO Resolution MEPC.204(62) (n 70), Annex 22, at pp. 15–16.

74 *Ibid.*, at pp. 15–18.

government to receive international recognition of the Great Barrier Reef as an environmentally sensitive area that needs special protection.⁷⁵

A considerable number of PSSAs show that States have neglected the practical function of the PSSA of being able to impose stricter navigational measures. If PSSAs are solely used for promoting international recognition without implementing any new measures, States are underutilising the practical function of PSSAs. As mentioned above, States can adopt more stringent APMS in the EEZ, which is only legally possible via the PSSA regime. Instead, the cases discussed here neglected this potentially important function. This also means that the scope of the PSSA is limited to use with an MPA and existing measures. This underutilisation may lead the PSSA regime to be ‘an additional administrative burden, due to the additional documentation required and the involvement of several different committees within the IMO’.⁷⁶

However, the result of PSSA designation raising international awareness cannot be ignored. The designation of a PSSA itself without stringent APMS can be effective in protecting the marine environment in terms of international awareness.⁷⁷ The area marked as a PSSA on navigational charts alone can raise awareness among ships navigating the area to take additional care.⁷⁸ Another advantage is administrative convenience. An area that is recognised as a World Heritage Site means that the international community has already recognised the area for its ecological values.⁷⁹ This allows the IMO to skip the assessment of the ecological criteria of a proposed PSSA.

Nevertheless, the IMO should be more stringent in considering new PSSA applications without any proposed APMS. Unlike World Heritage Sites or other existing MPAs without restrictive measures for vessels, the aim of the PSSA is not only to raise international awareness of the area, but also to protect areas that are vulnerable to international shipping activities with effective measures. If the proposing States aim to raise international awareness through then use of a PSSA, they need to convince other States of the environmental importance of the area and the need for advanced protection.

Until now, the cases discussed here are those where States have politicised the PSSA regime with the motive of international recognition, which was

75 Freestone and Gjerde (n 12), ‘Introduction: Appendix 3: Marine Environment Protection Committee – 36th Session Agenda Item 21 (MEPC/36/21/4 4 August 1994)’, 431–468, at p. 461.

76 Ringbom (n 12), at p. 470.

77 Kachel (n 12), at p. 179.

78 Harrison (n 26), at p. 130.

79 A Gillespie, ‘What is “sensitive” for a Particularly Sensitive Sea Area?’ (2016) 20 *New Zealand Journal of Environmental Law* 1–41, at p. 5.

formed outside the forum of the IMO. The next two sections explore the politicised arena within the IMO and how States have used politics to twist the 2005 Guidelines to suit their favoured outcome.

Particularly Sensitive Sea Areas and Ecosystems

The 2005 Guidelines state that a PSSA fulfilling the ecological criteria needs to be ‘a biologically functional unit, an effective, self-sustaining entity’.⁸⁰ They require that the IMO should also consider ‘the linkage between the recognized attributes, the identified vulnerability, the associated protective measure to prevent, reduce, or eliminate that vulnerability, and the overall size of the area, including whether the size is commensurate with that necessary to address the identified need’.⁸¹ In other words, the size of the area should closely link to the environmental threat posed to the ecosystem of the area, or what we could call the ‘ecosystem criterion’. The Guidelines’ wording confused States on how to interpret this criterion, that is, should a PSSA only contain a singular biologically functional unit or contain multiple ecosystems.⁸² This confusion surfaced as a contentious issue in the Western European PSSA designation process, but the IMO adopted the PSSA without settling on which interpretation to use.⁸³

Because the IMO was undecided on how to interpret the ecosystem criterion, the politicisation of the MEPC worsened the situation. Amidst the clashes of political interests, the IMO easily overlooked the ecosystem criterion and made inconsistent decisions in the Western European PSSA and the Baltic Sea PSSA. The Western European PSSA neglected the ecosystem criterion and is overinclusive of ecosystems, as the area contained different ecosystems raising doubt as to whether it is a single biologically functional unit.⁸⁴ In contrast, the Baltic Sea PSSA overlooked the criterion by being underinclusive, including only part of an ecosystem due to political opposition.

The following discussion illustrates what kind of political motives were present in the MEPC and describes how this affected the outcome of these PSSAs. This is not to argue that politicisation of the MEPC is inappropriate; as mentioned above, the PSSA regime is designed to embody such clashing interests. What is problematic here is that the States’ politicisation of an ambiguous

80 2005 Guidelines (n 13), para 4.4.9; Kachel (n 12), at p. 168.

81 2005 Guidelines (n 13), para 8.2.3.

82 Kachel (n 12), at p. 168.

83 Any Other Business: Designation of a Western European Particularly Sensitive Sea Area, IMO Doc LEG 87/16/1 (15 September 2003), para 8; Report of the Legal Committee on the Work on its Eighty-Seventh Session, IMO Doc LEG 87/17 (23 October 2003), para 196.

84 IMO Doc LEG 87/16/1 (n 83), para 8.

legal norm has led to the decisions regarding PSSA designation to be incoherent. In this discussion, this ambiguous legal norm is the ecosystem criterion.

The Western European PSSA is overinclusive of ecosystems due to the European Union's (EU) effort to include large areas of EU waters. This was for the purpose of expanding the EU maritime policy. The proposed area included the territorial sea, the EEZs of the proposing States, and the Strait of Dover, an international strait.⁸⁵ In proposing this PSSA, the EU held the primary role in advancing the application through its Member States.⁸⁶ The EU started to actively regulate vessel-source pollution after the *Erika* and the *Prestige* accidents in 1999 and 2002. Along with the EU legislation and establishment of the European Maritime Safety Agency,⁸⁷ the EU led the designation for the effective protection of European ports.⁸⁸ The EU approached the PSSA designation in the IMO as a general EU maritime policy in the post-*Prestige* era.⁸⁹ Moreover, the newly-proposed APMS banned single-hull tankers from EU waters and adopted a 48-hour mandatory reporting system for ships carrying heavy crude and fuel oil.⁹⁰ As these measures heavily regulated oil tankers, the motive for the Western European PSSA application appeared to be to universalise the oil tanker regulation policy of the EU.

The most contentious aspect of the proposed PSSA was the size of the proposed area. Due to its size, the area contained different ecosystems, which raised doubt as to whether it was a single biologically functional unit. The technical group was not able to reach a conclusion about whether the proposed area as a whole satisfied the ecosystem criterion; it was difficult to confirm whether such a large area, with multiple ecosystems, was required to tackle the shipping threat.⁹¹ This resulted in opposition from other States, which argued that PSSA designations can only be allowed in 'geographically limited sea

85 Identification and Protection of Special Areas and Particularly Sensitive Sea Areas: Designation of a Western European Particularly Sensitive Sea Area, Submitted by Belgium, France, Ireland, Portugal, Spain and the United Kingdom, IMO Doc MEPC/49/8/1 (11 April 2003).

86 L Nengye and F Maes, 'The European Union and the International Maritime Organization: EU's external influence on the prevention of vessel-source pollution' (2010) 41(4) *Journal of Maritime Law and Commerce* 581–594, at pp. 589–590; Kraska (n 12), at p. 538.

87 J van Leeuwen and K Kern, 'The external dimension of European Union marine governance: Institutional interplay between the EU and the International Maritime Organization' (2013) 13(1) *Global Environmental Politics* 69–87, at p. 76.

88 Kachel (n 12), at p. 293.

89 Ringbom (n 12), at p. 459.

90 IMO Doc MEPC/49/8/1 (n 85), para 10.

91 Report of the Marine Environment Protection Committee on its Forty-Ninth Session, IMO Doc MEPC/49/22 (8 August 2003), para 8.20.

areas with unique eco-systems and not [such] wide geographical regions'.⁹² Nevertheless, the political and economic pressure applied by the EU in the IMO committees enabled such a large PSSA, the Western European PSSA, to be designated.

The Baltic Sea PSSA is another example of a PSSA that fails to reflect the ecosystem of the area. The Baltic Sea PSSA did not include the whole ecosystem due to political matters, in contrast to the Western European PSSA which spans too many ecosystems. The increase of Russian oil exports through the Baltic Sea stimulated the Baltic Sea PSSA application.⁹³ As expected from the motive for the PSSA, Russia strongly opposed the Baltic Sea PSSA.⁹⁴ Without its consent, the Baltic Sea PSSA could not include Russian waters. Furthermore, the proposing Baltic States and Russia disagreed on the precise coordinates of the delineation line of the EEZ. This nearly led to the failure to adopt the Baltic Sea PSSA, which would have been left with partial coverage of the Baltic Sea and unclear boundaries. The MEPC designated the Baltic Sea PSSA eventually after Russia was assured that the PSSA excluded areas under Russian sovereignty and jurisdiction. The MEPC resolution designating the Baltic Sea PSSA provides that the area 'shall not prejudice the sovereignty or such sovereign rights and jurisdiction of the Russian Federation under international law'.⁹⁵

In spite of the success in designating the Baltic Sea PSSA, the exclusion of Russian waters means that not all of the ecosystems of the Baltic Sea are protected. The Baltic Sea PSSA failed to encompass Russian waters within the PSSA, even though the threat of the oil pollution was apparent with increased exports of Russian oil.⁹⁶ Even though the IMO resolution designating the Baltic Sea PSSA stated the geographical scope to be 'the Baltic Sea proper, the Gulf of Bothnia, the Gulf of Finland, and the entrance to the Baltic Sea',⁹⁷ the PSSA could not encompass Russian waters in the Gulf of Finland. This undermines the purposes of designating the Baltic Sea PSSA in the first place, which was motivated by the desire to alleviate the effects of Russian oil exports from Russian ports. Considering that the IMO recognises the vulnerability of the

92 Report of the Marine Environment Protection Committee on its Fifty-First Session, IMO Doc MEPC/51/22 (22 April 2004), para. 8.5.1.

93 Uggla (n 49), at p. 255; Identification and Protection of Special Areas and Particularly Sensitive Sea Areas, IMO Doc MEPC/51/8/1 (19 December 2003), para 4.1.

94 IMO Doc MEPC/51/22 (n 92), Annex 8.

95 Designation of the Baltic Sea Area as a Particularly Sensitive Sea Area, IMO Resolution MEPC.136(53), adopted 22 July 2005, IMO Doc MEPC 53/24/Add.2 (1 August 2005), Annex 24, para 1.1.

96 Uggla (n 49), at p. 251.

97 IMO Resolution MEPC.136(53) (n 95), para 1.1.

Baltic Sea to ‘man-made disturbances’,⁹⁸ the exclusion of Russian waters is disappointing in terms of reflecting the ecosystem of the Baltic Sea in the PSSA.

These adopted PSSAs show widely different approaches to the ecosystems in the area to be protected. In the Western European PSSA and the Baltic Sea PSSA, the ecosystem criterion was inconsistently applied because of the politicisation of the MEPC. Justified politics in the MEPC not only caused inconsistent decisions, but has also curtailed the potential legal development of the PSSA regime. Likewise, politicisation inside the IMO has hindered the development of the PSSA regime by watering-down APMS, as will be discussed below.

Adopting Stringent Associated Protective Measures

The 2005 Guidelines limit the extent of APMS to ‘actions that are to be, or have been, approved or adopted by IMO’.⁹⁹ Other than measures adopted under MARPOL 73/78 and the 1974 International Convention for the Safety of Life at Sea (SOLAS), other measures can be developed and adopted as long as they have an identified legal basis.¹⁰⁰ In other words, the IMO can develop and adopt new APMS. This section now delves into the APMS adopted in existing PSSAs and evaluates how stringently the IMO has regulated international shipping for the protection of the marine environment. After addressing the APMS with the case studies, it will be clear that due to politicisation within the IMO, the IMO committees have ‘watered down’ the more stringent APMS.¹⁰¹

Two PSSAs, those in the Torres Strait and the Strait of Bonifacio, demonstrate situations where more stringent proposed APMS were watered down. Both cases represent how the politicisation shaped the APMS proposed, with environmental interests being watered down by shipping interests.

Efforts to implement compulsory pilotage in the Torres Strait ultimately failed in 2005. In 2003, Australia and Papua New Guinea jointly submitted a proposal to include the Torres Strait by extending the Great Barrier Reef PSSA. They proposed two APMS, a two-way route in the Torres Strait and the Great North East Channel and the inclusion of Torres Strait in the compulsory pilotage regime.¹⁰² Compulsory pilotage requires ships to contact the pilotage

98 *Ibid.*, para 2.1.

99 2005 Guidelines (n 13), para 6.1.

100 *Ibid.*, para 6.1.3; International Convention for the Safety of Life at Sea (London, 1 November 1974, in force 25 May 1980) 1184 *UNTS* 2.

101 Harrison (n 26), at p. 129.

102 Identification and protection of Special Areas and Particularly Sensitive Sea Areas: Extension of Existing Great Barrier Reef PSSA to include the Torres Strait Region,

authority throughout the concerned area and to comply with the authority's instructions on navigational routes.¹⁰³

The proposed APMS were highly controversial amongst the Member States due to their possible infringement of the right of transit passage. From the perspective of the strait States, the adoption of compulsory pilotage was consistent with the LOSC. The proposing States argued that compulsory pilotage would not impede transit passage, but rather would ensure the safety of the passage.¹⁰⁴ States supporting the proposal deemed the compulsory pilotage proposal to be compliant with freedom of navigation. They also recognised that compulsory pilotage was a necessary measure to protect the sensitive marine ecosystem in the Straits.¹⁰⁵

Those doubting the legality of such measures highlighted the measure's infringement of the right of transit passage. They argued that compulsory pilotage has the practical effect of denying, impairing, or impeding the right of transit passage. Further, they suggested that compulsory pilotage 'implied the intention to impose some form of sanctions on those vessels, which did not take a licensed pilot'.¹⁰⁶ These States also commented that just because the LOSC does not prohibit compulsory pilotage in international straits does not mean it permits such a measure.¹⁰⁷

Facing these doubts, the MEPC only 'recommended pilotage' in the Torres Strait instead of compulsory pilotage.¹⁰⁸ The MEPC resolution does not state any compulsory nature of the pilotage. Yet, Australia promulgated Australian Marine Notice 8/2006 that required ships navigating the Torres Strait to engage

Submitted by Australia and Papua New Guinea, IMO Doc MEPC 49/8 (10 April 2003), paras 5.2, 5.7.

103 Freestone and Harris (n 12), at p. 344.

104 Any Other Business: Torres Strait PSSA Associated Protective Measure – Compulsory Pilotage: Submitted by Australia and Papua New Guinea, IMO Doc LEG 89/15 (24 August 2004), paras 11, 15, 21.

105 Report of the Legal Committee on the Work of its Eighty-ninth Session, IMO Doc LEG 89/16 (4 November 2004), para 228.

106 *Ibid.*, para 232. The rights of transit passage are prescribed in Article 38 of the LOSC.

107 *Ibid.*, para 233.

108 Designation of the Torres Strait as an Extension of the Great Barrier Reef Particularly Sensitive Sea Area, IMO Resolution MEPC.133(53), adopted 22 July 2005, IMO Doc MEPC 53/24/Add.2 (1 August 2005), Annex 21, p. 1, para 3. The recommendatory nature of the pilotage was reaffirmed by the Chairman at the fifty-fifth session of the MEPC: Report of the Marine Environment Protection Committee on its Fifty-Fifth Session, 16 October 2006, IMO Doc MEPC 55/23 (16 October 2006), para 8.10.

in compulsory pilotage and imposed penalties for non-compliance.¹⁰⁹ With regard to enforcement, Australia does not stop ships not complying with compulsory pilotage mid-passage, but enforces the law when the ships enter an Australian port.¹¹⁰ This later entry does not have to be on the same voyage but can be on a separate voyage.¹¹¹ Similar to the Torres Strait, the Strait of Bonifacio PSSA only adopted recommended pilotage, not compulsory pilotage.¹¹²

Another example is provided by the failure to adopt the ban on single-hull tankers in the Western European PSSA. The proposal to ban single-hull tankers in the PSSA was controversial, as the area of the Western European PSSA proposal included the territorial sea, the EEZ, and an international strait. This meant that the rights of innocent passage, transit passage, and freedom of navigation may have been threatened.¹¹³ Faced with heavy opposition, the proposal to ban single-hull tankers in the Western European PSSA was withdrawn.¹¹⁴

The proposed stringent APMS were watered down because of the weak legal basis of IMO resolutions designating PSSAs. The 2005 Guidelines clearly state that the legal basis for APMS must be found in one of the following: (1) an existing IMO instrument; (2) measures possible through amendment or adoption of an existing IMO instrument; or (3) measures proposed for adoption in the territorial sea or pursuant to Article 211(6) of the LOSC.¹¹⁵ This is because the IMO resolutions designating PSSAs do not have a legally binding character.¹¹⁶ As mentioned above, APMS rely on routeing or navigational measures which are already approved by the IMO under treaties such as MARPOL 73/78 and SOLAS. Since existing instruments provide a limited spectrum of protective measures, the PSSAs inherit this limitation.

This means that PSSAs have an inherently complementary role in protecting the marine environment against vessel-source pollution.¹¹⁷ States seeking environmental protection against shipping activities do not necessarily have to seek the PSSA designation to implement the same measures. The first two

109 Identification and protection of Special Areas and Particularly Sensitive Sea Areas: Torres Strait, Submitted by International Chamber of Shipping (ICS), BIMCO, INTERCARGO and INTERTANKO, IMO Doc MEPC 55/8/3 (10 August 2006), para 1.

110 S Bateman and M White, 'Compulsory pilotage in the Torres Strait: Overcoming unacceptable risks to a sensitive marine environment' (2009) 40(2) *ODIL* 184–203, at p. 198.

111 S Kopela, 'Port-State jurisdiction, extraterritoriality, and the protection of global commons' (2016) 47(2) *ODIL* 89–130, at p. 102.

112 IMO Resolution MEPC.204 (62) (n 70), Annex 22, pp. 15–16.

113 IMO Doc MEPC 49/22 (n 91), para 8.14.2.

114 IMO Doc LEG 87/16/1 (n 83), para 13.

115 2005 Guidelines (n 13), para 7.5.2.

116 Roberts (n 22), at pp. 94–95.

117 Ringbom (n 12), at p. 458.

of the APM legal bases, an existing IMO instrument, and measures possible through amendment or adoption of an existing IMO instrument, are available without the need to resort to the PSSA regime. As regards the third legal basis, measures proposed for adoption in the territorial sea or pursuant to Article 211(6) of the LOSC, the measures adopted in the territorial sea do not necessarily need to be adopted under the PSSA regime. Coastal States have sovereignty over the territorial sea, allowing navigational measures to be adopted as long as they do not obstruct innocent passage. In terms of measures adopted pursuant to Article 211(6), the provision itself does not stipulate any specific navigational measures that are permitted in the EEZ. Instead, it prescribes how the coastal State can adopt a clearly defined area and adopt special mandatory measures through the IMO. Although the PSSA regime refers to this provision as the legal basis, it is generally accepted that the regime of 'clearly defined area' under Article 211(6) has not developed in the way the drafters intended. As such, most of the APMs adopted hitherto in PSSAs exhibit similar kinds of measures, namely, recommended pilotage, ATBA, traffic separation schemes, no-anchoring areas, routeing and reporting systems, precautionary areas, and two-way routes.

The PSSA regime's reliance on existing IMO legal sources has caused the Member States to forego PSSA applications and instead to request similar measures through other IMO committees, such as the Maritime Safety Committee. The PSSA proposals require an onerous process of preparing information on the vulnerability of the proposed area posed by international shipping activities,¹¹⁸ which is not required when requesting navigational measures through other IMO committees. Moreover, the PSSA approval process in the IMO is more time-consuming as it requires approval from both the MEPC and the APM-related committees. For example, Indonesia submitted two information papers in 2017 and 2018 on establishing a PSSA in the Lombok Strait. In their information papers, they indicated that they planned to apply for a traffic separation scheme and ship reporting system and an ABTA as APMs.¹¹⁹ However, despite what they had said in their information papers, Indonesia did not in fact submit a PSSA proposal to the MEPC. Instead, Indonesia applied for the traffic separation scheme and associated routeing measures via the

118 2005 Guidelines (n 13), section 5.

119 Identification and Protection of Special Areas and PSSAs: Protection of the Lombok Strait including Gili Islands and Nusa Penida Islands, Submitted by Indonesia, IMO Doc MEPC 71/INF.39 (28 April 2017), para 13; Identification and Protection of Special Areas, ECAs and PSSAs: Recent Progress on the development of a PSSA proposal for the protection of Nusa Penida Islands in the Lombok Strait, IMO Doc MEPC 73/INF.18 (17 August 2018), para 14.

Sub-Committee on Navigation, Communications, and Search and Rescue.¹²⁰ As a result, Indonesia achieved the analogous environmental protection in the Lombok Strait faster than the time that it would have required if it had pursued a PSSA designation.

To tackle this evasion of the MEPC process, the Maritime Safety Committee adopted a new procedure in 2019 to encourage the proposing States to ‘consider first a submission to the MEPC with a view to establishing PSSAs, and/or associated protective measures’ when drafting or proposing ships’ routeing systems or ship reporting systems for the protection of the marine environment and wildlife.¹²¹ However, as the procedure only encourages States to ‘consider’ submitting the PSSA proposal, States’ compliance with the new procedure is yet to be confirmed. For example, in the same year, Brazil proposed the establishment of an ABTA in the Santos Basin region to protect the marine environment and reduce the risk of maritime incidents.¹²² The NCSR did not approve Brazil’s proposal at its seventh session for reasons that are not yet clear.¹²³ How successful this procedure will be in tackling States foregoing the PSSA designation process needs to be seen with more time and cases.

Moreover, States have resorted to politicised means to enforce their preferred measures. For example, the implementation of compulsory pilotage in the Torres Strait was based on Australian national rules.¹²⁴ If Australia did not have the willingness to implement the compulsory pilotage system and had merely followed the recommendatory language of the IMO resolution, Australia would not have implemented compulsory pilotage. There have also been cases where proposing States or actors imposed political and economic pressure on other States concerning their application. For example, during the negotiation of the Western European PSSA proposal, the EU dominated the negotiations by pressuring the IMO Member States to impose unilateral

120 Routeing Measures and Mandatory Ship Reporting Systems: Establishment of a new traffic separation scheme and associated routeing measures in the Lombok Strait, Indonesia, Submitted by Indonesia, IMO Doc NCSR 6/3/4 (12 October 2018).

121 Procedure for the Submission of Documents Containing Proposals for the Establishment of, or Amendments to, Ships’ Routeing Systems or Ship Reporting Systems, IMO Doc MSC.1/Circ.1608 (20 August 2019).

122 Routeing Measures and Mandatory Ship Reporting Systems: Information on the proposal for the establishment of an area to be avoided off the Brazilian southeast coast, Submitted by Brazil, IMO Doc NCSR 7/INF.10 (8 November 2019).

123 The NCSR report is not available as of December 2020. See IMO, ‘Sub-Committee on Navigation, Communications and Search and Rescue (NCSR), 7th session, 15–24 January 2020’ available at <https://imo.org/en/MediaCentre/MeetingSummaries/Pages/NCSR-7th-session.aspx>.

124 Marine Notices 8/2006 and 16/2006 (AU); IMO Doc MEPC 55/23 (n 108), para 8.12.

actions against foreign ships.¹²⁵ This pressure was to silence the complaints concerning the size of the Western European PSSA, which were mostly from the larger shipping States. This move was effective, due to the heavy reliance of ship owners on Western European trade and the high density of international shipping routes within the proposed area.¹²⁶ This economic pressure was coupled with the effective coordination by the EU with its Member States.¹²⁷ It was interesting to see States that rely on international shipping, such as Greece and Malta, also supported the Western European PSSA.¹²⁸

Without innovative APMS, the only advantage of the PSSA regime now is the international recognition it draws after the designation. The advantage of international recognition is fading, as seen from the Indonesian example in the Lombok Strait, because States are able to achieve the identical environmental protection of the PSSA through other IMO sub-committees. Without any new or innovative APMS to offer as they are watered down in the politics within the IMO, it is predictable that the States will continue to resort to other measures that are easier and faster to be approved by the IMO.

Conclusions

Despite the potential it holds, the PSSA regime has been underutilised due to the inappropriately drafted 2005 Guidelines as well as the politicisation surrounding the PSSA regime. For political reasons the IMO has failed to resolve the legal ambiguities and weaknesses in the 2005 Guidelines, and has further aggravated the situation by adopting inconsistent decisions and weak APMS.

Notwithstanding this history, PSSAs have the potential for further development. The IMO should realise that the PSSA is an alternative navigational measure to adopt that is more detailed and progressive than those that the LOSC expressly prescribes. The LOSC was negotiated during the 1970s when concerns about the marine environment were not as imperative as they are now. There were few measures explicitly allowed by the LOSC to restrict navigational rights and freedoms for environmental purposes. In this situation, PSSAs can be a means to remedy the inadequacies of the LOSC by addressing contemporary environmental concerns without going through the complicated LOSC

125 Kachel (n 12), at p. 293.

126 Kraska (n 12), at p. 538; Nengye and Maes (n 86), at p. 590.

127 Nengye and Maes (n 86), at p. 590.

128 V Frank, *The European Community and Marine Environment Protection in the International Law of the Sea: Implementing Global Obligations at the Regional Level* (Brill, Leiden, 2007) 264.

amendment procedures. Since the LOSC gives the IMO the power to adopt international rules and standards regarding vessel-source pollution, APMS in the PSSAs could provide a promising alternative route to adopting more stringent environmental measures.¹²⁹ This is particularly crucial since it is very rare for the bodies which designate MPAs to have the explicit power to restrict navigation that the IMO possesses. The PSSA regime still retains a great deal of potential for the better protection of the marine environment that the IMO and its Member States need to utilise properly.

¹²⁹ Ringbom (n 12), at pp. 470–471.