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The European Union at the International Seabed Authority: A Question of Competence on the Brink of Deep-Sea Mining

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Abstract

After years of great uncertainty on the viability of deep-sea mining activities, the International Seabed Authority is currently negotiating the draft regulations on exploitation of mineral resources in the Area. In this context, the EU has recently come up with a Commission proposal for an EU Council decision on the position to be taken on behalf of the EU at the meetings of the ISA organs. The proposal claims an exclusive EU competence for the negotiation of the draft, based on article 3 (2) of the Treaty on the Functioning of the European Union. In the light of the recent case law of the ECJ, this paper aims to discuss whether the EU does enjoy competence in the field of protection of the marine environment from the harmful effects of mining operations in the Area and, if so, its exclusive or shared nature. While the analysis will conclude that the EU is not attributed exclusive competence in this field, the paper will also consider the scenario by which the Council nonetheless obtains the necessary majority to negotiate the draft alone. In this respect, the conduct required from EU Member States in pursuance of the duty of sincere cooperation, and with a view to ensure coherence and consistency of the EU action in other international fora, is also explored.

Keywords: European Union (EU), European Union competence, International Seabed Authority (ISA), protection of the marine environment, deep-sea mining, sincere cooperation

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1. Introduction

Over the last 25 years,[1]1 the International Seabed Authority (ISA) – the intergovernmental organization through which the parties to the United Nations Convention on the Law of the Sea (UN-

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1 Jean-Pierre Lévy, *International Seabed Authority: 20 years* (The International Seabed Authority 2014) 20-42; Michael Lodge, 'International Seabed Authority', *Max Planck Encyclopedia of Public International Law* (2020); María Esther Salamanca-Aguado, *The Development of the Deep Seabed Mining Regime by the International Seabed Authority: From Exploration to Exploitation* (working paper, AEL 2022/11); Richard Collins and Duncan French, 'A Guardian of Universal Interest or Increasingly Out of Its Depth?' [2020] 17 International Organizations Law Review 633.

CLOS)[2] organize and control the exploration[3] and exploitation[4] of mineral resources in the seabed and ocean floors beyond the limits of national jurisdiction (the Area)[5] – has concluded 31 contracts with more than 20 public and private entities for the exploration of polymetallic nodules, polymetallic sulphides and cobalt rich crusts, the most promising mineral deposits in the Area.

After years of great uncertainty on the viability of deep-sea mining activities due to various technical and technological gaps,[6] the Council of the ISA is currently negotiating the draft regulations on exploitation of mineral resources in the Area (Draft),[7] whose adoption is expected by July 2023.[8]

Before the concerns of some States and the European Union (EU) Parliament for the effective protection of the marine environment from harmful effects arising from deep-sea mining, the EU drafted a Commission proposal for an EU Council decision on the position to be taken on behalf of the EU at the meetings

2 United Nations Convention on the Law of the Sea [1982] 1833 UNTS 3 [UNCLOS], art 157.

3 According to ISA Council, Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters [2013] ISBA/19/C/17, regulation 1, '"Exploration" means the searching for deposits of polymetallic nodules in the Area with exclusive rights, the analysis of such deposits, the use and testing of recovery systems and equipment, processing facilities and transportation systems and the carrying out of studies of the environmental, technical, economic, commercial and other appropriate factors that must be taken into account in exploitation'.

4 According to ISA Council, Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters [2013] ISBA/19/C/17, regulation 1, '"Exploitation" means the recovery for commercial purposes of polymetallic nodules in the Area and the extraction of minerals therefrom, including the construction and operation of mining, processing and transportation systems, for the production and marketing of metals'.

5 UNCLOS, art 1(1)(1). The legal doctrine on the Area is vast; for some references see Michael Lodge, 'The Deep Seabed', in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 226-53; María Esther Salamanca-Aguado, *La zona internacional de los fondos marinos: patrimonio común de la humanidad* (Dykinson, 2003); Alexander Kiss, 'La Notion de Patrimoine Commun de l'Humanite', *Collected Courses of The Hague Academy of International Law* (Brill 1982); Giovanni Ardito, 'Encroaching the Common Heritage of Mankind: A Tale of a Double-Track Process in The International Seabed Area', in Piefrancesco Breccia and others (eds), *Liber Amicorum Sergio Marchisio: il diritto della comunità internazionale tra caratteristiche strutturali e tendenze innovative* (Editoriale Scientifica 2022) 696-697.

6 Marzia Rovere, 'The Common Heritage applied to the resources of the seabed. Lessons learnt from the exploration of deep sea minerals and comparison to marine genetic resources' (2018) 5 Maritime Safety and Security Law Journal 86-88.

7 ISA Council, 'Draft Regulations on Exploitation of Mineral Resources in the Area' (2019) ISBA/25/C/WP.1.

8 After the Republic of Nauru triggered Section 1, paragraph 15 of the 1994 Agreement relating to the Implementation of Part XI of the UNCLOS (the Agreement), by which it requested the ISA Council to adopt within 2 years the regulations for the approval of the first deep-sea mining operation, the negotiations are expected to conclude by July 2023. In order to meet the established deadline, the Council has set out an intensive roadmap of meetings and intersessional work. Despite this, the negotiations of the environmental provisions of the Draft are revealing very intensive and time-consuming. This is mainly due to the mounting concerns about the physical impacts of the mining operations on the seafloor. They include the release of sediment plumes from seabed activities with a high density of small particles and of discharge material following preprocessing of the minerals, which may well lead to alterations in the seabed and water column communities and affect food availability. Indeed, the actual threats of deep-sea mining to ecosystems are difficult to predict fully because of the limited knowledge of the technology under development and of its impact on the geological and biological features of the deep-sea ecosystems. On the most recent developments at the ISA, see Pradeep Singh, 'The Invocation of the 'Two-Year Rule' at the International Seabed Authority: Legal Consequences and Implications' [2022] The International Journal of Marine and Coastal Law 375; Giovanni Ardito and Marzia Rovere, 'Racing the Clock: Recent Developments and Open Environmental Regulatory Issues at the International Seabed Authority on the Eve of Deep-Sea Mining' [2022] 140 Marine Policy 105074.

of the ISA organs. The proposal claims an exclusive EU competence for the negotiation of the Draft, pursuant to article 3(2) of the Treaty on the Functioning of the European Union (TFEU).[9]

Building on the harsh reaction to the proposal by some EU Member States – especially those directly involved in activities in the Area[10], this paper aims to discuss whether the EU enjoys competence in the field of protection of the marine environment from the harmful effects of deep-sea mining and, if so, whether it is exclusive or shared in nature. To this end, it will first analyse the rules, conditions and limits under which the EU is granted accession to the UNCLOS. It will then focus on the EU membership to the ISA so as to clarify why it should be for the EU Member States represented at the ISA Council to uphold an eventual EU common position. Finally, a discussion of the EU competences in the field will be provided, taking into account the arguments made by the Commission in its proposal. While the analysis will conclude that the EU is not attributed with exclusive competence in this field, the paper will also consider the scenario by which the Council nonetheless obtains the necessary majority to negotiate the Draft alone. In this respect, the conduct required from EU Member States in pursuance of the duty of sincere cooperation, and with a view to ensure coherence and consistency of the EU action in other international fora, is also explored.

2. The Proposal for a Council Decision on the Position to be Taken on Behalf of the European Union at the Meetings of the International Seabed Authority Council and Assembly

The EU interest in the negotiations of the Draft arose following the results of a European project on the management of impacts of deep-sea mining.[11] The research suggests the delay of the exploitation of the resources of the Area – which the UNCLOS declares the common heritage of mankind[12] – until scientific gaps on deep-sea ecosystems are properly filled. In the light of the uncertain impacts of deep-sea

9 Treaty on the Functioning of the European Union (as amended by the Lisbon Treaty), art 3(2).

10 Member States of the EU commented the EU Proposal in several COMAR Meetings. A list of these written comments is available at <https://data.consilium.europa.eu/doc/document/ST-5201-2022-INIT/en/pdf> (last accessed 22 December 2022). The negative reaction of EU Member States can also be inferred from the deadlock of the non-legislative procedure, which stopped in February 2021.

11 The project and its results can be found at <www.jpi-oceans.eu/en/miningimpact> (last accessed 22 December 2022).

12 UNCLOS article 136 declares the Area and its mineral resources the common heritage of mankind (CHMK), a *tertium genus* alternative to the traditional regimes of sovereignty and freedom of the high seas. As applied in Part XI UNCLOS, the CHMK is generally understood as made up of five constitutive elements. First, article 157 prohibits any claim or exercise of sovereignty over the Area and its resources, whose rights are vested in mankind. Second, under article 141, the Area shall only be used for peaceful purposes. Third, the Area and its resources shall be preserved in the interest of the present and future generations, consistently with the provisions of article 145. Fourth, all activities of exploration for and exploitation of mineral resources are to be carried out for the benefit of mankind and the revenues accruing therefrom ought to be shared among the international community. Finally, activities in the Area shall be managed through an *ad hoc* international mechanism embodied by the ISA. See Rüdiger Wolfrum, 'The Principle of the Common Heritage of Mankind' [1983] 42 Heidelberg Journal of International Law 312; Christopher Joyner, 'Legal Implications of the Concept of the Common Heritage of Mankind' [1986] 35 International & Comparative Law Quarterly 190; Antonio Augusto Cançado Trinidade, 'International Law for Humankind: Towards a New *jus gentium*', *Collected Courses of The Hague Academy of International Law* (Brill 2006) 365-396. Christopher Pinto, 'The Common Heritage of Mankind: Then and Now', *Collected Courses of The Hague Academy of International Law* (Brill 2012); Ornella Ferrajolo, 'The Common Heritage of Mankind in International Law: A Great Past but No Future?' (2019) 5 Maritime Safety and Security Law Journal 114.

mining on the marine environment, in January 2018 the EU Parliament first requested Member States to support an international moratorium.[13] This was also echoed in a 2021 resolution on the EU Biodiversity Strategy, in which the EU Parliament called on 'the Commission and Member States to promote a moratorium, including at the [ISA], on deep-seabed mining until such time as the effects of deep-sea mining on the marine environment, biodiversity and human activities at sea have been studied and researched sufficiently and deep seabed mining can be managed to ensure no marine biodiversity loss nor degradation of marine ecosystems'.[14]

In January 2021, the EU Commission handed out its proposal for a Council decision on the position to be taken on behalf of the EU at the meetings of the ISA bodies – namely the Council and the Assembly – with respect to the adoption and implementation of the Draft and its related standards and guidelines (Proposal).[15]

The procedural legal basis identified by the Commission for the Proposal is to be found in article 218(9) of the TFEU, which requires the Council to adopt a decision 'establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects'.[16] The regulations of the ISA, together with its rules and procedures, are secondary law that bind all UNCLOS parties and operators without any possibility of opting out. They result from a specialized law-making process, aimed at adopting rules of a technical nature through procedures which are similar to those used in international conferences.[17] In this context, the Draft is among the acts for which a position to be adopted by the EU can be established under article 218(9). As for the substantial legal basis, the Proposal refers to article 191 of the TFEU, establishing the fundamentals of the environmental policy of the EU, which is based on 'the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay'.[18]

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13 European Parliament, resolution of 16 January 2018 on international ocean governance: an agenda for the future of our oceans in the context of the 2030 SDGs [2018] OJ C 458/9, para 19: 'Calls on the Commission to encourage Member States to cease subsidising licences for mining prospecting and extraction in areas beyond national jurisdiction'.

14 European Parliament, resolution of 9 June 2021 on the EU Biodiversity Strategy for 2030: Bringing nature back into our lives [2021] OJ C 67/3, para 184.

15 European Commission, proposal for a Council decision on the position to be taken on behalf of the European Union at the meetings of the International Seabed Authority Council and Assembly [2021] COM (2021) 1 final.

16 Treaty on the Functioning of the European Union (as amended by the Lisbon Treaty) OJ C 202, 7.6.2016 (TFEU) art 218 (9).

17 *Responsibilities and obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion, 1 February 2011) ITLOS Reports 2011, 10, para 60; Satya Nandan, 'Legislative and Executive Powers of the International Seabed Authority for the Implementation of the Law of the Sea Convention', in Davor Vidas and Willy Østreng (eds), *Order for the Oceans at the Turn of the Century* (Brill 1999); Pradeep Singh, 'International Organisations and the Protection of the Marine environment', in Marta Chantal Ribeiro and others (eds), *Global Challenges and the Law of the Sea* (Springer 2020).

18 TFEU, art 191.

With regard to the content of the Proposal, the Commission envisages that the position the EU should take at the ISA is determined through a two-level approach.[19] The EU Council first has to define the guiding principles for building up a Union position. They are referred to in the Annex to the Proposal, and include compliance with articles 192[20] and 145[21] of the UNCLOS on the protection of the marine environment from the harmful effects arising from activities in the Area and the progress of knowledge on the possible impacts of deep-sea mining on the marine environment, to ensure that an assessment of the risks associated to such activity is rigorously undertaken. The Annex also recalls that the EU position should be consistent with the main principles underpinning the EU environmental policy, and in particular the principle of sustainable development, the precautionary principle and the ecosystem approach.[22] Moreover, according to the Proposal, ahead of any meeting of ISA organs, the Commission shall transmit to the EU Council or to the Council Working Party on the Law of the Sea (COMAR) a document specifying the position to be taken on EU's behalf on a specific matter.[23] The EU Council shall finally discuss and endorse the details of the position. According to article 2 of the Proposal, since, as a result of its observer status, the EU is prevented from autonomously express its position at the ISA Council, it is for EU Member States to uphold it.[24]

In advancing its Proposal, the Commission relies on an exclusive external competence for the negotiation of the Draft, in accordance with article 3(2) of the TFEU. It establishes that the EU enjoys exclusive external competence to undertake international commitments in three specific cases, i.e. a) whenever so provided in an EU legislative act; b) when necessary to enable the EU to exercise its internal competence; or c) when it may affect common rules or alter their scope. It is precisely this last scenario the Commission resorts to in its Proposal to claim its exclusive competence. However, surprisingly enough, the Commission does not clarify which EU *acquis* it considers altered by the Draft. Indeed, the Proposal does not provide specific arguments in support of the claim of exclusive competence. Actually, some of the arguments may have been presented in the Position paper on the competences of the EU with regard to matters governed by the Draft, a document presented by the Commission at the COMAR meetings, which is unfortunately not publicly available.[25] Despite this, according to the Commission, the EU acts mentioned in the Proposal would, 'justif[y] the content of the proposed position to be taken on the Union's behalf'.[26]

19 European Commission (n 5) Annexes 1 and 2.

20 Article 192 UNCLOS reads: 'States have the obligation to protect and preserve the marine environment'.

21 Article 145 UNCLOS reads: 'Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for inter alia: (a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities; (b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment'.

22 European Commission (n 15) Annex 1.

23 The Working party is made up of law of the sea experts from Member States and representative from the European Commission and the General Secretariat of the Council of the EU.

24 Treaty on European Union (Consolidated) OJ 2012/C326/01 (TEU) art 4 (3).

25 Reference to this document can however be found at Council of the European Union, List of WK documents distributed in the Law of the Sea Working Party during the first semester of 2021 [2021] 10384/21 COMAR 19.

26 European Commission (n 15) 7th recital.

In particular, the Proposal makes reference to the Marine Strategy Framework Directive (MSFD),[27] which aims to achieve or maintain good environmental status of the marine environment by addressing all human activities which potentially have an impact on it,[28] in pursuance of an ecosystem approach.[29] The same ecosystem approach is recalled in article 5 of the Directive 2014/89/EU establishing a framework for Maritime Spatial Planning (MSP),[30] which is also mentioned in the Proposal.

MSP is an integrative process through which Member States cope with the increasing demand for maritime space from traditional and emerging sectors while preserving the proper functioning of the marine ecosystems with a view to balance ecological, economic and social objectives. As a modern, holistic and integrated approach to the sustainable management of the sea, MSP can result in plans and administrative decisions on the spatial and temporal distribution of existing and future activities and uses in the marine waters.

None of the two directives contain a definition of an ecosystem approach, which is well established under international law, particularly in the field of watercourse law.[31] It can be interpreted as an integrated approach to managing human activities within ecologically meaningful boundaries seeking to manage the use of natural resources, while preserving both the biological wealth and the biological processes necessary to safeguard the composition, structure and functioning of the habitats of the ecosystem affected.[32]

Based on the scientific evidence of an ecological connectivity between the maritime areas within and beyond national jurisdiction,[33] the MSFD comes into play to the extent that exploitation activities in the Area could affect the good environmental status of maritime areas within national jurisdiction and undermine the environmental targets established in Member States' marine waters in pursuance of an ecosystem

27 European Parliament and Council Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) [2008] OJ L 164.

28 ibid recital 3: 'The marine environment is a precious heritage that must be protected, preserved and, where practicable, restored with the ultimate aim of maintaining biodiversity and providing diverse and dynamic oceans and seas which are clean, healthy and productive. In that respect, this Directive should, inter alia, promote the integration of environmental considerations into all relevant policy areas and deliver the environmental pillar of the future maritime policy for the European Union'.

29 ibid recital 5: 'The development and implementation of the thematic strategy should be aimed at the conservation of the marine ecosystems. This approach should include protected areas and should address all human activities that have an impact on the marine environment'.

30 European Parliament and Council Directive 2014/89/EU establishing a framework for maritime spatial planning [2014] OJ L 257.

31 See, *inter alia*, Attila Tanzi and Maurizio Arcari, *The United Nations Convention on the Law of International Watercourses: A Framework for Sharing* (Brill 2001); Ruby Moynihan, *Transboundary Freshwater Ecosystems in International Law* (Cambridge 2021); Vito De Lucia, *The 'Ecosystem Approach' in International Environmental Law* (Routledge 2019).

32 European Parliament and Council Regulation (EU) 1380/2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC [2013] OJ L 354, art 2(3).

33 Ekaterina Popova and others, 'Ecological connectivity between the areas beyond national jurisdiction and coastal waters: Safeguarding interests of coastal communities in developing countries' [2019] 104 Marine Policy 90.

approach. In achieving such targets, Member States are required to adopt and implement specific marine strategies. Under article 6 of the MSFD, they shall avail themselves of the existing regional institutional cooperation structures, including Regional Sea Conventions, i.e., treaties that engage neighbouring countries for the conservation and protection of their common marine environment from different sources of pollutions. They often provide for the adoption of measures to achieve or maintain good environmental status in pursuance of an ecosystem approach,[34] including marine protected areas (MPAs).

This is the case of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention),[35] whose scope of application covers both areas within and beyond national jurisdiction, under which an ecologically coherent network of MPAs has been established.[36] Some of them are also associated to specific conservation objectives and management measures, which are binding on all the parties to the OSPAR Convention, including the EU.[37] Among them, the Milne Seamount Complex MPA was created in the water column and seabed beyond national jurisdiction to restore the integrity and quality of the ecosystems it hosts.[38] Although there is currently no express appetite for deep-sea mining in the region, the Milne Seamount Complex is located in an area rich in ferromanganese crusts, which could well become a target for exploitation in the future. This is an activity whose regulation falls outside the mandate of the OSPAR Convention for the purpose of the protection of the marine environment. By way of example, if deep-sea mining took place in this area, the conservation and management measures associated to the network of MPA should be revised accordingly. Such measures are binding on the EU and hence form part of the EU law. In the view of the Commission, before the risk of affectation of its *acquis*, the Union is thus entitled to exclusively negotiate the Draft under article 3 (2) TFEU.

The other ground which can be inferred from the Proposal for the exercise of exclusive external competence pursuant to article 3(2) of the TFEU is Regulation 1380/2013 on the Common Fisheries Policy (CFP),[39] an area in respect to which the EU enjoys exclusive competence for the conservation of marine biological resources.[40] The CFP aims to conserve fish stocks and reduce negative impacts of fishing activities on marine ecosystems, in pursuance of an ecosystem approach referred to in article 2(3). To this end, the EU also supports and contributes to the work of RFMOs and to the implementation of their conservation measures. In particular, the EU adopted *ad hoc* acts to comply with its commitments under the RFMOs

34 European Parliament and Council Directive (n 27) art 13.

35 Convention for the Protection of the Marine Environment of the North-East Atlantic (adopted 22 September 1992, entered into force on 25 March 1998) 2354 UNTS 67.

36 The database of the OSPAR MPAs is available at <https://mpa.ospar.org/home_ospar> (last accessed 22 December 2022).

37 Council Decision 98/249/EC 7 on the conclusion of the Convention for the protection of the marine environment of the north-east Atlantic [1998] OJ 104.

38 OSPAR Decision 2010/1 on the Establishment of the Milne Seamount Complex Marine Protected Area [2010] OSPAR 10/23/1-E, Annex 34.

39 European Parliament and Council Regulation (n 32).

40 TFEU, art 3(1).

to which it is a party and to enhance the conservation of certain marine ABNJ.[41] For instance, Regulation 734/2008[42] aims to protect vulnerable marine ecosystems (VME) in the high seas from the adverse effects of bottom trawling fishing through the identification of selected closure areas.

Reference to the CFP in the Proposal seems to support the notion that, in the Commission view, the unpredictable effects of deep-sea mining on the marine environment would undermine the EU's ability to ensure the effective conservation of fish stocks and the compliance with measures adopted in pursuance of the commitments undertaken within RFMOs. Indeed, should deep-sea mining proceed in high seas areas closed to certain fishing activities, this would hamper the protection afforded to VME, *inter alia*, under Regulation 734/2008. From this perspective, the EU participation in the negotiations of the Draft is again necessary to avoid the affectation of the EU *acquis*.

3. The EU Proposal: An Appraisal

3.1 The EU and the UNCLOS

As of November 2022, the UNCLOS has been ratified by 167 States and the EU.[43] At the Third Conference on the Law of the Sea, the then European Community participated in the negotiations of the UNCLOS in quality of observer and as a member of the special interest group which emerged during the treaty-making process.[44] Its presence, along with its Member States, was necessary because of the competence it was attributed in the field of conservation of fish resources, in respect to which they could not autonomously assume international obligations.

Non-members of the European Community were particularly reluctant to accept that international organisations could accede to the UNCLOS, *inter alia*, for the unforeseeable consequences it could entail with respect to the attribution of the international responsibility for breaches of obligations arising from the convention.[45] Despite this, the intense lobbying of the Member States of the European Community resulted in the adoption of Annex IX to the UNCLOS. It deals with the modalities of the participation of international organizations in the treaty and links the right of international organizations to sign and accede to the UNCLOS to the condition that the majority of its Member States are signatories or have deposited the instrument of ratification or accession.[46] Moreover, the participation of international organizations

41 European Parliament and Council Regulation (n 32) art 29-30; Gabriela Oanta, 'Las contribuciones de la Unión europea a los desarrollos normativos de la pesca en alta mar', in Rafael Casado Raigon and Enrique Jesús Martínez Pineda (eds), *La contribución de la Unión Europea a la protección de los recursos biológicos en espacios mariinos de interés internacional* (Tirant lo Blanch 2021).

42 Council Regulation (EC) 734/2008 on the protection of vulnerable marine ecosystems in the high seas from the adverse impacts of bottom fishing gears [2008] OJ L 201.

43 Data can be accessed at the United Nations Treaty Collection website <https://treaties.un.org > follow > 22 December 2022.

44 Myron Nordquist, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol.1 (Martinus Nijhoff 1985) 84.

45 ibid.

46 UNCLOS, Annex IX.

in the UNCLOS is limited to the subject matters in respect of which competence has been transferred by Member States.[47] Whenever a transfer of competence to the organization has not taken place, such competence is presumed to belong to Member States.

The EU, the only intergovernmental organization which joined the UNCLOS, signed the convention as soon as the majority of its Member States had become signatories, on 7 December 1984, and it also approved the UNCLOS and the Agreement by Council decision 98/392 of 23 March 1998 (Decision).[48] Pursuant to article 5 of Annex IX to the UNCLOS, the instrument of formal accession is complemented by a Declaration concerning the competence of the EU (Declaration),[49] whose content – despite the many changes the European Community underwent – was never revised.[50]

From an EU internal perspective, the UNCLOS is a mixed agreement. The formula refers to international agreements jointly concluded by the EU and its Member States when the former is not competent for all the matters covered by a certain treaty and, hence, cannot conclude the agreement alone.[51] Mixed treaties have the same status in the EU legal order as agreements concluded by the EU. From this perspective, the UNCLOS forms an integral part of the EU legal order and ranks immediately after the primary sources of EU law.[52]

3.2 The EU at the ISA

According to article 156 of the UNCLOS, every party to the convention is *ipso facto* a member of the ISA.[53] Hence, as a party to the UNCLOS, the EU is also an ISA member. However, the EU is not represented in both the main organs of the ISA, i.e., the Assembly and the Council.[54]

47 UNCLOS, Annex IX, art 8.

48 EC Council decision concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof [1998] OJ L 179.

49 Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 28 July 1994 relating to the implementation of Part XI of the Convention (7 December 1984), available at <www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.> (last accessed 28 November 2022).

50 Andres Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base' [2012] 17 European Foreign Affairs Review 491.

51 Joni Heliskoski, 'Mixed Agreements: The EU Law Fundamentals', in Robert Schütze and Takis Tridimas (eds), *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (OUP 2018).

52 Ronán Long, 'The European Union and Law of the Sea Convention at the Age of 30', in David Freestone (ed), *The 1982 Law of the Sea Convention at 30* (Brill 2013).

53 While article 156 UNCLOS literarily refers to State Parties, it has always been interpreted as covering all subjects who, pursuant the relevant provisions of the UNCLOS, have consented to be bound by the convention. See Yoshifumi Tanaka, 'Article 1', in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea* (Hart 2017).

54 The Assembly is the supreme and plenary body of the ISA - where all its 168 members are represented - that establishes general policies on any matter within the competence of the ISA. The Council exercises the most sensitive and relevant functions entrusted to the ISA. As the executive body of the organization, it has a limited composition, restricted to 36 members. They are elected for a four-year term by the Assembly, through a sophisticated mechanism. Four members are selected from among those State parties which have either consumed or imported more than 2% of the total world consumption of the commodities produced from the minerals derived from the Area, including the State from the Eastern European region with the largest gross domestic product (GDP) and the State that, on the entry into force of the UNCLOS, had the largest GDP (Group A). Four members are from the eight larger investors in deep seabed mining (Group B). Four members are elected among the major net exporters of the minerals of the Area, including at least two developing countries (Group C). Six members come from developing countries representing special interests (Group D). The other 18 members are elected in such a way to ensure an equitable geographical distribution of seats in the Council as a whole (Group E). See articles 159-160 UNCLOS, and Rüdiger Wolfrum, 'The Decision-Making Process According to Sec. 3 of the Annex to the Implementation Agreement: A Model to be Followed for Other International Economic Organisations?', [1995] 55 Heidelberg Journal of International Law 310.

As of November 2022, six EU countries are members of the ISA Council: Italy, France, Germany, Czech Republic, the Netherlands and Poland.[55] Belgium and Spain enjoy observer status, meaning that they can participate in the ISA Council sessions, but without the right to vote.[56] However, with the last filling of vacancies decided by the Assembly, they will become members of the executive body in 2023.[57] Most of the EU States elected to the ISA Council currently sponsor or are engaged in one or more exploration activities in the Area and, for this reason, they are proactively drafting and negotiating the rules, regulations and procedures relating to activities in the Area.[58]

Contrary to the executive bodies of most international organizations, which only enjoy limited powers, the ISA Council has law-making, policy-making and inspection powers in any area of ISA competence. Indeed, it is the ISA Council who negotiates the rules, regulations and procedures for deep-sea mining, establishes any specific policy in pursuance of those decided by the Assembly and approves and monitors the compliance of the exploration and exploitation activities undertaken by public and private entities.[59]

While the EU is a full member of the Assembly, its limited competences and the peculiar composition of the ISA executive body do not allow the EU to be elected to the Council. Indeed, it only enjoys an observer status.[60] In accordance with the rules of procedure of the Assembly, any member of the ISA not represented in the Council can send a representative to attend its meetings but without voting rights.[61]

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55 The current composition of the Council is available at <www.isa.org.jm/index.php/authority/council/members> (last accessed 28 November 2022).

56 ISA, Rules of procedure of the Council, rule 74.

57 ISA Assembly, 'Decision of the Assembly of the International Seabed Authority relating to the election to fill the vacancies on the Council of the Authority in accordance with article 161, paragraph 3, of the United Nations Convention on the Law of the Sea' [2022] ISBA/27/A/14.

58 In particular, France – among the pioneer investor in activities in the Area – has been among the first to sponsor an exploration license for polymetallic nodules. Its Institut français de recherche pour l'exploitation de la mer currently holds a license for polymetallic nodules in the Clarion Clipperton Fracture area and one for polymetallic sulphides in the Mid Atlantic Ridge. Likewise, Germany sponsors its Federal Institute for Geosciences and Natural Resources of Germany which holds two exploration licenses for polymetallic nodules and polymetallic sulphides. The Czech Republic is part of a State consortium, Interoceanmetal Joint Organisation, which since 2001 hold an exploration license in the Clarion Clipperton Fracture area. Belgium also sponsors Global Sea Mineral Resources NV, a company having a contract for exploration for polymetallic nodules in the Clarion Clipperton Fracture area. Poland has recently concluded an exploration contract with the ISA for polymetallic sulphides in the Mid Atlantic Ridge, in an area including the well-known Lost City Hydrothermal Complex. With specific regard to the exploration license granted to the Government of Poland in an area covering the Lost City Hydrothermal Complex, see Giovanni Ardito, Gemma Andreone, Marzia Rovere, 'Overlapping and Fragmentation in the Protection and Conservation of the Marine Environment in Areas Beyond National Jurisdiction' [accepted and forthcoming by 2022] Frontiers in Marine Science.

59 UNCLOS, art 162.

60 See, in this regard, ISA Assembly, 'Indicative List Of Member States Of The International Seabed Authority Which Would Fulfil The Criteria For Membership In The Various Groups Of States In The Council In Accordance With Section 3, Paragraph 15, Of The Annex To The Agreement For The Implementation Of Part Xi Of The United Nations Convention On The Law Of The Sea Of 10 December 1982' [2022] ISBA/27/A/CRP.2.

61 ISA (n 56).

The mixed membership of the EU and its Member States in an international organization can give rise to complex issues of participation in the organization's activities and decision-making processes. With a view to preventing them, article 2 of the Decision requires the EU and its Member States to coordinate their position in the bodies of the ISA within the COMAR. However, in almost 30 years, the agenda of the COMAR has hardly addressed items relating to the ISA and the EU participation to the ISA meetings has long been sporadic.[62]

3.3 What Competence Does the EU Enjoy for the Negotiation of the Draft Regulations on Exploitation of the Area's Mineral Resources?

The EU Council adoption of common positions to be taken at the meetings of international organization is a well-established practice at the EU level. However, in case of mixed participation, by the EU and its Member States, in such international organizations, their drafting is not without challenges as they deal with the exercise of competences which are not always clearly delimited. This is at the origin of the many frictions which often oppose the EU Council or Member States and the Commission.

In this context, the Proposal under analysis is part of a recent strategy pursued by the Commission, by which it claims the exercise of an exclusive external competence in the field of protection of the marine environment in international fora. This is confirmed by two recent cases the Commission lodged before the ECJ against the Council, respectively concerning a position to be taken at the Commission for the Conservation of Antarctic Marine Living Resources (*Weddell Sea* case)[63] and at the International Maritime Organisation (IMO). Just like in the case under review, in both proceedings the Commission relied on article 3(2) of the TFEU to claim its exclusive competence and, in particular, the risks of affectation of the EU *acquis*, a position that the ECJ has not supported.

From the outset, it is worth recalling that, contrary to its Member States, the EU is not an entity with general purposes and competences.[64] Indeed, under the principle of conferral, a foundation of the EU

62 Veronica Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea Implementing Global Obligations at the Regional Level* (Brill 2007) 166.

63 The *Weddell Sea* judgment is a landmark decision in this context. By its applications, the European Commission asked, *inter alia*, the ECJ to annul the decision of the EU Council of 10 October 2016 in so far as it approves the submission, on behalf of the EU and its Member States, to the Commission for the Conservation of Antarctic Marine Living Resources, of three proposals for the creation of marine protected areas and a proposal for the creation of special areas for scientific study of the marine area concerned, of climate change and of the retreat of ice shelves. The Commission maintained that the envisaged measures fell within the area, referred to in Article 3(1)(d) TFEU, of exclusive EU competence regarding the conservation of marine biological resources, and that there was therefore no justification for submitting them on behalf of the European Union and its Member States. According to the ECJ and contrary to the Commission's submissions, fisheries constitute only an incidental purpose of the reflection paper and the envisaged measures. As protection of the environment is the main purpose and component of that paper and those measures, it must be held that the contested decisions do not fall within the exclusive competence of the EU laid down in Article 3 (1) (d) TFEU, but within the competence under Article4 (2) (e) TFEU regarding protection of the environment that it shares, in principle, with the Member States.

64 Luigi Daniele, *Diritto dell'Unione europea* (7th ed, Giuffre 2020) 446.

legal order currently enshrined in article 5 of the Treaty on the European Union (TEU), [65] the Union only has the competences Member States have decided to confer,[66] while those not conferred to the EU remain with Member States.[67] In particular, the fields in which the EU enjoys exclusive competence are clearly set out in article 3(1) TFEU, which includes competition rules for the functioning of the internal market, the monetary policy, the conservation of marine biological resources under the CFP and the common commercial policy.[68] The EU also enjoys shared competences with Member States, *inter alia*, in the areas of agriculture and fisheries and the protection of the environment. In these fields, Member States can exercise their competence to the extent that the EU has not exercised its own.[69] Finally, the EU is competent to support, coordinate or supplement the action of its Member States in areas like tourism, education and industry.[70]

Therefore, to understand whether the EU is entitled to exclusively negotiate the Draft, one should first scrutinize whether it enjoys any competence in the subject-matter. If so, it is in turn to be determined if such competence is exclusive or shared with Member States.[71] In order to address the first point, it is necessary to identify the subject matter of the Proposal. Unfortunately, this is not indicated in clear terms, as the Proposal only refers to the establishment of an EU position in relation to the rules, regulations and procedures of the ISA concerning 'prospecting, exploration and exploitation in the Area and the financial management and internal administration of the Authority'.[72] Some clarity is found in the seventh recital and in the Annex to the Proposal, explicitly referring to article 191 TFEU, which sets out the aims of the EU environmental policy. It can, hence, be assumed that the Proposal only aims at establishing an EU position at the ISA organs for the parts of the Draft concerning the protection of the marine environment, and in particular on the provisions concerning environmental impact assessments and statements, environmental management and monitoring plans, management of waste and the creation and management of an environmental compensation fund.[73]

The protection of the marine environment falls under the competence attributed to the EU. In particular, pursuant to article 4(2)(e) of the TFEU, such competence is shared with its Member States.

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65 TEU, art 5; Theodore Konstadinides, 'The Competences of the Union', in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law* (OUP 2018); Robert Schütze, '*An Introduction to European Law'* (OUP 2020) 61-76.

66 TEU, art 5.2.

67 ibid art 4.1.

68 TFEU, art 3(1).

69 ibid art 4.

70 ibid art 6.

71 *Commission v. Ireland* [2006] ECJ, ECLI:EU:C:2006:345, para 93.

72 European Commission (n 15) recitals 2 and 4.

73 In its last version, the Draft deals with fundamental policies and principles (Part I), the approval of plans of work for exploitation (Part II and V), the rights and obligations of contractors (Part III), the protection and preservation of the marine environment (Part IV), closure plans (Part VI), financial terms for exploitation (Part VII), annual, administrative and other fees (Part VIII), information gathering and handling (Part IX), standard and guidelines (Part X), inspection, compliance and enforcement (Part XI), dispute settlement (Part XII) and the review of the regulations (Part XIII) and is supplemented by several annexes, standards and guidelines.

This is also confirmed by the Declaration, according to which the EU enjoys exclusive competence only in the field of conservation and management of sea fishing resources and with respect to those provisions of the UNCLOS, particularly Part X and XI, relating to international trade.

With a view to safeguard the marine environment, the EU, just like any other party to the UNCLOS, is required to cooperate at a global and regional level including through competent international organisations.[74] This is also stated in article 191(4) of the UNCLOS, which acknowledges that the EU can conclude agreements with third parties or international organizations with a view to pursuing the aims of its environmental policy. Indeed, according to article 47 of the TFEU, the EU has legal personality[75] and, as a subject of international law, it carries out relations with other States and international organizations through diplomatic means and the conclusion of international agreements.[76]

The fact that the EU enjoys an external competence in the field of protection of the marine environment does not mean that such external competence is exclusive. Indeed, taking stock of the shared nature of the competence at stake, the same article 191 TFEU clarifies that the conclusion of international agreements in the field of protection of the marine environment shall be consistent with the respective sphere of competence of the EU and its Member States.[77] Despite this, in its Proposal, the Commission held that the EU has competence to negotiate the provisions of the Draft concerning the protection of the marine environment by virtue of article 3(2) of the TFEU. According to the ECJ, such provision shall be broadly interpreted and applies not only to international agreements but also to those measures adopted by a body established under the treaty for its implementation.[78] Relying on article 3(2) of the TFEU, the Commission claims that the external competence in the field of the protection of the environment has become exclusive because of the risk that certain Draft provisions might alter or affect the EU *acquis.*[79] For this reason, it would be for the EU alone to negotiate them in the ISA Council. [80]

The affectation risk referred to in article 3(2) of the TFEU reflects and codifies the well-known *ERTA* jurisprudence developed by the ECJ, according to which whenever the exercise of the internal competence could be affected by the conclusion of an international agreement, a derived exclusive external

74 Frank (n 62) 86.

75 TFEU, art 47.

76 Marise Cremona, 'Who can Make Treaties? The European Union' in Ducan Hollis (ed), *The Oxford Guide To Treaties* (2nd ed, OUP 2020); Rachek Frid, *The Relations between the EC and International Organizations—Legal Theory and Practice* (Kluwer 1995).

77 TFEU, art 191.

78 *Commission v Council (Antarctic MPAs)* [2018] ECJ, ECLI:EU:C:2018:925, para 112.

79 While article 216 TFEU deals with the hypothesis in which the external competence of the EU already exists, article 3 (2) TFEU aims to identify the main elements under which such competence qualifies as exclusive. See Fernando Castillo de la Torre, 'The Court of Justice and External Competence After Lisbon: Some Reflections on the Latest Case Law', in Piet Eeckhout and Manuel López-Escudero (eds), *The European Union's external Action in Times of Crisis* (Hart Publishing 2016).

80 Piet Eeckhout, *EU External Relations Law* (2nd ed, OUP 2011) 113.

competence shall be presumed.[81] In all likelihood, the ECJ's concern was that Member States would be able to conclude international agreements capable of conflicting with or modifying EU obligations.[82]

In the view of the ECJ, there exists a risk that EU law is affected, or its scope altered, by commitments undertaken by Member States whenever they fall within the scope of such EU common rules.[83] In the assessment of this risk, a full coincidence between a given international commitment and the EU *acquis* is not necessary.[84] In fact, the scope of the EU rules can also be altered by international commitments falling in an area already largely, even though not specifically, covered by such rules.[85]

Such broad assessment shall not only relate to the scope of the rules under scrutiny, but also to their meaning and effectiveness, taking into account foreseeable future development at the time of the analysis.[86] There follows that a specific assessment of the comprehensive and detailed relationship between a certain international commitment and the EU norms shall be undertaken on a case-by-case basis.[87]

With a view to ascertain whether article 3(2) of the TFEU is applicable to the case under scrutiny, it shall first be underlined that the geographical scopes of application of the Draft and of the EU *acquis* mentioned in the Proposal do not coincide. Indeed, while the Draft applies to activities in the Area, and hence in ABNJ, the territorial scope of application of the EU funding treaties and of the EU law is defined in article 52 TEU and article 355 TFEU and, as a general rule, is limited to the territories of its Member States. As the EU law does not apply to the Area as such, it is hence difficult to conceive how the provisions of the Draft could affect the EU *acquis*.

This is a critical element to bear in mind when it comes to assess the alleged risk of affectation of the MSFD. Indeed, it expressly applies to the EU marine waters as defined in article 3(1), namely the water column, the seabed and subsoils extending to the outmost reach of the area where Member States exercise jurisdiction. The MSFD requires EU Member States to prevent and reduce pollution of the marine environment possibly resulting in significant impacts on marine biodiversity and marine ecosystems in pursuance of an ecosystem approach. To this end, the transboundary effects of any human endeavour at sea shall also be taken into account, as required under article 2(1) of the MSFD. However, the mere fact, that activities in the Area regulated under the Draft could possibly result in transboundary effects which EU Member States have to take into account when implementing the marine strategies under

81 *Commission of the European Communities v Council of the European Communities* [1971] ECJ, ECLI:EU:C:1971:32.

82 *Opinion 2/15* [2017] ECJ, ECLI:EU:C:2017:376, para 170.

83 *Opinion 1/13* [2014] ECJ, EU:C:2014):2151, para 71; *Opinion 3/15* [2017] ECJ, EU:C:2017:114, para 105.

84 *Opinion 1/13* (n 83) para 72; Opinion 3/15 (n 83) para 106.

85 *Opinion 1/13* (n 83) para 73; Opinion 3/15 (n 83) para 107.

86 *Opinion 1/03* [2006] ECJ, ECLI:EU:C:2006:81, para 124 '[the EU] enjoys only conferred powers and [...] any competence, especially where it is exclusive and not expressly conferred by the Treaty, must have its basis in conclusions drawn from a specific analysis of the relationship between the agreement envisaged and the Community law in force and from which it is clear that the conclusion of such an agreement is capable of affecting the Community rules'.

87 *Commission v Council (Antarctic MPAs)* (n 78) para 115; *Opinion 1/03* (n 86) paras 124 and 133.

the MSFD, is not sufficient for the EU to assert an affectation of its *acquis*. After all, the same MSFD has cognizance of the variability of the stressors and of impacts of human activities at sea and requires EU Member States to update their strategies accordingly.[88] In other terms, deep-sea mining, should it ever take place, would represent just one of the many stressors Member States should consider when updating their MSFD strategies and no provision of the Draft prevents them from fulfilling such obligation.

Equally, the argument that the possible approval of a mining activity in an ABNJ currently covered by an area-based management tool or an MPA created within a regional framework to which the EU is a party would be contrary to the ecosystem-based approach pursued by the EU law and would require a modification of the EU rules and of the marine strategies of Member States does not appear in itself sufficient to recognize the exclusive competence of the EU in the negotiation and adoption of the Draft.

Indeed, the fact that the EU participates in the protection of certain MPA in ABNJ does not mean that it enjoys external competence to regulate any activity that could possibly endanger such protected sites. By way of example, for the recalled Milne Seamount, the same OSPAR Convention foresees a coordination mechanism with other international organisations managing activities in certain ABNJ protected by a MPA. In fact, there currently exists a Collective arrangement among the several competent international organisations – including a fisheries commission – in the area.[89] Its goal is to promote the exchange of information on each other's activities and achievements with a view to deliver a meaningful ecosystem approach to the management of all relevant human activities in the marine environment.[90]

In 2012, at the time when it was first proposed, the ISA considered the initiative too premature in the light of the only initial interest in exploitation activities.[91] Nonetheless, the ISA Secretariat regularly participates in the meeting of the arrangement as an observer. The very same status is also afforded to the OSPAR Commission within the organs of the ISA. This is pivotal in bringing any relevant issue pertaining to the conservation and management of the MPAs established under the OSPAR and in ABNJ, in applying an ecosystem approach, to the attention of its Member States and to avoid hampering the protection of such sites.

Moreover, with regard to the risk of affectation of the CFP, first of all, none of the objectives that the CFP pursues under article 39 TFEU – e.g., increasing productivity of fisheries and ensuring a fair standard of living for the fishing community - is related to the Draft, which instead aims at regulating the exploitation of the abiotic resources of the Area. This means that the provisions of the

88 European Parliament and Council Directive (n 27), recital 34.

89 ISA Council, 'Collective arrangement between competent international organizations on cooperation and coordination regarding selected areas in areas beyond national jurisdiction in the North-East Atlantic' [2014] ISBA/20/C/15.

90 David Johnson, 'Can Competent Authorities Cooperate for the Common Good: Towards a Collective Arrangement in the North East Atlantic', in Paul Berkman and Alexander Vylegzhanin (eds.), *Environmental Security in the Arctic Ocean* (Springer 2012).

91 ISA Council, 'Status of consultations between the International Seabed Authority and the OSPAR Commission [2015] ISBA/21/C/9; ISA Council, Summary report of the President of the Council of the International Seabed Authority on the work of the Council during the twenty-first session' [2015] ISBA/21/C/21, para 28.

Draft cannot in principle alter any of the EU rules relating to the CFP. Under the CFP, the EU has adopted some measures to protect VME from the effects of certain harmful fishing practices, like bottom trawling.[92] While it is true that deep-sea mining could possibly have even more destructive consequences than bottom trawling, the mere fact that the EU has enacted *ad hoc* protection and conservation measures within its CFP does not automatically mean that it enjoys exclusive external competence in determining whether and under which conditions other anthropogenic activities in ABNJ should be allowed to proceed. This conclusion was reached by the ECJ in the *Weddell Sea* case, in which it rejected the view that the existence of EU *acquis* under the CFP which may have some links to the international act to be adopted would be sufficient to automatically infer an exclusive competence of the EU in the field covered by such international commitment.[93]

Finally, it is noteworthy that through constant jurisprudence, the ECJ has held that it is for the party claiming the exclusivity to give evidence in support of the nature of the competence it is asserting.[94] In the case under analysis, the Commission does not present arguments demonstrating that the Draft or some of its provisions could undermine the meaning, scope or effectiveness of its secondary law, nor does it clarify what the adverse effects would be.[95] It can hence be concluded that in the field of the protection of the environment, the EU still shares its competence with Member States.

4. The Duty of Sincere Cooperation in the Negotiation of the Draft Regulation on Exploitation of Mineral Resources in the Area

If it is true that the EU does not enjoy an exclusive competence for the negotiation of the environmental provisions of the Draft, this does not mean that it has no role to play at all. In fact, whenever a certain international commitment covers an area where the EU is attributed shared competence and it has not adopted common rules yet, nothing 'preclude[s] the possibility of the required majority being obtained within the Council for the [EU] to exercise that external competence alone'.[96] This is arguably a political choice the Council might also take in the circumstance under analysis. In this case, the conduct of EU Member States at the ISA would be regulated by the principle of sincere cooperation.[97]

Codified in article 4(3) of the TEU, it establishes that the EU and its Member States shall in full mutual respect assist each other in their respective tasks. As far as the EU external action is concerned, in the case *Commission v. Luxemburg* concerning the negotiation, conclusion and ratification of certain in-

92 Marta Chantal Ribeiro, 'The Protection of Biodiversity in the Framework of the Common Fisheries Policy: What Room for the Shared Competence?', in Gemma Andreone (ed), *The Future of the Law of the Sea* (Springer 2017).

93 *Commission v Council (Antarctic MPAs)* (n 78) para 100-101.

94 ibid para 115.

95 ibid para 123.

96 ibid para 126; *Opinion 2/15* (n 82) para 68.

97 Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014).

ternational agreements, the ECJ clarified that a concerted EU action at international level, 'requires, for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation'. By the same rationale, a Council decision to adopt a position at the ISA Council on certain provisions of the Draft would entail that Member States represented at the ISA executive body could not autonomously act on the same subject matter without coordinating with the EU institutions.

The ECJ jurisprudence has gone even further in admitting that any unilateral intervention by Member States would amount to an interference with the EU external action – and hence a violation of the principle of sincere cooperation – irrespective of its practical implications. This was clearly underlined by the ECJ in a judgment rendered in 2010 relating to the implementation of the 2001 Convention on persistent organic pollutants. In particular, in the case *Commission v. Sweden*, the ECJ dealt with the Swedish unilateral decision to propose to the Secretariat of the convention the inclusion of a new organic pollutant in its annex. The decision was taken after the Council had been unable to find a common position on the topic. According to the Commission, the Sweden unilateral action was contrary to article 4(3) TEU. The ECJ confirmed that, in so doing, Sweden had acted in contrast with the common strategy developed at a supranational level and undermined the unity of the EU external representation, in clear violation of the principle of sincere cooperation. Hence, the conduct that, in such a circumstance, best flows from Member States' duty of sincere cooperation is to refrain from taking any stance on the subject matter covered by the EU position.[98]

The very same outcome would be expected from EU Member States at the ISA, especially from those elected at its Council and that are currently negotiating the Draft. This is particularly relevant if one takes into account the fact that the international rules governing the participation of international organisations to the ISA disable the EU from exercising its competences at the Council. In this circumstance, such competence should be exercised by Member States as 'trustees of the common interest'.[99] This formula was developed by the ECJ in the 1981 case *Commission v. United Kingdom* concerning the unilateral adoption of some conservation measures by the United Kingdom in the field of the fisheries policy, to support that 'Member States [have] not only an obligation to undertake detailed consultations with the Commission and to seek its approval in good faith, but also a duty not to lay down national conservation measures in spite of objections, reservations or conditions which might be formulated by the Commission'.[100]

More recently, with respect to external relations, in the case *Commission v. Greece* concerning the latter's unilateral proposal to the IMO falling under the EU exclusive competence, the ECJ, with a slightly different language, held once again that the fact that the EU cannot directly participate in the work of

98 Federico Casolari, *Leale cooperazione tra Stati membri e Unione Europea,* (Editoriale Scientifica 2020); Peter Van Elsuwege, 'The duty of Sincere Cooperation (Art. 4(3) TEU) and its implications for the national interest of EU Member States in the Field of External Relations', in Marton Varju (ed), *Between Compliance and Particularism* (Springer 2019).

99 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1981] ECJ, ECLI:EU:C:1981:93, para 30.

100 ibid para 31.

an international organization, 'does not prevent its external competence from being in fact exercised, in particular through the Member States acting jointly in the Community's interest'.[101] Hence, in the case under scrutiny, any position taken by Member States at the ISA should avoid hampering the Union strategy on the same subject matter.

Whether or not the Council will find the required majority for the EU to exercise its external competence in the negotiation of the Draft, in any case it is still for Member States to ensure coherence and consistency with the earlier and current EU action in other international fora. In particular, the EU is currently engaged in the negotiations of an international legally binding instrument for the conservation and sustainable use of biological diversity in marine areas beyond national jurisdiction (BBNJ agreement). The BBNJ agreement, which is the third agreement implementing the UNCLOS, addresses, together and as a whole, a package deal agreed upon by the General Assembly in 2011 and consisting of marine genetic resources, area-based management tools including marine protected areas, environmental impact assessment, capacity building and transfer of marine technology.[102]

Under resolution 72/249 – by which the UNGA convened an intergovernmental conference to conclude, as soon as possible, the BBNJ agreement – the EU was authorized to participate in the negotiations.[103] In 2018, the EU Council hence adopted a decision authorising the Commission to conduct the negotiations on behalf of the EU in matters falling within the Union's competence and in respect of which the Union has adopted rules.[104]

The subject matter of the negotiations falls within the competences of both the EU and its Member States and hence they shall cooperate with the Commission with a view to ensuring unity in the international representation. Both legal instruments are aimed at regulating activities taking place in marine areas beyond national jurisdiction and they both represent an implementation and further development of the rules contained in the UNCLOS. Moreover, some of the topics under negotiation at the intergovernmental conference, like environmental impact assessment and the creation of area-based management tools, are also dealt with in some environmental provisions of the Draft.

As a consequence, if the EU Council considered that the achievement of the aims it set for the BBNJ agreement would be facilitated by also having an EU position on some environmental provisions of the Draft, it could establish such a position for the sake of coherence and consistency of the EU action.[105]

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101 ibid See also *European Commission v Council of the European Union* [2022] ECJ, ECLI:EU:C:2022:260, para 59.

102 UNGA Res 66/231 (2012) A/RES/66/231.

103 UNGA Res 72/249 (2018) A/RES/72/249.

104 The relevant document is not public. However, in <https://data.consilium.europa.eu/doc/document/ST-6841-2018-INIT/en/pdf> (last accessed 22 December 2022) the COMAR adopted a recommendation, available at <https://data.consilium.europa.eu/doc/document/ST-6698-2018-INIT/en/pdf> (last accessed 22 December 2022) that allows to understand the mandate conferred to the Commission in the negotiation of the BBNJ Agreement. See also Pascale Ricard, 'The European Union and the Future International Legally Binding Instrument on Marine Biodiversity Beyond National Jurisdiction', in Marta Chantal Ribeiro (ed), *The Global Challenges and the Law of the Sea* (Springer 2020).

105 *European Commission v Kingdom of Sweden* [2010] ECJ, ECLI:EU:C:2010:203, para 75.

5. Conclusion

This paper has analysed and discussed the recent EU Proposal on the position to be taken on behalf of the EU at the meetings of the ISA organs. The Proposal, which was also inspired by the EU Parliament resolutions pledging for a moratorium to exploitation activities in the Area, is part and parcel of a strategy carried out by the EU commission to claim exclusive competence in the protection of the marine environment with a view to negotiate relevant agreements and decisions in the field. In this respect, the mentioned *Weddell Sea* and IMO cases brought before the ECJ are much representative of this trend.

Several COMAR meetings were devoted to the discussion of the Proposal. The reaction from EU Member States, especially those directly involved in activities in the Area, was harsh. Indeed, the Proposal was not welcomed by the majority, *inter alia* because of the advanced status of the negotiations in respect of which the EU has long showed limited interest to take part in.[106] Moreover, doubts arose with respect to the exclusive competence claimed by the Commission for the negotiation of the environmental provisions of the Draft and on the proposed arrangements for the adoption of a common position.

In this respect, the paper has first concluded that the Proposal only aims at establishing an EU position at the ISA organs in the field of the protection of the marine environment from the negative effects arising from deep-sea mining. The EU enjoys shared competence in the field of the protection of the environment under article 4(2)(e) of the TFEU. Contrary to the rationale of the Proposal, the analysis has shown that there is no ground for the Commission to assert that such competence has become exclusive by virtue of article 3(2) TFEU. Indeed, the *ERTA* scenario the Commission relies upon – i.e. the alleged risk of alteration or affection of the EU *acquis* posed by the Draft – does not find application in the case at stake. In particular, the Commission does not raise convincing arguments on how the MSFD and the CFP would be affected by the environmental provisions of the Draft.

Although the EU does not enjoy exclusive competence in the field, nothing prevents the EU Council from obtaining the necessary majority for the EU to negotiate the Draft. In this scenario, the conduct of Member States would be regulated by the principle of sincere cooperation, entailing a duty of close cooperation between them and the EU institutions or even a duty of abstention to ensure the consistency of the EU action in international fora. This is particularly the case for the negotiations of the BBNJ agreement to which the EU is currently engaged. Some elements of the package deal tackled in the BBNJ agreement, like environmental impact assessment and the creation of certain area-based management tools, are also at the core of the Draft. In this context, it is necessary for

106 The harsh opposition of EU Member States to the Proposal might be reconsidered in light of the recent position taken by some of them at the 27th session of the ISA. See, in this respect, the speech by the French Permanent Representative to the ISA, who declared that his country cannot support any deep-sea mining operation taking place. The statement is available at <https://isa.org.jm/files/files/documents/France_d%C3%A9claration.pdf> (last accessed 22 December 2022).

Member States to ensure that their action at the ISA is consistent with the position taken by the EU in the negotiations of the BBNJ agreement. This is a much-debated issue also at the ISA, where there is historically no political and diplomatic coordination among the EU Member States elected at the Council.[107] While some EU Member States advocate for a much stronger coordination between the position of the EU at the BBNJ Intergovernmental Conference and at the ISA, so far this has not resulted in any concrete action to harmonise developments in the two fora.

107 An exception to this lack of coordination is represented by the recent declaration of the EU and its Member States at the ISA Council concerning the Russian aggression against Ukraine available at <https://isa.org.jm/files/files/documents/d%C3%A9claration_FR_au_nom_de_l%27UE_et_ses_EM.pdf> (last accessed 22 December 2022).