



FONDS FRANÇAIS POUR
L'ENVIRONNEMENT MONDIAL

& DIDEM (IRD) /SAPPHIRE PARTNERSHIP

WIO LME SAPPHIRE

"Western Indian Ocean Large Marine Ecosystems Strategic Action Programme
Policy Harmonization and Institutional Reforms", Nairobi Convention, UNEP

DIDEM

Dialogue Science-Decision Makers

Component: High Seas, Remote and/or Deep Seabed [HS/RS/DS] & ABNJ — DIDEM Project

Developments in the 21st century Law of the Sea. How many nautical miles away are we from the environmental inflexion?

By Florence Galletti

S.A. Agulhas II, November 14th, 2022

Dr Florence GALLETTI is a Senior Researcher in Law at the Research Institute for Sustainable Development, IRD (MARBEC MARine Biodiversity, Exploitation and Conservation).

Leader (Marine Science & Law of the Sea) with Dr Jean-Francois Temon (oceanography) of the "High Sea, Remote and/or Deep Seabeds [HS/RS/DS] & ABNJ [areas beyond national jurisdictions]" component in the WIO DIDEM Project: Dialogue Science-Decision-Makers for the Integrated Management of the Coastal and Marine Environment 2021-2023 (<https://www.didem-project-en.org/>), in partnership with the Nairobi Convention. Associated with various university centres and faculties of Law & marine Science, she is thesis director in International Law of the Sea and Environment, especially for areas far from the coastline (water column and subsoil) as well as fisheries, coastal and remote biodiversity. She has been working with marine scientists closely for a very long time: she participated in the previous FFEM Project (2014-2018), Conservation and sustainable use of seamount ecosystems and hydrothermal vents in the south-west Indian Ocean beyond areas of national jurisdiction, and its related oceanographic cruise [MD 208 in 2017] and in this one about Saya de Malha Bank, WIO.

The "new Law of the Sea" (post-1982), discussed and compiled during the nine years of the Third United Nations Conference on the Law of the Sea (from 1973 to 1982), led to the United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982, which entered into force in 1994. It did so with a dual objective of organizing the economic development of States and resolving ocean-related conflicts between States over the oceans and seas. It responded by standardizing the marine areas that nations could use and organizing the secure distribution of the rights of each State over them, as well as the role of public international organizations, institutions or specialized agencies of the United Nations: regional fisheries organizations (RFOs), the International Seabed Authority (ISA), the Intergovernmental Oceanographic Commission (IOC), etc.

This results in a mapping of maritime zones established in accordance with the United Nations Convention on the Law of the Sea, customary law or international court judgments, with, on the one hand, classic spaces, most of which are delimited by scientific methods, such as "internal waters", "territorial seas", "contiguous zones" and "exclusive economic zones" (EEZs), the

"continental shelves" or now the extended "continental shelves", the "high sea", the "international seabed area", and their sub-declinations mainly formed by pelagic or benthic fishing areas, with, on the other hand, more specific legal spaces ("islands", "bays", "straits", "international channels", "archipelagic waters") and their regimes.

Did the international Law of the Sea of the 20th century have only a territorial aspect? The term "territory at sea" is almost a misnomer, and yet.

In truth, this international Law of the Sea has always had a functional aspect and has sought balance. It indicates how to distribute uses (communication routes, circulation of ships, organization of fisheries law upstream of fishing operations, possibilities of accessing and extracting the resource from the sea) and regulate access in cases where it is no longer possible to benefit from the freedoms of the high sea. It has therefore set out, in conditions that have become clear, who has the right to access, exploit and trade in marine resources.

It has been forgotten that it highlights the obligation to conserve certain ecological services rendered, even if the expression was not used at the time, and the need to not deprive other States of these services. The state of the environment is not unthought of in the UNCLOS text; on the contrary. It has recognized marine scientific research (Part XIII, UNCLOS) in its capacity to inform and analyze ocean resources.

Distinct from environmental law, which is concerned with the sea from the perspective of protecting the natural environment, the international law of the sea is now in need of instruments to maintain biological diversity in a status that is good enough to allow some level of exploitation.

Thus, in the field of rationalized exploitation, or supposed exploitation, of fisheries resources, UNCLOS was followed by the Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995. We can also mention the Agreement relating to the implementation of Part XI of UNCLOS of 28 July 1994, which establishes the conditions for the exploitation of the non-living (mineral) resources of the international deep seabed (The Area) with the International Seabed Authority (ISA) which, over time, is occupied with a delicate legal task: the drafting of the environmental mining code for this deep-sea exploration/exploitation. These are just examples.

This is no accident.

The multiplication of activities and projects in the seas, the reduction of available resources, and the increase in ecological degradation and dysfunction - better identified by the considerable advances in marine science - call into question the Law of the Sea of the 21st century, and above all the under-use of the latter to correct these situations.

Each case is unique, but maritime zones are not equal, even within the same State. With regard to internal waters and the territorial sea, the Law of the Sea, by guaranteeing the broadest range of competencies to the coastal State through the sovereignty regime, is in a position to support environmental law (national or international), which is essentially mobilized to try to protect parts of the coastline or coastal zones (12 nautical miles), provided that the State wants this for

its territory. A majority of States have developed some environmental law for lagoons, ports, and coastal areas, with an aspect of protection of species (some...) and protection of areas (some...). Its use remains insufficient for the coast (because constructions and rights of way have already been installed and produce undesirable effects on the environment and aesthetics), and all the more so in the EEZ (jurisdictional regime), on the continental shelf (sovereignty regime), or beyond national jurisdictions (no longer a state-based legal regime, the regime of the freedoms of the high sea, or regime of freedom limited by RFO measures, legal regime of exploration/exploitation stemming from ISA...).

What exists in the Law of the Sea and even in fisheries Law, in terms of legal instruments and possibilities, is nevertheless sufficient for governments to take action, alone or jointly, in compliance with what international Law allows. The development of more distant "non-reef" marine protected areas in the EEZ on relevant sites (e.g. seamounts) is an example of national public action timidly undertaken in the world for ecological purposes; they are struggling to gain a bilateral or multilateral dimension through agreements between States to protect, in pairs or groups, habitats distributed between the States. In the Western Indian Ocean, cooperation agreements of this type are of proven value, for example, for the protection and non-disturbance of marine mammals that pass from one EEZ to another (France, Madagascar, etc.) during their migration, which is scrutinized every year by observers and economic operators who hope to see them.

On these modern subjects, such as the legal protection of marine ecological networks (Galletti, 2014), the international Law of the Sea, driven by voluntary States, must be mobilized.

For the situation of ecosystems spatially distant from the coasts, included in a water column up to 200 nautical miles (maximum) or on the seabed up to 350 nautical miles (maximum) from the baseline - in the situation of an extended continental shelf held by a State - it is easy to understand that distance adds a legal, scientific, and technical difficulty to the vacillating national wills. However, it is here and now that the environmentalist shift that States should be making is taking place.

Marine scientific research can help. Practice shows that the coastal State is reserved about granting public scientific research authorizations to third States and sometimes chooses to quickly grant resource exploitation licenses to fisheries operators, in the EEZ or on its continental shelf, without much operational capacity to monitor 1) these activities and 2) the state of the sites after years of exploitation.

Finally, is the conservation of the integrity and biological capacity of environments - beyond waters under national jurisdiction (+200 nautical miles from the coast for the pelagic water column) and beyond the benthic seabed under national sovereignty (+200 or +350 nautical miles, depending on the rights over the extended continental shelf communicated by the coastal State), an accessible issue?

The law and control of international and deep-sea fisheries have been trying to do this for years (in the Indian Ocean: IOTC, APSOI, SIOFA) and will continue to do so with great difficulty as regards the control of operators and predations. Regarding the international Law of the Sea, a draft treaty is emerging: the "International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity in Areas beyond National Jurisdiction". The purpose and content of the treaty (70 articles) have been established through a UN negotiation procedure since 2017. Still, the 5th session of the Intergovernmental Conference, which was to

establish the text definitively, did not succeed in completing this task and convincing as many national delegations as possible on 26 August 2022; the procedure will continue in 2023.

Although critical, this treaty, the only one we have, should further, better, or newly legalize the conservation and use of marine biological diversity (Galletti, 2022).

Only the entry into force of the treaty would allow to fully address [through the chapter on area-based management instruments, including international marine protected areas, or the chapter on impact assessment] vulnerable, remote, deep or rare deep-sea/offshore ecosystems specific to a biogeographic region, such as seamounts, banks, underwater structures, threatened in the short or medium term by competition from fisheries extraction and mineral exploration activities (soon to be operational exploitation of the conceded blocks), or other unidentified, unprevented or uncontrolled uses (pollution, collisions, spills, illegal, unreported and unregulated fishing, known as IUU fishing...).

In the Indian Ocean, sites could benefit from this international marine area status if multidisciplinary scientific research continues to analyze them and if groups of researchers dedicate themselves to them (this is one of the expectations of the DIDEM project, component "High seas – Remote seabed – deep seabed and Areas beyond national jurisdiction", <https://www.didem-project.org/> & <https://www.didem-project-en.org/>). Among the results of multidisciplinary projects¹ and the professional sector, we have seen the status of certain international seamounts in the south-west Indian Ocean (Marsac, Galletti, Ternon et al., 2019), such as the Walters Shoal, which were previously left unprotected and are now protected from bottom trawling by the regional fisheries organization SIOFA).

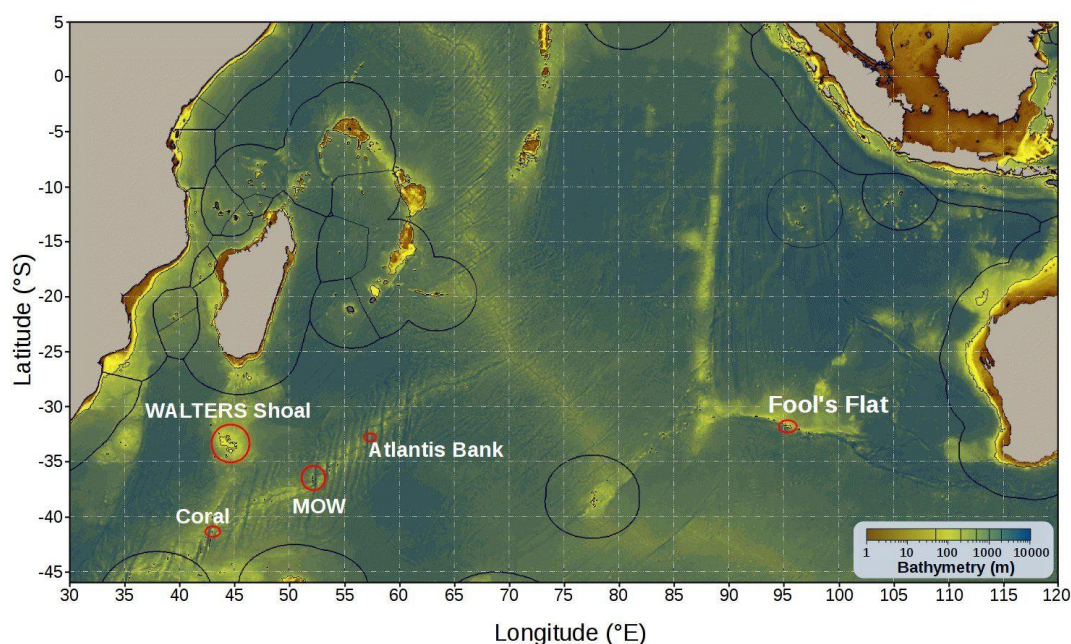


Figure: H.Demarcq, IRD, MARBEC, 2018, for F.Galletti, FFEM/IUCN Project "Conservation and sustainable use of seamount ecosystems and hydrothermal springs in the south-west Indian Ocean beyond areas of national jurisdiction (2014-2018).

¹ FFEM & UICN project « Conservation and sustainable exploitation of seamounts and hydrothermal vents ecosystems in the south-west Indian Ocean beyond areas of national jurisdiction », 2014-2018.

These seamounts may become, 1) based on scientific criteria, 2) because States convince themselves, and 3) in cooperation with the Secretariat of the Indian Ocean Regional Sea (Nairobi Convention for the Indian Ocean, UNEP) and other bodies, candidates for this international protected area status if the treaty becomes available and enters into force.

In addition to the inter-State rapprochements that can be found around the objectives of co-management of a shared marine ecological heritage, as the sciences show us, the progress of surface monitoring systems, such as software, services or processing of fisheries or deep-sea exploration data, are useful and should not be feared by coastal States.

Their acquisition should be facilitated to combat illegal uses of ocean areas (illegal, unreported and unregulated fishing, waste dumping, wildlife trafficking, and human rights abuses). For more than twenty years, hydrographic surveys, which UNCLOS distinguishes from marine scientific research, have been used and improved for meteorological intelligence purposes, increasing security (maritime navigation, land-based warnings, etc.). The performance of these drifting devices and their ability to collect more and more data is an opportunity that should serve the security of coastal States and enable them to be better prepared to withstand the effects of climate change affecting the seas and coasts, and hence the nations that live on them.

References cited for further reading.

GALLETTI F., (2022), "Point sur le régime de l'“instrument international juridiquement contraignant sur la conservation et l'utilisation durable de la diversité biologique marine des zones ne relevant pas de la juridiction nationale” et sur quelques conditions”, L'évolution du droit de la mer / The Evolution of the Law of the Sea, Editoriale Scientifica, Napoli, 10 pages, 2023.

GALLETTI F., (2014), La protection juridique des réseaux écologiques marins. Compétences et implications du droit de la mer contemporain, J. M. SOBRINO HEREDIA (dir.), La contribution de la Convention des Nations Unies sur le Droit de la Mer à la bonne gouvernance des mers et océans, Cahiers de l'Association Internationale du droit de la mer, Editoriale Scientifica, 2014.

MARSAC F., GALLETTI F., TERNON J.-F. et al., (2019), "Seamounts, plateaus and governance issues in the southwestern Indian Ocean, with emphasis on fisheries management and marine conservation, using the Walters Shoal as a case study for implementing a protection", Deep-Sea Research, Special Issue, 14 Avril 2019, Deep-Sea Research II, vol.176, 2020, <https://doi.org/10.1016/j.dsr2.2019.104715>.