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Regional Cooperation for the Conservation of Marine Biodiversity in the Eastern Tropical Pacific

A Rule of Law Perspective

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20.1 OCEAN GOVERNANCE AND THE RULE OF LAW

Governance depends on cooperation to succeed, building on partnerships and interactions across multiple domains and actors.[1] It is not a clear-cut notion, and is often characterized by flexibility and dynamism in contrast to the static structures usually associated with law.[2] Ocean governance is now a field in its own right reflecting the 'need and desire to pursue a holistic, integrated, and/or cross sectoral approach to the management of the oceans'.[3] It has been defined as 'the way in which ocean affairs are governed, not only by governments, but also by local communities, industries and other "stakeholders". It includes national and international law, public and private law as well as custom, tradition and culture and the institutions and processes created by them'.[4] It is clear that law is an essential element of ocean governance given that the system created by the United Nations Law of the Sea Convention (UNCLOS)[5] provides the overarching framework for management of the global ocean. Yet the precise relationship between the law of the

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[1] C. Blanchard, 'Fragmentation in High Seas Fisheries: Preliminary Reflections on a Global Oceans Governance Approach' (2017) 84 *Marine Policy* 327, 329.

[2] Ibid.

[3] E. J. Molenaar, 'Chapter 40 – Ocean Governance beyond Boundaries: Origins, Trends, and Current Challenges' in Andrés M. Cisneros-Montemayor, William W. L. Cheung and Yoshitaka Ota (eds.), *Predicting Future Oceans* (Amsterdam: Elsevier 2019), 419.

[4] As defined by Elisabeth Mann Borgese in *Ocean Governance: Legal, Institutional and Implementation Considerations*, Ocean Policy Research Institute Report No. 5 (The Nippon Foundation, 2002), cited in D. Werle and others, *The Future of Ocean Governance and Capacity Development* (Leiden: Brill Nijhoff 2019), 6.

[5] United Nations Convention on the Law of the Sea 1833 UNTS 397 (1982).

sea and ocean governance remains contested, with the law of the sea naturally more concerned with legally binding norms.[6]

The field of ocean governance itself has become increasingly complex with a diverse array of laws, actors and institutions involved. UNCLOS divided the ocean into arbitrary zones (e.g., areas beyond national jurisdiction (ABNJ) *versus* areas under national jurisdiction), which are regulated under different regimes and subject to different management standards. These are essentially geo-political divisions and do not correspond with ecological boundaries, which tend to group similar species and habitats together, often as controlled by climatic and oceanographic parameters.[7] This mismatch between the law of the sea and the ecological reality of the ocean has generated serious challenges from a rule of law perspective. It has been described as a 'paradox with which lawyers have to grapple'[8] and a 'serious deficiency' in ocean governance.[9] Consequences include significant regulatory gaps[10] and negative outcomes for ocean health.[11] Therefore, the 'rule of law'[12] as it currently applies to the oceans is clearly far from satisfactory.

Some scholars have argued that elements of good governance, such as cross sectoral cooperation and coordination and science-based decision-making, could be engaged to enhance the existing legal framework.[13] These 'less politicized' forms of governance are seen as offering a more holistic way to address the transboundary

[6] For more in-depth discussion on this subject, see Y. Takei, 'A Sketch of the Concept of Ocean Governance and Its Relationship with the Law of the Sea', in C. Ryngaert, E. J. Molenaar and S. Nouwen (eds.), *What's Wrong with International Law?* (Leiden: Brill Nijhoff 2015), 58–60.

[7] M. V. Lomolino and others, *Biogeography* (fourth ed., Sunderland, MA: Sinauer Associates Inc. 2010).

[8] P. W. Birnie, A. E. Boyle and C. Redgwell, *International Law and the Environment* (third ed., Oxford: Oxford University Press 2009), 704.

[9] Y. Tanaka, *The International Law of the Sea* (second ed., Cambridge: Cambridge University Press 2015), 4.

[10] See e.g., K. M. Gjerde, N. A. Clark and H. R. Harden-Davies, 'Building a Platform for the Future: The Relationship of the Expected New Agreement for Marine Biodiversity in Areas beyond National Jurisdiction and the UN Convention on the Law of the Sea' (2019) 33 *Ocean Yearbook Online* 1, 4–5.

[11] See e.g., The First Global Integrated Marine Assessment (United Nations World Ocean Assessment I), UN Doc. A/70/112, 22 July 2015 Available at www.un.org/regularprocess/content/first-world-ocean-assessment and the annual Ocean Health Index global assessments at http://ohi-science.org/ohi-global/

[12] The 'rule of law' is a very broad concept. The Secretary General of the United Nations describes it as a 'principle of governance' in which 'all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency'. United Nations. Guidance Note of the Secretary General. *UN Approach to Rule of Law Assistance*. April 2008. On the rule of law more generally, see T. Bingham, *The Rule of Law* (London: Penguin UK 2011).

[13] Takei (n 6) 61.

challenges particular to the marine environment.[14] It has also been asserted that regional cooperation and coordinated responses are key for managing the transboundary reality of many activities and processes in the marine environment.[15] This chapter will argue that regional cooperation has the potential to contribute to a more effective rule of law for the oceans by filling some of the gaps left by the 'chronic fragmentation'[16] of international ocean governance, especially if embedded within an overarching regional and global strategy.

First, the emergence of regional ocean governance as a subfield within the broader sphere of ocean governance will be introduced, along with its main implementing mechanisms, followed by a case study on State-led regional cooperation efforts in the Eastern Tropical Pacific to create the first transboundary network of marine protected areas (MPAs) in Latin America. Finally, specific rule of law challenges faced by this initiative will be discussed, such as the lack of a legally binding cooperation agreement, limited sectoral participation, the vast scale and the lack of a cohesive regional ocean governance framework in the region.

20.2 A REGIONAL APPROACH TO OCEAN GOVERNANCE

The international community has recognized the need for a move towards a more integrated approach to ocean management through its endorsement of the ecosystem approach.[17] While implementation of the ecosystem approach in practice remains an ongoing challenge,[18] regional ocean governance (ROG) efforts have shown promise by enabling cooperation and coordination across territorial and sectoral boundaries, which could help to link disconnected areas of regulation arising from fragmentation.[19]

[14] Blanchard (n 1) 329.

[15] See e.g., J. Palacios-Abrantes and others, 'The Transboundary Nature of the World's Exploited Marine Species' (2020) 10 *Nature Scientific Reports* 1.

[16] M. Ntona and E. Morgera, 'Connecting SDG 14 with the Other Sustainable Development Goals through Marine Spatial Planning' (2018) 93 *Marine Policy* 214, 215.

[17] The Convention on Biological Diversity (CBD) in COP 5 Decision V/6 (2000) defines the Ecosystem Approach (EA) as 'a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way'. For an overview of the EA in a marine context, see further S. R. Enright and B. Boteler 'The Ecosystem Approach in Marine Environmental Law and Governance' in T. O'Higgins, M. Lago and T. H. DeWitt (eds.), *Ecosystem-Based Management and Ecosystem Services: Theory, Tools, and Practice* (Cham: Springer 2020).

[18] See e.g., D. Langlet and R. Rayfuse 'Challenges in Implementing the Ecosystem Approach: Lessons Learned' in D. Langlet and R. Rayfuse (eds.), *The Ecosystem Approach in Ocean Planning and Governance. Perspectives from Europe and beyond* (Leiden: Brill Nijhoff 2018).

[19] G. Wright and others, 'Partnering for a Sustainable Ocean: The Role of Regional Ocean Governance in Implementing SDG14' (2017) Partnership for Regional Ocean Governance (PROG): IDDRI, IASS, TMG & UN Environment, 11.

The duty to cooperate regionally flows from the well-established general duty to cooperate in international law.[20] In the 1970s the notion that seas with multiple coastal States could be governed or managed regionally first appeared,[21] and by 1982, a legal obligation to cooperate on a regional basis for the protection and preservation of the marine environment was explicitly included in the text of UNCLOS.[22] The 1992 Convention on Biological Diversity (CBD) also promotes regional cooperation for the conservation and sustainable use of biological diversity.[23] The international community has continued to formally recognize the importance of regional levels of governance. For example, the 2030 Agenda for Sustainable Development underlines the importance of regional cooperation and coordination in order to achieve the Sustainable Development Goals (SDGs).[24] Enhanced ROG and a greater role for regional agreements has been proposed as a specific means of achieving the targets associated with SDG 14, which aims to 'conserve and sustainably use the oceans, seas and marine resources'.[25] It has been recommended that regional seas should have a key implementing role in the Post-2020 Global Biodiversity Framework, given that they are in a 'unique position to support States to achieve ocean-related elements',[26] and it is also very likely that ROG will have increased prominence under a new international treaty for biodiversity beyond national jurisdiction (BBNJ), which is currently under negotiation.[27]

From a global governance perspective, the main mechanisms for ROG at present include Regional Seas Programmes (RSP), Regional Fishery Bodies (RFB) and

[20] See e.g., *MOX Plant*, ITLOS case No. 10 (2001). See also Principle 4 of the 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations', General Assembly Res. 2625 (XXV), 26 October 1970.

[21] L. M. Alexander, 'Regionalism and the Law of the Sea: The Case of Semi-Enclosed Seas' (1974) 2 *Ocean Development & International Law* 151, cited in N. Oral, 'Forty Years of the UNEP Regional Seas Programme: From Past to Future', *Research Handbook on International Marine Environmental Law* (Cheltenham: Edward Elgar Publishing 2015), 341.

[22] Art. 197 UNCLOS. Art. 123 UNCLOS specifically requires States bordering enclosed and semi-enclosed seas to cooperate with each other 'directly or through an appropriate regional organization'.

[23] Convention on Biological Diversity 1760 UNTS 79 (1992). Preamble.

[24] United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UNGA Resolution A/RES/70/1 United Nations, New York, 2015, para. 21.

[25] Agenda 2030, 14, 23–24. See further https://sdgs.un.org/goals/goal14.

[26] United Nations Environment Programme, *Regional Seas Biodiversity under the post-2020 Global Biodiversity Framework* (Nairobi, 2021), 4.

[27] Resolution 72/249 adopted by the United Nations General Assembly on 24 December 2017 on an International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. UN doc A/Res 74/249. New York: United Nations General Assembly. For further discussion see e.g., N. A. Clark 'Institutional Arrangements for the New BBNJ Agreement: Moving beyond Global, Regional, and Hybrid' (2020) 122 *Marine Policy* 104–143.

Large Marine Ecosystem (LME) mechanisms.[28] The RSP and RFBs are intergovernmental bodies made up of State parties, whereas LME mechanisms are usually projects that bring together coastal States of the LMEs, international agencies and regional bodies.[29] The United Nations Environment Program (UNEP) established the RSP in 1974 to serve as the mechanism for promoting cooperation among States sharing a common regional marine space.[30] For each RSP, an action plan serves as the basis for regional cooperation, and many also decide to adopt legally binding instruments and framework conventions.[31] The framework conventions typically provide general terms and conditions and an overall direction for States to follow. However, they are usually too vague to lead to decisive actions, and parties must therefore negotiate specific agreements, known as protocols.[32] The mandates of the different RSPs have evolved from an initial focus on pollution to encompass biodiversity conservation, particularly through the creation of MPAs.[33] Several RSPs have adopted a separate protocol for protection of marine biodiversity,[34] which require State parties, either individually or cooperatively, to establish protected areas for fragile and vulnerable ecosystems.[35]

RFBs are regional mechanisms, established under UNCLOS, through which States cooperate on the sustainable use and conservation of marine living resources.[36] Considerable differences exist in the geographical mandates of RFBs, and they may cover both high seas areas and coastal maritime zones.[37] As with the RSP, the geographic scopes of the RFBs have been driven by a mix of scientific and political considerations and opportunism, rather than by a goal to demarcate ocean regions.[38] Regional Fishery Management Organizations (RFMOs) are a subset of

[28] J. Rochette and others, 'Regional Oceans Governance Mechanisms: A Review' (2015) 60 *Marine Policy* 9.

[29] R. Billé and others, *Regional Oceans Governance: Making Regional Seas Programmes, Regional Fishery Bodies and Large Marine Ecosystem Mechanisms Work Better Together* (UNEP Regional Seas Reports and Studies No 197 2016), 42.

[30] Oral (n 21) 339.

[31] Billé and others (n 29) 3.

[32] Ibid., 25.

[33] Ibid.

[34] The Caribbean, Mediterranean and Eastern Africa regions, the Red Sea and the Gulf of Aden, the Black Sea, the South East Pacific and the ROPME sea area. Cited in Oral (n 21) 353.

[35] Ibid.

[36] Art. 118 UNCLOS. See also Art. 8(1) of the Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995 (in force 11 December 2001) 2167 UNTS 3.

[37] Billé and others (n 29) 35.

[38] R. M. Warner, 'Conserving Marine Biodiversity in Areas beyond National Jurisdiction: Coevolution and Interaction with the Law of the Sea' (2014) 1 *Frontiers in Marine Science* 6, 4.

RFB with a management mandate and the power to establish legally binding conservation and management measures, such as temporary closures.[39]

These outlined approaches are complemented by other regional initiatives, such as those taken by political and economic organizations,[40] leaders and heads of State, non-governmental organizations, coastal communities and individuals.[41] A recent global study of ROG arrangements found that the majority of regional arrangements are 'indigenous', meaning developed by the countries of the region as opposed to being promoted by an external agency.[42] Given that most previous consideration of ROG has focused on the RSP and RFBs,[43] this discovery has important implications for ocean governance. The following sections of this chapter will focus on a case study of such an 'indigenous' regional cooperation agreement and its associated rule of law challenges.

20.3 REGIONAL COOPERATION IN THE EASTERN TROPICAL PACIFIC OCEAN

The decline of marine biological diversity worldwide, due to anthropogenic causes, has led to calls for more legally protected areas. International targets, which previously aimed for protection of 10 per cent of global waters by 2020, are due to be increased to 30 per cent by 2030 under the Post-2020 Global Biodiversity Framework.[44] Networks of MPAs,[45] including cross-jurisdictional boundaries, are now seen as increasingly necessary due to ecological connectivity between marine ecosystems.[46] Cross-jurisdictional coordination and regional cooperation are

[39] Billé and others (n 29) 37. RFBs that do not have a mandate to adopt binding measures are known as advisory RFBs. Currently there are forty-one marine RFBs worldwide, comprising twenty-one RFMOs and twenty advisory RFBs. See further www.fao.org/in-action/vulnerable-marine-ecosystems/background/regional-fishery-bodies/en/

[40] E.g., the European Union, the African Union (AU), Association of Southeast Asian Nations (ASEAN) and the Caribbean Community (CARICOM). See further Wright and others, 'Partnering for a Sustainable Ocean: The Role of Regional Ocean Governance in Implementing SDG14' (n 19) 16–18.

[41] D. E. Johnson and others, 'Building the Regional Perspective: Platforms for Success' (2014) 24 (S2) *Aquatic Conservation: Marine and Freshwater Ecosystems* 75–93, 75.

[42] R. Mahon and L. Fanning, 'Regional Ocean Governance: Polycentric Arrangements and Their Role in Global Ocean Governance' (2019) 107 *Marine Policy* 103590, 4, 11.

[43] Ibid.

[44] Target 3 of First Draft of the Post-2020 Global Biodiversity Framework, CBD/WG2020/3/3, 5 July 2021. Available at www.cbd.int/conferences/post2020/wg2020-03/documents

[45] Networks of MPAs have been defined as 'a collection of individual MPAs operating cooperatively and synergistically, at various spatial scales, and with a range of protection levels, in order to fulfil ecological aims more effectively and comprehensively than individual sites could alone'. IUCN World Commission on Protected Areas (IUCN-WCPA) *Establishing Marine Protected Area Networks: Making It Happen* (Washington, DC: IUCN-WCPA, National Oceanic and Atmospheric Administration and the Nature Conservancy 2008), 3.

[46] See e.g., D. Laffoley and others, 'Evolving the Narrative for Protecting a Rapidly Changing Ocean, Post COVID-19' (2020) 31, 1512–1534 *Aquatic Conservation: Marine and Freshwater Ecosystems* 4.

considered essential for their management.[47] The United States National Oceanic and Atmospheric Administration (NOAA) defines ecological networks of MPAs as 'systems of core habitats connected by ecological corridors that are established, restored, and/or maintained to conserve biological diversity in systems that have been fragmented'.[48] Ecological corridors are therefore important tools in the creation of an effective network of MPAs. Regional organizations, such as the European Union, now require integration of ecological corridors into MPA networks.[49]

The Eastern Tropical Pacific Marine Corridor (CMAR)[50] is regarded as a leading example of regional cooperation for the creation of a network of MPAs.[51] It is located within the Eastern Tropical Pacific Ocean (ETPO), which has exceptional levels of biodiversity, unique oceanographic conditions and large numbers of endemic, native and migratory species.[52] The proposed marine corridor encompasses the national waters, coasts and islands of Ecuador, Colombia, Costa Rica and Panama and contains five world-renowned MPAs: Galapagos (Ecuador), Cocos (Costa Rica), Coiba (Panama), Malpelo and Gorgona (Colombia) (Figure 20.1).

All of the MPAs, except for Gorgona, are UNESCO World Heritage Sites,[53] two are Ramsar Sites (Galapagos and Cocos)[54] and the International Maritime Organization (IMO) has designated Galapagos and Malpelo as Particularly Sensitive Sea Areas (PSSAs).[55] In further recognition of its biological value, CMAR was recognized in 2016 as an Ecologically and Biologically Significant Area (EBSA) by parties to the CBD, who considered it 'important for the connectivity of species on their migratory routes and at other times of their life cycles (e.g., mating, birth, feeding)'.[56] Despite its immense ecological value, the region faces a number of governance challenges, including illegal, unreported and unregulated

[47] P. J. S. Jones and S. D. Long, 'Analysis and Discussion of 28 Recent Marine Protected Area Governance (MPAG) Case Studies: Challenges of Decentralisation in the Shadow of Hierarchy' (2021) 127 *Marine Policy* 104362, 12; J. A. Guerreiro da Silva and others, 'Transboundary MPAs: A Challenge for the Twenty-First Century' (2012) 23 *Management of Environmental Quality: An International Journal* 328, 329.

[48] NOAA Ecological Connectivity for Marine Protected Areas, available at https://marineprotectedareas.noaa.gov/

[49] European Commission EU Biodiversity Strategy for 2030: Bringing nature back into our lives COM (2020) 380 final, 4.

[50] CMAR is the Spanish acronym and refers to Corredor Marino del Pacifico Este Tropical.

[51] Johnson and others (n 41) 80.

[52] See e.g., P. C. Fiedler and M. F. Lavín, 'Oceanographic Conditions of the Eastern Tropical Pacific' in P. W. Glynn, D. P. Manzello and I. C. Enochs (eds.), *Coral Reefs of the Eastern Tropical Pacific* (Berlin, Heidelberg, New York: Springer 2017), 59–83.

[53] https://whc.unesco.org/en/list/

[54] www.ramsar.org/sites/default/files/documents/library/sitelist.pdf

[55] www.imo.org/en/MediaCentre/HotTopics/PSSA/Pages/default.aspx

[56] CBD-COP Decision XII 22.

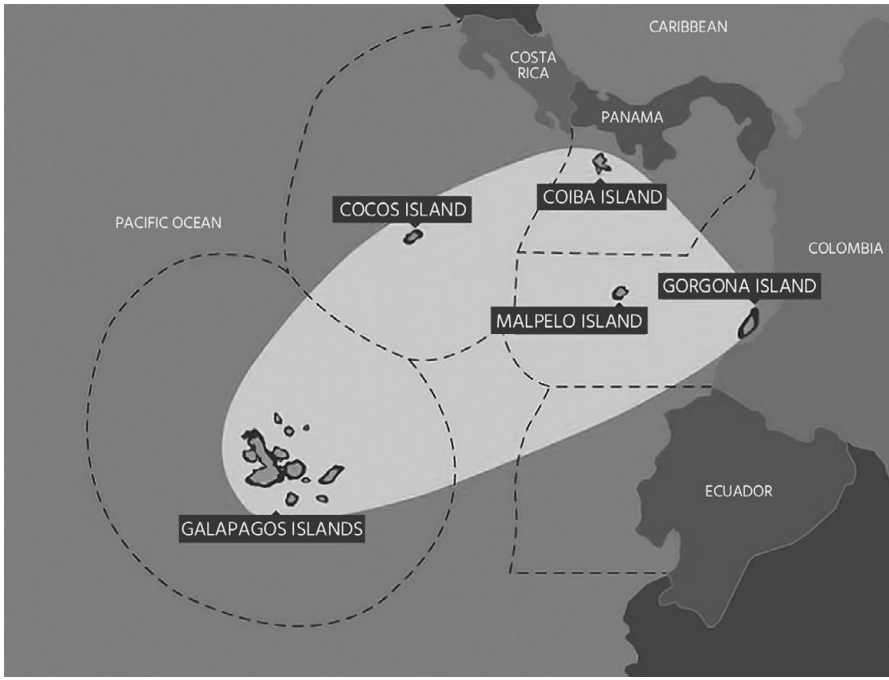

FIGURE 20.1. Proposed Eastern Tropical Pacific Marine Corridor (CMAR)
This map has been created for illustrative purposes only, and is based on the map available on the CMAR website at http://cmarpacifico.org/donde-trabajamos/pacifico-este-tropical. The official geographic delimitation of CMAR remains pending. Information provided by Ricardo Meneses-Orellana, CMAR Technical Secretariat.

(IUU) fishing, overfishing, pollution and coastal development.[57] Climate change[58] and weak governance[59] are overarching, aggravating factors.

In response to these pressures, CMAR was formally established in 2004 by the San Jose Declaration (SJD),[60] a non-binding regional cooperation

[57] See e.g., J. J. Alava and F. Paladines 'Illegal Fishing on the Galápagos High Seas' (2017) 357 *Science (Am. Assoc. Adv. Sci.)* 1362 and L. F. Ramirez, 'Marine Protected Areas in Colombia: Advances in Conservation and Barriers for Effective Governance' (2016) 125 *Ocean & Coastal Management*. 49–62.

[58] Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) *Global Assessment Report on Biodiversity and Ecosystem Services* (2019). Summary for policy-makers, 4.

[59] R. Arauz and others, *Migramar. Science for the Conservation of Migratory Marine Species in the Eastern Pacific* (MigraMar 2017); WildAid, *An Analysis of the Law Enforcement Chain in the Eastern Tropical Pacific Seascape* (2010) Preface, 1. Available at www.issuelab.org/resources/26036/26036.pdf

[60] Declaración de San José sobre el corredor marino de Conservación del Pacifico este Tropical Entre las Islas Coco – Galápagos – Malpelo – Coiba – Gorgona, el 2 de abril del 2004. Available at http://cmarpacifico.org/web-cmar/quienes-somos/que-es-el-cmar/

https://doi.org/10.1017/9781009253741.027 Published online by Cambridge University Press

agreement signed by Ecuador, Costa Rica, Panama and Colombia. The Action Plan for 2019–2024 defines CMAR as 'a regional initiative for conservation and sustainable use which seeks, via an ecosystem approach, the adequate management of the biodiversity, marine and coastal resources of the Eastern Tropical Pacific, through regional governmental strategies, jointly supported by civil society, nongovernmental organizations and international cooperation, with the MPAs of Cocos, Galapagos, Malpelo, Gorgona and Coiba considered core areas'.[61]

In order to achieve its objectives, the SJD provides for the establishment of a regional mechanism, made up of political and technical components. The political element consists of a Regional Ministerial Committee (RMC), which is made up of representatives of the Ministry of Environment of each State.[62] It issues guidelines and supports the process of implementation politically in accordance with the conservation priorities for CMAR, the policies of each participating State and the relevant international framework.[63] It is the main decision-making body for CMAR.[64] The RMC meets once a year and its Presidency has a rotating character between the four participating States, each term lasting three years.[65] The Foreign Ministries of each State also play an advisory role with regard to matters of international relations between the States.[66] The technical component of CMAR is made up of a Regional Technical Committee (RTC), which is responsible for defining the actions needed to implement CMAR.[67] It meets twice a year and acts as the advisory body to the RMC. It is made up of a delegate of each State's Ministry of Environment, who is often a director of one of the core MPAs.[68] In terms of decision-making, each State has one vote, yet all decisions are adopted by consensus.[69] The RTC is supported by a Secretariat in charge of carrying out CMAR management actions and coordinating cooperation between the four participating States and any involved international organizations and NGOs.[70]

[61] Corredor Marino del Pacífico Este (CMAR) *Plan de acción 2019–2024* (San José, Costa Rica 2019), 8. Quoted text translated from Spanish to English by author.
[62] San Jose Declaration (n 60) para 4.a.
[63] Ibid.
[64] CMAR Action Plan 2019–2024, 10.
[65] Ibid.
[66] Ibid.
[67] San Jose Declaration (n 60) para. 4.b.
[68] CMAR Action Plan 2019–2024, 10.
[69] Corredor Marino del Pacífico Este (CMAR) Technical Document *Corredor marino de conservación y desarrollo sostenible del pacifico este tropical entre las islas Coco – Galápagos – Malpelo – Coiba – Gorgona. Antecedentes y consideraciones técnicas para su definición* (San José, Costa Rica 2004), 30.
[70] CMAR Action Plan 2019–2024, 10.

20.4 RULE OF LAW CHALLENGES

MPA managers within CMAR territories have identified several limiting factors from a governance perspective, including overlapping or interfering jurisdiction between authorities, lack of coordination between authorities, lack of resources, lack of political will regarding conservation and institutional weakness in the government environmental sector.[71] While these are issues impeding effective ocean and coastal management more generally in CMAR member States, the following discussion will focus on four specific challenges faced by the marine corridor itself.

20.4.1 *Lack of a Legally Binding Agreement*

CMAR is a voluntary, political initiative between four States and therefore not legally binding.[72]

Voluntary, non-binding commitments have become a popular tool in international environmental governance, including in an ocean sustainability context.[73] They have been considered particularly useful in the context of transboundary governance, where competing sovereign interests can delay the negotiation of intergovernmental agreements.[74] As a political initiative, CMAR offers the possibility to harmonize national positions in the region with respect to marine environmental protection. On the other hand, the lack of any binding force has significant implications for compliance and enforcement. Voluntary commitments are often critiqued for lacking appropriate monitoring and evaluation strategies and not providing sufficient evaluation of their own effectiveness.[75] The lack of a legally binding agreement also implies no dedicated funding mechanism, which obviously impacts on critical issues such as institutional infrastructure, implementation and capacity for monitoring and enforcement. At a 2004 CMAR Regional Ministerial meeting, it was decided that the Secretariat would be funded by support from other interested governments, international organizations and NGOs,[76] creating circumstances that have not been conducive to financial sustainability. The Secretariat does not yet have a permanent physical infrastructure and currently rotates between each State every three years, concurrently with the Presidency. The State that exercises the Presidency covers the cost of operating the Secretariat with funds

[71] Wild Aid *An Analysis of the Law Enforcement Chain in the ETP Seascape*, 4 and K. Cremers, G. Wright and J. Rochette, 'Options for Strengthening Monitoring, Control and Surveillance of Human Activities in the Southeast Pacific Region' (2020) *STRONG High Seas Project* 11.

[72] CMAR Technical Document, 29.

[73] B. Neumann and S. Unger, 'From Voluntary Commitments to Ocean Sustainability' (2019) *Science* 363, 35–36.

[74] M. Voyer and others, 'The Role of Voluntary Commitments in Realizing the Promise of the Blue Economy' (2021) 71 *Global Environmental Change* 102372, 5.

[75] Ibid., 2.

[76] CMAR Technical Document, 30.

provided by that government's budget or via international cooperation.[77] In acknowledgement of the weaknesses inherent in the current non-binding model, the Action Plan for 2019–2024 recommends evaluating the possibilities for transforming CMAR into a legally binding agreement.[78]

20.4.2 *Limited Sectoral Participation*

Another governance challenge for CMAR is that it was not framed in a multi-sectoral manner from the outset. To create a level of sectoral engagement, Regional Working Groups and National Commissions are provided for within the structure of CMAR. The working groups cover five key thematic areas identified as priorities for conservation in the region (Tourism, MPAs, Science, Fisheries and Communications) and are made up of representatives from government institutions, NGOs, research and academia.[79] The purpose of the National Commissions[80] is to deal with any CMAR-related matters in a national context, and in conjunction with the working groups, incorporate the viewpoints of the different groups carrying out activities in the ETP.[81] Yet the private sector is notably absent from both. CMAR has acknowledged that interaction with the fishing sector has been limited due to the restricted capacity of CMAR to take political or institutional decisions affecting this sector.[82]

20.4.3 *Scale*

The scale of a project like CMAR involving transboundary marine management across four jurisdictions is a significant governance challenge. It is the first such undertaking in the region, and progress on formalizing the initiative has been slow due to the legal and institutional complexities involved in managing shared biological resources over such a large geographical area and the limited amount of resources available.[83] Given that the four CMAR States have already faced significant challenges in effectively managing MPAs within their national jurisdictions, it remains to be seen how this can effectively be done on a larger scale, especially in the absence of a wider supporting ROG strategy. CMAR has not yet been officially delimited from a geographical or jurisdictional perspective.[84] It is likely that the eventual delimitation of CMAR will only cover an area within the Exclusive Economic Zones (EEZs) of the respective member States,

[77] S. R. Enright, R. Meneses-Orellana and I. Keith, 'The Eastern Tropical Pacific Marine Corridor (CMAR): The Emergence of a Voluntary Regional Cooperation Mechanism for the Conservation and Sustainable Use of Marine Biodiversity within a Fragmented Regional Ocean Governance Landscape' (2021) 8 *Frontiers in Marine Science*. 674825, 5.

[78] CMAR Action Plan 2019–2024, 45.

[79] Ibid., 10.

[80] Only Colombia has established a National Commission thus far, in 2012. Ibid.

[81] Enright and others (n 77) 5.

[82] CMAR Action Plan 2019–2024, 11–12.

[83] CMAR Technical Document, 9.

[84] CMAR Action Plan 2019–2024, 11.

not the high seas pocket included in Figure 20.1.[85] This is due to the absence of a regional or internationally agreed legal framework with the power to establish protected areas in the high seas. However, the BBNJ negotiations, which aim to address such governance gaps, may result in a new international legal framework for the establishment of high seas MPAs.[86] The impact this may have on the ETP region remains unclear and will be discussed further in Section 20.4.6.

20.4.4 *Fragmented Regional Ocean Governance*

The wider ROG framework in the region is fragmented, with limited cross sectoral cooperation, differing membership compositions and varying mandates and geographic coverage. There is no RSP covering the Eastern Tropical Pacific region. While there is the Antigua Convention for the North East Pacific,[87] which was signed by Panama, Costa Rica, Colombia and several other Central American States in 2002,[88] it has not yet entered into force.[89] Out of the CMAR participating States, only Ecuador, Colombia and Panama are parties to the Lima Convention for the South East Pacific.[90] The Lima Convention applies to the territorial seas and the EEZs of its member States with a narrow mandate in the adjacent high seas, restricted to pollution.[91] However, its Executive Secretariat, a role held by the Permanent Commission for the South Pacific (CPPS),[92] has expressed a desire to expand its interests in the high seas.[93]

The CPPS could be considered weak from a rule of law perspective. It has an advisory mandate only and no management authority.[94] This means it does not have

[85] However, in this context, it should be noted that Ecuador has declared its right to extend its continental shelf to 350nm measured from the baselines of the Galapagos Archipelago and made a joint submission with Costa Rica to the Commission on the Limits of the Continental Shelf in December 2020. Available at www.un.org/Depts/los/clcs_new/submissions_files/submission_criecu_86_2020.htm

[86] The treaty negotiations are limited to four issues: marine genetic resources, including benefit-sharing, area-based management tools, including marine protected areas, environmental impact assessments and capacity building and marine technology transfer.

[87] Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific. Adopted on 18 February 2002. (Not yet in force). Available at www.ecolex.org (TRE-001350)

[88] Mexico, El Salvador, Honduras, Nicaragua and Guatemala.

[89] The Convention needs at least four country ratifications to come into force and only two countries (Guatemala and Panama) have ratified it thus far. Available at www.unenvironment.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/regional-seas-programmes/north-east-0

[90] Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific, 12 November 1981, in force 19 May 1986, 1648 UNTS 3 (Lima Convention).

[91] Ibid., Art. 1.

[92] CPPS is the Spanish acronym for Comisión Permanente del Pacifico Sur. Available at www.cpps-int.org/index.php/home/cpps-historia

[93] http://cpps.dyndns.info/consulta/index.php/asambleas/ordinarias/86-x-asamb-ord-2012/358-comp-galapagos

[94] UNEP-WCMC, 'Governance of areas beyond national jurisdiction for biodiversity conservation and sustainable use: Institutional arrangements and cross-sectoral cooperation in the

the power to establish legally binding conservation measures such as MPAs. However, it has a lot of support in the region as a cross-sectoral coordinating mechanism.[95] For example, it has signed bilateral cooperation agreements for the purposes of improving conservation with competent RFMOs in the region, the Inter-American Tropical Tuna Commission (IATTC),[96] of which all four CMAR States are members, and the South Pacific RFMO,[97] of which Ecuador is a member and Panama is a non-contracting Party. Given the importance of the fishing sector in the region, this type of cooperation is a positive step forward, especially given that the RFMOs have a management mandate and the power to establish legally binding conservation and management measures.

However, in general, cooperation between the key actors within this region is not well developed and enthusiasm for enhanced collaboration is varied. For example, the Memorandum of Understanding between CPPS and IATTC expired in 2020 and cooperation efforts have since stalled.[98] IATTC has previously expressed concerns that cross-sectoral area-based planning initiatives may compromise its ability to adopt a flexible approach to species protection.[99] Given that fishing is a fundamentally important socio-economic activity in the region, there has been reluctance by some authorities to commit to sharing data and information on those resources.[100] Therefore, it is not surprising that at the time of adoption of the SJD in 2004, the creation of a new regional mechanism was criticized as premature prior to adequately exploring the scope for working with existing bodies in the region, such as the CPPS, navies and the fishing sector.[101]

20.5 THE ROAD AHEAD

A key challenge from a rule of law perspective stems from the overlaps and gaps in the mandates of the applicable governance arrangements in the ETP. Previous studies examining ROG arrangements in the ETP region identified ten different governance arrangements but with no overarching integration mechanism in

Western Indian Ocean and the South East Pacific' (Cambridge: UN Environment Programme World Conservation Monitoring Centre 2017), 75.

[95] Ibid., 79.

[96] IATTC Memorándum de Entendimiento y Cooperación entre la Comisión Permanente del Pacifico Sur (CPPS) y la Comisión Interamericana del Atún Tropical (CIAT), 2015. Available at www.iattc.org/IATTCDocumentsENG.htm

[97] SPRFMO Memorandum of Understanding Between the Permanent Commission of the South Pacific (CPPS) and the South Pacific Regional Fisheries Management Organization (SPRFMO), signed 13 March 2019. Available at www.sprfmo.int/cooperation/mous

[98] Enright and others (n 77) 8.

[99] UNEP-WCMC, 'Governance of Areas beyond National Jurisdiction' (n 94) 83.

[100] Ibid., 81.

[101] R. Bensted-Smith and H. Kirkman, *Comparison of Approaches to Management of Large Marine Areas*. (Cambridge: Fauna & Flora International 2010), 98.

place.[102] It is arguable that CMAR emerged 'indigenously' as a response to the lack of an appropriate governance mechanism to facilitate transboundary marine governance in the region. However, it suffers from several of the same weaknesses that afflict ROG more generally, including a lack of interaction with important sectors such as fisheries, lack of resources and political instability among some participating States.[103] While bottom-up, State-led regional approaches such as CMAR do appear to engage more active participation of coastal States,[104] it is submitted that underpinning the marine corridor with a legally binding framework and integrating it within the broader ROG context would significantly strengthen CMAR.

CMAR has had limited interaction with other regional bodies operating in the region. However, cooperation efforts have increased in recent years. CMAR and CPPS have similar action plans and are currently working towards a cooperation agreement,[105] and there may be scope for a cooperation agreement with the IATTC in the future.[106] There have been calls for increased cross-sectoral cooperation in this region more generally, with a recent report recommending adoption of an agreement between the CPPS, IATTC and SPRFMO for the purposes of cooperating on data collection, data analysis, joint monitoring and enforcement actions in the Southeast Pacific.[107]

Integration is of course challenging when the applicable ROG framework remains fragmented. It has been claimed that fixing problems of fragmentation in ocean governance requires attention to all levels of policy processes and all types of interaction, but especially coordinating ones.[108] For this reason, CPPS has been suggested as the best-placed institution to play an integrating role in the region given its long history of facilitating cooperation.[109] However, the fact that it does not cover the entirety of the ETP could be a sticking point.[110] A clear benefit that CPPS offers

[102] Mahon and Fanning (n 42) 5.
[103] For a general critique on ROG, see Rochette and others (n 28).
[104] For some concrete examples in the context of CMAR, see Enright and others (n 77) 11.
[105] Ibid., 9.
[106] Ibid. To date, CMAR has participated as an observer in IATTC committee meetings and meetings of the Parties.
[107] Cremers and others (n 71) 40.
[108] L. Fanning and R. Mahon, 'Governance of the Global Ocean Commons: Hopelessly Fragmented or Fixable?' (2020) 48 *Coastal Management* 1–7, 530 citing M. Zurn and B. Faude, 'On Fragmentation, Differentiation, and Coordination' (2013) 13(3) *Global Environmental Politics* 119–130.
[109] UNEP-WCMC, 'Governance of Areas beyond National Jurisdiction for Biodiversity Conservation and Sustainable Use' (n 94) 79–80.
[110] R. Mahon and L. Fanning, 'Regional Ocean Governance: Integrating and Coordinating Mechanisms for Polycentric Systems' (2019) 107 *Marine Policy* 103589, Supplementary material, 4. Bensted-Smith and Kirkman (n 101) 131, observed that the CPPS mechanisms of decision-making and implementation can be quite cumbersome and it does not get involved in programmes involving only some of its members.

is the institutional support provided by the RSP (which has an explicit mandate for marine biodiversity conservation) such as common regional frameworks for monitoring, assessing and reporting on the state of the marine environment, which can provide a useful baseline for tracking progress against globally agreed goals and targets, such as MPA coverage.[111] This, in turn, should help to encourage the development of a coherent regional approach to design and implementation of MPA networks. The RSP also provides a useful platform for regions to engage with global ocean governance processes via its association with a UN body; in this way it plays an essential linking role between global and national levels of governance.[112]

While the regional scale has been acknowledged as the most appropriate for the management of biodiversity elements such as networks of MPAs and highly mobile species,[113] the new BBNJ instrument has the potential to help address some of the governance gaps in the ETP by introducing a legal mechanism at the global level for MPAs, which could potentially provide a legal basis for the designation of MPAs in ABNJ and a set of overarching governance principles to guide oversight and coordination of a global network of MPAs. While the final text of the treaty, and therefore the precise role of ROG organizations, remains under negotiation,[114] it is understood that existing regional and sectoral ocean governance bodies, as well as cross sectoral cooperation and coordination, will have a critical role to play in its effective implementation.[115] It has even been suggested that the new agreement should specifically recognize regional cooperative agreements, as part of an ecosystem approach.[116] This makes sense given that 'indigenous', State-led regional arrangements such as CMAR have the potential to mainstream ocean sustainability horizontally at the national level and link upwards into the broader ocean governance field by applying globally and regionally agreed standards.[117] Given the likelihood of increased visibility

[111] Johnson and others (n 41) 76–77.

[112] J. Rochette and others, 'The Regional Approach to the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction' (2014) 49 *Marine Policy* 109–117, 109.

[113] United Nations Environment Programme, Regional Seas Biodiversity under the post-2020 Global Biodiversity Framework, 6.

[114] The current draft text can be found at www.un.org/bbnj/ .For analysis see K. Cremers and others, 'A preliminary analysis of the draft high seas biodiversity treaty' (2020) IDDRI, *Study* N°01/20.

[115] K. M. Gjerde and S. S. Yadav, 'Polycentricity and Regional Ocean Governance: Implications for the Emerging UN Agreement on Marine Biodiversity Beyond National Jurisdiction' (2021) 8 *Frontiers in Marine Science*. 704748.

[116] K. M. Gjerde and G. Wright, 'Towards Ecosystem-Based Management of the Global Ocean: Strengthening Regional Cooperation through a New Agreement for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction' (2019) *STRONG High Seas Project*, 18.

[117] Mahon and Fanning (n 110), 1.

and roles for the regional level of ocean governance under BBNJ and the Post-2020 Global Biodiversity Framework, the time is ripe for a strengthening of existing ROG arrangements in the ETP, including CMAR itself, in order to enable the diverse range of applicable instruments to function as an effective, cohesive whole, in line with a 'multi-level', polycentric approach to governance.[118]

[118] Gjerde and Yadav (n 115) 2; Fanning and Mahon (n 108).