

10-1-1998

Critical Analysis of the SPAW Protocol: The Dilemma of Regional Cooperation

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Recommended Citation

Charlotte de Fontaubert and Tundy Agardy, *Critical Analysis of the SPAW Protocol: The Dilemma of Regional Cooperation*, 30 U. Miami Inter-Am. L. Rev. 85 (2015)

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CRITICAL ANALYSIS OF THE SPAW PROTOCOL: THE DILEMMA OF REGIONAL COOPERATION

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I. INTRODUCTION

The Second Protocol to the Cartagena Convention on Specially Protected Areas and Wildlife (SPAW Protocol) was adopted in June 1991, yet has still not entered into force.¹ To this day, fifteen States have signed the SPAW Protocol but only

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1. Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Jan. 18, 1990, *available in* 1 Y.B. INT'L ENV'T'L L. 441 (1990) [hereinafter SPAW Protocol]. The adoption of the SPAW Protocol was delayed until the 1991 Conference of Plenipotentiaries for the Adoption of the Annexes to the Protocol Concerning Specially Protected Areas and Wildlife in the Wider Caribbean, 1991. See David Freestone, *Protection of Marine Species and Ecosystems in The Wider Caribbean—The Protocol on Specially Protected Areas and Wildlife* 22 MARINE POLLUTION BULL. 579, 579-81 (1991).

four have become Parties.² The Protocol will enter into force thirty days after the ninth instrument of ratification has been deposited with the Colombian Government.³ To assess the overall value of the SPAW Protocol, this paper concentrates on the following aspects: the degree to which it allows the implementing Parties to adopt strong national marine protected area measures; the extent to which it promotes a regional approach to marine protected areas; and, finally, how the Protocol fits within the framework of international instruments that were adopted to the same end, especially those dealing with fisheries management.

Adopted in 1983, the SPAW Protocol is the second protocol to the Cartagena Convention, the major legal instrument of the Caribbean Environment Programme, set up under the United Nations Environment Programme Regional Seas Programme. Within the structure of this Regional Seas Programme, the States of the Wider Caribbean developed a Caribbean Action Plan, which was formally adopted by an intergovernmental meeting and later integrated in an umbrella regional convention. This convention demonstrates that member States recognized the importance of adopting regional approaches to protecting the marine environment and fostering the sustainable use of marine living resources.⁴ The Cartagena Convention and the Protocol concerning Cooperation in Combating Oil Spills in the Wider Caribbean Region⁵ were negotiated and adopted concurrently, and it was understood at the time that further negotiations would address other important aspects of the protection of the marine environment such as specially protected areas and wild-life and land-based sources of marine pollution and activities.⁶

2. U.N. Environmental Programme (UNEP), *Convention and Protocols Status Page* (visited Sept. 23, 1998) <<http://www.cep.unep.org/pubs/legislation/cartstatus.html#spaw>>.

3. SPAW Protocol, *supra* note 1, art. 27, 1 Y.B. INT'L ENV'T'L L. at 469. See also Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Mar. 24, 1983, 22 I.L.M. 221 [hereinafter Cartagena Convention].

4. On the importance of regional approaches to the conservation of marine resources, see WORLD CONSERVATION MONITORING CENTER, *THE BIODIVERSITY OF THE SEAS: A REGIONAL APPROACH* (1996); A.CHARLOTTE DE FONTAUBERT, ET AL., *BIODIVERSITY IN THE SEAS: IMPLEMENTING THE CONVENTION ON BIOLOGICAL DIVERSITY IN MARINE AND COASTAL HABITATS* (1996). See also A. Charlotte de Fontaubert, *Biodiversity in the Seas: Implementing the Convention on Biological Diversity in Marine and Coastal Habitats*, 10 GEO. INT'L ENV'T'L L. REV. 753 (1998).

5. Protocol Concerning Co-operation in Combating Oil Spills in the Wider Caribbean Region, Mar. 24, 1983, T.I.A.S. No. 11,085.

6. See, e.g., Revised Second Draft Protocol Concerning Pollution from Land-Based

II. REGIONAL APPROACH AND NATIONAL IMPLEMENTATION

The whole structure of the SPAW Protocol reflects its negotiation process and indicates the political intentions of the negotiating Parties. The negotiation history of the SPAW Protocol is somehow different from that of other legal instruments in that it was instigated by a meeting of experts, and it led to a more structured protocol than those that had been adopted for previous protocols on wildlife under the Regional Seas Programme.⁷ Specifically, the negotiating Parties agreed that a series of annexes would be adopted, listing the fauna and flora to be protected under the Protocol. This common approach for all the Parties was particularly important for protection of migratory species in that the same degree of protection must be afforded to the species throughout their range. While the Parties agreed on the need to protect the species, they initially disagreed over which species should be designated as protected. In particular, it was felt that thorough scientific evaluation was necessary before the degree of protection could be established. Under the Protocol, the species are listed in annexes according to the measures required to protect them, which measures are commensurate with the degree to which the species are threatened and endangered.⁸

It was at this stage of the negotiations that the conflict between the need to adopt a regional approach and issues of national sovereignty became most apparent, and therein lies one of the inherent paradoxes of the SPAW Protocol. Whilst the

Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, available as Annex IV to the Report of the Second Meeting of the Legal/Technical/Policy Experts for the Development of a Protocol Concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean, UNEP, U.N. Doc. UNEP(WATER)/CAR WG.21/6 (1997) [hereinafter Revised Second Draft of LBS Protocol].

7. For a discussion of details of the negotiating history, see David Freestone, *Specially Protected Areas and Wildlife in the Caribbean—The 1990 Kingston Protocol to the Cartagena Convention*, 5 INT'L J. ESTUARINE & COASTAL L. 362, 362-82 (1990); see also Protocol to the Barcelona Convention Concerning Mediterranean Specially Protected Areas, opened for signature Apr. 3, 1982, 1984 O.J. (L68) 38; Protocol to the Nairobi Convention Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region, opened for signature June 21, 1985, available in MARINE ENVIRONMENT LAW IN THE UNITED NATIONS ENVIRONMENT PROGRAMME (Peter H. Sand ed. 1988).

8. For more details on the listing process, see Alessandra Vanzella-Khouri, *Implementation of the Protocol Concerning Specially Protected Areas and Wildlife (SPAW) in the Wider Caribbean Region*, 30 U. MIAMI INTER-AM. L. REV. 53 (1998).

negotiators agreed that a common regional approach was called for, they had always understood that implementation of the Protocol would necessarily be carried out at the national level. Some participating countries clung to their exclusive jurisdiction in the designation of the areas and, by extension, the species to be protected. Some States expressed concerns with the protection afforded all mangroves under Annex III and another State argued that the sea turtles found in its water were territorial, and not migratory, and that their status actually allowed for sustainable harvesting.⁹ Under Article 11.4(d), a Party may enter a reservation to the listing of a particular species by notifying the Depository within ninety days of the vote of the Parties.¹⁰ A Party can also propose the amendment of the listing for populations in its own territory, inasmuch as it would be supported by adequate biological information pursuant to the requirements of domestic law.¹¹

Through the designation of threatened and protected species under common annexes, the Parties to the Protocol agree on areas where they will coordinate their protection efforts but essentially leave the implementation of this effort to be carried out nationally by each member State. Article 3 on General Obligations refers merely to the need to "take necessary measures to protect, preserve and manage in a sustainable way...areas that require protection to safeguard their special value and threatened or endangered species of flora and fauna."¹² The Protocol does refer specifically to the establishment of protected areas and includes a series of protection measures that can be adopted by the Parties to meet the objectives of the Protocol, but the implementation is to be carried out by the States as they see fit.¹³ Beyond the general obligations, the Protocol provides a catalog of tools and measures that can be adopted, yet achievement of its goals is left to the political will of the Parties.¹⁴ Article 14 provides for exemptions for traditional

9. All sea turtles were eventually listed under Annex II, which includes endangered and threatened species and prohibits the taking, possession, killing or commercial trade of the species and calls to prevent their disturbance particularly during periods of biological stress. SPAW Protocol, *supra* note 1, Annex II.

10. SPAW Protocol, *supra* note 1, art. 11(4)(d), 1 Y.B. INT'L ENV'T'L L. at 460.

11. *Id.* art. 7(3)(a), 1 Y.B. INT'L ENV'T'L L. at 456.

12. *Id.* art. 3(1), 1 Y.B. INT'L ENV'T'L L. at 453.

13. *Id.* art. 5, 1 Y.B. INT'L ENV'T'L L. at 454-55.

14. *Id.*

activities, whereby the State Parties are merely required to ensure that such exemptions will not endanger the maintenance of areas protected under the Protocol or cause the extinction or substantial risk to species within the protected areas.¹⁵ Rather than imposing strong obligations onto the Parties, the Protocol aims to facilitate cooperation, technical and scientific research, and mutual assistance.

The latitude left to the implementing States is thus considerable and points to the limits of what an international treaty, no matter how well crafted, can achieve politically. This kind of conflict between national and regional objectives is not unique to the SPAW Protocol, but rather indicative of the "lowest common denominator" approach whereby the provisions of a treaty or other legal instrument become watered down in order to be adopted by consensus. To some extent, the Protocol adopts a two-tier approach, whereby all the Parties agree to general and common objectives, but where the implementation is left to each State. This kind of approach makes particular sense in the case of the Wider Caribbean where the States involved are at different levels of development, where they have different resources and priorities, and where dependence on the marine environment is not uniform. There is a definite trade-off between wide adherence to some principles throughout the region and the lack of strong, binding measures to which all States would subscribe. This flexible approach is also reflected in the *ability* the States have to enclose terrestrial areas in their designated protected areas.¹⁶ This provision clearly reflects the progress achieved recently in the management of marine protected areas (MPAs), according to which important watersheds can be included and land-based activities are generally integrated in the designation process, but it remains merely an option for the designating States. In that respect, the constitutive parts of a good MPA regime are suggested to the Parties, but their adoption is not required of them.

There is, however, a major aspect of the SPAW Protocol that indicates that the regional MPAs regime that it sets up could amount to more than the sum of its national parts. MPAs serve a wide variety of functions and the Protocol recognizes the

15. *Id.* art. 14(1), 1 Y.B. INT'L ENV'T'L L. at 461-62.

16. *Id.* art. 1(c)(ii), 1 Y.B. INT'L ENV'T'L L. at 451.

various objectives that can be pursued. The goal pursued through the designation of an MPA will often dictate its shape, size and the means of implementation. If, for instance, a Party intends to protect an endemic and particularly threatened species and the goal is the protection of a single vulnerable habitat type, the design and management of the protected area can be relatively simple. But if the goal of the MPA is to protect a wide range of habitats or resources, the protected area established will be more complex. In the case of protected areas where the goal is the protection of the ecosystem and its processes, the underlying ecology in the region dictates the outer boundaries of the area to be protected.¹⁷ In the case of the Wider Caribbean, and given the objectives of the Protocol,¹⁸ MPA planners need to work towards conserving ecosystem integrity and thus towards designing networks of MPAs. Three approaches can be adopted in designating networks of protected areas: preserving ocean or coastal "wilderness" areas, resolving conflicts among users, or restoring degraded or over-exploited areas. In the case of the Wider Caribbean, choosing one approach over another depends on the state of the resources one aims to protect (and thus whether the approach is proactive, interactive or reactive). There is mounting evidence from physical oceanography in the Caribbean that in order to protect coral reefs in some areas, seed sources of recruits need to be identified and protected in other areas, sometimes a hundred miles removed.¹⁹ This in turn points to the importance of adopting a multilateral approach, which is likely to work more efficiently than the sum total of unilateral efforts that ignore the system dynamics. The SPAW Protocol provides the framework within which a regional network would allow for protection at the ecosystem level.²⁰

In that respect, the Protocol goes further than many global treaties, such as the U.N. Convention on the Law of the Sea (UNCLOS)²¹ and the Convention on Biological Diversity (CBD),²²

17. *Id.* art. 4(1), 1 Y.B. INT'L ENV'T'L L. at 453.

18. The Preamble refers to the fact that "the Wider Caribbean Region constitutes an interconnected group of ecosystems in which an environmental threat in one part represents a potential threat in other parts" and stresses "the importance of establishing regional co-operation to protect and, as appropriate, to restore and improve the state of ecosystems." *Id.* pmb., 1 Y.B. INT'L L. ENV'T'L L. at 450.

19. Callum M. Roberts, *Connectivity and Management of Caribbean Coral Reefs*, 278 SCIENCE 1454 (1997).

20. Freestone, *supra* note 1, at 579-81.

21. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10,

which merely encourage the State Parties to adopt protective measures as a *national* priority. Regional cooperation under SPAW takes place first and foremost in the designation of the species in the various annexes, and then through the establishment of buffer zones and reciprocity provisions when the buffer zones and protected areas are contiguous to international boundaries.²³ By promoting regional cooperation, the Protocol allows for the consideration of large marine ecosystems and the harnessing of the ecosystem science that is now available. With better knowledge of the ecosystems and of the areas where the most vulnerable components of these ecosystems are found, MPAs can be set up optimally, and the individual MPAs can be smaller and thus easier to manage. When it comes to site selection, "bigger" is not necessarily "better." The MPA designators are better off carefully targeting the area they want to protect so that they can focus on a clear objective, which will allow them to deploy appropriate enforcement mechanisms.²⁴ The designation of MPAs is one area where most of the costs can be divided among the State Parties, by allowing each one to concentrate on a particular aspect of the ecosystem that is being protected.

If carefully designed and grounded in good understanding of ecosystem dynamics, the designation of closed areas (or harvest refugia) within a network can play a key role in fisheries management. The designation of MPAs to that end is a relatively recent practice; MPAs had traditionally been designated to protect seascapes for recreation, and fisheries management was rarely the objective of MPAs. It is becoming increasingly clear, however, that harvest refugia can and are being used to help conserve and rebuild fish stocks.²⁵ In the case

1982, U.N. Doc. A/CONF.62/122, Oct. 7, 1982, U.N. Sales No. E.83.V.5, *reprinted* in 21 I.L.M. 1261 [hereinafter UNCLOS].

22. United Nations Conference on Environment and Development: United Nations Convention on Biological Diversity, June 5, 1992, S. Treaty Doc. 20, 103d Cong. (1993) *reprinted* in 31 I.L.M. 818 (entered into force Dec. 29, 1993) [hereinafter CBD].

23. SPAW Protocol, *supra* note 1, arts. 8 & 9, 1 Y.B. INT'L ENV'T'L L. at 457.

24. On marine protected area site selection, see TUNDI SPRING AGARDY, *MARINE PROTECTED AREAS AND OCEAN CONSERVATION*, ENVIRONMENTAL INTELLIGENCE UNIT, 183-90 (1997).

25. See Tundi Spring Agardy, *Closed Areas: A Tool to Complement Other Forms of Fisheries Management*, in *LIMITED ACCESS TO MARINE FISHERIES: KEEPING THE FOCUS ON CONSERVATION*, 197-203 (Karyn L. Gimbel ed., 1995); Callum M. Roberts & Julie P. Hawkins, *Marine Fishery Reserves for the Caribbean*, 5 *CARIBBEAN PARKS & PROTECTED AREA BULL.* 8 (1995).

of highly migratory species or straddling stocks, the States involved have an obligation to cooperate closely, particularly under the recently adopted U.N. Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks,²⁶ and the SPAW Protocol can be seen as a partial tool to implement regionally this global treaty. Because the marine resources in the Wider Caribbean are essentially shared resources, the adoption of a regional approach under the Protocol can multiply the effect of their State Parties' domestic efforts.

III. THE PROTOCOL AND OTHER INTERNATIONAL LEGAL INSTRUMENTS

One cannot highlight the shortcomings of the SPAW Protocol or bemoan the steps it failed to take without assessing the extent to which the Protocol is integrated with other legal international instruments, regional as well as global, which together set up a new regime for the protection of the marine environment. The Protocol, the Convention on International Trade in Endangered Species (CITES),²⁷ and the CBD clearly work together, and the obligations under all three are either congruent or complementary.²⁸ CITES seeks to ensure that international trade does not unduly impact plant and animal species that are threatened or endangered.²⁹ CITES functions through a system of annexes, where species are listed according to their level of threat or endangerment and where trade is restricted, or even banned for the most threatened species. This is clearly a similar approach to the annexes under SPAW, where the level of protection also depends on the degree of threat to the species.

26. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 Dec. 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 6th Sess., U.N. Doc. A/Conf. 164/37 (1995), reprinted in 34 I.L.M. 152 [hereinafter U.N. Straddling Stocks Agreement]. See A. Charlotte de Fontaubert, *The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Another Step in the Implementation of the Law of the Sea Convention*, 12 OCEAN Y.B. 79, 82-92 (1996) [hereinafter *Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks*].

27. Convention on International Trade in Endangered Species of Wild Fauna and Flora, opened for signature Mar. 3, 1973, 993 U.N.T.S. 243 (entered into force July 1, 1975) [hereinafter CITES].

28. See *Relationship between the Convention on Biological Diversity, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, and the Protocol Concerning Specially Protected Areas and Wildlife (SPAW) in the Wider Caribbean Region*, UNEP, U.N. Doc. UNEP(OCA)/CAR WG.19/4 (1995).

29. CITES *supra* note 27, art. II, 993 U.N.T.S. at 245.

The objectives of the CBD are the conservation of biodiversity, the sustainable use of biodiversity's components, and the equitable sharing of benefits derived from genetic resources.³⁰ State Parties are required, *inter alia*, to take measures to ensure the conservation and sustainable use of biodiversity, to monitor biodiversity in their territories, to identify and regulate destructive activities, and to integrate consideration of biodiversity into national decision-making.³¹ While the CBD and CITES are global in scale, all three instruments clearly aim to promote the conservation of biological diversity, and, for both CITES and SPAW, control of international trade is identified as a key component of such conservation.³² Some have actually argued that the SPAW Protocol can be considered as an implementing tool for the CBD,³³ but this may not be true as all provisions of the CBD are not covered under SPAW (particularly the provisions dealing with equitable sharing of genetic resources). The fact of the matter remains that each instrument actually pursues a different goal and that the implementation of one should not preclude that of the others.

The three instruments are so closely related that this interrelationship may actually have undermined the entry into force of the SPAW Protocol, which is currently being implemented without having entered into force.³⁴ This would tend to indicate that from a political standpoint the States in the region are developing a common agenda, under which they are binding themselves to common objectives. This political agenda has clearly been evolving from the general principles embodied in Agenda 21³⁵ to various legally binding instruments that more and more recognize the importance of regional approaches. For instance, there is a close linkage between the recommendations

30. CBD *supra* note 22, art. I, 31 I.L.M. at 823.

31. *Id.* arts. VII and X(a,b), 31 I.L.M. at 825-26.

32. SPAW Protocol *supra* note 1, art. V, 1 Y.B. INT'L ENV'TL L. at 454; CITES *supra* note 27, intro. & art. II, 993 U.N.T.S. at 245.

33. See, e.g., *Report of the Meeting of the Seventh Intergovernmental Meeting on the Action Plan for the Caribbean Environment Programme and Fourth Meeting of the Contracting Parties to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region*, UNEP, at 5, U.N. Doc. UNEP(OCA)/CAR IG.12/7 (1994)

34. See Vanzella-Khoury, *supra* note 8.

35. Agenda 21 is the blueprint for sustainable development adopted at the outcome of the U.N. Conference on Environment and Development (UNCED or the "Earth Summit," held in June 1992 in Rio de Janeiro). It was at this UNCED that the CBD was adopted. See CBD, *supra* note 22, 31 I.L.M. 818.

of the SPAW Protocol and those enclosed in the Jakarta Mandate, which was adopted at the Third Conference of the Parties of the CBD.³⁶ Under the Jakarta Mandate, the Parties to the CBD recommended a series of actions that should be taken to implement the CBD in marine and coastal habitats. The Jakarta Mandate specified five main areas where the Parties are invited to concentrate their efforts: integrated coastal area management, MPAs, sustainable use of coastal and marine living resources, mariculture and the prevention of introduction of alien species.³⁷ Though the Jakarta Mandate is a mere plan of action, and not legally binding, actions in all five of these areas are completely compatible with the provisions of the SPAW Protocol.

There are many other international instruments that share some of the same objectives as the SPAW Protocol. The Bonn Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention) was negotiated as a supplement to CITES and aims to provide greater protection for vulnerable migratory species.³⁸ Parties are required to protect endangered species, which include those whose entire populations "cyclically and predictably cross one or more national jurisdictional boundaries."³⁹ Parties are also required to conclude agreements for the conservation of species whose status is "unfavourable" to protect them from becoming endangered, a measure very close to the classification under Annex III of SPAW.⁴⁰ The Bonn Convention, just like the U.N. Straddling Stocks Agreement, essentially aims to prevent conflicts over shared resources by bringing together all the Parties that can stake a claim over such resources. Both instruments highlight the need to manage the stocks throughout their range and, therefore, privilege biological reality over political boundaries. Here again, the SPAW Protocol is in harmony with this principle and pursues the same objective.

36. "Jakarta Mandate" refers collectively to two UNEP documents concerning marine and coastal biological diversity: *Report on the Second Meeting of the Conference of the Parties to the Convention on Biological Diversity, Dec. 11/10*, U.N. Doc. UNEP/CBD/COP/2/19, Annex II at 56-61 (1995), and *Rec. 1/8 of the Subsidiary Body on Scientific, Technical, and Technological Advice*, U.N. Doc. UNEP/CBD/COP/2/5, at 34-43 (1995). For more information on the Jakarta Mandate, see DE FONTAUBERT ET AL., *supra* note 4.

37. Jakarta Mandate *supra* note 36.

38. Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 19 I.L.M. 11 (1980).

39. *Id.* art. I(1)(a), 19 I.L.M. at 16.

40. *Id.* art. II, 19 I.L.M. at 18.

Another important related treaty is the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention).⁴¹ The Ramsar Convention aims to protect wetlands of international importance from progressive encroachment and loss.⁴² While the Convention focuses on wetlands of importance for migratory waterfowl, it also recognizes the overall values of wetlands, including their ecological, economic, cultural, scientific and recreational value.⁴³ Parties are required to designate particular wetlands of importance and to establish wetlands nature reserves and cooperate in the exchange of information for wetlands management.⁴⁴ Ramsar is the only convention devoted to a specific habitat type, but wetlands containing species protected under the SPAW annexes could be protected under both instruments. In particular, at their last Conference of the Parties, the Parties to Ramsar emphasized the need to protect a series of critical areas that have not yet been designated, and most of them are marine areas.⁴⁵ Ramsar and SPAW are therefore complementary and can be implemented congruently.

The one area where SPAW may not have gone as far as it could have is that of international fisheries management, and in that respect the Protocol failed to link global conservation issues and fisheries management. The need to link these issues and to adopt an ecosystems approach became apparent later on and is most clearly embodied in the U.N. Straddling Stocks Agreement, which was adopted in 1995.⁴⁶ The U.N. Straddling Stocks Agreement also went further than the SPAW Protocol in that it exacted more commitment on the part of its member States. The U.N. Straddling Stocks Agreement, for instance, goes further by effecting a transfer of jurisdiction from the flag State to other States when a vessel is on the high seas (i.e., beyond areas of national jurisdiction).⁴⁷ It should be noted, however, that the U.N. Straddling Stocks Agreement marks the furthest that flag

41. Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, *opened for signature* Feb. 2, 1971, 996 U.N.T.S. 245.

42. *Id.* pmb1., 996 U.N.T.S. at 246.

43. *Id.*

44. *Id.* art. 2, 996 U.N.T.S. at 247.

45. *Report of the Sixth Meeting of the Conference of the Parties to the Convention on Wetlands of International Importance, Especially as Waterfowl Habitat*, Brisbane, Australia, Mar. 19-27, 1996 (on file with author).

46. U.N. Straddling Stocks Agreement, *supra* note 26.

47. *Id.* art. 21, 34 I.L.M. at 1563.

States have ever gone in relinquishing part of their exclusive jurisdiction and that coastal States are merely required to cooperate with other States who share the same stocks.⁴⁸ Because of the commercial value of the stocks harvested, fisheries agreements are least likely to generate consensus, but trust and confidence can be built up in small steps at the regional level through instruments such as the SPAW Protocol. While it does not go as far as it could, the Protocol actually provides a forum through which the State Parties can learn to trust one another. If cooperation is possible on networks of MPAs, for instance, particularly if some are used as refugia with an end to stock replenishment, the Parties will be more likely to agree to common fisheries management measures. To some degree, the SPAW listing process can also be linked to the International Union for the Conservation of Nature Red List process, under which some commercially valuable fisheries species are now being listed and criteria to identify threatened species have been developed.⁴⁹

Thus, SPAW is at least compatible and congruent with these international legal instruments, and, in some cases, SPAW goes further than some agreements. Even when SPAW does not require much commitment by the State Parties, the Protocol at least fosters a climate of trust and cooperation that can only enhance regional approaches to the protection of the marine environment. Further, SPAW needs to be considered within the framework of the evolution of the Cartagena Convention. Much like UNCLOS, the Cartagena Convention is a framework treaty and both are being expanded upon through the negotiation of ad hoc protocols and agreements. The 1994 Deep Seabed Mining Agreement⁵⁰ and the U.N. Straddling Stocks Agreement are but the first two steps in a trend that marks the evolution of UNCLOS as State Parties become more willing to tackle more difficult issues. The Parties to both UNCLOS and the Cartagena

48. *Id.* art. 20, 34 I.L.M. at 1562. Such abnegation of jurisdiction occurs in only very specific and limited circumstances. *Id.* art. 21, 34 I.L.M. at 1563; see also *Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks*, *supra* note 26.

49. See generally INTERNATIONAL UNION FOR THE CONSERVATION OF NATURE, WORLD CONSERVATION MONITORING CENTER AND THE WORLD CONSERVATION UNION, RED LIST OF THREATENED ANIMALS (1994).

50. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, U.N. Doc. A/RES/48/263 (1994), *reprinted in* 33 I.L.M. 1311.

Convention are also tackling the issue of impacts from land-based activities concurrently. The 1995 Washington Conference on the Prevention of Marine Pollution from Land-Based Activities resulted in the adoption of a strong Global Programme of Action (though not a legally binding instrument), and it started to address the issue of impacts from land-based activities that had been left essentially unsolved by the Convention.⁵¹ Concurrently, a third protocol to the Cartagena Convention on land-based sources and activities is being negotiated and could be adopted shortly.⁵² As more issues are added on to UNCLOS and to the Cartagena Convention, the value of these instruments increases, and, in that regard, SPAW needs to be seen as a major building block in the evolution of a significant Caribbean regional program.

The fact that SPAW has not entered into force, however, remains a vexing reminder of the steps still ahead. There are no clearly apparent reasons why the Parties who had promptly and cooperatively negotiated the Protocol have so far failed to ratify it to a significant extent. Many governments have reiterated their willingness to become Parties and indicated that they are well on their way towards ratification. It has been noted that the Protocol was open for ratification just as a flurry of international legal instruments were adopted and shortly before the convening of the U.N. Conference on Environment and Development (the "Earth Summit," held in Rio de Janeiro in June, 1992). The member States may not endow the regional SPAW with the same importance as the other, more financially supported global conventions to protect the marine environment.

Whilst the value of the SPAW Protocol cannot be assessed solely on the basis of the numbers of ratification, its failure to enter into force may be indicative of some flaws in meeting the expectations of the Parties that had negotiated it. The United States in particular has expressed reservations on the designation of some species under the annexes and indicated that it would not be bound by Article 11.1(b)(i) "to the extent that the United States Government permits the taking of marine

51. Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities, UNEP, U.N. Doc. UNEP (OCA)/LBA/IG.2/7 (1995).

52. See Revised Second Draft of LBS Protocol, *supra* note 6; see also Mary Schumacher, et al., *Land-base Marine Pollution in the Caribbean, Incentives and Prospects for an Effective Regional Protocol*, 20 MARINE POL'Y 99 (1996).

mammals for the purpose of display, in connection with the disposal of offshore drilling rigs, and as incidental catch referred to fishing operations."⁵³ These reservations have given rise to some concern on the part of the environmental community and may need to be revisited later. In the meantime, however, the obstacles to prompt ratification by the U.S. Senate appear to be more political than substantial. It should also be noted that two States (the United States and France) are expected to provide most of the financial assistance to support implementation by other States in the region, and their ratification would thus be an important development.

IV. CONCLUSION

The overall assessment of the Protocol remains a positive one, and it is ironic that its objectives may be met without its coming into force or without ratification by a significant number of Parties. Beyond these legal intricacies, however, the States in the region have started to demonstrate their willingness to work together, which bodes well for the future of cooperation in the region. Despite its shortcomings, the SPAW Protocol remains an important framework within which a network of MPAs can be established throughout the Wider Caribbean. In view of the key role such a network is likely to play, the member States of the Caribbean Environment Program should integrate the SPAW Protocol as a major tool in the design and implementation of their coastal zone management policies.

53. *Message from the President of the United States Transmitting the Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region*, S. Treaty Doc. 103-5, 103d Cong. (1993).