Singapore Management University
Institutional Knowledge at Singapore Management University

Research Collection Yong Pung How School Of Law | Yong Pung How School of Law

11-2018

The European Union and the establishment of marine protected areas in Antarctica

Nengye LIU

Follow this and additional works at: https://ink.library.smu.edu.sg/sol_research

Part of the Biodiversity Commons, and the Environmental Law Commons

Citation

LIU, Nengye. The European Union and the establishment of marine protected areas in Antarctica. (2018). *International Environmental Agreements: Politics, Law and Economics*. 18, (6), 861-874.
Available at: https://ink.library.smu.edu.sg/sol_research/4141

This Journal Article is brought to you for free and open access by the Yong Pung How School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection Yong Pung How School Of Law by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email cherylds@smu.edu.sg.

Int Environ Agreements (2018) 18:861–874
https://doi.org/10.1007/s10784-018-9419-8

ORIGINAL PAPER

The European Union and the establishment of marine protected areas in Antarctica

Nengye Liu[1]

Accepted: 26 October 2018 / Published online: 2 November 2018
© Springer Nature B.V. 2018

Abstract
This paper examines how the EU can best use its powers to establish marine protected areas (MPAs) in Antarctica. It first discusses the EU's role in Antarctic governance and legal basis for the EU's actions, with particular focus on the pending Joined Cases C-625/15 and C-659/16 at the Court of Justice of the European Union. Secondly, the paper analyses the negotiation process of the EU's MPA proposals in the Southern Ocean within the Commission for the Conservation of Antarctic Marine Living Resources. Thirdly, it provides suggestions regarding the EU's potential actions that might help achieve proposed Antarctic MPAs.

Keywords European Union (EU) · Marine protected areas · Antarctica · China · Southern Ocean

1 Introduction

Marine living resources in the world's oceans are at serious risk. According to the United Nations Food and Agriculture Organization (FAO), "the fraction of fish stocks within biologically sustainable levels has exhibited a downward trend, declining from 90% in 1974 to 66.9% in 2015" (FAO 2018). A continent that has been devoted to peace and science (Antarctic Treaty 1959), Antarctica, remains a relatively pristine wilderness. However, its abundant marine living resources are being degraded through the introduction of alien species and pollution from shipping, fishing, illegal, unreported and unregulated fishing (IUU fishing) and a mix of other increased human activities (Aronson et al. 2011). Antarctica is also dramatically impacted by climate change (see, for instance, Nalsh 2017). For example, a long-term decline in the abundance of Antarctic krill, the centre of the Antarctic food web,

✉ Nengye Liu
nengye.liu@adelaide.edu.au

[1] Adelaide Law School, University of Adelaide, Ligertwood Building, North Terrace, Adelaide, SA 5005, Australia

in the Southwest Atlantic sector of the Southern Ocean may be associated with reduced sea ice cover (British Antarctic Survey 2018).

In recent times, marine protected areas (MPAs)[1] become a popular tool to safeguard marine biodiversity around the world. The Convention on Biological Diversity (CBD)'s Aichi Target states that "by 2020, at least 10% of coastal and marine areas in the world, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures" (Target 11, Aichi Biodiversity Target 2010). Discussions on the establishment of MPAs in the Southern Ocean have been going on for years within the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the management body that gives effect to the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CAMLR Convention). Since 1982, the CCAMLR—currently 25 Members including the EU—has been governing marine living resources in the waters around Antarctica (Brooks 2019, Forthcoming). The CCAMLR committed to designate a network of Southern Ocean MPAs in accordance with global targets set by a number of international institutions since 2002 (CCAMLR 2002). Conservation Measure 91-04 was set up by the CCAMLR in 2011 as general framework for the establishment of MPAs. Based on a proposal from the UK (British Antarctic Survey 2009), the CCAMLR adopted the world's first high seas MPA in 2009, protecting 94,000 km^2 south of the South Orkney Islands (CCAMLR 2009). In 2012, at the CCAMLR annual meeting, formal proposals for MPAs in the Ross Sea (proposed by New Zealand and the USA) and the East Antarctic (proposed by Australia, France and the European Union (EU)) (CCAMLR-XXXI 2011) came under negotiation. While both MPA proposals face strong oppositions from China and Russia, in 2016 the EU presented a request prepared by Germany for a new MPA proposal in the Weddell Sea to the CCAMLR (SC-CAMLR 2016). While the Ross Sea MPA was established in 2017 (CCAMLR 2016), both the East Antarctic MPAs and Weddell Sea MPAs are still under negotiations.

Although most of its territory is situated in the northern hemisphere, the EU is well connected to Antarctica. For example, the EU Member States—France and UK, retain sovereign claim in the Antarctic region.[2] Norway, a member of the European Economic Area (EEA 1994),[3] who in many cases closely involved in the EU decision-making process, also

[1] According to European Environment Agency: MPAs are geographically distinct zones for which conservation objectives can be set. They are often established in an attempt to strike a balance between ecological constraints and economic activity so that the seas may continue to allow for goods and services to be delivered; marine reserves are MPAs where human impact is kept to a minimum, e.g. extraction is not permitted; MPA networks are a collection of individual MPAs or reserves operating synergistically, at various spatial scales, and covering a range of protection levels, designed to meet objectives that individual MPAs cannot achieve. See Marine Protected Areas in Europe's Seas, An Overview and Perspectives for the Future, European Environment Agency Report, No 3/2015, 8.

[2] Article IV, Antarctic Treaty provides that: "No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force." This is so-called agree to disagree, which freezes any sovereign claim in Antarctica.

[3] Agreement on the European Economic Area, which entered into force on 1 January 1994, brings together the EU Member States and the three EEA European Free Trade Association (EFTA) States: Iceland, Liechtenstein and Norway, in a single market, referred to as the "Internal Market". www.efta.int accessed 7 October 2018.

European Union—Australia Partnership Framework, A strategic partnership built on shared values and

has sovereign claims in Antarctica. Furthermore, among seven States (Australia, Argentina Chile, France, New Zealand, Norway and UK) that claim land territory in Antarctica, Australia and New Zealand are strategic partners of the EU (Framework Agreement between the EU and Australia 2017). This paper therefore aims to examine how the EU might best use its powers to establish MPAs for the conservation of marine living resources in Antarctica. It first discusses the EU's role in Antarctic governance and legal basis for the EU's actions, with particular focus on the pending Joined Cases C-625/15 and C-659/16 at the Court of Justice of the European Union (CJEU). Secondly, the paper briefly analyses the negotiation process of the EU's Antarctic MPA proposals within the CCAMLR. Thirdly, it provides suggestions regarding the EU's potential actions that might help achieve its objective.

2 The EU and Antarctic MPAs

2.1 The EU and Antarctic governance

The international framework for the conservation of Antarctic marine living resources is spread across a range of legal instruments. The United Nations Convention on the Law of the Sea (UNCLOS) and the Convention on Biological Diversity (CBD) are the two major global conventions relevant to the conservation of Antarctic marine living resources. They are supported by other treaties ranging from the International Convention for the Regulation of Whaling to relevant fisheries agreements, including the UN Fish Stocks Agreement (UNFSA) and FAO Code of Conduct for Responsible Fisheries. These global norms and regimes intersect and interrelate with the "existing structure of interlinking treaty instruments and measures for Antarctic governance" (Bowman et al. 2010)—the Antarctic Treaty System (ATS). The ATS comprises the 1959 Antarctic Treaty, the 1972 Convention on the Conservation of Antarctic Seals, the 1980 CAMLR Convention, the 1991 Environmental Protocol to the Antarctic Treaty, and the measures in effect under these instruments. The ATS has proved to be one of the successes of contemporary international law and diplomacy to maintain peace and security in the region (Triggs 2011). Nevertheless, the Antarctic is facing rapid environmental and geopolitical changes, which asks for the reform of Antarctic governance in future (Nature 2018).

The EU is a contracting party of the CBD, the UNCLOS and a member of the FAO. It is, however, provided by Article XIII, Antarctic Treaty that "The present Treaty…. shall be open for accession by any State which is a Member of the United Nations, or by any other State which may be invited to the Treaty with the consent of all the Contracting Parties…". The EU, as a supranational body, is therefore not able to become a contracting party to the Antarctic Treaty. Nevertheless, twelve out of 28 EU Member States currently enjoy consultative status[4] under the Antarctic Treaty, while eight others are non-consultative treaty parties. This potentially gives the EU, if speaking in one voice, a significant role in Antarctic

Footnote 3 (continued)

common ambition https://eeas.europa.eu/sites/eeas/files/partnership_framework2009eu_en.pdf accessed 7 October 2018.

[4] Article IX.2 of the Antarctic Treaty that only consultative parties—"parties that have demonstrated their interest in Antarctica by "conducting substantial research activity there"—are allowed to take part in decision-making processes.

governance. Moreover, the EU itself is a contracting party to the CAMLR Convention, so do EU Member States Belgium, Bulgaria, France, Finland, Germany, Greece, Italy, Netherlands, Poland, Sweden and Spain. The EU, represented by the European Commission, became a member of the CCAMLR through the so-called Regional Economic Integration Organization (REIO) clause.[5] First used for the EU to join the UNCLOS (Article 305 (1) (f) & Annex IV), the REIO clause now becomes a common practice for the EU to directly get involved in international organizations (Wessel and Blockmans 2016).

It must be pointed out that within the context of the Polar Regions (Arctic and Antarctica), the European Commission (the Commission) has been particularly active in the development of the EU's Arctic policy over the past decade. The Commission has published three EU Arctic policy documents between 2008 and 2016 (COM (2008) 763, JOIN (2012) 19 and JOIN (2016) 21). On the contrary, the EU has not adopted any official Antarctic policy document yet, which shows limited interests in engaging with Antarctic governance regime (Vanstappen and Wouters 2015).

2.2 Legal basis

The EU has been pushing greater international efforts to fight climate change and biodiversity loss. As a global actor, the EU has committed that "the Union shall act to help develop international measures to preserve and improve quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development" (Article 21 (2) (f) Treaty on the European Union (TEU)). With respect to issues regarding the conservation of marine living resources, the EU has exclusive competence[6] to act, both internally (Article 3 (1) (d), Treaty on the Functioning of the European Union (TFEU)) and externally (*Commission v. Council* (AETR case) [1971]). The EU declared as a condition to join the UNCLOS that:

> "The EU Member States have transferred competence to the EU with regard to the conservation and management of sea fishing resources. Hence in this field it is for the EU to adopt relevant rules and regulations and, within its competence to enter into *external undertakings* with third States or competent international organizations. This competence applies to waters under both national jurisdiction and high seas." (Declaration Concerning the Competence of the European Community with Regard to Matters Governed by the of United Nations 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, 1996)

[5] Article XXIX (2), CAMLR Convention: "This Convention shall be open for accession by regional economic integration organizations constituted by sovereign States which include among their members one or more States Members of the Commission and to which the States members of the organization have transferred, in whole or in part, competences with regard to the matters covered by this Convention".

[6] Competence is the term used in the Lisbon Treaty to describe the power the EU has to draw up policies and laws. The EU may introduce policies and laws only in relation to those areas that are set out in the treaties. The competences of the EU are divided into three categories: (1) the EU has exclusive competence (Article 3 Treaty on the Functioning of the European Union (TFEU)) (only the EU can act); (2) competences are shared between the EU and the member states (Article 4 TFEU) (the member states can act only if the EU has chosen not to); (3) the EU has competence to support, coordinate or supplement the actions of the member states (Article 6 TFEU)—in these areas, the EU may not adopt legally binding acts that require the member states to harmonise their laws and regulations.

The EU submitted a joint proposal to the CCAMLR with France and Australia for the establishment of East Antarctic MPAs in 2012. When it comes to the Weddell Sea proposal in 2016, the European Commission believes that MPAs are measures for the conservation of marine biological resources under the Common Fisheries Policy, which is exclusive competence for the EU.

On the other hand, the Council of the European Union and EU Member States insist that marine protection measures are under environmental policy, and are a shared competence between the EU and Member States (Article 4 (2) (e), TFEU). So that MPA proposals should be submitted on behalf of both the EU and its Member States (Council 2015). On 11 September 2015, the Chair of the Permanent Representative Committee (Coreper) of the Council of the European Union approved a reflection document on a future proposal to the CCAMLR for the creation of a MPA in the Weddell Sea on behalf of the EU and its Member States. The Coreper made a similar decision on 10 October 2016, just before the annual meeting of the CCAMLR (17–28 October 2016), that future proposals for all three Antarctic MPAs (East Antarctic, Ross Sea and Weddell Sea) should be submitted on behalf of both the EU and its Member States. The European Commission challenged the Coreper's decisions and asked the CJEU to partly annul them (Cases C-625/15 and C-659/16). This is a very important development, not only would further clarify the EU's competence in participating in the CCAMLR, but also shed light on the EU's competences in negotiating ocean governance issues more generally.

The judgment of Joined Cases C-625/15 and C-659/16 is pending at the moment. The Opinion of Advocate General Kokott (Kokott's Opinion) was delivered on 31 May 2018 (CURIA 2018). Kokott's Opinion is most interesting in two aspects. Firstly, it recognizes that the EU is able to participate in the establishment of Southern Ocean MPAs based on both its competences in environmental policy and possibly research policy, and its competence for the conservation of marine living resources. This confirms that MPA-related issues are falling into shared competence between the EU and its Member States. Kokott, however, invented a so-called centre-of-gravity approach, which provides:

> Where there is more than one conceivable legal basis, it is necessary that both on the internal and external action of the Union, to adopt a centre of gravity approach. If, as in this case, an act pursues a twofold purpose or it comprises two components, and if one of these is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component. (Para.81, Kokott's Opinion 2018)

Kokott then explains that "the main aim of the Antarctic MPAs is to conserve, study and protect ecosystems, biodiversity and habitats in the Antarctic and to tackle the harmful effects of climate change in that region". Therefore, the legal basis for the establishment of Antarctic MPAs is under EU environmental policy rather than fisheries policy. This can be seen as a subsequent interpretation from the EU on the nature of the CCAMLR. It is also in line with the majority view in the western world that the CCAMLR is no longer a regional fisheries management organization (RFMO), but mainly a conservation body to conserve Antarctic marine living resources and protect the Antarctic marine ecosystem (e.g. Press et al. 2019, Forthcoming).

Secondly, Kokott states that "the existence of a shared competence does not necessarily mean that there would always have to be mixed action by the Union and its Member States in an external area, with the Union being absolutely reliant for its external action on participation by the Member States alongside it". It is simply put as "shared competence and

mixed agreements are two separate issues". Kokott further identified preconditions for the EU and Member States' mixed actions externally:

> There is a need for mixed action by the Union and its Member States on the international stage *only* where the Union itself does not have sufficient exclusive or shared competences to act alone in relation to third countries or in international bodies. Only if the Union does not have powers of its own is it absolutely necessary for the Member States to participate alongside the Union in international matter. (Para.108, Kokott's Opinion 2018)

Indeed, "shared competences" is a broad category. Some scholars further divide it into four sub-categories that can provide a more nuanced picture of the possible competence divisions between the EU and its Member States (Kamphof and Wessel 2018): (1) shared pre-emptive competences, where Member State action is only excluded if the EU has already taken action on the issue; (2) shared non-pre-emptive competences, where Member State action is not excluded as long as the EU has not fully deployed a policy field; (3) minimum Union standards, where Member States can adopt more stringent measures; (4) parallel competences in the field of foreign and security policy. The Kokott' Opinion makes it clear that the EU's action to submit proposals to the CCAMLR on the establishment of MPAs has excluded its Member States' action based on a shared but pre-emptive competence under environmental policy.

Although Advocate General's opinion is not binding for the CJEU, in most cases the CJEU follows it. The Treaty on the European Union (TEU) established the principle of sincere cooperation that "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties" (Article 4 (3) TEU). The European Court of Justice (ECJ, now CJEU) first elaborates this principle in the Opinion 1/94, stating that

> Where it is apparent that the subject-matter of an agreement or convention falls in part within the competence of the Community and in part within that of the Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. (Opinion 1/94 [1994] E.C.R. I-5272)

The CJEU further judicialized this "Principle of Sincere Cooperation/Duty of Loyalty" through Commission v. Greece (C-45/07) [2009] and Commission v. Sweden (C-246/07) [2010], which greatly restricted actions of Member States at the international level (Liu and Maes 2012). For example, in the case Commission v. Greece, the ECJ concluded that "even if there had been a failure by the Commission in its performance of the duty of loyalty, this did not entitle the Member State to unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by an institution of rules of Community law" (Para. 26 Case C-45/07; Cremona 2009). If the judgement of Joined Cases C-625/15 and C659/16 is to follow Kokott's Opinion, it would become another milestone of the EU's creeping competence towards Member States, so as to enhance coherence at international stage. Consequently, it will become even more difficult for the EU Member States to act individually at international stage, even on issues falling into shared competence. As discussed below, like many other international organizations, geopolitical factors play a large role in the CCAMLR's decision-making process (Brooks et al. 2016), a coherent EU would be potentially in a better position to negotiate with other major powers, e.g. Russia and China, for achieving policy objectives, such as the establishment of Antarctic MPAs.

3 The EU and MPAs negotiations in the CCAMLR

The EU Directive 92/43/EEC (Habitat Directive) was adopted in 1992, which provides that a coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000 (Article 3, Habitat Directive). According to 2008 EU Marine Strategy Framework Directive, "establishing protected areas under this Directive will be an important step towards fulfilling the commitments undertaken at the World Summit on Sustainable Development and in the Convention on Biological Diversity, approved by Council Decision 93/626/EEC (1), and will contribute to the creation of coherent and representative networks of such areas". The EU 2011 Biodiversity Strategy also specifically set the sustainable use of fisheries resources as one of six targets to meet the EU's global commitments under the CBD's Aichi Target (COM 2011, 244).

Externally, the EU is keen to exercise greater influence over international debate on marine issues and the establishment of MPAs is identified as one strategy to achieve that goal (COM 2009, 536). The EU and its Member States have been driving initiatives on the establishment of MPAs in the Southern Ocean over the past decade. For example, Belgium hosted the Workshop on Bioregionalisation of the Southern Ocean in 2007 (CCAMLR-XXVI 2007), which was an important step in the CCAMLR's activities to develop a representative network of MPAs (CCAMLR-XXV 2006). As mentioned above, the UK (as a Member State of the EU) initiated a MPA proposal on the Southern Shelf of South Orkneys Island and was approved by the CCAMLR in 2009 without much opposition (CCAMLR Conservation Measure 91-03 2009). It, however, must be pointed out that concerns were expressed during the 2009 CCAMLR meeting as well. For example, Japan stated that the MPA should avoid restricting the fishery, with support from Republic of Korea and Russia (CCAMLR-XXVIII 2009). China raised the issue that the MPA as a conservation measure should maintain the balance between conservation and rational use (CCAMLR-XXVIII 2009), which has since been heavily debated in CCAMLR meetings regarding the establishment of MPAs (Tang 2017). Further, China was not pleased that the UK proposal was not accompanied by any workable plan, and in particular, the management plan for potential scientific research activities (SC-CAMLR-XXVIII 2009).

Encouraged by the UK's success, the EU, France, together with Australia, started putting a proposal to establish a representative system of MPAs for the whole East Antarctic planning domain in 2010 (EARSMPA) (European Commission 2013). Meanwhile, the USA and New Zealand were promoting a MPA proposal in the Ross Sea region, which was supported by the EU in CCAMLR meetings. The original objective of the EARSMPA was to declare some 1.9 million square kilometres over seven conservation zones in Eastern Antarctica (Gunnerus, Enderby, MacRobertson, Prydz, Drygalski, Wilkes, D'Urville Sea–Mertz) in order to establish a system which is representative for all biogeographic areas based on the best scientific evidence available (European Commission 2013). The proposal was first submitted for adoption to the 2012 CCAMLR Annual Meeting, but failed to be approved (CCAMLR-XXXI 2012). Since then, the EU and Australia have been advocating the establishment of the East Antarctic MPAs during the CCAMLR's Annual Meeting. Germany hosted a CCAMLR special meeting for MPA in 2013 (CCAMLR-SM-II 2013). In 2014, the EARSMPA proposal was revised to cover one million square kilometre over four separate areas (Gunnerus, MacRobertson, D'Urville Sea-Mertz and Drygalski) (Australian Antarctic Division 2014). It was further scaled back to three zones in 2017 (MacRobertson, D'Urville Sea-Mertz and Drygalski), which are believed by Australia and the EU as highly important scientific reference areas (Australian Antarctic Division 2018).

Moreover, the proposal had been changed from a closed system with multiple-use activities requiring approval, to an open system where activities are allowed until a decision by the CCAMLR is made to modify them (Para. 8.74, CCAMLR-XXXV 2016). However, there is no sign the EARSMPA will be established in the near future.

While the proposal for EARSMPA is in deadlock, the EU presented the Weddell Sea MPA proposal (WSMPA), prepared by Germany to the CCAMLR in 2016 (CCAMLR-XXXV/18 2016). The proposed MPA covers 1.8 million square kilometres in the Weddell Sea, which is a remote, ice-covered embayment east of the Antarctic Peninsula (The Pew Charitable Trusts 2017). Discussions on the WSMPA are only at the initial stage.

China and Russia posed similar concerns over all three proposals of Antarctic MPAs (Brooks 2017; Brooks et al. 2018). For example, in the 2014 annual meeting of the CCAMLR, China emphasized their position that there is no need for MPAs in the CCAMLR area in general due to the lack of threat and strong management measures which already exist in the CCAMLR area (Liu and Brooks 2018). Chinese delegates further asserted that MPAs should not interfere with CCAMLR States' right to fish (CCAMLR-XXXIII 2014). Moreover, Article II (2), CAMLR Convention provides that "for the purposes of this Convention, the term 'conservation' includes rational use". Rational use has been used by States, especially China, as a legal basis against MPAs proposed as to completely ban fishing (no-take zone) (Brooks 2013; Jacquet et al. 2016; Nilsson et al. 2016; Smith et al. 2016). With hesitation, China, however, became supportive of Ross Sea Region MPA (RSRMPA) at the end of 2015 CCAMLR Annual Meeting, which led to the establishment of RSRMPA in 2016 when Russia gave in (Liu and Brooks 2018).

The RSRMPA was established through Conservation Measure 91-05 (2016) and officially launched on 1 December 2017 (Jabour and Smith 2018). Legally speaking, it is an implementation measure of Articles IX. 1(f) and 2(g) of the CAMLR Convention.[7] The RSRMPA carefully balances fishing and conservation interests. It is divided into three zones: (1) the General Protection Zone (or no-take zone); (2) the Special Research Zone (for research fishing on toothfish); and (3) the Krill Research Zone [Para.5, Conservation Measure 91-05 (2016)]. Further, unlike many other MPAs under national jurisdiction, there is duration for the RSRMPA, which is 35 years. Nevertheless, China's suspicion against proposals for Antarctic MPAs is not completely eased after the establishment of RSRMPA. This is reflected during 2017 CCAMLR Annual Meeting, where China and USA had intense debates regarding the Research and Monitoring Plan (RMP) of the Ross Sea MPA. According to Conservation Measures 91-05 (Para. 14), "a Research and Monitoring Plan shall be introduced to the Scientific Committee and Commission no later than at their next annual meeting after this MPA is agreed". China insisted that a formal text of the RMP for Ross Sea, incorporating advice from the Scientific Committee, must be adopted as an annex of Conservation Measures 91-05 (Para. 5.76–79, CCAMLR-XXXVI 2017). On the other hand, the USA emphasized that a RMP is already in place based on what the Scientific Committee had endorsed (Para. 5.45, SC-CAMLR-XXXVI 2017) and no further action is required. After the 2017 Annual Meeting, China submitted, for the first time, a full RMP for RSRMPA for further discussions in the CCAMLR 2018 Annual Meeting.

[7] It reads, "The function of the Commission shall be to give effect to the objective and principles set out in Article ii of this Convention. To this end, it shall: 1 (f) formulate, adopt and revise conservation measures on the basis of the best scientific evidence available, subject to the provisions of paragraph 5 of this Article; 2 (g) the designation of the opening and closing of areas, regions or sub-regions for purposes of scientific study or conservation, including special areas for protection and scientific study".

4 The EU's potential actions

The EU is confident, as stated in its latest policy for international ocean governance, that "the EU is well placed to shape international ocean governance on the basis of its experience in developing a sustainable approach to ocean management, notably through its environment policy (in particular its Marine Strategy Framework Directive), integrated maritime policy (particularly its Maritime Spatial Planning Directive), reformed common fisheries policy, action against IUU fishing and its maritime transport policy (JOIN (2016) 49)". In a broad sense, the EU sees itself as a different power from other major powers in the world, such as the USA (Manners 2002). However, it is noted that the EARSMPA was proposed to the CCAMLR at the same time when the USA and New Zealand presented their RSRMPA proposal. The EU could perhaps learn from American diplomacy on how the USA persuades China on the establishment of RSRMPA. Moreover, considering the tension between the EU and Russia due to Russian annexation of Crimea since 2014 (European Union 2018), it would be more realistic to focus the EU's diplomatic effort on China first.

Although it looks like the Chinese delegation gave in at the very last minute in 2015, top-level diplomacy from the USA had played a key role behind for this to happen. The USA made designation of the Antarctic MPA a top diplomatic priority (Christian 2017). Prior to the 2015 CCAMLR meeting, President Xi Jinping visited the USA and engaged in discussions with President Barack Obama about a Ross Sea MPA (Tang 2017). Given the fact of Chinese system being a top-down command and control system, issues that agreed by the top leader would be seriously implemented by governmental officials at lower levels. As a result, the 8th Round of China–US Strategic and Economic Dialogue in June 2016 reaffirmed that China and USA are willing to work together in establishing the Ross MPA within the CCAMLR (China Ministry of Foreign Affairs 2016).

Meanwhile, unlike Taiwan and South China Sea, which are China's core interests, Chinese diplomacy is likely to be relatively collaborative and flexible in a so-called Strategic New Frontier[8] like the Polar Regions (Arctic and Antarctica). This is evidenced by China's first Arctic Policy White Paper, published in January 2018, which states that China will firmly adhere to applicable international law and existing international legal framework in the Arctic (State Council of P. R.China 2018).

The Chinese Ministry of Foreign Affairs has been holding bilateral dialogue on the law of the sea and Polar affairs with USA, Russia, France, UK, Japan and South Korea. On 29 January 2018, the first EU–China Dialogue on the law of the sea and Polar affairs was held in Brussels (China Ministry of Foreign Affairs 2018). Subsequently, the EU and China signed a unique Ocean Partnership (European Commission 2018) during the 20th EU–China Summit in Beijing, July 2018 (Council of the European Union 2018). The EU–China ocean partnership specifically sets out "the conservation of Antarctic marine living resources" as one area for future collaboration. In case the CJEU would follow Kokott's Opinion in Joined Cases C-625/15 and C-659/16, which would provide concrete legal basis for the EU to act alone in issues regarding Antarctic MPAs, the EU could definitely raise the issue of EARSMPA and WSMPA to the Chinese Government through this

[8] In January 2017, Chinese President Xi Jinping gave a speech "Establishing Common Future for Humankind" at the United Nations Office in Geneva where he emphasized that the deep seabed, Polar Regions, outer space and the Internet are "Strategic New Frontiers" for international cooperation (China Ministry of Foreign Affairs 2017).

bilateral channel in years to come. This would also fulfil the EU's vision in its China Strategy to "maximize EU cohesion and effectiveness in its dealings with China" (JOIN (2016) 30 final). More importantly, Southern Ocean MPAs must be among top EU diplomatic priority with China, and be incorporated into higher-level EU–China dialogues regularly, such as the EU–China Summit between the Presidents of the European Council and Commission and the Chinese President (European External Action Service 2015). So far, the Council's EU Strategy on China pay most attention to the rules-based international order in the South China Sea, acknowledging the Arbitral Award rendered by the Philippines v. China Arbitral Tribunal, enshrining the freedom of navigation, and asking for peaceful solution of sovereign disputes (Council of the European Union 2016). Under the EU–China 2020 Strategic Agenda for Cooperation (2020 Agenda), ocean collaboration (Section VI) merely states:

> Enhance exchanges and cooperation on comprehensive ocean management, ocean spatial planning, marine knowledge, marine observation and surveillance, R&D of marine science and technology, growth of the marine economy and ocean energy use.

Considering the CJEU is likely to identify the EU's competence for the establishment of the Antarctic MPAs under environmental policy, the EU may think of adding this specific issue to the Section V "Climate Change and Environmental Protection" of the 2020 Agenda. In order to support presidential talk between the EU and China on the Antarctic MPAs, an inter-service group from European Commission Directorate General for Environment, Directorate General Maritime Affairs and Fisheries (DG Mare) as well as Directorate General Research and Innovation may need to be formulated. This was a common practice when the EU drafted its Arctic policy documents (Liu 2017). The inter-service group for Antarctic MPAs might also lay the foundation for the adoption of the EU's future Antarctic policy.

Furthermore, China's global fishing interests play an important part in China's concerns on no-take zones in the Antarctic waters (Liu and Brooks 2018). The Chinese government views the CCAMLR as a RFMO rather than a conservation body. This can be proved by the fact that fisheries officials, scientists and industry representatives consist most of Chinese delegation to the CCAMLR (see, for example, CCAMLR 2017). The EU is the top trader of fishery and aquaculture products in the world in value terms, while China is the world's largest fish producer (The EU Fish Market 2017). The EU is an important fish market for China, which ranks as the EU's No. 2 supplier (European Commission 2016). The EU's IUU Regulations,[9] which use trade sanctions to ensure States trading fish products on the EU market not engage with IUU fishing (Miller et al. 2014), could potentially be a strong incentive for China to work together with the EU on global fisheries issues (He 2016), including in the Antarctic.

[9] Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing [2008] OJ L286; Council Regulation (EC) 1010/2009 laying down a detailed rule for the implementation of Council Regulation (EC) No. 1005/2008 [2009] OJ L280.

5 Concluding remarks

After the establishment of the MPA in the Ross Sea, the EU could and should take the lead to further conserve Antarctic marine living resources by pushing the East Antarctic MPAs and Weddell Sea MPAs. In case the CJEU would follow Kokott's Opinion in Joined Cases C-625/15 and C-659/16, this would pave the way for the EU to have firm legal basis to coordinate its Member States and act in one (and strong) voice at bilateral (e.g. EU–China Summit) and multilateral level (in particular CCAMLR). The EU could do so because the EU is a global actor with scientific, economic and diplomatic capacity to work together with other major powers like China on Antarctic affairs. The EU is also obliged to do so because the EU is committed by international and EU law to achieve sustainable management of marine living resources in the world, including the Southern Ocean. The Southern Ocean MPAs would be an interesting testing ground for the EU, who claims itself as a normative power, and who is confident to shape global ocean governance in the era of climate change. What urgently the EU can do is perhaps to invest more attention and raise the Southern Ocean MPAs as a top diplomatic priority on the agenda of the EU's diplomatic relations with China in particular.

Acknowledgements This is the resulting paper of the project "The European Union and the Conservation of Marine Living Resources in Antarctica", funded by the EU Centre for Global Affairs Annual Grant Program 2017, University of Adelaide, Australia.

References

Aichi Biodiversity Target (Target 11). (2010). Convention on Biological Diveristy COP 10 Decision X/2, StrategicPlan for Biodiveristy 2011-2020. https://www.cbd.int/decision/cop/default.shtml?id=12268. Accessed November 2, 2018.

Antarctic Treaty, adopted 1 December 1959, entered into force 23 June 1961, 402 UNTS 71.

Aronson, R. B., Thatje, S., McClintock, J. B., & Hughes, K. A. (2011). Anthropogenic Impacts on marine ecosystems in Antarctica. *Annals of the New York Academy of Sciences, 1223*(1), 82–107.

Australian Antarctic Division, Revised East Antarctic Marine Protected Area Proposal, 16 October 2014. http://www.antarctica.gov.au/news/2014/revised-east-antarctic-marine-protected-area-proposal. Accessed October 7, 2018.

Australian Antarctic Division, A Proposal for a Marine Protected Area in the East Antarctic Planning Domain, 15 August 2018. http://www.antarctica.gov.au/law-and-treaty/ccamlr/marine-protected-areas . Accessed October 7, 2018.

Bowman, M., Davies, P., & Redgwell, C. (2010). *Lyster's international wildlife law* (2nd ed., pp. 346–375). Cambridge: Cambridge University Press.

British Antarctic Survey, Impacts of Climate Change. https://discoveringantarctica.org.uk/challenges/sustainability/impacts-of-climate-change/. Accessed October 7, 2018.

British Antarctic Survey, South Orkneys Marine Protected Area. 20 November 2009. https://www.bas.ac.uk/media-post/south-orkneys-marine-protected-area/. Accessed October 7, 2018.

Brooks, C. M. (2013). Competing values on the Antarctic high seas: CCAMLR and the challenge of marine-protected araes. *The Polar Journal, 3*(2), 277–300.

Brooks, C. M., (2017). Why are talks over an East Antarctic marine park still deadlocked? The conversation. https://theconversation.com/why-are-talks-over-an-east-antarctic-marine-park-still-deadlocked-86681. Accessed October 7, 2018.

Brooks, C. M. (2019). Geopolitical complexity at the bottom of the world: CCAMLR's ongoing challenge of adopting marine protected areas. In N. Liu, C. Brooks, & T. Qin (Eds.), *Governing marine living resources in the polar regions*. Cheltenham: Edward Elgar.

Brooks, C. M., Crowder, L. B., Curran, L. M., Dunbar, R. B., Ainley, D. G., Dodds, K. J., et al. (2016). Science-based management in Decline in the Southern Ocean. *Science, 354*(6309), 185–187.

Brooks, C. M., et al. (2018). Antarctic fisheries: Factor Climate Change into their management. *Nature, 558,* 177–180.

CCAMLR. (2002). Report of the XXI Meeting of the Commission.
CCAMLR-SM-II. (2013). Report of the second special meeting of the commission.
CCAMLR-XXV, Report of the 25th meeting of the commission 2006, 24.
CCAMLR-XXVI, Report of the 26th meeting of the commission 2007, 32.
CCAMLR-XXVIII, Report of the 28th meeting of the commission 2009, 21.
CCAMLR-XXXI, Report of the 30th meeting of the commission 2011, 13.
CCAMLR-XXXI, Report of the 31st meeting of the commission 2012, 34.
CCAMLR-XXXIII, Report of the 33rd meeting of the commission 2014, 45.
CCAMLR-XXXV, Report of the 35th meeting of the commission 2016 (pp. 52–53).
CCAMLR-XXXV/18, *Proposal on a conservation measure establishing the Weddell Sea Marine Protected Area (WSMPA); see also, Federal Ministry of Food and Agriculture, Germany's Proposal for a Marine Protected Area in Antarctica, 17 January 2018*. https://www.bmel.de/EN/Forests-Fisheries/Marine-Conservation/_Texte/CCAMLR.html. Accessed October 7, 2018.
CCAMLR, Conservation Measure 91-03. (2009). *Protection of the South Orkney Islands Southern Shelf*. https://www.ccamlr.org/en/measure-91-03-2009. Accessed October 7, 2018.
CCAMLR, Conservation Measure 91-04. (2011). *General framework for the establishment of CCAMLR marine protected areas*. https://www.ccamlr.org/en/measure-91-04-2011. Accessed October 7, 2018.
CCAMLR, Conservation Measure 91-05. (2016). *Ross sea region marine protected area*. https://www.ccamlr.org/en/measure-91-05-2016. Accessed October 7, 2018.
CCAMLR-XXXVI, Report of the 36th meeting of the commission 2017, pp. 83–84.
China Ministry of Foreign Affairs. (2016). *List of results of the 8th round of China-US strategic and economic* .http://www.fmprc.gov.cn/web/ziliao_674904/1179_674909/t1370469.shtml. Accessed October 7, 2018 **(in Chinese)**.
China Ministry of Foreign Affairs. (2017). *Common future for humankind—Speech at United Nations Headquarter in Geneva*. 18 January 2017. http://www.mfa.gov.cn/web/zyxw/t1431760.shtml. Accessed October 7, 2018 **(in Chinese)**.
China Ministry of Foreign Affairs. (2018). *China-EU holds first round dialogue on the law of the sea and polar affairs*. 30 January 2018. https://www.fmprc.gov.cn/web/wjb_673085/zzjg_673183/tyfls_674667/xwlb_/t1530173.shtml. Accessed October 7, 2018 (**in Chinese**).
Christian, C. (2017). France, Australia and the EU can lead in protecting Antarctica and Southern Ocean. http://sdg.iisd.org/commentary/guest-articles/france-australia-and-the-eu-can-lead-in-protecting-antarctica-and-the-southern-ocean/. Accessed October 7, 2018.
Convention on the Conservation of Antarctic Marine Living Resources, adopted 20 May 1980, entered into force 7 April 1982, 1329 UNTS 175.
Council of the European Union, conclusion of the Chairman of the Permanent Representatives Committee of 11 September 2015.
Council of the European Union, Council conclusions EU Strategy on China, 18 July 2016.
Council of the European Union, EU-China Summit, Beijing, 16/07/2018. https://www.consilium.europa.eu/en/meetings/international-summit/2018/07/16/. Accessed October 7, 2018.
Court of Justice of European Union, *Commission v. Council* (Case C-22/70) [1971] ECR 263, Para.19.
Court of Justice of European Union, Opinion of Advocate General Kokott delivered on 31 May 2018, *Commission v. Council* (Joint Cases C-626/15 and C659/16).
Cremona, M. (2009). Extending the reach of the AETR principle: Comment on commission v Greece (C-45/07). *European Law Review, 34,* 754–768.
Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), [2008] OJ L 164/19.
Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, [1992] OJ L 206/7.
Editorial. (2018). Reform the Antarctic treaty. *Nature, 558,* 161. https://doi.org/10.1038/d41586-018-05368-7.
European Commission. (2016). Facts and figures on the common fisheries policy. https://ec.europa.eu/fisheries/sites/fisheries/files/docs/body/pcp_en.pdf. Accessed November 2, 2018.
European Commission. (2017). European market observatory for fisheries and aquaculture products. The EU Fish Market. http://www.eumofa.eu/documents/20178/108446/The+EU+fish+market+2017.pdf. Accessed November 2, 2018.
European Commission Communication of 20 November 2008, The European Union and the Arctic Region, COM (2008) 763.
European Commission Communication of 15 October 2009, Developing the international dimension of the Integrated Maritime Policy of the European Union, COM. (2009). 536; Summary: Strategy to strengthen global governance of seas and oceans, 31 March 2010. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:pe0010. Accessed October 7, 2018.

European Commission Communication of 3 May 2011, Our life insurance, our natural capital: an EU biodiversity strategy to 2020, COM (2011) 244, Annex Target 4.

European Commission, Declaration on the Establishment of a Blue Partnership for the Oceans: towards Better Ocean Governance, Sustainable Fisheries and a Thriving Maritime Economy between the European Union and the People's Republic of China, 16 July 2018. https://ec.europa.eu/fisheries/eu-and-china-sign-landmark-partnership-oceans_en. Accessed October 7, 2018.

European Commission Joint Communication to the European Parliament and the Council of 26 June 2012, Developing a European Union Policy towards the Arctic Region: progress since 2008 and next steps, JOIN (2012) 19.

European Commission Joint Communication to the European Parliament and the Council of 27 April 2016, An integrated European Union policy for the Arctic, JOIN (2016) 21.

European Commission Joint Communication to the European Parliament and the Council of 22 June 2016, Elements for a new EU strategy on China, JOIN (2016) 30.

European Commission Joint Communication to the European Parliament and the Council of 10 November 2016, International ocean governance: an agenda for the future of our oceans, JOIN (2016) 49, 3.

European Commission, Questions and Answers on the Establishment of Marine Protected Areas in the Southern Ocean and Antarctica, 16 October 2013 .http://europa.eu/rapid/press-release_MEMO-13-902_en.htm. Accessed October 7, 2018.

European External Action Service. (2015). EU-China Dialogue Architecture. https://eeas.europa.eu/delegations/china_en/18538/EU-China%20Dialogue%20Architecture. Accessed October 7, 2018.

European Union, EU Sanctions against Russia over Ukraine Crisis. 2 November 2018. https://europa.eu/newsroom/highlights/special-coverage/eu-sanctions-against-russia-over-ukrainecrisis_en. Accessed November 2, 2018.

FAO. (2018). The state of world fisheries and aquaculture 2018. In *Meeting the sustainable development goals* (p. 39). Rome.

Framework Agreement between the European Union and Australia (signed 7 August 2017, not yet in force).

He, J. (2016). Enhancing Chinese law and practice to combat illegal, unreported and unregulated fishing and trade. *Asia Pacific Journal of Environmental Law, 19*(1), 4–28.

Jabour, J., & Smith, D. (2018). The Ross Sea region marine protected area: Can it be successfully managed? *Ocean Yearbook, 32,* 190–205.

Jacquet, J., Blood-Patterson, E., Brooks, C. M., & Ainley, D. (2016). Rational use in Antarctic waters. *Marine Policy, 63,* 28–34.

Kamphof, R., & Wessel, R. A. (2018). Analysing shared competences in EU external action: The case for a politico-legal framework. *Europe and the World: a Law Review, 2*(1), 43.

Liu, N. (2017). The European Union's potential contribution to the governance of high sea fisheries in the central Arctic Ocean. In N. Liu, E. Kirk, & T. Henriksen (Eds.), *The European Union and the Arctic* (pp. 284–285). Leiden: Brill.

Liu, N., & Brooks, C. M. (2018). China's changing position towards marine protected areas in the southern ocean: Implications for the future Antarctic governance. *Marine Policy, 94,* 189–195.

Liu, N., & Maes, F. (2012). Legal constraints to the European Union's accession to the international maritime organization. *Journal of Maritime Law and Commerce, 43*(2), 279–291.

Manners, I. (2002). Normative power Europe: A contradiction in terms? *Journal of Common Market Studies, 40*(2), 235–258.

Miller, A. M. M., Bush, S. R., & Mol, A. P. J. (2014). Power Europe: EU and the illegal, unreported and unregulated tuna fisheries regulation in the west and central Pacific Ocean. *Marine Policy, 45,* 138–145.

Nalsh, T. (2017). What does the United Nations Paris climate agreement mean for Antarctica?: Implications for New Zealand's future research priorities. *Antarctic, 35*(4), 46–51.

Nilsson, J. A., Fulton, E. A., Haward, M., & Johnson, C. (2016). Consensus management in Antarctica's high seas—Past success and current challenges. *Marine Policy, 73,* 172–180.

Pew Charitable Trusts, Protection for the Weddell Sea, 1 October 2017. http://www.pewtrusts.org/~/media/assets/2017/10/gpc_protection_for_the_weddell_sea.pdf. Accessed October 7, 2018.

Press, A. J., Hodgson-Johnston, I., & Constable, A. J. (2019). The principles of the convention on the conservation of Antarctic Marine living resources: Why its commission is not a regional fisheries management organization. In N. Liu, C. Brooks, & T. Qin (Eds.), *Governing marine living resources in the polar regions*. Cheltenham: Edward Elgar.

SC-CAMLR-XXVIII. (2009). Scientific committee for the conservation of Antarctic Marine living resources. Report of the 28th meeting of the scientific committee (Vol. 8).

SC-CAMLR-XXXV. (2016). Report of the XXXV meeting of the CAMLR scientific committee.

SC-CAMLR-XXXVI. (2017). Report of the thirty-sixth meeting of the scientific committee.

Smith, D., McGee, J., & Jabour, J. (2016). Marine protected areas: A spark for contestation over ‘rational use’ of Antarctic marine living resources in the southern ocean? *Australian Journal of Maritime and Ocean Affairs, 8*(3), 180–198.

State Council of P. R.China. (2018). China’s Arctic Policy. 26 January 2018. http://www.scio.gov.cn/zfbps/32832/Document/1618243/1618243.htm. Accessed November 2, 2018.

Tang, J. (2017). China’s engagement in the establishment of marine protected areas in the Southern Ocean: From reactive to active. *Marine Policy, 75,* 68–74.

Triggs, G. (2011). The Antarctic Treaty System: A Model of Legal Creativity and Cooperation. In P. A. Berkman, M. A. Lang, D. W. H. Walton, & O. R. Young (Eds.), *Science diplomacy: Antarctica, science, and the governance of international spaces* (pp. 39–49). Washington, DC: Smithsonian Institution Scholarly Press.

Vanstappen, N., & Wouters, J. (2015). The EU and the Antarctic: Strange bedfellows? In K. Dodds, A. Hemmings, & P. Roberts (Eds.), *Handbook on the politics of Antarctica* (pp. 269–283). Cheltenham: Edward Elgar.

Wessel, R. A., & Blockmans, S. (2016). The legal status of influence of decisions of international organizations and other bodies in the European Union. In P. Eeckhout & M. Lopez-Escudero (Eds.), *The European Union’s external action in times of crisis* (p. 227). Oxford: Hart.