THE EUROPEAN COMMUNITY AND MARINE ENVIRONMENTAL PROTECTION IN THE INTERNATIONAL LAW OF THE SEA

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The European Community and Marine Environmental Protection in the International Law of the Sea

Implementing Global Obligations at the Regional Level

VERONICA FRANK

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To my parents, Federica and Giorgio,
and to Jim

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Veronica Frank Utrecht, September 2006

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ABBREVIATIONS

AJIL	American Journal of International Law
BARCON	1976 Barcelona Convention for the Protection of the Mediterranean Sea, as amended
BDC	Biodiversity Committee of the OSPAR Commission
CBD	Convention on Biological Diversity
CDEMs	Construction, Design, Equipment and Manning Standards
CFP	Common Fisheries Policy
CFSP	Common Foreign and Security Policy
CML Rev.	Common Market Law Review
COMAR	Council Working Party on the Law of the Sea
COREPER	Permanent Representatives Committee
CPSS	Common Policy on Safe Seas
CSD	Commission on Sustainable Development
DG	Directorate General of the European Commission
DG ENV	Directorate General on the Environment
DG FISH	Directorate General on Fisheries, now Fisheries and Maritime Affairs
DG TREN	Directorate General on Energy and Transport
DOALOS	UN Secretariat's Division on Oceans and the Law of the Sea
EAPs	European Environmental Action Programmes
EC	European Community
ECJ	European Court of Justice
EEcA	European Economic Area
EEnvA	European Environmental Agency
EEL Rev.	European Environmental Law Review
EEZ	Exclusive Economic Zone
ENB	Earth Negotiations Bulletin, published by the International Institute for Sustainable Development
EnvLR	Environmental Law Review
EP	European Parliament
EU	European Union
EURATOM	European Atomic Energy Community
FAO	Food and Agriculture Organization of the United Nations
GAIRAS	Generally Accepted International Rules and Standards
HELCOM	Commission of the 1992 Helsinki Convention for the Protection of the Baltic Sea

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IAEA	International Atomic Energy Authority
ICJ	International Court of Justice
ICP	Open-ended Informal Consultative Process on Oceans and the Law of the Sea
IJMCL	International Journal of Marine and Coastal Law
ILM	International Law Materials
ILC	International Law Commission
ILO	International Labour Organization
IMO	International Maritime Organization
IOs	International Organizations
ISBA	International Sea Bed Authority
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for Nature Conservation
LOSC	1982 United Nations Convention on the Law of the Sea
MEAs	Multilateral Environmental Agreements
MEPC	Marine Environmental Protection Committee of the International Maritime Organization
MOU	Memorandum of Understanding
MSC	Maritime Safety Committee of the International Maritime Organization
MSD	European Commission's Proposal for a Marine Strategy Directive
NGOs	Non-Governmental Organizations
NSMCs	North Sea Ministerial Conferences
ODIL	Ocean Development and International Law
OJ	Official Journal of the European Community
OSPARCOM	Commission of the OSPAR Convention
PSSAs	Particularly Sensitive Sea Areas
QMV	Qualified Majority Voting
RECIEL	Review of European Community and International Environmental Law
RFMOs	Regional Fisheries Management Organizations
REIOs	Regional Economic Integration Organizations
RDMC	Revue Du Marché Commun
RGDIP	Revue Générale de Droit International Public
SPLOS	Meetings of the States Parties of the Law of the Sea Convention
UKTS	United Kingdom Treaty Series
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS III	Third United Nations Conference on the Law of the Sea 1973-1982
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
UNSG	United Nations Secretary-General

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WPIEI	Council Working Party on International Environmental Issues
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization

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INTRODUCTION

1 Critical Issues and Central Questions

The European Community (EC or the Community), for legal and political reasons, has never established a comprehensive policy on "oceans and seas" as it has done in other environmental areas. Instead of adopting its own rules and standards, the Community has traditionally relied upon the existing international regime and has acceded, next to its member states, to the 1982 United Nations Convention on the Law of the Sea (LOSC) and most of the global and regional agreements implementing the Convention in European seas. All these Conventions are not self-executing, but require further action to be taken by the contracting parties. This book intends to provide a comprehensive picture of how the Community implements its international commitments under the LOSC and related marine environmental agreements in the light of the recent international and EC developments, while looking at the three main European regional seas: the Baltic Sea, the North-East Atlantic and the Mediterranean Sea.[1]

The implementation of the international oceans regime in European seas must be considered in the context of the unique legal and political structure of the Community and the special relation with its member states. The Community and its member states have "shared competences" in the field of the protection of the marine environment, which means that, within their respective spheres of powers, they may both act. As a consequence they have together acceded to the LOSC and all the marine environmental Conventions and they jointly participate in the work of the bodies established therein. However, as the Community declared at the time of signature and accession to the LOSC, the extent of its competence and the division of powers with its member states are not static, but may be subject to future changes. With the development of the European integration process, the member states have explicitly or implicitly transferred some of their powers to the Community in many areas covered by the LOSC and related agreements. As a result, in performing their international obligations, member states can no longer act in isolation; they rather have to operate within the framework of EC law, which limits to a considerable extent their capacity to take unilateral action.

This book looks closely at how the existence of a division of competence between the Community and the member states influences the implementation of the LOSC and related agreements in the European seas. The focus is on the relevant global and regional

1 The book does not take into account developments that occurred after 1st May 2006, with the exception of the *MOX Plant* Case, which was delivered by the European Court of Justice on 30th May 2006.

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Conventions and bodies in which the Community and its member states jointly participate and which provide an essential mechanism for implementing the LOSC. The joint participation of the Community and the member states in global and regional agreements creates legal problems both under international and EC law and influences to a large extent the manner in which the international regime is implemented in European seas. This book intends to contribute to a better understanding of some of the issues arising from the joint participation of the Community next to the member states in these frameworks *(who is competent and for what? What are the legal effects of the division of competencies vis-à-vis the EC institutions, the EC member states and non-EC contracting parties? How does this division influence the decision-making process within the relevant international organizations? How do the Community and the member states cooperate and coordinate their activities within the main global and regional fora implementing the LOSC?).* Especially in the past, joint participation confronted non-EC contracting parties with critical issues (*who has to exercise the rights and perform the obligations under the Conventions? Who is responsible in the case of violations?).* Vis-à-vis non-EC contracting parties these questions must be answered on the basis of international law. Some indications may be provided by the international agreement itself. The LOSC and some related agreements, for instance, contain general rules on the EC's participation and require both the Community and its member states to make a declaration at the time of the signature and/or accession specifying the respective spheres of competences. The so-called "participation clauses", however, are too broad and the declarations are too vaguely formulated to provide non-EC countries with clear and definite answers.

In their mutual relations, the division of competences between the Community and the member states is regulated by EC law. This is one of the most critical and disputed aspects of the EC's external policy and is particularly complicated with regard to ocean issues. It is disputed because for a long time the Community's actions for the protection of the oceans, unlike in other environmental fields, has been firmly opposed by its member states, striving to preserve their autonomous role at the international level. It is critical because of the absence of clear legal rules in the EC Treaty as regards the allocation of the respective spheres of competences and its legal effects. To fill this gap the European Court of Justice (ECJ) has developed a rather ambiguous doctrine, which does not provide for uniform solutions and leaves a number of questions unsolved (*is there any room left for the unilateral action of member states outside the Community's framework? Or is there an obligation for the member states always to act within the Community's framework?).* The ECJ doctrine, moreover, has been developed in relation to commercial and association agreements and its application is difficult with regard to marine environmental Conventions, which have different characteristics. Uncertainties or disputes about the division of competences between the Community and its member states may affect the correct implementation of their respective obligations, resulting in a lack of action, duplications and inconsistencies.

Instead of establishing rigid and uniform rules, the Court preferred to emphasise the duty of close cooperation between the Community and the member states in the negotiation, conclusion and implementation of the international agreements in which

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they jointly participate (so-called "mixed agreements"). However, in order to preserve the maximum level of flexibility, the Court has never clarified what the duty of co-operation entails in practice, leaving a number of questions still open *(are member states always obliged to coordinate their positions when acting at the international level?)*. The situation is further complicated by the absence of a uniform practice. The forms of coordination between the Community and its member states indeed vary depending on the forum, the issue on the agenda and other practical and political circumstances. Especially in the past, the absence of uniform procedures has often resulted in a lack of coordination affecting the effectiveness of the Community's external action. The lack of coordination is particularly dangerous within the framework of international organizations of which the Community is not a member (e.g., the International Maritime Organization (IMO)) and it may only participate through the coordinated action of its member states. The lack of coordination between the Community and its member states, moreover, may negatively affect and delay the decision-making process in the global and regional bodies where they jointly participate. This book does not suggest a model of participation or a uniform code of conduct, which would eventually affect flexibility, but identifies some common rules and practices and tries to put some order into the chaotic reality of the Community's participation in mixed agreements.

Additionally, the book discusses whether and to what extent the substantive approaches and measures adopted by the Community to implement its obligations under LOSC are consistent with the international regime. The Community's action to protect the marine environment must be in conformity, first of all, with the jurisdictional framework established by the LOSC, which sets out the rights and obligations of flag, coastal and port States in the different maritime zones. Especially in the field of shipping, the LOSC restricts the capacity of the coastal States, including the Community, to take unilateral action and to apply national rules for foreign vessels, but calls for the multilateral development and uniform application of international standards adopted by "the competent international organizations". The Community, in implementing its international obligations under the LOSC, may act in violation of these jurisdictional rules and adopt substantive standards which are different from the international ones. Although in the case of conflict international rules always prevail over Community legislation, these inconsistencies may subject member states to contradictory obligations under international and EC law, creating confusion and affecting the proper implementation of the international ocean regime. Over the years, the Community has become one of the most influential players in the implementation and further development of international rules and policies in the field of the marine environment. The consistency of the EC legislation with the law of the sea is particularly important given that the way in which the enlarged Community implements its international obligations has an important relevance in terms of state practice. By analyzing the EC legislation, this book intends to identify the main deficiencies, overlaps or inconsistencies eventually existing between global, regional and EC rules, as well as areas where further action is needed.

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2 Scope and Themes of the Book

This book focuses on the implementation of the international ocean regime by the European Community and its member states. Implementation is the main challenge for the future. With the entry into force of the LOSC in 1994 and the adoption of most marine environmental agreements, the 1990s have been characterized as a decade of developing the international law for the protection and preservation of the marine environment. It is now widely recognized that the coming decade should focus on the full implementation of existing Conventions at the regional and national levels. The proper implementation in a Community enlarged to 25 member states may without doubt contribute to this challenge.

For the purpose of this book the term "implementation" means giving effect to international norms by exercising the rights and performing the obligations under the relevant Conventions. Attention is placed in particular on (a) the joint participation of the Community and the member states in the work and activities of the decision-making bodies set out by the Conventions and the main political fora which are competent for ocean issues; and (b) the adoption by the Community of implementing legislation. The manner in which EC member states implement the international obligations under their exclusive competence remains outside the scope of this study.

The focus of this book is on standard-setting and not on enforcement of international rules. Enforcement, which is the capacity to punish violations, remains the primary responsibility of the member states, while the Community has limited competence in this field. Likewise, the settlement of disputes before international bodies, as well as responsibility and compensation in the case of environmental damage, will not be covered. Nevertheless, this book does pay some attention to the main compliance mechanisms available under EC law to ensure the full implementation of international ocean rules, including the ECJ's jurisdiction as regards the application and interpretation of international ocean agreements concluded by the Community and the capacity of the Commission to commence legal proceedings against member states for violations of relevant international standards.

The material scope of this book is limited to the implementation of the international rules governing vessel-source pollution, ocean dumping and the protection of marine habitats through the establishment and management of marine protected areas (MPAs). These issues have been chosen, first of all, because they illustrate three different approaches to marine environmental issues by the Community. As will be discussed in the case-study chapters, the Community has traditionally adopted a "global approach" to the regulation of vessel-source pollution by giving preference to international standards adopted by the IMO. Conversely, in the field of ocean dumping the Community has followed a more "regional approach" and has implemented its international obligations under the LOSC by becoming a party to the existing regional agreements. Finally, in the field of marine habitats protection the Community has adopted an "EC approach" and has implemented its international obligations directly within the framework of its nature conservation legislation (i.e., the Wild Birds Directive and the Habitats Directive). These approaches have been influenced by the different operation of the fundamental

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principles of EC law, especially subsidiarity and proportionality, in relation to each of the selected issues. Furthermore, the three selected topics show the different attitudes of member states vis-à-vis the involvement of the Community in ocean matters. Member states with strong maritime interests, for instance, have for a long time opposed the adoption of EC measures on vessel-source pollution. They were afraid, first of all, of losing their individual role at the international level, and, second, that the establishment of a strict environmental regime in Europe could place the EC shipping industry at a competitive disadvantage compared to the outside world. For similar reasons, member states have traditionally opposed the adoption of EC rules in the field of ocean dumping which was considered to be adequately regulated at the global and regional level. Community legislation, therefore, appeared to be duplicative and unnecessary. Conversely, member states have never contested the involvement of the Community in the protection of marine biodiversity, where interference with their national interests was minor compared to other fields.

The choice to deal with the establishment and management of MPAs next to the regulation of marine pollution from shipping and dumping might appear to be a curious one. This, however, is a particularly interesting topic since it involves the regulation of diverse human activities, including fisheries or shipping, where the Community has competences of a different nature. In addition, this is one of the most regulated issues at the global, regional and EC levels and provides a good example of the interrelationship between different layers of regulation.

Finally, one may wonder why land-based pollution and fisheries, which are the two most regulated sources of pressure on the marine environment at the EC level, are not discussed in detail. Since land-based pollution relates to activities taking place on land, the interference of EC legislation with the jurisdictional rules of the LOSC is minimal, making this topic of little interest for the purpose of this book. The same holds true for fishing activities. In this field, indeed, the member states have transferred their powers to the Community, which is exclusively competent to act at the international level and the issue of the division of competence does not normally arise. Therefore, land-based pollution, the environmental impact of fishing and some aspects of the conservation and management of marine living resources will only be discussed in general terms.

3 Outline of the Book

This book is divided into two main parts. The first part contains the general principles and rules regulating the implementation of the international regime for the protection of the marine environment within the European Community.

As a starting point, Chapter 1 gives a general description of the peculiarities and the structure of the international regime for the protection of the marine environment. The focus of the analysis is on the comprehensive legal framework, with special attention being paid to the LOSC (in particular the jurisdictional rules and Part XII on the protection and preservation of the marine environment), and on the implementing regime

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composed of multilateral environmental agreements (MEAs), "generally accepted" international rules and standards adopted by "the competent international organizations", and the Regional Seas Conventions. Of relevance for the present study are the 1976 Barcelona Convention for the protection of the Mediterranean Sea, as amended; the 1992 Convention for the protection of the North-East Atlantic (OSPAR) and the 1992 Helsinki Convention for the protection of the Baltic Sea. The Chapter looks closely at the institutional framework established by these Conventions as well as the main global and regional political processes, within and outside the UN, involved in ocean issues. These represent the main fora for the implementation of the LOSC and the further development of the law of the sea and ocean policies. Chapter 2 gives a general overview of the peculiarities which make the Community's regime a "new legal order of international law", including its sources, institutional framework, instruments, decision-making processes and compliance mechanisms. The focus of the discussion is on the EC rules governing the capacity of the Community to take action at the EC and international levels concerning matters related to the protection and preservation of the marine environment. Particular attention is given to the EC principles establishing "*whether",* "*when*", *"to what extent"* and *"in what manner"* the Community may act (i.e., attribution, subsidiarity and proportionality and the guiding principles of EC environmental law); the "material scope" of the Community competence and the different legal bases in the Treaties; and the "geographical scope" of such competence and its extension to the different maritime zones under the sovereignty or jurisdiction of the member states. Chapter 3 looks closely at the way in which the Community actually applies these rules and principles in the field of the marine environment and the approach it has taken towards the implementation of its international ocean obligations. Chapter 4 focuses on the international and EC rules governing the accession and joint participation of the Community and the member states in mixed agreements and in the activities of international organizations (IOs) dealing with ocean issues. Particular attention is devoted to the EC rules on the division of competences as laid down in the EC Treaty and the ECJ's case law; on the "participation clauses" contained in international agreements as well as on the procedural rules, as developed in day-to-day practice, on how the Community and the member states should cooperate in the negotiation, conclusion and implementation of mixed agreements. Finally, Chapter 5 looks closely at the participation of the Community next to its member states in the negotiation, conclusion and implementation of the LOSC and the main Regional Seas Conventions. Particular attention is placed on the manner in which they coordinate their activities in the bodies established by these Conventions.

The second part of the book applies the general principles and rules discussed in the first part to the specific fields of vessel-source pollution, ocean dumping and habitat protection through the establishment of MPAs. Each case-study chapter starts with an analysis of the existing global and regional rules governing the selected topic, with particular attention being paid to the jurisdictional provisions of the LOSC, and the specific approach taken by the Community in the implementation of its international obligations. Particular attention is given to the role played by the fundamental principles of EC law, EC institutions and the member states in shaping the Community's action

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in these matters. The focus of the discussion is on the manner in which the general rules on the division of competences are applicable in practice, with special attention being given to the coordination between the Community and the member states in the main international and regional fora (so-called Community coordination). The case-study chapters briefly describe the relevant legislation adopted by the Community in each of the selected fields and discuss the conformity of EC legislation with the international ocean regime, especially looking at the jurisdictional framework established by the LOSC.

The book concludes with some final considerations about the Community's action in marine environmental matters and the advantages and disadvantages of its participation next to the member states in the implementation of the international ocean regime. The Community's action, however, is not assessed in terms of "effectiveness", which is a very relative and discretionary concept and, in the absence of clear criteria, difficult to evaluate.

4 Reference Framework

To evaluate the manner in which the Community and the member states implement the environmental provisions of the LOSC and related global and regional instruments, the book looks, first of all, at the relevant rules on the division of competences. The main rules for such an evaluation are: a) the "participation clauses" contained in Annex IX to the LOSC and the declarations of competences released at the time of signature/accession to the Convention; b) analogous "participation clauses" contained in the global and regional agreements to which the EC is a party and declarations eventually released by the Commission at the time of accession; c) EC rules governing the division of competencies between the Community and the member states as laid down in the European Treaties and in the ECJ case law. The criteria developed by the ECJ, in turn, require a systematic analysis of the EC legislation related to the protection of the marine environment.

In the absence of legal rules and procedures under EC law, an assessment of the manner in which the Community and the member states coordinate their action in the global and regional bodies requires one to look at the practice. The information presented in this book is based on: a) the coordination meetings between the Community and the member states in preparation for the international negotiations. Since the reports of these meetings are normally confidential, relevant information has been obtained through interviews with EC and governmental officials and direct participation in the coordination meetings themselves (for which the author is most grateful); and b) the reports and minutes of the global and regional meetings where the Community is present. However, these reports are quite general and do not normally clarify the role and input provided by the EC representatives in the meeting. Further and more accurate information on the Community coordination have been obtained through interviews with the representatives of the Community or member states who attended the meetings, the chairperson of the meeting and officials from the secretariat of the conventions.

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The conformity of the Community's legislation with the international ocean regime has been evaluated on the basis of a) the jurisdictional rules codified in the LOSC and the environmental provisions contained mainly, but not exclusively, in Part XII of the Convention; b) the objectives, principles and approaches recommended in Chapter 17 of Agenda 21, the plan of action adopted at the United Nations Conference on Environment and Development (UNCED), and in the Plan of Implementation adopted at the 2002 World Summit on Sustainable Development (WSSD); c) "generally accepted international rules and standards" adopted by the "competent international organizations"; and d) MEAs and Regional Seas Conventions applying to European seas. However, the conformity of the EC legislation with the substantive rules and standards laid down in global and regional Conventions is only covered in general terms.

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CHAPTER 1

The Protection and Preservation of the Marine Environment under International Law

1.1 Introduction

The legal regime for the protection of the marine environment has its own peculiarities compared to the one governing the protection of the terrestrial environment. At sea states are not as free to take protective measures as they are on land; they have to act according to the jurisdictional rules of the law of the sea. These rules place some constraints on the capacity of coastal States to unilaterally control the environmental impact of sea-based activities and call for multilateral and uniform solutions. The largest part of the ocean space lies outside national jurisdictions and is open for use to all nations and most of the marine living resources move between different maritime areas. Due to the physical characteristics of the marine environment, the effects of human activities (e.g., shipping) and extractive uses (e.g., fisheries) may spread far beyond national jurisdictions and affect the interests of other states. Marine environmental protection, therefore, requires a high degree of cooperation compared to environmental issues on land.

The protection of the marine environment is an area where the jurisdictional rules of the law of the sea and the objectives, principles and approaches of international environmental law meet and influence each other to form the "international environmental law of the sea".[1] Part XII of the 1982 United Nations Convention on the Law of the Sea (LOSC) is the result of this combination.

The international regime for the protection of the marine environment[2] is based on two interdependent frameworks: (a) an umbrella framework (i.e., principles of customary international law; the LOSC, and Chapter 17 of Agenda 21, the plan of action adopted at the 1992 UN Conference on Environment and Development (UNCED) alongside the Plan of Implementation adopted at the World Summit on Sustainable Development (WSSD), held in Johannesburg in 2002) which sets out general principles and rules of global application, and (b) a regulatory regime composed of a variety of instruments implementing the general rules at the global (e.g., global regulatory instruments addressing specific sources of pollution; multilateral environmental agreements (MEAs)) and regional levels (e.g., Regional Seas Conventions). These two separate bodies interact and complement each other, creating a dynamic, coherent and uniform

1 E.L. Miles (1997), p. 24; W.L. Schachte, Jr. (1992), p. 59. See also L. de la Fayette (2001), p. 158.

2 The terms "international regime for the protection of the marine environment", "marine environmental regime", "ocean preservation regime" and "international ocean regime" are used in this book as synonymous.

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system. The LOSC constitutes the link between these two bodies. It does not contain detailed technical standards, but provides the legal basis for the multilateral development of rules within the "competent international organizations" and for the uniform implementation and enforcement of "generally accepted international rules and standards." Chapter 17 of Agenda 21 has introduced the new objectives, principles and concepts of international environmental law into the law of the sea and has worked as a catalyst for the implementation and further development of the environmental regime set out by the LOSC.

This Chapter provides a general overview of the international regime for the protection of the marine environment, without pretending to be exhaustive. The focus is placed on the necessary elements to carry out the analysis in the following chapters and to better understand the manner in which the European Community implements its international obligations in the field of ocean preservation. Particular attention is given to the institutional frameworks created by the global and regional instruments to coordinate and supervise implementation. The chapter concludes by pointing out the main shortcomings and future challenges for the international ocean regime.

1.1.1 Degradation of the Marine Environment

Life on earth strongly depends on the integrity and health of the oceans and seas, which cover over 70% of the planet's surface.[3] They provide fundamental ecological services and sustain economic development in many countries all around the world. During the past three decades, the protection and preservation of the marine environment has become a primary goal for the international community and important results have been achieved in controlling the traditional sources of marine pollution (e.g., shipping and dumping) and in the reduction of the most hazardous contaminants (e.g., lead, mercury and oil). Nevertheless, most of the problems identified in the past are still unsolved and new threats are placing oceans under increasing pressure (e.g., overexploitation of renewable resources; global warming; alteration of habitats and the loss of biodiversity; introduction of alien species transported in ballast waters; uncontrolled development of coastal areas; fish farming and aquaculture; hydrological changes and tourism).[4]

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3 For the latest information on the state of the oceans, see: Joint Group of Experts on Scientific Aspects of Marine Environmental Protection (GESAMP), Report No. 70, "A Sea of Troubles" (15.01.2001), at: http://gesamp.imo.org/publicat.htm; UNEP Annual Report 2004, at: www.unep.org/AnnualReport/2004/Protecting_seas_oceans_p56-59.pdf; UNEP Millennium Ecosystem Assessment (2005), at: www.millenniumassessment.org/en/index.aspx and the UN Atlas on the oceans, at: www.oceansatlas.org. Relevant information can also be found in the Report of the UN Secretary-General (UNSG Report) to the 60th session of the UN General Assembly (UNGA), (UN doc. A/60/63; 4.03.2005), pp. 30-47, and its addendum 2 (A/60/63/Add.2; 15.08.2005), pp. 19-25, both available at: www.un.org/Depts/los/general_assembly/general_assembly_reports.htm.

4 GESAMP (2001), *supra* n. 4, p. 3 and GESAMP Reports and Studies No.66 (1999), p. 1.

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Technological development, moreover, has shown new ways to use the sea and to exploit its resources and has progressively extended human activities further offshore and deeper into its waters.[5] The major threats to the marine environment, however, still come from activities on land (e.g., agricultural practices and industrial discharges).[6] As a result, the state of the marine environment and its resources are deteriorating worldwide.[7]

The impact of human activities on the marine environment varies depending on a multiplicity of ecological and geographical factors. Pressure is normally higher in coastal waters compared to offshore waters and is particularly severe in enclosed and semi-enclosed seas, which, due to their shallowness and limited circulation, renew themselves much more slowly compared to open seas. Socio-economic factors, such as population density, the concentration of industrial activities along the coastlines as well as the presence of major navigational routes and ports used for international trade, increase the exposure of the marine environment to anthropogenic pressures and show the existence of a direct link between ocean degradation and socio-economic development.

1.1.2 The Law of the Sea and the Protection and Preservation of the Marine Environment

The protection and preservation of the marine environment is a relatively new issue compared to the protection of nature on land.[8] Knowledge and understanding of oceans and seas, their processes and components are not as well developed as those on the terrestrial environment. For a long time, oceans and seas have been considered as inexhaustible reservoirs of resources, including fish and minerals, and capable of absorbing any kind of substances and materials discharged into their waters. Prior to the 1970s, the traditional law of the sea paid little or no attention to the protection of

5 New technologies, for instance, led to the discovery of the rich marine biodiversity of the seabed in areas beyond national jurisdiction and have shown the possibility to exploit them. Also the exploration and exploitation of oil and gas, which has traditionally been carried out in coastal waters and continental shelves, has progressively extended to deep waters up to 2000 meters. Similarly, fishing fleets are venturing into deep waters in search of new stocks. GESAMP (2001), p. 20.

6 According to the 1990 official data, 12% of marine pollution comes from shipping, 10% from ocean dumping, only 1% emanates from seabed activities, 44% from land-based activities and 33% through the atmosphere (except air traffic). See: GESAMP, "The State of the Marine Environment", Report No. 115, 1990.

7 *Inter alia,* GESAMP (2001), *supra* n. 4, p. 3.

8 See, in general, P.W. Birnie and A. Boyle (2002), pp. 347-56; L.A. Kimball (2001), pp. 1-4; R.R. Churchill and A.V. Lowe (1999), pp. 332-353.

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the marine environment.[9] The traditional regime was based on two fundamental components: (a) the almost absolute right of coastal States to exploit marine resources and to conduct human activities within waters under national jurisdiction and (b) the freedom of all states to use the high seas for various purposes (e.g., navigation, fishing, military activities and marine scientific research) with the only duty being to have "due regard" to the interests of other states. There was no legal obligation to protect the marine environment.[10]

The growing environmental awareness and a series of oil tanker disasters in the 1960s and 1970s focused the attention of the international community on the impact of human activities on the marine environment. The first UN global conference on the human environment, held in Stockholm in 1972, revealed a general dissatisfaction with the existing regime and recommended immediate action to protect oceans and seas.[11] The Stockholm Recommendations led to the adoption of new global and regional instruments addressing specific sources of marine pollution.[12] At the same time, the Stockholm Conference provided a decisive impulse to the Third United Nations Conference on the Law of the Sea (UNCLOS III), launched in 1973 with the ambitious mandate to adopt a convention "dealing with all matters relating to the law of the sea".[13] In 1982, after almost ten years of negotiations, the LOSC was adopted, establishing a comprehensive regime for the world's oceans in which the protection and preservation of the marine environment played a central role.[14]

There is no definition of "marine environment" under the LOSC or other international instruments. It is commonly agreed that the term "marine environment" refers to the ocean space taken as a whole (i.e., the surface of the sea, the water column, the subsoil, the seabed and the atmosphere above them) and everything comprised in that space, both physical and chemical components, including marine life.[15] As will be

9 There were a few Conventions addressing oil pollution (e.g., the 1954 International Convention for the Prevention of Pollution of the Sea by Oil) and some early fisheries agreements (e.g., the 1882 North Sea Fisheries Agreement and the 1931 Convention on the Regulation of Whaling) contained some conservation measures.

10 On the pre-UNCLOS III regime, see: R.R. Churchill and A.V. Lowe (1999), p. 333; P.W. Birnie and A. Boyle (2002), p. 351.

11 The Stockholm Declaration (Principle 7) and the Stockholm Action Plan (Recommendations 86-94) address marine pollution. See: Stockholm Conference Report, Annex III, p. 73 (in: UN doc. A/Conf.48/14/Rev.1 (1972).

12 See, e.g., 1972 London Dumping Convention; 1973 International Convention for the Prevention of Pollution from Ships (1973/78 MARPOL); 1974 Safety of Life at Sea Convention (SOLAS); 1974 Helsinki Convention for the Protection of the Marine Environment of the Baltic; 1974 Paris Convention for the Prevention of Marine Pollution from Land-Based Sources; and 1976 Barcelona Convention for the Protection of the Mediterranean.

13 UNGA Resolution 3067 (XXVIII)), in UN Doc. A/9030(1973).

14 Montego Bay, 10 December 1982, 1833 UNTS 396.

15 The LOSC expressly extends the duty to protect and preserve the marine environment to "rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species or *other forms of marine life*" (Article 194(5)). In its Report to the Plenary regarding the

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discussed in more detail in Chapter 8, the term "marine life" seems to be broad enough to include marine biodiversity and all living components of marine ecosystems,[16] but excluding fish stocks and other commercial species.[17] The latter, indeed, enter into the different regime on the conservation of marine living resources, which is regulated in other parts of the LOSC. This regime is closely related to the management and utilization of fisheries and will be marginally covered in Chapter 8. However, it should be stressed that the existence of a special regime for fisheries does not exclude the application of the general rules and principles of marine environmental protection in this field.

Before the 1990s, the marine protection regime focused almost exclusively on the "prevention, reduction and control" of marine pollution, which was defined in quite narrow terms. The generally accepted definition, as adopted in Article 1(4) of the LOSC, refers to "the *introduction by man*, directly or indirectly, of *substances* or *energy* into the marine environment, including estuaries, which results *or is likely to result* in such *deleterious effects* as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of the sea water and reduction of amenities" (emphasis added).[18] According to this definition, there must be, first of all, an introduction, whether deliberate or accidental, "by man", with the exclusion of all natural phenomena, even if they result in deleterious effects. Second, only "substances and energy" may cause pollution. However, both terms have been interpreted extensively to include alien organisms carried in the ballast waters of ships (substances), electricity, sound, vibration, heat and radiation (energy), as well as other forms of physical disturbance, such as anchoring and grounding. Third, not all pollution is prohibited, but only pollution that "may" have "deleterious" effects.[19] Some substances and energies are indeed harmless or can be rapidly rendered inoffensive upon contact with the sea. Although the list of

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Proposal on Article 1 (1)(4), the Chairman of the Third Committee noted that consensus had been reached on the inclusion of marine life within the term marine environment (A/CONF.62/RCNG/1 (1978)).

16 See: H.M. Dotinga and A.G. Oude Elferink (2000), p. 159.

17 LOSC (Article 1(1)(4)); 1995 BARCON (Article 2.a); 1992 Helsinki Convention (Article 4.1) and 1992 OSPAR Convention (Article 2.2.a) make a distinction between "living resources" and "marine life". See, in general, Chapter 8.2.1; D. Owen (2001), p. 51, and R. Platzöder (2001), p. 137.

18 For a critical analysis of this definition see, *inter alia,* H.M. Dotinga and A.G. Oude Elferink (2000), pp. 158-9; E.J. Molenaar (1998), pp. 16-18; R.R. Churchill and A.V. Lowe (1999), p. 329; A.C.H. Kiss and D. Shelton (1991), p. 117.

19 Conversely, previous agreements (e.g., the 1976 BARCON, 1974 Baltic Convention, 1972 Oslo Dumping Convention and the MARPOL 73/78) only refer to the introduction of substances "resulting" in deleterious effects. In this way, the LOSC anticipates a preventive, even though not yet precautionary, approach to marine protection.

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the deleterious effects is rather extensive (e.g., any "impairment of the quality of sea water"), some minor consequences for the marine environment are still tolerated.[20]

Following the new developments of international environmental law, as endorsed at UNCED, the legal regime for the preservation of oceans has progressively extended its scope to types of anthropogenic pressures other than pollution. Most post-UNCED agreements have replaced the term "pollution" with "degradation" so as to formally cover erosion and sedimentation, habitat destruction and the use of harmful technology and fishing practices.[21] These agreements, moreover, not only aim to "prevent, reduce and control", but also to "eliminate" or "abate" pollution and "restore" adversely affected marine areas.[22] Some of them, moreover, include the impact of human activities "on marine ecosystems" or "marine life" in the definition of pollution.[23]

1.2 The Framework Regime

1.2.1 (Pre-UNCED) Principles of Customary International Law

The umbrella regime for the protection and preservation of the marine environment is composed, first of all, of principles of customary international law. These principles are legally binding and universally applicable regardless of their codification within a treaty. However, only a few of them apply to the marine environment and their contribution to ocean preservation is quite limited.[24]

Customary law places States under a general duty to "prevent" damage to the marine environment (the *preventive principle*) and to use "due diligence" in conducting harmful activities under their national jurisdiction or control.[25] In both cases, however, States are required to take appropriate measures for which they are capable, financially and technologically.[26] In many cases (e.g., eutrophication from agricultural practices) the costs of prevention may be too high to require preventive action. A high degree of

20 *Inter alia,* R.R. Churchill and A.V. Lowe (1999), p. 329, and A.C.H. Kiss and D. Shelton (1991), p. 117.

21 1994 UNSG Report (A/49/631), Paras. 74-76.

22 E.g., OSPAR Convention (Article 2(1)(a)); 1992 Helsinki Convention (Article 3(1)) and 1995 BARCON Article 4(1).

23 E.g., OSPAR Convention, Article 1(d) and BARCON, Article 2(a).

24 On the customary principles of international environmental law see, in general: P. Sands (2003), pp. 231-252; P.W. Birnie and A. Boyle (2002), pp. 144 and 351; R. Churchill and A. Lowe (1999), p. 332. See also: B. Kwiatkowska (2001), pp. 18-22, and A. Nollkaemper (1993).

25 E.g., *Trail Smelter Arbitration* (III RIAA 1905, at 1965) and Principle 21 of the Stockolm Declaration, *supra* n. 12.

26 A. Nollkaemper (1993), p. 41.

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scientific certainty and predictability of the harmful effects of human activities, moreover, are essential conditions for the adoption of preventive measures.[27]

Moreover, States are under a general duty not to cause "serious or significant" damage to the environment of other states or areas beyond national jurisdiction, such as the high seas (*sic utere tuo ut alienum non laedas)* and not to "unreasonably" interfere with the traditional freedoms of other states in this area (the *reasonable use principle*).[28] Presumably, on the basis of these principles, States may not allow their nationals to conduct activities (e.g., to discharge hazardous substances or destructive fishing practices) in a manner that could cause harm or be prejudicial to the interests of other States. Both principles, however, only apply to transboundary situations. They do not establish a positive legal duty to protect the marine environment within waters under national sovereignty or jurisdiction, but only a responsibility to compensate environmental damage.

Furthermore, States are under a general duty of cooperation by means of information exchange, consultation and notification. This duty, however, only emerges in the case of transboundary pollution and/or in emergency situations (the *principle of good neighbourliness and international cooperation*).[29]

Generally speaking, according to the principles of customary international law not all interferences, harm or damage must be avoided or prevented, but only those which are "unreasonable", "serious", "appreciable" or "significant" and States have a great deal of discretion in determining these thresholds.[30] These principles, therefore, are too general and too broadly formulated to require States to take concrete action to protect the marine environment.

All the principles discussed so far were established when international environmental law was still at its very early stage. In the course of the 1980s, in the run-up to UNCED, new objectives, principles and concepts, such as sustainable development, the precautionary principle and the ecosystem approach, have emerged and, as will be briefly discussed in section 1.2.3, were endorsed in Agenda 21. Their legal status, however, is still unclear.[31] Nevertheless, as will be discussed in Chapter 2.4.3, most of these emerging objectives and principles (e.g., sustainable development and the precautionary principle) have been codified in the EC Treaty and, therefore, have legally binding status within the EC legal system.

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27 Full scientific certainty does not exist. As will be discussed in section 1.2.3, these elements differentiate the preventive principle from the precautionary principle.

28 E.g., Article 2(2) of the 1985 High Seas Convention. See also: International Court of Justice (ICJ), *Icelandic Fisheries Case* (25.02.1974) and 1974 *Nuclear Test Case* (20.12.1974).

29 The International Tribunal on the Law of the Sea (ITLOS) confirmed the customary nature of the duty to cooperate in the 2001 MOX Plant Order *(Ireland v. United Kingdom)*, Provisional Measures, Case n. 10, Para. 82, available online at: www.itlos.org/start2_en.html.

30 See, for instance, A. Nollkaemper, (1993), p. 30.

31 See: P. Sands (2003), pp. 231-32 and 252-290; P.W. Birnie and A. Boyle (2002), pp. 79-152.

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1.2.2 The 1982 UN Law of the Sea Convention (LOSC) and the Protection and Preservation of the Marine Environment

The LOSC recognizes that uses and problems of marine space are closely interrelated and must be considered as a whole (the Preamble). The protection and preservation of the marine environment therefore constitutes an essential component and an integral part of the legal regime of the sea. The Convention, moreover, represents the first attempt to regulate all sources of marine pollution and different aspects of marine degradation within a single instrument. At the time of its adoption, the LOSC was considered as the "strongest comprehensive environmental treaty in existence or likely to emerge for quite some time".[32] Since its entry into force on 16 November 1994, the regime established by the Convention has gained nearly universal acceptance and its environmental provisions are widely considered to reflect customary law.[33]

The environmental regime established by the Convention is based on the combination of the jurisdictional rules of the law of the sea with objectives, principles and approaches of international environmental law. The protection and preservation of the marine environment is specifically regulated in Part XII which is the result of this combination. However, due to the comprehensive character of the LOSC and the inter-sectoral nature of marine issues, relevant provisions can be found in different parts of the Convention (e.g., Parts V and VII on conservation and management of living resources in the EEZ and high seas or Part XIII on marine scientific research). The LOSC has codified the customary principles discussed in the previous section and, in some cases, has further clarified their content. The jurisdictional rules and Part XII are discussed separately in the next paragraphs.

1.2.2.1 Jurisdictional Regime

The LOSC sets out the basic jurisdictional framework for conducting human activities at sea and the rights and duties of States in different maritime zones. In each zone, the Convention specifies the extent of the prescriptive jurisdiction, which is the capacity of States to adopt legislation, including environmental rules, and enforcement jurisdiction, which is the capacity of States to bring about compliance with these rules and to punish

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32 See: P.W. Birnie and A. Boyle (2002), p. 348.

33 By 30 April 2006, the LOSC has 149 parties (www.un.org/Depts/los/reference_files/status 2005.pdf). The customary nature of Part XII has been recognized in the Preamble of the OSPAR Convention, and in Chapter 17(1) and 17 (22) of Agenda 21, by most legal authors and governments, including non-parties, such as the US (see, e.g., Statement by the US Delegation at the 11th Session of UNCLOS III (Official Records, Vol. 17, p.116; 1983 Statement of President Reagan on United States Ocean Policy (19 Weekly Comp. Pres. Doc. 383, 1983). More recently see: Statement of Mr. J. F. Turner before the US Senate Environmental Committee, 23.03.2004, at: www.eezinternational.com/news/2004/25.03.04-feature3.html) and remarks by Dr. C. Rice during her Senate confirmation hearing as Secretary of State, available at: http://www.agiweb.org/gap/legis109/lawofthesea.html.

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violations. Most of the jurisdictional provisions of the LOSC are declaratory of existing international law, while others (e.g., Exclusive Economic Zone (EEZ)) codify the latest developments in the law of the sea.[34] This paragraph outlines the environmental powers of States in the different maritime zones, while specific rights and duties of flag States (i.e., "the State whose nationality a particular vessel has"), coastal States (i.e., "the State in one of whose maritime zones a particular vessel lies" or a particular activity is conducted) and port States (i.e., "the State in one of whose ports a particular vessel lies") in each zone will be covered in more detail in the case-study chapters.[35] Also the regime on international navigation (e.g., the right of innocent passage, transit passage and the freedom of navigation, *inter alia*) is discussed in detail in Chapter 6.

The LOSC places some limits on the capacity of coastal States to control the activities of foreign States in waters under their sovereignty and jurisdiction. The level of control varies according to the kind of activities and to the maritime zone concerned and generally decreases when proceeding towards the high seas. As one legal author pointed out, coastal (and port) State jurisdiction "always implies jurisdiction over foreign vessels. Jurisdiction over a State's own vessel implies acting in the capacity as flag State".[36] Flag States have sovereignty over their own vessels wherever they are and may impose on them any kind of standard or practice they deem necessary to protect the marine environment.

Generally speaking, internal waters (i.e., all waters within the baselines, including ports), just like land territory, are under the full sovereignty of coastal (or port) States that have exclusive and unlimited control over the protection of their marine environment.[37]

Sovereignty extends to the territorial sea up to 12 nautical miles (n.m.) from the baselines. In this zone, however, the level of coastal State control is limited by the right of innocent passage which pertains to all foreign vessels, and this will be covered in detail in Chapter 6.[38]

The LOSC has extended the powers of coastal States up to 200 n.m. within the EEZ.[39] This zone does not exist automatically, but must be claimed. Within this new maritime zone, which was formerly subjected to the high seas regime, coastal States have, *inter alia*, sovereignty over the conservation and management of natural resources

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34 E.g., P.W. Birnie and A. Boyle (2002), p. 348, and B. Kwiatkowska (1989), Ch.5. The ICJ in *Tunisia Libya/Continental Shelf* Case (24.02.1982) considered the concept of EEZ as part of the modern international law and again in *Libya/Malta Continental Shelf* Case (3.06.1985) it stated that it had become a part of customary law through state practice.

35 Quotes are from R.R. Churchill and A.V. Lowe (1999), p. 344. For a detailed analysis of the LOSC jurisdictional framework see, *ibid.* pp. 60-176 and 203-52.

36 See: E.J. Molenaar (1998), p. 92.

37 LOSC, Article 2(1). In internal waters foreign vessels have no right of innocent passage (ibid., Article 8). See, in general, R.R. Churchill and A.V. Lowe (1999), pp. 60-65.

38 See: ibid, pp. 71-102 and Chapter 6 of this book. In the "contiguous zone", adjacent to the territorial sea up to 24 n.m., coastal States do not have environmental rights.

39 See, in general, B. Kwiatkowska (1989), pp. 171-9; E. Franckx (2003), pp. 11-30.

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and jurisdiction for the protection and preservation of the marine environment.[40] As will be discussed in further detail in the case-study chapters, in this area coastal States may take environmentally protective measures as long as they do not interfere with the traditional freedoms of other States, first and foremost the freedom of navigation.[41] Flag states, however, must comply with coastal State environmental laws and regulations adopted in accordance with the LOSC.[42]

In the continental shelf, which extends up to 200 n.m. from the baselines (in certain cases beyond that limit), coastal States have sovereign rights for the purpose of exploring and exploiting natural resources.[43] As will be discussed in more detail in Chapter 8.2.2, the sovereign rights of exploitation seem to embrace the right to manage and conserve the natural resources of the continental shelf.[44] In addition, the coastal States can take measures for the reduction and control of pollution from pipelines, but cannot impede the laying or maintenance of cables and pipelines by other States.[45] Part XII, moreover, grants coastal States jurisdiction as far as dumping in the continental shelf and pollution from seabed activities are concerned.[46]

The LOSC reconfirms that areas beyond national jurisdiction are subject to the traditional freedoms of the high seas (i.e., fishing, navigation, overflight, laying submarine cables and pipelines, building artificial islands and other facilities and conducting scientific research). In the high seas, the primary responsibility to protect and preserve the marine environment lies on flag States, which must ensure that vessels flying their flag comply with existing international rules and standards.[47] Coastal States cannot take unilateral action in this area, but they have to cooperate in the multilateral development of protective measures within the competent international organizations.

Finally, the Area includes the seabed, the ocean floor and the subsoil thereof, beyond the limits of national jurisdiction and represents a common heritage of mankind.[48] The regime governing the Area and the exploration and exploitation of its mineral resources is regulated in Part XI of the Convention. In respect of activities in the Area, as defined

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40 LOSC, Article 56(1)(a) and Article 5(6)(1)(b)(iii). Coastal States have sovereign rights with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from water, currents and winds, and jurisdiction with regard to the establishment and use of artificial islands, installations and structures, and marine scientific research.

41 LOSC, Article 56(2). See also, *infra* Chapter 6.2 and Chapter 8.2.2 and 8.6.1.

42 LOSC, Article 58(3). As will be discussed in Chapter 6, the LOSC introduced a similar regime in straits used for international navigation (Articles 42.1 (b) and 233) and grants some environmental powers to archipelagic states with regard to the regulation of archipelagic sea-lane passage (Article 53).

43 LOSC, Articles 76 and 77.

44 See, E.J. Molenaar (2005), p. 558 and Chapter 8.2.2, n. 25.

45 *Ibid.*, Article 79.

46 *Ibid.*, Articles 210(5) and 208 (1).

47 *Ibid.*, Articles 92 and 94.

48 *Ibid.*, Articles 1.1(1) and 136.

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in Article 1.1(3) of the LOSC, it is for the International Sea Bed Authority (ISBA) to take all appropriate measures for the prevention, reduction and control of pollution, other hazards to the marine environment and interference with its ecological balance (Article 145 (a)), as well as the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna (b).[49]

The LOSC jurisdictional provisions intended to attain a balance between the coastal State's extended environmental rights and the interests of other States to use the oceans and exercise their traditional freedoms.[50] As a matter of compromise, the LOSC gives preference to multilateral cooperation either among states directly or within the competent international organizations or general diplomatic conferences.[51]

1.2.2.2 Part XII

The jurisdictional rules for the "protection and preservation" of the marine environment are further specified in Part XII of the LOSC. The LOSC does not clarify the difference between these two terms.[52] It is largely accepted that "protection" refers to an existing or imminent danger, while "preservation" maintains the elements of sustainability and relates to the maintenance of the quality of the marine environment and the long-term policies to tackle marine environmental problems.[53]

Part XII of the LOSC does not contain technical standards, but clarifies the extent of the rights and duties of States with regard to different sources of pollution and sets out the main principles that States have to follow in carrying out their duties. Generally speaking, the Convention places States under four main sets of obligations.

First, all States are under an unconditional duty to take measures to protect and preserve the marine environment (Article 192) and to exploit their marine resources in accordance with this duty (Article 193). These provisions, which are considered as "the capstone of the international environmental law of the sea",[54] transform the protection of the marine environment from a mere right into a positive legal duty, not confined to transboundary situations.[55] The content of this general duty is specified further in Article 194. States are required to take all necessary measures to prevent, reduce and control marine pollution using the best practical means at their disposal and

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49 *Ibid.*, Article 145(a) pays particular attention to protection from the harmful effects of such activities as drilling, dredging, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities.

50 See B. Kwiatkowska (1995), p. 14.

51 To be qualified as "general", a diplomatic conference (GDC) must be open to universal or nearly universal participation. See: S. Rosenne and A. Yankov (eds.) (1991), p. 209.

52 See on this point: S. Rosenne and A. Yankov (eds.) (1991), p. 40.

53 *Ibid.*, pp. 11-2.

54 See 1989 UNSG Report (A/44/461, Para. 5). See also E.L. Miles (1997), p. 24.

55 Article 194 indeed makes a clear distinction between the duty to protect the marine environment (Para. 1) and the responsibility not to cause damage by pollution to other states (Para. 2). See, e.g., A. Boyle (1985), p. 370.

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according to their capabilities.[56] Six main sources of pollution are identified and addressed in further detail in several Articles of the Convention, namely: pollution from land-based and coastal activities (Article 207), from seabed mining within national jurisdiction (Article 208), from activities in the Area (Article 209), from ocean dumping (Article 210); from ships (Article 211) and from or through the atmosphere (Article 212). In addition, States have to take all necessary measures to protect and preserve "rare and fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life" (Article 194(5)).

Second, States have to cooperate on a global or regional basis, directly or through competent international organizations, in the multilateral development of international rules and standards, practices and procedures for the protection and preservation of the marine environment (e.g., Article 197). The Convention places strong emphasis on regional cooperation especially between States bordering enclosed or semi-enclosed seas (Article 123).[57]

Third, in order to guarantee the maximum level of coherence and uniformity, the LOSC requires States to give effect to "generally accepted" and to enforce "generally applicable" international rules and standards established by the competent international organizations. The required level of compliance with the generally "accepted" or "applicable" rules and standards varies according to the types of activities and the maritime zone where they take place. States have to "take into account", "conform to", "give effect to" or "implement" international rules, which, depending on the circumstances, may represent minimum or maximum standards.

Generally, the LOSC provisions are particularly articulate with regard to activities taking place at sea, especially shipping, where there is a higher interference with the interests of other States. Conversely, the provisions are quite rudimentary with regard to land-based activities, where there is a stronger impact on national sovereignty and the primary responsibility is left to coastal (and land-locked) States.[58] For the same reasons, the provisions on enforcement are also very weak, except for vessel-source pollution.

Fourth, States are subject to a series of procedural obligations concerning notification and information exchange (Article 198), the development of pollution contingency plans (Article 199), cooperation through scientific research (Articles 200-201) and technological assistance (Articles 202), monitoring (Article 204) and reporting (Article 205). In addition, Article 206 requires States, "as far as practicable", to conduct environmental

56 States, however, are encouraged to harmonize their national policies (LOSC, Article 194(1)).

57 LOSC, Article 122 defines enclosed and semi-enclosed seas as "a gulf, basin or sea surrounded by two or more states and connected to another sea or the ocean by a narrow inlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal states".

58 States are simply required to "take into account" international land-based pollution and atmospheric pollution standards (LOSC, Article 212(1)). See, in general, P.W. Birnie and A. Boyle (2002), p. 308; A. Yankov (1999), p. 281; R. Wolfrum (1995), p. 1014.

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impact assessments (EIAs) of projects and activities which are potentially dangerous for the marine environment, while Article 235 sets out a general duty to compensate pollution damage and to cooperate in the development of international rules on responsibility and liability.

Even though Part XII is based on the 1972 Stockholm Declaration, it seems to formulate, at least at an embryonic stage and in very general terms, some of the emerging objectives, principles and approaches of ocean governance endorsed at UNCED (e.g., sustainable development,[59] the need to take an integrated[60] and precautionary[61] approach and the polluter-pays principle[62]).

As will be discussed in Chapter 6, the environmental regime established by the LOSC has recently been the object of some criticism. The "package deal" nature of the Convention, which was meant to be acceptable without reservations by the international community as a whole, has resulted in a high level of compromise between the coastal State's environmental interests and the flag State's traditional freedoms to use the sea and its resources.[63] This compromise has often resulted in the lowest common denominator with a clear preference for utilization rather than preservation.[64] In addition, the LOSC is based on a balance of interests as they stood three decades ago and does not reflect the modern requirements of environmental protection.[65] In spite of this criticism, the idea of formally amending the Convention has never been supported.[66]

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59 E.g., LOSC, Article 193 and Article 62(1) on optimum sustainable yield. See, in general, A. Yankov (1999), p. 275, and E.L. Miles (1997), pp. 16-42. In addition, the LOSC anticipates the idea of common, but differentiated responsibilities (e.g., Articles 194(1); 207(4); 202 and 203). See: K.R. Simmonds (1989), p. 94.

60 E.g., Preamble to the LOSC, Article 195, Article 196 and several provisions on conservation and management of marine living resources.

61 See, e.g., the definition of pollution in Article 1(4). See also: Judge Laing, Separate Opinion on the 1999 *Southern Bluefin Tuna Case (*Para. 17). For a detailed discussion see: A. Trouwborst (2006), pp. 219 and 233, and A. Trouwborst (2002), p. 65.

62 E.g., LOSC, Article 235. The polluter-pays principle was formulated for the first time in the 1970s within the framework of the OECD.

63 See A. Yankov (1999), p. 276.

64 R. Platzöder (2001), p. 138; D.R. Rothwell in A.G. Oude Elferink (ed.) (2005), p. 148.

65 E.g., 2003 UNSG Report A/58/50 (Paras. 37 and 58).

66 For a general discussion see: D. Freestone and A.G. Oude Elferink in A.G. Oude Elferink (ed.) (2005), pp. 169-221.

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1.2.3 Chapter 17 of Agenda 21

Since 1982, when the LOSC was adopted, international environmental law has developed considerably.[67] The increasing degradation of the environment, including the oceans and seas, revealed the limits of the traditional approach to environmental protection.[68] It soon became clear that there is a direct link between (marine) environmental degradation and socio-economic development and these factors can no longer be tackled in isolation.[69] To fill these gaps the UNCED endorsed the new goal of sustainable development, as a form of development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs, together with new principles and approaches to achieve this goal.[70] In the marine environmental context, sustainable development acquires a special importance since millions of people all around the world depend on the sea and its resources. Agenda 21, the UNCED's Plan of Action, dedicates particular attention to oceans and seas and emphasizes the need to protect and preserve the marine environment in harmony with the rational use and development of its resources.[71]

Chapter 17 on "Protection of the Ocean and all kinds of seas" sets out the blueprint for the sustainable development of oceans and introduces new objectives, principles, and concepts of ocean governance into the existing regime.[72] The protection of the marine environment is one of the seven areas of action identified in the Chapter.[73] The LOSC is considered as the proper legal framework for the protection and sustainable use of the marine environment, but Agenda 21 calls for a new approach to marine issues.[74] This approach has to be "integrated in content" and "precautionary and anti-

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67 On UNCED and ocean law and policies, see, in general, P. Sands (2003), pp. 455-57; A. Yankov (1999), p. 271; P.W. Birnie (1999), pp. 387-415; B. Cicin-Sain and R.W. Knecht (1993), p. 323; A. Nollkaemper (1993), p. 537.

68 The GESAMP Report on the state of the oceans No. 39 (1990), published on the eve of the UNCED, revealed a substantial increase in marine pollution compared to 1980s levels.

69 G. Bruntland (ed.), World Commission on Environment and Development, *Our Common Future* (1987), 1987, p. 28.

70 See UN Doc. A/CONF.151/26/Rev.1, Vol.I (1992). Sustainable development is defined in the 1987 Bruntland Report (*supra* n. 70). For an overview of sustainable development and other UNCED principles see: P. Sands (2003), pp. 252-266, and G. Handl (1995), pp. 35-43. For more on the role of sustainable development in ocean preservation see: M. Kusuma-Atmadja, T. A. Mensah and B.H. Oxman (eds.) (1997),

71 Agenda 21, Chapter 17.1, *infra* n. 72. Chapter 17 is the most articulated chapter of Agenda 21.

72 Chapter 17 on "Protection of the Oceans, All Kind of Seas including Enclosed and Semi-enclosed Seas, and Coastal Areas, and the Protection, Rational Use and Development of their Living Resources", adopted in Rio de Janeiro, 3-14 June 1992 (A/CONF.151/26, Vol. II, (1992)), available at: www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm

73 Programme (b), Paras. 17.18-43.

74 Agenda 21 contains many references to the LOSC (e.g., Paras. 17.22, 17.49, 17.69, 17.77-8, and 17.99).

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cipatory in ambit".[75] Considering the limited knowledge and understanding of the marine environment and the difficulty in predicting the impact of human activities on marine ecosystems, the adoption of a precautionary approach to ocean preservation appears particularly important since it justifies the adoption of preventive measures even in the absence of "clear scientific evidence".[76] In addition, Chapter 17 urges States to conduct a prior environmental assessment of all potentially hazardous activities, to apply clean technologies (e.g., best available technology (BAT) and best environmental practice (BET)) and the polluter-pays principle.[77] Furthermore, Chapter 17 urges States to preserve rare or fragile "ecosystems", as well as habitats and other ecologically sensitive areas and it implicitly endorses the ecosystem-based approach.[78]

States are recommended to take measures to address marine degradation (not only pollution) from land-based activities acting primarily at the national, regional or sub-regional level.[79] In addition, they are encouraged to assess the need for additional measures to control sea-based activities (i.e., shipping, dumping, offshore oil and gas platforms and ports), acting primarily within the framework of international organizations, whether they be sub-regional, regional or global.[80] As will be discussed in more detail in Chapter 6, Chapter 17 devotes particular attention to shipping and urges the wide ratification and proper implementation of existing international instruments. Furthermore, there is a strong emphasis on monitoring, reporting, and financial and technological assistance.[81] Finally, Chapter 17 stresses the need to improve cooperation and coordination among national, regional and global institutions with competence concerning marine environmental issues, within and outside the UN system.[82]

Despite its legally non-binding nature, Chapter 17 had a decisive influence on the further development of the marine environmental regime and its principles and recommendations have worked as guidelines for States and international organizations in the

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75 E.g., Agenda 21, Paras. 17.1, 17.5, 17.6, 17.21 and 17.22.

76 Not surprisingly, the principle had its first international formulation in the Declaration adopted at the 1984 North Sea Ministerial Conference (1984 NSMC Declaration, Para. A.7) and has received particular attention in subsequent NSMCs (e.g., London, 1987; The Hague, 1990; and Esbjerg, 1995). For a full discussion on the legal status and content of the precautionary principle see: A. Trouwborst (2006); P. Sands (2003), pp. 266-79; S. Marr (2003); and A. Trouwborst (2002). On the application of the precautionary principle to marine issues see also: D. Freestone and E. Hey in D. Freestone and E. Hey (1999), pp. 3-15; A. Nollkaemper (1995), p. 71; E. Hey (1992), pp. 303-18; A. Nollkaemper (1991), pp. 107-110.

77 Agenda 21, Para. 17.22 (a) (b) and (d). In addition, it endorses the principle of common, but differentiated responsibilities (Para. 17.23) and access to information and public participation in planning and decision-making (Para. 17.5(f)).

78 E.g., Agenda 21, paras. 17.85, 17.74 (f), 17.71, 17.30 (a)(v). However, there is no explicit reference to the "ecosystem approach".

79 Agenda 21, paras. 17.24 –29.

80 Agenda 21, paras. 17.30 –35.

81 E.g., Agenda 21, paras. 17.35; 17.36; 17.37; 17.41 and 17. 42.

82 Agenda 21, programme F on "Strengthening international, including regional, cooperation and coordination", paras. 17.115-122.

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implementation of their commitments under the LOSC.[83] There is a close interaction between Chapter 17 and the Convention.[84] The LOSC establishes the legal framework for the programme of action on oceans laid down in Chapter 17, which, in turn, spells out the methods for implementing the LOSC. In 1997, at its 19th Special Session, the UN General Assembly formalized this interaction and required the UN Commission on Sustainable Development (CSD) to review periodically the progress in the implementation of Chapter 17 on the basis of the framework established by the LOSC.[85]

1.2.4 World Summit on Sustainable Development (WSSD)

The WSSD, held in Johannesburg in 2002 to review the progress in the implementation of Agenda 21, dedicated marginal attention to oceans and seas compared to other issues. Originally, oceans were not even listed on the agenda for the WSSD.[86] The Plan of Implementation adopted at the Summit (WSSD Plan) only deals with the marine environment in paragraphs 29-34 of Section IV on "protecting and managing the natural resource base of economic and social development" and most of the relevant provisions relate to fisheries.[87] Nevertheless, the contribution of the WSSD Plan to the preservation of the marine environment and marine life cannot be underestimated. In order to achieve the sustainable development of the oceans, the WSSD Plan urges States to ratify and implement the LOSC and to promote the implementation of Chapter 17 of Agenda 21.[88] The Plan reaffirms the commitments under Chapter 17 (e.g., an integrated approach to ocean management), but in some cases it attaches clear targets and timetables (e.g., the application of an ecosystem approach by 2010).[89] In addition, as will be discussed in Chapter 8.3.2, the WSSD Plan introduces new clear-cut targets (e.g., the establishment of a network of representative marine protected areas by 2012 and the elimination of destructive fishing practices by 2010), urging the international community to increase

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83 See, for instance, S.M. Schwebel (1999), pp. 413-15.

84 E.g., A. Yankov (1999), pp. 271-295.

85 See UN Programme for Further Implementation of the UNCED Agenda 21 in the Years 1997-2002 (UNGA Official Records, 19th Special Session, UN Doc. A/RES/S-19/2, Para. 36). The CSD was established by the UNGA in 1992 to review periodically the follow-up to Agenda 21. The CSD reported to the UNGA on the follow-up to Chapter 17 in April 1999 and in May 2001 (e.g., UNGA Res. 54/31 and 54/33, 24.11.1999; UNGA Res. 55/7, 30.10.2000 and UNGA Res. 56/12, 28.11.2001).

86 This was in part because ocean issues were considered as having been completely settled with the entry into force of the LOSC. See 2003 UNSG Report (A/58/50). The strong pressure exercised by governments, international organizations and NGOs during the preparatory process brought oceans, coasts and small island developing states (SIDS) back on to the Summit's agenda.

87 The Plan of Implementation (hereinafter WSSD Plan) and all documents adopted at the Summit are available at: http://www.johannesburgsummit.org/html/documents/documents.html

88 WSSD Plan, Para. 29(a) and (b).

89 See, e.g., WSSD Plan, Paras. 29(d) (e) and 31 (c).

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efforts to preserve marine life. Unlike Chapter 17, the WSSD Plan contains only a soft commitment to the precautionary approach, which in the past few years has lost much of its popularity.[90] On the other hand, the Plan reaffirms the need to conduct an EIA of all potentially harmful activities as a major tool to achieve sustainable development.[91] In addition, the Plan urges the wide ratification and effective implementation of existing marine Conventions and attaches great importance to the transfer of marine science and technology, as well as to the establishment of a regular reporting and assessment process by 2004 as a means of promoting compliance.[92] Like Chapter 17, the WSSD Plan calls for the strengthening of international cooperation and coordination both at the global and regional levels.[93]

In 2003, in the WSSD follow-up, the CSD established a multi-year programme of work for advancing the implementation of Agenda 21 and the WSSD Plan. Oceans and seas, marine resources and SIDS are not scheduled for review until 2014-2015, suggesting that the sustainable development of oceans and its resources is not a top priority on the global agenda.[94]

1.3 The Global Implementation Regime

1.3.1 "Generally Accepted" and "Applicable" International Rules and Standards adopted by the "Competent International Organizations"

UNCLOS III was not considered as the most appropriate forum to adopt operational provisions, which are usually highly technical and require great expertise. Besides, there were already a number of international regulatory instruments in place setting out technical standards (e.g., MARPOL 73/78; SOLAS 74 or the 1972 London Dumping Convention). Therefore, it appeared more convenient to establish the jurisdictional framework and to rely, by means of rules of reference, on the technical standards adopted by the competent organizations. More precisely, the LOSC requires contracting Parties

90 This is mainly due to the many uncertainties surrounding its content and legal status. The WSSD Plan recommends taking the precautionary approach "into account" only twice and not in relation to ocean matters (i.e., Paras. 22 and 103(f)). Also the 5th NSM Declaration (Bergen, 2002) refers to the precautionary "principle" only once in relation to sustainable fisheries (Para. 15). The recent proposal for an EC Marine Strategy Directive does not contain any reference to the precautionary principle.

91 The WSSD Plan refers five times to the need to conduct an EIA (e.g., Paras. 18(e), 34(c), 56 (h), 91(d) and 119). Also the 2002 NSMC Declaration contains a strong commitment to EIA (Para. 11(i) and Para. 32).

92 WSSD Plan, Paras. 34 (a) and 36(b). The latter paragraph has been endorsed in UNGA in Resolution 57/141 (Para. 45) and resolution 58/240 (Para. 64(a)).

93 WSSD Plan, Para. 29 (c) and (f).

94 The programme is available at: www.un.org/esa/sustdev/csd/csd11/CSD_mulityear_prog_work.htm.

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to give effect to the generally "accepted" or generally "applicable" international rules and standards adopted by "the competent international organizations", but does not define either of these terms and does not identify the competent organizations.[95]

The LOSC normally refers to generally "accepted" international rules and standards (GAIRAS) with regard to the exercise of prescriptive jurisdiction. It is largely agreed that standards are generally "accepted" when they meet the criteria of "widespread and representative participation".[96] These standards do not necessarily refer to customary rules or binding rules, but they might also include recommendatory instruments.[97] What is still controversial is whether GAIRAS apply to all contracting Parties to the LOSC regardless of their individual participation in the instrument containing the standards. The main argument against an extended application of GAIRAS relates to the highly technical nature of these standards which should only bind states which have expressly approved them. Such an extended application, moreover, would discourage and make it irrelevant for States to become parties to the regulatory instruments containing the standards, given that they would anyway be bound through their participation in the LOSC.[98] Conversely, according to most legal authors the extended application of GAIRAS is consistent with the need for uniformity and coherence pursued by the LOSC.[99] In their view States that voluntarily adhere to the LOSC have indirectly consented to be bound by GAIRAS. In addition, the duty under the LOSC to apply GAIRAS would work as an incentive for States to accede to the instruments containing these standards in order to enjoy the rights, not only the duties, contained in these Conventions.[100] This view has far-reaching implications for the European Community, which is a party to the LOSC, but is not a member of some international organizations (e.g., IMO and ILO) and cannot be a party to their regulatory instruments. Given that

95 As A. Blanco-Bazán (in M.H. Nordquist and J. Moore (eds.) (1999)) points out, this vague and ambiguous terminology is not to be attributed to poor draftsmanship, but is the result of a compromise.

96 E.g., E.J. Molenaar (1998), p. 156; B.H. Oxman (1991), p. 157 and A. Yankov in A.H.A. Soons (1990), p. 467. For a recent general discussion on GAIRAS see: E. Franckx (2003), pp. 20-3 and International Law Association (ILA), Final Report of the Sixty-Ninth Conference (hereinafter ILA 69), held in London in July 2000, pp. 34-6.

97 E.g., E. Franckx in H. Ringbom (ed.) (1997), p. 70; P.W. Birnie in H. Ringbom (ed.) (1997), p. 46; E.J. Molenaar (1998), p. 152. See also ILA 69, *supra* n. 96 Conclusion 2.

98 E.g., A. Blanco-Bazán in M.H. Nordquist and J. Moore (eds.) (1999), pp. 269-87 and Report of Workshop IV on "Protection of the Marine Environment" Proceedings of the 23rd Annual Conference of the Law of the Sea Institute, in: A.H.A. Soons (ed.) (1990), pp. 690-2.

99 See, *inter alia*, E. Franckx (2003), p. 22. See also ILA 69, *supra* n. 97, conclusions 5 and 6; R.R. Churchill and A.V. Lowe (1999), p. 347; R. Wolfrum (1999), p. 233; H. Ringbom (1999), p. 22; E.J. Molenaar (1998), pp. 157; E. Franckx, in H. Ringbom (ed.) (1997), p. 70; D. Bodansky (1991), pp. 742-3; B.H. Oxman (1991), p. 109; W. Van Reenen (1981), pp. 3-44.

100 See IMO Study, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization (IMO doc. LEG/MISC/3, 6.01.2003).

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for the purpose of this study most GAIRAS relate to vessel-source pollution and maritime safety, the issue will be discussed in further detail in Chapter 6.10.

On the other hand, the LOSC normally refers to generally "applicable" international rules and standards with regard to enforcement jurisdiction. These standards, therefore, require a higher level of acceptance and exclusively refer to regulatory Conventions to which the States concerned are parties.[101]

As far as the "competent international organizations" are concerned, the only indirect reference is contained in Article 2(2) of Annex VIII of the LOSC, which lays down the list of experts composing the Special Arbitral Tribunal. Such a list has to be established and maintained by the competent organization, namely: the Food and Agriculture Organization (FAO) in the field of fisheries; the Intergovernmental Oceanographic Commission (IOC) in the field of marine scientific research; the United Nations Environment Programme (UNEP) in the field of the protection and preservation of the marine environment in general; and the International Maritime Organization (IMO) in the field of navigation, including pollution from vessels and by dumping.[102] GAIRAS, however, may also be adopted by organizations other than those referred to in Article 2(2) of Annex VIII. The International Atomic Energy Agency (IAEA), for instance, is considered to be the competent organization for the adoption of the global standards for the safe transport of nuclear materials, while the International Labour Organization (ILO) is responsible for the regulation of working standards. Given the complexity and the cross-sectoral nature of marine environmental issues, the mandate of these organizations sometimes overlaps[103] and might result in duplications and inconsistencies.[104]

1.3.2 Multilateral Environmental Agreements (MEAs)

As discussed in 1.2.2.2, the LOSC (and Chapter 17 of Agenda 21) sets out the framework for the multilateral development of marine environmental rules and standards acting

101 E.g., E. Franckx (2003), p. 22; ILA 69, *supra* n. 96, p. 40; E.J. Molenaar (1998), p. 169; S. Rosenne and A. Yankov (eds.) (1991), p. 271; A. Yankov in A.H.A. Soons (ed.) (1990), p. 467.

102 Most of the shipping provisions of the LOSC (i.e., Articles 22(3); 41(4) (5); 53(9), 60(3), (5); 208(5), 211(2) (3), 217(1) (4), 218(1), and 220(2)) implicitly refer to the IMO as "the" competent international organization. Conversely, the LOSC provisions on dumping refer to the "competent international organizations", suggesting that the IMO is not exclusively competent concerning dumping, as this lies within the field of shipping.

103 This is the case, for instance, concerning the IMO's and UNEP's competences in dumping matters, the IMO's and IAEA's competences in safety issues, and the IMO's, UNEP's and UNESCO's competences in issues related to marine protected areas.

104 For instance, there seem to be some inconsistencies between the notification requirements for ships carrying hazardous wastes under the UNEP's 1989 Basel Convention for the Control of Transboundary Movement of Hazardous Wastes and their Disposal (28 ILM (1989), p. 657) and some IMO requirements under SOLAS.

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primarily within the competent international organizations. Most of this cooperation takes place within the framework of a number of MEAs, which extend their scope to oceans and seas, such as, *inter alia,* the 1992 UN Convention on Biological Diversity (CBD) or the 1972 UN Convention on the protection of international wetlands (Ramsar Convention). The relevant MEAs will be discussed in detail in the case-study chapters.

Generally speaking, all MEAs have a similar "three-pillar" structure based on a framework agreement, which lays down the objective, general principles and obligations and institutional arrangements; separate Protocol(s), which further specify the general obligations; and different Annexes (or Appendixes), which contain detailed standards or list the species or substances controlled under the agreement. The Conference of the Parties (COP), which is composed of all contracting parties, reviews the implementation of the framework agreement and keeps it constantly up to date. Amendments or adjustments to the Protocol(s) and the Annex(es) are adopted by the Meeting of the Parties (MOP), which is formed only by those contracting parties which have ratified the Protocol.[105] By participating in the work of these bodies, contracting parties implement their obligations under the MEAs and, indirectly, under the LOSC. MEAs, therefore, play a central role in the implementation of the LOSC.

Article 237 of the LOSC reinforces the link between the Convention and MEAs, making it clear that the provisions of Part XII are without prejudice to specific obligations assumed by states parties under other environmental agreements compatible with the Convention. These obligations, however, must be performed in accordance with the general principles and objectives of the LOSC.[106] In order to avoid inconsistencies, most of the relevant MEAs (e.g., CBD) expressly refer to the law of the sea as codified in the LOSC.

1.3.3 UN Agenda Item on Oceans and the Law of the Sea

The LOSC, unlike MEAs and other international Conventions, does not establish an institutional mechanism to keep its implementation under review.[107] The annual Meetings of the States Parties to the Law of the Sea Convention (SPLOS), unlike COPs/MOPs, only deal with budgetary and administrative matters and with the functioning of the institutions established under the Convention.[108] This choice has been influenced in part by the fact that most issues covered by the LOSC were already regulated under

105 For a detailed analysis of the structure of MEAs see: R. Churchill and G. Ulfstein (2000), pp. 623-659.

106 See also, LOSC, Article 311(2), which regulates the relationship between the LOSC and other compatible international agreements.

107 The LOSC establishes two complex amendment procedures, which are examined in Chapter 6.

108 LOSC, Article 319(2)(e); Annex II, Article 2(3) and Annex VI, Articles 4(4), 18, and 19.

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other institutional arrangements (e.g., within IMO or FAO).[109] Creating a specific institutional framework for the revision of substantive issues of the LOSC, therefore, would have been inefficient and redundant. Since 1983, the function of supervising the implementation of the LOSC has been taken over by the UN General Assembly (UNGA) under the agenda item "oceans and law of the sea", but without an explicit mandate in the LOSC.[110] The reasons for this choice, which are mainly of a political nature, have been exhaustively discussed elsewhere and will not be covered here.[111]

Ocean issues and the law of the sea are the object of a comprehensive annual review carried out by the UNGA on the basis of a Report prepared by the Secretary-General (i.e., the Secretariat's Division of Ocean Affairs and the Law of the Sea (DOALOS)) and the final recommendations of the Open-ended Informal Consultative Process on Oceans and the Law of the Sea (ICP). On the basis of Article 319(2)(a) of the LOSC,[112] the UN Secretary-General has received a general mandate to prepare a comprehensive annual report on the implementation of the Convention focusing on the main developments and issues relating to oceans and the law of the sea (UNSG Report).[113] Occasionally, the UNSG Report also takes note, in rather general terms, of the compliance and conformity of state practice with the LOSC.[114] The Report is submitted to the UNGA for its annual review and provides the basis for the discussion within the ICP. Established in 1999 to prepare and facilitate the UNGA debate, the ICP meets annually to discuss a number of topics related to the implementation of the LOSC and the latest developments in the law of the sea, which have been identified by the UNGA in its previous annual resolution.[115] The ICP meetings are open to the participation of all stakeholders involved in ocean affairs, including all UN members regardless of their membership in LOSC (e.g., the US), UN specialized Agencies (e.g., IMO, FAO, ILO), international organizations and regional economic integration organizations (EC), as well as NGOs. This process, therefore, allows all relevant legal, political, economic,

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109 For a detailed discussion on this topic, see A.G. Oude Elferink in A.G. Oude Elferink and D.R. Rothwell (eds.) (2004), pp. 295-312.

110 UNGA Resolution 37/66 (18.02.1983) and UNGA Resolution 49/28 (19.12.1994).

111 See: T. Treves in A. Oude Elferink (ed.) (2005), pp. 55-74; E. Hey in *ibid.,* pp. 75-88; and A.G. Oude Elferink in A.G. Oude Elferink and D.R. Rothwell (eds.) (2004).

112 LOSC, Article 319(2)(a) requires the UNSG to report on "issues of a general nature that have arisen with respect to this Convention".

113 UNGA Resolution 38/59 B, 14.12.1983 (Para. 8). The UNSG Report is normally published around March and may be integrated with further addition(s). UNSG Reports are available at: www.un.org/Depts/los/general_assembly/general_assembly_reports.htm.

114 The UNSG 2003 Report (A/58/65, Para. 57), for instance, noted that unilateral measures taken by some EC member states (e.g., France, Spain and Portugal) to ban ships from their EEZ are not in conformity with LOSC, Article 58. This remark has been contested by many, including the EC and its member states, as going beyond the UNSG's role.

115 The ICP (or UNICPOLOS) was established by UNGA Resolution 54/33, 24.11.1999, and its mandate has been renewed for another three years by UNGA Resolution 57/141, 21.02.2003. The ICP's Reports and recommendations are available at: www.un.org/Depts/los/consultative_process/consultative_process.htm.

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social and environmental aspects of ocean affairs to be addressed in an integrated manner. The ICP highlights the priorities of future common action, identifies additional issues that might require future attention and concludes with the adoption of final recommendations (so-called "agreed elements") to the UNGA. In several aspects, therefore, the ICP is *de facto* playing the role of a conference for the parties to the LOSC and represents the main forum for assessing the implementation of the Convention.

The UNGA normally endorses the ICP recommendations in its annual resolution on "*oceans and law of the sea*".[116] These Resolutions mostly relate to substantive matters, while jurisdictional issues and the conformity of state practice with the LOSC are covered in rather general terms. Despite their soft-law nature, UNGA Resolutions have strong political force. They set out the global political Agenda on "oceans and the law of the sea" for the coming year and identify the action to be taken by UN members, organs, and specialized agencies to achieve the LOSC's objectives. In this way they play a central role in the implementation of the LOSC and influence to a great extent the further developments of ocean policies and the law of the sea. Governments, including non-LOSC parties, attach great importance to full and effective participation in the UN ocean debate, which represents an important platform to promote their targets and defend their national interests at the international level.

Since 1997, the scope of the SPLOS's mandate has been the object of further discussions. LOSC parties are divided into those which support extending this mandate to the LOSC supervision process (e.g., most of the EC member states) and those which consider such an involvement to be an unnecessary duplication of the UNGA and ICP work (e.g., Japan, Norway, the UK).[117] Since the 10th session in June 2000, the issue has become a regular item on the SPLOS's agenda. The role of the SPLOS in reviewing the implementation of the Convention, therefore, might be subject to further evolution. For the time being, however, this does not seem to be very likely.

Finally, it is worth noting that global conferences (e.g., the Millennium+5 Summit, held in September 2005)[118] and global ministerial meetings (e.g., the annual ministerial environmental forum/UNEP Governing Council)[119] also play an important role in assessing major progress and obstacles encountered in the implementation of the international ocean regime and in identifying future challenges and items where further cooperation is needed. These political fora facilitate the better understanding of ocean

116 The UNGA may also adopt other Resolutions on ocean-related matters (e.g., sustainable fisheries). UNGA Resolutions are available at: www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm.

117 For a general discussion, see T. Treves in: A.G. Oude Elferink (ed.) (2005), pp. 62-5 and A.G. Oude Elferink (2004), pp. 306-19.

118 www.globalpolicy.org/msummit/millenni/. So far, UNESCO has organized three global conferences (the latest in January 2006) on "oceans, coasts and islands" to review the progress and obstacles in the implementation of the WSSD Plan at: www.globaloceans.org/paris3/.

119 E.g., UNEP Governing Council/Global Ministerial Environmental Forum, 23rd Session, 21-5 February 2005, available at: www.iisd.ca/unepgc/23gc/.

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issues in the light of the LOSC and Chapter 17 and give a fundamental impetus to their proper implementation.

1.4 The Regional Implementation Regime

1.4.1 Focus on Regional Cooperation

Both the LOSC and Chapter 17 of Agenda 21 place strong emphasis on regional cooperation, which is considered as the most efficient way to proceed when the nature of the problem or the geographical characteristics of the seas so indicate.[120] Regional rules consistent with the LOSC may well contribute to the effective implementation of the global regime, especially in relation to enclosed and semi-enclosed seas, which due to their oceanographic and ecological characteristics require special protection.[121] (Marine) environmental problems, moreover, may be tackled and monitored more effectively at the regional, rather than global level. In addition, regional agreements between states sharing similar interests normally result in a lower level of compromise, stronger commitments and higher environmental standards compared to global instruments.

As a result, in all major regional seas, from the Caribbean to the South Pacific Ocean, the ocean framework regime has been implemented by means of regional Conventions.[122] In European seas, which, with the exception of the North East Atlantic, are all semi-enclosed seas within the terms of Article 122 of the LOSC, the umbrella regime has been implemented within the framework of three main regional agreements, i.e.: the UNEP-sponsored 1976 Barcelona Convention for the protection of the Mediterranean and related Protocols, as amended, the 1992 OSPAR Convention for the Protection of the North-East Atlantic and North Sea, and the 1992 Helsinki Convention for the Protection of the Baltic Sea. These agreements, which in this study are referred to as "Regional Seas Conventions,"[123] set out the framework for closer regional cooperation between the neighbouring coastal States in the protection and preservation of the marine environment from all sources of marine degradation. This cooperation takes place primarily within the decision-making bodies established by the Conventions, which, therefore, represent the main fora for the implementation of the global regime at the regional level. The Regional Seas Conventions have many elements in common.

120 The LOSC calls for regional harmonization especially with regard to land-based pollution (Article 207 (3)) and marine pollution from seabed activities within national jurisdiction (Article 208(4)).

121 E.g., S. Rosenne and A. Yankov (eds.) (1990), p. 201.

122 Most of these agreements have been adopted under the auspices of the UNEP Regional Seas Programmes, consultable at: www.unep.org/water/regseas/regseas.htm.

123 This terminology is used bearing in mind that the term "Regional Seas Conventions" normally refers to the Conventions adopted under the UNEP Regional Seas Programme, *supra* n. 122.

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First of all, they have a similar structure, which closely mirrors the MEAs (i.e., a framework Convention supplemented by additional Protocol(s) and Annexes). Second, they do not contain jurisdictional rules, but normally refer to the regime set out in the LOSC.[124] Third, in the follow-up to UNCED, the three Conventions have undergone a similar revision process which brought them into line with the main goals, principles and approaches of Chapter 17 of Agenda 21. Finally, the regime established by the Regional Seas Conventions is generally stricter than the international one. The main elements of these Conventions are discussed in further detail in the following paragraphs.

In addition to the Regional Seas Conventions, a number of "sectoral" agreements play an important role in the implementation of the global regime in European Seas. These agreements vary in nature, ranging from regulatory instruments addressing specific sources of pollution (e.g., the Paris Memorandum of Understanding on Port State Control) to regional environmental agreements covering specific components of the marine environment (e.g., the Bern Convention for the Protection of European Habitats) or particular species in a specific geographical area (e.g., the 1991 Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (ASCOBANS)). The relevant "sectoral" agreements will be covered in detail within the case-study chapters.

Finally, regional political fora, such as the North Sea Ministerial Conferences (NSMCs), the meetings of the environmental ministers of the Baltic Sea States and the Council of the Baltic Sea States (CBSS), as well as the Euro-Mediterranean Process (Euro-Med), play an important role in the implementation of the global ocean regime at the regional level and strongly influence its further development.[125] Their role is to identify the specific problems of the region and possible solutions in order to speed up the decision-making process in the competent regional institutions (e.g., the EC, OSPAR, HELCOM, and BARCON). Despite their legally non-binding nature, the declarations adopted by these ministerial meetings provide the political impetus for the further work of the competent regional organizations and have a profound impact on their policies and legislation. Moreover, by endorsing most of the commitments of Agenda 21, regional ministerial declarations have encouraged the application of new objectives, principles and approaches in the European legal frameworks.[126]

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124 See: OSPAR Convention, Preamble, 1992 Helsinki Convention, Articles 10(2) and 11(3) and 1995 BARCON, Article 3.

125 NSMC are attended by the environmental ministers of Belgium, Denmark, France, Germany, the Netherlands, Norway, Sweden, the UK and the representatives of the EC. See, in general, P. Ehlers in D. Freestone and T. IJlstra (eds.) (1990), pp. 3-14, and Y. van der Mensbrugghe in *ibid.*, pp. 15-21. On the Baltic ministerial meeting see: <www.helcom.fi/ministerial_declarations/en_GB/declarations/>; on the CBSS see: www.cbss.st/; on the Euro-Med see: http://europa.eu.int/comm/external_relations/med_mideast/intro/. See, in further detail: Chapter 3.4.2.

126 See, for instance, *supra* n. 76.

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1.4.2 The 1992 OSPAR Convention

As do most semi-enclosed seas, the North Sea and other parts of the North-East Atlantic (e.g., the Irish Sea) require special protection. In addition, a number of geographical and socio-economic factors increase the environmental pressure in this region.[127] Some of the most polluted European rivers (e.g., the Elbe and the Rhine) flow into its shallow waters and shipping traffic in the area is particularly intense, connecting some of the major European ports (e.g., Antwerp, Rotterdam and Hamburg) to the Baltic Sea. The North Sea and the Irish Sea are among the world's largest oil and gas reservoirs and there is currently production from the continental shelves of Denmark, Germany, Ireland, the Netherlands Norway and the United Kingdom. The 1990 Hague NSMC devoted attention to the alarming level of marine pollution affecting the North-East Atlantic and the failure of the existing regime to ensure effective protection and called for a new approach.[128] As a response, in 1992, in the follow-up to Agenda 21, the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) was signed, replacing the 1972 Oslo Dumping Convention and the 1974 Paris Convention on Land-based Pollution.[129]

The OSPAR Convention establishes a comprehensive legal framework for the protection of the marine environment of the North-East Atlantic Area from all sources of marine degradation (not only pollution), except fishing, atmospheric and vessel-source pollution, which are considered to be appropriately regulated within other frameworks.[130] The regime set out by the Convention is particularly stringent and innovatory. Parties are required to take all necessary measures not only to prevent, but also to "eliminate" marine pollution and "any other adverse effects of human activities" on the marine environment, including ecosystems, and to "restore", when practicable, marine areas which have been adversely affected.[131] The Convention, moreover, applies to all maritime zones within and beyond national sovereignty and jurisdiction, including internal waters and the high seas (in accordance with international law).[132] The body

127 On the state of the marine environment in the region see, e.g., OSPAR, Quality Status Report 2000 for the North-East Atlantic, available at: <http://www.ospar.org/eng/html/>.

128 On the impact of the NSMC on the work of OSPAR see: J.B. Skjaerseth (2003); E. Hey, T. IJlstra, A. Nollkaemper (1993), p. 2.

129 Convention for the Protection of the Marine Environment of the North-East Atlantic, adopted in Paris on 22.09.1992 and entered into force on 25.03.1998. OSPAR currently has 15 contracting parties: i.e., Belgium, Denmark, the EC, Finland, France, Germany, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Switzerland and the UK. The Convention is open to participation by the Russian Federation, (as a Barents Sea coastal State) and the Czech Republic (as a riparian State of the river Elbe) (OSPAR, Article 25). For a detailed analysis of the OSPAR Convention see: E. Hey (2002), pp. 325-350; L. de la Fayette (1999), pp. 247-297; E. Hey, T. IJlstra and A. Nollkaemper (1993).

130 OSPAR, Preamble.

131 OSPAR, Articles 1(a),(d) and 2(1).

132 Earlier Regional Seas Conventions did not apply to internal waters.

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of the Convention sets out in legally binding terms the principles and approaches of Agenda 21 (e.g., sustainable development, precautionary principle, polluter-pays principle, BAT and BET),[133] broad obligations for contracting parties and more detailed powers and duties of the OSPAR Commission (OSPARCOM).[134] These are further specified in a number of Annexes and Appendixes, which form an integral part of the Convention and have the same legal status.[135] Additional Annexes may be adopted in the future to address new issues as long as they are not "already the subject of effective measures agreed by other international organizations or prescribed by other international conventions" (Article7). This allows the OSPAR regime to extend its scope to new marine threats, avoiding duplication of work undertaken by other bodies.

The OSPARCOM plays a central role in the implementation and enforcement of the Convention. It may adopt legally binding decisions and non-binding recommendations, which have a political weight similar to the NSMC declarations (Articles 10-13). Decisions and recommendations are taken by unanimity or, when this is not possible, by a three-quarters majority (i.e., 11 votes out of the 14 parties plus the EC). In addition, OSPARCOM may avail itself of a newly established non-compliance mechanism to ensure or facilitate the proper implementation of OSPAR provisions/decisions/recommendations. This mechanism is much more stringent compared to that under MEAs, but its effectiveness largely depends on the initiative of the OSPARCOM (Articles 22 and 23). Parties are under a duty to periodically report on measures taken to implement OSPAR provisions, decisions and recommendations, as well as on the effectiveness of these measures and the obstacles encountered. On the basis of these reports the OSPARCOM decides, "when appropriate", on the necessary steps to bring about full compliance with OSPAR provisions and decisions or to promote the implementation of its recommendations. The Commission, however, has a high level of discretion in deciding "when it is appropriate" to act and what steps should be taken.[136]

Cooperation among OSPAR contracting parties at the decision-making level takes place within the annual meetings of the OSPARCOM, and at the working level within

133 OSPAR, Article 2(2). Conversely, most MEAs enunciate the general principles in the preamble, not in their operative part.

134 The Commission is made up of representatives of each of the contracting Parties and it is not a separate international body. However, it has its own duties, which are generally described in Article 10 of the OSPAR Convention and further specified in the Annexes to the Convention.

135 I.e., Annex I (land-based pollution), Annex II (dumping and incineration), Annex III (offshore sources), Annex IV (assessment of the quality of the marine environment) and Annex V (protection and conservation of ecosystems and biodiversity), as well as Appendix 1 (guidelines for the definition of BAT and BET), Appendix 2 (criteria for the adoption of programs to combat land-based pollution and offshore sources of pollution) and Appendix 3 (criteria for the identification of human activities that may have an adverse effect on the marine environment).

136 As will be discussed in further detail in Chapters 6.5.4 and 8.5.1, the OSPARCOM has no competence in fisheries and shipping matters.

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three management and advice bodies, as well as six main committees and eight working groups dealing with sectoral issues and preparing the work of the OSPARCOM.[137] All these meetings are normally attended by officials from the Ministry of the Environment of the contracting parties and representatives from the European Commission (Directorate General Environment (DG ENV)).[138] In addition, OSPARCOM ministerial meetings may be held to determine the guidelines for future work under the Convention.[139] The OSPAR's Agenda, therefore, appears to be quite full and it is rather demanding for contracting parties to attend all the meetings.

At the first ministerial meeting of the OSPARCOM, held in Sintra in 1998, the regime established by the OSPAR Convention was reinforced with ambitious targets and deadlines. So far, this regime and the cooperation between OSPAR contracting parties have produced important results in terms of a reduction in the traditional sources of pressure in the area.[140] However, there are still problems in implementation and monitoring, mainly because of resource constraints.

1.4.3 The 1992 Helsinki Convention

Compared to other European seas, the Baltic Sea is particularly vulnerable to pollution and requires a higher level of protection.[141] Its waters are very shallow, with a maximum depth of 210 meters, and its rather restricted circulation makes it particularly difficult to clean up any pollution. After two decades of operation, the 1974 Helsinki Convention did not succeed in arresting marine degradation in the Baltic Sea Area.[142] In the follow-up to Agenda 21, under the political impetus of the Baltic Ministerial Declarations, the Baltic coastal states decided to adopt new approaches and to strengthen the existing legal regime.[143] The political changes which occurred in the region at the beginning of the 1990s, moreover, created the political momentum for the adoption of a new Convention. The new 1992 Helsinki Convention, which entered into force

137 On the OSPARCOM's Rules of Procedure: Organization, Committees and Working Groups see: www.ospar.org/eng/html/welcome.html.

138 Only in France is the competent ministry the Ministry of Foreign Affairs.

139 So far, two main OSPARCOM ministerial meetings have been held, in June 2003 in Bremen and in 1998 in Sintra.

140 See OSPAR, Quality Status Report 2000, at www.ospar.org/eng/html/welcome.html.

141 On the state of the Baltic Sea, see: GIWA Regional Assessment at: www.giwa.net/publications/r17.phtml.

142 Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, 22.03.1974. For a detailed analysis of the Helsinki Convention see: M. Fitzmaurice (1998), pp. 379-93; P. Ehlers (1993), pp. 191-15; U. Jenisch (1996), pp. 47-67.

143 See, e.g., 1988 Ministerial Declaration of the Baltic environmental ministers calling for a 50% reduction of heavy metals, nutrients and other toxic and persistent pollutants by 1995. Baltic ministerial declarations (available at: www.helcom.fi/ministerial_declarations/en_GB/declarations/) have driven the work of HELCOM.

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on 17 January 2000, is particularly advanced and presents many similarities with the 1992 OSPAR regime.[144]

The 1992 Helsinki Convention sets out a comprehensive legal framework for promoting the "ecological restoration" of the Baltic Sea, "eliminating" pollution from all sources and reducing "adverse impacts of human activities" on "marine ecosystems".[145] Unlike the OSPAR, the Helsinki Convention contains some general provisions on shipping and does not expressly exclude fishing. Its regime, like OSPAR, applies to waters under the sovereignty and jurisdiction of the contracting parties, including internal waters. There are no high seas in the Baltic.

The body of the Convention lays down in binding terms the general environmental principles and approaches of Agenda 21 (i.e., precautionary principle, the polluter pays principle, the integrated approach, BAT and BET, and EIA),[146] broad obligations for contracting parties with a strong emphasis on co-operation, notification, consultation and reporting,[147] and more detailed provisions for the Baltic Marine Environment Protection Commission (HELCOM). These general provisions are further specified in a number of Annexes that have the same legal status as the Convention.

The main task of HELCOM is to monitor and keep under review the implementation of the Convention. Unlike OSPARCOM, however, HELCOM cannot adopt binding decisions, but only recommendations on measures related to the purposes of the Convention.[148] These recommendations, however, are adopted by unanimity and have great political weight. HELCOM meetings take place annually and are attended by senior officials from the environment ministries of the contracting parties accompanied by national experts and from the representatives of the European Commission (DG ENV). This state of affairs has been the subject of some criticism. [149]First of all, the fact that officials, and not ministers, participate in the work of HELCOM seems to weaken the political weight of the HELCOM recommendations. In addition, officials, unlike ministers, have to follow political instructions from their governments and are not in a position to take immediate decisions. This situation, together with the unanimity rule, may lead to considerable delays in HELCOM decision-making and postpone important issues to the next annual meeting.

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144 Helsinki, 9.04.1992, entry into force on 17.01.2000, replacing the 1974 Convention. The 1992 Helsinki Convention has 10 contracting parties, i.e., Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland, Russia, Sweden and the EC.

145 1992 Helsinki Convention, Articles 1 and 5. The definition of marine pollution explicitly includes any adverse impact on marine ecosystems (ibid. Article 3(1)).

146 *Ibid.*, Article 3(2),(3),(4) and (5) and Article 7.

147 *Ibid.*, Articles 13, 14 and 16.

148 *Ibid.*, Articles 19, 20 and 21.

149 See P. Ehlers, "HELCOM Ministerial Declarations - Milestones and Driving Forces", paper presented at the international conference held in 2004 on the 30th anniversary of the Helsinki Convention, "International Co-operation for the Baltic Sea Environment: Past, Present and Future", available at: www.lva.gov.lv/eng/helcom/conf/VidAgentura-Brosura-Papildus.pdf.

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Cooperation between contracting parties at the working level takes place within five main groups which prepare the work for HELCOM and, at a higher level, within the meetings of the Heads of Delegations (HOD) and HELCOM, where decisions are taken.[150] Considering that each group meets at least once a year, it is rather demanding on the contracting parties to attend all the meetings on the Helcom's Agenda.

So far, cooperation between the Baltic coastal states has been rather successful, but there are still serious implementation gaps.[151]

1.4.4 The 1976 Barcelona Convention (BARCON) and its Protocols, as Amended

The Mediterranean Sea is Europe's largest and deepest sea.[152] It is connected to the Atlantic Ocean through the narrow Straits of Gibraltar (i.e., 14 kilometres wide) and its water exchange is very slow. Like other semi-enclosed seas, therefore, the Mediterranean Sea is particularly vulnerable to pollution and other sources of pressure on the marine environment. Compared to other European seas, the situation in this region is rendered particularly difficult by socio-economic factors, including the presence of many developing countries and countries with economies in transition, political problems, including maritime delimitations and sovereignty issues, and the particular juridical state of the Mediterranean Sea. So far, for geopolitical and economic reasons, the Mediterranean coastal States have been reluctant to establish an EEZ in their Mediterranean waters.[153] As a consequence, the capacity of coastal States to adopt unilateral protective and conservation measures is restricted to the 12 n.m. limit. Beyond that limit, coastal States may only control activities under national jurisdiction. The effective protection of the Mediterranean Sea therefore requires a particularly high level of cooperation compared to other regional seas, not only between coastal States, but also with all states operating in the area.[154]

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150 See: www.helcom.fi/groups/en_GB/groups/.

151 See: 2004 international conference for the 30th anniversary of the Helsinki Convention, *supra* n. 150.

152 E.g., European Environmental Agency (EEnvA), State of and pressures on the marine and coastal Mediterranean environment (2000), at: http://reports.eea.eu.int/medsea/en/medsea_en.pdf.

153 Given that in the Mediterranean no point is more distant than 200 n.m. from the opposite land, if all coastal States established an EEZ, there would be no high seas left in the Mediterranean. Egypt (1981), Morocco (1983), and Cyprus (2004) have proclaimed an EEZ in the Mediterranean, but have not yet adopted any implementing legislation. Other Mediterranean coastal States (Algeria, Malta, Spain and Tunisia) have established "fishing zones" or "zones of ecological protection" (Croatia and France) extending beyond their territorial sea. See, in general, C. Chevalier (2005) and T. Scovazzi, (1999).

154 The 1995 BARCON, Article 4 (6) indeed calls on contracting parties to promote the adoption by competent international organizations of environmental measures for the Mediterranean.

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The 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution (BARCON) is the oldest of the UNEP's Regional Seas Agreements and sets out the general framework for cooperation in the protection of the Mediterranean Sea from several sources of pollution (e.g., dumping, accidental and operational discharges from ships, exploration and exploitation of the continental shelf, and land-based activities).[155] In 1995, in the UNCED follow-up, the Barcelona system went through a revision process, which extended its objective[156] and brought the Convention into line with the main principles and goals of Chapter 17.[157] The structure of the Convention is very similar to that of the OSPAR and Helsinki Conventions. Its body contains general principles (i.e., sustainable development, the precautionary principle, the duty to carry out an EIA, the polluter pays principle, integrated management, the use of BAT and BET),[158] general obligations for contracting parties to control several sources of pollution and to protect and preserve biodiversity,[159] monitoring, reporting and technical cooperation,[160] and procedural and institutional rules.[161] All the general provisions are further specified in eight Protocols which form an integral part of the Convention.[162] The Barcelona regime, like OSPAR, applies to internal waters and the high seas in accordance with the LOSC and international law (Articles 1 and 3). The revised BARCON, moreover, introduced a non-compliance procedure which mirrors the OSPAR Convention (Article 27).

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155 The Barcelona Convention for the Protection of the Mediterranean Sea against Pollution, 16.02.1976 (15 ILM (1976) 290), entered into force on 12.02.1978, as amended. Currently, the BARCON has 22 parties: i.e., Albania, Algeria, Bosnia and Herzegovina, Croatia, Cyprus, Egypt, France, Greece, Israel, Italy, Lebanon, Lybia, Malta, Monaco, Morocco, Serbia and Montenegro, Slovenia, Spain, Syria, Tunisia, Turkey and the EC. See in detail T. Scovazzi (1999), pp. 82-99.

156 The main objective is to "prevent, abate, combat and to the fullest possible extent eliminate pollution […] and to protect and enhance the marine environment in that area so as to contribute towards sustainable development" (1995 BARCON, Article 4(1)).

157 The amended Convention (renamed: "Convention for the protection of the marine environment and the coastal region of the Mediterranean") (UNEP (OCA) MED IG.6/7, 9-10.06.1995) entered into force on 9.07.2004 for all contracting parties except for Bosnia and Herzegovina, Israel, Lebanon, Libya, Morocco, and Serbia and Montenegro, see: www.unepmap.org/Archivio/All_Languages/WebDocs/WordDocs/StatusOfSignaturesAndRatifications.doc.

158 1995 BARCON, Article 4.

159 *Ibid*., Articles 5-11. Article 14, moreover, requires the adoption of environmental legislation to implement the Convention and its Protocols.

160 1995 BARCON, Articles 12, 13 and 26.

161 In addition, there are provisions on liability and compensation (ibid, Article 16), dispute settlement (Article 28) and arbitration (Annex A).

162 Existing protocols (available at: www.unepmap.org/home.asp) cover dumping pollution, prevention and emergencies, land-based sources, specially protected areas, offshore activities, and transboundary movement of hazardous waste. A new protocol on integrated coastal zone management is in the course of completion.

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The BARCON is administered by UNEP, which carries out secretariat functions (Article 17), while five "regional activities centers"(RACs) assist the contracting parties in the implementation of their obligations under the different Protocols.[163] Meetings of the Contracting Parties (MOPs) are convened every two years on a ministerial level to review the implementation of the Convention and its Protocols, acting by qualified majority.[164] The MOPs normally conclude with the adoption of a ministerial declaration, which despite its legally non-binding nature has great political weight and sets out the guidelines for future work under the Convention. The work of the MOP is prepared by the National Focal Points, who are senior officials from the environmental ministries of the states parties plus the representative from the European Commission (DG ENV), and within a number of working groups attended by officials and/or national experts discussing key issues related to the scope of the BARCON.[165] The BARCON's agenda is not as full as those of OSPARCOM and HELCOM, but is also quite challenging.

The strong political, economic and social diversity among Mediterranean coastal States and the numerous problems affecting the area have made cooperation in the region quite difficult. The Barcelona regime, moreover, suffers from strong implementation gaps, while lack of monitoring and reliable data represent additional problems.[166]

1.5 The Present Limits of and Future Challenges for the International Regime

In December 2002, on the 20th anniversary of the adoption of the LOSC, it was apparent that the regime established by the Convention had achieved important results in tackling traditional sources of marine pollution, but had generally failed to arrest marine degradation and the depletion of its resources.[167] The main cause of this failure is the general lack of implementation and enforcement of existing rules. For many governments, especially maritime states and developing countries, short-term economic benefits often prevail over long-term environmental policies. So far, therefore, they have been unwilling to comply fully with their international obligations or simply have been unable to do so, due to the lack of adequate legal and institutional frameworks and financial constraints. The proliferation of global, regional, and sub-regional instruments; the resulting

163 Details on the Mediterranean Action Plan (MAP) and the BARCON institutional structure are available at: www.unepmap.org/home.asp.

164 1995 BARCON, Article 18. MOPs also decide on budgetary issues and fix the working programme for the following biennium.

165 All Reports are available at: http://195.97.36.231/dbtw-wpd/sample/Final/MAPPredefined.htm.

166 See, e.g., EEnvA, Third Environmental Assessment of the European Environment (2003).

167 E.g., UNGA 57, commemorative meeting for the 20th Anniversary of the LOSC, 9-10 December 2002, at: www.un.org/Depts/los/convention_agreements/convention_20years/oceanssourceoflife.pdf. See also May 2001 Report of the CSD, *supra* n.85, on the major achievements and challenges related to the implementation of Chapter 17, available at: http://earthwatch.unep.net/oceans/index.php

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patchwork of rules; and the inadequacy of existing financing and monitoring mechanisms make implementation increasingly complex.[168] In addition, traditional enforcement mechanisms may be difficult and economically too costly for some States. The increasing resort to voluntary instruments, such as guidelines, codes and recommendations, moreover, make enforcement particularly complicated. As a response, in the past two decades, most MEAs and Regional Seas Conventions established non-compliance procedures, which intend to assist States to meet their international duties by providing administrative, technical and economic support. In addition, increasing attention has been placed on assessing, monitoring and reporting.[169] Nevertheless, progress has so far been slow and existing procedures still appear to be inadequate to bring about full compliance, which ultimately depends on the States parties.

Regional Seas Conventions have the potential to fill most gaps in the global regime. However, the use of soft law and policy instruments together with financial, institutional and political constraints have, so far, prevented regional Conventions from being fully effective.

There are currently many international organizations and bodies involved in the implementation of the LOSC. In the UNCED follow-up, new steps have been taken towards enhancing coordination and cooperation. Since January 2005, a new mechanism has been established (i.e., the Oceans and Coastal Areas Network (UN-Oceans), to review joint and overlapping activities. Despite the progress that has been made, the level of coordination does not yet seem to be completely satisfactory.

The main challenges for the future, therefore, are the full implementation of existing rules, a comprehensive and integrated approach to ocean management as well as an effective level of coordination among all bodies and processes involved in ocean affairs.[170]

1.6 Conclusions

The LOSC places states under a positive legal duty to protect and preserve the marine environment and sets out the framework for future action. Chapter 17 of Agenda 21, moreover, establishes the objectives, principles and approaches which have to guide states in implementing their obligations under the LOSC. The LOSC and Agenda 21 recognize that marine environmental problems are closely interrelated and cannot be tackled in isolation, but require an integrated and comprehensive approach and environmentally sound economic development. In addition, they both place strong emphasis

168 The CSD report, *supra* n. 85, Para. 26.

169 E.g., UNSG Report on "Regular process for a global reporting and assessment of the state of the marine environment, including socio-economic aspects", UN doc. A/60/91, 24.06.2005.

170 E.g., UNSG 2005 Report (A/60/63. Add 2), Para. 113. See also: 2005 World Summit Outcome, in UNGA 60/L.1, Para. 56(l).

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on international and regional cooperation and the multilateral development of international rules and standards.

The implementation of the global regime on ocean preservation therefore takes place at three different levels: (a) at the global level, within the competent international organizations and the main political fora; (b) at the regional level, within the Regional Seas Conventions and the main regional political fora and (c) at the national level. Implementing measures need to be consistent with the jurisdictional framework set by the LOSC, which places some limits on the capacity of coastal States to take action.

In the past three decades the LOSC has provided the legal basis for the adoption of an extensive corpus of international instruments of a different legal nature, at the global, regional, subregional levels, covering a variety of sources of pressure on the marine environment and its components. Ensuring the full implementation of and consistency among all these instruments represents the main challenge for the future. As will be observed in the course of this study, the European Community framework offers important tools to meet such a challenge in European seas. On the other hand, the implementation of the LOSC in Europe encounters additional difficulties due to the particular status of the EC and the special relationship with its member states. The following chapters will identify the main advantages and disadvantages to the participation of the European Community next to its member states in each of the three levels of implementation mentioned above.

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CHAPTER 2

The Legal Framework for European Community (EC) Action to Protect and Preserve the Marine Environment

2.1 Introduction

The implementation of the international ocean regime in European seas must be examined in the context of the unique legal and political structure of the Community and the special relation with its member states. The present chapter provides some general remarks on the main elements which makes the EC system a "new legal order of international law", including its legal subjects, sources, institutional framework, instruments, decision-making processes and compliance mechanisms. The focus of the discussion is on European environmental law and the capacity of the Community to take action at the internal and international levels concerning matters related to the protection and preservation of the marine environment. Particular attention is given to the rules and principles justifying "*when*", "*whether", "to what extent"* and *"in what manner"* the Community may act. With the evolution of the European integration process, the member states have transferred, completely or partially, explicitly or implicitly, some of their powers to the Community, thereby limiting their capacity to take autonomous action at the national and international levels. The Community capacity to act, generally defined as "competence", is not unlimited, but derives from the attribution of powers under the EC Treaty (the principle of attribution). Such a (shared) competence, moreover, has to be exercised according to the fundamental principles of EC law (i.e., subsidiarity and proportionality) and guiding principles of European environmental law (e.g., integration, regional differentiation, precautionary principle). These principles are essential in order to understand the Community's approach to ocean preservation and the manner in which it implements its commitments under the international ocean regime, which will be discussed in detail in Chapter 3. Different from the "existence" of a Community competence is the "nature" of its powers, which may be exclusive or shared with the member states. Defining the nature of the EC competence is a fundamental step in determining the division of powers between the EC and its member states, which will be covered separately in Chapter 4. Chapter 2 concludes with some final considerations of the possible added value of the Community legal system for the proper implementation of the international ocean regime in the European seas. The discussion does not pretend to be exhaustive, but provides an important starting point for conducting the analysis in the following chapters.

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2.2 Mechanisms of European Integration

2.2.1 Legal Subjects

At the time of its creation in 1957, the then European Economic Community (EEC) was conceived as a purely economic organization whose primary objective was the establishment of a common market without internal borders or trade barriers between the member states. In addition, the member states created the European Atomic Energy Community (EURATOM), which is a legal entity different from the EEC with a separate legal personality, but acting through the same institutions.[1]

With the development of the European integration process and the further amendments of the original Treaty, the EEC evolved into a wider entity, which includes, *inter alia*, environmental protection among its primary objectives.[2] In 1992, the Maastricht Treaty formalized this development and transformed the original EEC into the European Community (EC), normally referred as the "Community".

The 1992 Maastricht Treaty, moreover, extended the cooperation between the EC member states beyond economic integration and related matters by establishing a European monetary and political union, i.e., the European Union (EU).[3] The EU was conceived as an overarching political entity formed by the Community and its member states cooperating intergovernmentally in matters of common foreign and security policy (CFSP) and with cooperation in justice and home affairs (JHA). There was no intention to create an international legal person separate from the existing Community(ies), equipped with its own treaty-making powers and able to undertake international obligations.[4] The EU does not have its own institutional structure, it may only act through its components: i.e., the Community and the member states.

The EU legal system, therefore, is a complex legal order based on three pillars: the EC and EURATOM (first pillar) plus two intergovernmental pillars: the CFSP (second pillar) and the PJJC (ex JHA) (third pillar).[5] The EU's action under the two intergovernmental pillars is governed by different mechanisms, decision-making and instruments, compared to the EC action under the first pillar. The member states are

1 Both the EEC Treaty and the EURATOM Treaty were signed in Rome on 25 March 1957 and entered into force on 1 January 1958.

2 See, in general: P. Craig and G. de Búrca (2003), pp. 1-52; F.G. Jacobs (2004), pp. 303-16; J. Monar and W. Wessels (2001); A. Moravcsik (1999); D. Urwin (1995).

3 See, in general, P. Craig and G. de Búrca (2003), pp. 24-9. The consolidated text of the Treaty on the European Union (EU Treaty) is available at: http://europa.eu.int/eur-lex/lex/en/treaties/index.htm.

4 The EC Treaty, Article 281, makes explicit reference only to the legal personality of the EC. Conversely, there is no reference to the legal personality of the EU in the EU Treaty. See J. Klabbers in: M. Koskenniemi (1998), pp. 231-53 and I. Macleod *et al.* (1996), p. 25.

5 With the Treaty of Amsterdam, part of the third pillar (asylum and immigration policies) has been transferred to the first pillar (EC). Currently, the third pillar deals only with policy and judicial cooperation in criminal matters.

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the main actors here and the EC institutions play a secondary role. This study focuses mainly on the law of the first pillar (i.e., EC or Community law), while the second and the third pillars (i.e., non-EC law) are covered only marginally.

Bearing in mind the fundamental difference between the EC and the EU, it has become common practice in the field of external relations to refer to the EU to indicate the member states and the Community also when matters under the first pillar are on the table.[6] This is mainly in order to simplify relations with third countries. For similar reasons, the Treaty establishing a Constitution for Europe, which has not yet entered into force, unified the EU and the EC into a single entity (Article IV-438 (1)) with a single legal personality (Article I-7) and abolished the three-pillar structure but internally the original distinction still remains.[7]

At present, the EU/EC has 25 member states (Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom), two acceding countries (Bulgaria and Romania) are expected to join in 2007 and there are three candidate countries (Croatia, the Former Yugoslav Republic of Macedonia and Turkey).[8]

2.2.2 The EC System as a "New Order of International Law"

The European Community system is part of public international law, but it has its own peculiarities, which make it a "new legal order of international law".[9] Born out of an international agreement between contracting parties, the EC legal order has progressively evolved into something which is rather innovative, dynamic and effective compared to other international regimes.[10]

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6 See, e.g., http://europa.eu.int/comm/external_relations/env/index.htm.

7 Treaty establishing the Constitution for Europe, signed in Rome on 29.10.2004, not yet in force. Text available at: http://europa.eu.int/constitution/en/lstoc1_en.htm. On the main changes brought about by the Constitution see: A. Dashwood (2004), pp. 355-81.

8 In addition, there are three potential candidate countries: Albania, Bosnia and Herzegovina, and Serbia and Montenegro. For more information about enlargement see: http://europa.eu.int/comm/enlargement/enlargement.htm.

9 E.g., Case C-26/62, *Van Gend en Loos*. For a general discussion see: A. Dashwood (2004), pp. 376-80 and C.W.A. Timmermans (1999), pp. 181-94.

10 See D. Bethlehem in: M. Koskenniemi (ed.) (1998), p. 184.

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The Community legal order is subordinate to international law,[11] but has supremacy over national law.[12] According to the principle of supremacy, member states have to abstain from taking any measure, including national legislation or the conclusion of international agreements, which is inconsistent with Community law, and must always give preference to Community law over conflicting national law.[13] Under particular conditions, moreover, Community legislation may have "direct effect" and extend to non-state actors, including individuals, granting them rights which may be enforced before national courts.[14] As will be discussed in the following paragraphs, the strong institutional framework and the progressive extension of qualified majority voting (QMV) in the Council provide the Community's system with a strong autonomy from the national systems of the member states.

2.2.3 Sources of EC (Environmental) Law

The Community legal order is based on five main sources. First, the constitutive Treaties (i.e., the 1957 Treaty of Rome establishing the EEC, the 1957 Treaty of Rome establishing the EURATOM and the 1992 Maastricht Treaty establishing the EU, insofar as this has amended the EEC Treaty), their Annexes and Protocols and all subsequent amendments (i.e., the 1987 Single European Act, the 1996 Amsterdam Treaty, and the 2001 Treaty of Nice) set out the Community's constitutional framework and represent the primary source of Community law.[15] If, in the future, the European Constitution will enter into force, it will replace the EC and EU Treaties (but not the EURATOM Treaty).[16]

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11 On the relation between EC law and customary international law see: e.g., Case C-4/73 *Nold*, Para. 507; Case C-61/94, *Commission v. Germany*, Para. 52; and Case T-115/94, *Opel Australia*, Para. 90. On the relation between EC law and international agreements concluded by the Community, see *infra* section 2.2.3.

12 E.g., Case C-6/64, *Costa v. ENEL*. The supremacy is now expressly codified in Article I-10 (1) of the EU Constitution. See in general, P. Craig and C. de Búrca (2003), pp. 275-315 and D. Bethlehem in M. Koskenniemi (ed.) (1998), pp. 169-96.

13 Any conflicting national provisions, whether prior or subsequent, are automatically inapplicable and national courts cannot take such provisions into consideration (e.g., Case C-106/77 *Simmenthal*, and, recently, Joined cases C-10-22/97, *IN.CO.GE '90 Srl)*.

14 For a detailed discussion on the direct effect see: S. Prechal (2005), pp. 216-70 and P. Craig and C. de Búrca (2003), pp. 178-229.

15 The consolidated version of the European Community Treaty (EC Treaty), after the entry into force of the Treaty of Nice on 1 February 2003, is available at: http://europa.eu.int/eur-lex/lex/en/treaties/index.htm.

16 Article IV 437 (1). The EU constitution should enter into force on 1 November 2006 provided that all instruments of ratification have been deposited. So far, only 14 out of the 25 member states (i.e., Austria, Cyprus, Estonia, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Malta, Slovakia, Slovenia, Spain, and Sweden) have ratified either by national parliaments or by referenda. After the negative outcome of the referenda in the Netherlands and France it is very unlikely that the Constitution in its present form will ever enter into force.

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The case law of the European Court of Justice represents another important source of EC law.[17] In performing its duties, indeed, the Court not only implements existing law, but in most cases provides new interpretations, which contribute to a large extent to its further development.

International agreements concluded by the Community according to the procedure laid down in the EC Treaty, as well as binding decisions adopted by the bodies established by these agreements, constitute another primary source of EC law and are binding on the Community's institutions as well as on member states (Article 300(7) EC).[18] According to the Court, these agreements become an integral part of EC law.[19] They prevail over EC secondary legislation[20] and, in some cases, they may have supremacy over the Treaty.[21] The supremacy of the EC Treaty, however, is without prejudice to the validity and enforceability of the international agreements under international law.[22]

The legislative acts of the Community institutions adopted in conformity with the Treaties represent a secondary source of EC law.[23] Article 249 EC lists five different types of Community legislation (i.e., regulations, directives, decisions, recommendations and opinions).

Regulations have general application, are binding in their entirety and are directly applicable to all member states without the need to be transposed into national law. Regulations are mostly used to implement international agreements and whenever there is a need for a more uniform regime.[24] In the absence of an explicit derogation clause, regulations do not allow member states to adopt different (either more or less stringent)

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17 See, e.g., Opinion 1/91 (Paras. 21 and 46) and Case C-294/83 *"Les Verts"* (para. 23).

18 In Case C-30/88, *Greece v. Commission* (Para. 13), the Court made it clear that binding decisions taken by the bodies created by an international Convention also become an integral part of EC law in the same way and with the same consequences as the agreement itself. See, in general: E. Hey and A. Nollkaemper (1995), p. 296; I. McLeod *et al*. (1996), p. 138; B. Martenczuk in: V. Kronenberg (ed.) (2001), pp. 155-63; A. Peters (1997), pp. 12-13; C.W.A. Timmermans (1999), p. 189. See also *infra* Chapter 4.4.

19 *Inter alia*, Opinion 2/94, Para. 24; Case C-181/73 *Haegeman*, Para. 3; Case C-12/86, *Demirel*, Para. 7. See, in general: I. Macleod *et al*. (1996), pp. 133-37.

20 See, *inter alia*, Case C-377/98, *The Netherlands v. European Parliament and Council*, Para. 53; and Case C-61/94, *Commission v. Germany*, Para. 52.

21 This, however, is still a controversial point. In Case T-306/01 (Yuzuf Case) the Tribunal of First Instance recognized the supremacy of a Security Council Resolution over the EC Treaty. See Tomuschat (2006), pp. 537-51.

22 Opinion 1/00, Paras. 20-21.

23 For a detailed analysis of the instruments of EC law see: P. Craig and G. de Búrca (2003), pp. 111-17, and L. Kramer (2000), pp. 38-46. The EU Constitution changes the terminology of the legal instruments, but their content remains substantially the same.

24 Regulations are mostly used for the harmonization of trade-related environmental measures (e.g., CITES Regulation 338/97 on the import and export of endangered species of wild animals and plants; Council Regulation 259/93 on the import and export of hazardous wastes; Council Regulation 348/81 on the import of whales and other cetacean products).

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standards either through national legislation or by acceding to an international agreement.[25]

Directives are the most used instruments in EC environmental law.[26] They require member states to achieve a specific result within a given period of time, but they leave them free to choose the most appropriate means. They guarantee large flexibility, but, unlike regulations, they need to be transposed and incorporated into national law. Environmental Directives based on Article 175 EC normally provide for "minimum harmonization". They lay down minimum standards and fix a minimum level of protection throughout the Community, but member states are normally free to adopt more stringent measures than those contained in the Directive.[27] However, when a more uniform regime is needed, Directives may also provide for a higher degree ("total" or "exhaustive") of harmonization.[28]

Finally, Decisions are only binding upon the member state(s) (or individuals) to which they are addressed, while Recommendations and Opinions are not legally binding, but have a great deal of political force.

However, the list contained in Article 249 discussed above is not exhaustive.[29] In addition to the "official" instruments, there are a number of other instruments, such as additional soft law instruments (e.g., communications, resolutions, codes, white and green papers, guidelines, reports, among others) and *sui generis* acts. Among these it is worth mentioning the so-called Decisions *sui generis*, which, unlike Decisions under Article 249 EC, are addressed on EC institutions or have general application. Decisions *sui generis* are normally used by the Council and the EP to adopt the Environmental Action Programmes (EAPs) proposed by the Commission. These programmes define the policy objectives, strategies, and the guiding principles of the Community environmental action and are legally binding for EC Institutions which are under the positive duty to implement them (Article 175(3) EC).[30]

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25 E.g., Case C-148/78, *Ratti*.

26 For a detailed discussion on the Directives see: S. Prechal (2005).

27 Minimum harmonization Directives are usually adopted concerning matters where national differences are not likely to affect the common market, such as environmental quality standards or the protection of flora and fauna.

28 This is often the case for Directives based on Article 95 EC regulating product standards and trade-related environmental measures (e.g., Directive 84/631 on the transboundary shipment of hazardous waste). However, it is not the legal basis which determines whether the directive provides for "total" or "minimum" harmonization, but the content of the directive. For a full discussion see: P.J. Slot (1996), pp. 378-97. This issue is discussed in further detail in Chapter 4.2.2.1.

29 H. Somsen in T. Jewell and J. Steele (eds.) (1998), pp. 189-90.

30 According to Article 175(3) EC, EAPs have to be adopted by the Council on the basis of a co-decision with the EP. Since 1973, six EAPs have been adopted. The Sixth EAP: "Environment 2010: Our Future, Our Choice" setting out the framework of the Community environmental policy for 2001-2010 (COM (2001) 31, 24.1.2001), was adopted by Decision 1600/2002 of the EP and the Council, 22.07.2002, based on Article 175(3) EC.

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Finally, the general principles of law (e.g. non-discrimination) represent an important unwritten source of Community law.[31]

All sources discussed so far form the so-called "*acquis communautaire"* which is binding in its entirety on both the member states and on the Community's institutions.[32] The "*acquis communautaire"* also applies to acceding and candidate countries, which in order to join the Community have to incorporate the entire body of EC law into their legal systems (but they are *de facto* only bound starting from the date of their accession).[33] Some EC legislation, including environmental rules, may also apply to members of the European Economic Area (EEcA), i.e., Liechtenstein, Iceland and Norway.[34]

In addition to the legal sources, it is important to mention political instruments (e.g., Conclusions of the European Council or Recommendations of the EP), which define the Community's general orientation in different policy areas. Despite their non-binding status, these instruments have a great deal of political force and provide the input for new legal developments.[35]

Finally, it is worth mentioning that the EU's action under the 2nd and 3rd pillars is based on different instruments. Some of them (e.g., common positions under the 2nd pillar and framework decisions under the 3rd pillar) have binding force.[36]

2.2.4 EC Institutions

To carry out its tasks, the Community is equipped with a strong institutional structure, which differentiates it from other international organizations (EC Treaty, Article 7).[37] The EC institutions, like state organs, are not legal entities separated from the Community and they have no legal personality under international law. They have to assist the Community in the achievement of its objectives on the basis of their duty of sincere cooperation (EC Treaty, Article 5).[38]

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31 However, see on this point P. Craig and G. de Búrca (2003), pp. 337-38.

32 For a detailed discussion on the *acquis communautaire*, see C. Delcourt (2001), pp. 829-70.

33 This is one of the "Copenhagen criteria" adopted in June 1993 by the Copenhagen European Council.

34 Preamble (point 4) to the Agreement on the creation of the EEcA, signed in Porto, 2.05.1992 (entered into force on 1.01.1994) among the three above-mentioned countries and the EC member states. Parties are required to strengthen cooperation in several areas, including the environment (Article 78) and to adopt "parallel legislation, where appropriate, of identical or similar content" (Article 80).

35 On the EC policy instruments in general, see: K. Wellens and G. Borchardt (1989), pp. 267-321.

36 Instruments of the CFSP, for instance, are listed in Article 12 EU and include: principles and guidelines, common strategy, joint actions, common positions, and systematic cooperation between the member states.

37 There are five institutions. This section does not discuss the Court of Auditors.

38 E.g., Case C-65/93, *Parliament v. Council*, Para. 22.

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The European Commission (hereinafter the Commission) has three main functions (Article 211 EC).[39] First of all, it has the right of initiative and is the key player at the stage of policy and legislation formulation in all matters under the first pillar.[40] It drafts proposals for new policy and legislation, which form the basis for negotiations among member states in the Council. Second, it is the executive organ of the Community. As the "guardian of the Treaties" it supervises compliance with EC law and may bring actions against member states acting in violation of EC legislation (Article 226 EC). Third, as will be discussed in Chapter 4, the Commission represents the Community at the international level on matters under EC (exclusive) competence and maintains all appropriate relations with the UN's organs, its specialized agencies, and other international organizations.[41] In performing its functions the Commission has to act in the exclusive interest of the Community and be independent from any governments or any other body (Article 213 EC). The Commission, therefore, is a truly supranational organ and the main political force towards EC integration.

The Commission is divided into twenty-four Directorates-General (DGs) with different and sometimes opposing policy objectives (e.g., DG Environment, DG Trade, DG Competition) and fifteen services (e.g., the Legal Service).[42] Each DG consists of separate directorates and units. Despite the internal fragmentation, the Commission as a whole is responsible for its acts and has to work as a single body. Each proposal therefore needs to be developed and adopted in close coordination with all interested DGs, directorates and units.[43]

The Council is the main legislative body of the Community.[44] It is made up of ministers of member states and its composition changes according to the issue at stake. The Council meets in nine different configurations (e.g., Environment, Agriculture and Fisheries, General Affairs and External Relations), bringing together the ministers responsible for the areas concerned. The Presidency of the Council, which changes every six months, sets out the agenda and chairs these meetings. Each configuration meets on average two times under each Presidency.

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39 For a detailed discussion on the composition, functioning and powers of the Commission see: P. Craig and C. de Búrca (2003), pp. 54-64; L. Kramer (2000), pp. 26-32; H. Somsen in T. Jewell and J. Steele (eds.) (1998), pp. 172-5; A.M. Sbragia in: H. Wallace and W. Wallace (eds.) (2000), pp. 298-300.

40 The Commission shares the right of initiative with the member states in matters under the second pillar (CFSP) and in some matters relating to the third pillar.

41 Articles 300(1) and 302 EC. Next to the UN, the EC Treaty expressly refers only to the Council of Europe (Article 303 EC) and the Organization for Economic Cooperation and Development (OECD) (Article 304 EC).

42 For a list of all the Commission's DGs and services see: http://europa.eu.int/comm/dgs_en.htm.

43 See: Rules of Procedures of the Commission, Article 21 on interdepartmental cooperation and coordination (C (2000) 3614) (OJ. L 308/26, 8.12.2000). See also L. Kramer (1997), p. 282, and A. M. Sbragia in: H. Wallace and W. Wallace (eds.) (2000), p. 299.

44 Article 202 EC. For a detailed discussion on the structure, composition, functioning and powers of the Council see: P. Craig and C. de Búrca (2003), pp. 65-71, and L. Kramer (2000), pp. 34-5. See also: http://ue.eu.int/cms3_fo/showPage.asp?id=427&lang=en&mode=g.

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The Council, unlike the Commission, is the forum where the different national interests are represented. Its work is prepared by the Permanent Representatives Committee (COREPER), which is composed of the permanent representatives of the member states in the rank of ambassador (Article 207 EC). The COREPER examines draft legislation before it is submitted to the Council for adoption and plays a central role in the EC decision-making process.[45] The COREPER is assisted by a large number of committees, working parties, or working groups made up of national delegates and experts. They examine the legislative proposals of the Commission before they are discussed in the COREPER, which normally focuses only on points where consensus has not been reached. Together with the COREPER, these bodies represent the fora where negotiations among member states and, to a minor extent, between the member states and the Commission, take place. Representatives from the Commission may indeed also attend these meetings, but they play a secondary role.

As will be discussed in detail in Chapter 4, the Council is mainly responsible for concluding international agreements. In addition, the Presidency is charged with the external political representation of the EU in matters under the second pillar (CFSP) and, although it is not an organ of the Community,[46] it also plays a central role in matters under the first pillar (EC).[47]

The European Parliament (EP) has become the main legislator together with the Council. It has primarily legislative and budgetary tasks, but it also supervises the work of the Commission and the Council.[48] The EP's work is prepared by twenty permanent committees responsible for different areas (e.g., the Environment, Public Health and Food Safety Committee, Transport and Tourism Committee, Legal Affairs Committee) and composed of Members of the European Parliament (MEPs).[49] The Commission's proposals are discussed within the competent committee under the chairmanship of a 'rapporteur' who reports to the plenary where decisions are taken. The European Parliament (EP), like (in part) the Council, is made up of politicians, who, however,

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45 See Rules and Procedures of the Council, Council Decision 2004/338/EC/Euratom, 22.03.2004 (OJ 2004 L106/22), Article 19 (10). The COREPER prepares so-called *common positions* which are then adopted by the Council.

46 The Presidency is not listed among the EC institutions (Article 7 EC) and has no functions under the EC pillar (except for the operation of the European Central Bank), but only under the second pillar (Article 18 EU).

47 See in detail Chapter 4.3.2.5.

48 For a detailed discussion on the composition, functioning and powers of the EP see: P. Craig and C. de Búrca (2003), pp. 75-86, and A. M. Sbragia in: H. Wallace and W. Wallace (eds.) (2000), pp. 301-1. The EP considers proposals drawn up by the Commission alongside the Economic and Social Committee (ECS), which is made up of representatives of various categories of economic and social activities (Article 257 EC) and the Committee of the Regions, which is composed of local and regional authorities (Article 263 EC). The EP's Rules and Procedures are available at: www2.europarl.eu.int/omk/sipade2?PROG=RULES-EP&L=EN&REF=TOC#X6

49 EP permanent and temporary committees and meeting documents are available at: www.europarl.eu.int/activities/expert/committees.do?language=EN.

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sit according to political grouping, not by nationality. This is the only democratically elected EC institution and represents the voice of the European citizens in the EC decision-making process. Like the Commission, the EP also has strong supranational aspirations. It is considered to be the greenest of the Community institutions and has traditionally placed environmental issues at the top of its agenda. The EP, unlike the Council, normally tends to raise the environmental standards proposed by the Commission.[50] Its increasing role in the legislative process, which has been strengthened over the years, has had a strong influence on the progressive development of European environmental law.

The European Court of Justice (ECJ or "the Court"), together with the Court of First Instance (CFI), is the judicial organ of the Community.[51] Its main role is to ensure that EC law is uniformly interpreted and applied throughout the EU. In particular, the Court exercises judicial control over the acts of the EC institutions and reviews member states' compliance with EC law.[52] The ECJ has exclusive jurisdiction over all disputes between member states concerning violations of the EC Treaty (Article 292 EC).[53] In addition, the Court gives so-called preliminary rulings on the interpretation or validity of Community legislation (Article 234 EC) and provides opinions on the consistency of international agreements with the EC Treaty (Article 300(6) EC). The Court is not competent in matters under the second pillar (CFSP) and has only limited powers (preliminary rulings) with regard to matters under the third pillar (PJJC).[54] Like the Commission and the EP, the Court is a supranational institution with strong integration aspirations. It has played a central role in advancing European integration and expanding the Community's competence. The Court's case law has paid particular attention to the environment and has had a decisive influence on the establishment and development of EC environmental law through a process of balancing conflicting environmental and

50 This is mainly due to the lobbying efforts of the environmental NGOs. The EP, however, is also heavily lobbied by the industry, including the shipping and the fisheries industries. On the EP role in EC environmental law and policy see: L. Kramer (2000), pp. 32-4; H. Somsen in T. Jewell and J. Steele (eds.) (1998), pp. 175-77; A.M. Sbragia in: H. Wallace and W. Wallace (eds.) (2000), pp. 301-02.

51 For a detailed discussion on the composition, functioning and division of powers between the ECJ and CFI see: P. Craig and C. de Búrca (2003), pp. 86-102; A.M. Sbragia in: H. Wallace and W. Wallace (eds.) (2000), pp. 303. The CFI normally decides on cases brought by individuals (Article 230(4) EC) and on competition matters.

52 The EC Treaty sets forth several proceedings before the ECJ: the infringement proceeding brought by the Commission against member states for lack of compliance with EC law (Article 226 EC); actions for annulment of EC acts adopted in violation of the Treaty (Article 230 EC); complaints concerning the failure of the Community to act (Article 232 EC); and actions for damages arising from the actions (or non-actions) of EC institutions (Articles 235 and 288(2) EC).

53 See also *infra* Chapter 4.4.

54 In 3rd pillar matters, the member states have the right to choose whether or not to accept the ECJ's jurisdiction (EU Treaty, Article 35.2). The ECJ's competence in these matters is rather restricted (Article 35 (6) and (7) EU).

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economic interests.[55] The Court is independent from national governments and in performing its functions it tries to mediate between the EC institutions and the member states. Its judgments, therefore, are often influenced by political considerations.[56]

Finally, the European Council is not a Community institution, but the main political organ of the EU.[57] It is composed of the Heads of State or Government plus the President of the Commission. It meets twice yearly under the chairmanship of the member state holding the Presidency in order to define the general political guidelines of the EU, but it has no legislative power (Article 4, EU Treaty). Despite their non-legally binding status, the European Council's Conclusions have a great deal of political force and have influenced, to a great extent, the evolution of EC environmental law.[58]

2.2.5 EC Decision-Making Processes

The EC Treaty lays down different decision-making procedures, which provide for a different degree of participation on the part of the EC institutions and normally require a final decision by the Council according to three voting requirements (i.e., unanimity, simple majority and QMV). The amendments to the EC Treaty have progressively strengthened the role of the EP within the legislative process and have extended the QMV in the Council.[59] These changes have resulted in the substantial "greening" of the EC legislative process.

As already mentioned, the participation of the EP strongly influences the environmental content of EC legislation. Its involvement is minimal in the "consultation procedure",[60] is a bit stronger in the "cooperation procedure",[61] and it is decisive in the "co-decision procedure" and the "assent procedure" where the EP is a co-legislator

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55 The Court's main contribution to the EC's environmental policy has been the progressive extension of the environmental grounds of justification which, under certain circumstances, justify trade restrictions (*infra* Chapter 4.2.3) and the expansion of the external competence of the Community (*infra* Chapter 4.2.2).

56 See: P. Craig and C. de Búrca (2003), p. 89; G. Garret (1995), p. 171; L. Kramer (2000), p. 35.

57 For a detailed discussion of the composition, functioning and powers of the European Council see: P. Craig and C. de Búrca (2003), pp. 71-5. The Treaty on the EU Constitution includes the European Council among the institutions of the Union alongside the Commission, the Council, the EP and the ECJ (Article I-19 (1)).

58 Presidency conclusions are available at: http://ue.eu.int/cms3_fo/showPage.asp?id=432&lang=en&mode=g.

59 For a detailed discussion see: P. Craig and G. de Búrca (2003), pp. 139-77; A. Dashwood (2004), pp. 373-76; A. Dashwood (1998), p. 25; P. Craig and C. Harlow (eds.) (1998); P. Craig (1997), p. 105.

60 Consultation is still maintained in a very few policy areas, such as fisheries (Article 37 (2) and Article 175(2)); see P. Craig and G. de Búrca (2003), p. 141.

61 The cooperation procedure is maintained only for economic and monetary union measures, see P. Craig and G. de Búrca (2003), pp. 141-4.

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together with the Council and enjoys a real veto power.[62] The co-decision has currently become the standard procedure for most Community legislation. This procedure is quite complex.[63] In essence, it gives the EP the right to propose amendments to the Commission's proposal before it is approved by the Council. If the Commission accepts the EP amendment the Council must either reject them unanimously or adopt them by QMV (Article 251 EC). It may consist of three phases: a first reading in the EP and the Council (with no time-limits); which may be followed by a second reading (with a quite extended time-limit) and eventually a third reading (with a more stringent time-limit). The co-decision procedure may therefore be rather time-consuming and it may take years before a proposal is adopted, especially when it involves highly political or sensitive issues.

The extension of QMV in the Council has removed the capacity of member states to block a proposal and has limited their capacity to exercising the full political control guaranteed in the past under the unanimity rule.[64] In addition, it speeds up the adoption of Community measures, makes higher environmental standards easier to agree upon, and lessens the extent of the compromise.

At present, the standard procedure for the adoption of Community environmental legislation is co-decision with the EP and QMV in the Council. However, "by way of derogation", the "unanimity" rule and the consultation procedure have been maintained for a number of measures, including, inter alia, measures "significantly affecting" the energy policy of member states.[65] As will be discussed in detail in Chapter 4.3.2.7, QMV in the Council is also the rule for the conclusion of international Conventions, while the standard procedure is consultation with the EP (Article 300(2) and (3) EC).

2.2.6 EC Compliance Mechanisms

The EC Treaty leaves the implementation and enforcement of EC law, including environmental legislation, under the control of the member states.[66] Each member state is under

62 See in detail, P. Craig and G. de Búrca (2003), pp. 144-8. Only in exceptional cases may the Commission and/or the Commission and the Council act alone without any involvement by the EP, see, ibid. p. 140.

63 See: Co-decision Guide available at: http://ue.eu.int/uedocs/cms_data/docs/2004/4/29/Codecision%20guide.pdf.

64 Currently QMV in the Council is reached when 232 votes out of 321 are cast and the decision receives a favourable vote from the majority of the member states. Conversely, unanimity is still the rule in the EU pillars, while QMV is exceptionally applied in limited areas.

65 Some marine environmental measures (e.g., standards related to the maritime transport of oil) could, in principle, fall within the scope of these broad exceptions listed in Article 175(2) EC. So far, however, this has never occurred.

66 On the implementation and enforcement of EC law see, in general, J.H. Jans (2000), pp. 135-159; A. Berg (1999), pp. 63-6; A.M. Sbragia in: H. Wallace and W. Wallace (eds.) (2000), pp. 304-08; H. Somsen in T. Jewell and J. Steele (eds.) (1998), pp. 200-03.

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a legal duty to take all appropriate measures to ensure the fulfilment of obligations arising from the Treaty or from action taken by the EC institutions (Article 10 EC) and to implement and finance the common environmental policy (Article 175(4) EC). The implementation duties require, in the first place, the transposition of Community legislation into the national legal systems and its full application. In performing these duties member states act according to their national system and there are no uniform rules on transposition at the EC level.[67] The Community legal order, however, provides for strong monitoring, enforcement and financing instruments to facilitate or ensure full compliance with EC law.

The Commission, first of all, "shall ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied" (Article 211 EC). In carrying out the monitoring function, the Commission is assisted by a number of agencies, including the European Environmental Agency (EEnvA).[68]

When the Commission considers that a member state has failed to fulfill an obligation under the Treaty, it may start an infringement proceeding acting on its own initiative (Article 226 EC) or at the request of a member state (Article 227 EC). The Commission may bring member states to Court also in the case of inadequate enforcement.[69] If member states do not comply with the ECJ's judgments, which are final and irrevocable, the Court may also impose pecuniary sanctions (Article 228(2) EC).[70] Pecuniary sanctions may have an important deterrent effect and encourage member states to comply with EC rules. The infringement procedure may, however, be rather time-consuming and does not offer prompt solutions to prevent environmental harm.

Over the years, individuals have played an increasingly important role in the enforcement of the EC law. Indeed, they may initiate actions before national courts against member states for the violation of EC legislation having direct effect. National Courts may, in turn, bring the case to the ECJ. When issues are too political, the Commission often finds it more convenient to stimulate individuals to start actions.

In addition, the EC system provides for several financing mechanisms to assist member states in complying with EC environmental legislation. These include, first of all, "LIFE" (i.e., LIFE Nature and LIFE Environment), which is directed at the development and effective implementation of the Community's environmental policy; but also Cohesion Funds which intend to assist less developed member states to cover

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67 However, there are some guiding principles on transposition in the ECJ's case law, see: S. Prechal (2005), Chapter 5.

68 The EEnvA was established in 1990 (Council Regulation 1210/90) to provide the EC institutions and the general public with targeted, relevant and reliable information. Since 1994, the EEmvA has been assisted by the European Topic Centre on Marine and Coastal Environment (ETC/MCE) which carries out the work on marine and coastal issues.

69 E.g., Case C-56/90 *Blackpool Case*; Case C-198/97, *Commission v. Germany,* [1999]; Case C-374/98 *Commission v. France.*

70 Recently, in Case C-304/02 *Commission v. France* [2005], the Court ordered France to pay a penalty payment of huge proportion for a violation of EC provisions on fisheries. See also: Case C-278/01, *Commission v. Spain* [2004] and C-387/97, *Commission v. Greece.*

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the substantial costs of the higher EC environmental standards; and, to some extent, Structural Funds, which promote harmonious, balanced and sustainable development within the Community.[71]

Although the level of compliance has increased over the past few years, the Community environmental system still faces strong implementation and enforcement gaps, which have so far prevented the common environmental policy from being fully effective.[72] The proper implementation and enforcement of EC legislation ultimately depends on the member states. Those who voted against legislation adopted by QMV or did not participate in the decision-making may have political or economic interests not to apply the legislation. The workload and the shortage of personnel of DG ENV, moreover, often impede an effective exercise of the monitoring function.[73] The lack of motivation to comply, together with the ambiguity in policy objectives, excessive derogation clauses, the increasing use of soft-law instruments, the participation of too many actors and overlapping authorities in the implementation process, insufficient technical, personal and financial resources; and a lack of information are some of the main shortcomings resulting in the serious implementation deficit.

2.3 The "Existence" of EC Competence

2.3.1 The Attribution Principle

The Community, unlike states, does not have "sovereignty" or "jurisdiction" but only powers which are attributed to it, explicitly or implicitly, by its member states. These powers are generally referred to as "competence".[74] The EC legal order is based, in the first place, on the fundamental principle of the "attribution" of competence. According to this principle the Community is entitled to act only "within the limit of the powers conferred upon it by the Treaty and of the objectives assigned to it therein" (Article

71 LIFE was established in 1992 (Council Regulation 1973/92/EEC), replacing two existing mechanisms (i.e., the 1991 Regulation on the Community Action for the Protection of the Environment in the Mediterranean Basin (MEDSPA) (EEC Regulation 563/91) and the 1991 Regulation on the Community Action for the Protection the Coastal Areas and Waters of the Irish Sea, North Sea, Baltic Sea and North-East Atlantic (NORSPA) (EEC Regulation 3908/91)). For a general overview of the financial mechanisms for the environment, see L. Kramer (1997), Chapter 7, and S.P. Johnson and G. Corcelle (1989), pp. 343-50.

72 See, e.g., the Sixth Annual Survey on the Implementation and Enforcement of Community Environmental Law, SEC (2005)1055, 20.08.2005; available at: http://europa.eu.int/comm/environment/law/as04.htm.

73 See: H. Somsen in T. Jewell and J. Steele (eds.) (1998), pp. 200-03; L. Granvik (1998), p. 270 and L. Kramer (1997), p. 283.

74 For a general discussion see: N. Wolff (2002), p. 21; I. Macleod *et al.* (1996), pp. 38-9 and J.A. Usher (1985), pp. 121-42.

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5(1) EC).[75] The legality of Community legislation may be challenged for non-compliance with this principle and both EC institutions and member states may start an action before the ECJ for annulment of EC acts adopted in violation of the Treaty (Article 230 EC).

To determine whether the Community has competence concerning a specific subject-matter or area (e.g., marine environmental protection) it is, therefore, necessary to look at the objectives of the Treaty and the existence of a proper legal basis for the Community action.

2.3.1.1 EC Objectives

The Treaty of Maastricht included the promotion of a "high level of protection and improvement of the quality of the environment" among the fundamental objectives of the Community laid down in Article 2 EC on an equal footing with respect to other objectives.[76] There is no definition of "environment" in the Treaty. Community legislation, however, refers to an "all-embracing" concept which comprises human beings, natural habitats, fauna, flora, and all biological forms, water, air, climate, soil and landscape and the interaction among these factors.[77] Oceans and seas together with their components therefore fall within the scope of Article 2.[78] The content of the environmental objective is further specified in Article 174(1) EC which sets out four specific objectives of the Community's Environmental Policy. First, the Community's action shall aim to "preserve, protect and *improve* the quality of the environment" (*emphasis added*). This objective seems to be broad enough to justify, under the attribution principle, any kind of measure necessary to control all possible threats to and

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75 The EU Constitution places strong emphasis on this principle, referred to as the "principle of conferral" (i.e., Articles I-1 (1), I-9 (1)(2) and I-18 (3) of the Draft Constitution). For a detailed discussion of the principle see: A. Dashwood (2004), pp. 357-62; J.H. Jans (2000), p. 10; A. Von Bogdany and J. Bast (2002), pp. 232-4, and in general, A. Dashwood (1996), pp. 113-28.

76 On the origin and evolution of the EC's environmental policy see: J.H. Jans (2000), pp. 3-10; S.P. Johnson and G. Corcelle (1995), pp. 1-11; A.M. Sbragia in H. Wallace and W. Wallace (eds.) (2000), pp. 296-8; H. Somsen in: T. Jewell and J. Steele (1998), pp. 161-70; L. Kramer (2000), pp. 1-4; S. Bär *et al*. (2001), pp. 212-20.

77 E.g., Council Directive 97/11 on EIA (Article 3) and Council Directive 79/117/EEC on the placing on the market and use of plant protection products containing certain active substances (Article 2(10)) and the Habitats Directive (Preamble).

78 E.g., European Council Declaration on the environmental imperative, 15 June 1990 (in: Bulletin EC 1990, No. 6, pp. 16-20), Para. 1.36. For more on the point see L. Kramer (2000), p. 2. The Commission's proposal for a marine framework directive (COM (2005) 505, 24.10.2005), defines the "environmental status" as "the overall state of the environment in marine waters, taking into account the structure, functioning and processes of the constituent marine ecosystems together with natural physiographic, geographic and climatic factors, as well as physical and chemical conditions including those resulting from human activities in the area concerned" (Article 1).

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"improve" the quality of the marine environment in line with Chapter 17 of Agenda 21. Second, the Community action shall be directed at "protecting human health". This objective may justify the adoption of a broad range of marine environmental measures related to water quality, transboundary movement of hazardous or radioactive substances, or the accumulation of dangerous substances in the food chain of fish stocks.[79] The third objective of the environmental policy is "the prudent and rational utilization of natural resources".[80] The term "natural resources" is not defined in the Treaty, but it seems to comprise marine natural resources, including marine habitats, ecosystems and marine species of flora and fauna.[81] The term "utilization" might suggest that "natural resources" also include commercially exploitable resources. However, as will be discussed in further detail in Chapter 8, measures related to the conservation and utilization of fisheries are outside the scope of the environmental policy and have to be adopted within the framework of the Common Fisheries Policy. Similarly, the Community is not entitled to take measures which may affect the exploitation of energy resources from the seabed.[82] With these two exceptions in mind, the Community seems to be entitled to take any legislative action to ensure the prudent and rational utilization of marine natural resources. Fourth, the common environmental policy shall promote measures at the international level to deal with regional or worldwide environmental problems. This objective may justify Community participation in the multilateral development of ocean law and policies at the global and regional levels.

Finally, the promotion of a "harmonious, balanced and sustainable development of economic activities" is another fundamental objective of the Community under Article 2 EC.[83] The sustainable development goal may justify a broad range of Community measures directed at the sustainable use of the marine environment and its resources.

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79 As will be discussed in further detail in Chapter 3.4.4, most of the EC "water quality" legislation and EURATOM legislation are aimed at the protection of "human health".

80 According to L. Kramer (2000), p. 58, resource utilization is "prudent and rational" if it avoids the destruction or complete removal of the resources.

81 Most EC policy documents following Principle 2 of the Stockholm Declaration refer to all "natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems". In addition, the Communication from the Commission: Ten Years After Rio: Preparing for the World Summit on "Sustainable Development" (COM (2001) 53, p. 16) expressly refers to "natural resources issues such as oceans and seas".

82 For instance, Directive 94/22 on the conditions for granting and using authorizations for the "protection, exploration and production of hydrocarbons" makes it clear that member states maintain sovereign rights over their hydrocarbon resources (Preamble). According to the Declaration annexed to the 1987 SEA, the "Community's activities in the sphere of the environment *may* not interfere with national policies regarding the *exploitation* of energy resources". See also J.H. Jans (2000), p. 28.

83 The sustainable development goal is further specified in a number of policy documents. See *infra*, Chapter 3.4.5.

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2.3.1.2 Legal Bases for EC "Internal" Competence

Since the introduction of the Environmental title into the Treaty in 1987, there is no doubt about the existence of a Community competence in environmental matters, including the protection of the marine environment. What is problematic, however, is the determination of the correct legal basis for the Community action. Due to their cross-sectoral nature, marine environmental measures may indeed be based on a number of different legal bases in the Treaty.

First of all, measures necessary to achieve the environmental objectives laid down in Article 174(1), including marine environmental rules and standards, may be based on Article 175 EC.[84] This provision may provide the proper legal basis for the control of all potential threats to the marine environment. That is confirmed in the broad definition of "pollution" contained in EC legislation based on Article 175 which refers to "the discharge by man, directly or indirectly, of substances and energy into the aquatic environment, the results of which are such as to cause hazards to human health, harm to living resources and to aquatic ecosystems, damage to amenities or interfere with other legitimate uses of waters".[85]

Marine-related legislation, moreover, may be based on other Articles of the EC Treaty, such as Article 37 (conservation of fisheries resources, impact of fisheries and agricultural practices on the marine environment),[86] Article 80(2) on the Common Transport Policy (maritime safety and vessel-source pollution), Article 95 (harmonization of pollution standards within the EC),[87] Article 133 on the common commercial policy (trade-related marine environmental measures affecting import and export to or from the Community), Article 163 (marine research), and Article 173 (marine technological development). In addition, the EURATOM Treaty may provide the proper legal basis

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84 Before the introduction of a proper legal basis in the EC Treaty with the 1987 SEA, environmental Directives were based on the combination of Article 100 (now Article 95) on the harmonization of national laws which are likely to affect the single market, and Article 235 (now Article 308) on implicit powers (e.g., Council Directive 76/464/EEC on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, as amended). Both Articles required unanimity in the Council and provided no involvement of the EP.

85 E.g., Directive 76/464/EEC (Article 1(e)). The Water Framework Directive 2000/60/EC defines pollution as the direct or indirect introduction, as a result of human activities, of substances or "heat" into air, water, or land which, *inter alia*, results in damage or impairs or interferes with legitimate uses of the environment" (Article 2 (33)).

86 E.g., Council Regulation 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy and Council Regulation 973/2001 on technical measures for conservation of migratory stocks. For examples of "conservation measures" which may be based on Article 37, see A. Berg (1999), p. 74.

87 E.g., TiO2 Directive 92/112. The proper functioning of the internal market, however, must be the primary objective of these measures. On this point see: L. Kramer (2000), p. 68, and J.H. Jans (2000), p. 82.

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for measures related to the shipment of nuclear material and safety standards (Article 31 and 32) or the disposal of radioactive waste (including ocean dumping) (Article 37).

The identification of the proper legal basis is not merely a theoretical issue. It is necessary, first of all, for the validity of the measure, which can be challenged and annulled in the case of an incorrect basis. Second, it is fundamental for the decision-making procedure to follow and for the level of the involvement of the Community institutions, especially the EP, in the legislative process.[88] Third, the choice of the correct legal basis determines the "nature", whether exclusive or shared, of the Community competence and affects the extent to which member states are entitled to adopt more stringent measures. For instance, measures based on Articles 175 or 95 EC always allow member states to maintain or introduce higher environmental standards,[89] while measures based on Articles 80(2), 37 or 133 EC do not provide for such a possibility.

According to the Court, in choosing the proper legal basis for the Community action, it is necessary to look at the "primary objective" and the "centre of gravity" of the measure.[90] In practice, even though an environmental measure imposes rules on products or fisheries management, it still has to be based on Article 175 EC if the primary objective is the protection of the environment and the effect on other policies is only incidental.[91] However, when a measure pursues different objectives which are equally essential, it may be adopted on several legal bases, as long as their decision-making procedures are not inconsistent (as would be the case in a co-decision vis-à-vis consultation and unanimity in the Council) and may be combined.[92]

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88 For that reason the EP started several actions before the ECJ for the annulment of EC legislation adopted on an incorrect legal basis. See J.H. Jans (2000), p. 58, and H. Somsen in T. Jewell and J. Steele (eds.) (1998), pp. 184-87.

89 See respectively, Article 176 EC and Article 95(4) and (5) EC.

90 E.g., Case C-42/97, *European Parliament v. Council,* Paras. 39-40. According to the Court such a choice must be based on objective factors capable of judicial review (e.g., Case C-269/97, *Commission v. Council,* Para. 43 and C-36/98, *Spain v. Council,* Para. 58). For the recent case law, see: H. Somsen (2003), pp. 1415-18.

91 See, e.g., *WTO Opinion 1/94*, Para. 57 and Case C-281/01, *Commission v. Council,* Para. 86. As a consequence, the Council based many trade-related regulations on Article 175 EC (e.g., CITES Regulation 338/97 and Regulation 259/93 on the transfrontier shipment of waste). For a discussion on the correct legal basis for the adoption of fisheries-related measures to protect the aquatic wildlife see: Chapter 8.8.2.

92 Joined cases C-164-165/97, *European Parliament v. Council,* Para. 14. See C-300/89, *Commission v. Council,* Paras. 17-21. According to J.H. Jans (2000), pp. 54-5, the more demanding procedure applies plus any additional requirement of the less demanding procedure.

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2.3.2 EC External Competence

2.3.2.1 The EC's International Legal Personality

To be able to operate on the international plane the Community, in the first place, must possess international legal personality.[93] The Community seems to satisfy all the criteria which an organization has to meet in order to enjoy legal personality under international law as established by the International Court of Justice (ICJ).[94] In particular, it is a "supra-national organization founded on a constitutional Treaty" and "equipped with an institutional structure and powers in order to reach certain objectives". In addition, the active role played by the Community at the international level indicates the "widespread recognition" of its international legal personality. The EC Treaty itself implicitly recognizes the international legal personality of the Community (e.g., Articles 281; 174(4), 133, 300(1) and 310 EC).[95]

The attribution of international personality entitles the Community, in first place, to conclude agreements and to participate in the activities of other international organizations. As will be discussed in Chapter 4, however, Community accession or participation must be expressly allowed in the agreement or in the statute of the organization in question.

This international legal personality, moreover, implies the recognition of the international rights and duties of the Community, which may be brought before international tribunals, except those whose jurisdiction is limited to states, such as, for instance, the ICJ.[96]

According to the ICJ the rights and duties of an organization depend on the objectives and functions attributed or implied in the constituent document and developed in practice.[97] The broad scope of the EC objectives and functions as attributed in the EC Treaty seem to provide the Community with a potentially unlimited legal capacity to act at the international level.

Finally, the attribution of international legal personality confers on the Community a right to establish diplomatic relations with third countries or international organizations (the so-called "right of legation"), and the right of its Institutions to enjoy privileges and immunities in third States.

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93 On the EC's legal personality see, in general, I. Macleod *et al.* (1996), pp. 29-36, R. Frid, (1995), pp. 9-54.

94 The ICJ set out the relevant criteria in its advisory opinion in *Reparations for Injuries Suffered in Service of United Nations [*1949].

95 According to Article 281 EC "the Community shall have legal personality". That provision has been criticized as "the most laconic of the whole Treaty", but it is generally considered as including "international legal personality". See R. Frid (1995), p. 22.

96 See, for instance, Article 34 of the ICJ Statute.

97 See *Reparations for Injuries Suffered in Service of United Nations,* Paras. 179-80.

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2.3.2.2 EC External Competence under EC Law

The fact that the Community enjoys legal personality under international law is not sufficient, under EC law, to justify the Community's external action, which has to find a proper legal basis in the Treaty. The EC Treaty indeed extends the attribution principle to the Community's external policies and allows the EC institutions to begin international negotiations only "*where this Treaty provides for* the conclusion of agreements between the Community and one or more States or international organizations" (Article 300(1) EC) (emphasis added).[98]

In addition to Article 300(1), there are several legal bases in the EC Treaty for Community action at the international level. The EC Treaty provides the Community with an explicit external competence in environmental matters ("the Community and Member States shall cooperate with third countries and with the competent international organizations […]") (Article 174(4)), in commercial matters (Article 133 EC)[99] and for the conclusion of association agreements (Article 310 EC). In addition, the EURATOM Treaty (Article 101) explicitly allows the Community to establish contractual relations with third countries and international organizations in matters related to radioactive materials.[100] The same considerations in 2.3.1.2 on the choice of the proper legal basis also apply in this context.

Moreover, under the EU Treaty (second pillar): "the Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy" in order to, *inter alia*, promote international cooperation (Article 11, Title V). As will be discussed in Chapter 5, this provision provides the legal basis for the EU's participation in the international development of ocean policies within the UN and other political fora.[101]

The existence of an "explicit" legal basis in the Treaty is not a *conditio sine qua non* for the Community's international action.[102] In the leading *ERTA Case*, the ECJ

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98 See also ECJ Opinion 2/94, Para. 24. Article 300(5), moreover, implies that the negotiation of an agreement which is outside the competence of the Community requires an amendment to the Treaty in order to provide the EC institutions with the necessary powers.

99 Article 133 (together with Article 300), for example, has been adopted as a legal basis for Council Decision 94/562/EC authorizing the signature by the EC of the agreement implementing Part XI of the LOSC.

100 On the basis of Article 101, the EURATOM acceded, *inter alia*, to the International Convention on the Physical Protection of Nuclear Materials (Commission Regulation 3956/92) and concluded cooperation agreements on matters of common interest with the International Atomic Energy Agency (IAEA) in 1975 (O.J. L329/28) and with the International Labour Organization (ILO) in 1963 (OJ 18/473).

101 E.g., G. Loibl (2000), pp. 226-7. The issue is discussed in detail in Chapter 5.2.7.4.

102 The EEC Treaty, prior to Maastricht, did not contain any reference to an external environmental competence. However, even before 1992, the Community was already active at the international level and was a party to several Conventions (e.g., the 1974 Paris Convention; the 1976 BARCON and the 1989 Basel Convention on the Control of the Transboundary Movement of Hazardous Waste).

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made it clear that the Community's external competences are coextensive with those which are internal (the so-called principle of "*in foro interno, in foro externo")*.[103] According to the Court, the Community is entitled to conclude international Conventions or to establish contractual links with third countries not only by virtue of an express conferment by the Treaty, but such a competence can be "implied by other provisions of the Treaty conferring internal powers."[104] When the Community has used its powers to adopt internal legislation, it acquires competence to act externally concerning the same subject-matter. As will be discussed in Chapter 6, vessel-source pollution, for instance, is an area where the Community has acquired an implicit external competence on the basis of internal legislation.

In the *Kramer Case* and in *Opinion 1/76* the Court took a further step and recognized that the Community's external powers may derive from the provisions of the Treaty conferring internal competence, even in the absence of internal legislation (the so-called *Kramer/Opinion 1/76 Doctrine)*, whenever the external action appears "necessary for the obtainment of one of the Community objectives" (the so-called Necessity Test).[105] Considering the central position acquired by the environmental objective within the EC legal framework, the *ERTA* and the *Kramer/Opinion 1/76 Doctrine* confer on the Community a potentially unlimited external competence in environmental matters.[106] In the original interpretation by the Court, the Community's external action becomes "necessary" whenever Community objectives cannot be effectively achieved by internal measures alone, but require the adoption of international measures which are also applicable to third countries. The protection of the marine environment is clearly a Community objective which requires cooperation with third countries. In order to be effective, EC measures should indeed apply to all ships using Community waters, including vessels flying the flag of third States. A broad reading of necessity would therefore confer on the Community an almost unlimited external competence in international fora discussing marine issues. "Necessity", moreover, is a highly political concept that provides the Community institutions with a large degree of discretion as to whether to act. This may distort the delicate balance which forms the basis of the

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103 Case C-22/70 (*ERTA*), Para. 19. See in detail: J. Temple Lang (1986), p. 197.

104 Case 22/70 (*ERTA*), Para.16. On the Community's implicit external competence see, *inter alia*, J. H. Jans (2000), p. 80; A. Dashwood in M. Koskenniemi (ed.) (1998), pp. 113-123; I. Macleod *et al*. (1996), pp. 46-53; R. Frid (1995), p. 74; A. Maunu (1995), pp. 115-27; A.T.S. Leenen (1992), p. 101; A. Nollkaemper (1987), pp. 63-6.

105 Joined Cases 3, 4, 6/76 (*Kramer*) and Opinion 1/76 (Para. 17). See also ILO Opinion 2/91, Para.7.

106 So far, however, the Community has made limited use of its implied external competence and has only taken action on the basis of the *Kramer -Opinion 1/76 Doctrine* in two cases: i.e., the signature of the 1974 Paris Convention on land-based pollution and the commitment made within the UN Framework Convention on Climate Change. In both cases there were no internal rules justifying the EC's external action. However, the Commission has relied on the *Kramer -Opinion 1/76 Doctrine* on other occasions, such as the proposed accession to the 1972 Oslo Convention.

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EC legal system and affect the principle of attribution. The Court, therefore, has subsequently narrowed down its original approach by saying that the Community's external action is "necessary" only when there are no alternatives available and the same result could not be achieved by the coordinated action of the member states.[107] In addition, the international agreement in question must be directly related to the "specific objective" of an internal legislative measure (not to the general objectives of the EC)[108] and the Community and international objectives must be "inextricably linked".[109] If these conditions are met, the Community may acquire an implicit external competence also in the absence of internal measures.

2.3.3 The Nature of EC Competence: "Exclusive" or "Shared"?

Different from the "existence" of a Community competence, both internal and external, is the "nature", whether "exclusive" or "shared", of such a competence. The nature of the EC's powers determines the extent to which the member states retain their autonomy to act outside the EC framework. Defining the nature of the Community's competence, therefore, is central to determining the division of powers between the Community and the member states. The issue will be discussed in detail in Chapter 4.2.1 and 4.2.2. However, some preliminary considerations are needed.

By means of the Treaties or the Acts of Accession, the member states have explicitly consented to transfer their competence to the Community in entire policy areas, which come under the "exclusive" competence of the Community. There are a few policy areas subject to "exclusive" competence, including the common fisheries policy,[110] the common commercial policy,[111] and the promotion of uniform health and safety standards against the dangers of radioactivity under the EURATOM Treaty.[112] In these areas, moreover, the Community has exclusive external competence on the basis of the principle of *in foro interno, in foro externo* announced by the Court in the *ERTA* case.[113]

The extent of the Community competence, however, is not static. The Court, in its case law, draws a fundamental distinction between "exclusivity" under primary law

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107 WTO Opinion 1/94, Para. 79.

108 ILO Opinion 2/91, Para. 7.

109 WTO Opinion 1/94, Paras. 86 and 89, and C-467/98 (*Open Skies*), Paras. 56-57.

110 See: Article 37 EC and Article 102 of the Act of Accession of the United Kingdom, Ireland and Denmark, commencing on 1 January 1979. See also Joined Cases 3, 4, 6/76 (*Kramer*), Paras. 16-20.

111 Article 133 EC, however, does not expressly refer to an "exclusive" competence, which, however, may be implied in Paras. 1 and 3.

112 EURATOM Article 101 draws a parallel between internal and external competence. See also Opinion 1/78, Paras. 13-18.

113 Case 22/70 (*ERTA*), Para. 19.

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and "pre-emption" under secondary law.[114] In the case of "pre-emption", the transfer of powers results implicitly from the exercise by the Community of its internal competence, either through the adoption of secondary legislation or through the conclusion of international agreements, and only covers specific subject-matters. The criteria which trigger pre-emption and its legal effects will be discussed in detail in Chapter 4.2.2.

In policy areas originally conceived as being at the core of national sovereignty, the transfer of powers from the member states to the Community has been only partial. These areas come under "shared" (or "joint") competences of the Community and the member states and neither of them is exclusively competent, but, in principle, they may both act.[115] The EC Treaty, however, never refers to "shared competence" or any similar term and does not explain what shared competence means in practice.[116]

Generally speaking, it is possible to identify three situations where competence is shared. First, it may stem from the Treaty. In environmental matters, for instance, the shared nature of the Community's competence implicitly emerges from Article 176 EC, which allows member states always to adopt more stringent environmental standards than those laid down at the Community level.[117] The shared nature of the external environmental competence appears more clearly from Article 174(4), according to which "*within their respective spheres of competences the* Community and Member States shall cooperate with third countries and with the competent international organizations […] *without prejudice to Member States' competence* to negotiate in international bodies and to conclude international agreements" (emphasis added). Second, competence is shared in matters which are regulated by minimum standards at the EC level, leaving member states free to adopt higher standards. Third, competence is shared on issues which fall in part within the exclusive powers of the Community and in part within the exclusive powers of member states or whenever it is impossible to separate issues under the respective sphere of competence. As will be discussed in further detail in Chapter 4, this situation normally occurs with regard to the negotiation of marine environmental agreements.

However, in the absence of clear rules in the Treaty and due to the ambiguity of the ECJ case law on the matter, the exact meaning and legal effects of shared competences are still quite controversial. This is one of the most critical aspects in the field of the Community's external relations and will be discussed in detail in Chapter 4.2.4.

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114 Case 22/70 (*ERTA*), Para. 22. The issue is discussed in detail in Chapter 4.2.2.

115 With Opinion 2/91 and Opinion 1/94 the Court started to refer to "joint competence". Before this it used the term "mixed competence". Some authors also refer to "concurrent powers".

116 As will be discussed in Chapter 4.6, the EU Constitution clearly defines matters under shared and exclusive competence.

117 L. Kramer (2000), p. 75. However, it is important to bear in mind that in other fields, like human rights, things work somewhat differently.

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2.4 The "Exercise" of EC Competence

2.4.1 The Principle of Subsidiarity

The "existence" of a Community competence is not, *per se*, enough to legitimize its action. Such action must be justified on the basis of the principle of subsidiarity, which determines "when" the Community may exercise its powers.[118] This principle intends to strike a balance between "efficiency" of action and the freedom of member states and has been introduced in order to protect the member states against an excessive transfer of authority to the Community. Originally formulated as a specific principle of the environmental policy (former Article 130r(4) EC), it has developed into a fundamental principle guiding Community action as a whole. As in the case of the attribution principle, the legality of Community legislation may be challenged for non-compliance with the subsidiarity principle, which is enforceable before the ECJ by the EC institutions and the member states under Article 230 EC.[119]

The subsidiarity principle is currently formulated in Article 5(2) EC which reads: "in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community." The principle, moreover, is reflected in Article 176 EC and Article 174(4) EC with regard to the external environmental policy.

It is clear from the definition in Article 5(2) that the subsidiarity principle does not apply to areas under the exclusive competence of the Community or the member states (under the Treaty), but only applies to areas of shared competences.[120] Before taking any legislative action, moreover, the Community (i.e., the Commission) has to demonstrate that the objectives in question (a) cannot be "sufficiently" achieved by member states acting at the national level, and (b) it can be "better" achieved at the Community level.[121] Member states may challenge the validity of EC legislation before the ECJ for non-compliance with these criteria, but the Court has always been quite reluctant to annul EC legislation on this basis.[122] Indeed, the criteria in Article 5 are so broadly

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118 For a detailed analysis of the subsidiarity principle see: P. Craig and G. de Búrca (2003), pp. 124-129; J.H. Jans (2000), pp. 11-7; L. Kramer (2000), pp. 11-4; A. Dashwood (2004), pp. 366-9; G. de Búrca (2000); H. Somsen in T. Jewell and J. Steele (eds.) (1998), pp. 187-89.

119 However, Court does not conduct a substantive review, but simply looks at whether the Community has taken subsidiarity into account. It does not assess what level of protection is the most effective.

120 See: Subsidiarity and Proportionality Protocol, Para. 3. See also: P. Craig and G. de Búrca (2003), pp. 124-127, G. de Búrca (2000), pp. 18-24.

121 Subsidiarity and Proportionality Protocol, Paras. 4 and 5.

122 See, for instance, Case C-233/94 *Germany v. European Parliament* and Council, Paras. 26-8. See on that point J.H. Jans (2000), p. 14, P. Craig and G. de Búrca (2003), p. 129. The EU Constitution provides national parliaments with the power to control the compliance of EC

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formulated and based on such relative notions (i.e., "sufficiently" and "better") as to leave the EC institutions with a high level of discretion in deciding when to act. The Protocol annexed to the Treaty of Amsterdam provides some guidance on how to apply subsidiarity (and proportionality), but once again it does not establish clear legal criteria. Community action, for instance, is justified whenever transnational environmental problems are at stake, either global or regional, which have cross-border effects.[123] Marine environmental degradation and marine biodiversity loss, as typical transboundary issues, seem *prima facie* to justify Community intervention. According to the Commission, however, not all transboundary problems justify Community action, but to meet the subsidiarity criteria it is necessary to look at: (a) the Community dimension of the problem; (b) the most effective solution, considering the means available to the Community and to the member states (the *comparative effectiveness* test); and (c) the added value of the Community action compared to isolated action by member states (the *added value test)*.[124] Although the Community action for the protection of the marine environment may be justifiable under (c), it will hardly meet the (a) requirement. Marine degradation, indeed, does not know of maritime boundaries nor does it exclusively involve EC member states and appears to be more of a "regional", rather than a Community problem. Whether or not the Community action meets the (b) requirement, moreover, must be determined on a case-by-case basis, depending on the issue and taking into account different legal, geographical, environmental, economic and political factors. These factors and the manner in which the subsidiarity principle applies to different marine issues will be considered in the case-study chapters.

2.4.2 The Principle of Proportionality

Even though the Community's action passes the subsidiary test, it must also be justified on the basis of the principle of proportionality, which determines "to what extent" and "in what form" the Community may act. The principle is formulated in Article 5(3) EC which requires that "any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty". First of all, it is clear that the proportionality test, unlike subsidiarity, applies to "any" Community action, including in areas under its exclusive competence.[125] However, Article 5(3) does not establish clear legal criteria on how to apply proportionality. According to the Court, in order to establish whether Community law complies with the principle of proportionality, it must be ascertained "whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary

legislation with the subsidiarity criteria "before" its adoption.

123 Subsidiarity and Proportionality Protocol, Para. 5.

124 Communication from the Commission on the Subsidiarity Principle, SEC (92) 1900. See also H. Somsen in T. Jewell and J. Steele (eds.) (1998), p. 188.

125 E.g., G. de Búrca (2000), p. 24.

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to achieve it".[126] The Protocol of the Amsterdam Treaty provides some additional guidance and requires that Community action shall be "as simple as possible" and leave "as much scope for national decision as possible".[127] As a consequence, Directives should always be preferred above Regulations and the use of non-binding instruments, such as Recommendations or voluntary Codes of Conduct, should be encouraged.[128] In this fashion, the Protocol suggests that EC legislation should set the general framework, leaving member states free to take specific actions. This approach is reflected in Article 176 EC, which allows member states to maintain or introduce more stringent environmental standards than those contained in EC legislation.[129]

As far as the external competence is concerned, in order to justify Community action on the basis of the proportionality principle, it is important to look at the international regime. When existing international instruments seem to be adequate and effective enough to achieve the objectives pursued, Community action does not seem to be necessary.

As in the case of the subsidiarity principle, the member states and the EC institutions may challenge the validity of the Community legislation for non-compliance with the proportionality principle on the basis of Article 230 EC.

2.4.3 Guiding Principles of the EC "Environmental" Policy

Different from the fundamental principles discussed in the previous paragraphs are the guiding principles which define "in which manner" and "how" the Community should act. Community action has to be guided, in the first place, by the integration principle. Originally formulated as a principle of EC environmental policy, in the Amsterdam Treaty "integration" has been included among the general principles of EC law.[130] The evolution of the integration principle into a general principle of EC law suggests that there is no hierarchy in the EC Treaty among the economic and the environmental objectives which need to be satisfied without one prevailing over the other. Article 6 EC requires the Community institutions to integrate environmental protection requirements into the definition and implementation of all common policies and activities in view of promoting sustainable development. That means that, as a minimum, they have to take environmental considerations fully into consideration before taking any action within the different common policies, including, for instance, transport, fisheries,

126 Case C-84/94, *UK v. Council,* Para. 57.

127 Subsidiarity and Proportionality Protocol, Paras. 6 and 7.

128 *Ibid.* See on this G. de Búrca (2000), pp. 32-33.

129 See the Opinion of Advocate-General Cosmas in the C-318/98, *Fornasar Case*, Para. 35.

130 On the integration principle see N.M. Dhondt (2003); R. Garabello in T. Scovazzi (ed.) (2001), pp. 79-116; D. Grimeaud (2000), pp. 207-18, M. Wasmeier (2001), pp. 159-177. Communication from the Commission, "Partnership for Integration - A Strategy for Integrating Environment into European Union Policies" (COM (98) 333).

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agriculture, energy and industry.[131] However, the content of the principle is rather vague and it is not entirely clear which "environmental protection requirements" have to be integrated in practice.[132] The EAPs and other policy documents provide some guidance. The Sixth EAP, for instance, calls for an integrated strategy which deals with the pollution and degradation of marine habitats and coastlines and also calls for the full integration of environmental considerations into the 2002 revision of the Common Fisheries Policy, as well as into all aspects of the Community's external relations, including trade and development cooperation.[133] Nevertheless, the EC institutions still have a great deal of discretion in balancing the environment with other interests and do not always fully integrate environmental considerations into other policy sectors. So far, moreover, the ECJ has seemed reluctant to challenge the validity of Community legislation for not taking environmental considerations into sufficient account.[134]

Article 174(2) EC, moreover, sets out a number of principles which should guide Community action in the field of the environment. These principles are further specified in the EAPs and other policy documents and determine "the manner" in which the Community should exercise its environmental competence.[135] Community environmental policy shall aim, first of all, at a "high level of protection". This principle, which repeats the fundamental objective under Article 2 EC, intends to ensure that environmental legislation, which usually lays down minimum standards, provides for a sufficiently strong level of protection throughout the Community. The Court seems to admit the possibility, in some cases, to annul environmental legislation for non-compliance with the high level of protection principle.[136] Second, the EC institutions are required to take into account the "diversity of situations" and the "different environmental conditions" in the various regions of the Community.[137] The principle of "*regional differentiation"* is in line with the regional approach of the LOSC and, as will be discussed in further detail in Chapter 3.2.3, it has played a central role, together with the subsidiarity principle, in shaping Community action in marine environmental matters. Article 174(2) EC, moreover, endorses the main principles of Chapter 17 of Agenda 21 and requires that the Community environmental policy "shall be based on the

131 As Advocate-General Leger pointed out in its Opinion on Case C-371/98 sustainable development requires the Community, as a minimum, to apply the integration principle.

132 See on this point J.H. Jans (2000), p. 18.

133 The 6th EAP, Paras. 7.2 and 35. The EAP also includes the "integration of environmental concerns into other policies" among the strategic approaches to achieve the EC's environmental objectives (Para. 2.2). See, for more details, Chapter 3.5.1.

134 See, e.g., Case C-341/1995, *Bettati Case,* and Case C-293/97 *Standley Case*.

135 For a detailed analysis of these principles: L. Kramer (2000), pp. 9-20, and J.H. Jans (2000), p. 31-3.

136 See, Opinion of Advocate-General Cosmas in the C-318/98, *Fornasar Case*, Para. 32.

137 See also Article 174 (3) EC. That regional approach is reflected in most environmental legislation in the field of water quality (e.g., Directive 76/160 on the quality standards for bathing waters or Directive 79/923 on the quality required of shellfish waters). For more details see L. Kramer (2000), pp. 133-40.

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precautionary principle, and on the principle that preventive action should be taken, that environmental damage should as a priority be rectified at source[138] and that the polluter should pay".[139] By embodying these principles in the Treaty, the EC legal order clarifies their content and confers on them a more concrete dimension. The Community commitment to the precautionary principle is particularly strong.[140] Although the principle is explicitly mentioned only in the Environmental title, it seems to apply to other policy areas, including the Common Fisheries Policy.[141] On several occasions, the Court, supporting the position taken by the Commission, has justified Community action on the basis of the precautionary principle and has made it clear that "where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of these risks become fully apparent".[142] Nevertheless, the recent proposal for a Maritime Strategy Directive does not contain any reference to the precautionary principle. The idea that to "prevent is better than to cure", moreover, has been central to the Community's environmental policy since the earliest stages and has inspired legislation in the field of environmental impact assessment (EIA), use of BAT and BET, prior information and consultation.[143] Surprisingly, however, the general definition of "aquatic pollution" adopted by the Community does not reflect the preventive principle, but refers to the introduction of substances and energy "which result" in damage to the environment.[144]

Despite their inclusion in the EC Treaty, the nature of these principles is not entirely clear and they seem to work as general guidelines for the EC institutions, rather than legally binding rules.[145] According to the Court, these principles could only be used

138 This principle has influenced most EC legislation in the fields of water quality, transboundary shipment and disposal of wastes.

139 This principle has been central to EC environmental policy since the beginning because of its possible impact on the internal market and finds application in all Community legislation regarding environmental liability, environmental charges and imposition of environmental standards.

140 The Maastricht Treaty, unlike most global and regional instruments, formulates precaution as a "principle" rather than an "approach". On the role of the precautionary principle within the EC legal order and on the role played by the EC in promoting the global acceptance of this principle, see A. Trouwborst (2002), pp. 142-8; J.H. Jans (2000), pp. 33-4; L. Kramer (2000), pp. 16-7.

141 The Court has expressly recognized the application of the precautionary principle to the CFP in C-405/92 *(Driftnets Case) (*Para. 3).

142 E.g., Case C-180/96 *R. v. Ministry of Agriculture, Fisheries and Food and Others*, Para. 63; Case C-405/92, *Driftnets Case,* Para 3; C-418/97 *ARCO Chemie Netherlands and others*, Paras. 39-40. For an overview of the ECJ case law on the precautionary principle, see: A. Trouwborst (2002), pp. 175-8.

143 E.g., EIA Council Directive 85/337, as amended, and IPPC Directive 96/61.

144 E.g., Water Framework Directive 2000/60/EC (Article 2(33)) and Directive 76/464/EEC (Article 1(e)).

145 L. Kramer (2000), p. 10.

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in exceptional cases to challenge the validity of EC legislation when the Council has committed a "manifest error of appraisal regarding the condition for the application of Article 130r [now Article 174]".[146]

2.5 The "Geographical" Scope of EC Environmental Competence

Defining the geographical scope of the Community's environmental competence is central to the present study.[147] In particular, it is fundamental to determine whether the Community is competent to regulate the environmental impact of human activities taking place in maritime areas within and beyond the sovereignty or jurisdiction of its member states.

First of all, for sake of clarity, it should be said that the Community, unlike states, has no competence with regard to the establishment of maritime zones or maritime boundary delimitation, which remain under the exclusive sovereignty of the member states.[148]

The EC Treaty does not make any explicit reference to the geographical scope of the application of EC law. According to Article 299, the EC Treaty applies to the member states, subject to some exceptions and adjustments, without making any reference to their territory.[149] According to the Community's Declaration upon the formal confirmation of the LOSC, on the other hand, the Convention applies to "the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in the Treaty, in particular Article 227 (now Article 299) thereof".[150] The Declaration makes it clear that the EC's competence in the field of fisheries applies to waters under national jurisdiction and to the high seas, but is silent about the geographical scope of the Community's environmental competence.

The applicability of the EC Treaty, including Article 175, to the territorial sea of its member states does not raise particular problems.[151] Conversely, the extension of the EC's environmental competence beyond the territorial waters of the member states

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146 Case C-341/1995, *Gianni Bettati,* Para 35. According to L. Kramer (2000), p.8, this is a case of systematically disregarding the principles.

147 On the geographical scope of the EC law in general see, *inter alia*, J. Wolff (2000), pp. 30-43; C. Bury and J. Sack in: E. Franckx and P. Gauthier (eds.) (2003), p. 66; I. Macleod *et al.* (1996), pp. 69-72; D. Freestone (1992), pp. 103-05; P. Birnie, (1992), pp. 193-216; J.C. Woodlife (1975), p. 7-26.

148 J. Wolff (2000), pp. 30; E. Franckx (1992), pp. 239-40; D. Freestone (1992), p. 97; D. Vignes in: T. Treves (ed.) (1997), pp. 7-26, at 8.

149 These are listed in Article 299 EC, Paras. 2-6 and in the Acts of Accession.

150 The Text of the Community's Declaration is reproduced in Annex II to this book.

151 Under the Vienna Convention of the Law of Treaties (Article 29), in the absence of further specifications, a Treaty is binding upon each party with respect to the "entire territory". According to the International Law Commission "the territory" includes any "appurtenant territorial waters and airspace". See ILC Report [1966], p. 45.

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(i.e., continental shelves and EEZ) has for a long time been the object of discussion and has been traditionally opposed by those member states having strong interests in oil and gas exploitation, maritime transport and fisheries.[152]

The ECJ has recognized that any extension of member states' sovereignty or jurisdiction in accordance with international law implies a corresponding extension of the application of EC law and policies.[153] The Court, moreover, has made it clear that Community competence in the internal waters, territorial sea and EEZ of the member states must be exercised in conformity with the LOSC.[154] The Court's conclusions on the EEZ seem to be also applicable, by analogy, to the continental shelf.[155] The Court, moreover, has on several occasions recognized the Community's competence to regulate activities on the high seas, insofar as the member states have authority under international law.[156] All the relevant case law, however, expressly refers to fisheries and vessel-source pollution and, until recently, the Court has never expressly pronounced on the application of EC environmental legislation beyond the territorial sea of the member states. Nevertheless, as will be discussed in further detail in Chapter 8.8.3.2, the extended seaward application of environmental legislation is largely accepted and, in 2005, has been finally recognized by the Court.[157]

Existing EC environmental legislation, unlike maritime safety and fisheries legislation,[158] makes no reference to the geographical application beyond the territorial sea of the member states. Some environmental Directives expressly apply to coastal

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152 E.g., *inter alia*, D. Freestone (1992), p. 104; J.E. Harders (1990), pp. 263-79; J.C. Woodliffe (1975), pp. 7-26.

153 E.g., Case C-61/77, *Commission v.* Ireland. See also: Case C-286/90, *Poulsen*, Paras. 9 and 24; C-405/92, *Driftnets Case*, Para. 5; Case C-285/89, *Commission v. Spain.*

154 Case C-286/90, *Poulsen*, Paras. 25-8.

155 The Community has adopted legislation which applies to resources of the continental shelf. Council Regulation 802/68, for instance, includes in the definition of "goods" subject to the common market rules "products taken from the sea-bed or beneath the sea-bed outside the territorial waters, if that country has, for the purpose of exploitation, exclusive rights to such soil or subsoil" (Article 4.2.h), except petroleum products (Article 3).

156 E.g., Case C-286/90, *Poulsen*, Para. 24; Joined Cases 3-4-6/76, *Kramer*; C-405/92, *Driftnets Case*, Paras. 12 and 15; Joined Cases 89-104-114-116-117-125-129/85, *Woodpulp.* All these cases relate to fisheries.

157 See Case C-6/04, *Commission v. United Kingdom*, para. 117. See also: *The Queen v. The Secretary of State for Trade and Industry* ex parte *Greenpeace Case*, 5.11.1999, in: Environmental Law Reports 2000, p. 221. On this judgment see: D. Owen (2000), pp. 46-8; J.H. Jans (2000), pp. 385-7.

158 E.g., Directive 2005/35/EC on ship-source pollution, Article 3(1), *infra* Chapter 6. 8.7. EC fisheries law applies to activities taking place in Community waters (i.e., waters under the sovereignty or jurisdiction of the member states) or by Community fishing vessels or nationals of Member States wherever they are (i.e., Council Regulation 2371/2002 on the Common Fisheries Policy, Article 1(1)).

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waters;[159] others extend to the territorial sea,[160] while still others generally refer to the sea.[161] The Commission, however, has consistently adhered to the extended application of EC environmental legislation beyond the territorial waters, including the EEZ established by member states in accordance with international law.[162] As will be discussed in further detail in Chapter 3, the recent proposal for a Marine Strategy Directive expressly applies to "all European waters on the seaward side of the baseline from which the extent of the territorial waters is measured extending to the outmost reach of the area covered by the sovereignty or jurisdiction of the Member States including the bed of all those waters and its subsoil, hereinafter 'European marine waters'".[163]

2.6 Conclusions

The European Community has its own peculiarities, compared to other international organizations, which make it a "new legal order of international law". This body of law is in a position of supremacy compared to the member states' national systems. The strong institutional framework, the progressive extension of the QMV in the Council and the extensive jurisdiction of the ECJ confer on the Community legal order a strong autonomy from the national systems of the member states. By establishing a Community of unlimited duration, with its own institutions, legal personality and its own capacity to act on the international plane, and, by creating an autonomous and evolving body of law, which is binding on them, their courts and their citizens, the member states have explicitly or implicitly consented to limit, completely or partially, their legislative sovereignty in many policy areas,[164] including the (marine) environment.

Community competence, however, is not unlimited, but is based, first of all, on the principle of attribution, according to which the Community is entitled to take actions necessary to achieve the objectives of the Treaty and within the limits of the powers conferred therein. As discussed in Chapter 2.2.1.1, the objectives of the Community in the field of the environment, however, are so broadly formulated as to justify virtually

159 E.g., the Water Framework Directive 2000/60/EC defines coastal waters as "surface waters on the landward side of a line, every point of which is at a distance of one nautical mile on the seaward side from the nearest point of the baseline from which the breadth of the territorial waters is measured […]". See also: Council Directive 79/923/EEC on the quality required of shellfish waters.

160 E.g., Council Directive the 76/464/EEC on the quality standards for bathing waters.

161 E.g., TiO2 Council Directive 78/176/EEC.

162 See, e.g., Communication from the Commission, Towards a Strategy to Protect and Conserve the Marine Environment, COM(2002)539 (Para. 10) and COM/2003/92 final, at 4.3. In COM (1999) 363, moreover, the Commission states that, as far as member states have competence, the Habitats Directive applies to the EEZ. See for further details Chapter 8.8.3.2.

163 COM (2005) 505, 24.10.2005, Article 1. See *infra* Chapter 3.5.1.

164 Case 6/64, *Costa v. ENEL*, Paras. 593-4.

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any action of the Community considered to be necessary to protect and preserve the marine environment and its resources. The Community's competence in environmental matters, including ocean issues, finds a solid legal basis in various provisions of the EC Treaty. In addition, the Treaty confers on the Community the power to conclude international Conventions and to establish contractual relations with third countries in a number of policy areas, including the environment. Moreover, according to the Court in the *ERTA Case* the Community's external competence may be implied by other provisions of the Treaty conferring internal powers. The "existence" of Community internal and external competence in (marine) environmental matters, therefore, cannot be contested. What may be contested is the choice of the legal basis for such an action, which influences the level of participation of the EC institutions in the decision-making process. Currently, environmental legislation is adopted by means of co-decision with the EP and by QMV in the Council. Normally, the EP, unlike the Council, tends to raise the standards proposed by the Commission and its participation in the decision-making, therefore, influences the environmental content of EC legislation to a great extent.

Different from the "existence" of a Community competence is the "nature" of such competence, whether "exclusive" or "shared", which defines the residual autonomy of the member states to act. The extent of the Community's competence, however, is not static, but evolves according to the developments in the European integration process. The Court, indeed, draws a difference between the exclusive competence under the EC Treaty and the transfer of powers resulting implicitly from the adoption of EC legislation ("pre-emption").

"Whether" and "to what extent" the Community is entitled to "exercise" its competence requires a case-by-case analysis on the basis of the subsidiarity and proportionality principles. According to the former, in areas outside its exclusive competence, Community action is only justified when it appears to be more effective to achieve the proposed objectives compared to a member state's action. According to the latter, Community action cannot go beyond what is necessary to achieve the objectives of the Treaty. Both principles, however, are based on relative concepts such as "effectiveness" or "necessity" and are linked to the Community's objectives as broadly defined in the EC Treaty. In the absence of clear legal criteria on how to apply subsidiarity and proportionality, the determination of whether and how the Community may act is often a matter of political choice.

Finally, the Community's action in environmental matters has to be guided by a number of principles, including those recommended by Agenda 21 (e.g., the integration, precautionary, prevention and polluter-pays principles), which define "in what manner" the Community should act.

The validity of the Community's action may be challenged both by the member states and the EC institutions for non-compliance with the attribution, subsidiarity and proportionality principles, and, in some cases, the guiding principles of EC environmental law.

As far as the "geographical scope" of the Community's environmental competence is concerned, in the absence of specific provisions in the EC Treaty, the Court has made

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it clear that the Community has the authority to regulate activities in the territorial sea, EEZ as well as in the high seas, as long as member states have competence under international law and as far as it acts in accordance with the LOSC.

As discussed in this Chapter, the Community's legal order is equipped with a series of enforcement tools (such as the possibility for the Commission to initiate infringement proceedings against member states not complying with EC rules, the capacity, under certain circumstances, of individuals to take action before national courts for a violation of rights stemming from EC legislation, and the possibility for the Court to order monetary penalties) which make it particularly effective compared to other international regimes, especially in the field of (marine) pollution.

Finally, it is worth stressing that political considerations and institutional dynamics play a fundamental role in shaping the work of the Community. In general, the Commission, supported by the EP and ECJ, tends to extend European integration further, while the member states in the Council normally try to resist these attempts and defend their national interests. The constant struggle between supranational and national aspirations creates the scenario for Community action in marine environmental matters.

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CHAPTER 3

The Protection and Preservation of the Marine Environment under EC Law

3.1 Introduction

The previous Chapter discussed the rules governing "whether" and "how" the Community may act to protect the marine environment and the instruments and mechanisms available under EC law. The present Chapter looks closely at the way the Community actually applies these rules and the approach it has taken with regard to marine issues. For the purpose of the discussion, "European oceans and seas" refer to the Baltic Sea, the North-East Atlantic and the Mediterranean Sea. Given the fact that, at the moment, none of the Black Sea coastal States is an EC member, the Black Sea is not covered.[1]

The protection and preservation of the marine environment and its essential functions have been a central element in the Community's environmental policy since its inception. Nevertheless, despite the existence of adequate legal bases in the EC Treaty, marine environmental protection has traditionally played a subordinate role within European environmental law. So far, the Community has never developed a comprehensive policy on oceans as it did for other environmental areas and its action "at sea", unlike "on land", has been limited, fragmented and indirect. Given the cross-sectoral nature of marine issues, important aspects related to the protection of the marine environment have been directly or indirectly regulated within the framework of different policies (e.g., water quality, transport or fishing). For a long time, rather than establishing its own rules and standards, the Community has relied on the international ocean regime, either by urging its member states to adopt and implement existing international conventions or, when possible, by acceding to them itself. The present Chapter briefly discusses the main factors which have influenced this "multilateral" approach to ocean preservation. As a result, the legal regime for the preservation of the marine environment within the European Community may take the shape of a pyramid figure formed by three main building blocks: the global ocean regime (customary principles, the LOSC and Chapter 17 of Agenda 21 together with the WSSD Plan), which stands at the top, the international implementing regime (MEAs and Regional Seas Conventions) which stands in the middle, and sectoral EC legislation forming the base. The Chapter briefly describes

1 The Community is not a party to the Black Sea Convention, which reserves membership only to states. However, since 2001 it has observer status in the Convention and in view of the next enlargement concerning Bulgaria and Romania (and Turkey), it has increased its participation in this forum. The Black Sea, moreover, is fully integrated in the new European Marine Strategy (e.g., COM (2002) 539, Para. 10 and p. 48).

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this legal framework with strong attention being given to the action taken by the Community towards the implementation of its international commitments.

The "patchwork" regime applying to European seas leads to inconsistencies, overlaps and duplications and does not respond to the need to adopt an integrated approach to ocean issues as recommended at the international level. In the past few years, therefore, the Community has gradually changed its traditional approach. The Chapter concludes discussing the recent Commission's proposal for a Marine Strategy and a Marine Strategy Directive and the steps taken towards the adoption of a comprehensive policy on oceans and seas.

3.1.1 The State of Europe's Marine Environment

The latest official data on the status of Europe's oceans and seas reveal a rather critical situation.[2] In spite of the important results achieved in the past three decades in terms of controlling the traditional sources of pollution, European marine environment is still subject to serious pressure. As discussed in Chapter 1.4.1, the European seas, due to their ecological, geographical and socio-economic characteristics are particularly exposed to the threats posed by human activities, including merchant shipping and the introduction of non-native species from the ballast waters of ships,[3] over-fishing and the use of destructive fishing practices (e.g., bottom trawling),[4] ocean dumping,[5] oil and gas extraction,[6] land-based activities, especially agricultural practice and waste water treatment,[7] as well as contamination from litter and noise pollution.[8] As will be further

2 See, for instance, EEnvA, "European Environment, State and Outlook 2005", pp. 132-67, at: http://reports.eea.eu.int/state_of_environment_report_2005_1/en/SOER2005_all.pdf, the Commission Communication, "Thematic Strategy on the Protection and Conservation of the Marine Environment" and Impact Assessment, and the Commission Communication, "Towards a strategy to protect and conserve the marine environment" (COM(2002)539).

3 Commission (2005), Impact Assessment, *infra* n. 94, p. 10 and Chapter 6.1.1.

4 Over-fishing is posing a serious threat to the very availability of commercial stocks (e.g., cod, hake and tuna) and has a strong impact on non-target species. See Commission (2005), Impact Assessment, *infra* n. 94, pp. 7-8; and COM (2002) 539, pp. 29-32.

5 Ocean dumping, however, no longer represents a major threat to European seas. See, in general, Chapter 7.2.1.

6 As discussed in 1.4.2, there is oil and gas extraction from the continental shelves of Denmark, Germany, the Netherlands and the UK. Despite a substantial reduction of discharges from offshore platforms, there is still a high risk of marine pollution associated with the expansion of drilling operations in deeper waters and ice-covered waters. E.g., Commission (2005), Impact Assessment, *infra* n. 94, p. 13 and COM (2002) 539, p. 34.

7 Eutrophication is a main problem in all European seas together with contamination by hazardous substances, urbanization, uncontrolled development of coastal areas, concentration of human activities along the coasts and tourism (e.g., Commission (2005), Impact Assessment, *infra* n. 94, pp. 10-13 and COM (2002) 539, p. 35.

8 E.g., Commission (2005), Impact Assessment, *infra* n. 94, pp. 12-13.

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discussed in Chapter 8, these activities have a strong impact on marine biodiversity and ecosystems, including sensitive habitats (e.g., marl beds, Posidonia meadows and deep-sea coral reefs), and non-targeted species, including cetaceans, seals, marine birds and turtles.

3.2 The Marginal Role of Marine Environmental Protection within EC Law

The Community has recognized the essential role of oceans and seas and the need to enhance efforts to protect and preserve the marine environment since the early stages of its common environmental policy.[9] In the First Environmental Action Programme (1973) the Commission identified marine pollution as one of the major and most dangerous environmental problems in the whole Community and, due to the diversity of sources, the most difficult to control.[10] At the same time, the Council, supported by the EP,[11] stressed the importance for the Community to take measures to combat marine pollution.[12] Also the European Council, since 1978, has devoted increasing attention to the protection of oceans and seas, urging the Community and member states to take concrete action to preserve the marine environment.[13]

Despite the strong political commitment, the protection of the marine environment has traditionally played a secondary role within EC law.[14] So far, the Community has never established a common policy or comprehensive legislation on oceans and seas as it did for other environmental sectors. Ocean preservation, instead, has been treated within the framework of different environmental policies, but first of all, the common

9 For a general discussion on the protection of the marine environment within the common environmental policy see: L. Kramer (1997), pp. 259-97; S.P. Johnson and G. Corcelle (1989), pp. 115-22; A.C.H. Kiss and D. Shelton (1997), pp. 338-51; D. Anderson in M. Kusuma-Atmadja, T.A. Mensah and B.H. Oxman (eds.) (1997), pp. 700-13; P.W. Birnie (1992), pp. 193-216; K.R. Simmonds (1989), pp. 74-107.

10 See the First Environmental Action Programme, 22.11.1973, Chapter 6, p. 25. The First EAP is the only one which devotes specific attention to oceans and seas within a section on "marine pollution". It identified the major sources of marine pollution which needed to be controlled, namely: sea transport and navigation, deliberate ocean dumping, the exploitation of marine and submarine resources, especially from the seabed, and land-based discharges. See, in general, L. Kramer (1997), pp. 261-78; K.R. Simmonds (1989), pp. 75-79.

11 E.g., Resolution 3.03.1983 (OJ C 69/66); Resolution 25.10. 1984 (OJ C 314/91); Written Question 1385/84 [Beyer de Ryke] (OJ C 129/9) and Written Question 401/886 [Muntingh] (OJ C 299/63). On the position of the EP see: P.W. Birnie (1992), p. 205 and S.P. Johnson and G. Corcelle (1989), pp. 340-41.

12 Declaration of the Council of 22 November 1973 on the First EAP (OJ C 112, 20.12.1973, p. 1).

13 See, *inter alia*, the 1978 Copenhagen European Summit; the 1988 Rhodes European Summit and the 1998 Lisbon Declaration adopted for the International Year of the Ocean (Expo 98).

14 L. Kramer (1997), p. 206.

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water policy, which, however, focuses mainly on fresh waters.[15] The most direct and concrete action has been taken within areas outside the environmental policy, such as transport and fisheries, and, to a certain extent, the internal market and agriculture. Most of these measures, however, are not designed specifically for the protection of the marine environment, which is always in a subordinate position compared to other objectives.

In performing its monitoring functions, moreover, the Commission has traditionally dedicated minor attention to protection of the oceans and seas. The marine environment, indeed, does not normally receive specific consideration within the annual reports on the state of the environment,[16] nor within the annual surveys on the implementation and enforcement of Community environmental law,[17] but it is always treated within the general context of the "aquatic environment" and at a secondary level compared to fresh waters and coastal areas. Also the EC environmental financing mechanisms (i.e., LIFE Nature and LIFE Environment) give strong priority to the protection of nature on land, while marine environmental protection projects are largely underrepresented.[18] Likewise, the Court in its case law has dedicated little attention to the protection of the marine environment.[19]

The limited attention of EC environmental law to oceans and seas has been influenced, at least in part, by a general lack of reliable data and a strong gap in knowledge with regard to the marine environment compared to the terrestrial environment.[20] In addition, several factors of a legal, political and institutional nature have for a long time prevented the establishment of a comprehensive marine environmental policy and

15 Originally, the Common Water Policy (COM (1996) 59, 21.02.1996, as amended) did not include any specific action on marine waters. The new Water Framework Directive 2000/60/EC extends to "coastal waters" up to 1 n.m. from the baseline (Article 2(7)).

16 However, the 2005 EEnvA Report, *supra* n. 2, contains a special section on "marine and coastal environment".

17 E.g., 6th Annual Survey on the Implementation and Enforcement of Community Environmental Law, SEC (2005) 1055, 17.08.2005, at: http://europa.eu.int/comm/environment/law/pdf/6th_en.pdf. This, however, may be explained by the absence of specific EC law on marine environmental protection.

18 The list of all LIFE-sponsored projects is available at: http://europa.eu.int/comm/environment/life/project/Projects/index.cfm. So far, projects related to the protection of the marine environment have been a minority and they mostly relate to integrated coastal management and coastal areas (e.g., LIFE98 NAT/P/005275 on Integrated Management of Coastal and Marine Zones in the Azores). See also: List of LIFE Environment Projects 2005, p. 72, at: http://europa.eu.int/comm/environment/life/infoproducts/lifeenvcompilation_05_lowres.pdf and List of LIFE Nature Projects for the conservation of habitats and species, available at: http://europa.eu.int/comm/environment/life/life/nature.htm.

19 Most of the Court's relevant case law relates to the conservation of fisheries (e.g., Joined Cases 3, 4 and 6/76, *Kramer*; Case C-405/92, *Driftnets Case*), while only a few judgments have dealt indirectly with marine environmental protection (e.g., C-379/92, *Peralta Case* and Case C-286/90, *Poulsen*).

20 Commission (2005), Impact Assessment, *infra* n. 94, p.15. The lack of data is a direct consequence of the fact that conducting monitoring at sea is particularly expensive.

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the necessary legislation and this has resulted in the incorrect impression that oceans and seas are not the "Community's business". These factors will be briefly discussed in the following paragraphs.

3.2.1 Institutional Fragmentation

The absence of a common marine policy and legislation is at the same time the cause and the effect of a strong institutional fragmentation within the Community with regard to marine issues. Within the Commission, DG ENV is the main body responsible for marine environmental issues, but important aspects related to oceans and seas are also dealt with by other DGs including, *inter alia*, DG Energy and Transport (TREN), DG Fisheries (FISH), DG External Relations (RELEX), with diverse and sometimes opposing interests. Within DG ENV itself, marine matters are discussed by several units and, mainly due to resource constraints, a separate unit dealing exclusively with oceans and seas has never been established.[21] According to the Commission's procedural rules on interdepartmental coordination, each Unit has to act in conjunction with all interested Units, bearing in mind that the Commission as a whole will be responsible for the final measure.[22] Reportedly, however, the level of coordination among the different DGs and units involved has traditionally been rather weak.

The fragmentation existing within the Commission is also reflected in the work of the Council. Marine environmental issues are discussed within different Working Groups or Working Parties under different Council configurations. The Council's Working Party on the Law of the Sea (COMAR), for instance, acting within the framework of the Council's General Affairs and External Relations, is the main body responsible for assisting the COREPER in examining the consistency of EC legislative proposals with the LOSC and the law of the sea.[23] Marine-related legislation, however, may also be discussed within the framework of the Environmental Council (e.g., Working Group on Environment and Working Party on International Environmental

21 See L. Kramer (1997), p. 209. Within DG ENV, for instance, Unit B1 has for a long time been responsible for the protection of "Water, Marine and Soil Quality". Currently, Unit D2 is the main Unit responsible for "Protection of water and marine environment", but important marine environment-related issues are also dealt with within other units, such as, for instance, Unit B2 (Nature and Bio-diversity), Unit E1 (international relations), Unit A4 (interinstitutional relations), Unit B1 (agriculture and soil), Unit B3 (impact from forestry practices), Unit C1 (air pollution from ships), Unit C 3 (industrial effluents), Unit C4 (chemical control), and Directorate G (aspects related to integrated coastal zone management and sustainable use of conservation of marine living resources).

22 See: Rules of Procedures of the Commission, Article 21 on interdepartmental cooperation and coordination (C(2000) 3614)(OJ. L 308/26, 8.12.2000).

23 The mandate of the COMAR is contained in Annex III of Council Decision 98/329, concerning the conclusion of the LOSC by the Community. For a full discussion see: Chapter 5.2.7.3.

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Issues (WPIEI)), within the Transport Council (e.g., Transport Working Group), or within the Fisheries Council (e.g., External Fisheries Group), among others.

Similarly, within the European Parliament oceans and seas are dealt with by different committees, mainly the Committee on Environment, Public Health and Food Safety,[24] but also the Agriculture and Fisheries Committee; the Transport and Tourism Committee, and the External Relations Committee, among others.

The institutional fragmentation existing at the EC level is also present at the national level. Within the member states, decision-making responsibilities on marine environmental matters are normally spread among different ministries (e.g., Environment, Transport, Fisheries, Foreign Affairs) and departments.

This strong institutional fragmentation has contributed to a great extent to the Community's sector-by-sector approach to marine issues. The institutionalisation of the integration principle by the Treaty of Amsterdam (Article 6 of the EC Treaty) has created the political momentum for a change and established the legal basis for a more comprehensive approach to marine environmental protection. The principle, however, still leaves a high level of discretion for the EC institutions to decide what has to be integrated and in what manner. So far, therefore, environmental concerns have not been fully and properly integrated into sectoral policies and legislation.[25]

3.2.2 Conflict of Interests

Oceans and marine resources play a vital role in the life and economy of most of the EC member states. Traditionally, therefore, they have opposed any direct involvement of the Community in marine environmental issues, which strongly affect their national interests and impinge on their sovereignty.[26] Conversely, in the field of fisheries, member states had to accept that they would transfer their competence to the Community because of the strong impact of fisheries regulations on the establishment of a single market, which was the primary objective of the (at the time) EEC.

The conflict of interests is particularly strong also among member states. Generally speaking, it is possible to divide member states into three main groups, namely: those with strong maritime interests (e.g., Cyprus, Denmark, Greece, Malta and, to some extent, Belgium, the Netherlands, and the UK); those with strong fisheries interests (e.g., Ireland, Italy, Portugal and Spain, and, to some extent, Estonia, France, Latvia, Lithuania and Poland); and the more environmentally-oriented countries (e.g., Germany, Finland

24 On the history, composition and powers of the Environmental Committee see: www.europarl.eu.int/comparl/envi/default_en.htm.

25 E.g., Commission (2005), Impact Assessment, *infra* n. 94, p. 15.

26 For a full discussion see: P. Daillier (1979), pp. 436-43.

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and Sweden and, to some extent, the Netherlands).[27] The same diversity of interests existing between member states is present among different EC institutions and within the Commission itself. The conflict of interests has made it particularly complex for the member states to agree on uniform measures, especially before the Treaty of Maastricht, when marine-related legislation normally required unanimity in the Council and simple consultation with the EP. Similarly, for the Commission it has been rather difficult to propose marine-related legislation and most of its attempts have been blocked in the Council. The limited role of the EP in the environmental decision-making process has further hindered the adoption of marine environmental measures. The progressive extension of QMV in the Council and the co-decision with the EP has partially changed the situation. As will be discussed later in this chapter, however, economic considerations and market integration objectives have traditionally prevailed over the necessity to arrest marine degradation within the Community and have played a decisive role in limiting the Community's autonomous action in this field.

3.2.3 The Principles of Subsidiarity and Proportionality

For a long time, the member states have used the principles of subsidiarity and proportionality to limit the Community's regulatory action in marine environmental matters to a minimum, mostly in relation to land-based pollution.[28] EC law (Article 5 EC) and all EAPs require that action should be taken at the level (global, regional, or national) which is best suited to the type of pollution and the geographical area concerned. European waters are all enclosed or semi-enclosed seas within the meaning of Article 122 of the LOSC and require close cooperation among all coastal States in the region, including non-EC countries, such as the Russian Federation in the Baltic, or the North African states and Syria in the Mediterranean. As discussed in Chapter 2, marine degradation appears more as a "regional", rather than a Community problem and may be tackled most effectively at the regional or global levels, rather than at the EC level. In addition, the principle of regional differentiation, as endorsed in Article 174(2) and (3) EC and strongly supported by the ECJ, requires different strategies for different regional seas according to their peculiarities and their capacity to absorb pollution. Standards and measures which are effective in the Baltic Sea could be totally

27 Future enlargements will increase maritime interests within the EC because Bulgaria, Croatia, Romania, and Turkey are all maritime nations. In addition, there is the group of landlocked states (i.e., Austria, the Czech Republic, Hungary, Luxembourg and Slovakia) with no strong marine-related interests. These countries may take different positions according to the circumstances.

28 EC measures on land-based pollution appeared necessary and to be the most effective on the basis of the subsidiarity and proportionality principles because of the lack of adequate global and regional rules and the potential impact of different national standards on the internal market. Most of the relevant legislation is indeed based on Article 100 (and 235) on the harmonization of national laws affecting the single market. See, for instance, *infra* n. 63.

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useless in the Mediterranean Sea and *vice-versa.* The geographic, oceanographic, climatic, economic and political diversity of European seas makes it extremely difficult to adopt a coherent and uniform legal framework at the EC level, except in a very general form. Therefore, regional regimes appear to be more effective than EC uniform standards that are equally applicable to all the European seas. For a long time, moreover, existing global and regional mechanisms appeared adequate enough to control the traditional sources of marine degradation and to achieve the high level of environmental protection required by the EC Treaty (Article 2) in European seas. Additional EC rules, therefore, were not considered to be "necessary" and were not justified under the subsidiarity and proportionality principles. To avoid confrontation with the member states, the Commission has preferred to direct its efforts at other environmental matters.

3.2.4 The EC's Multilateral Approach to Ocean Preservation

All factors discussed in the previous paragraphs have influenced the Community's multilateral approach to ocean preservation.[29] Since the beginning of the environmental policy, the Community has traditionally considered international cooperation as the most effective means to address ocean issues. With the exception of land-based pollution, the first EAP placed strong emphasis on the development of international instruments and limited the role of the Community in the adoption of measures for their effective implementation.[30] The following EAPs enhanced the multilateral approach and called for the Community's autonomous participation, next to that of the member states, in existing global and regional instruments.[31] In addition, the Commission, supported by the EP, is strongly committed to multilateralism and has traditionally considered international cooperation as a precondition for meeting global challenges.[32]

The member states in the Council have strongly supported the Community's multilateral approach. In order to defend their interests and priorities, for a long time they

29 This book, following the EC terminology, refers to "multilateral approach" as opposed to unilateral regulatory action. See, for instance, the Commission's Communication (COM(2003)526), "The European Union and the United Nations. The choice of multilateralism".

30 The First EAP "authorized" the Commission to submit proposals for controlling sea transport and navigation, deliberate ocean dumping, and the exploitation of marine and submarine resources and expressly "required" it to fix emission limits and environmental quality objectives to reduce land-based pollution.

31 Within the subsequent EAPs the marine environment is not covered separately, as it was within the First EAP, but is generally treated within the broader context of "Water". This suggests that marine environmental protection is not a priority area for Community action, but is better regulated at the international level. On the relevant provisions of the various EAPs see: L. Kramer (1997), pp. 264-78, and S.P. Johnson and G. Corcelle (1989), pp.109-21.

32 See: Communication from the Commission, The European Union and the United Nations: The Choice of Multilateralism, COM (2003)526, Paras. 3 and 5.

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preferred to regulate marine environmental issues at the international level. Member states, indeed, have stronger control over the international decision-making process, which is normally based on consent, compared to that of the EC, where environmental measures are generally adopted by QMV. In addition, international standards are generally less stringent and more flexible compared to those of the EC.[33] At the political level the European Council in its declarations has also expressed a clear preference for international cooperation as the most effective tool to protect the marine environment.[34]

Economic considerations, next to the subsidiarity and proportionality principles, have played the main role in influencing the Community's multilateral approach to ocean issues. International cooperation is generally considered as more appropriate compared to unilateral environmental measures, which have a major impact on trade.[35] The adoption of EC autonomous standards that are more stringent than international ones could place the EC's industry at a competitive disadvantage with respect to the rest of the world. In addition, autonomous international action by the member states could lead to disparities at the EC level affecting the proper functioning of the internal market.[36] In order to protect the competitiveness of European industry and the proper functioning of the internal market, therefore, the Community has strongly preferred coordinated action with its member states at the international level.

Instead of adopting its own standards, therefore, the Community has decided to pursue its marine environmental objectives by acting at the international level, in the first place by becoming a party to the LOSC and most marine environmental agreements open to the participation of regional economic integration organizations (REIOs). The accession to and the participation of the Community, next to its member states, in the LOSC and international agreements applying to European seas will be discussed in detail in Chapter 5. The following paragraphs will briefly describe the legal framework which is applicable to European seas as a result of the multilateral approach adopted by the Community.

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33 E.g., L. Kramer (1997), p. 293.

34 The 1978 Copenhagen Declaration, for instance, calls on the EC Institutions to take measures for the effective implementation of the existing international rules and for the prevention of accidents through the member states' coordinated action (See EEC Bulletin 4- 1978- point 1.4.3). Similarly, the Expo 98 Declaration calls on member states which have not done so to sign and ratify the LOSC and other relevant global and regional conventions sponsored by the IMO and UNEP (Para. 11).

35 See, *inter alia*, *United States-Import Prohibition of Certain Shrimp and Shrimp Products Case,* Report AB-1998-4, WTO Appellate Body, WT/DS58/AB/R, 12.10.1999, Para. 68.

36 See A. Nollkaemper (1987), p. 57.

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3.3 The EC and the Global Framework Regime

The European Court has expressly recognized that the Community is subject to, and must exercise its powers in accordance with, "international law of the sea".[37] The Community, therefore, just as any other international legal person, is, first, under the positive legal duty to protect the marine environment according to the customary principles discussed in Chapter 1. With the exception of the duty to take preventive action, the EC Treaty does not expressly refer to customary principles, but only to the emerging principles embodied in Agenda 21.[38] The customary principles, however, have been endorsed in EC secondary legislation and the main policy documents. As a consequence, the Community has a general duty to prevent damage to the marine environment within the jurisdiction of the member states (the preventive principle) and to ensure that activities carried out therein do not affect waters outside their jurisdiction or the high seas (*sic utere tuo ut alienum non laedas*).[39] To this end, the Community has to ensure that member states use "due diligence" in carrying out potentially dangerous activities, by performing an environmental impact assessment and by using the best available means at their disposal.[40] In addition, in the case of transboundary pollution and/or emergency situations, the EC institutions and the member states are under an obligation to cooperate by means of information exchange, consultation and notification (the principle of good neighbourliness and international cooperation).[41] All these duties, however, must be exercised having "due regard" to the traditional freedoms of the high seas (the "reasonable use" principle).[42]

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37 E.g., Case C-286/90, *Poulsen*, Para. 9. In C-405/92, *Driftnets Case* (Para. 12), the ECJ made it clear that the EC's competence follows that of its member states and the Community may take action in the capacity of flag, coastal and port State on matters under its competence as long as its member states are entitled to do so under international law. For a general discussion on the relationship between the EC and the law of the sea see: P. Daillier (1979), pp. 416-36.

38 This omission could be explained by the fact that the EC legislator did not think it necessary to reconfirm principles which are commonly accepted. Conversely, Article 174(2) expressly refers to the emerging principles discussed in Chapter 2.4.3 whose status, in some cases, was still rather controversial under international law (e.g., the precautionary principle).

39 The *sic utere tuo ut alienum non laedas* has been expressly recalled in the First EAP.

40 The duty to use *due diligence* is reflected in different pieces of EC legislation requiring member states to apply EIA, BAT and BET, such as, *inter alia*, EIA Directive 85/337, as amended. See, *inter alia*, A. Nollkaemper (1993), p. 41.

41 The principle of good neighbourliness finds its application in most of the maritime safety legislation (e.g., Council Decision on a Community cooperative framework in the domain of accidental marine pollution (2000-2006)), and in a large part of the water quality legislation (e.g., Article 10 of the Shellfish Directive 79/923/EEC and Article 4(4) of the Water Quality Directive 76/160/EEC). On the application of the principle of cooperation in the EC Transport and Environmental policies see: A. Nollkaemper (1993), pp. 161-63.

42 E.g., Case C-286/90, *Poulsen* (1992); and Case C-432/92, *R. v. Ministry of Agriculture, Fisheries and Food,* ex parte *Anastasiou.*

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Second, as a party to the LOSC, the Community has the responsibility to protect and preserve the marine environment according to the relevant provisions of Part XII and the jurisdictional rules examined in Chapter 1. In particular, the Community is under three sets of obligations: a) to cooperate at both the global and regional level, directly or through competent international organizations, in the multilateral development of international rules and standards; b) to implement and enforce international rules at the EC level; and c) to take all necessary measures to protect and preserve the marine environment. It is worth recalling that, as discussed in Chapters 2.2.3 and 4.4, the marine environmental provisions of the LOSC and other marine environmental Conventions which fall under the competence of the Community form an integral part of EC law and have the same legal effects as Community legislation.[43]

Third, as a signatory of Agenda 21, the Community has assumed a "political" commitment to prevent, reduce and control the "degradation" of the marine environment and to achieve the sustainable development of oceans and seas in accordance with the provisions of Chapter 17. In particular, the Community is under five sets of commitments: a) to adopt an integrated and precautionary approach to ocean management and to apply the emerging principles discussed in Chapter 1; b) to participate in the multilateral development of international rules and standards and to cooperate and coordinate its action with the competent international organizations both at the global and regional level; c) to promote ratification and the proper implementation of the LOSC and existing international instruments on ocean preservation; d) to assist developing countries through the transfer of financial and technical resources; and e) to promote global ocean governance by ensuring access to relevant information and public participation in planning and decision-making at appropriate levels. Despite their non-legally binding nature, the Community has attached great importance to its commitments under Agenda 21 and has endorsed most of its principles in the EC Treaty. At the WSSD in Johannesburg, the Community enhanced its commitments under Chapter 17 and agreed to take specific and targeted action with strong marine environmental implications.[44]

3.4 The EC and the International Implementation Regime

3.4.1 MEAs and Regional Seas Conventions

The LOSC and Chapter 17 of Agenda 21 require States to cooperate, directly or through competent international organizations, in the multilateral development of international

43 Case C-104/81, *Hautpzollamt Mainz v. Kupferberg* [1982].

44 E.g., a) to maintain and restore fish stocks to levels that can produce the maximum sustainable yield no later than 2015; b) to reverse the current trend in natural resource degradation as soon as possible by adopting and implementing strategies to protect ecosystems and to achieve an integrated management of land, water and living resources; and c) to achieve a significant reduction in the current rate of loss of biological diversity by 2010. See: Chapter 8.3.2.

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rules for the protection and preservation of the marine environment. In addition, they place strong emphasis on regional cooperation, especially in relation to enclosed and semi-enclosed seas. As discussed in Chapter 1.3.2, this cooperation takes place primarily within the framework of a number of MEAs and Regional Seas Conventions. As discussed in Chapter 2.3.1.1, moreover, the promotion of measures at the international level to deal with transboundary environmental problems is one of the key objectives of the common environmental policy and the EC Treaty explicitly provides for Community participation, next to its member states, in multilateral environmental agreements (Article 174).

The Community, therefore, has decided to implement its obligations under the global ocean regime by participating in multilateral negotiations and acceding, in the first place, to Regional Seas Conventions which apply to European seas and allow REIOs to become a party (e.g., the 1976 BARCON and its Protocols, as amended; OSPAR, the 1992 Helsinki Convention) and other relevant MEAs (e.g., CBD, Ramsar Convention, Basel Convention).[45]

To meet its responsibility under the MEAs and Regional Seas Conventions, therefore, the Community is under two sets of obligations: a) to cooperate with other parties within the decision-making bodies established by the conventions (e.g., COP/MOPs; OSPARCOM; HELCOM); and b) to implement the provisions of these agreements as well as the binding decisions adopted by the relevant bodies.[46]

3.4.2 The EC and Multilateral Policy-Making in Ocean Affairs

The Community implements its obligations under the LOSC and Chapter 17 of Agenda 21 by also participating in the multilateral development of ocean policies within the main political forums, especially within the framework of the UN system. The EC, moreover, is at the forefront of the global debate on sustainable development within the UNGA and the UN Commission on Sustainable Development (CSD).

In addition, the Community takes an active part in the discussions within the main political fora involved in the implementation of the global ocean regime at the regional

45 An exhaustive list of MEAs, including Regional Seas Conventions to which the Community is a party or a signatory, with all details on signature, conclusion and publication in the Official Journal, is available at: http://europa.eu.int/comm/environment/international_issues/agreements_en.htm.

46 As discussed in Chapters 2.2.3, 2.6 and 4.4, not only the provisions of the agreement, but also the binding decisions of their bodies (e.g., COP/MOPs; OSPARCOM; HELCOM) governing matters under the EC's exclusive competence become an integral part of EC law. See N. Lavranos (2002), pp. 48-50; R. Churchill and G. Ulfstein (2000), pp. 643-7; P. Sands (1991), pp. 2511-23.

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level. First of all, it plays a central role within the NSMCs.[47] All Community EAPs have devoted particular attention to the problems affecting the North Sea.[48] There is a strong mutual influence between EC environmental policy and the NSMC Policies. Given that the majority of the North Sea coastal states are also EC members, the Community, acting as a full member in the NSMC, has always encouraged the development of the policies in this forum in a manner which is consistent with its own environmental policy. At the same time, it has taken concrete steps to give effect to the declarations adopted by the NSMC.[49]

The Community, moreover, is at the forefront in promoting (marine) environmental cooperation in the Baltic Sea area and plays a central role within the CBSS and within the meetings of the Baltic Sea's environmental ministers.[50] The Community, indeed, actively participates in the Joint Comprehensive Environmental Action Programme (JCP) established in 1992 to foster cooperation among coastal states in order to restore the sound ecological balance of the Baltic Sea, as well as within the Baltic Sea Agenda 21, launched in 1996 to promote the sustainable development of the region.[51] In addition, starting from 1998, the EC has strengthened its political involvement in the Northern regions launching a new Northern Dimension initiative to foster cooperation among the EC, Baltic Sea coastal states and Russia in different areas, including marine environmental protection and sustainable development, and to ensure synergies and coherence among the respective policies.[52]

Similarly, the Community has launched and plays a leading role within the Euro-Med, which promotes multilateral cooperation and political dialogue towards the achievement of sustainable development, integrated coastal zone management and the protection and preservation of the marine environment in the Mediterranean region.[53]

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47 On the NSMCs see Chapter 1.4.1. On the role of the EC within the NSMCs see: P. Ehlers in: D. Freestone and T. IJlstra (eds.) (1990), pp. 3-14; Y. van der Mensbrugghe in: *ibid,* pp. 15-21; J.L. Prat in: *ibid,* pp. 101-10.

48 E.g., the Fourth EAP urges the EC to take measures to improve the aquatic environment of the North Sea.

49 The Council Resolution of 28 June 1988 on the protection of the North Sea and other Community waters (OJ C 209), for instance, is part of the programme for the implementation of the Declaration adopted by the 2nd NSMC.

50 On the CBSS and the Baltic ministerial meeting see Chapter 1.4.1. The European Commission, in addition, participates in the meetings of the Barents Euro Arctic Council (BEAC).

51 On the JCP see: www.helcom.fi/projects/jcp/en_GB/pitf/; on Baltic 21 see: www.baltic21.org/.

52 For an overview of the Northern Dimension for Policies of the Union, see: http://europa.eu.int/comm/external_relations/north_dim/.

53 The Declaration adopted at the Barcelona Conference, held in November 1995, established a new partnership between the EU and 12 Southern and Eastern Mediterranean Countries. Sustainable development and (marine) environmental protection have been fully integrated in the objectives of the Euro-Med Process (e.g., Declaration of the Euro-Mediterranean Conference on the Environment, Helsinki 28.11.1997 (Para. 2) and the Athens Ministerial Declaration, 10/07/2002). For further information see: http://europa.eu.int/comm/external_relations/euromed/.

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3.4.3 The EC and the "Generally Accepted" and "Applicable" International Rules and Standards adopted by the "Competent International Organizations"

Both the LOSC and Chapter 17 of Agenda 21 require the Community to give effect to (and enforce) the "generally accepted" or "applicable" rules and standards adopted by the competent international organizations (GAIRAS). These are considered, in the first place, to be those agreed within the IMO, the ILO, the FAO and UNEP, including non-binding Codes and Recommendations.[54] As discussed in Chapter 1.3.1, even though the Community is not a member of most of these organizations (e.g., IMO and ILO), it seems to be nevertheless bound by the GAIRAS on the basis of the rules of reference contained in the LOSC.

So far, the Community has "given effect" to existing GAIRAS in two different ways, by acceding to the Conventions containing the standards, whenever possible (e.g., FAO Agreement)[55] or by incorporating, in whole or in part, the standards into EC legislation. Since most of the GAIRAS which are relevant to the present study relate to the control of vessel-source pollution (i.e., IMO standards), this issue will be discussed in detail in Chapter 6.10.

3.4.4 EC Legislation to Protect and Preserve the Marine Environment

As a party to the LOSC, the Community is under a duty to adopt all the necessary measures to protect and preserve the marine environment. As already discussed, so far it has implemented such a duty in a rather fragmented and indirect manner.

Most of the EC marine-related legislation focuses on land-based pollution and has been adopted within the framework of the water quality policy. The water quality legislation is directed, *inter alia*, at implementing the Community's obligations under the Regional Seas Conventions.[56] The relevant Directives set out a framework for the

54 For instance, EC Regulation 2099/2002 establishing a Committee on Safe Seas (COSS) defines "International Instruments" as "the conventions, protocols, resolutions, codes, compendia of rules, circulars, standards and provisions adopted by an international conference, International Maritime Organization (IMO), International Labour Organization (ILO) or the parties to a memorandum of understanding referred to in the provisions of the Community maritime legislation in force" (Article 2(1)).

55 E.g., Council Decision 96/428 on the acceptance by the Community of the FAO Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas, pp. 24-5.

56 The Water Framework Directive 2000/60/EC, for instance, aims, *inter alia*, at the implementation by the Community and the member states of their obligations under the OSPAR, the Helsinki Convention and BARCON (Para. 21 and Article 1).

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control of discharges of hazardous substances into the aquatic environment[57] and determine the maximum concentration of pollution permissible in a given aquatic recipient, such as bathing waters or shellfish waters.[58] These measures, however, are not purely environmental, but they relate primarily to the protection of human health. In addition, water quality directives make no distinction between fresh and sea waters, but they generally refer to the "aquatic environment" as a whole, giving strong preference to fresh waters. Some of them expressly refer to coastal waters,[59] or to the territorial sea,[60] or, generally, to the sea,[61] but even in these cases most of the action required has to be taken on land. Other land-based sources of marine pollution, such as urban wastes, moreover, are controlled within the framework of the common chemical policy and are aimed at phasing out the production and/or use of certain chemicals, pesticides and discharges from industries.[62] Additionally, the discharge of nitrates, sewage sludge, and titanium dioxide has been regulated within the framework of the common market policy, with the primary objective being to prevent the distortion of competition, not to protect the marine environment.[63]

In addition, the Community has implemented its international obligations in the field of the transboundary shipment of wastes and, indirectly, ocean dumping and incineration, within the context of the common waste policy. Waste legislation applies, but is not specifically directed at controlling discharges at sea.[64] Moreover, the shipments of radioactive substances between member states has been regulated under the EURATOM Treaty (Articles 31 and 32), but the main objective is to protect the health of workers and the general public against the dangers of radioactivity, rather than the marine environment.[65]

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57 The main instrument is Council Directive 76/464/EC on pollution caused by certain dangerous substances discharged into the aquatic environment, which sets out the framework for the phasing out and control of polluting substances. In addition, a number of so-called "daughter" directives fix emission limits for some of the most dangerous pollutants, such as, *inter alia*, mercury (Mercury Discharge Directive 82/176/ EEC) and cadmium (Cadmium Discharge Directive 83/513/EEC).

58 E.g., Directive 76/160/EEC on the quality of bathing water (Article 1(2)).

59 E.g., Directive 79/923/EEC on shellfish waters (Article 1); Directive 91/271/EEC on Urban Waste Water Treatment, as amended (Article 2(13)); the Water Framework Directive (Article 2(7)).

60 See EEC Directive 76/464 EC (Article 1(1)) and all daughter directives. Also the Water Framework Directive, which applies to territorial and marine waters, Article 1(e).

61 See TiO2 Directive 78/176/EEC.

62 See Directive 91/271/EEC on Urban Waste Water Treatment, as amended.

63 The TiO2 Directive 78/176/EEC, for example, has been adopted on the basis of Article 95 EC (ex Article 100) to prevent the distortion of competition in the TiO2 Industry.

64 These measures will be covered in further detail in Chapter 7.5.6.

65 See Council Regulation 1493/93 and Council Directive 92/3/Euratom, on the supervision and control of shipments of radioactive waste between member states and into and out of the Community.

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As will be discussed in Chapter 8, the Community has implemented its international obligations on the preservation of marine habitats and species within the framework of its nature conservation policy by means of the Wild Birds and Habitats Directives. So far, however, both Directives have focused on the protection of nature on land and give marginal attention to marine habitats and biodiversity. Additionally, the Community has implemented some of its international commitments on the conservation of marine living resources within the framework of the Common Fisheries Policy (CFP). The relevant legal instruments, however, focus primarily on the utilization of fisheries resources rather than the preservation of marine life and ecosystems.[66]

As will be discussed in detail in Chapter 6, the Community has implemented its global commitments on vessel-source pollution acting within the framework of the Common Transport Policy. Most of the relevant measures, however, intend to ensure maritime safety and liability and compensation in the case of maritime accidents, rather than the protection of the marine environment *per se*.

As will be discussed later in this Chapter, most EC marine-related legislation, in its present form, does not ensure the full compliance by the Community with its international obligations under the LOSC, MEAs and Regional Seas Conventions.[67] EC measures, moreover, suffer from a strong implementation deficit.[68] Lately, however, the Commission has appeared determined to enhance monitoring and enforcement and to bring about full compliance by member states with EC rules and, to some extent, with international and regional standards.[69]

3.4.5 The EC's Action to implement Chapter 17 of Agenda 21

The Community is aware of its responsibility in global environmental problems as one of the major consumers of renewable and non-renewable resources, including marine living and non-living resources.[70] In the follow-up to UNCED, therefore, it has taken the lead in promoting most of the targets, principles and approaches recommended in Agenda 21 and has taken concrete steps towards their implementation in the EC system. Initially, however, marine environmental protection was not a priority action for the

66 The CFP includes technical measures to support sustainable fisheries, such as satellite observation, the improvement of technical equipment to decrease catches of juvenile fish and the ban on drift-net fishing, which give effect to international fisheries management standards. See, in general, Chapter 8.8.3.4.

67 E.g., Commission (2005), Impact Assessment, *infra* n. 94.

68 E.g., 6th Annual Survey on Implementation and Enforcement of EC Environmental Law, *supra* n. 17.

69 E.g., Case C 239/03, *Commission v. French Republic,* 7.10.2004, on the failure of France to fulfil its obligations under the BARCON and its Land-Based Pollution Protocol and the failure to adopt appropriate measures to prevent, abate and combat heavy pollution.

70 E.g., Sixth EAP, Para. 7.2; EU External Strategy on Sustainable Development (COM (2001) 53); and Commission's Communication on Multilateralism (COM (2003)526).

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Community at the WSSD. In the view of the Commission the WSSD should concentrate on those natural resource issues that are of particular importance to economic development, such as energy, freshwater and soil degradation, while other issues, including oceans and seas "may be important to address, but should in principle not be a priority for the summit Agenda".[71] Even so, the Community has played a central role in promoting the main ocean-related targets and is currently acting as a frontrunner in the follow-up to the Summit.[72]

In view of the WSSD, the Community has adopted an "internal"[73] and a "global"[74] strategy on sustainable development. Both strategies recognize the importance of the oceans as a source of life. However, the protection of the marine environment is not considered as an objective in itself, but as a means to achieve "sustainable use of natural resources" or "sustainable management of natural and environmental resources".[75] The focus is placed on the control of fisheries and the revision of the CFP as a key tool to maintain biodiversity and preserving ecosystems.[76] The contribution of these strategies towards the implementation of Chapter 17 of Agenda 21, therefore, seems to be rather limited.[77]

Furthermore, the Community has indirectly implemented its commitments under Chapter 17 within the framework of its Sixth EAP[78] and other sectoral strategies in

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71 EU External Strategy on Sustainable Development (COM (2001) 53, Para. 16.

72 See Chapter 8.8.4.2. See also the EU Statement on Oceans and the Law of the Sea made at the 20th anniversary of the LOSC (10.12.2002),by Ambassador Kofod on behalf of the EU.

73 To implement Agenda 21, the Community relied on the Fifth EAP "Toward Sustainability" adopted in preparation for the 1992 UNCED. In 1997, at the 19th UNGA Special Session, all signatories of the Rio Declaration, including the EU, committed themselves to drawing up strategies for sustainable development in view of the 2002 WSSD. The Union's Sustainable Development Strategy was adopted by the Göteborg European Council, 15-16 June 2001, on the basis of the Communication from the Commission "A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development" (COM (2001) 264).

74 The global strategy intends to achieve a "global deal" on sustainable development at the WSSD. See the Communication from the Commission "Ten Years After Rio: Preparing for the World Summit on Sustainable Development" (COM (2001) 53).

75 See: Para. 31 of the internal Strategy and Para. 12 of the global Strategy. See also Para. 2.4 of the revised EU Strategy on Sustainable Development for 2005-210, which will be adopted by the Council in June 2006 (available at: http://europa.eu.int/comm/sustainable/sds2005-2010/docs/communication_en.pdf).

76 The global Strategy, for instance, emphasizes the importance of the ocean as a source of life and the increasing pressures from human activities, especially from fisheries, which is depleting stocks and damaging marine ecosystems (Para. 12). In order to reverse this trend, the Strategy calls for the development, by 2015, of Community measures on distant water fisheries, which may contribute to sustainable fisheries outside EC waters (Para. 13).

77 For a critical analysis of the strategies see: V. Jenkins (2002), pp. 261-4.

78 The Sixth EAP is an integral part of the EU strategy on sustainable development. According to V. Jenkins (2002), the Sixth EAP appears to be a better model for sustainable development than the Sustainable Development Strategy itself since it does not exclusively focus on

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the field of biodiversity, sustainable fisheries, integrated coastal zone management (ICZM), and marine scientific research.[79] Likewise, the proposed European Marine Strategy, the proposed Maritime Strategy Directive and the current work toward a future Maritime Policy, which will be discussed in the following sections, aim at achieving the sustainable development of European oceans and seas.

The Community is also firmly committed towards the promotion of capacity-building in marine-related matters as a means to put all States in the position to be able to meet their international marine environmental obligations.[80]

3.5 The Way Forward

3.5.1 The European Marine Strategy

The Sixth EAP, setting out the framework for the Community's environmental action for 2001-2010, places considerable emphasis on ocean preservation compared to the previous programmes. The protection of the marine environment is considered as a main policy approach to protect "nature and biodiversity". In order to reduce the tremendous pressure posed by human activities on the marine environment and its biodiversity the EAP calls, first of all, for the revision of the CFP.[81] The Commission, however, recognizes that the effective protection of the marine environment and its biodiversity needs to go beyond the sustainable exploitation of renewable marine resources and requires the effective integration of environmental considerations into all Community policies as well as all aspects of the Community's external relations. The Programme, therefore, calls for the development of a thematic strategy which addresses pollution and degradation of the marine environment from different human activities in an integrated manner. The focus of such a strategy should be on the full implementation of existing international, regional and EC legislation rather than on the adoption of new legal instru-

integration, but also on transparency, environmental information and public participation in the environmental decision-making.

79 For instance, the 6th EC Research Framework Programme (FP6) (2002-2006) emphasizes the need to improve the understanding of the marine environment and ecosystems so as to minimize the impact of human activities and to contribute towards the sustainable management of marine natural resources. See also the proposal for a FP7 (2007-2013). Similarly, "Integrated Coastal Zone Management: A Strategy for Europe"(COM (2000) 547) intends to meet EU commitments under Chapter 17 of Agenda 21, but is mainly directed towards the sustainable development of coastal "land" areas. On the 1998 Biodiversity Strategy and 2001 Biodiversity Action Plan see: Chapter 8.8.1.

80 See, e.g., Statement by Ambassador J. A. De Yturriaga Barberán, on behalf of the EU, at the UNGA special session on the law of the sea, 9.04.2002. The Community and the member states account for 55% of the international official development assistance (COM (2003)526, at 3).

81 Sixth EAP, Para. 4 (4).

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ments.[82] The Sixth EAP, moreover, reaffirms the willingness of the Community to promote multilateral co-operation in global environmental matters and calls for better co-ordination with the member states in all relevant international bodies.[83]

In 2002, in the follow-up to the Sixth EAP, the Commission published a Communication which was intended to be the first step "Towards a strategy to protect and conserve the marine environment".[84] This ambitious and comprehensive strategy shall contribute to the protection and sustainable development of oceans and their biodiversity throughout the world, focusing not only on European waters, but also on adjacent seas, such as the Barents Sea and the Arctic Ocean, and other international seas.[85] The Communication reviews the current sources of pressures affecting Europe's seas, the existing global, regional and EC instruments, as well as the monitoring, assessment and reporting mechanisms, and identifies the main inconsistencies and overlaps.[86] On the basis of this review, the Commission has established a detailed and ambitious action plan setting out the objectives of the future Marine Strategy and the actions needed to meet them.[87] Most of these objectives simply repeat the Sixth EAP (and the Sustainable Development Strategy);[88] others go much further by setting out clear and ambitious deadlines for the phasing out of several sources of marine pollution.[89] To meet these targets, the Commission calls for the full implementation of existing EC rules and standards, but does not envisage the adoption of new comprehensive legislation on marine preservation. Although some action has to be taken at the EC level, the Commission places considerable attention on multilateral cooperation and on the effective and coherent implementation of international rules and standards. A central element of the future strategy indeed

82 *Ibid.,* Paras. 4 (4); 5(4) and 7(2)).

83 *Ibid.,* Para. 7 (2).

84 See the Communication from the Commission "Towards a strategy to protect and conserve the marine environment", COM (2002) 539. According to the Sixth EAP this strategy is an integral part of the EU's Sustainable Development Strategy. Its overall objective is indeed to promote the sustainable use of the seas and the conservation of marine ecosystems, including seabeds, estuarine and coastal areas, paying special attention to sites having a high biodiversity value (p. 17).

85 COM (2002) 539, Para. 10.

86 *Ibid.,* Chapters 2, 3, 4 and 5, pp. 5-16. In particular, the Commission recognizes strong overlaps and inconsistencies with regard to the control of hazardous substances (p. 36), in the field of biodiversity (pp. 34-5) and eutrophication (p. 38), while there are no wasteful overlaps in the field of chronic pollution (p. 39), radionuclides (p. 41), health and the environment (p. 42) and maritime transport (p. 45).

87 *Ibid.,* Chapters 7 and 8, pp. 17-28 and Annex 5.

88 E.g., halting the biodiversity decline by 2010 (Objective 1), restoring degraded marine ecosystems (Objective 2) and to reform the CFP (Objective 3).

89 E.g., the progressive reduction of discharges of polluting and radioactive substances by 2020 (Objectives 4 and 6); the elimination of eutrophication by 2010 (Objective 5); compliance with existing oil discharge limits from platforms and offshore installations by 2010 at the latest and the elimination of all discharges by 2020 (Objective 7); the elimination of maritime litter from illegal disposal at sea by 2010 (Objective 8).

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should be effective coordination and cooperation among all bodies dealing with marine protection within the framework of the LOSC and Chapter 17 of Agenda 21, different regional and global Conventions and bodies.[90] To this end, the Commission emphasizes the need to develop the future Marine Strategy in close collaboration with regional Conventions.

To draw up the Strategy, the Commission set up a consultation process which was open to participation by all relevant stakeholders (e.g., member states and candidate countries, key non-EU neighbouring countries, international commissions and conventions, industry, and NGOs).[91]

In March 2003, the Environmental Council endorsed the approach and the objectives of the Marine Strategy as outlined by the Commission in its Communication, while the EP, supported by NGOs, considered such a Strategy not to be ambitious enough.[92] On 24 October 2005, after two years of intensive stakeholder consultations, the Commission presented the European Marine Strategy (EMS).[93] The EMS is composed of a Communication, a proposal for a Marine Strategy Directive (MSD) and an Impact Assessment.[94]

The 2005 Communication briefly identifies the principal threats to Europe's marine environment and the main gaps in the existing legal framework.[95] In the first place,

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90 See Objective 12, p. 20 and Action 21, p. 25. Action 22 (p. 26), moreover, reaffirms the need to increase EC influence on ocean issues by means of better coordinated EC positions in international bodies and by seeking membership in some vital organizations, such as IMO.

91 In addition, four EC working groups have been established to examine the specific issues in further detail, i.e., Strategic Goals and Objectives (SGO), Ecosystem Approach to Managing Human Activities (EAM), European Marine Monitoring and Assessment (EMMA) and Hazardous Substances (HS). The completion of the Marine Strategy was included in the Commission's Legislative Work Programme for 2005.

92 See: Environmental Council Conclusions, 4 March 2003, and the Report of the EP, Rapporteur Laura Gonzalez Alvarez, 7.05.2003 (A5-0158/2003). See also European Environment and Sustainable Development Advisory Councils (EEAC), Working Group Marine (WGM), "Analysis of gaps in the process to draw up the EMS", May 2004, available at: http://www.eeac-net.org/workgroups/pdf/WG%20Marine_GapAnalysis%20EU%20Marine%20Strategy_May04.pdf and NGOs' Position Statement, November 2004 European Marine Strategy: Towards a Robust Legal Instrument to Protect the Marine Environment, available at: http://www.greenpeace.dk/files/2900-2999/file_2969.pdf.

93 The results of the stakeholder consultation process are available at: http://europa.eu.int/comm/environment/water/consult_marine.htm. See also 2005 Impact Assessment, *infra* n. 94, Para. 10, pp. 52-54.

94 See: Communication from the Commission to the Council and the European Parliament, "Thematic Strategy on Protection and Conservation of the Marine Environment", COM (2005) 504, 24.10.2005; Proposal for a Directive establishing a Framework for Community Action in the field of Marine Environmental Policy (Marine Strategy Directive), COM (2005) 505 and Commission Staff Working Document on "Impact Assessment" (SEC (2005) 1290), all available at: http://europa.eu.int/comm/environment/water/marine.htm.

95 See, in general, COM (2005) 504, paras 2, 3 and 4 and Impact Assessment, Para. 3.3, pp. 14-16.

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the Commission reconfirms the lack of a comprehensive and integrated Community policy on oceans and seas. Measures to control and reduce the different source pressures effecting the marine environment do exist, but they have been developed in a sector-by-sector approach and have resulted in a patchwork of policies, legislation, programmes and action plans at the national, regional, EC and international level. There is still little coordination and some duplication between the existing instruments, strategies, and monitoring/assessment mechanisms, as well as strong information gaps.[96] Regional Seas Conventions provide the technical expertise and work as a bridge with non-EC countries and are therefore considered invaluable instruments for delivering the EC Strategy. However, they lack appropriate enforcement mechanisms.

The Commission recognizes that despite some progress, especially in the field of land-based pollution, the state of the marine environment has been deteriorating significantly over the past decades and the existing patchwork regime has been unable to ensure a high level of protection for the European marine environment as requested by Article 2 EC. The Marine Strategy (and the MSD) is expected to fill the gap in the Community's environmental policy by putting an end to the sector-by-sector approach and providing a legally enforceable framework for the EC member states.

The Communication sets out the overall objective of the Marine Strategy, as well as the key elements, principles and approaches to achieve it.[97] However, it is not as detailed as the 2003 Communication and does not contain specific deadlines for meeting its targets. The Marine Strategy is based on an ecosystem-based approach and a co-operative approach with the Regional Seas Conventions; there is no reference to the precautionary principle.[98] One of the key elements in building the Strategy is a dual EU/regional approach whereby the Community sets out the framework for cooperation among member states and third countries, while the planning and execution of measures are left to the Regional Seas Conventions, taking into account the diversity of marine regions. The Regional Seas Conventions, therefore, will play a fundamental role in the implementation of the Strategy. Such a Strategy, moreover, should promote strong synergies with other EC policies, especially the CFP and maritime safety policy.[99]

The Marine Strategy has a strong international dimension. Although it is primarily focused on protecting European seas, it also seeks to reduce the impact of the Community's activities in marine areas outside the jurisdiction of the EC member states,

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96 However, the work carried out under the Regional Seas Conventions in the preparation of the EMS has significantly contributed to enhancing coordination (COM (2005) 504, p.5).

97 The overall objective is "to protect and restore Europe's oceans and seas and ensure that human activities are carried out in a sustainable manner so that current and future generations enjoy and benefit from biologically diverse and dynamic oceans and seas that are safe, clean, healthy and productive" (COM (2005) 504, Para 5.1 and Impact Assessment, Para. 5.1).

98 COM (2005) 504, Para. 5.2. According to the Commission, moreover, the Strategy will facilitate enhanced cooperation with Regional Seas Conventions and with third countries (*ibid.*, Para. 6.3).

99 COM (2005) 504, Paras. 6.1 and 6.2.

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including the high seas.[100] The Strategy, moreover, will contribute to fostering Community implementation of its commitments under international agreements and Regional Seas Conventions.[101]

Despite the strong accent on integration, the Marine Strategy does not envisage the creation of an institutional mechanism or overarching structure to ensure the coherence of policies and the effective participation of all relevant DGs in the marine-related decision-making process. Moreover, the role of the marine Regional Seas Conventions and bodies and their contribution to the success of the Marine Strategy are not clearly defined and there is no specific indication as to how to coordinate different levels of monitoring and reporting in order to make the best use of resources. On the other hand, the EMS's importance as a guidance and coordination document cannot be underestimated.

3.5.2 The Proposal for a Marine Strategy Directive (MSD)

The proposal for a MSD represents the main component of the Marine Strategy. The adoption of a legally binding instrument was one of the most controversial issues during the preparation of the Strategy. Most member states are still struggling with the implementation of existing EC legislation (e.g., the Habitats Directive and the Water Framework Directive) and while they recognize the need for a Marine Strategy, some of them are not ready to accept additional binding commitments. In addition, member states, especially OSPAR and HELCOM contracting parties, expressed strong concerns about the future role of Regional Conventions, which in their view offer the most appropriate framework for dealing with marine environmental issues.[102] Although they recognize the added value of an EC legislative instrument in terms of monitoring and assessment, they considered regional measures to be more effective compared to EC-wide standards to respond to the particular conditions of regional seas.[103] Reportedly, moreover, some member states are afraid that an EC legal instrument could trigger the exclusive competence of the Commission in the regional bodies.

Among the various options on the table (e.g., *inter alia*, tightening up existing legislation; a voluntary approach based on non-binding recommendations; decisions addressed to individual member states), the adoption of a flexible legal instrument, in the form of a framework directive, appeared to be the most appropriate and effective

100 *Ibid.,* Para. 1, p. 2.

101 *Ibid.,* Para. 6.2.3. Member states are encouraged to ratify and implement international Conventions.

102 E.g., Summary Record of the First Joint Meeting of the Heads of Delegation to HELCOM and OSPAR (Joint HELCOM/OSPAR HOD 1/2002), 17.01.2003, Para. 2.4.

103 Reportedly, OSPAR Parties, mainly due to financial constraints, experience serious difficulties in carrying out monitoring/assessment. Under the EC Directive they would be obliged to find the necessary resources to meet their monitoring/assessment obligations.

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solution.[104] Given the transboundary nature of marine ecosystems and issues, the objective of the proposal cannot be sufficiently achieved by the member states alone, but requires cooperation and common principles. According to the Commission, international cooperation, especially within the framework of the Regional Seas Conventions, has so far delivered mixed results mainly because of a lack of adequate enforcement and control mechanisms. The Community could bolster the Conventions' ongoing efforts to protect the regional seas by providing a legally enforceable framework at the EC level. The Community, therefore, offers the most effective framework for addressing common challenges according to the subsidiarity principle.[105] However, to be consistent with the proportionality principle and the principle of regional differentiation, the proposal leaves ample scope for national decisions and regional cooperation. The overall idea is to adopt a framework instrument which is ambitious in its scope, but not too prescriptive in its tools.[106] As a consequence, the proposed directive is based on a dual approach: it defines common objectives and principles, but leaves member states free to plan and implement measures at national and regional level, taking into account the diverse regional conditions.

The proposed Directive builds upon existing regional and international agreements that the Community has adhered to and will provide a legal framework for their implementation within the EC. In this way, the proposal will contribute to meeting the obligations of the Community and the member states under the LOSC and other international marine agreements.[107]

The MSD proposal, which is based on Article 175 EC, sets out the framework for achieving good environmental status (GES) in European marine waters by 2021 (Article 1).[108] European marine waters include all waters under the sovereignty or jurisdiction of the member states, including the seabed and its sub-soil (Article 2). GES is not defined in the proposal, but it is up to the member states to determine GES in their marine waters according to a set of criteria which will be developed by the Commission in a second stage. The proposal is based on an ecosystem approach and recognizes that the diverse conditions, problems and needs of the marine regions require different and specific solutions and have to be taken into account in the planning and execution of measures.[109] Therefore, ecosystem-based marine regions are identified as the implementation units to be defined on the basis of their hydrological, oceanographic and biogeographic characteristics (Article 3). For each marine region, member states are required to develop "Marine Strategies" (MS) for the integrated management of all human activities (Article 4). Member states are encouraged to cooperate among themselves

104 See: Impact Assessment, Para. 6.2, pp. 28-32.

105 COM (2005) 505, Explanatory Memorandum, pp. 6-7.

106 COM (2005) 504, Para. 5.4, See also: COM (2005) 505, Explanatory Memorandum, p. 7, and Impact Assessment, Para. 8, pp. 35-50 and Para. 11, pp. 54-56.

107 COM (2005) 504, Preamble, Paras. 9-11.

108 2021 coincides with the first review of the River Basin Management Plans under the Water Framework Directive and allows for synergies in the implementation of the two directives.

109 COM (2005) 505, Preamble, Para. 5.

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and with third countries sharing the same Marine Region and, when appropriate, to act within the framework of existing Regional Seas Conventions (Article 5).[110] Each MS has to contain a detailed assessment of the current state of the marine waters and of the environmental impact of human activities (Article 7); a definition of GES (Article 8), clear environmental targets, which should be consistent with existing national, EC or international targets (Article 9), and monitoring programmes (Article 10), according to a specific time frame set out in the proposal. Within each MS, member states have to establish a programme of cost-effective measures designed to achieve a GES, "taking into account" measures required under existing EU legislation and international instruments (Article 12).[111] It is up to the Commission to assess whether the programmes of measures constitute an appropriate means for achieving GES and eventually to reject them in total or in part (Article 15). Finally, the proposal contains provisions on derogations, updating, reports and public information and expressly allows the member states to adopt more stringent standards at the national or regional level.

The proposal, in its current version, appears to be very broad and difficult to enforce.[112] Unlike in an earlier draft, which has never been published by the Commission, member states are not required to achieve a GES or improve the state of the marine environment, but only to draw up Strategies designed for this purpose.[113] Therefore, it will be very difficult to hold a member state accountable for failing to improve the state of the marine environment. In addition, it is unclear how and according to which criteria the Commission determines whether a Marine Strategy is sufficiently adequate. It is for the member states to define GES in their marine regions but, unlike the earlier draft, the current proposal does not contain any indicative criteria of what constitutes a healthy environment. These criteria will be developed by the Commission in accordance with the comitology procedure within two years after the entry into force of the MSD.[114] This may represent a possible deadlock in the decision-making process within the EP, which is not involved in the comitology procedure. Finally, the current proposal, unlike the earlier draft, does not require member states which share the same marine region to draw up common strategies, but simply encourages cooperation. This may

110 See also COM (2005) 505, Preamble, Para. 7, requiring that "where practical and appropriate, existing institutional structures established in Marine Regions should be used to ensure such coordination".

111 The programmes of measures need to be developed by 2016 and become operational by 2018. The Preamble of the proposal, however, makes it clear that measures related to fisheries must be taken within the context of the CFP and those related to the use of radioactive material need to be taken under Articles 30 and 31 of EURATOM (Preamble, Para. 28).

112 See, e.g., NGOs' position on the Marine Strategy Directive available at:<http://eu.greenpeace.org/downloads/oceans/MSD_coalition_spin_document_EN.pdf>

113 The earlier draft of the proposal is available at www.wrrl-info.de/docs/legal_proposal.doc.

114 The comitology procedure is a practical executive mechanism whereby the Council authorizes the Commission to make minor modifications or adjustments to EC legislation. This mechanism was introduced before co-decision became the common procedure and does not involve the EP. Reportedly, the EP is the main opponent of this procedure.

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lead to the adoption of different strategies within the same region. These shortcomings are the result of the high level of compromise between the Commission and the member states during the drafting process and indicate that there is still considerable resistance to strengthening the Community's involvement in marine environmental matters. The EP, as a result of the lobbying efforts by the environmental NGOs, will probably try to reinforce the content of the Commission's proposal in the first reading and put forward several amendments. However, it is expected that some member states in the Council will resist too stringent and rigid commitments (and a strict formulation of the GES criteria). The road toward the adoption of the MSD, therefore, may be still long and arduous.

3.5.3 Towards an Integrated European "Maritime" Policy?

The LOSC, in its Preamble, makes it clear that "the problems of the ocean space are closely inter-related and need to be considered as a whole" and there is growing international recognition that ocean affairs are interlinked and require a comprehensive approach. Nevertheless, the Community has so far looked at oceans and seas in a rather fragmented manner.[115] This fragmented approach might change in the future as a consequence of the recent reorganization within the Commission and the work towards a European Maritime Policy. Since 1 January 2005, DG FISH has become responsible for Fisheries and "Maritime Affairs". The idea is to put an end to the traditional sector-by-sector approach and to integrate all aspects of marine affairs and services under a single and coherent framework. In the view of the Commission, "maritime affairs" encompass a broad range of sectors, such as fisheries and aquaculture, offshore oil and gas extraction, tourism, renewable energies and maritime transport.[116] However, it is not entirely clear which activities will be transferred the responsibility of DG FISH.[117]

The need for "an all-embracing Maritime Policy" has become one of the strategic objectives of the Commission for 2005-2009.[118] For that purpose, in January 2005, the new President of the Commission, Mr. Barroso, set up a Maritime Policy Task Force

115 See the Speech by Mr. J. Borg, "Towards European Maritime Policy", Conference of Peripheral Maritime Regions of Europe, Santiago de Compostela, 14.01.2005, p. 3, http://europe.eu.int/comm/fisheries/whatsnew/new_en.htm.

116 See, e.g., Mr. J. Borg, *supra* n. 115. However, the term "maritime" is normally related to shipping and navigation and does not seem to be the most appropriate to describe a comprehensive policy on oceans and seas.

117 For instance, it is possible that DG FISH will absorb some issues related to the safety of fishing vessels and the training and certification of personnel on board fishing vessels, but it is highly improbable that DG TREN will relinquish its competence in maritime safety and security issues.

118 The Commission's strategic objectives and work programme are available at: http://europa.eu.int/comm/atwork/programmes/index_en.htm.

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formed by the Commissioners responsible for areas directly related to maritime affairs (i.e., Environment, Transport, Enterprise and Industry, Regional Policy, Research and Energy) and led by the new Fisheries Commissioner with the aim being to produce, by the first half of 2006, a Green Paper on a future European "Maritime" Policy.[119] In March 2005, the Commission published a Communication entitled "Towards a Future Maritime Policy for the Union" which represents a first step towards a coherent and integrated oceans policy in Europe along the lines of other countries (e.g., Australia, Canada, Portugal and the US). The overall vision is that of a "Europe with a dynamic maritime economy in harmony with the marine environment, supported by sound marine scientific research and technology, which allows human beings to continue to reap the rich harvest from the ocean in a sustainable manner".[120] The future Maritime Policy should strive to achieve a fair balance between the economic, social, environmental, security and safety aspects of maritime activities, ensuring both the conservation of resources and the improvement of competitiveness, long-term growth and employment in the maritime sector. The European Marine Strategy discussed in the previous paragraph should constitute the environmental pillar of the future Maritime Policy.[121] In practice, however, the Commission's Communication focuses more on the use rather than the preservation of the marine environment and its resources and on boosting the competitiveness of the European maritime industry. Indeed, the future Maritime Policy is strictly linked to the Lisbon Strategy, which aims at promoting economic growth in the EU.[122]

According to the Commission, there is a clear case for a European integrated Maritime Policy. Oceans and seas play a vital role in the EC's economy and social life and, especially after the 2004 enlargement, this maritime dimension has increased to a great extent.[123] The scale of the maritime challenges that Europe has to face in terms of resources and the types of action needed can be better tackled at the EC level, rather

119 The Task Force acts in collaboration with a Member State Expert Group on Maritime Affairs composed of experts in a wide range of fields (e.g., marine environmental protection and pollution, marine biodiversity, integrated coastal estuaries and seas management, marine science and technology, law of the sea, maritime safety and security, fisheries and aquaculture, maritime transport and ports, ship and fleet management, shipbuilding and repair, energy, job creation, training, tourism and governance, and in consultation with stakeholders.

120 See Communication to the Commission from the President and Mr. Borg, "Towards a Future Maritime Policy for the Union", 2.03.2005 (hereinafter March 2005 Communication) and the Speech by Mr. J. Borg, *supra* n. 115. These and other relevant speeches and documents are available at: http://europe.eu.int/comm/fisheries/whatsnew/new_en.htm.

121 March 2005 Communication; COM (2005) 504, Para. 6.1 (pp. 6-7); and Impact Assessment, *infra* n. 94, Para. 8.6 (pp. 48-49).

122 The European Maritime Policy is a product of the Lisbon Strategy and has been strongly promoted by the new Commission's President Barroso. For an overview of the EU Lisbon Strategy see: www.euractiv.com/en/agenda2004/lisbon-agenda/article-117510.

123 Speech addressed to the ITLOS by EU Commissioner Borg on Oceans and the Law of the Sea: Towards New Horizons, 2.09.2005.

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than by individual member states.[124] The adoption of a European Maritime Policy, therefore, would be in line with the subsidiarity principle.

The current fragmentation of decision-making in maritime affairs has so far made it quite difficult to reconcile competing uses of the oceans and seas and has often resulted in conflicting measures.[125] An integrated Maritime Policy will allow the Community to realize the full potential of its seas in a sustainable manner, building upon existing policies and legislation. The Maritime Task Force is currently looking at the links between maritime-related sectoral policies and how they could be combined to reinforce each other.

In addition, the future European Maritime Policy will promote close cooperation between the different EC, national and regional decision-making levels. It will also look at the relationship between the law of the sea and EC policies, as well as the options to pursue EC international leadership and promote EC principles and objectives in international fora, including ILO and IMO, regional organizations and third countries.[126]

The Green Paper is expected to clarify several key issues, including consistencies and inconsistencies between the different sectoral and regional maritime policies, the relationship between the Marine Strategy and the future Maritime Policy, how comprehensive this Policy should be, whether it should rely on existing frameworks or create an overarching framework including new and existing legislation, and whether an institutional and operational framework should be established to ensure coherent and integrated governance.

Once published, the Green Paper will form the platform for an extensive consultation process with all relevant stakeholders, which may result in a concrete Commission proposal for a Maritime Policy.[127] According to the Commission, the initiative has already triggered an enthusiastic response from several member states and key stakeholders. However, given the multiplicity of actors involved (e.g., the shipping industry, the fisheries and aquaculture industry, the oil and gas industry, the tourism sector, environmental NGOs) and the conflicting interests on the table, it is difficult to foresee how the future European Maritime Policy will look, what will be its legal status and what role the marine environment will play within that Policy.

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124 See, in detail, March 2005 Communication, *supra* n. 120, Para. 4.

125 E.g., speech by Mr. Borg, Designating a European Vision for the Oceans and Seas, Inauguration of the 10th Annual EC Maritime Law Course of the IMO International Maritime Law Institute (IMLI), Malta, 4.04.2005.

126 March 2005 Communication, *supra* n. 120, Para. 6.6.

127 The Green Paper is a document published by the Commission to stimulate discussion and to instigate consultation on a specific issue at the European level. It may result in a White Paper which translates the outcome of these discussions into a concrete proposal for Community action.

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3.5.4 Strengthening the EC External Policy on Oceans and Seas

Despite the initiatives discussed in the previous paragraphs, the Community is still firmly committed to international cooperation as the key for the protection of oceans and seas.[128]

As will be discussed in detail in the case-study chapters, in the past few years the Community has strengthened its external environmental policy and has taken a lead next to its member states in the global debate on oceans and seas within the UN, CBD, and IMO. The international regime, as it stands, has proved to be unable to guarantee an effective level of protection for Europe's seas, and several issues need to be further addressed. The Community, however, recognizes that the necessary action should be taken primarily within the competent international organizations.[129] It wishes to act as a front-runner in the development of multilateral instruments, and to stimulate the earliest possible ratification by its member states and, where appropriate, by the Community itself.[130] Additional EC measures, when necessary, shall be complementary to and not a substitute for international rules.

The Community attaches great importance to the need to act within the framework of the LOSC and Chapter 17 of Agenda 21 and to secure universal acceptance of the LOSC.[131] Furthermore, the Community realises the need for the better implementation and enforcement of existing international instruments and wishes to be a model in implementing international obligations.

Finally, it should be stressed that, in terms of world trade and industry, the EC is a global player and heavily depends on global standards. For the Community, therefore, ensuring consistency between the international and EC regimes is fundamental in order to protect European competitiveness.

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128 See e.g., COM (2003) 526, Para. 3. However, as will be discussed in Chapter 6, the Community has been recently criticized for taking an "unilateral" approach in the field of vessel-source pollution.

129 EU Presidency Statements before the UN (all available at: http://europa-eu-un.org/home/index_en.htm) recognize that, despite the important steps taken at the EC level, action shall be taken mainly within, *inter alia*, FAO and Regional Fisheries Management Organizations (RFMOs) with regard to the sustainable management of fisheries (e.g., EU Presidency and EC Statement, 6th ICP, 6.6.2005); within UNEP for integrated coastal zone management (e.g., EU Presidency Statement, 26.10.2000); within IMO for marine safety (e.g., EU Presidency Statement, 4th ICP, 2.06.2003); within the Intergovernmental Oceanographic Commission of UNESCO (IOC) for marine research (e.g., EU Presidency Statements of 8-9.05.2001); within the International Hydrographic Organization (IHO) for capacity-building in the production of nautical charts (e.g., EU Statement No.2, 4th ICP, 2.06.2003).

130 E.g., COM (2003) 526, Para. 3.

131 E.g., EU Presidency Statement, "Conservation and Sustainable Use of Marine Biodiversity", 6th ICP, 9.06.2005; EU Presidency Statement by Prof. G. Nesi, Legal Adviser of the Permanent Mission of Italy to the UN, 58th UNGA, 24.11.2003; EU Statement by Ambassador A. Vassilakis, 4th ICP, 2.06.2003; EU Statement by Ambassador M. Kofod, 57th UNGA, 10.12.2002.

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In the light of all considerations made so far, it is very likely that the Community will continue pursuing its marine environmental objectives and targets acting primarily, but not exclusively, at the international level.[132]

3.6 Conclusions

Traditionally, the marine environment has played a limited role within EC environmental law. Instead of establishing its own rules and standards the Community has preferred to rely on the international ocean regime which is considered as the proper and most effective framework to protect the marine environment. As a consequence, it became a party to the LOSC and signed Chapter 17 of Agenda 21. So far, the Community has implemented its international obligations by acting, in the first place, at the international level. In particular, it has acceded to existing global and regional agreements implementing the LOSC (and Chapter 17) and participates individually or through its member states' coordinated action in the decision-making bodies established therein, as well as in main political fora dealing with ocean affairs. On the other hand, the Community's regulatory action towards the implementation of its international obligations in the field of the marine environment has been traditionally rather marginal.

Up to now, the Community has not established a comprehensive policy and legislation on the protection of the marine environment as it did for other environmental sectors. Conversely, it has looked at oceans and seas in a rather fragmented manner, acting within the framework of different sectoral policies, such as transport, fisheries, agriculture or the internal market. This sector-by-sector approach and the resulting patchwork regime have so far failed to ensure a high level of protection for the European marine environment. In the past few years, in response to the increasing pressure on the European seas, the Community has partially changed its traditional approach and has taken new steps toward an integrated policy on marine environmental issues. In October 2005, the Commission proposed a European Marine Strategy together with a MSD and is currently in the process of developing a comprehensive Maritime Policy. Furthermore, starting from January 2005, DG Fisheries has become responsible for Maritime Affairs laying down the basis for stronger institutional integration. Despite these initiatives, however, the Community has not abandoned its traditional multilateral approach to ocean issues and still places strong emphasis on international cooperation in the development of marine environmental standards. A central element of the Marine Strategy, the MSD and the future Maritime Policy is to enhance the implementation of existing EC and international legislation in a coherent and integrated manner. The Community recognizes the importance of the work being done at the international level, especially within the framework of the Regional Seas Conventions, but notices several

132 E.g., EU Statement on oceans and law of the sea, by B. Bradshaw, Parliamentary Under-Secretary, Department for Environment Food and Rural Affairs (UK) on behalf of the EU, 60th UNGA, 28.11.2005.

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inconsistencies, overlaps and implementation/enforcement gaps. In order to avoid duplication of efforts and a waste of resources, therefore, it promotes effective coordination among all bodies involved in marine protection and coherence among different instruments and policies at the global, regional and EC level. The member states are encouraged to use, whenever appropriate, existing regional conventions and bodies, which provide fundamental tools for implementing the MSD. At the same time, the Marine Strategy and the MSD build upon existing regional and international agreements that the Community has adhered to and will provide a legal framework for their implementation and enforcement within the EC.

In the past few years, moreover, the Community has considerably enhanced its role in the main international bodies responsible for marine environmental issues and ocean affairs trying to advance its targets and influence the development of the marine environmental policies and legislation along the lines of those of the EC. The Community attaches great importance to ensuring consistency between the international and EC regimes in order to protect European competitiveness and the correct functioning of the internal market. It is very likely, therefore, that it will continue to pursue its marine environmental objectives acting mainly at the international level.

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CHAPTER 4

Rules Governing the Joint Participation of the EC, Next to the Member States, in "Mixed Agreements" and International Organizations

4.1 Introduction

In the past three decades the Community has enhanced its involvement in international environmental and ocean affairs and has participated together with its member states in all major negotiations. Currently, the Community and its member states speak with one voice on a growing number of marine environmental issues and have become one of the most influential players on the international scene. Nevertheless, their joint participation in international decision-making still creates practical problems and raises issues both under EC and international law. The purpose of this Chapter is to outline the general rules governing the accession to and joint participation of the Community and the member states in so-called "mixed agreements" and international organizations (IOs).

This Chapter begins by discussing the division of external competence between the Community and the member states and its legal implications. Since there is copious literature on this topic, the analysis does not pretend to be exhaustive. The EC Treaty does not contain clear rules on how to divide the respective spheres of power and how things should work in areas outside the exclusive competence. To fill these gaps, the Court has developed a rather ambiguous doctrine, which does not provide any clear-cut and uniform answers, but requires case-by-case solutions. This is among the most critical and disputed aspects of EC law and is particularly complicated in relation to ocean matters. The jurisprudential rules, indeed, have been developed by the Court in a different context and it is not always clear to what extent they may be applicable to marine environmental issues.

To overcome the difficulty in drawing a clear allocation of external competence, the Court has pointed attention to the conclusion by the Community and the member states of mixed agreements and/or their joint accession to IOs (the so-called phenomenon of "mixity"). Although mixity has become the common way in which the Community conducts its external relations, there is still some confusion surrounding their joint action and its legal consequences. Some indications may be provided by the mixed agreement itself by means of "participation clauses", which will be briefly discussed in section 4.3.1. Instead of establishing rigid rules on how the Community and the member states should behave at the international level, the Court has emphasised the duty of close cooperation in the various phases of the life of the mixed agreement. However, it has not shed much light on how this cooperation should work in practice and what its legal consequences are. The central part of the Chapter addresses the procedural rules, as developed in the day-by-day practice of the Community, on how to apply the duty of

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close cooperation to the negotiation, conclusion, entry into force and implementation of mixed agreements. These are mainly practical rules and vary to a great extent depending on the agreement, negotiation or even meeting in question. The lack of clear and uniform rules, however, is the direct consequence of the need to ensure the maximum level of flexibility in the manner in which the Community and the member states participate in international negotiations.

4.2 The Division of External Competences between the EC and the Member States

4.2.1 The Legal Effect of EC "Exclusive" External Competence

As the Court has pointed out, in areas under the Community's "exclusive" competence, such as fisheries, member states have "fully and definitively" transferred their power to the Community and are no longer entitled to take individual actions outside the EC framework.[1] In these matters, therefore, member states have lost their concurrent external powers and can no longer conclude international agreements or undertake obligations with third countries or *inter se*, nor can they pursue their own interests or adopt positions which are different from those of the Community when they act at the international level.[2] In areas such as fisheries, therefore, it is for the Community, represented by the Commission, to negotiate, conclude and implement international agreements or become a member of an international organization.[3] If the Commission does not take action, the EC institutions and the member states may bring it to Court, on the basis of Article 232 EC, for not fulfilling its obligations under the Treaty. The transfer of competence is irreversible and the mere fact that the Community abstains from taking action does not mean that powers return to the member states.[4]

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1 Case C-804/79 *(Fisheries Case)*, Paras. 17 and 18. On the legal effects of the external exclusive competence of the Community see: I. Macleod *et al.* (1996), pp. 61-3.

2 E.g., Case C-22/70 (*ERTA* Case), Para. 17. See also: Opinion 1/75, at 1364. For the sake of clarity it is worth mentioning that all those considerations do not apply in respect of the member states' dependent territories, which remain outside the scope of the EC Treaty.

3 As a consequence, the Commission alone has become a member of most RFMOs. Conversely, the EC has become a member to the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) alongside some member states. This is because CCAMLR not only regulates fisheries, but is also involved in ecosystem management, including the conservation of species, such as penguins, which are not covered by EC wildlife legislation. In addition, the member states retain their powers to act with regard to their dependent territories. Denmark, for instance, has acceded to several fisheries agreements on behalf of the Faeroe Islands and Greenland next to the Community.

4 Case C-804/79 (*Fisheries Case)*, Para. 20. However, according to I. Macleod *et al.* (1996), p. 62, the member states' competence revives to the extent that common measures have been revoked.

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Exclusivity, however, does not rule out member states' international action *in toto,* but simply prevents them from acting outside the Community framework. Therefore, there may still be some room left for member states' residual action.[5] First, in policy areas under its exclusive competence the Community may always decide whether and how to act. As a consequence it may expressly authorize member states to act on its behalf at the international level, by negotiating, concluding and implementing an agreement with third parties.[6] Member states, however, always need to act in close cooperation with the Commission and their action must be limited to the minimum necessary to protect common interests.[7] Second, member states may be authorized on an interim basis to act at the international level in areas under EC exclusive competence whenever the Community is not able to take timely action.[8] Third, member states may be required to act whenever the Community *alone* is not entitled to conclude an international agreement or to become a member of an international organization because of the absence of an "accession clause" for REIOs.[9] Fourth, the member states may participate in an agreement under the EC's exclusive competence whenever the Community does not have the sufficient administrative or financial capacity to take upon itself all the obligations stemming from that agreement.[10] Finally, as will be discussed later in this chapter, even within agreements covering areas under the EC's exclusive competence there may always be subject-matter which still remains within the member states' concurrent powers and requires their concurrent action.[11] In all these cases the member state's external action is based on the duty of cooperation laid down in Article 10 EC

5 See A.T.S. Leenen (1992), p. 104; A. Nollkaemper (1987), p. 80; P. Mengozzi (1997), p. 380; A. Neuwahl (1996), p. 671.

6 E.g., Case C-41/76, *Dockerwolke*, Para. 32 and Case C-131/73, *Grossoli*, Para. 7.

7 E.g., Case C-804/79 (*Fisheries Case)*, Paras. 22-3. That requires the duty to consult with the Commission, to seek its approval in good faith and to abstain from any action in case of objections, reservations or conditions manifested by the Commission (*ibid.*, Para. 31).

8 E.g., Case C-804/79 (*Fisheries Case)*, Paras. 9, 22-3, and Case C-61/77, *Commission v. Ireland*, Paras. 66-7.

9 H.G. Schermers (in D. O'Keeffe and H.G. Schermers (1983), p. 27), refers to these as "false mixed agreements". As the Court made clear in its ILO Opinion 2/91 (Paras. 36-39), in these cases the Community needs to act through its member states.

10 In Opinion 1/78 (*Rubber Case*), the ECJ made it clear that member states can take upon themselves the financial burden of administrative expense. However, this does not affect the division of powers between member states and the Community.

11 In WTO Opinion 1/94, the Court considered the division of powers between the Community and the member states to conclude the WTO Agreements, in particular GATS and TRIPs. The Commission claimed the EC's exclusive competence because the WTO Agreement fell under the scope of Article 113. The Court rejected this argument, stating that not all aspects of trade in services and intellectual property covered by GATS and TRIPs fall under the scope of Article 113. Therefore, it considered the Community to be exclusively competent only for the conclusion of multilateral agreements on trade in goods (Paras. 22-34) and jointly competent for GATS (Paras. 36-53) and TRIPs (Paras. 54-71).

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as well as on the need to protect the interests of the Community in international fora and to ensure the proper functioning of the EC system.[12]

However, what would be the legal consequences if a member state takes unilateral action by contracting international obligations with third countries or agreeing upon international measures in an area of exclusive external competence, without express authorization, or pursuing their own interests, or going beyond what is necessary to attain the common objectives? If the validity of these obligations and agreements is not likely to be affected under international law, this is not the same under Community law.[13] In general, the unilateral actions of member states in an area within the exclusive Community competence represents a violation of the EC Treaty, which entitles the Commission or another member state to bring an action before the ECJ under, respectively, Articles 226 and 227 EC.[14] As the Court has pointed out, exclusivity derives directly from the principle of the supremacy of the Community legal order.[15] As a consequence, national measures concluding or implementing an international agreement in an area which falls under the EC's exclusive competence cannot be applied by national courts.[16]

These situations may occur with regard to fisheries or commercially-related issues, but not with regard to marine environmental matters, where competences are normally shared. However, all the considerations mentioned so far also apply to the Community's implicit exclusive competence stemming from EC legislation on the basis of the "pre-emption" doctrine, which is discussed below.

4.2.2 Pre-emptive Effects of EC Law

As discussed in Chapter 2.3.3, in its case law the Court makes a distinction between the Community's exclusive powers deriving directly from primary law and those implicitly stemming from secondary law on the basis of "pre-emption". In the case of "pre-emption", the transfer of powers results implicitly from the exercise by the Community of its internal competence, either through the adoption of EC legislation or

12 E.g., Case C-804/79 (*Fisheries Case)*, Paras. 9, 22-3 and 28, and Case C-61/77, *Commission v. Ireland*, Paras. 66-67. A prohibition on member states to act as a result of the transfer of powers would result in the total blocking of the EC and member states' external activities.

13 See, in general, J. Klabbers in: E. Cannizzaro (ed.) (2002), p. 173; A.T.S. Leenen (1992), pp. 106-7; A. Neuwahl (1996), p. 671.

14 Individuals could also bring an action before national courts whenever an international measure adopted unilaterally by a member state in areas under the EC's exclusive competence violates their rights as granted under EC law. The remedies available to individuals for a breach of EC law, however, depend on the national juridical systems. See, in general, A. Neuwahl (1996), p. 670.

15 E.g., Case C-106/77, *Simmenthal*. See also: A. Neuwahl (1996), p. 673 and Chapter 2.2.2.

16 In joined cases C–10-22/97 *IN.CO.GE,* the Court stated that if there is a clash between EC and national rules, the latter cannot apply, but it is for the national court to decide what will happen next (e.g., to annul the measure).

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through the conclusion of international agreements, and unlike "exclusivity" it only covers specific subject-matter. "Pre-emption", however, does not confer on the Community any new "exclusive" competence and it does not alter the division of powers under the Treaty, but simply regulates the exercise of these powers. The objective is to preserve the unity and efficiency of the EC regime by pre-empting member states from acting autonomously at the international level whenever their concurrent action would hamper the achievement of the Community's objectives. As already mentioned, pre-emption seems to produce the same legal effects of "exclusivity" under primary law.[17] Not surprisingly, the concept of pre-emption has been viewed with suspicion by member states in the Council, but supported by the Commission, which always tries to increase the Community's exclusive external competence to the maximum extent. There is extensive literature on this topic, which will not be discussed in detail here.[18] However, it is worth briefly describing the main criteria that trigger pre-emption and whether or how they apply to marine environmental issues.

4.2.2.1 "Minimum", "Total" or "Exhaustive" Harmonization?

As the Court pointed out in the leading case *ERTA*, any time that the Community has adopted common rules on the basis of its internal powers, member states are "pre-empted" from assuming, outside the EC framework, any international obligations which would "affect" these rules or "alter their scope" (the *ERTA or Affect Doctrine*).[19] As a consequence the Community acquires an implicit exclusive competence to act. The main condition for pre-emption to arise is that the unilateral action of member states may "affect" or "alter the scope" of common rules. Therefore, there is still some room left for concurrent member-state external action on the same subject-matter as long as it does not jeopardize the EC's objectives.

First of all, it is necessary to determine "when" and "whether" member states' individual actions at the international level may "affect" common rules or "alter their scope". Initially, the Court adopted a rather broad approach according to which the adoption of common rules, "*whatever form these may take*", could trigger pre-emption.[20] To avoid an undesirable loss of external competence, the member states have

17 I. Macleod *et al.* (1996), p. 60. See also Opinion 2/91, Paras. 25 and 26. Most of the Court's case law generally refers to "exclusive" competence, also to indicate the powers of the Community as resulting from "pre-emption".

18 See, in general, P. Eeckhout (2004), pp. 58-94; E.D. Cross (1992), p. 447-72; A. Dashwood in: M. Koskenniemi (ed.) (1998), pp. 113-25; J. Helinskoski (2001), pp. 30-45; R. Frid (1995), pp. 98-111; N.A. Neuwahl (1991), pp. 717-40; K.R. Simmonds (1989), pp. 19-40; A. Maunu (1995), pp. 115-28; J. Temple Lang (1986), p. 193; A. Nollkaemper (1987) 63-6; A. Nollkaemper in: H. Ringbom (ed.) (1997), pp. 172-76; M.J Dolmans (1985), pp. 17-25.

19 Case 22/70 (*ERTA*), Para. 22.

20 In Case 22/70 (*ERTA*), Para. 17, for instance, the Court referred to all mandatory rules of substantive law "*whatever form these may take*" (emphasis added), including the Treaty, secondary legislation or international agreements concluded by the Community. This has

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often been reluctant to agree on common rules, such as in the field of shipping and dumping, and this added an extra constraint on the EC decision-making process. Aware of the risk of such a wide interpretation, the Court has progressively adopted a stricter approach.[21] As pointed out in WTO Opinion 1/94, member-state international action "affects" common rules and it is, therefore, pre-empted only when it would render EC rules "ineffective" and make it "impossible" to achieve the Community's objectives.[22] In addition, the Court draws a distinction between "total" and "minimum" harmonization.[23] Member states are pre-empted from acting outside the Community framework and the Community acquires an implicit exclusive competence only in relation to matters of an international agreement that had been "totally harmonized" at the EC level.[24] As discussed in Chapter 2.2.3, this is normally the case of Directives which do not allow for any derogation other than those expressly allowed in the Directive itself (so-called "total harmonization Directives").[25] Even though Regulations go far beyond "total harmonization", but set forth a complete "unification" of national legislation in certain areas, they have the same pre-emptive effects of total harmonization Directives. "Total

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been recently confirmed in Case C- 468/98 (*Open Skies*), Para. 73. Moreover, international instruments "affect" common rules not only in the case of direct conflict, but also when they interfere with the operation of these rules, making it more difficult, complicated or less satisfactory to attain the full achievement of their objectives. See on that: M. Dolmans (1985), p. 33; J. Temple Lang (1986), p. 193, and A. Nollkaemper (1997), p. 173.

21 In ILO Opinion 2/91, Paras. 22 and 25-6, the ECJ made it clear that in order to determine whether the conclusion of an international agreement affects common rules and pre-empts member states' concurrent action, it is necessary to look at: (a) whether common rules "*cover to a large extent"* the same subject-matter dealt with in the international agreement and (b) whether EC rules were adopted with a view to achieving "*an ever greater degree of harmonization*".

22 See WTO Opinion 1/94, Para. 86. For a more detailed analysis of the case see, e.g., P. Pescatore (1999), pp. 387-405, and A. Maunu (1995), pp. 122-3.

23 On the difference between "minimum" and "total" harmonization see: Chapter 2.1.3.

24 In WTO Opinion 1/94, the Court held that, since the subject-matter covered by the GATS and TRIPs had not been totally harmonized at the EC level, the Community had no exclusive competence to sign WTO Agreements, but shared this competence with its member states (e.g., Paras. 77, 96 and 103). However, the rather restrictive approach of the Court in the WTO Opinion has been influenced by the Court's unwillingness to decide on such a politically delicate issue, thereby preferring to leave this task to the other EC institutions (see Para. 79 of the WTO Opinion 1/94). Moreover, in ILO Opinion 2/91 (Paras. 17, 25-26), the Court recognized that since the subject-matter of Part III of ILO Convention 170 was "totally harmonized" at the Community level, the ILO provisions were of such kind as to "affect" common rules and pre-empt member states from signing unilaterally the ILO Convention and making commitments on these matters outside the Community framework. In Opinion 2/92, the Court uses the same arguments to declare the exclusive competence of the EC to participate in the third revised decision of the OECD on national treatment. See, in general, P. Eeckhout (2004), pp 69-87; A. Nollkaemper (1996), p. 174; J.H. Jans (2000), pp. 86-7; R. Frid (1995), p. 101.

25 See: P.J. Slot (1996), p. 382.

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harmonization" Directives and Regulations are quite frequent in the field of maritime transport and maritime safety, but are not that common in other marine environmental areas.[26]

Conversely, member states' international actions are not likely to "affect" Community legislation laying down minimum rules and pre-emption does not normally occur. According to the Court, indeed, in a case of minimum harmonization, member states are substantially free to undertake higher international commitments or conclude international agreements containing more stringent rules than those laid down at the EC level.[27] n This is the case for all environmental directives based on Article 175 EC, which always allows member states to maintain or introduce more stringent protective standards acting either on the national or international level.[28] The same also applies to legislation based on Article 95 (ex Article 100) EC.[29] However, this is not the end of the story. More recently, the Court came to the conclusion that the mere fact that a Directive lays down minimum standards does not mean that the subject-matter has not been "exhaustively" harmonized.[30] Member states are not allowed to agree on more stringent international standards that would otherwise interfere with the scope of the Directive and jeopardize the full achievement of its objectives. In order to determine to what extent member states retain a concurrent external competence, it is therefore necessary to look at the specific "scope" of the Directive and at whether or not it intends to exhaustively regulate the subject-matter, even if only by means of minimum standards. This is not always possible and adds an element of confusion.

So far, the Court's general trend has been to restrict rather than extend the implied exclusive external competence of the Community and to preserve member states' concurrent actions. Nonetheless, in its latest case law, the Court seems to have reversed this trend and has returned to its original broad approach in the *ERTA* case. In the *Open Skies* cases, the Court indeed makes it clear that the Community acquires an implicit exclusive competence whenever the international agreement enters into an area which is "*largely covered by EC rules*".[31] Once again, however, the Court does not define

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26 Maritime transport legislation will be discussed in Chapter 6. See also EURATOM Regulation 1493/93 on shipments of radioactive substances between member states and EURATOM Directive 3/92 on the supervision and control of shipments of radioactive waste between member states and into and out of the Community.

27 In ILO Opinion 2/91 (Para. 17), the ECJ made it clear that this does not affect the member states' compliance with the less stringent EC standards. See, e.g., A. Nollkaemper (1997), p. 175; A. Nollkaemper (1987), p. 84; J.H. Jans (2000), p. 87.

28 Article 176 EC entitles member states to maintain or "introduce" more stringent protective measures than those laid down in Directives.

29 See Article 95 (4) and (5) EC on the approximation of laws.

30 E.g. Case C-1/96, *Compassion in World Farming*, Paras. 56-58. See: J.H. Jans (2000), p. 102.

31 In this case pre-emption occurs even though there is no conflict between the international agreement and the EC rules. See, e.g., C-468/98 (*Open Skies*), Para. 73 and C-476/98 (*Open Skies)*, Paras. 104-6.

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the term "largely". Presumably, it is not necessary that an international agreement cover exactly the same subject-matter as the EC legislation, but it is sufficient that the area is covered by a sufficient amount of Community legislation. Even though this case law relates to commercial agreements, it could be transposable to (marine) environmental Conventions. Finally, in its most recent case law (February 2006) the Court has made it clear that the fact that the international agreement covers an area which has been largely harmonized at the EC level does not necessarily trigger an exclusive competence of the Community to act, but it is necessary to assess whether the international agreement in question affects the uniform and consistent application of EC rules and the proper functioning of the system which they establish.[32] Once again, in the absence of clear legal criteria, determining the nature of the EC's competence is largely left to flexible policy considerations.

4.2.2.2 International Rules: Minimum or Maximum Standards?

The fact that EC legislation lays down minimum standards is not *per se* sufficient to rule out pre-emption. According to the Court, in order to determine whether or not pre-emption occurs, it is also necessary to look at whether the international standards discussed at the international level are maximum or minimum standards. Member states are pre-empted from participating individually in the negotiation of international agreements containing maximum standards, which would make it impossible for them to comply with the more stringent Community requirements.[33] Their individual accession would affect EC rules and prevent the further development of higher EC standards. The Community therefore becomes exclusively competent to conclude the agreement and to take action within its framework. Conversely, pre-emption does not occur with regard to international agreements containing minimum standards, whether they be higher or lower than those of the EC, which do not preclude the application and further development of stricter EC rules.[34] In this case, member states are still entitled to take concurrent action at the international level. This applies to all Regional Seas Conventions, which normally set out the minimum level of protection throughout the area, but always allow contracting Parties, including the EC, to adopt higher standards. Conversely, the "minimum or maximum standards" criterion finds difficult application with regard to other international agreements dealing with ocean issues (e.g., LOSC, IMO regulatory instruments and the CBD). As will be discussed in further detail in the case-study chapters, these Conventions may contain minimum or maximum standards depending on whether they apply to flag, port or coastal States, and also depending on the maritime zone and the activities concerned. Moreover, most of these Conventions (e.g., IMO

32 See: Opinion 1/03, on the EC's exclusive competence to conclude the Lugano Convention (Para. 133).

33 See Opinion 2/91, Para. 17; J.H. Jans (2000), p. 87; E. Hey in M. Evans and D. Malcolm (eds.) (1997), pp. 281-85; I. Macleod *et al.* (1996), p. 66.

34 ILO Opinion 2/91, Para. 17.

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Conventions) make no distinction between flag, port and coastal States, making it very difficult to determine a clear allocation of external powers between the Community and the member states on the basis of the "minimum or maximum standards" criterion.[35]

4.2.2.3 The "Necessity Test"

As pointed out in Chapter 2.3.2.2, the Court has made it clear that the "existence" of Community external competence does not depend on the prior adoption of common rules (*Kramer/Opinion 1/76 Doctrine*).[36] The Community is implicitly entitled to conclude an international agreement or undertake commitments with third States on matters which are within its internal competence at any time when the external action appears to be "necessary for the attainment of one of the Community objectives*"* (the so-called Necessity Test).

However, it is still controversial whether the Necessity Test also applies to the "nature" of the Community's external competence.[37] As the Court pointed out in WTO Opinion 1/94, the Community's "exclusive" external competence does not automatically flow from the existence of internal powers, but "only insofar as common rules have been established at internal level does the external competence of the Community become exclusive".[38] In the absence of internal measures, therefore, member states cannot be pre-empted from acting and the Community does not become exclusively competent in the negotiation and conclusion of an international agreement.[39] However, the Court seems to suggest that as soon as the Community enters into the international agreement on the basis of the Necessity Test, it acquires an exclusive competence for

35 See: *infra* Chapter 6, sections 7 and 9; A. Nollkaemper (1997), pp. 175-6; A.E. Hey and A. Nollkaemper (1995), pp. 290-91.

36 Opinion 1/76, and Joined Cases 3-4 and 6/76 (*Kramer)*. See also ILO Opinion 2/91, Para.7.

37 This does not seem to be the original intention of the Court which in both Opinion 1/76 and the *Kramer* Case formulated the Necessity Test to verify the "existence", not the "nature" of the EC's external powers, and not to exclude concurrent member states' actions. See, e.g., P. Eeckhout (2004), pp. 68-9; J. Heliskoski (2001), pp. 43-4; R. Frid (1995) pp. 105-9; Dolmans (1985), pp. 20-1; J. Temple Lang (1986), p. 157 (footnote 3). *Contra:* A. Nollkaemper (1997), p. 177 and A. Maunu, (1995), pp. 121-23. Also Article I-13 (2) of the EU Constitution seems to suggest that the Necessity Test may provide the EC with exclusive external competence.

38 WTO Opinion 1/94, Paras. 77 and 89. See also ILO Opinion 2/91, Para. 9, where the Court, in determining the exclusive or non-exclusive nature of the Community's competence, only recalls the *ERTA* doctrine but makes no reference to the Necessity Test. See also the Opinion of Advocate-General Tizzano in Case C-466/98 (*Open Skies)*, Paras. 46-59 and P. Eeckhout (2004), pp. 89-91.

39 See M. Dolmans (1985), p. 34 and D. Thieme (2001), pp. 252-264, p. 253. Of a different opinion is I. Macleod *et al.* (1996), p. 61.

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its implementation.[40] As a result, member states are no longer allowed to take implementing measures, to negotiate an agreement or to undertake international obligations on the same subject-matter outside the EC framework.[41] The Community used the Necessity Test to accede, *inter alia*, to the 1974 Paris Convention on the control of marine pollution from land-based sources. Such an accession, however, has not triggered pre-emption and the Community has never exercised any exclusive competence in the implementation of that Convention.[42]

The narrow reading of the Necessity Test is part and parcel of the general trend of the Court to restrict the implied exclusive external competence, of the Community. Therefore, it may be used by member states, together with the principles of subsidiarity and proportionality, as a means to limit the Community's external action and to preserve their concurrent competences.[43]

4.2.3 Member States' Residual Powers in Matters under their Exclusive Competence or outside EC Legislation

For the sake of completeness it is worth making a quick reference to the capacity left to member states to take international action outside the Community framework. Generally speaking, in areas that remain under their exclusive competence as well as in the absence of EC measures or outside their scope, member states are substantially free to adopt national environmental rules and to conclude international agreements with third States as long as they do not interfere with intra-Community trade. Article 28 EC indeed prohibits *any* quantitative restriction on imports of "goods" or "any measure having equivalent effects".[44] Following the broad interpretation of the Court, anti-pollution and maritime safety standards, such as construction standards for vessels (construction, design, equipment and manning standards (CDEMs), port state control restrictions or any environmental prohibitions which hinder intra-Community trade (e.g.,

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40 In WTO Opinion 1/94, Para. 85, the Court, recalling the *Kramer/Opinion 1/76 Doctrine*, observes that where internal powers can only be effectively exercised at the same time as external powers "…external powers may be exercised, and *thus become exclusive*, without any internal legislation having first been adopted" (emphasis added).

41 See, in general R. Frid (1995) pp. 104-7.

42 See COM (84) 673 (in OJ C116/7). On the accession to and participation of the EC in the Paris Convention see: A. Nollkaemper (1987), pp. 73-75. See also *supra* Chapter 2.3.3.

43 A. Nollkaemper (1997), p. 181.

44 Article 28 is the core provision of the entire EC Treaty. Its scope, therefore, has been initially interpreted quite extensively by the Court as including measures which are not, *per se*, discriminatory. The Court interpreted a measure having an equivalent effect to a trade restriction as: "any measure capable to hinder, directly or indirectly, actually or potentially, intra-Community trade", *Dassonville,* C-8/74(1974). Article 29 EC, moreover, extends the prohibition of quantitative restriction to exports of goods. For a general overview of Articles 28, 29, 30 and "rules of reason" see in detail: L. Kramer (2000), pp. 75-930; L. Kramer (1997), Chapter 9; J.H. Jans (2000), pp. 232-67.

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the prohibition of destructive fishing practices) might be considered as "measures having equivalent effect" and, therefore, may come within the scope of that prohibition. Similarly, according to the Court, waste is a "good" in the sense of Article 28.[45] Ocean dumping restrictions therefore seem to fall within the scope of this provision.

Article 30 EC, however, allows certain "non-discriminatory" trade restrictions which are necessary, *inter alia*, "to protect health or life of humans, animals or plants".[46] Presumably, the Treaty entitles member states to adopt non-discriminatory measures which are necessary, *inter alia*, to ensure maritime safety, to prohibit ocean dumping of hazardous wastes and to protect marine biodiversity, even though these may hinder intra-Community trade. In addition, the Court has extended the possibility for member states to go beyond Article 30 by introducing the "rule of reason" ground of justification for the "mandatory requirements" of Community law.[47] The Court, moreover, has entitled member states to rely on both Article 30 and "mandatory requirements" to protect the environment *per se* and to use "mandatory requirements" to justify *de facto* discriminatory measures as long as they are based on objective justifications.[48] More recently, moreover, the Court has recognized the possibility to rely on the environmental grounds of justification to adopt extraterritorial measures which are necessary to achieve "global" environmental objectives.[49] Combating ocean degradation is clearly a global environmental objective and member states seem to be entitled to adopt unilateral measures affecting intra-Community trade which are necessary to protect the marine environment both within and outside their jurisdiction.[50] Presumably, unilateral measures may also include international commitments undertaken with third countries, international agreements and related implementing measures. Nevertheless, it would

45 See: Case C-2/90 *(Walloon Waste*).

46 These measures, however, are only allowed provided that they are not "means of arbitrary discrimination or a disguised restriction to trade" (Article 30 EC).

47 The "mandatory requirements" exception was established by the Court in Case- C 120/78, *Cassis de Dijon* Case.

48 E.g.: Case C-302/86 (*Danish Bottle)* and Case C-2/90 *(Walloon Waste*). Article 30 and the "mandatory requirements" in their original formulation did not include the protection of the environment as such and could only justify non-discriminatory measures.

49 In the *Preussen Elektra Case* (Para. 74) the Court justified a national "discriminatory" measure which is in line with the international environmental policy in the energy sector. This is an important change of approach since the Court's traditional case law (e.g., *Kramer, Red Grouse, Hedley Lomas* and *Compassion in World Farming*) excluded the possibility for member states to rely on Article 30 or "mandatory requirements" to protect the environment outside their territory.

50 See, for instance, the German ban on imports of products made from *Corallium rubrum*, which is a species of coral living in the Mediterranean Sea. According to the Commission such a ban does not violate Articles 28 and 30 EC.

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be rather difficult for member states to convince the Court that these measures are objectively justified.[51]

4.2.4 The Legal Effects of Shared Competences

As discussed in Chapter 2.3.3, in the field of marine environmental protection the Community and the member states have shared competence to act at the international level. According to Article 174 (4) EC, in environmental matters the Community and the member states may conclude international agreements and undertake contractual relations with third countries "within their respective spheres of competence" and "without prejudice to the competence of the member states to negotiate in international bodies and to conclude agreements".[52] That means that neither of them is exclusively competent as regards the subject-matter of the agreement or the activities of an international body, but rather that they are both entitled to act. However, there are no further indications in the Treaty as to how to define "the respective spheres of powers" and what may be "prejudicial" to the member states. According to the Court, in matters of shared competences member states are entitled, "but not legally required", to use the EC institutions.[53] That means that, in principle, they may decide whether to enter into multilateral treaty relations with third countries by acting unilaterally or through the EC institutions.[54] In which circumstances and to what extent member states may take autonomous action is still controversial. However, it seems that they are not entirely free in their decision, but they must act consistently with EC law, in the first place, with the duty of cooperation under Article 10 EC. Article 10 seems to require, as a minimum, consulting the EC institutions before becoming a party to or implementing a Convention in the area of shared competence.[55]

In the absence of specific rules in the EC Treaty, it is not entirely clear what the legal implications of shared competences are in practice. The Court, for political reasons, has always been evasive and quite reluctant to clarify the matter, but has preferred to highlight the duty of close cooperation and the phenomenon of "mixity". Both issues will be examined separately in the following paragraphs.

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51 National measures may be justified under Article 30 or "mandatory requirements" only in the absence of Community legislation or outside its scope, for non-economic proposes and as long as they are proportional, see: A. Nollkaemper (1997), 181.

52 However, Declaration No. 10 contained in the Final Act of the 1996 IGC (in: O.J. 1992 C 191/100) makes it clear that Article 174(4) in no way affects the principles resulting from the *ERTA* case. The fact that Declaration 10 only refers to the *ERTA* case suggests that member states were not ready to expressly recognize the application of the *Kramer-Opinion 1/76 Doctrine* (Necessity Test).

53 See Case C-316/91, *European Parliament v. Council,* Paras. 26 and 34.

54 See e.g., J. Heliskoski (2001), p. 26 and A. Nollkaemper (1996), p. 182.

55 Case C-316/91, *European Parliament v. Council,* Paras. 26 and 34.

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4.2.4.1 The Duty of Cooperation and Close Coordination

The EC Treaty places member states and the Community institutions under a general duty to cooperate. This general duty (also called the principle of loyalty) is laid down in Article 10 EC (former Article 5) which requires member states to take all appropriate measures to ensure the fulfilment of the obligations arising from the Treaty, to facilitate the achievement of the Community's tasks and to abstain from taking any measures which could jeopardize the attainment of the Community's objectives. The Court has constantly emphasised the duty of cooperation as one of the pillars of the Community's legal order and the Community's external policies.[56] This duty stems directly from the principle of supremacy, which requires member states to avoid conflicts between EC law and commitments undertaken with third countries.[57]

Strictly linked to the duty of cooperation is the duty of close coordination at the international level. Such a duty is only explicitly mentioned in Title V of the EU Treaty in relation to the CFSP (second pillar).[58] According to Article 19 EU "member states *shall coordinate their action* in international organizations and international conferences. They shall uphold the *common positions* in such fora" (emphasis added).[59] As will be discussed in further detail in Chapter 5, the action of the Community within the framework of the LOSC and its participation in the law of the sea debate within the UN (i.e., UNGA and ICP) is treated as an area of foreign policy where the duty of coordination should thus apply.[60] However, as discussed in Chapter 2, the CFSP, unlike the first pillar (EC), is not subject to ECJ judicial control and the member states could not be brought to Court for violating the duty of coordination.

The Court, supported by the Commission, has extended the duty of coordination to all aspects of external relations, also outside the CSFP.[61] In the view of the Court,

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56 *E.g., Case 22-70 (ERTA)*, Paras. 21-22; Joined Cases 3- 4-6/76 *(Kramer)*, Paras. 42-45; WTO Opinion 1/94, Paras. 106-110; case C-25/94 (*FAO Case*), Paras. 106-09; Case C-468/98 (*Open Skies*), Paras. 107-108. See, in general, P. Eeckhout (2004), pp. 209-15 and N.A. Neuwahl (1996), p. 677.

57 E.g., WTO Opinion 1/94, Para. 21. In Case C-25/94 (*FAO Case*), the Court held that the Community is in a position to impose on member states specific obligations of cooperation even in fields which remain under their exclusive competences (such as the registration of fishing vessels).

58 See, in general, G. Loibl in: H. Somsen (ed.) (2002), pp. 226-7.

59 Moreover, Article 11(2) EU requires that "Member States shall refrain from any action which is contrary to the interests of the Union or is likely to impair its effectiveness as a cohesive force in international relations".

60 The mandate of the COMAR makes it clear that questions arising within the framework of the LOSC or UNGA which fall under EU foreign policy are governed by Title V EU. The COMAR mandate is contained in Annex III to Council Decision 98/392 on the Community's conclusion of the LOSC. See, in general, Chapter 5.2.7.3.

61 See, e.g., European Commission, Report on the Operation of the Treaty of the European Union, Brussels, 10.05.1995, (SEC (95)) and A. Maunu (1995), p. 126. The unitary inter-

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this duty stems directly from the need for unity in the international representation of the Community. More precisely, whenever an international agreement or the activities of an international body cover matters under shared competence or for which neither the Community nor the member states are entirely competent, there should be a "close association" between the institutions of the Community and the member states.[62] As a consequence they have to cooperate and coordinate their action in all phases of the life of the agreement including its negotiation, conclusion, application and implementation, as well as in activities of international bodies.[63] Such a duty, according to the Court, is particularly important when the Community cannot accede to an international agreement or be a member of an IO or when the rights and obligations of the Community and of the member states under an agreement are strictly linked.[64] However, in order to allow the Community and the member states to take a pragmatic approach and to reach practical solutions tailored to the circumstances of each case, the Court deliberately wanted to keep the concept of cooperation as flexible as possible and has never provided clear indications as to how the duty of close cooperation should work in practice.

4.2.4.2 The Phenomenon of "Mixity"

"Mixity" has no explicit legal basis in the EC Treaty, but is a practical invention endorsed by the ECJ. It refers to a situation where the Community participates together with all or some of its member states in a multilateral agreement, a so-called "mixed agreement", with third States or in the activities of an international body.[65] There are different factors, primarily of a legal nature influencing mixity.[66] International agreements or the Statute of an IO hardly fit in the distribution of competences under Community law and normally cover matters outside the EC's exclusive competence on which the Community is not entitled to act alone. In addition, mixity is a direct legal consequence of the difficulty in defining "shared competence" and clearly allocates between the respective spheres the powers of the Community and its member states. In most cases the scope of the agreement (or the IO) does not correspond to the subject-matter of EC legislation.[67] A mixed agreement is therefore generally defined as "any treaty

national representation, according to the Commission, is a *conditio sine qua non* for the effectiveness of the EC's external actions.

62 See ILO Opinion 2/91, Para. 36 and Opinion 1/78, Paras. 34 and 36.

63 WTO Opinion 1/94, Para. 108, makes it clear that the entire life of a mixed agreement is a joint affair on the part of the Community and the member states. See also ILO Opinion 2/91 and Case C-25/94 *(FAO Case)*.

64 WTO Opinion 1/94, Para. 109.

65 See M. Dolmans (1985), p. 1. The term "mixity" was introduced at the Leiden Colloquium on Mixed Agreements, organized by the Europa Institute of Leiden University in 1982.

66 See, in general, C.D. Ehlermann in: D. O'Keeffe and H.G. Schermers (eds.) (1983), pp. 3-21 and P. Eeckhout (2004), pp. 198-99.

67 See A. Nollkaemper (1997), p. 183.

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to which an international organization, some of its Member States and one or more third States are parties and for the execution of which neither the organization nor its Member States have full competence".[68]

Political considerations, just like legal factors, played a decisive role in establishing the practice of mixity. Member states in the Council have been traditionally reluctant to relinquish their position as international actors in favour of the Community and supported mixity as a means to preserve their influence and visibility in the international scene.[69] This is particularly evident within the framework of marine environmental agreements where member states, especially maritime nations (e.g., Greece) as well as the coastal State-oriented countries (e.g., Denmark, Germany and Sweden) have been trying to preserve their concurrent external competence and their capacity to defend their interests and promote their priorities at the international level. Conversely, the Commission has traditionally encouraged the conclusion of "pure" Community agreements as the most effective means to achieve common objectives. Nevertheless, supported by the EP,[70] it has accepted mixity as a way to avoid disputes with member states over the allocation of external powers and to facilitate the adoption of international agreements. Likewise, the Court has endorsed mixity as a means to avoid defining a strict allocation of powers between the Community and the member states.[71] At the end of the day, mixity is a practical solution which allows the Community and the member states to participate in international agreements or in the activities of an international body with a considerable degree of flexibility.

Mixity, moreover, has been influenced to a large extent by external factors.[72] The participation of Community in international decision-making confronted the non-EC contracting parties with a new reality. In the past (e.g., at UNCLOS III), third parties refused to negotiate with the Community alone because of a lack of understanding with regard to its legal status, the existence, scope and nature of its competence, and the relation between the EC and international legal regimes. For a long time, moreover, some countries, especially the Eastern European States, for political reasons refused to accept the Community as an international legal entity and an autonomous negotiating

68 H.G. Schermers in: D. O'Keeffe and H.G. Schermers (1983), p. 25.

69 See, *inter alia*, J. Heliskoski (2001), p. 81 and C.D. Ehlermann (1983), p. 6.

70 The EP has traditionally been against a clear demarcation of powers between the Community and the member states, but supports a clarification of the respective spheres of competence in the field of external relations in order to provide the public and non-EC counterparts with a clearer idea of "who does what" in the EU and to achieve greater efficiency and effectiveness in the EU international action, see, e.g., EP Committee on Constitutional Affairs, Report on the division of competences between the European Union and the Member States (2001/2024 (INI), p. 30).

71 See Opinion 1/78, Para. 38. See, in general, I. Macleod *et al.* (1996), p. 145. According to N.A. Neuwahl (1996), p. 667, the Court always preferred to avoid the issue of the allocation of external powers, suggesting that this issue should be solved at the institutional, rather than jurisdictional level.

72 See: N.A. Neuwahl (1991), p. 718 and J. Temple Lang (1986), pp. 157-8.

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partner. In order to defend the interests of non-EC parties, therefore, some international Conventions (e.g., LOSC) or statutes of IOs (e.g., FAO) link Community accession to ratification by one or more of its member states making "mixity", *de facto*, necessary.[73]

Mixity has become a well-established concept of Community law and the common way in which the Community conducts its external relations. Except for some fishing-related instruments, the Community has concluded all marine environmental treaties in the form of mixed agreements together with one or more of its member states. Nevertheless, there is still some confusion surrounding the joint participation of the Community and its member states in mixed agreements or IOs. Vis-à-vis non-EC contracting Parties, relevant issues have to be regulated under international law; while internally they have to be solved by EC law.

Different from the "classical mixity" discussed so far, is the so-called "cross-pillar mixity", which arises in negotiations covering matters respectively under the EC Treaty and the EU Treaty. As will be discussed in detail in Chapter 5, this situation arises with regard to the Community's participation in the UN discussions under the agenda item "oceans and the law of the sea", which is treated as an area of common foreign policy under the second pillar of the EU Treaty. Reasons of space do not allow for a detailed discussion of cross-pillar mixity, but some general observations will be made in Chapters 5.2.7.4 and 6.8.7.

4.3 Joint Participation of the EC and Member States in Mixed Agreements

4.3.1 Joint Participation under International Law: the "Participation Clauses"

There are no specific and uniform rules under international law on how the Community and the member states should participate in the negotiation, conclusion and implementation of a mixed agreement.[74] Their joint participation varies according to the rules of each agreement. Many international treaties allowing the Community to become a party (as well as the Statutes of IOs providing for Community membership) contain so-called "participation clauses" whereby they define the terms and the conditions of the joint participation.[75]

Currently, third States have become increasingly familiar with the Community and its legal order and seem to have realized that, no matter what struggle the Community and the member states are facing internally, their external relations with third countries

73 E.g., K.R. Simmonds (1986), p. 524.

74 See, in general, J.J. Ruiz in T. Scovazzi (ed.) (2001), pp. 58-77 and A. Bleckmann in: D. O'Keeffe and H.G. Schermers (1983), p. 155.

75 "Participation clauses" are not a prerogative of mixed agreements, but they may be included in treaties concluded by the Community alone.

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are governed by public international law.[76] Nevertheless, until recently, mixity has confronted non-EC parties with many questions regarding the allocation of competence between the Community and the member states and "who is responsible for what". Non-EC parties were afraid that an unclear division of competence could undermine the full implementation of the commitments under the agreement and wished to avoid a situation where the Community or the member states might hide behind each other. Moreover, they felt that the additional participation of the Community could provide the EC member states with double representation, *uti singuli* and as EC members, and confer on them a privileged position compared to the other parties of the agreement. Worried about losing part of their influence in international decision-making, moreover, non-EC parties traditionally opposed the Community acting as a block especially within the framework of Regional Seas Conventions.[77] The "participation clauses" intended to address these concerns, ensuring that the Community participates in the agreement with the same rights and obligations on matters within its sphere of competence as any other party. In principle all aspects of Community participation may be regulated.

4.3.1.1 Declaration of Competence

To avoid the situation where the unclear internal demarcation of the exact competence between the Commission and its member states could result in 'implementation gaps', non-EC parties to a mixed agreement have often demanded a more specific statement on the delimitation of their respective powers. Most of the conventions adopted within the framework of the UN, including the LOSC, CBD and the Fish Stocks Agreement, require the Community (or both the Community and its member states) to declare, at the time of signature, accession or ratification, their respective sphere of competence and responsibility vis-à-vis other Parties.[78] Conversely, none of the Regional Seas Conventions concluded by the Community provide for a similar declaration.

The EC institutions have always been fairly reluctant to proceed towards a clear demarcation of competence.[79] These kinds of declarations, indeed, eliminate some of the main advantages of the conclusion of mixed agreements, such as flexibility in

76 See M. Björklund (2001), pp. 373-402.

77 See, e.g., J. Sack (1995), pp.1235-37.

78 See LOSC, Articles 2 and 5 of Annex IX. The LOSC was the first mixed agreement to require such a declaration. See also UNFSA, Article 47(2); CBD, Articles 34(3) and 35(2); Basel Convention, Article 22 (2) and (3); Article 26 of the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region. The EC signed the Convention together with the UK, France and the Netherlands which are parties with respect to their dependent territories (COM (83) 733 in OJ C5/1(1984)), but has not yet become a party. A similar declaration is also required by the 1985 Ozone Layer Convention, Article 13(3); Espoo Convention, Article 17(5); Transboundary Watercourses Convention, Article 35(3); UNFCCC, Article 22(3); UNCCD, Article 34(3).

79 See, in general, P. Eeckhout (2004), pp. 216-218 and J. Heliskoski (2001), pp. 97-100.

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international actions and the prevention of internal discussions on the division of powers.[80] The evolutionary nature of the Community's external powers, moreover, would make it particularly difficult to draw a complete list of matters under the respective spheres of competence and this kind of declaration would soon become obsolete. A clear demarcation of powers, moreover, would hinder the further development of the Community's external competences.[81] Aware of this risk, some agreements require the Community to promptly disclose any substantial modification in the extent of its competence.[82]

Traditionally, the Court also discouraged these kinds of declarations, suggesting that there is no need to explain and define the division of powers to other parties. The exact nature of such a division, according to the ECJ, is a domestic issue and as long as the implementation of the mixed agreement is not incomplete, then non-EC parties have no need to intervene in these matters.[83] On the other hand, the Court has always encouraged the EC institutions and the member states to sort out questions of competence in mutual agreements, on the basis of the general duty of cooperation.[84]

However, when a mixed agreement so requires, the Community is under an international obligation to submit a declaration of competence. This declaration takes the form of a public statement and is normally contained in an Annex to the Community instrument of formal approval or accession. It indicates the matters regulated by the Convention which are under the competence, exclusive or shared, of the Community. The EC's competences, however, are described in general terms by referring to the relevant provisions of the Treaty or internal legislative measures. The declarations are normally so widely formulated and ambiguous as to be not very helpful in clarifying the division of the respective powers between the Community and the member states.[85] In addition, they usually state that the EC's competence is evolutionary in nature and they reserve the right of the Community to make further declarations.

4.3.1.2 The Link between EC and Member States' Participation

To ensure the full implementation of the obligations stemming from the agreement, several mixed agreements contain a special clause making Community accession dependent on the previous participation of all, the majority or several of its member states. Community participation alongside all its member states would be the best guarantee for non-EC parties. However, such an option may create a deadlock situation

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80 J. Temple Lang, (1986), p. 174 and I. Macleod *et al.* (1996), pp.160-1.

81 See K.R. Simmonds (1986), p. 531 and J. Temple Lang (1986), pp. 160 and 172-4.

82 E.g., Basel Convention, Article 22(3); Ozone Layer Convention, Article 13(3); Transboundary Watercourses Convention, Article 35(3); UNFCCC, Article 22(3), UNCCD, Article 34(3); Espoo Convention, Article 17(5).

83 See Opinion 1/78, Para. 35.

84 In Case C-25/94 *(FAO Case)* the Court also stressed the duty to elaborate a suitable strategy on how to proceed within the framework of the mixed agreement.

85 I. Macleod *et al.* (1996), p. 161.

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and actually block Community accession.[86] As a compromise solution, therefore, many mixed agreements, such as the LOSC, are open to the Community together with the majority of its member states.[87] In addition, as a guarantee for non-EC parties, most mixed agreements provide that if the Community becomes a party without any of its member states, it shall be bound by all the obligations under the agreement.[88]

4.3.1.3 Exercising Rights and Obligations (the Responsibility Clause)

Mixed agreements may contain more specific provisions on the exercise of the rights and obligations stemming from the agreement. Some Conventions, like the LOSC, for example, make it clear that the Community shall exercise the rights and perform the duties concerning matters for which competence has been transferred by member states.[89] Most mixed agreements contain a standard formula providing that the Community and its member states "*shall decide* on their respective responsibilities for the performance of their obligations under the Convention. In such cases, the organization and the member states *shall not* be entitled to *exercise rights* under the Convention *concurrently*" (emphasis added).[90] This is something different from the declaration of competence discussed above.[91] Such a decision, indeed, does not interfere with the allocation of the respective competences, but only with the exercise of such competence. This formula, moreover, seeks to avoid the situation where the Community and the member states exercise the rights under the Convention "simultaneously" and guarantees against any privileged position of EC member states as a result of double representation.

4.3.1.4 Voting Rights

The participation clauses may also regulate the exercise of voting rights within the decision-making bodies established by the agreement. In order to avoid the risk of double representation for the EC and its member states, most mixed agreements (e.g., LOSC, OSPAR, 1992 Helsinki and BARCON) provide for an alternative voting mechanism. According to this mechanism the Community is provided with a number of votes equal to the number of member states which are parties to the Convention, but has to abstain

86 See C.D. Ehlermann (1983), p. 12.

87 E.g., LOSC, Articles 2 and 3(1) of Annex IX. See also the FAO Statute. As will be discussed in Chapter 5, OSPAR, Helsinki and BARCON do not link Community accession to the majority of its member states.

88 See, e.g., LOSC, Article 5; CBD, Article 34(2); UNFSA, Article 47(2)(ii); Basel Convention, Article 22(2); Espoo Convention, Article 17(4); Ozone Layer Convention, Article 14(4); International Watercourses Convention, Article 35(2); UNCCD, Article 34(2).

89 E.g., LOSC, Article 4(3) and UNFSA, Article 47(2)(ii).

90 E.g., CBD, Article 34(2); International Watercourses Convention, Article 35(3); Ozone Layer Convention, Article 13 (2); UNFCCC, Article 22(3); Basel Convention, Article 22(2); Espoo Convention, Article 17(4); UNCCD, Article 34(2).

91 See, in general, J. Temple Lang (1986), pp. 170-72.

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from voting when its member states do so and *vice-versa*.[92] This mechanism, moreover, intends to avoid the situation where the joint participation of the Community and the member states may influence or obstruct the work of the body established by the agreement. The alternative voting, however, does not completely eliminate the risk of the Community forcing and/or blocking decisions on matters under its exclusive competence, when it may vote on its own. This risk is particularly great in the context of mixed agreements, like the OSPAR Convention, where decisions are taken by QMV and the EC member states represent the large majority of the contracting Parties.

4.3.2 Joint Participation in Mixed Agreements under EC Law: Procedural Aspects

At the EC level, mixity gives rise to difficulties of a procedural nature with regard to who is going to conduct negotiations and how, who has to speak on behalf of the Community, how the EC delegation should be composed, who is entitled to sign/ratify the agreement; and who has to act in the body established by the mixed agreement.[93] The EC Treaty, unlike the EURATOM Treaty, does not contain specific rules on the negotiation, conclusion and implementation of mixed agreements.[94] In principle, the procedural rules laid down in Article 300 EC with regard to purely Community agreements (i.e., those concluded by the Community alone) are also valid for mixed agreements. In practice, these rules find difficult application with regard to mixed negotiations.

As the Court has clarified in its case law, the Community and the member states are responsible for the negotiation, conclusion, and implementation of the provisions of a mixed agreement and they exercise the rights and perform the duties stemming from the agreement within their respective areas of exclusive competence. The relevant case law, however, mainly relates to commercial and association agreements. Within

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92 See also CBD, Article 31(2) and FAO Statute, Paras. 8-10. Other Conventions, such as the Antarctic Treaty (Article 12(4)), make it clear that when the EC participates alone in the decision-making process it has only one vote. See in general, J.J. Ruiz in T. Scovazzi (ed. (2001), pp. 71-73; J. Sack (1995), p. 1243; A.T.S Leenen (1992), p. 95.

93 There have been a number of unsatisfactory attempts to draw up codes of conduct in the context of mixed agreements. The best-known example is PROBA 20, an informal gentlemen's agreement concluded between the Commission and the Council for the negotiation of and participation in the Community and the member states in a group of commodity agreements negotiated within the framework of UNCTAD. PROBA 20 gave the Commission the role of a spokesperson and negotiator. See J. Heliskoski (2001), pp. 82-85; N.A. Neuwahl (1996), p. 679 and J. Sack, (1995), p. 1253.

94 Article 102 EURATOM, without referring specifically to "mixed agreements", lays down provisions for Treaties that have to be concluded by the EURATOM together with the member states. On the participation of the Community in mixed agreements in general see: H.G. Schermers in: D. O'Keeffe and H.G. Schermers (eds.), (1983), pp. 27-8; E.L.M. Volker, C.W.A. Timmermans *et al.* (1981); A. Rosas in: M. Koskenniemi (ed.) (1998), pp. 125-148; N.A. Neuwahl (1991), pp. 717-740; I. Macleod *et al.* (1996), pp.142-64, P. Eeckhout (2004), pp. 191- 225; P.N. Okowa in: M. Evans (ed.) (1997), pp. 301-329; J. Vogler (1999), pp. 24-48.

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these kinds of agreements it is normally possible to clearly identify and separate the subject-matter under the respective exclusive competences of the Community and the member states.[95] These rules, therefore, are not entirely transposable to marine environmental agreements that are predominantly under the shared competence of the Community and the member states and it is difficult or even impossible to clearly separate the respective spheres of powers. As already mentioned, to overcome these difficulties, the Court has emphasized the duty of close cooperation in all phases of the mixed agreement, but has never spelled out in clear terms how such cooperation should work in practice and what the legal effects are. Relevant rules and mechanisms have been developed in the day-by-day practice of the Community's external relations and they are far from uniform.

4.3.2.1 The Pre-negotiation Stage

The duty of cooperation seems to arise even before the stage of negotiations. Whenever a forthcoming agreement covers matters under the Community's exclusive or shared competence, Article 10 EC requires member states to do their best to ensure the participation of the EC. At this stage, it is common practice for the Commission to start informal and exploratory talks with other Parties to the future agreement even without Council authorization. On the basis of these talks the Commission submits a proposal to the Council asking for a mandate to commence formal negotiations. The cross-sectoral nature of many environmental agreements, especially in the field of the marine environment, normally requires inter-service consultations within different DGs of the Commission (e.g., environment, transport, fisheries and trade). The conflicting interests on the table often result in tension between the various DGs and EC institutions involved in the process. Normally, already at the pre-negotiation stage the EC institutions emphasize the need for coordination and the uniform representation of the Community at the international level.[96]

4.3.2.2 The Council's Authorization

The EC Treaty (Article 300(1)) makes it clear that in order to participate in the negotiation of an international Convention, the Commission always needs authorization from

95 On the different typologies of mixed agreements see: M. Dolmans (1985), pp.40-3; H.G. Schermers (1983), pp. 26-28; R. Frid (1995), p. 112.

96 The Commission's proposal for a Council mandate usually contains the following standard formula: "as the draft Convention also covers matters outside Community competence, the Commission and the member states *will*, by means of close cooperation during the negotiation process, *ensure unity in the international representation* of the Community" (emphasis added). See: D. Thieme (2001), p. 257.

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the Council.[97] This also seems to be valid for mixed negotiations. The negotiating mandate is based on a Recommendation by the Commission, which explains why it is important for the Community to accede to the agreement and suggests the guidelines for conducting the negotiations. The Commission's Recommendation is normally discussed first within the competent Working Group of the Council, second within the COREPER and, finally, within the Council. There is no formal involvement of the EP at this stage.

The Council's authorization is normally adopted by QMV, unless the agreement covers matters that require unanimity at the EC level, and takes the form of a Decision.[98] As will be discussed in the case-study Chapters, this authorization is not always easy to obtain.[99]

In the mandate, which usually follows a standard formula, the Council calls for close cooperation between the EC institutions and the member states during the negotiations and lays down so-called negotiating Directives for the Commission.[100] Article 300(1) EC, however, refers to "such directives as the Council *may* issue" to the Commission (emphasis added), making it clear that the mandate does not always need to set out negotiation guidelines. Negotiation Directives are intentionally broad and only indicate the objective which the Community wants to achieve from the negotiations, leaving the Commission with a free choice with regard to the strategy which should be adopted. This is, in part, in order to leave the Commission with more room to maneuver and, in part not to prejudice the outcome of the negotiations, since the text of the mandate may be available to a large number of officials. However, in order to protect the Community's position during the negotiations, normally the mandate is not made public.

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97 This Chapter refers to the terms "mandate" and "authorization" as synonymous. Article 300(1), however, expressly refers to an "authorization". See, for a general discussion, P. Eeckhout (2004), pp. 169-74; J. Vogler (2004), p. 68; F. Pocar in: E. Cannizzaro (ed.) (2002), pp. 3-15; D. Thieme (2001), pp. 256-57.

98 This is a Decision *sui generis*, which differs from a Decision under Article 249 EC because it does not bind member states, but only EC institutions. See Chapter 2.2.3.

99 See, for instance, the failed attempt by the Commission to obtain the Council's authorization to negotiate the EC accession to the 1972 Oslo Dumping Convention, *infra* Chapter 7.5.2.

100 Normally the Council's mandate states that: "The European Community will participate in the negotiation of a Convention on (…), the Commission will conduct these negotiations on behalf of the European Community for matters covered by Community competence, in consultation with a special committee appointed by the Council to assist it in this task and within the framework of the appended negotiating directives, and with regard to matters under the Draft Convention which fall in part within the jurisdiction of the Community and partly within the jurisdiction of the member states, the Presidency, the Commission and the Member States *shall ensure close cooperation* during the negotiation process (by means of coordinating their view)" (emphasis added). See in general, D. Thieme (2001), p. 257 and P. Eeckhout (2004), p. 171. The Negotiating Directives are usually annexed to the Council authorization, after a standard text.

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When the mixed agreement relates to matters subject to shared competence, like marine environmental issues, the Council may either authorize the Commission to conduct the entire negotiations without prejudice to the division of competences,[101] or to negotiate only that part of the agreement which is under the Community's exclusive competence. In the latter case, member states participate in the negotiations next to the Commission in relation to the areas under their exclusive competence.[102]

In the authorization the Council may also give general instructions on the negotiation of the participation clauses eventually envisaged in the mixed agreement. In order to ensure legal certainty and to prevent future conflicts with regard to the division of competence, the mandate may include a reference to the respective spheres of power. So far, however, this has been quite exceptional.[103] The Council's mandate may be granted for a single or a series of negotiations; in this latter case it is called a "permanent mandate".[104] The Council may always modify the mandate at a later stage.

Finally, it is worth mentioning that member states have on several occasions proposed that the Negotiation Directives should be determined in the Council's Conclusions instead of in the Council's authorization.[105] Such an option, however, has no legal basis in the EC Treaty and, with regard to environmental agreements, it is a legal anomaly. First of all, Council's Conclusions are not regulated anywhere in the EC Treaty. Secondly, they are always adopted by unanimity, while the Council's authorization to conduct environmental negotiations is adopted by QMV. Reportedly, the Commission is very annoyed at this practice and has the firm intention to resist it.

4.3.2.3 "Community Coordination" and "Common Positions"

As a general rule, the Community and the member states may negotiate independently with regard to the part of the mixed agreement that is under their respective exclusive competence. However, the general duty of cooperation under Article 10 EC requires them, as a minimum, to inform each other as to their respective positions.

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101 See *infra* n. 122.

102 Reportedly, in the past the Commission used to ask for a general negotiating mandate, while the current trend is to request very specific authorization on definite points of the negotiations which may affect the *acquis communautaire*.

103 For instance, the Council Decision (Council Doc. No. 10887/95 ENV, 30.10.1995) authorizing the Commission to negotiate the Biosafety Protocol contains an Annex listing the issues of the Protocol under the respective sphere of competence. This, however, has remained an isolated case.

104 For instance, the mandate for the negotiation of the Climate Change Convention extends to the adoption of future Protocols.

105 Reportedly, this has been discussed in the ENV Council of 10 March 2005 with regard to the mandate for the Arhus Convention and the Cartagena Protocol. See the Council Conclusions at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/envir/84322.pdf, pp. 16-17.

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With regard to matters under the EC's exclusive competence, the Commission and the member states are under a duty to reach common positions (Article 300(2) EC).[106] This seems to include matters that have been totally harmonized at the EC level. Common positions are normally adopted by the Council acting on QMV, unless they concern matters which require unanimity. With regard to matters under shared competence, on the other hand, the Commission and the member states must coordinate their actions.[107] Presumably, this does not mean that they must reach common positions, but simply that they have to "use the best endeavours" to do so.[108] Normally, common positions on matters under shared competence are adopted by unanimity.[109] This may prove to be very difficult with regard to ocean issues where the conflict of interests between the member states and the EC institutions is particularly strong. If, in spite of the efforts, it is not possible to agree upon common views, member states may act and speak on behalf of their governments.[110] However, they are strongly discouraged from doing so because the presentation of different positions within the EU may undermine the Community negotiation role.

Only when the Community is unable to act because it is not entitled to accede to the mixed agreement (or to become a member of an IO) are member states required to reach common positions, otherwise they must refrain from acting.[111] However, it is still controversial whether the duty to reach common positions only applies to matters under the exclusive competence of the Community or also to those under shared competence.[112]

In addition, as already mentioned, Title V (Article 19) of the EU Treaty requires member states to reach common positions on matters under the CFSP.[113]

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106 So far, the adoption of common positions under mixed agreements has not received much attention in the legal literature. For a general discussion see: J. Heliskoski (2001), pp. 101-05.

107 See, in general, I. Macleod *et al.* (1996), pp. 148-150; N.A Neuwahl (1996), p. 679; A. Nollkaemper (1997), p. 184.

108 The Court seems to support this conclusion in WTO Opinion 1/94 (Para. 109) where it suggests that the duty to cooperate can be more imperative in some cases than in others. See also I. Macleod *et al.* (1996), pp. 149-50 and D. O'Keefe (1999), pp.7-36.

109 See, e.g., Agreement between the Council and the Commission Regarding the Preparations for FAO Meetings and Statements and Voting, 19.12.1991 (FAO Agreement), Para. 2.3.

110 See, e.g., FAO Agreement, Para. 2.4.

111 See, e.g., ILO Opinion 2/91, Paras. 36-39. In these cases the Court has indeed stressed the importance of the duty to cooperate closely (see: WTO Opinion 1/94, Para. 109).

112 According to R. Frid (1995), pp. 221-22, the duty of cooperation also excludes any unilateral action by the member states on matters of shared competence. See also, *infra*, Chapter 6.9.3 on EC co-ordination in IMO.

113 As will be discussed in Chapter 5.2.7.3, the mandate of the COMAR includes coordination among member states "with a view to drafting common positions on issues of general interest coming under the CFSP" (Article 2, Council Decision 98/392).

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Coordination takes place within meetings known as "Community coordination" where representatives of the member states and the Commission try to elaborate common views.[114] When the mixed agreement requires a declaration of competence, the Commission and the member states also have to decide on the allocation of their respective powers and responsibilities.[115]

The meetings take place in Brussels (so-called pre-coordination) and/or directly "on the spot". In Brussels, Community coordination in areas under shared competence normally takes place within the framework of the competent Working Group or Working Party of the Council and is chaired by the Presidency.[116] If necessary, issues may be brought to the COREPER. In areas under the EC's exclusive competence (e.g., fisheries), coordination is carried out by the Commission under the chairmanship of the competent DG.[117] On the spot, the Community and the member states coordinate their positions outside the negotiations, during early-morning and late-evening meetings or coffee/lunch breaks. These meetings are chaired by the Presidency with the close assistance of the Commission.[118]

Community co-ordination has both positive and negative implications. By speaking with a single voice and presenting itself as being united vis-à-vis the rest of the world, the Community may play a stronger role in the negotiations. A good coordination at the EC level, moreover, may facilitate and speed up the negotiation process to the advantage of all concerned. For third States it is certainly easier to negotiate with a single entity, rather than with 25 uncoordinated member states. On the other side, EC coordination may be a source of great frustration and major delays in the negotiating process. The 25 member states, unlike other contracting Parties, cannot be quick and creative negotiators, but they have to report to and ask directions from Brussels and their capitals. This may be particularly irritating for third States who have to wait until the EU has put its house in order.[119] This, however, is the inevitable corollary of Community participation in international decision-making.

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114 In general, see: P. Eeckhout (2004), pp. 184-86; J. Vogler (2004), p. 70; G. Loibl (2002), pp. 224-40; I. Macleod *et al.* (1996), p. 148. In these meetings they may also decide upon some administrative matters, such as the composition of the delegation or who is going to speak for the Community.

115 Generally the Commission tends to postpone internal discussions on the division of competence until after the entry into force of the agreement in order to avoid excessive delays, e.g., WTO Opinion 1/94, Para. 106.

116 As far as marine environmental matters are concerned, coordination takes place mainly within the WGIEI or in the COMAR. These groups meet on a regular basis, not only in order to prepare the negotiations.

117 See: G. Loibl (2002), p. 228. As will be discussed in Chapter 6, EC coordination in preparation for the IMO meetings on matters under shared competence takes place within the Commission (DG TREN).

118 Often the representatives of the member states who participated in the pre-coordination in Brussels are not the same as those who attend the international meeting, making it necessary to reconfirm the common positions.

119 J. Vogler (2004), p. 68.

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4.3.2.4 Delegations

There are no uniform rules as regards the composition of the Community's delegation in mixed negotiations or in IOs and the practice changes according to the forum and the situation.[120]

The Community and the member states may participate in the negotiations with separate delegations (so-called "bicephalous" delegation). The EC delegation may have different compositions and include representatives from the Commission alone or, as in the case of UNCLOS III, together with civil servants from the Council. Representatives of member states may also join the EC delegation.[121]

Alternatively, the Community and the member states may participate in mixed negotiations with a single delegation composed of representatives from both the Commission and governmental officials (the so-called "Rome formula") or from the Commission alone.[122] This formula is without doubt more effective in terms of uniform representation at the international level. However, it requires a higher degree of coordination and the previous adoption of common positions. In ocean matters, where the interests of the Community and the member states often seriously conflict, the Rome formula might cause excessive delays in the negotiation process. As a consequence, the "bicephalous" delegation has been the standard formula for the negotiation of marine environmental treaties.

Finally, at the political level, especially in the UN and the main political fora, the EU delegation normally meets in the so-called Troika format, which is composed of the current and the incoming Presidencies, the Secretary-General of the Council and the European Commission.

4.3.2.5 The Right to Conduct Negotiations and the Right to Speak

As a general rule, the Commission conducts negotiations and expresses common positions on matters under the Community's exclusive competence. Member states may speak in order to support and/or add to the Commission's statement. However, when the agreement does not allow for EC participation, the Presidency may speak for the Community on behalf of the Commission.[123] Moreover, when the nature of the Community's competence is controversial or when matters are on the table which are only in part under the EC's exclusive competence, the Commission may leave the negotiations

120 See J. Groux in D. O'Keefe and H.G. Schermers (1983), p. 93; I. Macleod *et al.* (1996), p. 175; D. Thieme (2001), p. 258. In agreements concluded exclusively by the Community, such as fisheries agreements, there is only a single Community delegation composed of the representatives of the Commission (DG FISH).

121 See I. Macleod *et al.*, (1996), p. 175 and D. Thieme (2001), p. 258.

122 In the latter case the Commission needs a mandate from both the Council and representatives of the governments of the member states and acts on behalf of both the EC and the member states. See: J. Heliskoski (2001), pp. 79-82.

123 E.g., J. J. Ruiz in T. Scovazzi (ed.) (2001), pp. 69-71 and D. Thieme (2001), p. 258.

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to the member states. On the other hand, on matters of shared competence it is normally for the Presidency of the Council to conduct the negotiations and to present common positions, unless the Commission has been authorized to act on behalf of both the Community and the member states.[124] In exceptional cases the Presidency may also negotiate on matters which are mainly under the exclusive competence of the member states, but contain some elements of Community competence.[125] Member states and the Commission may speak in order to support and/or to add to the Presidency's statement.[126] Finally, member states speak on matters under their exclusive competence. Normally they express their views after the Presidency has spoken.

It is worth stressing that these are practical rules with no legal basis in the Treaty and they are mainly driven by political considerations and the circumstances of the case. In some cases, the Commission, due to a lack of personnel, expertise or simply to avoid confrontation with member states, might find it more convenient to allow them to conduct negotiations on specific subjects. Conversely, in areas where the interests are more uniform, as in the field of marine biodiversity, member states might find it more effective to allow the Community to take the lead, either through the Presidency or the Commission. The forms of mixed participation, therefore, may change from forum to forum and sometimes even during the same negotiations or within the same meeting. Apparently, EC Institutions and member states both want to retain this flexibility to the maximum extent.

4.3.2.6 Special Consultation Committees

According to Article 300(1) EC, in conducting negotiations, the Commission shall act in consultation with a special committee appointed by the Council.[127] These committees are normally permanent and their role should be merely consultative. Once the committee has been consulted, it is for the Commission to decide how to proceed in the negotiations. In policy areas other than the environment, these consultation committees are well organized and this mechanism seems to work successfully. Conversely, in the environmental policy area, a permanent committee has never been established, but the Council appoints *ad hoc* committees for each negotiation.[128] These committees are normally composed of the same representatives of the member states acting in the working groups of the Council. Each member state's representative inevitably tends to defend the interests of his/her government just as if it is a discussion within the

124 See Chapter 4.3.2.2, n. 101.

125 The Presidency, for instance, negotiated on behalf of the member states within the CBD-COPs during the rounds of negotiations on the Biosafety Protocol to the CBD. See: ENB at: www.iisd.ca/vol09/ and D. Thieme (2001), p. 262-63.

126 See Council Conclusions of 2 March 1992, Bull. EC 3-1992, at 49; L.J. Brinkhorst in: D. Curtin and T. Heukels (eds.) (1994), p. 613. See also the FAO Agreement, Para. 2.3.

127 Article 300(1) does not contain any special indication on the composition of these committees.

128 So far the only "real" consultative committee in the sense of Article 300(1) has been appointed for the negotiations on the UNFCCC (Council Doc. No. 9781/94; PV7CONS; 65 ENV 274).

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Council, transforming these consultation meetings into real EC coordination. As a result of this practice the Commission has to act as a double negotiator: with the other parties to the agreement, on the one side, and with the member states, on the other. This does not seem to be the original intention of the EC Treaty.[129]

4.3.2.7 Conclusion, Signature and Ratification

Once the negotiations are concluded, both the Community and the member states have to sign and ratify the mixed agreement according to the respective constitutional procedures. The EC procedure is laid down in Article 300 EC, which is also valid for mixed agreements and expressly applies to the conclusion of environmental Conventions (Article 174(4) EC).

On the basis of a "proposal" from the Commission, the Council concludes the international agreement acting on QMV, unless it covers a field for which unanimity is required for the adoption of internal rules (Article 300(2) EC).[130] After the entry into force of the Treaty of Nice, this procedure now also applies to the adoption of binding decisions by the bodies established by an agreement to which the Community is a party.[131] These include decisions of the COPs/MOPs having legal effects (e.g., formal amendments), but exclude recommendations or political declarations (e.g., HELCOM recommendations). It follows that in order to adopt binding decisions by an international body such as, for instance, OSPARCOM, the Council needs a Commission proposal fixing the line which should be followed in order to defend the EC's interests and objectives. This, so far, has never occurred.[132] The Commission is currently promoting the wider use of Article 300(2) EC.[133]

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129 Article 300(1) expressly refers to a "committee", not a "Council working group". Reportedly, in environmental matters these meetings work like discussions within a Council working group where the Commission speaks after the member states and its role is diminished to that of a simple observer.

130 Article 300(2) refers to a "proposal" from the Commission, which is something more formal than a simple "recommendation" under Article 300(1) and leaves less discretion for the Council. The Council cannot conclude the agreement without the Commission's proposal. See, in general, P. Eeckhout (2004), pp. 175-81.

131 Before the Treaty of Nice, Article 300(2) only referred to decisions of a body set out by an association agreement. See, in general, P. Eeckhout (2004), p. 175-77; J. Heliskoski (2001), pp. 101-03; B. Martenczuk in: V. Kronenberg (ed.) (2001), p. 152.

132 Reportedly, Article 300(2) has been applied only once, with regard to the CITES. This agreement, however, covers trade-related matters under the EC's exclusive competence and, since the EC is not a party, the member states needed to know what was the line which should be followed in order to defend the EC's interests and objectives.

133 The Commission is currently promoting the use of Article 300(2) within the Groupe Interservices Compétences Externes (GICE) formed from representatives of various DGs. Reportedly, the Council's Legal Service has only once drawn attention to Article 300(2), when the Commission adopted a decision by NAFO without involving the Council. In a note the Legal Service said that on the basis of Article 300(2), decisions on matters under the EC's exclusive

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The standard procedure for the conclusion of international environmental agreements is consultation with the EP, while for the adoption of binding decisions from bodies established by the agreement the EP only has to be "immediately and fully informed" (Article 300(3) EC). Given the frequency of these kinds of decisions, the duty to consult the EP would excessively delay the process and affect the role of the Community in the negotiations.[134] The Council must have "due regard" for the EP recommendations, but it may set a time-limit for the delivery of the EP's opinion "according to the urgency of the matter". If the EP does not respect such a time-limit, the Council may proceed without the EP's opinion.[135] Although the EP may be informally involved in the negotiation of international agreements, its role remains rather marginal and largely depends on the political will of the Council and Commission.[136] However, "by way of derogation", international agreements that entail an amendment of existing EC legislation adopted by co-decision require the express assent of the EP (Article 300(3) EC). The same applies to "other agreements establishing a specific institutional framework by organizing co-operation procedures" (*ibidem*). The meaning of this phrase is not entirely clear, but it seems to be broad enough to include marine environmental agreements establishing an institutional structure.[137] As will be discussed later in this Chapter, the Treaty establishing the EU Constitution reinforces the EP's external powers to a great extent and requires the EP's consent for all agreements covering a field like the

competence, such as fisheries, also require a formal proposal from the Commission and a decision of the Council. The Commission is now using this precedent to require that all decisions have to be adopted on the basis of a Commission proposal.

134 See P. Eeckhout (2004), p. 185 and A. Dashwood (1999), p. 207.

135 Failure to consult the EP constitutes a breach of the procedural requirement and leads to the invalidity of the EC instrument concluding the agreement. Parliament also has some duties in this respect. It has to look carefully and pay due attention to the Commission's proposal and "cooperate sincerely" with the Council (See, *inter alia*, Case C-70/88, *Parliament v. Council,* Paras. 21-3 and Case C-38/79, *Roquette Frères v. Council*).

136 The Commission and the Council have developed a series of informal procedures for the involvement of the EP in the negotiation and conclusion of international agreements. The EP has to be kept regularly and fully informed during all phases of the negotiations, including the preparation of the negotiation directives, and its views have to be taken into account. See, e.g., the Framework Agreement on Relations between the European Parliament and the Commission (2001), in: OJ C 121/122, Annex 2; Communication on the role of the Parliament in the preparation and conclusion of international agreements and accession treaties (1982), in: Bull. EC 5/1982, Paras. 2.4.2 to 2.4.7; Solemn Declaration on the European Union (1981), in: Bull. EC 6/1983, Para. 2.3.7. On the limited role of the EP see, in general, P. Eeckhout (2004), pp. 177-79.

137 EP assent, for instance, has been requested for the conclusion of the LOSC (see: Chapter 5.2.4). Conversely, the OSPAR Convention, the 1992 Helsinki Convention and BARCON have been adopted in simple consultation with the EP, even though they establish an institutional framework. According to I. Macleod *et al.* (1996), p. 102, Article 300(3) EC refers to those mixed agreements establishing close cooperation between the EC and the member states, on the one side, and third parties, on the other . This is not the case for the OSPAR Convention, Helsinki Convention and BARCON.

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environment or transport, for which a co-decision is required for the adoption of internal measures, even if these measures do not yet exist.[138]

Consent to be bound is usually expressed by the Presidency, but also the Commission may sign of behalf of the Community, if this is agreed.[139] Normally, the instrument of ratification (or "conclusion" according to EC terminology) is included in a Decision[140] or a Regulation, especially when the agreement contains provisions having direct effect.

The EC Treaty, unlike EURATOM, does not require member states to first ratify.[141] However, in order to avoid conflicting international obligations, it is common practice for the Community to deposit its instrument of approval only after the member states have done so. The Commission and the Council have frequently expressed preference for a simultaneous ratification, which seems to be more in line with the general duty of cooperation.[142] Member states, however, have been fairly reluctant to accept legal obligations to ratify at a particular time or in a certain manner.

4.3.2.8 Future Modifications, Amendment and Withdrawal

Amendments to an international agreement, like the agreement itself, have to be ratified by both the Community and all the member states which are parties in accordance with their respective constitutional procedures. The ratification of amendments may be a rather time-consuming process. Article 300(4) EC therefore provides that the Council may, at the time of concluding the agreement and "by way of derogation" from the general rule, authorize the Commission to approve future modifications on behalf of the Community when such modifications take place by means of a simplified procedure.[143] Most marine environmental agreements, including IMO regulatory instruments, provide for a simplified procedure for amending technical Annexes and Appendixes. Delegating to the Commission for the adoption of minor changes to an international agreement would seem to be the most logical and effective option. So far, however, the Council has been quite reluctant to issue this kind of authorization to the Commission, showing that there is still strong resistance from member states concerning the expansion of the

138 See Article III-325 of the Treaty establishing the EU Constitution.

139 See Case C-327/91, France v. Commission (Para. 28). See on that I. Macleod *et al.* (1996), pp. 92-3.

140 This is a Decision *sui generis,* see Chapter 2.2.3. The decision may also contain provisions concerning Community representation in bodies and organs set out in the agreement.

141 See: Article 102 EURATOM.

142 See, e.g., Decision of the Council of 8.06.1998 concerning the ratification by the Community of the UNFSA. See also: Article 3 of Council Decision 88/540 on the conclusion of the Ozone Layer Convention and the Montreal Protocol; Council Decision 94/69 (OJ 33 [1994]) on the conclusion of the UNFCCC (last para. of the Preamble). See, in general, J. Heliskoski (2001), pp. 92-95; P. Eeckhout (2004), p. 219 and I. Macleod *et al.* (1996), p. 155.

143 See: P. Eeckhout (2004), p. 185 and I. Macleod *et al.* (1996), pp. 92-3.

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Community's external powers.[144] The EP does not seem to favour this option either, given its traditional opposition to any form of delegating powers from the Council to the Commission, certainly concerning powers in which it is not directly involved.[145]

Finally, Article 300 EC does not contain any provisions on withdrawal,[146] which is normally regulated in the international agreement itself. In the absence of specific provisions, the general rules of international law as codified in the Vienna Convention on the Law of Treaties will apply.[147]

4.3.2.9 Implementation

As discussed in Chapter 1, international environmental agreements are not "self-executing", but require contracting Parties to take action to implement their provisions. These actions range from adopting implementing legislation, reporting and monitoring, and participating in the work of the bodies established by the agreement.

As a general rule the Community and the member states are responsible for the implementation of a mixed agreement according to their respective sphere of competence and acting in close cooperation.[148] The subsidiarity principle plays a fundamental role in the implementation of the provisions of the mixed agreement that are under shared competence. Therefore, at the EC or national level, action which seems to be the most effective to achieve the objective of the agreement will be taken. Generally, it is for the Community to adopt legislation implementing the mixed agreement, including binding decisions of the bodies established therein, while monitoring and reporting are normally left to the individual member states.

The joint participation of the Community and member states in the work of the bodies established by a mixed agreement is governed by the same rules as those discussed with regard to mixed negotiations. In sum: representatives of the Community and the member states participate in the decision-making within these bodies and they have the right to speak and vote on matters under their respective sphere of com-

144 As will be discussed in Chapter 5 there has been an attempt to delegate such a power to the Commission within the framework of the OSPAR Convention.

145 As discussed in Chapter 3.5.2, n. 114, the EP is the main opponent of so-called "comitology procedure". Article 300(4) is a form of comitology at the external level. Presumably, the EP could only support the use of Article 300(4) if it had a role in the delegation process.

146 However, Article 300(2) contains provisions on suspending the application of an agreement, which follow the same procedure as its conclusion, but without any involvement of the EP.

147 On withdrawal, suspension and reservations see, in general, A. Rosas in M. Koskenniemi (ed.) (1998), pp. 135-38 and P. Eeckhout (2004), p. 186.

148 Case C-25/94 *(FAO Case),* Paras. 35-36. The EURATOM Treaty (Article 115), unlike the EC Treaty, expressly requires cooperation in the implementation of a mixed agreement.

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petence.[149] When matters under shared competence are on the table, they have to do their best to coordinate their positions, but they are not legally obliged to do so.[150]

4.3.2.10 Responsibility vis-à-vis Non-EC parties

Under EC law the Community and the member states are responsible for performing the obligations arising from the mixed agreement according to their respective spheres of competence.[151] Vis-à-vis the non-EC parties to the agreement, the situation is different.[152] In the view of the Court, whenever the Community and the member states jointly contract international obligations in a field falling under shared competence, they are jointly liable for the implementation of these commitments.[153] However, in the opinion of Advocate-General Jacobs, the joint liability rule should apply to the entire mixed agreement regardless of whether it covers matters under exclusive or shared competence "unless the provisions of the agreement point to the opposite conclusions".[154] This would be the case for the LOSC and all agreements requiring the Community and the member states to declare their respective spheres of competence. Conversely, in the absence of any explicit indication (e.g., Regional Seas Conventions), the obligations and rights of the Community and the member states vis-à-vis non-EC parties should be taken as an "undivided whole".[155] The Court in its case law seems to implicitly endorse this view.[156]

The legal implications of this joint liability, however, are still unclear. Following a broad approach, in the case of a violation of any provision of the agreement, non-EC parties would be entitled to seek full satisfaction from the Community or from the member states regardless of the division of their internal competences. This would lead to the unacceptable result of the Community or the member state being held responsible in matters outside their competence. Under the rule of law, each party to an agreement

149 For a general discussion on Community participation in the adoption and implementation of COP/MOPs decisions see: N. Lavranos (2002), pp. 44-50.

150 See, C.D. Ehlermann (1983), p. 14.

151 See, in general, P. Eeckhout (2004), pp. 222-23; I. Macleod *et al.* (1996), pp. 158-60;

152 For a critical analysis of the issue, see M. Björklund (2001), pp. 373-402.

153 See Case C-31/91, *Parliament v. Council,* Para. 29. The case refers to the Lomé Convention, which is essentially a bilateral agreement between the EC and the member states on the one part, and the ACP States on the other. In this particular case, therefore, the EC and the member states are a single entity and are jointly responsible. It is not clear whether this judgment may be applied to all mixed agreements.

154 See the Opinion of Advocate-General Jacobs in Case C-31/91, *Parliament v. Council,* Para. 69.

155 *Ibid.* See also: G. Gaja in D. O'Keeffe and H.G. Schermers (1983), p. 137 and P. Eeckhout (2004), pp. 222-23; C. Tomuschat in: E. Cannizzaro (ed.) (2002), p. 185. Conversely, according to I. Macleod *et al.* (1996), p. 159 and J. Temple Lang (1986), p. 163, joint responsibility should always be the rule regardless of the express indication of the division of competence. See also, in general, E. Neframi in: E. Cannizzaro (ed.) (2002), pp. 193-230.

156 Opinion 1/78, Para. 35.

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is responsible for the performance of its own obligations and joint liability cannot be presumed. However, some authors have argued that "the special circumstances of the Community and the Member States may amount to an exception to this rule".[157] Internally, the Community and the member states will always be able to regulate their mutual relations on the basis of the respective division of competences and initiate an infringement proceeding before the Court for a violation of EC law. As Schermers pointed out, "in that respect the mixed agreement is a problem shifter…the division of the competence and of the liability is postponed until the application of the agreement".[158]

4.4 The Legal Effects of a Mixed Agreement within EC Law

According to Article 300(7) EC, international agreements concluded by the Community (alone) are binding on the EC institutions and on the member states. As has been consistently held by the Court, these agreements form an integral part of the Community's legal order and acquire the same characteristics of EC law.[159] As a consequence, they have primacy over conflicting national legislation and bind all member states regardless of their individual participation in the agreement; they are subjected to the exclusive jurisdiction of the Court as far as their interpretation and application are concerned and may constitute the legal basis for the judicial procedures under the Treaties.[160] In certain circumstances, moreover, rights and duties stemming from international agreements may also have direct effect and be enforceable before national courts by individuals. According to the Court, however, the relevant provisions must be sufficiently precise, clear and not subject to any subsequent measure of implementation.[161]

As the Court has made clear, the same legal consequences of purely Community agreements also apply to parts of the mixed agreements which are under the Community's exclusive competence, whether explicit or implicit (pre-emption).[162] In the recently delivered *MOX Plant* case the Court has recognized that also parts of a mixed agreement (in that case the OSPAR Convention) which fall under the shared competence of the Community form an integral part of the Community legal order and acquire the

157 According to I. Macleod *et al.* (1996), p. 159, "special circumstances" refer to the difficulty in determining the delimitation of competence and the convenience of joint liability for third parties.

158 See H.G. Schermers in: D. O'Keeffe and H. Schermers (eds.) (1982), p. 170.

159 E.g., Case C-181/73 *Haegeman*, Para. 3, and Case C-12/86, *Demirel*, Para. 7. See, in general: I. Macleod *et al.* (1996), pp. 133-37 and Chapter 2.2.3.

160 Case C-104/81, *Hauptzollamt Mainz v. Kupferberg, inter alia,* Paras. 3 and 23

161 E.g., Case C-12/86, *Demirel*, Para. 14 and Joined cases 21-24/72 *International Fruit Company*, Para. 20.

162 See, Case C-239/03, *Commission v. French Republic*, Para. 25; Case C-13/00, *Commission v. Ireland*, Paras. 14-15 and Case C-12/86, *Demirel,* Para. 9.

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same characteristics of EC law.[163] However, it is still quite controversial whether provisions of a mixed agreement which are under shared competence may bind all the member states regardless of their individual participation in the agreement.[164] The issue is particularly important in relation to the Regional Seas Conventions, which normally cover matters under shared competence and have been concluded by the Community with only some of its member states. The Court's case law is rather ambiguous and does not shed much light on this matter. Nevertheless, it has been suggested that as soon as the Community adopts legislation implementing the mixed agreement, all member states, including those who did not ratify, become bound by all its provisions, regardless of whether they are under shared or exclusive competence.[165] In the view of this author, the same conclusion should also apply in the absence of implementing legislation. By acceding to a mixed agreement (e.g., a regional seas convention) on the basis of Article 174(4) EC, the Community indeed assumes an international duty to ensure that its member states comply with the relevant standards when conducting activities under its competence, whether exclusive or shared, in waters controlled by that agreement. The Court, on several occasions, including the *MOX Plant* case, has emphasized that Article 10 EC requires member states to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardize the attainment of the Treaty's objectives.[166]

Another controversial issue is whether and to what extent the Court has jurisdiction to interpret and apply provisions of the mixed agreement which fall under shared competence or the exclusive powers of the member states.[167] Traditionally, the Court has been quite reluctant to pronounce clearly on this issue and has described its jurisdiction in very broad terms.[168] It is clear that the Court has no jurisdiction in relation to parts of a mixed agreement which remain under the exclusive competence of the member states such as, for instance, the provisions of the LOSC related to maritime boundary delimitation.[169] Presumably, the Commission cannot start an infringement

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163 See: *MOX Plant case* (Case C-459/03) *Commission v. Ireland,* decision delivered on 30.05.2006, Para. 126. See also, in general: N. Lavranos (2005), pp. 219-21.

164 It is clear that provisions that fall under the member state's exclusive competence do not form an integral part of EC law and can only bind member states which are parties *uti singuli.* See: e.g., LOSC, Article 4(5) of Annex IX. On the applicability of mixed agreements vis-à-vis member states which are not parties see L. Granvik in M. Koskenniemi (1998), pp. 266-8 and M.J Dolmans (1985), p. 64.

165 See: L. Granvik in: M. Koskenniemi (1998), pp. 266-8.

166 *MOX Plant case,* Para. 174 and Opinion 1/03, Para. 119.

167 See, in general, J. Heliskoski (2001), pp. 52-61; J. Heliskoski (2000), pp. 395-412 and P. Eeckhout (2004), pp. 233-56.

168 The leading cases on the issue, however, exclusively relate to association agreements which cover commercial matters which are predominantly under the EC's exclusive competence, see, e.g., Case C- 181/73 *Haegeman*, Paras. 4-6; Case C- 12/86, *Demirel* (Paras. 8 and 9).

169 See: Case C-379/92 *(Peralta)* and Case C-12/86 *Demirel,* Para. 12, and, in general, N. Lavranos (2005), p. 220 and I. Macleod *et al.* (1996), p. 157. For a different view see: J. Heliskoski (2001), p. 55 and A. Rosas in M. Koskenniemi (1998), pp. 140-41.

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proceeding against member states under Article 226 EC for a violation of these provisions because the Community has no competence whatsoever in these matters. Conversely, the Court has recently affirmed that it has jurisdiction to deal with disputes relating to the interpretation and application of the provisions of a mixed agreement (i.e., Part XII of the LOSC, OSPAR, and BARCON Protocol on Land-Based Pollution) which cover matters under shared competence and to assess a member state's compliance with these provisions.[170] The Commission, therefore, is entitled to start an infringement proceeding under Article 226 EC against a member state for not complying with the provisions of marine environmental agreements covering matters under shared competence.[171]

For a long time, it has been highly controversial whether the jurisdiction of the Court is exclusive in the sense of Article 292 EC and represents the only means of dispute settlement available between member states.[172] This issue arises with regard to those mixed agreements, such as the LOSC or the OSPAR Convention, which establish their own dispute settlement bodies and procedures. In the view of the Commission, the Court's jurisdiction is always exclusive and member states cannot bring a dispute before any other judicial body.[173] This, in principle, only applies to internal disputes between member states and/or EC institutions, not to third countries.[174] The issue of exclusive jurisdiction has been examined by the Court in the *MOX Plant Case*.[175] On 30 October 2003, the Commission instituted an infringement proceeding against Ireland for unilaterally submitting a dispute against the UK before a tribunal outside the Community

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170 See, e.g., *MOX Plant case,* Para.121. See also Case C-239/03, *Commission v. French Republic*, Paras. 29-31. This Case refers to the failure of France to fulfil obligations arising from Articles 4(1) and 8 of the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources. According to France the Court had no jurisdiction since there is no EC legislation on the matters covered by Articles 4(1) and 8 (Para. 22). The Court rejected this argument, saying that the Protocol falls under shared competence and relates to a field which is covered in large measure by EC legislation. See also Case C-13/00, *Commission v, Ireland*, Paras. 14-20.

171 Case C-13/00, *Commission v. Ireland*, Para. 20.

172 According to Article 292: "member states undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein". For a full discussion on this point see: N. Lavranos (2005), pp. 221-25 and N. Lavranos (2005), pp. 240-46.

173 See, for instance, *MOX Plant Case,* Paras. 61-65.

174 Similarly, the ECJ's exclusive jurisdiction, in principle, does not apply to disputes between the Community and third countries concerning matters under the EC's exclusive competence. See, e.g. *Swordfish Case, ITLOS Case No. 7, (Chile v. European Community*), *infra* Chapter 5.2.7.1, n. 80. It should be said that the Community has been always quite hesitant to have its legal order adjudged by non-EC judicial bodies. Reportedly, this was the premise of both the continuing suspension of the *Swordfish Case* and the dismissal of jurisdiction by the 1998 *Spain v. Canada judgment.*

175 Case C-459/03, *Commission v. Ireland*, 30 October 2003 (in OJ C 7/24, 10.01.2004). The dispute concerns the international movement of radioactive materials from the MOX Plant, located at Sellafield, and the protection of the marine environment of the Irish Sea.

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legal order (i.e., the Arbitral Tribunal under Annex VII of the LOSC). In the view of the Commission, in this way Ireland had violated its obligations under Articles 10 and 292 EC (and the corresponding Articles 192-193 EURATOM).[176] Almost three years later, on 30 May 2006, the Court delivered its judgment, which fully endorsed the position of the Commission.[177] According the Court, the matters covered by the provisions of the Convention (LOSC) relied upon by Ireland before the Annex VI Tribunal are very largely regulated by Community measures.[178] Therefore, they form an integral part of EC law and enter within the exclusive jurisdiction of the Court. By bringing a unilateral action before the Annex VII Arbitral Tribunal, without prior consultation with the Commission, Ireland had failed to fulfill its obligations under Article 10 and 292 EC (and the corresponding Articles 192-193 EURATOM).[179] In the view of the Court, "the institution and pursuit of proceedings before the Arbitral Tribunal […] involve a manifest risk that the jurisdictional order laid down in the Treaties and, consequently, the autonomy of the Community legal system may be adversely affected".[180] In the view of the Court, moreover, an international agreement such as the LOSC cannot affect the exclusive jurisdiction of the Court in regard to the resolution of disputes between the member states concerning the interpretation and application of EC law.[181] The LOSC (Article 282) intends to avoid that clash by making clear that the compulsory procedures initiated unilaterally by a party on the basis of a special Treaty (e.g., Article 292 EC) prevail over the compulsory procedures under the Convention (e.g., Annex VII Arbitral Tribunal), thereby preserving the autonomy of the Community legal order.[182] According to Article 282, however, this is true "unless the parties to the dispute otherwise agree". Although the Court has not pronounced itself on this point, on the basis of Article 282, one may assume that it would be still possible for member states (e.g., Ireland and the UK), in consultation with the Commission, to "otherwise agree" to submit the part of the dispute that does not concern the interpretation and application of EC law to a judicial body other than the ECJ (e.g., the Annex VII Arbitral Tribunal). Such an external judicial body could render its decision on the basis of international law and work as a domestic court with regard to the interpretation and application of EC law by requesting the ECJ for a preliminary ruling on the basis

176 In 2001 Ireland initiated a proceeding against the UK before an Arbitral Tribunal constituted under Annex VII of the LOSC (www.pca-cpa.org/ENGLISH/RPC/). Pending the constitution of the Annex VII Tribunal, Ireland requested the ITLOS to adopt provisional measures (Case No. 10, for the documentation see: www.itlos.org/start2_en.html). The proceeding before the Annex VII Arbitral Tribunal has been suspended pending the ECJ decision on the matter. For a detailed discussion of the *MOX Plant Case* see: B. Kwiatkowska (2003), pp. 1-58.

177 See also the reasoned Opinion of Advocate General Poiares Maduro in Case C-459/03 (decision delivered on 18.01.2006) which supported the view of the Commission.

178 *MOX Plant case,* Para. 110.

179 *Ibid.*, Paras. 126, 152 and 153.

180 *Ibid.*, Paras. 154. See also, *ibid.*, Paras. 125-127 and 176-177.

181 *Ibid.,* Para. 132.

182 *Ibid.,* Para. 132.

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of Article 234 EC.[183] If we accept this solution, it would be possible to maintain the MOX Plant Arbitral Tribunal in combination with a request for a preliminary ruling to the ECJ. This would represent an interesting and unprecedented example of cooperation among different judicial bodies and an interesting application of Article 282 of the LOSC.

On several occasions the Court has made it clear that it has jurisdiction to interpret all the provisions of a mixed agreement regardless of whether they fall within the exclusive or shared competence of the Community.[184] This is necessary in view of the need to secure uniformity in interpretation. However, the Court has expressly acknowledged that in interpreting an international agreement as part of the Community legal order, it is bound by the decisions of the judicial organ eventually established by the agreement.[185] However, when they establish such a judicial organ, the member states and the Community must ensure that the pre-eminent role of the Court under the Treaties is not prejudiced.[186]

Finally, it seems that provisions of mixed agreements which are subject to shared competence may also have direct effect as long as they are sufficiently precise, clear and not subject to any subsequent measure of implementation.[187] Framework agreements (e.g., the LOSC, CBD, OSPAR, the Helsinki Convention and the BARCON) are not capable of having direct effect, but those provisions of their Protocols or Annexes which are sufficiently precise could have direct effect.

4.5 The EC and International Organizations (IOs)

Before concluding it is worth making a brief reference to the Community's accession and participation in the activities of IOs. The EC Treaty does not contain specific

183 This option has been envisaged in the 2005 *Belgium v. Netherlands Iron Rhine Case*, where Belgium and the Netherlands agreed to bring a dispute before the Annex VII Arbitral Tribunal, taking into account their obligations under Article 292 EC. The dispute in question concerned the violation of the 1839 Separation Treaty between Belgium and the Netherlands which covers matters, such as acoustic pollution, which have been harmonized by EC legislation. The Tribunal, however, did not find it necessary to request the ECJ for a preliminary ruling for the purpose of rendering its award, given that there was no need to decide on the interpretation of EC law.

184 See Case C-53/96 *Hermès*, Paras. 32-33. For a critical analysis of the judgment, see J. Heliskoski (2000), pp. 408-12. See also Case C-239/03, *Commission v. French Republic*, and cases C-300/98 and C-392/98, *Dior and Others*, Paras. 33 and 35.

185 See, e.g., Opinion 1/91 (EEA Agreement I), Paras. 39-40.

186 See: Opinion 1/91, Paras. 44-46.

187 See, e.g., Case C-239/03, *Commission v. French Republic* [2004].

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provisions on this matter.[188] The Court, however, has made it clear that the powers conferred by the Treaty on the Community include the capacity, within the scope of its competence, to participate in the establishment of an international organization and to become a member.[189]

For the Community to become a member of an IO it is, first of all, necessary that the Statute of the organization provides for the participation of "*regional economic integration organizations*". Only a limited number of IOs covering matters (largely) under the EC's exclusive competence, such as the FAO, the WTO or regional fisheries organizations, contain such a clause.[190]

Even when IOs, such as the FAO, cover matters that are largely under the exclusive competence of the Community, there are always areas which remain under the shared or exclusive competence of the member states. In these cases, therefore, the Community accedes to and participates in the activities of that organization alongside its member states. The joint participation in IOs is governed by the same rules discussed with regard to mixed agreements. The division of competence is also a central issue in this context since it determines who is entitled to speak and vote in the organization. Generally speaking, the Community, in matters under its exclusive competence, has the same status and exercises the same rights as any other State which is a member of the IO. The Community and the member states represent themselves in the organs of the organization and exercise their right to speak and vote on matters falling under their respective exclusive competences. In matters subject to shared competence they have to act in close cooperation and coordinate their positions. The specific terms of the joint participation of the Community and the member states in IOs vary according to the rules of each organization. The Statute of the FAO, for instance, sets out participation clauses similar to those contained in mixed agreements, including a declaration of competence and an alternative voting mechanism.

Most of the existing IOs, within and outside the UN, reserve full membership exclusively to states. Normally, therefore, the Community participates in the activities of IOs as an observer. In particular, the Community holds observer status in nearly all institutions within the framework of the UN, including its principal organs (e.g., the

188 The only relevant rules are: Article 281 EC on the international legal personality of the Community; Article 302 allowing the Commission to maintain appropriate relations with organs and specialized agencies of the United Nations; Article 303 on cooperation with the Council of Europe; Article 304 on cooperation with the OECD. See, in general, P. Eeckhout (2004), pp. 199-209; S. Marchisio in E. Cannizzaro (ed.) (2002), pp. 231-35; R. Frid (1996); I. Macleod *et al.* (1996), Ch. 7; J. Sack (1995).

189 See Opinion 1/76, Para. 5. See I. Macleod *et al.* (1996), p. 169, and J. Sack (1995), p. 1229.

190 The FAO is the only UN agency which allows the EC to become a member. The EC's accession, however, required an amendment to the FAO Constitution. See, *inter alia*, R. Frid (1996), pp. 229-76.

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UNGA), subsidiary organs (e.g., the UNEP), and specialized agencies (e.g., the IMO).[191] The position of the Community as an observer depends on the rules of each organization. Generally, the Commission is invited to attend the meetings of the organization whenever issues of Community interest are at stake. At the meetings, it may express its view after other members of the IO have done so, but it has no right to vote. In these cases, the Court has emphasized the need for close cooperation. Member states have to coordinate their views in preparation for these meetings and try to reach common positions in order to defend the Community's interests.[192] Except for administrative costs, the Community normally has no financial obligations.

Generally, there is formal cooperation between the Commission and the Secretariats of IOs where the Community holds observer status. This cooperation takes place by means of regular contacts, an exchange of documents and information and consultation on matters of common interests.[193] The Commission, moreover, has established permanent missions to several IOs, such as the UN in New York, the IMO in London and the FAO in Rome.

Finally, the Community may be invited to participate in global or regional conferences whenever matters under its competence (exclusive or shared) are on the agenda. Also in this case, the role played by the Community varies according to the rules of the conference and is regulated by the same rules discussed for mixed agreements.[194]

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191 The EC has no status in the Security Council, the Trusteeship Council or in the International Court of Justice. It holds observer status in UNCTAD, the Economic Commission for Europe, ILO, WHO, WIPO and UNIDO, outside the UN, in the OECD and Council of Europe. See, in general, R. Frid (1995), pp. 170-73.

192 The member states, for instance, regularly coordinate their actions at the UN. This coordination has gradually increased and now covers all six main committees of the UNGA and its subordinate bodies. More than a thousand internal EC coordination meetings take place each year. See: EU paper on model UN conferences, April 2005, available at:http://europa-eu-un.org/articles/en/article_1245_en.htm.

193 See, for instance, the cooperation between the EC and UNEP which was formalized in an exchange of letters between the Executive Director of UNEP, Dr. Mostafa K. Tolba, and the President of the Commission, Gaston E. Thorn, in June 1983. See Commission of the European Communities (CEC) (Serial), "Directory of the Commission of the European Community", Luxembourg, Office for Official Publications of the European Communities (1989), "Relations between the European Community and International Organizations", pp. 85-6.

194 The Community has, for instance, been allowed to participate in the work of UNCED with a status of "full participant" without voting rights. See: UNGA Decision 6/470, 12.04.1992 amending the draft rules of procedure of UNCED, Bull. EC 2 1992, points 1.3.153 and Bull EC 3 1992, point 1.2.120, and, in general, J. Heliskoski (2001), pp. 76-77; J. Volger (2004), pp. 67-68; R. Frid (1996), p. 183.

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4.6 The EU Constitution and Mixed Agreements

The Treaty establishing the EU Constitution, if ever adopted, would introduce some important clarifications and new mechanisms that might contribute to enhancing the effectiveness of the EU's external actions. First, the EU Constitution brings about a clearer and more transparent allocation of external powers between the Community and the member states by listing areas which are under the exclusive competence of the Community, areas under shared powers and those that remain under the exclusive competence of the member states.[195] Second, it clarifies the legal consequences of the division of competences and codifies the pre-emption doctrine as developed by the Court.[196] Third, the Constitution introduces some changes to the procedure for negotiating and concluding mixed agreements and establishes a mechanism to ensure that, as far as possible, the Union expresses a single position and is represented by a single delegation.[197] Broadly speaking, the Council would authorize the opening of negotiations on the basis of a recommendation from the Commission or from a newly established Union Minister for Foreign Affairs when the negotiations relate exclusively or principally to the CFSP. The Council, moreover, would nominate the Union negotiator or head of the Union's negotiating team. The agreement would be signed and concluded by the Council on the basis of a proposal by the negotiator, who might also be authorized by the Council to approve future amendments on behalf of the Union. Additionally, as mentioned in Chapter 4.3.2.7, the new procedure would require the EP's consent for the adoption of all agreements covering fields where co-decision applies to the adoption of internal measures.

As has emerged during the drafting of the new procedure, when the negotiations cover matters under shared competence, the Community and the member states would be free to act with separate delegations. However, they should always try to establish

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195 See, in particular, the Treaty establishing the EU Constitution Article I-13(1) (the EC's exclusive competences) and Article I-14 (shared competence). Article I-17 lists under the category of "areas of supporting, coordinating and complementary action" matters that remain under the exclusive competence of the member states.

196 I.e., Treaty establishing the EU Constitution, Article I-12 (categories of competence) and Article I-13(2) reading: "The Union shall also have *exclusive competence* for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union *or* is *necessary to enable the Union to exercise its internal competence*, or insofar as its conclusion may *affect* common rules or alter their scope" (emphasis added). See also Article III-323 (international agreements).

197 The new procedure is set out in the Treaty establishing the EU Constitution, Article III-325 which merges the existing procedures under Article 300 EC and Article 24 EU (the conclusion of agreements under the CFSP). This "merger" would not alter the existing division of competences between the EC and the EU on one side, and the EC and the member states on the other, and would not confer any extra competences on the Community. See: e.g., Final Report of the Working Group III on Legal Personality, Working document 29, 24.09.2004, (WG III-WD 29), Para. 37, available at: http://european-convention.eu.int/dynadoc.asp?lang=EN&Content=WGIII.

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a single delegation and to reach common positions.[198] It seems that, apart from an increased role of the EP in the international decision-making, the EU Constitution does not bring about any substantial changes to the existing situation. This indicates that neither the EC institutions nor the member states are willing to determine rigid rules on how to conduct mixed negotiations and how to coordinate actions in matters under shared competence, but that they wish to preserve the maximum level of flexibility.

4.7 Conclusions

In the past two decades, the EC has become increasingly proactive at the international level and has taken the lead in most international environmental negotiations. In the course of the 1990s, Community coordination has been substantially improved in order to push the EC environmental agenda to the international level. Currently the EC speaks with a single voice on most environmental issues and its role as a single and highly influential actor is widely acknowledged. On the other side, the mixed participation of the Community and its member states in the international scene is still rather chaotic and creates some problems both internally and for third parties.

Internally, in the absence of clear provisions in the EC Treaty and due to the ambiguity of the Court's case law, it is still not perfectly understood what "shared competence" actually means in practice and what the legal consequences of the division of powers between the Community and its member states are. The allocation of external powers is not a situation where either the Community or the member states are fully competent, but requires pragmatic and case-by-case solutions. The situation is particularly confusing with regard to ocean issues. The jurisprudential rules of the Court have indeed been formulated with regard to policy areas under the EC's exclusive competence, such as trade and fisheries, and are not entirely transposable to marine environmental matters, which generally fall under shared competence and where the pre-emption criteria (e.g., maximum or minimum international standards) are difficult to apply. On the basis of the Court's latest case law, moreover, the determination of the nature of the Community's external competence is a highly discretionary process, largely based on policy considerations. This, on the one hand, guarantees a large degree of flexibility, but on the other, increases confusion.

Instead of proceeding towards a clear definition of shared competence and the respective spheres of powers of the Community and the member states, the Court has highlighted the duty of close cooperation in all phases of mixed agreements. However, it has not provided strict directions on how such a duty should work in practice, thereby creating uncertainty among member states with regard to whether and how far they have to coordinate their positions and may take autonomous action at the international level. On the other hand, the doctrine of mixity as developed by the Court responds to the need to ensure the maximum level of flexibility in joint participation in inter-

198 *Ibid.,* Paras. 37 and 38.

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national negotiations. So far, the Court, supported by the EC institutions and the member states in the Council, has intentionally avoided establishing uniform and rigid rules on how the EC institutions and the member states should behave at the international level concerning matters under shared competence. In these matters the action of the Community and the member states is mainly driven by political and practical considerations and requires flexible and pragmatic solutions tailored to the circumstances of each negotiation. For that reason, they want to keep the division of external competence as dynamic as possible.

In the absence of uniform procedural rules under EC law, the forms of mixed participation vary according to the circumstances and the agreement in question, creating confusion for third States with regard to "who is speaking for whom". Uncertainties, ambiguities and the lack of coordination may affect the entire decision-making process and the role of the Community in the negotiations. The Community, moreover, by its very nature cannot be a speedy and impulsive negotiator, but needs to coordinate the positions of its member states. EC coordination inevitably adds an extra layer to the negotiation process and may be a source of major delays and frustration for third States.

All these problems illustrate the complex nature of the Community as an international actor and they are the inevitable corollary of Community participation in international decision-making.

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CHAPTER 5

The Accession and Participation of the EC, Next to its Member States, in the UN Law of the Sea Convention (LOSC) and Regional Seas Agreements

5.1 Introduction

Chapter 4 discussed the general rules governing the joint participation of the Community next to its member states in the negotiation, conclusion and implementation of mixed agreements and their joint action within IOs. The present Chapter looks closely at the way these general rules found application in the negotiation, conclusion and implementation of the LOSC and the main Regional Seas Conventions applying to European Seas. Particular attention is given to the manner in which the Community and its member states coordinate their action within the bodies set up by these Conventions.

The discussion begins with the Community's participation alongside its member states in the UNCLOS III and their joint accession to the LOSC. This was the first time that they had taken part alongside each other in the negotiation of such an ambitious Convention, which still represents the most elaborate mixed agreement ever concluded by the Community. Their joint accession to the LOSC confronted third parties and the Community itself with problems of unprecedented complexity of a legal and political nature, which are discussed in Chapter 5.2.1. The so-called "EEC Participation Clauses" were among the most debated and controversial items on the Conference table. They were the result of a highly political compromise between the need to provide guarantees to non-EC parties and secure the Community's accession to the Convention, but they left both sides largely unsatisfied. The EEC clauses and their main limits are examined in detail in Chapter 5.2.2. The focus will subsequently move on to the participation and the role played by the Community in the bodies established by the LOSC (Chapter 5.2.7.1), in the UN discussions under the agenda item "oceans and the law of the sea" (Chapter 5.2.7.2) and Community coordination in these fora (Chapter 5.2.7.3). As discussed in Chapter 5.2.7.4, the Community's participation in the UN oceans-related discussions is conducted within the framework of the 2nd pillar of the EU Treaty, which limits the role of the EC (and the Commission) to a great extent. The Chapter raises some questions as regards the consistency of this approach with EC law, especially when the foreign policy format is used to discuss matters under the EC's exclusive competence.

The analysis then shifts to the Community's accession to and participation in the OSPAR Convention (Chapter 5.3), the 1992 Helsinki Convention (Chapter 5.4) and the 1976 BARCON and its Protocols, as amended (Chapter 5.5). The focus of the discussion is on the main issues raised by the Community's accession and the role played by the Commission in these frameworks. The Chapter concludes with some observations on the legal, political and practical factors that currently limit the role of the Community

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in the LOSC and Regional Seas Conventions and the pragmatic approach taken by the Commission in these frameworks.

5.2 The EC and the 1982 LOSC

5.2.1 EC Participation in the Third UN Conference on the Law of the Sea (UNCLOS III)

UNCLOS III was launched in 1973 with the ambitious mandate to adopt a Convention "dealing with all matters relating to the law of the sea".[1] From the beginning, the Community's participation appeared to be necessary because the negotiations covered areas, such as fisheries conservation and commercial matters, under the EC's exclusive competence.[2] In these areas the member states (at that time: Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, the Netherlands and the UK) had completely transferred their competence to the Community (at that time still the EEC), including the power to negotiate and conclude international agreements. Starting with the Caracas Session in 1974, therefore, the EEC was invited to participate in UNCLOS III as an observer.[3] This observer status, however, provided it with limited powers to attend (upon invitation and concerning matters within the scope of its activities) the main committees and subsidiary organs, but without the right to vote in the deliberations of the Conference.[4] For the EEC, therefore, it was crucial that member states coordinated their positions in matters affecting its competence. The member states had a legal obligation to reach common positions only on agenda items under the EEC's exclusive competence, while with regard to items of shared competence they were invited by the Council to consult each other in the presence of the Commission.[5] The Community participated with a delegation composed of officials from the Commission and the Secretariat of the Council, while each member state was present with its own delegation.

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1 UNGA Res. 3067, 28 UN GAOR, Supp. (No. 30) 13, UN Doc. A/9030 (1973).

2 For a full discussion on the EEC's participation in UNCLOS III see, e.g., C. Archer in A.W. Koers and B. H. Oxman (eds.) (1984), pp. 533-43; J. Fons Buhl (1982), pp. 181-200; D.P. Daillier (1979), pp. 417-73; D. Freestone (1992), pp. 97-114; G. Gaja (1980-81), p. 110; pp. 278-80; A.W. Koers (1979), pp. 426-41; K.R. Simmonds (1989), pp.11-128; K.R. Simmonds (1986), p. 524; T. Treves (1983), pp. 173-89; T. Treves (1976), pp. 445-66; D. Vignes in: S. Houston Lay, R. Churchill, M. Nordquist, K.R. Simmonds and J. Welch (eds.) (1973), pp. 335-47.

3 See UNGA Resolution 3208 (XXIX), 11.10.1974, UN. Doc. A/L.743.

4 See: Rule 64 of the Rules of Procedures of UNCLOS III, in: UN Doc. A/Conf.62/30/Rev.3, 27.08.1974. See: K.R. Simmonds (1989), p.111.

5 See: Council Decision of 4 June 1974 (in: Bull. EC 6- 1974, point 2.3.26). With regard to agenda items under the EEC's competence, common positions should be established according to "the usual procedure", while for issues of an economic nature affecting EEC policies, the member states should enter into consultation in the presence of the Commission.

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Community coordination took place directly on the spot prior and during each session and covered a variety of issues directly or indirectly related to EEC competences (e.g., exploitation of seabed resources, utilization and conservation of fisheries, protection of the marine environment, marine scientific research, access of land-locked states to/ from the sea, semi-enclosed seas, the continental shelf regime, and dispute settlement). Coordination, however, was very weak, especially concerning matters under shared competence. Member states appeared particularly divided on agenda items impinging on sensitive national interests and it was not always possible to reach common positions.[6] Even when they succeeded in harmonizing their views, some member states continued to submit individual proposals, not always coordinated with the common positions on a number of important items (e.g., vessel-source pollution and ocean dumping).[7]

The Council and the Commission also appeared to be divided on some important procedural issues, including who should be responsible for introducing common positions in matters with EEC exclusive competence.[8] The Commission wanted to reserve for itself the right to speak on behalf of the EEC, but the Council decided that the common position had to be delivered by the member state holding the Presidency according to the normal procedure. Most of the time, positions were presented on behalf of the nine member states. Only at a later stage, and mainly in relation to fisheries issues, were common positions introduced on behalf of the EEC.[9] Since the beginning of the Conference, therefore, the Community appeared to be rather disunited and its participation created confusion and uncertainties in the Conference at large.[10]

Apparently the only issue with total agreement between the Community and its member states was the need to become a party to the LOSC.[11] It soon become evident that observer status was not enough to protect the Community's growing interests in areas governed by the future Convention. Full participation in UNCLOS III and acces-

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6 Coordination was particularly difficult with regard to the definition of the outer limits of the continental shelf, marine scientific research, revenue sharing from the exploitation of the continental shelf beyond 200 nautical miles, and the regime for the exploitation of the Area, see: J. Fons Buhl (1982), p. 186; P. Daillier (1979), pp. 441-43; T. Treves (1983), pp. 177-81.

7 For instance, the EC Council Working Paper of 25 July 1974 on jurisdiction over vessels likely to pollute the ocean or engaged in dumping operations, was followed a year later by the Draft Articles submitted by Germany on the protection of the marine environment from pollution by ships and by proposals presented respectively by France, the Netherlands and Germany on coastal State permission for dumping, jurisdiction over dumping violations and the establishment of special areas. All documents are reproduced in R. Platzöder X, pp. 407-13; 414-418; 442 (Article 25 bis ISNT); 447 (Article 19(3) ISNT; 472 (Article 21(5) RSNT).

8 See: the Proposal from the EEC Commission to the Council before the UNCLOS III's 2nd session on the EEC's common positions, see: SEC (74) 862, in: EC Bull.6- 1974, point 2.3.26.

9 A.W. Koers (1979), p. 438. On EEC coordination see also: K.R. Simmonds (1989), 11-14; T. Treves (1983), pp. 174-82 and J. Fons Buhl (1982), pp. 182-183.

10 See: K.R. Simmonds (1989), p. 112.

11 *Ibid.*, p. 115.

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sion to the future Convention were crucial for the Community in order to be represented and to defend its own interests in the main institutions established by the Convention.[12] In the short term, the signature of the LOSC would entitle the Community to participate in the work and decisions of the Preparatory Commission (PrepCom) responsible for establishing the institutions of the Convention, namely the ISBA and the ITLOS. This was necessary for the Community to protect its competence on matters affected by Part XI on sea-bed mining (i.e., in the field of the common commercial policy) and to coordinate the positions of its member states, which were particularly divided on these issues. Moreover, participation in such ambitious negotiations and accession to the future LOSC represented an important occasion for the Community to consolidate its political and legal recognition as an international actor. Initially, therefore, environmental interests played a minor role in the decision of the Community to become a party to the LOSC. In 1973, when UNCLOS III was launched, the EC's environmental policy was in its infancy. At that time, Community action in (marine) environmental matters did not yet have an explicit legal basis in the Treaty and there was no relevant EC legislation in place. However, in the course of the following UNCLOS III sessions, the Community adopted legislation and acceded to marine environmental agreements covering matters on the Conference table, such as marine pollution and wildlife conservation. The consolidation of its competence in marine-related issues made it increasingly important for the Community to become a party to the LOSC alongside the member states.

The issue of the Community's accession to the Convention and that of the "EEC Participation Clauses" has been matters of informal discussion since 1976.[13] But starting from the eighth session, in 1979, they were included on the agenda of the negotiations on the basis of a joint proposal from the EEC and the member states, and became among the most debated and controversial items at the Conference.[14]

12 *Ibid.*

13 See: the Draft Memorandum submitted by the EEC Commission on 10.09.1976 on final clauses (in R. Platzöder XII, pp. 304-307) and letters addressed to the president of the Conference by the Netherlands Presidency in September 1976 (6 Off. Rec. 119, UN Doc. A/CONF.62/48), the UK Presidency in July 1977 (7 Off. Rec. 48, UN Doc. A/CONF.62/54) and the Italian Presidency in March 1980 (UN Doc. A/CONF.62/98). See also the Statement of the Danish Presidency in plenary, 7th session, 5.05.1978 (UN Doc. A/CONF.62/SR.95 (1978)).

14 The 1979 EEC joint proposal (in UN Doc. A/CONF. 62/L.32, in R. Platzöder XII, p. 356) was followed, in 1981, by a revised informal proposal (Conf. Doc. FC/22, in R. Platzöder XII, pp. 425-26). See, in general, J. Fons Buhl (1981), p. 553; G. Gaja (1981), p. 110; M.C. Giorgi (1985), p. 92; E. Hey in M. Evans and D. Malcolm (eds.) (1997), pp. 277-300; A.W. Koers (1979), pp. 439-40; K.R. Simmonds (1989), pp. 115-23; T. Treves (1983), p. 182.

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5.2.2 Annex IX and the "EEC Participation Clauses"

The LOSC is the first global treaty within the framework of the UN expressly open to accession by international organizations to which member states have transferred treaty-making powers (Article 305 (f)).[15] The negotiation of the final provisions of the Convention and of Annex IX on the participation of international organizations were among the most complex and time-consuming of the entire Conference. Given the fact that the Community was the only international organization of relevance when these provisions were drafted, the issue of EEC participation was at the centre of the debate starting from the eighth session.[16]

The EEC's participation as an equal party to the Convention next to its member states confronted third States and the Community itself with problems of unprecedented complexity, in the first place problems of a legal nature. For third parties, most of these problems were directly related to the uniqueness of the Community legal system. Third States were not yet familiar with the EEC legal order and there was still great confusion about the status of the Community, the relation between Community law and public international law, the existence, scope and the nature of the EEC's competence, and the division of powers with the member states. The comprehensive scope of the LOSC, the interlinked nature of its provisions and the evolutionary nature of the EEC's competence made it almost impossible to draw a clear line between the Community's and the member states' respective spheres of powers. This created uncertainties about who should perform the duties stemming from the Convention. One of the most controversial issues during the negotiations of the EEC participation clauses was the legal effect of Community accession vis-à-vis member states which are not parties *uti singuli*. Third States appeared particularly fearful that the accession of the Community without the totality of its member states could confer rights and benefits under the Convention without the corresponding obligations on those member states which decided not to ratify. As discussed in Chapter 4.3.3, indeed, under EC law the provisions of a mixed agreement governing matters under the exclusive competence of the Community, such as the utilization and the conservation of marine living resources, apply to all member states regardless of their individual participation in the agreement.[17] Conversely, the prevailing feeling was that provisions on matters subject to shared competence, such as marine environmental protection, only bind member states that are parties. As a consequence, by virtue of their EEC membership, member states that decided to stay outside the LOSC would obtain a rather privileged position compared to the other parties. First of all, they could profit from the parts of the Convention that best suit their interests (e.g., the fisheries provisions) without being bound by less favourable parts under shared

15 See K.R. Simmonds (1986), p. 524.

16 On problems raised by the EEC's participation see, in general, J. Fons Buhl (1981), p. 553; G. Gaja (1981), p. 110; A.W. Koers (1979), pp. 439-40; K.R. Simmonds (1989), pp. 115-23; T. Treves (1983), p. 182.

17 E.g., M.J Dolmans (1985), p. 64.

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competence (e.g., Part XI).[18] In this fashion, they would obtain the status of a participant with major reservations. This would be contrary to the spirit of the LOSC, which was intended as a "package deal" with no reservations admitted.[19]

The EEC's accession, moreover, also encountered obstacles of a political nature. The participation of the Community in a Treaty covering so many sensitive political and military aspects met with firm opposition from several delegations.[20] The Soviet Union and the Eastern Block Countries refused to recognize the EEC's legal personality and opposed the participation of an international organization as an equal party to a State. Developing countries, especially the Asian and Latin American groups, looked with suspicion at the intention of the Community to contribute to a "just and equitable international economic order for the oceans".[21] Arab States linked the EEC's participation to the accession of national liberation movements.[22] Moreover, there was general concern about how to decide which international organizations should have the right to accede.

For the Community and its member states, most of the difficulties encountered during the negotiations depended on the very special character of the LOSC, which represented the most elaborate convention ever concluded in the form of a mixed agreement. At that time, the existing practice of mixity was almost exclusively related to commercial or association agreements of a completely different nature compared to the LOSC and where the respective spheres of competence were better defined. The absence of clear rules and procedures affected EC coordination in UNCLOS III. In turn, the poor coordination between the Community and its member states, as well as among the EEC institutions, increased the concerns of the Conference at large over the capacity of the Community to act as a single Party.[23]

All these factors triggered general scepticism about the Community's accession to the LOSC. That made it necessary to negotiate a form of EEC participation which

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18 See, e.g., G. Gaja (1981), p. 111.

19 LOSC, Article 309. The EEC explicitly recognized this risk in the 1976 Draft Memorandum on Final Clauses, *supra* n. 13, which made it clear that: "the Convention will be the result of a package deal. Accordingly, it should contain a provision which, insofar as possible, excludes the package being broken up and individual States taking from it those parts they like (the rights) and rejecting those parts they don't like (the obligations and mandatory dispute settlement)".

20 T. Treves in E. Cannizzaro (ed.) (2002), p. 279. Conversely other delegations (e.g., Egypt, Greece, Iceland, and Portugal) supported the EEC's accession.

21 See: Preamble to the LOSC (Para. 5). This mistrust was influenced by the position taken by a number of member states in the global debate on the New International Economic Order (NIEO). In the same period, indeed, eight member states voted against the adoption of the 1974 General Assembly's Charter of Economic Rights and Duties of States (UNGA Res 3281 (XXIX) of 12 December 1974).

22 EC participation was also linked to that of not fully independent governments and by Namibia, as represented by the UN Council for Namibia, see T. Treves (1983), p. 185 and K.R. Simmonds (1986), p. 525.

23 See, e.g., A.W. Koers (1979), p. 439.

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clarified as much as possible the division of competence between the Community and the member states and avoided any privileged positions both for member states which would become parties to the Convention as well as for those who decided to stay outside. At the eleventh session of the Conference, in 1981, after extensive discussions, the "EEC Participation Clauses"[24] were agreed upon and included in Annex IX governing the participation of international organizations.[25] As a consequence, the final provisions of the Convention were modified in order to open the LOSC for signature (Article 305 (f)), formal confirmation (Article 306) and accession (Article 307) by international organizations according to the provisions of Annex IX. The lack of understanding of the nature of the EEC already emerges in the definition of "international organization" adopted in Annex IX (Article 1) which refers to "*intergovernmental* organizations constituted by States to which its member States have transferred competence over matters governed by the Convention, including the competence to enter into treaties in respect to those matters" (emphasis added). As a commentator pointed out, the term "intergovernmental" does not render full justice to the EEC as an organization with its own legislative, executive and judiciary institutions separate from its member states and with a directly elected Parliament.[26]

5.2.2.1 Linking the Community's Participation to that of the Majority of its Member States

Annex IX makes the EC's participation conditional upon that of the majority of its member states. In particular, it provides that an international organization is entitled to sign the Convention (Article 2) and deposit its instrument of "formal confirmation" or accession (Article 3 (1)) only if the majority of its members have done so.

The majority clause has a double objective. First of all, it intends to reassure third States as regards the full implementation of the obligations stemming from the Convention. Second, it excludes the possibility that the Community's sole accession to the LOSC may provide its member states with rights and benefits in matters under the EC's exclusive competence.[27] The majority solution represents a compromise between conflicting interests on the table. On the one hand, linking the EEC's accession to that of all member states would have been a better guarantee for third States. For the Commun-

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24 On the EEC clauses see: Report of the President on the question of participation in the Convention, 8 March-3 April 1982 (UN Doc. A/CONF.62/L.86, 26.03.1982) in R. Platzöder XV, pp. 526-37 and M.H. Nordquist, S. Rosenne, and L.B. Sohn (eds.) (1989), pp. 455-64.

25 Annex IX on participation of international organizations was adopted as an integral part of the Convention. In turn, Resolution IV was adopted as Annex I of the Final Act allowing national liberation movements that participated in the Conference to sign the Final Act and participate as observers in the work of the PrepCom and the ISBA's Assembly. See: K.R Simmonds (1989), p. 125.

26 See: H. da Fonseca-Wollheim, representative of the Commission (DG RELEX) in: E.L. Miles and T. Treves (eds.) (1993), p. 174.

27 See G. Gaja (1981), p. 111.

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ity, on the other hand, this option could have created a deadlock situation and blocked its accession to the LOSC.[28] Although the majority solution appeared to be the most reasonable compromise, it was still far from satisfactory from an EC law point of view. Such an option indeed left open the possibility for individual member states to accede to the Convention without the Community. Under EC law, however, member states could not commit themselves in matters governed by the LOSC that are under the exclusive competence of the Community. Given the fact that the Convention does not allow reservations, the majority solution could in practice impede an individual member state's accession.[29] The Commission therefore repeatedly urged member states to sign the LOSC and to deposit their instrument of ratification simultaneously with the Community.[30] In the Commission's view, the individual deposit of an instrument of ratification by single member states not coordinated with the Community would be an infringement of EC law and could be brought before the Court.[31] Despite the Commission's call, there was no coordination among the member states and the Community in the signature[32] and deposit of their instruments of confirmation.[33]

5.2.2.2 The Extent of Participation and Rights and Obligations

One of the primary objectives of Annex IX was to ensure that the EEC's accession to the Convention did not confer on the Community and its member states a privileged position compared to other parties. For this purpose, Article 4(3) of Annex IX provides that an international organization has rights and obligations under the Convention only concerning matters relating to which competence has been transferred to it by member

28 This risk became evident when, in 1984, the Federal Republic of Germany and the UK announced their decision not to sign the Convention because of their dissatisfaction with Part XI on deep seabed mining. See, e.g., Statement by Mr. Malcom Rifkind, Minister of State at the Foreign and Commonwealth Office, in the House of Commons, 6.12.1984. See K.R. Simmonds (1989), pp. 134-5.

29 See, in general, H. da Fonseca-Wollheim (1993), pp. 176-7 and K. R. Simmonds (1989), pp.131-2.

30 On simultaneous signature see: COM (82) 699, 10.10.1982 (EC Bull. 10-1982, Para. 2.2.29 and EC Bull. 11-1982, Para 2.2.48). On simultaneous ratification see: the Commission's response to the written question of the EP (in: OJ C 226, 7.10.1985, pp. 3-4; OJ C 8, 9.4.1986, p. 27. 1) and the Commission's Communication to the Council, 24.11. 1987, COM (87) 403.

31 *Ibid.*

32 The EEC and its ten member states signed the Final Act of UNCLOS III simultaneously, on 10.12.1982, but only five of them (i.e., Denmark, France, Greece, Ireland and the Netherlands) also signed the Convention. Belgium and Luxembourg signed the LOSC on 5 and 7 December 1984 opening, respectively, the door to the Community's signature that was deposited on 7.12.1984. See: K.R. Simmonds (1989), p. 132.

33 Unlike the UNFSA which was ratified by the EC and its member states simultaneously (on 19.12.2003), the ratification of the LOSC was completely uncoordinated, see *infra* n. 64.

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states which are parties to the Convention.[34] In addition, Article 4(4) makes it clear that the participation of an international organization would in no case entail an increase of representation "to which its member states which are States Parties would otherwise be entitled, including rights in decision-making". That means that the Community may not claim an additional vote, but on matters under its exclusive competence it exercises a voting right with a number of votes equal to the number of its member states which are parties to the Convention.[35]

In order to ensure that member states which are not parties to the LOSC did not derive benefits from the Community's accession, Article 4(5) of Annex IX makes it clear that the "participation of such an international organization shall in no case confer any rights under this Convention on member states of the organization which are not states parties to this Convention."[36] As the Belgian Presidency pointed out during the Conference, however, this clause seems to be prejudicial to EEC law since it would force the organization to discriminate between the member states.[37] The acquisition of some benefits by all member states is implied in the very nature of the Community legal order and in its fundamental principles, such as the principles of equality and non-discrimination. It would be impossible for the Community to provide for unequal treatment of its member states.[38]

Finally, according to Article 5(6) of Annex IX, in the event of a conflict between the obligations of the Community under the LOSC and its obligations under EC law, the former shall prevail. Accordingly, a member state which is a party to the LOSC cannot avoid performing its obligations under the Convention in order to comply with EC law.[39]

5.2.2.3 Declaration of Competences

During the UNCLOS III, third States insistently asked for clarification concerning the division of competence between the Community and its member states.[40] In order to

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34 According to Article 4(1) of Annex IX, the act of formal confirmation or accession of the international organization shall contain an undertaking to accept all rights and obligations under the LOSC on matters where competence has been transferred by its member states parties to the Convention.

35 T. Treves (2002), p. 279 and B.H. Oxman (1980), p. 41.

36 Report of the President on the question of participation, in Platzöder XV, p. 528. See also M. H. Nordquist, S. Rosenne, and L.B. Sohn (eds.) (1989), p. 459.

37 See: the Letter addressed to the President of the Conference, 11th Session, by the representative of Belgium (FC/28, 1 March 1982) in: R. Platzöder XII, p. 454. See also the EP's Report by the Legal Affairs Committee on the signature and ratification of the LOSC, 3.11.1982 in: EP Working Documents 1982-83, N. 1-793-82.

38 See G. Gaja (1981), p. 112 and M.J. Dolmans (1985), p. 65.

39 See: C.D. Ehlermann (1983), p. 20 and M. J. Dolmans (1985), pp. 81-2.

40 See: the Proposals and Suggestions on the Community's participation submitted by a number of non-EC delegations, *inter alia*, Group of 77 (25.03.1981, in R. Platzöder XII, pp. 341-343);

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ensure the maximum degree of clarity, Annex IX requires that, at the time of signature, an international organization shall make a "declaration specifying the matters governed by the Convention in respect of which competences has been transferred to the organization by its States members which are signatories, as well as the nature and extent of such competence" (Article 2). In addition, at the time of the formal confirmation of or accession to the Convention, both the international organization and its member states have to specify their respective spheres of competence (Article 5(1) and (2)). There is the presumption that member states retain their competence in all matters governed by the Convention with respect to which the transfer of competence has not been specifically declared, notified or communicated by the international organization (Article 5(3)). However, Article 5(4) expressly recognizes the evolving nature of the EC's competence and requires both the Community and its member states to keep these declarations constantly up to date and to promptly notify the Secretariat of any changes, including the transfer of new powers. In addition, they have to provide all information on the division of competences at the request of other states Parties (Article 5(5)).

The provisions on the declaration of competence were among the most critical of the entire Annex IX. As discussed in Chapter 4.3.1.1, the EC institutions and the member states have always been reluctant to issue this type of declaration.[41] Therefore, they tried to avoid the introduction of a similar requirement in the text of the LOSC.[42] As the Belgian Presidency pointed out in a letter addressed to the president of the Conference before the opening of the eleventh session, the EEC and its member states considered the division of competence as a purely internal matter.[43] Moreover, given the comprehensive character of the LOSC, which constitutes a totality of interlocking and non-separable rights and duties, it would be extremely difficult or even impossible to clearly individualize separable issues and to bring them within the sphere of competence of the Community or the member states.[44] In addition, given the evolving nature of the EC's competence, any statement of this kind would never be completely accurate and might mislead third States. These difficulties are reflected in the cautious nature of the Declarations submitted by the Community upon the signature of the Convention,

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the USSR (26.03.1981, in *ibid.,* p. 344); Egypt (12 .03.1982, in *ibid.*, pp. 457-58); Colombia (*ibid.*), Japan (*ibid.*); Brazil (12.03.1982, in *ibid.,*, p. 459); Peru (*ibid.*); the USSR (*ibid.*).

41 See, in general, G. Gaja (1981), pp. 113-114 and M.J. Dolmans (1985), p. 79.

42 Report of the President on the question of participation, in R. Platzöder XV, p. 528.

43 Conference Doc FC/27, 27.08.1981, in R. Platzöder XII, pp. 444-453. In addition, according to Ambassador Dever, "the nature and the scope of the division of competence varies as a result of the evolution peculiar to the system they have set up among themselves. By the same token we would particularly point out that no declaration can be made on this matter except on the exclusive responsibility of the Community or of its member states, and that no such declarations may be interpreted outside the framework of the institutions provided for in the Treaty of Rome". See also the 1976 Draft Memorandum submitted by the Dutch Presidency, in R. Platzöder XII, pp. 310-314.

44 E.g., H.G. Schermers (1983), pp. 26-27.

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in 1984, and upon the deposit of its act of formal confirmation, in 1997. Both Declarations will be discussed later in the chapter.

5.2.4.4 Responsibility, Liability and Dispute Settlement

The declarations of competence under Article 5 of the LOSC's Annex IX determine the party which is responsible for performing the duties stemming from the Convention.[45] According to Article 6(1) of Annex IX, parties which have competence under Article 5 also bear responsibility for a failure to comply with the obligations stemming from the Convention.[46] Upon request, moreover, the Community and its member states shall provide third States with further information regarding who is responsible for specific subject-matters. The failure to provide the requested information within a reasonable period of time or the provision of contradictory information shall result in "joint or several liability" (Article 6(2)). These provisions intend to provide third States with the maximum level of clarity about who among the Community or the member states is accountable for implementing the Convention.

Finally, under Article 7(1) of Annex IX, an international organization, at the time of the deposit of its instrument of formal confirmation, is free to choose, by written declaration, one of the different means of dispute settlement provided for under Article 287 of the LOSC, with the exception of the International Court of Justice (ICJ).[47] At the time of the ratification of the LOSC, the Community did not choose any specific dispute settlement procedures under Article 287 and postponed such a decision to a later stage.[48] So far, the Community has never made such a choice. Nevertheless, when an international organization is party to a dispute together with one or more of its member states, it is deemed to have accepted the same procedure as the member state, except when the member state has only opted for the ICJ (Article 7(3)).[49] In this case they are deemed to have accepted arbitration under Annex VII unless the parties to the dispute otherwise agree. As discussed in Chapter 4.3.2.10, however, disputes between member states or between member states and EC institutions concerning provisions under the EC's exclusive competence need to be brought before the ECJ. The ECJ, in the recently delivered *MOX Plant Case* made it clear that the same also applies with regard to provisions subject to shared competence.[50] In principle, therefore, the Court may influence to a great extent the interpretation and application of the LOSC within

45 M.H. Nordquist, S. Rosenne, and L. B. Sohn (eds.) (1989), p. 462.

46 There has been some criticism about the fact that, before the EEC's accession, declarations under Article 5(2) could *de facto* result in reservations from the LOSC's provisions under EEC exclusive competence. See, *e.g.*, M.J. Dolmans (1986), p. 66 and K.R. Simmonds (1986).

47 According to the ICJ's Statute only States have access to the Court. Article 287 includes, *inter alia*, the ITLOS and its Sea-Bed Dispute Chamber, Arbitration, and Special Arbitration.

48 See: Council Decision 98/392/EC, *infra* n. 65.

49 See, in general, T. Treves (2002), pp. 291-96 and K.R. Simmonds (1989), pp. 139-42.

50 See: Case C-459/03, *MOX Plant,* Paras. 121-126 and Chapter 4.4.

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the EU. In practice, the rulings of the Court relating to the LOSC have so far been quite exceptional.[51]

5.2.3 The EC's Signature and Declaration upon Signature

On 10 December 1982, after almost a decade of complex negotiations, the LOSC was adopted and opened for signature.[52] However, there was an internal obstacle which still impeded the Community from signing the Convention.[53] At that time, the signature of an international agreement required unanimity in the Council (Article 228, now Article 300, EC).[54] The firm opposition of the Federal Republic of Germany and the United Kingdom to Part XI on the deep seabed mining regime and their decision not to sign the Convention threatened to block the decision in the Council. This obstacle was removed when, on 6 December 1984, both countries declared that they would not obstruct EC accession, opening the door to the Community's signature.[55] On 7 December 1984, the Community signed the LOSC after all its member states, except the Federal Republic of Germany and the United Kingdom, had signed it.[56] According to the requirement of Article 2 of Annex IX, the Community deposited a Declaration specifying the competence which had been transferred to it by its member states.[57]

The opening statement of the EC Declaration reflects a balance of the different positions taken by its member states during the negotiations. After a general acknowledgment of the Convention as "a major effort in the codification and progressive development" of the international law of the sea, the Community, reflecting the concerns of

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51 E.g., C-410/03, *Commission v. Italy* (Para. 54); Case C-6/04, *Commission v. UK* (Paras. 122-25). See also: C-379/92, *Peralta,* Case C-405/92, (*Drift Net Case*), Paras. 13-5*;* Case C-286/90**,** *Poulsen*; Case C-9/89, *Spain v. Council*; C-221/89, *Factortame;* C-459/03, *MOX Plant*.

52 Montego Bay, 10 December 1982, 21 I.L.M. (1982), 1261. Only four of the (at the time) ten member states (i.e., Denmark, France, Greece and Ireland) voted in favour of the final text of the Convention, while the other six abstained because of their dissatisfaction with Part XI. See UN Doc A/CONF.62/SR.182, pp. 138-9.

53 For a full discussion on the Community's signature see: T. Treves in Cannizzaro (ed.) (2002), pp. 281-2; A.H.A. Soons (1991); pp. 281-83; K.R. Simmonds (1989) pp. 142-4; J. Devine (1997), pp. 95-100; K.R. Simmonds (1986), pp. 521-44; M.C. Giorgi (1985), pp. 91-2.

54 However, abstentions did not preclude unanimity. H. da Fonseca-Wollheim (1992), p.178, notes that unanimity was required also because environmental matters, at that time, still needed unanimity under Article 235 EEC.

55 Statement by Mr. M. Rifkind, Minister of State at the Foreign and Commonwealth Office, in the House of Commons on 6 December 1984. See K.R. Simmonds (1989), p. 135.

56 See: Law of the Sea Bulletin no. 18, June 1991, p. 6. The EC was able to reach the majority requirement under Article 2 of Annex IX only on 5.12.1984 when Belgium and Luxembourg deposited their signatures.

57 See: UN Law of the Sea Bulletin, no. 4 (1985), p. 9 and Bull. EC 12-1984. The Text of the Declaration is reproduced in Annex I to this book, pp. 351-53. See also the EP's Resolution, 11.06.1983 (OJ C 184).

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the majority of its member states, expressed its dissatisfaction with regard to the provisions on deep seabed mining, which were considered not to be conducive to the development of such activities.[58] Accordingly, the Community made its ratification dependent upon the rectification of "considerable deficiencies and flaws" in the provisions of Part XI in order to produce a generally accepted regime and new efforts directed at producing "a universally accepted Convention". The Community recognized the importance of the work which remained to be done within the PrepCom and manifested its intention to contribute, within the limits of its competence, to the "task of finding satisfactory solutions."

The second part of the declaration indicates the matters governed by the LOSC which are under the Community's competence in a rather elusive and laconic fashion, reflecting a general dislike for these kinds of declarations. The Community pointed out that competence had been transferred by member states in the field of "conservation and management of fishing resources". On these matters the Community has exclusive power to adopt relevant rules and regulations and conclude international agreements with third parties or competent international organizations, but the enforcement power rests with member states.[59]

With regard to the protection and preservation of the marine environment, the Declaration, implicitly recalling the *ERTA* doctrine, pointed out that member states had transferred their competences in matters covered by EC legislation or international agreements concluded by the Community, which are listed in an Annex.

According to the Declaration, moreover, the Community has "certain powers" with regard to the provisions of Part X (on the Rights of Access of Land-locked States to and from the Sea and Freedom of Transit) that have implications for the establishment of a customs union. Finally, with regard to Part XI on seabed mining, the Community "enjoys competence" in matters of commercial policy, including the control of unfair economic practices.

The Declaration concluded by confirming the evolving character of the Community's external competence which is "by its very nature, subject to continuous development". "As a result", continued the Declaration, "the Community reserves the right to make new declarations at a later date."

The elusiveness of the Community's Declaration upon signature does not seem to be a satisfactory response to the requirements of Article 2 of Annex IX.[60] The vague nature of this Declaration, however, may be explained not only because of the general reluctance of the EC to define clearly the division of competence, but also because,

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58 Some member states (Belgium, the Netherlands, France, Italy and Luxembourg) expressed their dissatisfaction with Part XI in their individual declarations upon signature. See: K.R. Simmonds (1989), p. 142.

59 K.R. Simmonds (1986), p. 534, noted that the Declaration of competence in this area is particularly concise because, at that time, the 1983 Common Fisheries Policy, which reflects the main fisheries provisions of the LOSC, was already well established.

60 See, e.g., K.R. Simmonds (1989), p. 144 and K.R. Simmonds (1986), p. 537.

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in the short term, the decision to sign the LOSC had been taken in order to participate in the work of the PrepCom as a full member.[61]

5.2.4 The EC's "Formal Confirmation" and Declaration upon "Formal Confirmation"

The general dissatisfaction of EC member states and other parties with the provisions of Part XI governing the management of seabed mineral resources beyond national jurisdiction represented the main political obstacle to the ratification of the LOSC.[62] Once this obstacle had been removed with the adoption of the Agreement of 28 July 1994 on the implementation of Part XI thereof (hereinafter "the Agreement")[63], the LOSC entered into force on 16 November 1994, more than a decade after its conclusion.

After the majority of the EC member states ratified the Convention, the door was open to the Community's accession.[64] On 23 March 1998, the Council, on the basis of a proposal by the Commission and with the consent of the EP, adopted a decision concerning the conclusion by the Community of the LOSC and the Agreement.[65] That decision was based on Articles 43 (fisheries), 113 (commercial policy), 130s (environment) in conjunction with Article 228(2) and (3) (now Article 300) of the EEC Treaty. The adoption of multiple legal bases was possible because, at that time, they all provided for the same decision-making procedure, i.e.: QMV in the Council and consultation with the EP. In this case, the consent of the EP was necessary under Article 228(3)

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61 As K.R. Simmonds (1986), p. 537, pointed out, the signature did not bind the Community to ratify the LOSC, but only to refrain from acting against its objectives (Article 18 (a) of the Vienna Convention on the Law of Treaties).

62 According to Article 308, the LOSC "shall enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession."

63 See: UNGA Resolution 48/263. The EC signed the Agreement on 29.07.1994 (Council Decision 94/562/EC) and applied it provisionally from 16.11.1994 (*ibid.*, Article 2).

64 Once the problems with Part XI were eliminated, Germany was the first member state to ratify the LOSC on 14.10.1994, followed by Italy (13.01.1995), France (11.04.1996), the Netherlands (28.06.1996), the UK (25.07.1995). For Belgium, Luxembourg and Denmark see *infra* n. 67. See also: Cyprus (12.12.1988), Malta (20.05.1993), Slovenia (16.06.1995), Austria (14.07.1995), Greece (21.07.1995), Slovakia (8.05.1996), the Czech Republic (21.06.1996), Finland and Ireland (21.06.1996), Sweden (25.06.1996), Spain (15.01.1997), Portugal (3.11.1997), Poland (13.11.1998), Lithuania (12.11.2003), Latvia (23.12.2004), Estonia (26.08.2005). The chronological list of ratifications is available at: www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea.

65 See: Council Decision 98/392/EC, 23.03.1998, concerning the conclusion by the European Community of the LOSC and the Agreement relating to the implementation of Part XI thereof; Proposal from the Commission for a Council Decision concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI (COM/97/0037, OJ C 155, 23.05.1997) and the Assent of the European Parliament (OJ C 325, 27.10.1997, p. 14).

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in view of the specific institutional framework created by the Convention and the Agreement (e.g., ISBA).[66]

The Community acceded to the LOSC and the Agreement alongside all (at the time fifteen) member states except Belgium, Denmark and Luxembourg.[67] On 1 April 1998, the Community deposited its instrument of formal confirmation together with a Declaration under Article 5(1) of Annex IX specifying the matters on which competence had been transferred by its member states.[68]

The instrument of formal confirmation opens with a declaration of acceptance of all rights and obligations stemming from the Convention in respect of matters for which competence has been transferred by its member states which are Parties to the Convention as required by Article 4(1) of Annex IX. In addition, in accordance with Article 310 of the LOSC,[69] the Community declares its objection to any declaration or position excluding or amending the legal scope of the provisions of the Convention with specific references to fisheries activities.[70]

The Declaration of competence under Article 5(1) is much more elaborate and precise compared to the one made upon signature. First of all, the Declaration makes it clear that both the LOSC and the Agreement shall apply, with regard to the competences transferred to the Community, exclusively to the territories where the EC Treaty applies and under the conditions laid down therein.[71] With regard to territories outside the geographical scope of the EC Treaty, the Declaration does not apply and is without prejudice to acts or positions adopted by member states under the Convention and "the Agreement" on behalf and in the interests of those territories.

The Declaration confirms the evolving nature of the scope and the exercise of the Community's external competence and that the Community will "complete or amend this declaration, if necessary, in accordance with Art 5(4) of Annex IX of the Conven-

66 C. Nordmann in: D. Vidas and W. Østreng (eds.) (1999), p. 356; Chapter 4.3.2.7.

67 Belgium deposited its instrument of formal confirmation on 13.11.1998; Luxembourg on 5.10.2000; Denmark on 16.11.2004.

68 See: UN Law of the Sea Bulletin, no. 37 (1998), p. 7 and EC OJ L 179, 23.06. 1998, p. 128. The Text of the Declaration is reproduced in Annex II to this book, pp. 354-59. Article 4(4) of the Agreement requests an analogous declaration and provides that formal confirmation by an international organization shall be in accordance with LOSC's Annex IX.

69 Article 310 allows contracting Parties, at the time of signature, ratification or accession, to make statements regarding the application of the LOSC, which do not purport to exclude or modify the legal effect of its provisions.

70 According to the Community, the LOSC does not recognize the rights and jurisdiction of coastal States regarding the exploitation, conservation and management of fisheries resources, other than sedentary species, outside their EEZ. In addition, it reserves the right to make subsequent declarations in respect of the LOSC and the Agreement and in response to future declarations and positions of other Parties.

71 On the application of the LOSC (and the Agreement) in the territory and maritime zones of the member states see: J. Fons Buhl (1982), pp. 185-6.

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tion." So far, however, the Community has never issued any new declarations in this respect.[72]

This Declaration represents a substantial improvement in terms of clarity compared to the one upon signature and makes a clear distinction between the Community's exclusive competence and powers shared with the member states. First of all, the Community reconfirms its exclusive competence in the field of "conservation and management of sea fishing resources", with the exception of enforcement, which remains with the member states. In addition, the Community's exclusive competence extends to waters under national fisheries jurisdiction and to the high seas, but member states remain competent for measures related to the exercise of jurisdiction over vessels, flagging and the registration of vessels and for the enforcement of penal and administrative sanctions. However, they have to act in conformity with EC law, which also provides for administrative sanctions. In addition, by virtue of the common commercial and customs policy, the Community is exclusively competent in respect of all provisions of Parts X and XI of the LOSC and of the Agreement which are related to international trade.

On the other hand, the Community shares its competence with the member states as regards fisheries matters which are not directly related to the "conservation and management" of fisheries resources. Research and technological development, together with development cooperation, are quoted as examples.

With regard to the provisions of the Convention on maritime transport, the safety of navigation and the prevention of marine pollution, as contained, *inter alia,* in Parts II, III, V, VII and XI, the Declaration makes it clear that "the Community has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof *affect common rules established by the Community*. When the Community rules exist but are *not affected*, in particular in cases of Community provisions establishing only *minimum standards*, the Member States have competence, without prejudice to the competence of the Community to act in this field. Otherwise competence rests with the Member States" (emphasis added). In this way, the Declaration endorses the ECJ's narrower reading of the Affect (or *ERTA*) doctrine as formulated in WTO Opinion 1/94. According to the Declaration, the extent of the EC's competence stemming from the adoption of Community acts has to be assessed by reference to the specific provisions of each measure and, in particular, "the extent to which these provisions establish common rules". A list of Community acts is included in an Appendix to the Declaration. The list of relevant EC legislation and Conventions to which the Community is a party is much more extensive compared to the Declaration made upon signature and indicates the increased involvement of the Community in marine environmental issues both at internal and external levels.

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72 In the speech on "Oceans and the Law of the Sea: Towards New Horizons" (available at: http://europa.eu.int/comm/fisheries/news_corner/discours/speech76_en.htm) before the ITLOS in September 2005, EU Commissioner Borg mentioned the opportunity to consider updating the list of legislation attached to the Declaration.

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In addition, the Community shares competence with its member states with regard to the provisions of Parts XIII and XIV of the Convention on the promotion of cooperation on research and technological development with non-EC countries and international organizations. Finally, the Declaration includes a reference to the Community policies and activities in the field of controlling unfair economic practices, government procurement, industrial competitiveness, and development aid, which are related to the LOSC, especially Parts VI and XI, and the Agreement.

Comparing this Declaration with the one released upon signature, it is evident that the Community, despite its reluctance with regard to statements of this kind, has made an extra effort in order to achieve more clarity on such a difficult issue as the division of competences with its member states. This extra effort, however, has been probably justified by the fact that the declaration under Article 5(1) has legal effects which are considerably different from those of the declaration under Article 2. Most importantly, it determines who is responsible vis-à-vis non-EC parties for violations of the Convention (Article 6(1) of Annex IX).

5.2.5 Declarations by Member States

Upon accession to the LOSC all member states, except Cyprus, Luxembourg, Poland and Slovenia, made individual declarations under Articles 310 and 287 of the LOSC.[73] In their declarations, each of the twelve member states that had acceded to the Convention before the EC did so recognized that there had been a transfer of competence to the Community in certain matters governed by the LOSC and announced that a detailed declaration on the nature and extent of this competence will be made in due course in accordance to the provisions of Annex IX (Article 5(2)). So far, however, none of them has made such a declaration of competence. Only Belgium, Denmark and Estonia, which had acceded to the Convention after the Community, make explicit reference to the EC's Declaration upon formal confirmation, while Latvia has not even referred to the EC membership in its declaration. The member states, therefore, have not fully complied with their obligations under Article 5(2) of Annex IX. This shows that there is still some reluctance to release official statements declaring the transfer of competence to the Community on law of the sea issues.

5.2.6 Limits of Annex IX

Annex IX has been criticized for being a highly political compromise that, in the end, left all parties involved far from satisfied.[74] The compromise formula, indeed, did not

73 See: <www.un.org/Depts/los/convention_agreements/convention_declarations.htm>

74 See in general: K.R Simmonds, in: D. O'Keeffe and H.G. Schermers (eds.) (1983), p. 201 and C.D. Ehlermann in: D. O'Keeffe and H.G. Schermers (eds.) (1983), p. 21.

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bring about sufficient clarity and left most of the concerns of third States unsolved. At the same time, the Annex does not reflect the Community's view as to its own competence and capacity as an international actor. Some have argued that, as a result of the compromise, the Community has been allowed to become a limited participant in the LOSC whilst its member states have been able to protect their own positions as individual contracting parties.[75] Annex IX, however, is considered to be a response to a particular situation and circumstances that are not likely to occur again. Therefore, it has not been taken as a model for regulating the joint participation of the Community and the member states in other mixed agreements.[76]

5.2.7 EC Participation, next to the Member States, in the Implementation of the LOSC[77]

5.2.7.1 EC Participation in the Bodies Set Out by the LOSC

After the ratification by Lithuania (November 2003), Denmark (November 2004), Latvia (December 2004) and Estonia (August 2005), the Community currently participates in the implementation of the LOSC alongside all its member states.

The Community participates as a full member in the annual Meetings of the States Parties of the Law of the Sea Convention (SPLOS). The Community does not play a particularly active role in SPLOS given the fact that these meetings deal primarily with the functioning of the institutions established under the Convention and with budgetary and administrative issues. Since matters falling under the EC's exclusive competence or other substantive issues are not discussed in this forum, it is normally for the Presidency to speak and vote on behalf of the Community. The Community is also a full member of the ISBA, but only has observer status in the ISBA's Council. Its role in this body, however, is not very active. The annual sessions of the ISBA take place in Kingston (Jamaica), generally in the summer (July-August), shortly after the SPLOS and ICP (June-July). The Commission, due to its shortage of resources, cannot attend all the meetings, but must prioritize its actions. Apparently, matters discussed in the ISBA are not a priority for the EC.[78]

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75 K.R. Simmonds (1986), p. 527.

76 However, according to the UNFSA (Article 47 (1)), Annex IX of the LOSC, except Articles 2 and 3, applies *mutatis mutandis* to the EC's signature, accession or ratification of the UNFSA. See also *supra* Chapter 4.3.1.1, at n. 85.

77 This Chapter only discusses the participation of the Community and the member states in the bodies supervising the implementation of the LOSC; it does not cover the legislative actions taken to give effect to the LOSC provisions.

78 In addition, the EC institutions are closed during the entire month of August for the summer break. Reportedly, this makes it difficult for EC representatives to attend the ISBA's sessions. See also: H. da Fonseca-Wollheim (1992), pp. 181-82.

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The Community cannot participate in the Commission on the Limits of the Continental Shelf, which is only made up of individuals and it has not submitted the nomination of an expert since this is a matter under the exclusive competence of the member states.[79]

As discussed in Chapter 4.4, the EC may be a party in a dispute with third Countries before the ITLOS concerning matters under its exclusive competence, such as fisheries.[80] In this case it is for the Commission (in the form of its Legal Service) to represent the Community before the Tribunal.

5.2.7.2 EC Participation in the UN debate under the Agenda Item on Oceans and the Law of the Sea

In spite of its observer status at the UN, the EU is actively involved and plays a central role in the UN discussions under the agenda item on "oceans and the law of the sea". It is worth noting that in this forum, like in all political processes, it is a common practice generally to refer to the EU even when matters under the first pillar (EC) are on the table. The EU has recognized the UN General Assembly as the proper body for reviewing the implementation of the LOSC and for a global discussion on ocean affairs and takes an active part in the negotiation of its annual resolutions on oceans and the law of the sea.[81] In addition, it has been among the main promoters of the establishment, and the prolongation of the mandate, of the ICP.[82] As discussed in Chapter 1.3.3, the ICP is *de facto* playing the role of a conference for the parties of the LOSC and is the main forum where the implementation of the Convention is assessed. The observer status of the Community at the UN, however, limits the role of the Commission in the ICP to a great extent and does not do justice to its full participation in the LOSC. If the discussion within the ICP were conducted within the SPLOS, the role of the EC (and the Commission) would indeed be definitely different. The Community, therefore, is attaching great importance to resolving the discrepancy that currently exists between

79 C. Nordmann in D. Vidas and W. Østreg (eds.) (1999), p. 361.

80 See, e.g. *Swordfish case*, ITLOS Case No. 7 *(Chile v. European Community)* concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean, available at: www.itlos.org/start2_en.html. See, in general, T. Treves (2002), pp. 292-96.

81 For an overview of the EU's participation in the UN debate on Oceans and the Law of the Sea and EU Statements see: http://europa-eu-un.org/home/index_en.htm.

82 See, *inter alia*, the Speech by the EU Commissioner Borg on Oceans and Law of the Sea (Hamburg, 2.09.2005), and the Statement by Mrs. L. Lijnzaad on behalf of the EU Presidency at the 2005 ICP on Oceans and Law of the Sea, the Future of the ICP (10.06.2005). See also: Statement by Ambassador Yturriaga Barberán on behalf of the EU before the UNGA Sixth Committee (12.4.2002). All available at: http://europa-eu-un.org/articles/articleslist_s14_en.htm.

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the observer status and its competence, whether exclusive or shared, with respect to many issues discussed in the ICP.[83]

The Commission attends the UNGA/ICP meetings with a small delegation composed of representatives of the different DGs concerned (normally DG ENV, DG RELEX and occasionally DG TREN, DG FISH, etc.). The Commission sits at the back together with the other observer organizations and, as will be discussed in Chapter 5.2.7.4**,** does not normally take the floor. The main role in these fora is played by the Presidency, which is charged with the political representation of the EU. The level of the involvement of the Community in the UN debate on "oceans and the law of the sea", however, largely depends on the items on the agenda and will be discussed in further detail in the case-study Chapters.

5.2.7.3 The Council's Working Party on the Law of the Sea (COMAR) and Community Coordination in LOSC-related issues

The Community coordination with regard to all issues related to the LOSC takes place within the Council's Working Party on the Law of the Sea (COMAR).[84] Within this framework the Community and the member states define their common positions within the bodies set up by the LOSC as well as within the UNGA and ICP.[85] The COMAR meets within the framework of the General Affairs Council and is composed of law of the sea experts from the member states, normally from the Ministry of Foreign Affairs, assisted by the General Secretariat of the Council and under the chairmanship of the Presidency.[86] The Group meets regularly in Brussels, normally four times per year or more depending on the Presidency and on specific needs. Starting from the Irish Presidency in January 2004, it has become common practice to run the COMAR meetings consistently with the UN calendar.[87] Normally the Presidency or, when matters

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83 See, e.g., Speech by EU Commissioner Borg and the Statement by Mrs. L. Lijnzaad, *supra* n. 82. See also, Statement by B. Bradshaw on behalf of the UK Presidency to the 60th session of the UNGA, 20.11.2005.

84 The COMAR's mandate is contained in Annex III to the Council Decision 98/392 on the conclusion by the Community of the LOSC, Article 2.

85 In particular the COMAR's mandate includes, *inter alia*: the preparation, on issues under the EC's exclusive competence, of draft common positions within the bodies set up by the LOSC; the "coordination of the activities" of the EC and the member states in the ISBA and its bodies; and consultations with a view to drafting common positions on issues of general interest coming under the CFSP. See also *supra* Chapter 4.3.2.3.

86 The COMAR replaced the "Group of Senior Officials 'Law of the Sea'", established in 1977 and composed of heads of delegation from the member states. The Group was formed by a "Legal Expert Group" mainly composed of officials from the Ministries of Foreign Affairs; and a "Seabed Expert Group", mainly composed of officials from the Ministries of Economic Affairs.

87 For instance, the latest two COMAR were convened in November 2005 right before the adoption of the UNGA Resolution on Oceans and Law of the Sea, and in January 2006, in preparation for the first session of the *Ad Hoc* Open-ended Informal Working Group estab-

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under the EC's exclusive competence are on the table, the Commission draft EU statements or makes comments on draft UNGA resolutions. The draft text is circulated to the member states and the interested DGs of the Commission and is then discussed and finalized by the member states in the COMAR. Common positions are normally adopted by consensus. The COMAR meetings are open to the participation of the Commission, which, reportedly, plays a secondary role in these discussions. The common positions adopted in the COMAR may be further defined in New York, where both the Council's Secretariat and the Commission have permanent missions.[88] Community coordination, moreover, continues on the spot, outside the meetings, under the chairmanship of the Presidency and with the close assistance of the Commission.[89]

5.2.7.4 The "Common Foreign Policy" Format and the Limited Role of the EC

Within the EC there seems to be a general tendency to consider everything which deals with the law of the sea as foreign policy. Therefore, the review of the LOSC under the UN agenda item "oceans and the law of the sea" is carried out within the framework of the second pillar (CFSP) of the EU Treaty.[90] The foreign policy format also applies when issues under the EC pillar, including fisheries, are on the table. As a result, the Community coordination for the UNGA/ICP uses the same instruments and working mechanisms as the CFSP. Everything is done by EU Statements drafted within the Council (COMAR) under the chairmanship of the Presidency and adopted by unanimity. Internal communication for COMAR works by "correspondance Europeénne" (coreu), which is a form of codified transmission used for circulating confidential information under the CFSP. The use of such a sophisticated mechanism not only renders communication difficult and time-consuming, but it not fully understandable with regard to matters under the EC pillar.[91] This approach seems to be inconsistent with Article 47 (and Article 29) of the EU Treaty and with the ECJ's case law (e.g., judgment of 13 Septem-

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lished by UNGA Resolution 59/24 to study issues relating to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction, in February. Conversely, in the past there was no coordination whatsoever between the COMAR meetings and the UN calendar.

88 See, in general, "Description of the European Commission Delegation in New York", 1.04.2005, available at: http://europa-eu-un.org/articles/el/article_458_el.htm.

89 On EU coordination in UNGA, see, in general: "EU Paper on Model UN Conferences", 5.04.2005, at: http://europa-eu-un.org/articles/en/article_1245_en.htm and "The EU and How it Works at the UN", 1.05.2004, at: http://europa-eu-un.org/articles/en/article_1002_en.htm.

90 According to the COMAR's mandate, *supra* n. 84, common positions on issues under EC competence have to be adopted by the "normal procedure", while issues under EU foreign policy are governed by the second pillar, Title V of the EU Treaty.

91 Reportedly, within the September 2004 COMAR the Presidency proposed to coordinate the answer to a Greenpeace paper on bottom trawling by "coreu", which is the same instrument used for coordinating EU positions on, for instance, Iraq.

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ber 2005), which exclude the possibility to absorb EC issues into the EU Treaty and to use EU working mechanisms for regulating EC issues.[92]

In the UNGA and the ICP, moreover, the main role is played by the Presidency. It is common practice for the Presidency to speak on behalf of the EU not only on matters involving shared competence, such as marine environmental protection, but also on matters under the EC's exclusive competence. In this way, the Presidency presents the position of the 26, namely: the 25 member states plus the EC (the Commission). In the view of the Commission, the Presidency, as an organ of the EU, has no role under the EC Treaty and should not speak on behalf of the EC.[93] This practice, moreover, prevents the Community from playing its legitimate role in the process and impedes the Commission in exercising its institutional function as the external representative of the EC (Article 300(1) EC). The Commission intends to correct this anomaly and attaches great importance to the possibility to express the Community's views on EC matters. So far, this has only happened once, during the latest ICP in June 2005, where the representative of DG FISH was able to take the floor in plenary and present the EC's positions on matters related to "sustainable fisheries".[94] Nevertheless, the role of the Presidency in the UN is justified by the observer status of the EC at the UN and the political nature of the discussions in UNGA.

Until December 2004, LOSC coordination within the Commission was under the responsibility of DG External Relations (DG RELEX). This is the "diplomatic DG" of the Commission and works according to a typical foreign affairs format. DG RELEX, moreover, did not seem to be particularly interested in technical work or in defending the "sectoral" interests of the Community (e.g., environmental protection or maritime safety) and never invested strong efforts in defining priorities and clear results that the EC wanted to achieve from the UN process. This approach has further limited the influence of the Commission (and the EC) in the discussions. The situation might change in the future as a result of the recent reorganization within the Commission. Since January 2005, the new DG Fisheries and Maritime Affairs (hereinafter DG FISH) has taken over the LOSC coordination. The transfer of responsibilities to DG FISH, which, unlike DG RELEX, is used to working on matters under the EC's exclusive competence and to fighting on behalf of the EC, might have the effect of moving the LOSC coordination back to the EC pillar and to reinforce the role of the Commission (and the EC) in the process. As will be discussed in the case-study Chapters, DG FISH has

92 Case C-176/03, *Commission v. Council*, Paras. 38-39. According to the judgment the task of the Court is to ensure that acts under the scope of the 3rd pillar do not encroach upon the powers conferred on the Community by the EC Treaty. See also Case C-170/96, *Commission v. Council*, Para. 16. For a general discussion see: R. Baratta in: E. Cannizzaro (ed.) (2002), pp. 51-75 and C.W.A. Timmermans (1996), pp. 61-75.

93 As discussed in Chapter 1, the Presidency is not an EC institution and has no formal functions under the EC Treaty (except in relation to the European Investment Bank), but only under the EU Treaty, second pillar (e.g., Article 18).

94 As will be discussed in Chapter 8.8.4.2, however, this has occurred in a totally informal way and has merely been a pragmatic solution.

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taken the LOSC coordination quite seriously. However, DG FISH's serious lack of resources may hinder the effective participation of the EC in the UN debate.

Strengthening the role of the Commission in the UNGA/ICP process would certainly restore the institutional balance within the EU, but not necessarily enhance the influence of the Community in the UN oceans debate. EU Statements presented by the Presidency carry great political weight and a growing number of countries, including acceding and candidate countries alongside EEA countries, have increasingly associated themselves with EU positions. From a substantive point of view, however, the EU Statements are not always as concrete as the positions taken by the Commission on matters under the EC's exclusive competence. The Commission, indeed, tends to clearly define priorities and results that the EC wants to achieve out of an international process and its inputs in the discussions are normally more technical and detailed.

Finally, it is worth noting that ICP, SPLOS and UNGA meetings are time-intensive and require long preparation and a great deal of expertise. In order to achieve positive results, for instance, it would be necessary to send representatives to New York and start negotiating the UNGA resolution at least two months in advance, as some delegations, like Norway, do. The Commission, due to its resource constraints, cannot do that and in the most delicate moments when experts are needed it may only avail itself of personnel working in the EC (Commission and Council) missions in New York. These are normally diplomats and do not have the necessary expertise. This is another practical factor limiting the effectiveness and the role of the EC in the LOSC's supervision process.

5.3 The EC and the 1992 OSPAR Convention

5.3.1 The EC's Accession to the 1992 OSPAR Convention

In 1998, the European Community acceded to the 1992 OSPAR Convention alongside some of its member states (i.e., Belgium, Denmark, Finland, France, Germany, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the UK) plus Iceland, Norway and Switzerland.[95] The Community's accession put an end to the long controversy over the EC's participation in the North-East Atlantic regime. The EEC, indeed, was already a party to the 1974 Paris Convention for the prevention of marine pollution from land-based sources, but it had never been able to accede to the 1972 Oslo Convention on the control of ocean dumping.

95 Council Decision 98/249/EC, 7.10.1997 (OJ 104, 3.04.1998), is based on Articles 130s and 288 (2) and (3) EEC. See, in general, E. Hey, T. IJlstra and A. Nollkaemper (1993), p. 37 and T. IJlstra in: J. Lebullenger and D. Le Morvan (eds.) (1990), pp. 381-401.

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The 1974 Paris Convention was the first environmental agreement adopted by the Community alongside some of its member states.[96] Although, at that time, there was no specific legal basis in the EEC Treaty for Community action on environmental matters and there was no substantive legislation in place, the First EAP (1973) placed strong emphasis on the control of marine pollution from land-based sources.[97] In addition, the Community, acting on the basis of Articles 100 and 235 EEC, was in the process of adopting several directives on the industrial discharges of hazardous substances controlled by the Paris Convention.[98] The Community, therefore, was held to be competent for the subject-matter governed by the Paris Convention and its participation was considered necessary, on the basis of Article 235 EEC, "in order to attain, in operation of the common market, one of the objectives of the Community in the field of the protection of the environment and the quality of life".[99] As a result, the Community, represented by the European Commission, was able to accede to the Paris Convention and participated in the work of the Paris Commission (PARCOM) as a full member alongside its member states with the right to speak and vote on matters under its exclusive competence. The history of the participation of the Community in PARCOM, however, has not been a positive one. The competence issue has been particularly controversial in this framework. The continuous disputes over the allocation of powers between the EC Commission and the member states and the lack of understanding by third States of mechanisms of EC integration slowed down the decision-making process in PARCOM. The situation did not even improve after that when, at the 1986 Meeting of the Parties, a representative from the EC Commission, at the request of the chairman, provided a clarification on the EC's competences in the PARCOM and the relationship between the Community and its member states.[100] The EC Commission, moreover, has been traditionally quite obstructive in PARCOM. On several occasions it refused to agree to the adoption of higher standards for substances regulated at EC level (e.g., PCBs) despite the fact that all the other parties, including the EC member states, were in favour.[101]

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96 The Paris Convention was concluded by the Council, on the basis of a proposal from the Commission, with Decision 75/437/EEC.

97 See: First EAP (1973), Chapter 6, at 25.

98 I.e., Council Directive 75/439/EEC on the disposal of waste oils and Council Directive 75/442/EEC, 15.07.1975 on waste and Council Directive 76/160/EEC on the quality of bathing waters.

99 Council Decision 75/437/EEC on the disposal of waste oils. Since Italy was not a party to the Paris Convention, the Decision also defined the internal rules and procedures to be followed by the Community within the framework of the Convention. The Council, moreover, recommended that the Commission should ensure that provisions of the Convention were implemented in a coherent and coordinated way in relation to forthcoming EEC legislation on the control of industrial discharges of hazardous substances.

100 See: PARCOM, Eighth Annual Report, point 13 and J.L. Prat (1991), p. 107. See also: M. Fitzmaurice (1992), p. 222.

101 On the EC in PARCOM in general, see: M. Fitzmaurice (1992), p. 218; J.L. Prat in: D. Freestone and T. IJlstra (eds.) (1990), p. 107; T. IJlstra in: J. Lebullenger and D. Le Morvan (eds.) (1990), pp. 384-94.

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As will be discussed in detail in Chapter 7, the negative experience with the EC's participation in the 1974 Paris Convention, and the lack of EC competence on ocean dumping matters were among the main factors preventing the Community's accession to the 1972 Oslo Dumping Convention.

When, in 1990, the parties to the Paris and the Oslo Conventions decided to revise and update the regime governing the North-East Atlantic and to address all sources of pollution in a single instrument, the full participation of the Community appeared to be necessary. At that time the Community had indeed already adopted a consistent body of law addressing land-based pollution and had exclusive (explicit and/or implicit) competence concerning several issues covered by the future OSPAR Convention (e.g., discharges of radioactive and other hazardous substances). In addition, the large majority of the parties to the new OSPAR Convention were EC member states[102] and many EC directives also applied to EEcA countries, such as Iceland and Norway, and to a certain extent, to Switzerland.[103] As a consequence, the new OSPAR Convention has been opened for signature by "regional economic integration organizations" (Article 25(d)). As in the case of the LOSC, the European Community was the only organization in mind at the time of the adoption of the Convention and the accession clause has been introduced in order to secure its participation.[104] As a guarantee for non-EC parties, the OSPAR membership was limited to organizations having as a member "at least one state" which was a contracting party to the Oslo and the Paris Conventions (Article 25). In addition, Article 20 provides for an alternative voting system. This system was introduced not only to avoid double representation, but also to eliminate the risk of the Community forcing or blocking decisions, as occurred in PARCOM. Decisions within the OSPARCOM, indeed, are taken by a three-quarters majority (OSPAR, Article 13), which means 11 votes out of the 13 parties plus the EC. Currently 10 OSPAR parties are also EC member states. If in the future Norway, Iceland or Switzerland decide to join the EU, the EC will be able to block decisions in OSPARCOM.[105] This is one of the reasons why the competence issue has always been a central one in this forum. Nevertheless, the OSPAR Convention, unlike the LOSC, does not require the Community to make a Declaration of competence at the time of signature or ratification. This is a further indication of the reluctance of both the EC and its member states, which are

102 At the time of its adoption, 9 out of 14 OSPAR Parties were EC member states. All of OSPAR's parties were also signatories to the Oslo Convention, except for the EC and Luxembourg.

103 The Agreement of the European Economic Area (EEcA) requires members to cooperate with the EC in a number of matters including the environment (Articles 78-88) and to comply with a list of applicable EC legislation listed in Annex XX, which includes many environmental Directives. Switzerland also has entered into a number of bilateral agreements with the Community and much of its environmental legislation is similar. See: L. de la Fayette (1999), p. 262.

104 For instance, Article 20 on the exercise of voting rights expressly refers to the EC. See also Annex IV, Article 2(a) on the assessment of the quality of the marine environment.

105 See: A. Nollkaemper (1993), p. 38.

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the large majority of the OSPAR contracting parties, to release these kinds of statements and their willingness to preserve the flexibility of action within this forum.

5.3.2 EC Participation in the 1992 OSPAR Convention

In the Decision on the conclusion of the OSPAR Convention, the Council authorized the Commission to represent the Community in the work of the OSPARCOM as regards matters within the sphere of EC competence.[106] Soon after the conclusion of the Convention, moreover, the Commission was provided with a permanent mandate to negotiate and participate in the adoption of decisions within OSPAR.[107] According to this mandate, however, amendments to the Convention and decisions taken within OSPARCOM always need to be specifically approved by the Council. This was the first and the last attempt to provide the Commission with a permanent mandate in the framework of a multilateral environmental agreement. Reportedly, this attempt failed because of the conflict of competence between the EC and the member states in OSPARCOM.[108] Reportedly, the negotiations on this mandate were long and difficult. The Commission, on the one side, tried to obtain a general authorization to negotiate on behalf of the EC on all matters under the EC's competence. Member states, on the other side, opposed a broad mandate and as a compromise it was agreed that the Commission may vote on behalf of the Community only on matters which clearly fall within the EC's exclusive competence. Whenever it is not clear whether there is exclusive or shared competence, the member states maintain their rights to vote and speak in OSPAR. However, in order to avoid conflicts they did not clearly spell out the matters under the respective spheres of competence. Reportedly, this resulted in an odd situation in which no one exactly knew who was responsible for what. The permanent mandate should have been reviewed by 31 December 2000, but this has never occurred. It is therefore unclear whether the old mandate is still in force.

106 Council Decision 98/249/EC, Article 3, adopted on the basis of a proposal from the Commission and having regard to the opinion of the EP (in: OJ C 89, 10.04.1995, p. 199).

107 See Council Conclusions of 19.11.1997 on "negotiating directives relating to the OSPAR Convention" (12385/97; ENV 375). This document is not accessible to the public. This is a mandate of the kind under Article 300(1) of the EC Treaty, with the characteristics of Article 300 (4).

108 Reportedly, the Commission used its permanent mandate for the first time at the OSPARCOM 1998, in Sintra. Important issues were on the table, including the decision on the dumping of oil platforms. Since there was no EC legislation on that matter, the Commission, in order to avoid the reaction of the member states, sent to OSPARCOM a letter opting out from that decision. This letter spurred the strong reaction of the member states which claimed that the Commission had no competence to draft an opting-out letter since it had no competence concerning the dumping of oil platforms.

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The issue of competence is still particularly controversial in OSPAR, especially with regard to the control of hazardous substances.[109] The Commission claims exclusive competence for all substances that have been regulated at the EC level and tends to oppose the adoption of higher standards (e.g., a total ban) in OSPAR. According to the Commission, the member states are not allowed to discuss and take decisions on these matters in OSPARCOM.[110] Conversely, the member states always try to allege the existence of shared competence in order to preserve their autonomy of action. Reportedly, the other OSPAR Parties and OSPARCOM itself do not support an excessive expansion of the EC's exclusive competence either. The exclusive competence in the field of fisheries, in their view, did not produce any positive results and the environmental impact of fishing activities in the OSPAR area is higher than ever.

Within the Commission DG ENV is the main responsible body and the point of reference for all the Regional Seas Conventions. Representatives from DG ENV normally attend the meeting of OSPARCOM and its main committees, although they generally give preference to the bodies where decisions are taken. Only exceptionally do representatives from other DGs, upon the invitation of DG ENV, take part in the OSPAR meetings discussing issues in which they are interested. As will be discussed in further detail in the case-study Chapters, the role of the Commission in the OSPAR framework largely depends on the representative attending the meeting and the issue on the table.

Normally there is no Community coordination in the preparation of the OSPAR meetings. The OSPAR Convention, like other Regional Agreements, intended to establish a framework for open discussion among the Parties. EC coordination goes against the transparency that parties want to establish in OSPAR. Therefore, they always tried to avoid any kind of block-forming and to prevent the risk of turning OSPAR into bilateral talks between Norway, Iceland, and Switzerland on the one side, and the EC Commission on the other. Sometimes, however, the Commission asks member states to coordinate positions on specific issues which may have an impact on EC legislation, especially in the field of hazardous substances. Coordination, in these cases, takes place on the spot in a totally informal way, outside the main sessions and under the chairmanship of the Presidency.[111] Both EC member states and non-EC parties become very irritated

109 On the other side, there is no conflict of competence with regard to the control of radioactive substances since the Community has clear exclusive competence under the EURATOM Treaty.

110 See, for instance, the controversy between the Netherlands and the Commission on restricting the use of short-chain chlorinated paraffins (SCCPs). The Netherlands implemented an OSPAR decision restricting the use of such a substance in national law. Subsequently, the EC adopted similar legislation but with some differences (e.g., restricting the use of SCCPs for two purposes only: metalworking and leather finishing). The Commission asked the Netherlands to change national legislation according to EC law, but the latter refused, arguing that it also had an obligation towards the OSPAR. See: Commission Decision 2004/1 (OJ 2004 L1/20) and Commission Decision 2003/549 (OJ 2003 L 187/27).

111 Reportedly, this happened during the adoption of the OSPAR 2003 decision on radioactive discharges. In that case the Irish Presidency asked the Dutch delegation to chair the coordination meeting. It also happened with regard to the OSPAR discussions on the use of PCBs.

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by EC coordination, which adds an extra layer to the negotiation process and is time-consuming. NGOs are usually the most hostile to EC coordination because they cannot take part therein. So far, therefore, EC coordination in OSPAR has been quite exceptional.

There are many overlaps between the EC and the OSPAR regimes in matters such as eutrophication, hazardous and radioactive substances, and environmental quality objectives.[112] At its 2001 meeting in Valencia, the OSPARCOM adopted a strategic document on how the EC and OSPAR could better coordinate their activities in overlapping fields.[113] Reportedly, on some matters (e.g., hazardous substances or eutrophication), OSPAR measures appeared to be stronger compared to the EC legislation and there have been more progress and better results in OSPAR than in the EC. However, unlike the EC Commission, OSPARCOM lacks the necessary enforcement powers to ensure compliance. In general, therefore, the role of OSPAR should be to obtain the information, identify the problems and the possible solutions and ask the EC Commission to take the legislative action.[114] It has become common practice for OSPARCOM to draft background documents and to send them to the responsible DG (e.g., DG ENV, DG Internal Market, DG Enterprise). Reportedly, however, the Commission does not always take the recommended action. The Community already has its own legal instruments (e.g., the Water Framework Directive), which intend to harmonize rules within the EC and it does not seem to be interested in strengthening OSPAR (or other regional) standards, which may undermine EC harmonization.

5.4 The EC and the 1992 Helsinki Convention

5.4.1 The EC's Accession to the 1992 Helsinki Convention

The history of the Community's accession to the Helsinki regime has been a long and difficult one.[115] In 1977, the Council, on the basis of a proposal from the Commission,

112 The Water Framework Directive 2000/60/EC, for instance, sets out ecological objectives (EOs) for coastal areas which are not entirely consistent with the EOs under OSPAR. Also the definition of eutrophication in the Water Framework Directive is slightly different from the one under OSPAR.

113 See: "Draft Strategic Document on Cooperation between OSPAR and the European Community" (Doc. OSPAR 01/10/1), and "Revision of the Strategic Document on Cooperation between OSPAR and the European Community" (Doc. OSPAR 01/10/04), both available in: Summary Records (OSPAR 01/18/1-E) at: www.ospar.org/eng/html/welcome.html.

114 "Considerations on Strategic Cooperation between OSPAR and the European Community", in: OSPAR 2001, Valencia 25-9 June 2001 (Annex 17), and "Background Document on Cooperation between OSPAR and the European Community", *ibid.,* (Annex 16); both documents have been negotiated in special sessions, and are available at: www.ospar.org/eng/html/welcome.html. These documents also call for a common approach to monitoring and assessment.

115 See, in general, M. Fitzmaurice (1992), Chapter 7, pp. 201-25.

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applied for membership to the original 1974 Helsinki Convention, claiming the existence of extended Community competence in matters regulated by that Convention.[116] In the view of the Commission, the exclusive nature of the Community's competence required member states not to enter into international agreements with third States, including the 1974 Helsinki Convention, unless the Community itself became a party.[117] In order to avoid conflicting obligations under the EC and Helsinki regimes, the Commission urged the EC Baltic States (i.e., Denmark and Germany) to delay ratification of the Helsinki Convention until the Community had itself acceded. The Council, however, did not endorse the Commission's recommendation, indicating the reluctance of member states to accept an excessive restriction of their sovereignty.

Since the beginning, the Community's accession to the Helsinki Convention encountered several obstacles of a legal and political nature. From an EC law perspective, it was questionable whether the Community's membership was necessary, given that only two contracting parties (i.e., Denmark and Germany) were also EC member states.[118] The Community, moreover, did not seem to have exclusive competence concerning matters covered by the Convention since the existing EC legislation only contained minimum standards. For non-EC contracting parties, on the other hand, it was doubtful whether the Community's accession could bring any added value in terms of environmental protection in the Baltic Sea Area. The negative experience with the EC's participation in PARCOM and the tendency of the Community to prevent the adoption of regional standards which are more stringent than those of the EC or which cover matters not yet regulated at the EC level created further resistance to the Community's participation. Last but not least, as discussed in Chapter 4, the Community's accession was opposed for a long time by the Eastern European States, which were the majority of the Helsinki contracting parties and were traditionally reluctant to recognize the EC as a legal entity.

In 1978, by means of a letter addressed to the Secretary-General of the Helsinki Convention, the EC Council expressed once more the Community's desire to accede to the Convention.[119] Eventually, the EC Commission was invited to participate as an observer without any right to vote and in 1991 it attended the meetings of the *ad hoc* group set up to revise the Convention. Only in 1992, when the new Helsinki Convention was adopted, was the Community allowed to become a full member of the Convention. At that time, indeed, many of the obstacles which prevented the EC's accession had disappeared. The consolidation of the EC's competence concerning matters covered by the Convention and the imminent accession of Finland and Sweden (in 1996) made the EC's membership more compelling than ever. In addition, the advent of "perestroika" and the establishment of dialogue on the enlargement of the EC to the

116 The 1977 Council Decision has not been published.
117 COM (1977) 48, pp. 4-5.
118 M. Fitzmaurice (1992), p. 222.
119 Published in OJ 328, 7.12.1978, p. 37.

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east considerably changed the attitude toward the Community.[120] Furthermore, the Commission's participation in HELCOM, albeit only as an observer, was not as negative and obstructive as in PARCOM.[121]

The 1992 Helsinki Convention was opened for signature by States and "the European Economic Community" (Article 34). The Commission participated in the negotiations on behalf of the Community. In 1994, the Council, on the basis of a proposal from the Commission and having regard to the opinion of the EP, adopted two decisions on the Community's accession to both the 1974 and 1992 Helsinki Convention.[122] The new Convention does not link the Community's participation to that of its member states. However, as a guarantee for non-EC contracting parties, Article 35(4) provides that the Community, just as any other regional economic integration organization which becomes a party to the Convention, exercises the rights and fulfils the duties which the Convention attributes to its member states in matters within its own competence, on its own behalf, and the member states shall not be entitled to exercise such rights individually. This provision intends, on the one hand, to hold the Community responsible vis-à-vis non-EC parties for all matters under its competence. On the other hand, it excludes the possibility that the joint participation of the Community and the member states in the Convention could result in a double representation and to confer on them a privileged position compared to the other parties. Under the Helsinki Convention, like under OSPAR, there is no requirement for the Community and the member states to make a Declaration on the respective spheres of competence and responsibilities. Article 35(4) suggests that there is a division of competence, but that is an internal matter, in this way endorsing the general approach of the Community and its member states. The competence issue, moreover, is less problematic in this forum compared to OSPARCOM since the final decisions in HELCOM are taken by unanimity and each contracting party has the power of a veto.

120 M. Fitzmaurice (1992), p. 215.

121 The Commission, for instance, did not oppose the adoption by Germany and Denmark of the HELCOM Recommendation introducing a total ban on the use of PCBs and PCTs. This may be explained because of the non-binding nature of HELCOM's recommendations compared to OSPAR's decisions.

122 I.e., Council Decision 94/156/EC on the accession of the Community to the 1974 Helsinki Convention and Council Decision 94/157/EC on "the conclusion" on behalf of the Community of the 1992 revised Helsinki Convention, 21.02.1994. Both decisions were based on Article 130r (now Article 174) and Article 288 (now Article 300) EEC. The accession to the 1974 Convention was necessary to secure the EC's participation in the Baltic regime until the entry into force of the 1992 Convention. The EC signed the 1992 Helsinki Convention on 24.09.1992.

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5.4.2 EC Participation in the 1992 Helsinki Convention

The Community, represented by the Commission, participates in HELCOM and its main committees as a full member, with speaking and voting rights on matters falling within the EC's exclusive competence. It is for the Commission, normally DG ENV, to attend the meetings, but other DGs may be invited whenever issues in which they are interested are on the table. Here, unlike in OSPAR, there has been no attempt to provide the Commission with a permanent mandate or an authorization under Article 300(4) EC[123] and the Commission needs a specific authorization by the Council before taking decisions in HELCOM.

The role of the Community in the Helsinki Convention is similar to the one played in OSPAR and will be further discussed in the case-study Chapters. In general, representatives from the Commission attend the meetings, but because of resource constraints they prioritize participation at the level where decisions are taken. The Commission, therefore, is very active in HELCOM and the Meeting of Heads of Delegations (HODs), but less so in the various sub-committees, depending on the matters on the agenda.

Like in other Regional Conventions, the role of the Community in HELCOM is not very proactive. For political reasons, the Commission normally prefers to leave the implementation of the Helsinki Convention to its member states, which before the EC's accession were free to act individually in this forum. Its work, therefore, is principally focused on ensuring that the steps taken by HELCOM to improve the situation in the Baltic are in line with EC legislation and the member states do not violate the EC's exclusive competence (e.g., fisheries-related matters and the control of hazardous substances).[124] Normally, however, matters discussed in HELCOM are subject to shared competence and, reportedly, there are no serious conflicts of competence between the EC member states and the Commission in this forum.

Just like in OSPAR, the Community does not seem to be particularly interested in strengthening the work of HELCOM, which overlaps to a great extent with EC legislation. As already mentioned, EC legislation is directed primarily at harmonizing EC standards rather than addressing the specific needs of a region. The adoption of regional standards on which the Community does not have a decisive influence might hinder that EC-wide harmonisation.

In HELCOM there is no Community coordination at all. The Helsinki Convention has a long tradition of open discussions and cooperation between equal parties in order to find generally acceptable solutions. HELCOM has always discouraged any form of block-forming and coordination between the Parties, which may lead to confrontation

123 As discussed in Chapter 4.3.2.8, Article 300(4) refers to amendments adopted though a simplified procedure. Article 32 of the Helsinki Convention sets out such a simplified procedure.

124 However, following the accession of the EC to the International Baltic Sea Fishery Commission (IBSFC), the IBSFC has jurisdiction concerning all species occurring in the Baltic Sea (C-405/92, *Driftnets Case* (Para. 55) and Regulation 345/92, 22nd recital).

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instead of cooperation. After the 2004 enlargement, all of the Helsinki Convention's contracting parties, except the Russian Federation, are now EC member states. Today, more than in the past, it is fundamental to avoid any block-forming in order not to transform HELCOM into a bilateral dialogue between the EC and the Russian Federation. Unlike in OSPAR, moreover, EC member states and the Commission do not coordinate positions, not even on the spot. To coordinate positions they would indeed have to ask the Russian delegation to leave the room and this would be contrary to the spirit of the Convention. This is a highly delicate situation and, apparently, the Community wishes to keep HELCOM as an effective forum to promote dialogue, not confrontation, with the Russian Federation. Moreover, EC coordination in HELCOM does not seem to be necessary either. As already mentioned, the Community, just as all other Parties, has a veto power and there is no risk that member states' unilateral action may affect the EC's exclusive competence.

5.5 The EC and the 1976 Barcelona Convention (BARCON) and its Protocols, as Amended

5.5.1 The EC's Accession to the BARCON

During the negotiations on the 1976 BARCON, the accession of the Community was at the centre of a forceful debate among the future contracting parties.[125] EC negotiating parties (i.e., France and Italy) initially supported the EC's accession, while non-EC negotiating parties firmly opposed this for the same reasons which prevented or delayed the EC's participation in the other Regional Conventions. At that time, the Community's legal system was not perfectly understood and there was a general lack of clarity concerning the Community's competence and the allocation of powers and responsibilities with its member states. The negative experience with the Community's participation in PARCOM, moreover, made it questionable whether its accession could bring any added value in terms of the protection of the Mediterranean Sea or only confusion and delays. Besides, given the fact that only two out of the fifteen future parties were also EC member states, the participation of the Community in the Mediterranean regime did not appear to be as necessary as it was, for instance, in the North-East Atlantic.

On the contrary, according to the Community, its participation in the BARCON was necessary since that Convention covered areas falling, at least in part, within its competence and in December 1975 the Council authorized the Commission to negotiate the Community's accession. According to the Council, given the lack of environmental provisions in the EEC Treaty, accession to the BARCON was necessary in order to

125 See, in general, P. Haas (1990), p. 109; B. Vukas, in: J. Lebullenger and D. Le Morvan (eds.) (1990), pp. 403-08; S.P. Johnson and G. Corcelle (1989), pp. 262-3 and 296-98; T. Scovazzi (1999).

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achieve, in the course of the completion of the single market, the objectives of the Community in the field of the protection of the environment and the quality of life.[126] The accession of the Community, moreover, was necessary because the 1976 BARCON covered matters which fell within the scope of the EC's water quality legislation.[127] In addition, the accession to a Convention which brings together all Mediterranean coastal States including Greece, Israel, Libya, Morocco, Tunisia and Turkey, was important from a political point of view and the Community attached great importance to its participation in such a sensitive region.

Despite the initial resistance of the non-EC parties, the BARCON was opened for signature by States, the EEC and by any similar regional economic grouping "at least one member of which is a coastal state of the Mediterranean Sea area and which exercises competences in fields covered by this Convention, as well as by any Protocol affecting them."[128] This was intended as a guarantee for non-EC parties of the implementation of the obligations stemming from the Convention. In order to prevent double representation, moreover, the BARCON, like the LOSC, OSPAR and Helsinki Convention, provides for an alternative voting system whereby the Community and the member states exercise voting rights within the areas of their respective exclusive competence.[129] Like the other Regional Conventions, the Convention does not require a Declaration of competence. Reportedly, even though there is still some confusion as to the division of competence, there are no major conflicts among the member states and the Commission in BARCON.

The Community ratified the BARCON in 1977, together with its Dumping Protocol,[130] and subsequently acceded to all of BARCON's Protocols currently in force.[131] In 1999, moreover, the Council, on the basis of a proposal from the Commission and

126 See: Council Decision 77/585/EEC, *infra* n. 130.

127 The Council authorized the Commission to negotiate EEC accession to the 1976 BARCON and its Dumping Protocol with the view of ensuring consistency with Directive 76/464/EEC, 4.05.1976, on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community and fixing standards for bathing waters and shellfish waters which were covered by Community legislation (Council Decision 77/585/EEC, *infra* n. 130).

128 1976 BARCON, Article 24.

129 *Ibid.,* Article 19.

130 The Community signed the Convention and the Dumping Protocol on 13.09.1976 and concluded them on the basis of Articles 100 and 235 EEC by means of Council Decision 77/585/EEC, 25.07.1977, concluding the Convention for the Protection of the Mediterranean Sea against Pollution and the Protocol for the Prevention of the Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft.

131 On the EC's accession to the BARCON's Protocols and the acceptance of their amendments see: http://europa.eu.int/scadplus/leg/en/lvb/l28084.htm and www.unep.org/regionalseas/Programmes/UNEP_Administered_Programmes/Mediterranean_Region/default2.asp

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having regard to the opinion of the EP, accepted the 1995 amendments to the BARCON.[132]

5.5.2 EC Participation in the BARCON

Although the protection of the Mediterranean region has been a priority area for the EC's environmental policy since the beginning,[133] and the EU plays a leading role in the political cooperation in the area,[134] the Community's involvement in the BARCON has traditionally been quite weak. The Community's action within this framework, however, varies according to the matters on the agenda and this will be further discussed in the case-study Chapters. In general, the Community is not actively involved in the decision-making within the BARCON framework for the same reasons discussed with regard to the other Regional Conventions. In the first place, most of the subjects covered by the Convention do not fall within the Community's exclusive competence. The sovereignty issue, moreover, has always been particularly strong within this framework and although the Mediterranean EC member states had to accept the Community's accession to the Convention and its Protocols, they traditionally opposed an excessive involvement of the Commission therein. For political and practical reasons, therefore, the Community normally leaves the general implementation of the BARCON to the member states and concentrates its efforts on those subjects which may affect its exclusive competence. The Community, for instance, is quite active within the framework of the Land-based Pollution Protocol and had actively participated in the drafting of the Protocol on the Transboundary Shipment of Hazardous Wastes, although it has not become a party to that Protocol. Conversely, its involvement is minimal in the Dumping Protocol, where the Community has limited and unclear powers.

The Commission took part on behalf of the Community in the Ninth Ordinary Meeting of the Contracting Parties (MOP 9) that considered and adopted the amendments to the BARCON (with some of its Protocols) and in the Conference of Plenipotentiaries that formally adopted it. A representative from DG ENV attended the meetings of the expert working group set up by the contracting parties to negotiate the revision of the

132 Council Decision 1999/802/EC on the acceptance of amendments to the Convention for the Protection of the Mediterranean Sea against Pollution and the Protocol for the Prevention of the Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft.

133 See: 3rd EAP (1982-86) and the Communication from the Commission on the protection of the environment in the Mediterranean Basin (MEDSPA), 23.04.1984 (OJ C 13, 24.05.1984). On the participation of the EC in the Mediterranean regime, see in general: B. Vukas, in: J. Lebullenger and D. Le Morvan (eds.) (1990), pp. 403-08; S.P. Johnson and G. Corcelle (1989), pp. 262-3 and 296-98.

134 On a detailed discussion of the Euro-Mediterranean Partnership and the so-called Barcelona Process see: http://europa.eu.int/comm/external_relations/euromed/index.htm.

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Convention.[135] However, since the Commission had not yet received a formal mandate from the Council, it could not act on behalf of the Community in the group and France, Greece, Italy and Spain took individual positions in the negotiations.[136] As it emerges from the Reports of the meetings, the role of the Commission in the drafting of the amendments to the Convention and its Protocols has been mostly limited to ensuring that the BARCON rules do not conflict with or alter the scope of EC legislation.

DG ENV normally attends the meetings of the BARCON at the higher level (e.g., MOPs and Meetings of National Focal Points), but is less active at the technical level (e.g., Working Groups, Meetings of National Legal and Technical Experts).[137] Like in other regional fora, the role of the Commission is mainly directed at promoting consistency between the EC and BARCON rules and ensuring that EC member states act in accordance with EC law.

Normally there is no Community coordination in the preparation of the BARCON meetings. Since 2003, however, there have been several attempts by the Commission to coordinate member states' positions concerning BARCON within the framework of the Council.[138] These attempts have so far not been very successful, mainly because of the general reluctance of the EC Mediterranean member states to coordinate positions within the framework of a sub-regional agreement to which only a few member states are Parties. In addition, delegates who attend BARCON's meetings are not always the same ones who attend the Council's Working Groups in Brussels. Lately there has been some progress in the preparation of the MOP 14, held in November 2005. At the request of the Commission, the draft COP declaration was previously discussed within the Council's Working Group on International Environmental Issues in the presence of all member states, including non-BARCON parties. Moreover, on a few occasions (e.g., MOP 13) there had been some *de minimis* coordination on the spot, but this was done

135 Two meetings of legal and technical government-designated experts were held in Barcelona on 14-18.11.1994 (UNEP (OCA)/MED WG.82/4) and on 7-11.02.1995 (UNEP (OCA)/MED WG.91/7).

136 See: UNEP (OCA)/MED WG.91/7, Para. 12. Curiously, according to the Council Decision 1999/802/EC, the Commission participated on behalf of the EC in the working party that negotiated the amendments.

137 Reports of the meetings within the framework of the Barcelona Convention are available at: http://195.97.36.231/dbtw-wpd/sample/Final/MAPPredefined.htm.

138 Reportedly, in 2003, the Commission proposed that the Presidency should convene a meeting in preparation for the MOP 13 in Catania. Initially the Italian Presidency opposed this, arguing that there was no need for coordination for sub-regional Conventions. Eventually, a minor point was added to the agenda of the Working Party on External Relations where no experts attended and neither did those people who had participated in Catania, so the information did not circulate well and it was not particularly effective. Again in 2004, DG ENV included a point on the BARCON on the Agenda of the Working Group on Environment, but also in this case coordination was not effective.

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in a rather informal way with brief meetings held immediately before the plenary, during the coffee breaks or lunches.[139]

The Commission is becoming increasingly involved in discussions within the BARCON framework and attaches great importance to reinforcing EC coordination in this forum. Coordination appears more compelling here than in any other Regional Convention since EC member states are a minority of the contracting parties. The Community, however, still has a minor influence in the decision-making within the BARCON framework, where decisions are taken by a three-fourths majority (Articles 16 and 17). That means that they require 16 votes out of 21 contracting parties. After the accession of Cyprus, Malta and Slovenia in 2004, the Community currently has only 7 votes in this framework. With the future enlargement in the Mediterranean (to Croatia, Macedonia, Turkey and potentially Albania and Bosnia and Herzegovina) the Community will certainly enhance its numerical weight, but it will not yet have a decisive influence in BARCON. For the Community, therefore, strong coordination seems to be necessary to defend its interests in this framework and to promote consistency with EC law. EC contracting parties (currently: Cyprus, France, Greece, Italy, Malta, Slovenia and Spain), on the other hand, particularly defend their individual participation in the BARCON and wish to maintain their capacity to act in this framework in a totally intergovernmental manner. Reportedly, moreover, they believe that the Community's participation in the framework of BARCON has so far not been very successful, but has added rigidity and confusion in the decision-making process and has often lowered the level of protection in the Mediterranean region.[140] In their view, the Community is not interested in addressing regional needs, but seeks to achieve uniformity and tends to import into the Mediterranean context problems that belong to other regional seas. On the other hand, they also seem to recognize the added political weight of their coordinated action in BARCON. As will be discussed in the case-study chapters, therefore, the level of coordination largely depends on the issue on the table.

5.6 Conclusions

Despite the many difficulties and obstacles encountered, the participation of the Community, next to its member states, in the UNCLOS III, and the accession to the LOSC and Regional Seas Conventions tested its capacity to act at the international level and strengthened its political recognition as an international actor. Most of the obstacles

139 The Commission noticed that the common practice in BARCON of holding negotiations on the legal texts immediately before signature causes institutional difficulties for the EC and affects the level of coordination (COM (2003) 588, p. 3).

140 See, for instance, Declaration made by the Community at the Izmir Conference limiting the application of the BARCON Protocol on Prevention of Pollution by Transboundary Movements of Hazardous Wastes and their Disposal (in UNEP (OCA)/MED/IG.9/4, 11.10.1996 reprinted in 12 IJMCL (1997), p. 474). For a full discussion, see: T. Scovazzi (1998), pp. 265-66.

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existing in the 1970s, when these Conventions were adopted (e.g., the international community's scant familiarity with the EC legal system and the special relationship between the Community and its member states, the infancy of the EC's environmental policy and of the ECJ's doctrine on external powers, the lack of a specific legal basis in the EC Treaty for the Community's action on (marine) environmental matters, the lack of practice with regard to the negotiation of mixed agreements in the field of the marine environment, and the ideological opposition of the Eastern Block), are no longer in place.

Currently, the Community participates in the work of the LOSC and Regional Seas Conventions alongside its member states. The role of the Commission (and of the EC) in these frameworks, however, is limited by different factors of a legal, political and practical nature, including the many uncertainties still surrounding the concept of shared competence and its legal implications. Generally speaking, the Commission always follows a very pragmatic approach in the regional and global fora and its role very much depends on the resources available, the personal competence of the representative attending the meeting, and the circumstances of each case.

The weak role of the Community in the supervision of the LOSC's implementation is influenced by a series of external and internal factors, such as the limited administrative and budgetary functions of the SPLOS in which the Community participates as a full member (section 5.2.7.1), and its observer status at the UN, especially in the ICP and UNGA, where the supervision of the LOSC takes place in practice (section 5.2.7.2). At the EC level, the Community's participation in UN discussions under the agenda item on "oceans and the law of the sea" is regulated within the framework of the second pillar of the EU Treaty (CFSP). The main role, therefore, is played by the Presidency and everything is done by EU Statements drafted within the COMAR, also when matters under this EC pillar, including issues under the EC's exclusive competence, are on the table (sections 5.2.7.3 and 5.2.7.4). This approach impedes the Commission in playing its institutional function under Article 300(1) EC and seems to be inconsistent with the EU Treaty (e.g., Article 47) and the case law of the Court, which excludes the possibility of using EU mechanisms for dealing with EC matters. However, the EU format and the role of the Presidency are justified by the political nature of the UNGA/ICP process and the observer role of the Community in the UN. The recent reorganization within the Commission and the transfer of responsibility for the LOSC coordination from DG RELEX to DG FISH might strengthen the role of the Commission (and the EC) in the LOSC's supervision process. However, the serious resource constraints of the Commission, and of DG FISH in particular, may jeopardize the effective participation of the EC in this process.

The Commission, acting on behalf of the Community, participates in the work of the bodies established by the Regional Seas Conventions (e.g., OSPARCOM, HELCOM and Barcelona MOPs) as a full member with the right to vote on matters under the EC's exclusive (explicit or implicit) competence. However, with a few exceptions mostly related to land-based pollution, the Community has no exclusive competence concerning the activities covered by the Regional Conventions, but powers are normally shared with the member states. Except for the OSPAR Convention, normally there are no

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serious conflicts of competences between the Commission and the member states in the regional frameworks. For political and practical reasons (e.g., the long tradition of member states' individual participation in the regional fora and the Commission's resource constraints), the Community normally leaves member states free to speak and vote in the regional bodies and only controls whether they are acting consistently with EC law. In general, also when matters covered by EC legislation are on the table, the Community does not play a very proactive role in the Regional Conventions, but concentrates its efforts on promoting consistency between the EC and the regional regimes. The EC legislation, indeed, is primarily directed at harmonizing rules within the Community and the Commission does not seem to be particularly keen to strengthen regional standards which might affect EC-wide harmonization. For the same reason, the regional bodies and the contracting parties to the Regional Conventions (including EC parties) do not seem to favour an increased Community involvement in these frameworks.

Normally, there is no Community coordination within the framework of the Regional Seas Conventions. The latter, indeed, are intended to establish a framework for open discussion and cooperation among parties at the same level and are always opposed to any form of block-forming. Coordination, moreover, does not seem to be necessary either, since the member states are aware that they cannot take unilateral decisions in matters under the EC's exclusive competence.

The 2004 enlargement created significant opportunities to strengthen the role of the EC within the regional decision-making processes. However, for all the reasons discussed in this Chapter, it is very unlikely that in the future the Community will enhance its involvement within the Regional Seas Conventions and will reinforce EC coordination, with the exception, perhaps, of the BARCON.

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CHAPTER 6

Preventing Oil Pollution from Shipping

6.1 Introduction

Combating oil pollution from merchant shipping has been among the first environmental issues ever discussed at the international level and its global regime has now reached coverage and a level of specificity with few equivalents in other environmental areas.[1] This articulated and comprehensive regime is based on two interdependent bodies consisting of an "umbrella" framework (i.e., customary law, the LOSC and Chapter 17 of Agenda 21) and a special regulatory regime which is contained almost exclusively in instruments adopted by the IMO. Due to its global nature, shipping is better regulated at the global level and regional maritime safety and anti-pollution standards have traditionally been an exception. In the past few years, however, new steps have been taken at the regional level (e.g., the Helsinki Convention and BARCON) to raise the level of protection in regional seas, like the Baltic and the Mediterranean Seas, which are particularly exposed to the risk of oil pollution from international shipping.

The Chapter starts by discussing the main characteristics of the regime for the prevention of oil pollution from maritime transport, which presents its own peculiarities compared to the regulation of other sources of marine pollution. The attention subsequently moves to the relevant provisions of the LOSC and the main international standards, including the regional agreements to which the EC is a party. The main purpose is to identify the rights and duties of the Community in its capacity as flag, coastal and port State and the legal possibilities available under international law to protect EC waters against the risk posed by oil tankers transiting along European coasts. The Chapter identifies the main shortcomings of the existing international regime.

The focus of the discussion then moves to the manner in which the Community implements its international obligations under the LOSC. In particular, like other LOSC contracting parties, the Community is subject to three main sets of obligations: a) to adopt the necessary measures to "minimize to the fullest possible extent" pollution from vessels; b) to cooperate in the multilateral development of international standards in IMO to "prevent, reduce and control" vessel-source pollution, to promote the adoption of routing systems to minimize the risk of accidents; and to re-examine these standards from time to time; and c) to give effect to existing GAIRAS and enforce them in the Community. The Chapter looks at the steps taken by the Community to comply with these three sets of obligations. In exercising the rights and performing the duties stemming from the LOSC, however, the Community has to act consistently with the

1 See, in general: H. Ringbom (ed.) (1997), pp. 1-9.

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EC Treaty. Particular attention, therefore, is paid to the manner in which the fundamental principles of EC law have shaped Community action in this field. After a general overview of the EC Common Policy on Safe Seas (CPSS), the Chapter looks at recent EC legislative initiatives to reduce the risk of oil pollution from tankers and their conformity with international rules. Particular attention is given to the joint participation of the Community next to its member states in the relevant decision-making and political fora at the global (e.g., UN, IMO) and regional (e.g., HELCOM and BARCON) levels and the manner in which they coordinate their action in these bodies. The issue of the Community's membership of the IMO and the recent Commission suggestion to amend the LOSC's provisions on freedom of navigation are also discussed. The Chapter concludes with some final observations about the consistency of the EC's regulatory action in maritime safety issues with the international legal framework, indicating the main advantages and disadvantages.

The Chapter discusses exclusively the public international law aspects of oil pollution from tankers, leaving aside private international law issues (e.g., liability and compensation for damage, emergency response, and salvage).[2] Since preventing maritime disasters is the most effective way to avoid ship-source pollution,[3] the Chapter covers both anti-pollution and maritime safety rules, especially looking at three types of standards: a) discharge standards, which intend to combat operational pollution, fixing the maximum amount of oil which can be released from ships;[4] b) navigation standards (e.g., routing and reporting), which intend to reduce the likelihood of collisions and regulate maritime traffic in particularly congested or vulnerable areas;[5] and c) construction, design, equipment and manning standards (CDEMs), which intend to improve the safety of ships in order to prevent or reduce the risk of oil spills or minimize their environmental consequences.[6] For reasons of space, the Chapter does not cover air emission standards (e.g., sulphur limits for marine fuel) nor social standards (e.g., minimum qualifications and training of seafarers), although the Community has taken regulatory action on both matters. Following the EC terminology, the Chapter will often refer to "maritime safety" in a broad sense to include the prevention of pollution from ships.

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2 However, it is worth noting that the EC pays a great deal of attention to liability and compensation for oil pollution and to oil pollution response. Likewise, market-based initiatives and the contributions of the private sector are not discussed.

3 See: "Safer Ships, Cleaner Seas", Report of Lord Donaldson's Inquiry into the prevention of pollution from merchant shipping (hereinafter Lord Donaldson's Report), 1994, Para. 1.11.

4 For a full discussion on discharge standards see: E. J. Molenaar (1998), pp. 21-2 and D. Bodansky (1991), p. 729.

5 For a full discussion on navigation standards see: G. Plant in H. Ringbom (ed.) (1997), pp. 11-29; G. Plant (1985), pp. 134-147 and 332-3; E.J. Molenaar (1998), pp. 24-5; D. Bodansky (1991), pp. 730-1.

6 For a full discussion on CDEMs, see E. J. Molenaar (1998), pp. 23-4 and D. Bodansky (1991), pp. 729-30.

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6.1.1 Pollution from the Maritime Transport of Oil: Extent of the Phenomenon

Reasons of space do not permit me to cover all aspects of vessel-source pollution. The scope of the Chapter, therefore, is limited exclusively to rules and standards for the control of "oil" discharges from ships,[7] bearing in mind that oil is not the only and not even the most dangerous of all marine pollutants.[8] However, it is the marine pollutant with the greatest visual impact, "you can see it, taste it and smell it", it spreads rapidly over large areas and it has dramatic and long-lasting environmental and socio-economic consequences.[9] Catastrophic spills involving tankers, such as the *Exxon Valdez*, the *Erika* and the *Prestige,* have attracted public attention to the problem of oil pollution. They provoked a strong political reaction and in the past three decades have worked as a catalyst for the main developments in the law of the sea. Combating oil pollution from shipping has become a priority for action in all main fora involved with ocean affairs at the global, regional, EC and national level. Among all shipping-generated pollutants, oil is definitely the most regulated one. This complex regime, therefore, offers an interesting example of coordination between different legislative levels.

About 90 per cent of oil supplies at the EC and global level are currently carried by sea.[10] Given the strong dependency of the global economy on maritime transport, the regime for the control of oil pollution from vessels offers the best example of how to strike a balance between conflicting environmental and navigational interests.

Oil discharges may be operational or accidental. Although accidents involving oil tankers are the most visible and dramatic cause of marine pollution, they only account for 10 per cent of all oil spilled into the ocean and they are responsible for less than ¼ of all vessel-source pollution.[11] The major threat still comes from deliberate dis-

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7 The definition of oil adopted in MARPOL 73/78, Annex I, Reg. I, is rather broad and refers to petroleum in any form, including crude oil, fuel oil and all refined products other than petrochemicals.

8 Over the past decades the international regime on vessel-source pollution has extended considerably to cover new hazardous and noxious substances (e.g., chemicals and anti-fouling paints), air emissions from ships, sewage, garbage and alien organisms carried in ballast waters.

9 See Lord Donaldson's Report (1994), Para. 1/12. Detailed information on oil pollution is available at: http://oils.gpa.unep.org/facts/operational.htm; US National Research Council, "Oil in the Sea III. Inputs, Fates and Effects" (2003), consultable at: www.nap.edu/catalog/10388.html?onpi_newsdoc052302.

10 For an overview see: European Community Shipowner Association (ECSA), Annual Report, 2004-2005, p. 7, available at: www.ecsa.be/ar/Rapport%202004-2005.pdf and UNCTAD, Review of Maritime Transport, (2005), UNCTAD/RMT/2005. See also: UNSG Report (A/61/632), March 2006, Para. 207.

11 See, e.g., <www4.nas.edu/onpi/webextra.nsf/web/oil?OpenDocument>.

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charges, such as tank-cleaning operations.[12] In spite of existing regulations, operational discharges continue to take place illegally. This is in part due to the significant lack of reception facilities in ports where ships may discharge their oil residues, but also because it is easier and less costly for tankers to dispose of their dirty waters in the open sea.

Although tanker disasters brought maritime transport into the spotlight, shipping is currently considered as the safest, cleanest and cheapest mode of transportation.[13] Over the past decades, indeed, new safety and environmental standards and advances in technology have considerably reduced the amount of oil spilled intentionally or accidentally into the ocean as a result of shipping activities, and today vessel-source pollution accounts for only 12 per cent of overall marine pollution.[14] Despite this progress, the maritime transport of oil continues to cause alarm. The main concern is the existence of too many substandard ships which considerably increase the risk of maritime disasters.[15] Combating substandard shipping and reinforcing flag State control, therefore, have become a primary objective of ocean policy at the global and regional levels.[16]

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12 According to the US, each year an amount of oil larger than the total amount of oil spilled from the *Prestige*, *Erika*, *Sea Empress*, *Braer* and *Aegean Sea* is deliberately discharged into the ocean (IMO doc. MEPC 51/14, 26.01.2004, at (1)). See also COM (2003) 92, at (1). See also UNSG Report (A/61/632), March 2006; Para. 208.

13 E.g., Addendum to the UNSG Report (A/59/62/Add.1), 18.08.2004, Para. 218. See also the speech by the IMO Secretary General (hereinafter IMO-SG), E. Mitropoulos, at the EP MARE, 22/01/2004, available at: www.imo.org/home.aspat.

14 See GESAMP Report No. 39, The State of the Marine Environment (1990), p. 88; GESAMP, Report of the Thirtieth Session, Principality of Monaco, 22-26 May 2000; GESAMP, Sea of Troubles, Report no. 70, (2001), p.26.

15 The term "substandard ship" has been defined as "a vessel that, through its physical condition, its operation or activities of its crew, fails to meet basic standards of seaworthiness and thereby poses a threat to life and/or the environment. This would be evidenced by the failure of the vessel to meet regulations contained in international maritime conventions to the extent that it would be considered unfit to sail by a reasonable flag state or port state inspection". See: MTC/OECD Policy Statement on Substandard Shipping (2002), at www.oecd.org/dataoecd/18/37/2080990.pdf.

16 *See,* e.g., UNGA Resolution (A/60/30), 8.03.2006, Paras. 47-49; 2005 UNGA Resolution (A/59/L.22), 5.11.2004, Paras. 34, 38, 41, 42, 46; Report of the 5th UN-ICP (A/59/122), June 2004; UNSG Report (A/59/62), February 2004, Paras. 151 and 308. See also, 2003 UNGA Resolution (A/58/L.19), Para. 23, all available at: www.un.org/Depts/los/general_assembly/general_assembly.htm. See also the G8 Action Plan on "Marine Environment and Tanker Safety", Para. 2(3), Evian Summit (2003); Joint HELCOM/OSPARCOM Declaration (Bremen, 25-26/06/2003), Paras. 28-33; Declaration of the 13th MOP of BARCON, Catania, 11-14/11/2003 (UNEP-DEC0/MED IG.15/4-CRP.4/COR.1), Paras. 16-20, and MTC/OECD Policy Statement on Substandard Shipping (2002).

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6.1.2 The Need to Strike a Balance between Conflicting Interests, Uniformity and Flexibility

Before discussing the specific rules for the control of oil pollution from shipping, it is important to look at the peculiarities which differentiate this regime from that of other sources of marine pollution.

The global economy is heavily dependent on maritime transport and on the traditional freedom of navigation and this dependency is likely to increase in the future as a result of the globalization of markets. The growing volume of maritime traffic, coupled with the major changes which have occurred in the maritime transport sector in the past 30 years (e.g., the hazardous nature of the materials transported by sea, the size and increasing speeds of tankers), have increased the risk for coastal States. The threat is particularly high in closed or semi-enclosed seas (as all European waters are) where oil spills may have devastating and long-lasting environmental and socio-economic consequences. The environmental interests of coastal States, however, have to be carefully balanced against the interest of flag States, and of the international community as a whole, in preserving the traditional freedom of navigation.

Due to its international character, shipping, more than any other source of pollution, has much to gain from uniform standards and it is better regulated at the global, rather than at the national or regional level.[17] Global standards applicable everywhere ensure legal certainty and facilitate international navigation. Conversely, the existence of different national or regional regulations, especially CDEMs, creates great confusion for flag States, operators and crew as to which standards apply, thereby making it extremely difficult to operate a vessel internationally and significantly increasing the costs of the voyage.[18] Uniform standards, moreover, ensure a level playing field for all operators and eliminate competitive advantages for substandard ships.[19] Anti-pollution requirements bring about considerable new costs for the maritime industry and flag States are generally reluctant to adopt stricter environmental standards for their ships unless other states do the same.[20]

Besides, global standards are more effective, from an environmental point of view and ensure a uniform level of protection worldwide.[21] Conversely, the adoption of stricter national or regional requirements may transfer the risk to regions with lower

17 H. Ringbom (ed.) (1997), p. 2.

18 In December 2003, for instance, under the threat of a Spanish ban, the 24-year old Russian-flagged single-hulled *Geroi Sevastopolya* en route from Ventspils to Singapore with a load of 55,000 tonnes of heavy grade oil (renamed "the new *Prestige*" for the strong analogies with the sunken tanker), was forced to circumnavigate the Cape of Good Hope, adding 14 days to the voyage, to avoid passing through the Strait of Gibraltar (Lloyd's List, 22/12/2003).

19 E.g., OECD/MTC Report on Costs Saving from Non-Compliance with International Environmental Regulations in the Maritime Sector (2003), at: www.oecd.org/dataoecd/4/26/2496757.pdf.

20 E. J. Molenaar (1998), pp. 27-28 and R.R. Churchill and A.V. Lowe (1999), p. 338.

21 E.g., 2003 ICP Report, Para. 53.

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safety and anti-pollution standards. Moreover, due to its transboundary nature marine pollution is more effectively tackled by collective action at the international level, while national or regional initiatives may be frustrated by the unsafe and environmentally unfriendly practices in other marine regions.

Finally, in order to be effective the regulation of vessel-source pollution requires the maximum level of flexibility and a legal system able to adapt to the environmental changes and to the rapid technological developments in the maritime transport sector.

The existing international, regional and EC rules for the prevention of oil pollution from shipping have to be examined against this background. Any new initiative to strengthen maritime safety and pollution prevention from maritime transport must take all these considerations into account.

6.1.3 The Global Legal Framework for the Prevention of Oil Pollution from Shipping

Not surprisingly the regulation of vessel-source pollution was among the most debated and controversial issues during the UNCLOS III negotiations.[22] The failure of the traditional framework and the need to counteract the unilateral initiatives of coastal States triggered a revision of the existing rules. Serious efforts have been made to create a global regime based on a maximum level of uniformity and flexibility and where the conflicting interests involved are carefully balanced. The jurisdictional framework of that regime is laid down in the LOSC, which distributes the power to adopt and enforce vessel-source pollution standards between flag, coastal and port States. Part XII pays substantial attention to the prevention of marine pollution from ships compared to other sources and the relevant provisions are among the most detailed in the entire Convention. The consistent practice of states, including non-parties to the LOSC, indicates that these provisions are generally considered as reflecting customary international law.[23]

The LOSC recognizes that shipping activities place strong pressure on the marine environment and requires all States to take the necessary measures to "minimize to the fullest possible extent" pollution from vessels.[24] These measures, however, have to

22 See, in general: R. Platzöder (1987); B.H. Oxman (1979); D. Bodansky (1991), pp. 719-777; E. J. Molenaar (1998), p. 51; T. Keselj (1999), p. 127; B. Kwiatkowska (1989), p. 170.

23 See *supra* Chapter 1.2.2, n. 34. The customary nature of the LOSC provisions in the field of vessel-source pollution has been expressly recognized by the ECJ in the *Poulsen* Case (Para. 9).

24 LOSC Article 194(3)(b) requires States to adopt measures for preventing accidents and dealing with emergencies, ensuring the safety of operation at sea, preventing intentional and unintentional discharges, regulating the design, construction, equipment, operation and manning of vessels. In addition, the LOSC contains a number of cooperation requirements to prevent or minimize accidental pollution and to respond effectively to emergency situations (e.g., Articles 198, 199 and 211(7)).

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be taken while avoiding "unjustifiable interference" with the exercise of the rights of other States according to the Convention.[25]

In order to ensure the maximum level of uniformity, the LOSC places considerable restraints on the capacity of coastal States to act unilaterally and sets out the framework for the multilateral development of the relevant rules within "the" competent international organization: namely the IMO. The IMO is considered to be the only body which is entitled to adopt measures interfering with shipping and the proper forum in which to balance coastal State demands for more stringent protection with flag State needs to preserve the freedom of navigation.[26] Article 211(1), therefore, requires all States to cooperate within the IMO or general diplomatic conferences[27] in the multilateral development of standards to "prevent, reduce and control" vessel-source pollution and to promote the adoption of routing systems to minimize the risk of accidents. States are required to re-examine these standards from time to time as necessary in order to keep the overall system constantly up to date.

The LOSC does not contain technical requirements, but by means of "rules of reference" requires flag States to give effect to existing GAIRAS.[28] As will be discussed in Chapter 6.4.2, the main GAIRAS relating to vessel-source pollution are contained in the global regulatory instruments adopted by the IMO.[29] The "rule of reference" contained in the LOSC not only ensures uniformity, but also great flexibility, since, as will be discussed later, IMO standards may be rapidly updated by means of a tacit acceptance procedure.

6.2 The Jurisdictional Framework under the LOSC

6.2.1 Flag States

The LOSC strongly guarantees the traditional rights of navigation of flag States. The Convention not only reconfirms the customary freedom of navigation by flag States on the high seas[30] and the right of innocent passage through the territorial sea,[31] but

25 *Ibid.,* Article 194(4).

26 S. Rosenne and A. Yankov (eds.) (1991), pp. 176-207. On the IMO as "the" competent international organization see, *inter alia*, "Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization", IMO doc. LEG/MISC/3/Rev.1, 6.1.2003. For a general discussion see: A. Blanco-Bazán (2003), pp. 31-47.

27 On the meaning of "general" diplomatic conferences (GDC) see: Chapter 1.2.2.1. According to B. Kwiatkowska (1989), at n. 33, the reference to GDC was introduced to meet the concerns of some developing states which saw the IMO as an organization of maritime States.

28 On the meaning of GAIRAS see Chapter 1.3.1.

29 In addition, some GAIRAS related to vessel-source pollution have been adopted by ILO and IAEA.

30 LOSC, Article 87(1)(a). Such a freedom has to be exercised with "due regard for the interests of other states" (*Ibid.,* Article 87(2)).

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it goes further, by establishing the right of passage through the EEZ,[32] the right of transit passage through straits used for international navigation[33] and the right of sea-lane passage through archipelagic sea lanes.[34] These new rights of passage have been introduced to mitigate the effects of the nationalization of waters which were previously subjected to the freedom of navigation regime even and coastal States have very limited powers vis-à-vis foreign ships in these areas, even also in relation to potentially hazardous or substandard ships.

To counterbalance these extended rights of navigation, the LOSC places flag States under the positive legal duty to ensure that ships flying their flag, wherever they are located, do comply with all safety, anti-pollution and seaworthiness standards established by the IMO.[35] In particular, flag States must adopt national vessel-source pollution regulations which are at least as stringent as the existing GAIRAS and must enforce them on vessels flying their flag.[36] For flag States, therefore, international standards represent the minimum standards that they must adopt and enforce for their vessels if they want to operate them internationally. Nothing in the Convention prevents States from applying to ships flying their flag stricter national safety and anti-pollution standards, including CDEMs.

Furthermore, Article 94 requires States to exercise effective jurisdiction and control over ships registered under their flags, by ensuring that they conform, *inter alia*, to existing pollution prevention rules and are constructed and equipped according to IMO safety and seaworthiness standards.[37] For that purpose, before registration and periodically thereafter, the LOSC requires flag States to inspect their vessels through qualified surveyors and to issue certificates attesting compliance with IMO standards.[38] It is common practice to delegate the verification and issuing of the certificates to classifica-

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31 *Ibid.,* Article 17. See Chapter 6.2.2.1.

32 *Ibid.,* Article 58.

33 *Ibid.,* Article 38.

34 *Ibid.,* Article 54. There are no archipelagic waters according to the LOSC in Europe and the regime of archipelagic passage will not be discussed.

35 LOSC, Articles 94(5), 211(2) and 217(1). This is an important change compared to the pre-LOSC regime in which the prescriptive and enforcement jurisdiction of the flag State with regard to anti-pollution standards were merely discretionary. See, *inter alia*, R.R. Churchill and A.V. Lowe (1999), pp. 344-5.

36 LOSC, Articles 211(2) and 217(1).

37 LOSC, Articles 94(3) requires flag States to take measures to ensure safety with regard to, *inter alia*: (a) construction, equipment, and seaworthiness of ships; (b) the manning of ships, labour conditions and training of crew, taking into account the international instruments; (c) the use of signals, maintenance of communication and prevention of collision. See also Articles 94(5) and 217(1). In addition LOSC Article 94(4) requires flag states to ensure that (a) their vessels carry adequate charts, publications and navigation equipment, and (b and c) the captain and crew are fully aware of existing international maritime safety and anti-pollution regulations.

38 LOSC Articles 94(4) (a) and 217(3). Similar provisions are contained in MARPOL 73/78, Article 5, MARPOL Annex 1, Reg. 4-8 and SOLAS Chapter 1, Reg. 6-13.

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tion societies that, therefore, play a major role in ensuring safe and environmentally sound shipping.

Article 94, however, is not entirely clear as to the manner in which jurisdiction should be exercised over the vessel. The UN General Assembly has recommended that in order to exercise effective control, flag States should not register any vessels unless they have truly effective means of enforcing international rules and standards.[39] Flag States should have, *inter alia*, adequate maritime legislation in place complying with GAIRAS, an effective maritime administration, an adequate organization to inspect ships, and adequate mechanisms to investigate possible accidents.

When, after inspection, a vessel is discovered not to be in compliance with existing IMO seaworthiness standards, the LOSC requires the flag States to detain the ship and prohibit it from sailing until it corrects the violations.[40] In addition, flag States have to investigate alleged violations committed by their ships,[41] institute proceedings for violations of GAIRAS wherever they have occurred,[42] and impose penalties of adequate severity to discourage violations.[43]

Despite the general dissatisfaction with the traditional regime, the LOSC reconfirms the principle that primary responsibility for the regulation of vessel-source pollution lies with the flag State.[44] The main problem with this approach is that flag States are normally not directly affected by pollution and they have little incentive to adopt anti-pollution standards.[45] The situation is aggravated by the fact that an increasing number of shipowners register their ships in countries which do not require a particular link between the vessel and the flag (i.e., flags of convenience (FOCs) or open registers) and generally have far less stringent safety, environmental and labour legislation.[46] Since these vessels almost never call at the ports of their States of registration, FOCs are generally suspected of not exercising real powers of enforcement over their ships. This phenomenon has been favoured by the lack of a definition under international law of the criteria for the registration of ships. Article 91(1) of the LOSC, reflecting customary law, simply requires that a "genuine link" must exist between the State and the vessel

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39 See, 2005 UNGA Resolution (Para. 47); 2004 UNGA Resolution (Para. 38) and 2003 UNGA Resolution (Para. 27). See also Report from the Consultative Group on Flag State Implementation set up by the UNSG to explore all flag State-related issues raised by the *Prestige* accident (UN doc. A/59/63), 2 June 2004 (FSI Report), Para. 118, available at: www.un.org/Depts/los/general_assembly/documents/flagstateimpl.pdf.

40 LOSC, Article 217(2). See also SOLAS, Chapter 1, Reg. 19(c).

41 LOSC, Article 217(6). See also MARPOL 73/78, Article 6(4).

42 LOSC, Article 217(4).

43 *Ibid.,* Article 217(8). See also MARPOL 73/78, Article 4(1).

44 These provisions reflect the existing customary law, see, e.g., S. Rosenne and A. Yankov (eds.) (1991), p. 255; R.R. Churchill and A.V. Lowe (1999), p. 346; D. Bodansky (1991), p. 741; C. Allen, p. 568.

45 R.R. Churchill and A.V. Lowe (1999), p. 346 and D. Bodansky (1991), pp. 737 and 742.

46 Even though FOCs have traditionally been known for not complying with international maritime safety, environmental and labour standards, the number of well-performing FOCs is increasing. See, e.g., 2003 Annual Report of the Paris MOU.

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flying its flag, but leaves flag States entirely free to determine the conditions for granting their nationality to ships.[47] The proliferation of FOCs has once more brought into question the adequacy of the primary responsibility of flag States for controlling vessel-source pollution.

6.2.2 Coastal States

The LOSC recognizes that coastal States are more directly affected by international shipping compared to flag States and have the greatest interest in establishing an effective system to combat vessel-source pollution.[48] As a result the LOSC extends the capacity of coastal States to control dangerous traffic and defend their marine environment and related interests from hazardous ships as long as they do not interfere too much with the freedom of navigation of other States.[49] Outside ports and internal waters, therefore, the level of control of coastal States is limited by the traditional rights of navigation and decreases when proceeding toward the high seas, where ships are under the exclusive jurisdiction of the flag State.[50]

6.2.2.1 Territorial Sea

In the territorial sea the sovereignty of the coastal State is limited by the right of innocent passage of foreign ships.[51] For security reasons the coastal State may suspend the passage of all foreign ships in specific areas of its territorial sea, but this suspension must be temporary and duly published.[52] Otherwise, the right of innocent passage can never be denied unless it is considered prejudicial to the peace, good order or security of the coastal State.[53] That is the case when the foreign vessel is engaged, *inter alia*,

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47 The 2004 UNGA Resolution (Para. 42) requests the UNSG to further examine and clarify the role of the genuine link in relation to the duty of flag States to exercise effective control over their ships. For a detailed analysis of the "genuine link" see: A.G. Oude Elferink in: I.F. Dekker and H.H.G. Post (eds.) (2003), pp. 41-63 and E.J. Molenaar (1998), pp. 76-7 and 89.

48 D. Bodansky (1991), p. 737. As E.J. Molenaar (1998), p. 92, has pointed out, coastal (and port) State jurisdiction "always implies jurisdiction over foreign vessels. Jurisdiction over a State's own vessel implies acting in the capacity as flag State".

49 E.g., LOSC Articles 192, 194, 195, 198, 199, 211, 221, 225.

50 *Ibid.,* Article 92.

51 Innocent passage is defined in *ibid*, Article 17. That passage has to be continuous and expeditious, but in case of distress or *force majeure* it may include stopping and anchoring (*ibid*, Article 18(2)). Innocent passage also applies to internal waters enclosed by straight baselines (*ibid*, Article 8(2)).

52 LOSC, Article 25(3).

53 In this case the vessel may be expelled from the territorial sea. LOSC, Articles 25(1), 27 and 28. See R.R. Churchill and A.V. Lowe (1999), p. 349 and E.J. Molenaar (1998), p. 249 and, in general, L.S. Johnson (2004), pp. 62-7.

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in acts of "wilful and serious pollution".[54] The transport of oil and other hazardous materials in the absence of a clear polluting intent, as well as violations of CDEMs or accidental discharges, do not seem to be *per se* sufficient to establish the passage as "not innocent", but a positive and "wilful act" is always needed.[55] It follows that only intentional discharges may justify the exclusion of the vessel from the territorial sea, but they must still be "serious". This would exclude operational discharges, such as tanker-cleaning operations.[56] However, in the absence of a clear definition of "serious pollution", coastal States have a large margin of discretion to determine the seriousness of the pollution. The passage, moreover, ceases to be innocent when a foreign ship engages in "any other activity not having a direct bearing on passage".[57] This seems to be the case when a ship is involved in a maritime casualty.[58]

Coastal States have the right ("may"), but not the duty, to regulate innocent passage for the purpose, *inter alia*, of the safety of navigation and the regulation of maritime traffic, environmental protection and the prevention, reduction and control of pollution, and conservation of the living resources of the sea.[59] In particular, they may require foreign oil tankers to confine their passage to special sea-lanes and traffic separation schemes[60] and to comply with special discharge standards, which may also go beyond existing GAIRAS.[61] However, they cannot require foreign vessels to observe national CDEMs which are more stringent than international standards.[62] In no circumstance,

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54 LOSC, Article 19(2)(h).

55 *Inter alia*, D. Bodansky (1991), p. 754; R.R. Churchill and A.V. Lowe (1999), p. 72; E.J. Molenaar (1998), pp. 197-8; M. Valenzuela (1999), p. 493. However, according to J.M. Van Dyke (1996), p. 384, the traditional navigational freedoms do not apply to ultra-hazardous cargoes.

56 According to E.J. Molenaar (1998), p. 197, however, an operational discharge could, under certain conditions, be regarded as "serious" if it takes place in a heavily polluted enclosed sea.

57 LOSC, Article 19(2) (l). In addition, according to K. Hakapää (1981), pp. 184-5, violations of navigation standards, such as national routing schemes, may render the passage not innocent.

58 See, for instance, LOSC, Article 221. According to E.J. Molenaar (1998), p. 198, maritime casualties cannot be characterized as "passage" under Article 18 and ships involved in such casualties lose their right of innocent passage.

59 LOSC, Article 21(1)(a), (d) and (f). Foreign ships exercising the right of innocent passage shall comply with *all such laws and regulations* and all GAIRAS relating to the prevention of collisions at sea, *ibid,* Article 21(4).

60 *Ibid.,* Articles 22 and 23. TSS and sea-lanes have to be clearly indicated on charts and be given due publicity. Moreover, they have to be established taking into account the existing IMO recommendations. For a full discussion of this subject, see: J. Roberts (2005), pp. 137-8; L.S. Johnson (2004), pp. 69-71; E. J. Molenaar (1998), pp. 24-5; G. Plant, in H. Ringbom (ed.) (1997), pp. 11-29; G. Plant (1985), pp. 134-147 and 332-3; D. Bodansky (1991), pp. 730-1.

61 LOSC Articles 21(3), 24 and 211(4).

62 *Ibid.,* Article 21(2).

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moreover, may national legislation result in *de facto* or discriminatory limitations to the right of innocent passage.[63]

As far as enforcement is concerned, coastal States have unrestricted jurisdiction over foreign vessels which are not engaged in innocent passage.[64] Otherwise, they may exercise their enforcement powers only if there are "clear grounds" for believing that a foreign vessel during its passage has violated the conditions for access to ports and internal waters or other international vessel-source pollution requirements.[65]

6.2.2.2 Straits used for International Navigation

The environmental jurisdiction of coastal States diminishes to a considerable extent in straits used for international navigation, such as the English Channel, the Dover and Gibraltar Straits, where foreign ships enjoy a right of transit passage.[66] This right, unlike the right of innocent passage in the territorial sea, can never be suspended and shall not be impeded unless there is an alternative route of similar convenience.[67] The regulatory powers of the coastal States bordering the strait are limited to the prescription of navigational rules (e.g., sea lanes, TSS or reporting requirements) which have to conform to "applicable" international rules and need to be approved by the IMO, and discharge standards for oil, oil waste (and other noxious substances), which have to give effect to "applicable" international standards.[68] In the strait, therefore, navigational and discharge standards contained in instruments to which coastal States are contracting parties, represent maximum standards.[69] National measures cannot cover CDEMs and

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63 *Ibid.,* Articles 21(2), (4) and 24.

64 See *supra* n. 54.

65 In this case the coastal State may board, inspect and eventually detain the ship (LOSC, Articles 25(2) and 220(2)).

66 For a detailed analysis of this regime see: E. J. Molenaar (1998), pp. 283-360. See also S.N. Nandan and D. H. Anderson (1989), pp. 159-185.

67 LOSC Articles 38(1) and 44. It is worth mentioning that in the cases specified in Article 45(1), the right of innocent passage discussed in Chapter 6.2.2.1 shall also apply in straits used for international navigation, but it can never be suspended (ibid, 45(2)).

68 LOSC Articles 41and 42(1)(a) and (b). On the meaning of "applicable" standards, see *supra* Chapter 1.3.1. According to G. Plant (1992), p. 249-50, navigational standards must be approved by IMO and accepted by all States bordering the strait.

69 See, e.g., the controversial proposal by Australia and Papua New Guinea for compulsory pilotage in the Torres Strait PSSA, which has been strongly challenged in IMO. Although the submitting States made it clear that the pilotage would apply to an area entirely located within the territorial sea, in NAV 50 (July 2004), this measure was strongly opposed by maritime States (e.g., Panama, the Russian Federation and the US) and the shipping industry as an impediment to the right of transit passage in violation of Article 38 of the LOSC. According to the opponents there are no IMO instruments which may be used as a legal basis for such a measure and the IMO has never approved compulsory pilotage in an international strait. The issue has been referred to LEG 89 (October 2004), which was unable to decide on the legality of such a measure. At MEPC 53 (July 2005), the US, supported by the large

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in no circumstance can they hamper transit.[70]

During the passage through such straits, foreign ships are requested to comply with existing maritime safety and discharge GAIRAS and national environmental measures adopted in conformity with the LOSC.[71] But the Convention is silent as to the consequences of a lack of compliance with these standards. The LOSC makes it clear that coastal States may take "appropriate" enforcement measures against foreign ships which violate "national discharge or navigational standards" causing or threatening "major" pollution damage to the marine environment of the straits, but it is not entirely clear what this broad provision entails in practice.[72] Arguably, coastal States cannot use their enforcement powers to correct violations of CDEMs and they cannot impede transit passage through an international strait.

6.2.2.3 The Exclusive Economic Zone (EEZ)

The level of control of coastal States is particularly limited when foreign tankers are transiting through the EEZ.[73] All coastal States can do in this area is to prescribe, for the purpose of enforcement, national safety and environmental measures giving effect to existing GAIRAS and promote routing systems to minimize the threat of accidents, which, however, have to be approved by the IMO.[74] As will be discussed in further detail in Chapter 8.6.1, in certain circumstances coastal States may adopt stricter standards (except CDEMs) for "clearly defined" vulnerable areas of their EEZ, but they always need the IMO's approval.[75] Only in ice-covered areas within their EEZ may coastal States "unilaterally" increase safety and anti-pollution requirements, including CDEMs, without going through the IMO.[76] Outside ice-covered areas, therefore, the legislative power of the coastal States vis-à-vis foreign vessels in transit through the EEZ is limited to the adoption of rules which have to be agreed at the international level. It is for flag States to ensure that vessels flying their flag comply with these

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majority of shipping nations, forcefully expressed opposition to compulsory pilotage in international straits and, eventually, the MEPC approved non-compulsory pilotage in the Torres Strait.

70 National laws, moreover, cannot be discriminatory and must be duly publicized. LOSC, Article 42(2) and (3)).

71 *Ibid.,* Articles 39(2) (a) and (b) and 42(4).

72 *Ibid.,* Article 233. For a full discussion see: E.J. Molenaar (1998), pp. 295-8.

73 In the EEZ, coastal States must have due regard to the rights of navigation of flag States (LOSC, Article 56 (2)). For a full discussion on coastal state jurisdiction in the EEZ see: L.S. Johnson (2004), pp. 95-135; E. J. Molenaar (1998), pp. 361-99; B. Kwiatkowska (1989), pp. 171-9.

74 LOSC, Articles 211(1) and 211(5).

75 *Ibid.,* Article 211(6)(c).

76 *Ibid.,* Article 234. This is the only real exception to the EEZ regime. However, the margin of discretion of coastal States is limited by the duty to have "due regard" to the freedom of navigation and to act on the basis of the best available scientific evidence.

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standards,[77] but if they do not, the coastal State has limited capacity to correct violations.

Most of the enforcement mechanisms available to coastal States in the EEZ relate to the violation of discharge or navigational standards, not CDEMs.[78] The availability of these enforcement mechanisms, moreover, depends on the gravity of the discharge and/or damage and little can be done before the pollution occurs. Generally speaking, coastal States may physically inspect a foreign ship in transit only if they have "clear grounds for believing" that during the passage the ship has committed a violation of international anti-pollution standards resulting in a "substantial discharge" causing or threatening "significant pollution" of the marine environment.[79] But in order to institute proceedings and eventually to detain that vessel, a coastal State must have "clear objective evidence" that such a violation has occurred and has resulted in a discharge causing or threatening "major damage" to its marine environment and related interests.[80] In the absence of any discharge, coastal States' enforcement powers are mainly limited to requesting the information necessary to determine whether a violation has taken place.[81]

Conversely, the LOSC recognizes the extensive enforcement powers of coastal States vis-à-vis foreign ships involved in "maritime casualties".[82] In this case they may take all proportionate measures within and beyond the territorial sea, including the high seas, to protect their coastline or related interests from actual or possible damage.[83] Although the definition of "maritime casualty" is rather broad, coastal States' powers only arise after a casualty has occurred.

The coastal States' enforcement capacity is further restricted by a series of "safeguards" which are intended to ensure that in exercising their powers, States do not endanger the safety of navigation, expose the marine environment to an unreasonable risk or affect too much the commercial interests of ships.[84]

The LOSC does not seem to favour coastal States' enforcement in the EEZ and outside the territorial sea in general. Stopping, boarding and inspecting large tankers in these waters, especially in highly congested maritime areas, is a complex and highly

77 LOSC, Article 58(3).

78 On coastal State enforcement jurisdiction in the EEZ: L.S. Johnson (2004), pp. 118-22 and E.J. Molenaar (1998), pp. 382-8.

79 LOSC, Article 220(5).

80 *Ibid.,* Article 220(6). The LOSC, however, does not explain the difference between "significant pollution" justifying an inspection and "major damage" justifying proceedings and, eventually, the arrest of the vessel.

81 *Ibid.,* Article 220(3)).

82 Maritime casualties are defined as the "collision of vessels, stranding or other incidents of navigation or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo", LOSC, Article 221(2).

83 *Ibid.,* Article 221(1).

84 These safeguards are contained in Section 7, Part XII of the LOSC.

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risky operation and has a strong impact on the freedom of navigation. The Convention, therefore, tries to limit these operations as much as possible.

However, it is worth mentioning that coastal States may employ the entire range of mechanisms available in Part XV of the LOSC to deal with flag States that are in breach of their international obligations. Article 297(1)(b) LOSC, indeed, allows coastal States to start a procedure against a flag State which, in exercising its rights of navigation, has acted in contravention of the LOSC or national and international standards adopted in conformity with the Convention.[85] Presumably, therefore, coastal States may initiate a legal action against a badly performing flag State that does not comply with its obligations under Articles 94 and 217 of the LOSC. For various reasons, including the costs of commencing such procedures, coastal States have so far not taken advantage of this possibility.

6.2.3 Port States[86]

6.2.3.1 Legislative Jurisdiction

The LOSC, reflecting customary international law, confirms that States have plenary jurisdiction over their internal waters which is equivalent to that over their land territory.[87] States have the right ("may") to lay down special environmental requirements as a condition for access to their ports and to take all the necessary steps vis-à-vis vessels, regardless of their flag, to prevent any violation of these conditions.[88] Groups of States, moreover, may also establish common access conditions.[89] In the absence of any express limits in the LOSC, it is commonly agreed that port-access requirements may cover all kinds of safety, anti-pollution and seaworthiness standards, including CDEMs.[90]

In the wake of the *Prestige* accident, a number of EC coastal States and the Community itself, acting in their capacity as port States, unilaterally strengthened CDEMs

85 On the scope of Article 297(1) see E.J. Molenaar (1998), pp. 485-8.

86 The LOSC makes reference to port States only in Article 218 with regard to enforcement jurisdiction. Some authors (e.g., D. Bodansky (1991), p. 740 and G. Kasoulides, p. 122), therefore, refer to port States only to indicate enforcement against foreign vessels present in port. The present book refers to both prescriptive and enforcement jurisdiction based on the presence of the vessel in port.

87 LOSC, Article 2(1).

88 *Ibid.,* Articles 25(2) and 211(3); these requirements must be given due publicity and be communicated to the IMO. See also: *Nicaragua Case (Nicaragua v. United States)*, 27/06/1986, ICJ Reports 1986, p. 14-101, Para. 213.

89 LOSC, Article 211(3).

90 See, *inter alia*, L.S. Johnson (2004), p. 40; E. J. Molenaar, pp. 103-104 and K. Hapaaka (1981), p. 169.

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for the safe transport of heavy grades of oil (HGOs) without going through the IMO.[91] These unilateral and regional initiatives go far beyond MARPOL 73/78 and have attracted a great deal of criticism.[92] This strong reaction raises once again the delicate question as to how far States may go in using their right to regulate the access of foreign ships to their ports and, in particular, whether their legislative jurisdiction also covers CDEMs, given the extraterritorial effects and far-reaching implications of these standards on international shipping.

Although this is not the appropriate place properly to address such a highly delicate issue, it is worth making some general observations.[93] The right of port States to set conditions for the entrance into port of foreign ships going beyond international standards and to deny access to vessels not complying with these requirements is widely recognized as reflecting customary international law.[94] Port State regulatory capacity, however, is not unlimited, as it may be restricted, first of all, by treaty obligations.[95] IMO instruments, such as MARPOL 73/78, do not regulate the legislative jurisdiction of coastal States, but they generally refer to the regime contained in the LOSC.[96] By acceding to an IMO Convention, therefore, coastal States do not seem to renounce their

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91 Spain (24343 Royal Decree-law 9/2002, 13/12/2002), Italy (Italian Ministerial Decree 21/02/2003), France and Portugal (Malaga Agreement, 26/11/2002, which also includes Spain). These requirements, which are *per se* consistent with Articles 25(2) and 211(3) of LOSC, have been complemented by the practice of escorting foreign single hulls out of the EEZ, including ships in transit. This practice had the practical effect of denying the passage of foreign merchant vessels perfectly conforming to IMO standards and with good port control records through several European EEZs and some of the major straits used for international navigation, such as the English Channel and the Strait of Gibraltar, and has been condemned as a restriction of the freedom of navigation that is totally inconsistent with the LOSC. *Inter alia*, 2003 UNSG Report, at (57); 2003 ICP Report, at (71-3); Joint Statement of the Round Table of International Shipping Organizations (INTERTANKO, the ICS, the Baltic and the International Maritime Council and INTERCARGO), 12/12/2002, available at: www.intertanko.com/artikkel.asp?id=5045. The EC institutions have never supported this practice. The Community, on the other hand, adopted the Regulation 1726/2003, 22.07.2003, *infra* n. 309.

92 See, e.g., Speech of the IMO SG, E. Mitropoulos, before the EP-MARE, 22/01/2004, available at: www.imo.org/home.aspat and shipping industry, *supra* n. 13.

93 For a full discussion of the subject: L.S. Johnson (2004), pp. 38-46; L. de La Fayette (1996), pp. 1-22; E.J. Molenaar in H. Ringbom (ed.) (1997), pp. 201- 216; E.J. Molenaar (1998), pp. 101-4 and 110-7; H. Ringbom (1999), pp. 23-24; M. Valenzuela in: A.H.A. Soons (ed.) (1991), pp. 213-215; A.V. Lowe (1977), pp. 597-622.

94 L.S. Johnson (2004), p. 39; L. de La Fayette (1996), pp. 2-3 and 11-12; E.J. Molenaar (1998), p. 101; A.V. Lowe (1977), p. 607; M. Valenzuela (1999), p. 493. See also *Nicaragua Case.*

95 See: H. Ringbom (1999), p. 23.

96 MARPOL Article 9(2) makes it clear that "Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea […] nor the present or future claims and legal views of any State concerning the law of the sea and the nature and the extent of coastal and flag State jurisdiction".

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right to regulate port access as granted by the LOSC in relation to all matters covered by the IMO instrument. Additionally, according to Article 31(1) of the Vienna Convention on the Law of Treaties, a Convention shall be interpreted "in accordance with the terms of the treaty" and "in the light of its object and purpose".[97] In the absence of provisions on legislative jurisdiction in the IMO Conventions, it is necessary to look at their objective.[98] Generally, the IMO Conventions have a double aim: (a) promoting maritime safety and/or marine environmental protection; and (b) ensuring uniformity of regulation in international shipping. However, it is generally accepted that these Conventions, unlike the LOSC, do not represent a "package deal" between different interests. As already mentioned, they are generally addressed to flag States and require them to implement and enforce the relevant standards, but do not intend to limit the capacity of coastal or port States to adopt protective measures in accordance with international law.[99] It seems that port States, in principle, are entitled to adopt safety and environmental requirements which may be stricter than those contained in IMO instruments if this is necessary to ensure the achievement of the objectives pursued by these instruments.

However, port State requirements cannot hamper the rights of passage as guaranteed by the LOSC and must be consistent with the general principles of international law, such as proportionality, non-discrimination and the prohibition on abusing rights.[100] Generally speaking, there must be a direct connection between access requirements and the legitimate interests of port States to ensure maritime safety and marine environmental protection and the access requirements have to apply to all vessels entering ports regardless of their flag. In excluding the abuse of rights, moreover, the environmental rights of port States should be carefully balanced against the navigation rights of flag States.[101] The "extra-territorial" effects of port access conditions concerning CDEMs are purely incidental since these standards by their very nature cannot exclusively apply when the ship is in port, but necessarily extend to vessels before entry. Presumably, when foreign ships decide to operate in a particular country or region they accept the

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97 See E.J. Molenaar in H. Ringbom (ed.) (1997), pp. 204-6.

98 However, SOLAS, Article VI(d), for instance, provides that: "all matters that are not expressly provided for in the present Convention remain subject to the legislation of the Contracting Governments". According to E.J. Molenaar, in Ringbom (ed.), pp. 204-5, on the one hand, this provision seems to exclude the capacity of states Parties to go beyond the standards contained in SOLAS but, on the other , the terms "expressly provided for" give Parties ample room to adopt their own standards in matters not regulated by SOLAS. The absence of such a provision in other IMO Conventions, such as MARPOL 73/78, moreover, seem to imply that, as a rule, Parties can go beyond IMO standards when exercising their port State jurisdiction.

99 See: L.S. Johnson (2004), pp. 43-46; E.J. Molenaar, in H. Ringbom (ed.) (1997), p. 204-5.

100 E.g., LOSC, Article 300. For a full discussion see: H. Ringbom (1999), pp. 23-4; E. J. Molenaar (1998), pp. 115-7 and E.J. Molenaar in H. Ringbom (ed.) (1997), pp. 209-11.

101 The abuse of rights is the exercise of a right for a purpose different from that for which it was created. See: E.J. Molenaar (1998), p. 43 and E.J. Molenaar in H. Ringbom (ed.) (1997), pp. 209-10.

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sovereignty of the port State and implicitly agree to comply with its higher safety and environmental standards, including CDEMs.

All considerations mentioned so far seem also to apply to regional organizations. Although the LOSC provisions on vessel-source pollution make no explicit reference to regional organizations as they do for other sources of marine pollution (e.g., dumping), Article 211(3) seems to entitle port States to exercise their legislative jurisdiction on a regional basis. In principle, nothing in the LOSC or in the IMO Conventions excludes the possibility for a regional organization, such as the EC, to which member states have transferred their competence, to establish special safety or environmental requirements for the access of all ships, including foreign vessels, into the ports of its member state.[102] As a contracting party to the LOSC, indeed, the Community has the right to act on the basis of Article 211(3). The regional exercise of port State legislative jurisdiction, therefore, may probably be challenged from a political point of view because of its strong impact on the uniformity of shipping regulations, but it seems to be consistent with the existing legal framework.

6.2.3.2 Enforcement Jurisdiction

While the LOSC provisions on port State legislative jurisdiction generally reflect customary law, it is in respect of port State enforcement jurisdiction that the Convention is quite innovatory.[103] To correct the deficiencies of flag State enforcement and implementation and to compensate for the limited enforcement powers of the coastal State, the LOSC grants States greater authority over foreign vessels which are voluntarily in their ports.[104] Port State enforcement, indeed, entails a smaller interference with the freedom of navigation and can be performed more safely compared to enforcement at sea.

In particular, Article 218 confers a right on port States to investigate, correct and eventually punish violations of international "discharge" standards by foreign ships on the high seas or in areas under the jurisdiction of another State.[105] In addition, Article 219 places port States under a positive legal duty (not a mere right) to detain a foreign

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102 Some IMO instruments expressly call for regional action, see, e.g., Article 3 (5) of the 1993 Torremolinos Protocol on safety of fishing vessels.

103 On the evolution of port state enforcement jurisdiction see: D. Anderson in A. Boyle and D. Freestone (eds.) (1996), pp. 325-337. For an in-depth analysis of port State jurisdiction see also D. Bodansky (1991), pp. 759-754, E.J. Molenaar (1998), 186-91; G.C. Kasoulides in H. Ringbom (ed.) (1997), pp. 121-39; T. Keselj (1999), pp. 127-59.

104 E.g., D. Bodansky (1991), pp. 738-40; E.J. Molenaar (1998), pp. 104-10; Valenzuela (1999), p. 496.

105 LOSC Article 218(1) and (2). So far, however, port States have made little use of their enforcement powers with regard to discharge violations on the high seas. See: D. Bodansky (1991), p. 763 and M. Valenzuela (1999), p. 497.

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ship which does not comply with international standards related to "seaworthiness"[106] and represents a risk for the marine environment and to prevent it from sailing until failures have been corrected.[107] It is worth noting that both provisions refer to "applicable" international standards, which are contained in Conventions applying to the vessel in question.[108] Port inspections, however, are limited to the control of the certificates issued by the flag States or classification societies to attest compliance with relevant standards unless there are clear grounds for believing that the conditions of the vessel and/or its equipment do not correspond substantially with what has been attested in the certificates.[109] In addition, in exercising their extended enforcement powers, port States must observe a set of safeguards which intend to protect the commercial interests of the foreign ships and prevent an excessive or discriminatory exercise of port State authority over the ship.[110] The LOSC provisions on port State jurisdiction formed the basis for the development of Port State Control (PSC) regimes, which, as will be discussed later in this Chapter, have become the main tool to ensure flag State compliance with international safety and anti-pollution standards. However, it is generally agreed that PSC was not intended and should not be a substitute for effective flag State implementation and enforcement.[111] In an ideal world PSC should not even be necessary. In reality, it has become the "the first line of defence" for coastal States.[112]

6.3 Chapter 17 of Agenda 21 and Oil Pollution from Shipping

Like the LOSC, Chapter 17 of Agenda 21 pays particular attention to the degradation of the marine environment from shipping compared to other human activities and confirms the need to take multilateral action. Agenda 21 invites States, acting within the framework of the IMO and other relevant international organizations, sub-regional, regional or global, to assess the need for additional measures to control activities related

106 Article 219 raises questions with regard to the exact meaning of "seaworthiness conditions". It is largely accepted that seaworthiness is a subcategory of CDEMs. On the issue see T. Keselj (1999), pp. 139-40.

107 This duty, however, is tempered by the clause "as far as practicable". A similar duty was already regulated in SOLAS, Reg. 19(c) and 4 and in MARPOL 73/78, Article 5(2).

108 On the meaning of "applicable" standards see: *supra* Chapter 1. See also D. Bodansky (1991), pp. 760-3.

109 LOSC Articles 217(3) and 226; MARPOL 73/78, Article 5 and SOLAS, Chapter I, Reg.19 (b).

110 LOSC, Part XII, Section 7, Articles 223-231.

111 See, e.g., 2003 UNSG Report, Para. 92 and the Statement by Mr. Smyth on behalf of the EU at the 5th ICP, 11.06.2004, available at: europa-eu-un.org/articleslist.asp?section=11. See also the Preamble to the Paris MOU, *infra* n. 156, which recognizes as a fundamental principle the flag State's primary responsibility for the effective application of international standards and the EU Directive on Port State Control, Para. 3 of the Preamble.

112 Lord Donaldson's Report (1994), Para. 11.5, p. 135.

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to shipping and ports which still create particular concerns. Additional measures, when necessary, must be adopted by the IMO.

In particular, States are invited to promote the wider ratification and implementation of the relevant shipping Conventions and Protocols, to assist governments in overcoming obstacles in the implementation of existing standards, to enhance the monitoring of illegal discharges (especially by aerial surveillance), to strengthen the enforcement of MARPOL standards,[113] to increase the protection of particularly sensitive sea areas,[114] to promote navigational safety by adequate ship-routing,[115] and to facilitate the establishment of port reception facilities for the collection of, *inter alia*, oily residues.[116]

Agenda 21, moreover, urges the IMO to assess, upon a request by the States concerned, the state of marine pollution in areas of congested shipping, such as heavily trafficked international straits, with a view to ensuring compliance with existing GAIRAS, especially MARPOL 73/78, in accordance with the LOSC.[117]

Chapter 17 of Agenda 21 has triggered new developments and played an important role in enhancing the international regime on maritime safety and pollution prevention.[118] In 2002, ten years after the Rio Conference, however, the level of ratification, implementation and enforcement of existing Conventions appeared to be far from satisfactory. The WSSD Plan of Implementation adopted in Johannesburg therefore urged the IMO to promote wider ratification and to secure full flag State compliance with internationally agreed standards.[119]

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113 Agenda 21, Para. 17.30.a (i), (ii) and (iii).

114 *Ibid.,* Para. 17.30.a (iv), calls for assessing the state of pollution caused by ships in particularly sensitive areas identified by IMO and taking action to implement applicable measures, where necessary, within such areas to ensure compliance with generally accepted international regulations. *Ibid.,* Para. (v) encourages action "to ensure respect of areas designed by coastal states, within their EEZ, consistent with international law, in order to protect and preserve rare and fragile ecosystems".

115 Agenda 21, Para. 17.30.a (vii).

116 Especially in MARPOL Special Areas (i.e., Agenda 21, Para. 17.30.d). In addition, Agenda 21 calls for the development of new measures for ballast water discharges, cargo ships, including bulk carriers, carriage of irradiated nuclear fuel in flasks on board of ships, an IMO Code on Safety for Nuclear Merchant Ships, air pollution from ships, compensation for pollution damage caused by substances other than oil (Para. 17.30.a), a reduction of pollution by organotin compounds used in antifouling paints (Para. 17.32), an oil pollution response (paras. 17.33 and 17.34).

117 Agenda 21, para. 17.31.

118 A. Boyle and D. Freestone (2001), pp. 292-95 and A. Nollkaemper (1993), pp. 537-56.

119 WSSD Implementation Plan, Para. 33(a). The Plan also calls for further action on ballast water and safe transport of radioactive wastes and material (Para. 33 (b)) and effective liability mechanisms (Para. 33.bis).

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6.4 The Global Implementation Regime

6.4.1 The International Maritime Organization (IMO)

The IMO was established in 1948 as the UN special agency responsible for improving maritime safety and preventing pollution from international shipping.[120] One of the primary objectives of the organization is to "[…] encourage and facilitate *the general adoption* of *the highest practicable standards* in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships […]" (emphasis added).[121]

The IMO currently has 164 Members, including all 25 EC member states and acceding countries as well as all candidate countries, except Macedonia. Its main bodies are the Assembly, the Council, the Secretariat and the five main committees, which undertake most of the work of the organization. The Assembly, which is the governing body of the organization, is composed of all IMO Members and meets once every two years. It has an approval role with regard to the programme of work, the budget and IMO instruments and makes recommendations to contracting parties on maritime safety and pollution prevention matters. The Council is the IMO's executive body and is composed of 40 Members elected by the Assembly for a two-year term among contracting parties having larger interests in international shipping services, international seaborne trade, maritime transport and navigation. It supervises and coordinates the work of the organization and in between Assembly sessions acts as the IMO's governing body.[122]

The Maritime Safety Committee (MSC) is composed of all IMO Members and addresses a wide range of safety-at-sea issues.[123] It is responsible for keeping SOLAS and other IMO safety instruments under review and adopts recommendations and guidelines on safety matters which, in certain cases, are submitted to the Assembly for approval. In addition, the MSC is responsible for approving routing measures proposed

120 1948 Geneva Convention establishing the International Maritime Consultative Organization (IMCO), which in 1982 became the IMO.

121 1948 Geneva Convention, Article 1(a). See also Article 15(j). For the meaning of "highest practicable standards" see *infra* section 6.6. The other IMO objective is to promote international shipping by removing national discriminatory and unnecessary restrictions (ibid, Article 1(b)). See, in general, A. Blanco-Bazán (2003), pp. 31-47 and R. Wolfrum (1999), pp. 223-236.

122 The Council, *inter alia*, considers the draft work programme, the budget and proposals of the committees and submits them to the Assembly and appoints the Secretary-General with the approval of the Assembly. Since 1 January 2004, the IMO's SG has been Mr. Efthimios E. Mitropoulos, from Greece.

123 MSC deals with the construction and equipment of ships, aids to navigation, the prevention of collisions, handling of dangerous cargoes, safety in ship manning, safety procedures and requirements, hydrographic information, casualty investigation, navigation records, salvage and rescue and other factors directly affecting maritime safety.

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by coastal States outside the territorial sea.[124] The Marine Environment Protection Committee (MEPC) is composed of all IMO Members and coordinates the IMO's activities related to the prevention and control of pollution from ships. It supervises the implementation of MARPOL 73/78 and other IMO environmental instruments and keeps them under review. The MEPC, moreover, is responsible for the designation of Particularly Sensitive Sea Areas (PSSAs) and the adoption therein of associate protective measures (APMs).[125] The MSC and MEPC are assisted by nine sub-committees, such as the sub-committee on the Safety of Navigation (NAV), which carry out the preparatory work and are open to the participation of all IMO Members. Particularly relevant, moreover, is the Legal Committee (LEG), which is responsible for legal issues related to the IMO's activities.[126] (e.g., NSC) or twice every other year, and once in the intervening year (i.e., MEPC), IMO committees meet regularly twice a year but, when necessary, they may also convene extraordinary sessions. All decisions in IMO are normally taken by consensus.

The IMO has no enforcement mandate. In the past few years, however, the organization has been increasingly involved in supervising the implementation and enforcement of IMO instruments.[127] In November 2005, the 24th IMO Assembly formally adopted the IMO Voluntary Member State Audit Scheme in order to assess the manner in which flag States implement and enforce IMO safety-related standards and provide follow-up advice and technical assistance to correct non-conformities. The scheme has been established "in such a manner as not to exclude the possibility in the future of it becoming mandatory".[128] Alongside the Audit Scheme, the Assembly has adopted a Code for Implementation, which spells out the criteria for the uniform implementation of IMO mandatory instruments.[129]

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124 See: IMO Resolution A. 858(20), 1977, and IMO Guidelines on Ship Routing (IMO Resolution A.574 (14), 1989, as amended). See: G. Plant, in H. Ringbom (ed.) (1997), pp. 11-29.

125 The PSSAs and APMs under the IMO regime are discussed in detail in Chapter 8.6.3.

126 In addition, there are also the Technical Co-operation Committee (TCC), which provides technical assistance to governments in implementing IMO instruments, and the Facilitation Committee (FC), which is a subsidiary body of the Council responsible for reducing and simplifying formalities for ships when entering and leaving ports.

127 See, e.g., Opening Statement by the then IMO SG, Mr. O'Neil, to the 23rd IMO Assembly, 24.11.2003, in IMO doc. A/23/INF.6, p. 7.

128 IMO Resolution A. 974(24) on the framework and procedures for the Voluntary IMO Member State Audit Scheme, 1.12.2005 and IMO Resolution A. 946(23), 25.02.2004, Para. 1.

129 IMO Resolution A. 973 (24), 1.12.2005.

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6.4.2 Global Regulatory Instruments

The maritime safety and anti-pollution GAIRAS referred to in the LOSC are mainly contained in IMO regulatory instruments of a varied legal nature.[130] As the LEG has pointed out, in order to establish whether parties to the LOSC are obliged to implement IMO instruments it is decisive to look at their degree of international acceptance.[131] Relevant GAIRAS, therefore, not only include binding Conventions (e.g., SOLAS or MARPOL), but also a large number of IMO Recommendations, Codes and Guidelines which are adopted by the IMO by consensus.[132] The present discussion, however, is limited to the main IMO regulatory Conventions. This is not the proper place for a technical analysis of these instruments, but it is worth making some general observations and identifying some common features.

Adopted in 1973 in the wake of the 1967 *Torrey Canyon* accident, MARPOL 73/78 was established with the ambitious objective to eliminate completely any intentional pollution by oil and other hazardous substances and to minimize accidental discharges.[133] The Convention sets out the standards to prevent both operational[134] and accidental[135] discharges by oil and other harmful pollutants.[136] Pollution by oil is regulated in Annex I, which contains three main sets of standards.[137] First of all, discharge standards determine the maximum amount of oil which may be released into the marine environment (Regulation 9), except in "special areas" where oil discharges

130 The IMO regulatory instruments may be divided into two categories: those containing vessel safety and anti-pollution standards and those covering pollution response, compensation and liability. The latter are not discussed in this Chapter.

131 IMO doc. LEG/MISC/3/Rev.1, p. 6.

132 Since all 164 IMO Members may participate in the negotiation of IMO Resolutions, these represent GAIRAS and LOSC Parties are expected to comply with them. See: IMO doc. LEG/MISC/3/Rev.1, p. 5. See also P.W. Birnie in H. Ringbom (ed.) (1997), pp. 31-57.

133 The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto, as amended, and its 1997 Protocol are available at: www.admiraltylawguide.com/interconv.html#MP. For an overview of MARPOL 73/78, its history and all its subsequent amendments see: www.imo.org/home.asp.

134 MARPOL, Article 2(3)(a) defines "discharge" as "any release howsoever caused from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying."

135 MARPOL, Article 2(6) adopts a broad definition of "incident" as "an event involving the *actual or probable* discharge into the sea of a harmful substance, or effluents containing such a substance". Annex I (Regulation 11) lists a number of exceptions.

136 In addition to oil, MARPOL regulates discharges of noxious liquid substances carried in bulk (Annex II), harmful substances carried in packages (Annex 3), sewage (Annex IV), garbage (V). In 1997, the IMO adopted an Annex VI on prevention of air pollution from ships, which entered into force on 19.05.2005. Only Annexes I and II are compulsory, while the others are optional and contracting parties are free not to accept them by means of a declaration.

137 The original Annex I, which entered into force on 2.10.1983, has been recently revised. The revised Annex I will enter into force on 1.1.2007.

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are completely prohibited.[138] Contracting parties, moreover, have to ensure the availability of adequate port reception facilities for the collection of oil residues and oil mixtures (Regulations 10 and 12). Finally, Annex I contains several CDEMs for tankers in order to prevent accidental spillage of oil.[139] In the past three decades, as a response to several disastrous maritime accidents and to the threat of unilateral and regional initiatives, the MEPC has strengthened MARPOL safety standards, especially those related to the progressive phasing-out of single-hull tankers.[140] By 30 April 2006, a total of 137 States, including all EC member and acceding states, representing over 97 per cent of the world's tonnage are now parties to MARPOL 73/78 (Annexes I and II), which, therefore, may be considered as generally accepted.[141]

The 1974 *SOLAS,* together with its 1978 and 1988 Protocols, is considered as the most important and comprehensive international instrument on ship safety.[142] The Convention contains, *inter alia*, CDEMs for oil carriers engaged in international voyages and navigational requirements for all ships in all voyages. In particular, the new Chapter V on the "Safety of Navigation" regulates ship routing systems[143] and establishes new mandatory ship reporting requirements.[144] Ships, including tankers, are required to carry, on board, new mandatory reporting systems such as "black boxes" (voyage data recorders (VDRs)) similar to those used in the aviation sector, and automatic identification systems (AIS) which provide information about the ship to other vessels or to coastal authorities on shore. Over the years the MSC has progressively strengthened

138 These areas which are particularly vulnerable to vessel-source pollution include the Mediterranean Sea, the Baltic Sea and now also the North Sea (Annex I, Regulation 10).

139 These include, for instance, segregated ballast tanks in protective locations, double bottom tanks and equipment to retain oily residues on board until they can be safely discharged on shore (e.g., oily water separation, crude oil tank washing and discharge monitoring equipment). See Annex I, Regulations 13 to 17.

140 The latest amendments to MARPOL's Annex I will be discussed in section 6.7 of this Chapter.

141 The status of MARPOL 73/78 may be consulted at: http://www.imo.org/home.asp. Some EC member states have not yet ratified Annex IV and V.

142 The 1974 International Convention for the Safety of Life at Sea and its Protocols, as amended, are available at: www.admiraltylawguide.com/interconv.html#SS. For an overview of the SOLAS amendments see: www.imo.org/home.asp.

143 Chapter V was revised in December 2000 by MSC and the amendments entered into force on 1 July 2002. According to the new Reg. V/8 (a) and (j) ship routing should be established bearing in mind the need to protect the marine environment and it must comply with LOSC. See also IMO Guidelines on Ship Routing (IMO Res. A.574 (14), 1989, as amended).

144 Reg. V/11 makes it mandatory for all ships entering areas covered by reporting systems to give coastal State authorities detailed information about their sailing plans. Reg. V/12 provides that the use of vessel traffic services (VTS) may only be made mandatory within the coastal State's territorial sea. See also: IMO General Principles for Ships' Reporting Systems (IMO Res. A. 851 (20), 1997) and IMO Guidelines and Criteria for Ships' Reporting Systems (IMO Res. MSC 43(64), 1994).

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the SOLAS standards to improve tanker safety and reduce the risk of pollution.[145] By 30 April 2006, SOLAS had 156 parties, representing over 98 per cent of the world's tonnage.[146] There is no doubt about its degree of general acceptance.

Finally, the 1972 Convention on the International Regulations for Preventing Collisions at Sea (COLREG) is worth mentioning as it contains the relevant standards for the adoption of traffic separation schemes (TSS).[147]

In the early 1970s, when MARPOL and SOLAS were negotiated, the issue of coastal State jurisdiction was still quite controversial. Negotiating parties, therefore, decided to leave such a critical issue to UNCLOS III by referring to the codification and development of the law of the sea being undertaken by that conference.[148] It is important to stress once more that IMO Conventions do not intend to deal with jurisdictional aspects regulated in the LOSC.

Generally speaking, IMO Conventions require flag States to implement and enforce their technical standards and to issue certificates attesting that ships flying their flags comply with the relevant requirements.[149] To correct the deficiencies of flag States, they also contain port State control (PSC) rules which mirror the LOSC provisions of port State enforcement, but in some respects are more stringent.[150] During the past three decades, indeed, the scope of port inspections under the IMO Conventions has expanded to cover operational requirements, including the performance of the crew.[151] MARPOL 73/78, moreover, regulates the institution of proceedings and requires States Parties to punish MARPOL violations wherever they occur with penalties adequate in severity to discourage future infringements.[152]

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145 Perhaps the most important amendment has been the introduction in 1994 of a new Chapter IX requiring vessel operators, starting from 1 July 1998, to implement the International Safety Management Code (ISM Code) for the safe management and operation of ships and for pollution prevention (adopted in 1993 with IMO Res. A.741(18)).

146 All EC member states are parties to the 1978 Protocol. Not all EC member states are parties to the 1988 Protocol (e.g., Austria, Belgium, the Czech Republic, Hungary, and Poland), which entered into force on 3.02.2000.

147 Rules 1(d) and 10 of COLREG 1972, as amended. See also IMO Guidelines for Vessel Traffic Services (IMO Res. A 857(20), 1997, replacing IMO Res. A. 578(14), 1985).

148 E.g., MARPOL 73/78, Article 9(2).

149 See: MARPOL, Annex I, Reg. 5 - 8 on the International Pollution Prevention (IOPP) certificate. SOLAS Reg. I/19 (a) (b) and Reg. I/4 require different certificates (e.g., Minimum Safe Manning Document, Safety Construction Certificate, Safety Equipment Certificate and, from July 1998, a certificate of compliance with the ISM Code).

150 E.g., SOLAS, Reg. I/19, Reg. IX/6 and Reg. XI/4; MARPOL 73/78, Articles 5 and 6; Annex I, Reg. 8A. See also IMO Procedure for Port State Control (IMO Res. A. 882(21), 2000).

151 E.g., SOLAS Reg. XI/4; MARPOL 73/78 Annex I, Reg. 8A. See also IMO Procedures for the Control of Operational Requirements related to Safety of Ships and Pollution Prevention (IMO Res. A. 742 (18), 1993) and IMO Res. A. 882(21). For a full discussion see: E.J Molenaar (1998), Para. 3.4 and G. Kasoulides (1993).

152 MARPOL 73/78, Article 4.

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In order to ensure the maximum level of uniformity and to eliminate unfair competition derived from the non-acceptance of the international standards, both MARPOL 73/78 and SOLAS contain a "no more favourable treatment clause" which allows contracting parties to apply the MARPOL/SOLAS standards also to ships flying the flag of non-parties when in ports.[153]

Technical standards contained in the Annexes to the IMO Conventions are constantly kept under review by the competent IMO committees by means of a "tacit acceptance procedure" whereby amendments enter automatically into force on a fixed date without the need to wait for formal ratification by contracting parties.[154] This procedure ensures the maximum degree of flexibility and allows the IMO regulatory regime to respond rapidly to the new requirement of maritime safety and marine environmental protection.

6.5 Regional Implementation Regime

6.5.1 Paris Memorandum of Understanding on Port State Control (Paris MOU)

In the course of the 1980s, as a response to the general lack of control by flag States over their vessels and the increasing numbers of substandard ships, maritime authorities in different regions started to coordinate their PSC systems in order to effectively exercise their port State enforcement powers and to reduce the possibility for substandard ships to escape inspections.[155] PSC, indeed, may be more effectively conducted at the regional level to avoid that operators divert their ships to ports that carry out less stringent or no inspections (ports of convenience). The existence of ports of convenience not only favours substandard shipping, but also places those port States that carry out proper inspections at a competitive disadvantage.

In 1982, the ministers responsible for maritime safety from 13 European coastal States adopted, in Paris, a regional administrative agreement, the so-called Memorandum

153 E.g., MARPOL 73/78, Article 5(4); 1978 SOLAS Protocol, Article II(3); 1988 SOLAS Protocol, Article I(3). For a detailed examination of this clause see E.J. Molenaar (1998), pp. 119-21.

154 More precisely, amendments enter into force unless within a certain period of time they are expressly rejected by one-third of the contracting parties or by contracting parties whose combined fleets represent at least 50 per cent of the world's gross tonnage. Amendments to IMO Conventions, on the other hand, still require ratification by two-thirds of the contracting parties.

155 On the Paris MOU and the evolution of PSC agreements see: G. Kasoulides (1993); G. Kasoulides in H. Ringbom (ed.) (1997), pp. 129-39; G. Kasoulides in D. Freestone and T. IJlstra (eds.) (1990), pp. 180-92; D. Anderson in A. Boyle and D. Freestone (eds.) (2001), pp. 332-337; E.J. Molenaar (1996), pp. 241-288.

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of Understanding on Port State Control (Paris MOU)[156] to verify and ensure that all foreign ships entering their ports comply with international maritime safety and anti-pollution standards regardless of their participation in the relevant Conventions.[157] The Paris MOU sets out an organizational structure[158] and establishes common inspection procedures, including an inspection rate (i.e., 25 per cent of all foreign ships entering their ports), targeting criteria for "high-risk vessels" (e.g., age, category, flag or classification society, detention and inspection records), reporting requirements and exchange of information between parties.[159] In addition, port State authorities have to ensure that ships not complying with existing standards correct their deficiencies before leaving port and they may impose penal or administrative sanctions.[160]

From a legal point of view the Paris MOU is not a treaty, but a regional cooperative arrangement among shipping administrations implementing Article 211(3) LOSC and PSC provisions of the IMO Conventions. Therefore, it does not establish legal rights and duties for States parties. In the early 1990s, it became apparent that the Paris MOU was not being applied correctly and uniformly by all States participating in the scheme.[161] In the past few years, therefore, the Paris MOU has undergone a revision process which has been strongly influenced by the EC regime on PSC and, as will be discussed later, there is a strong synergy between the two regimes.

The IMO has strongly promoted the adoption of MOUs in different regions along the lines of the Paris MOU.[162] As a result, analogous MOUs are currently in place in all major regions, including the Mediterranean Sea.[163] In principle, PSC schemes may be an extremely valuable tool for combating substandard shipping, ensuring that

156 The Paris MOU was adopted on 26.01.1982, (1982) 21 ILM 1, as amended. The current Member States are: Belgium, Canada, Croatia, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, the Netherlands, Norway, Poland, Portugal, the Russian Federation, Slovenia, Spain, Sweden and the U.K. These include 14 EC member states and 2 EEcA Countries. Cyprus, Estonia, Latvia, Lithuania, and Malta are not parties, but have "cooperative status" in the Paris MOU.

157 Like the IMO Conventions, the Paris MOU includes the "no more favourable treatment" clause (Section 2.4 and Annex I, Para. 1.3). Relevant instruments are laid down in Section 2.1 and they include the main IMO Conventions and ILO 1976 Convention No. 147 on Minimum Standards. The IMO ISM Code has also recently been included.

158 The main bodies are: the Port State Control Committee, which is the executive body of the MOU and is composed of representatives of the participating maritime authorities and of the EC Commission, a Secretariat, based in The Hague, which prepares the meetings and reports, a Computer Centre, which contains all inspection records.

159 Inspection procedures are contained in the Paris MOU, Annex I. See, in detail: E.J. Molenaar (1996), pp. 249-57.

160 Paris MOU, Section 3.7.

161 See, e.g., R. Salvarani (1996) pp. 225-231.

162 E.g., Regional Cooperation in the Control of Ships and Discharges (IMO Res. A.682(17), 1991). In 1995, the IMO Assembly adopted new Procedures for Port State Control (IMO Res. A. 787(19)) which builds on the 1982 Paris MOU.

163 For an overview of existing MOUs see E.J. Molenaar (1998), pp. 121-31.

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non-complying vessels have no place to hide. In practice, however, the existing rate of inspections and current penalties has not been sufficiently severe to discourage violations. In addition, the lack of human and financial resources, superficial controls, and inconsistencies between different inspection and targeting procedures have prevented this mechanism from being completely successful.[164] Maritime authorities participating to the Paris MOU are currently in the process of adopting a new inspection regime, which will reinforce the existing rules to a great extent.

6.5.2 The 1992 Helsinki Convention

The Baltic Sea is particularly exposed to the threat of oil pollution from shipping. In the last few years tanker traffic in the area has risen considerably and it is expected to rise further as a consequence of increasing oil exports from Russia.[165] Navigation in these waters is rendered particularly difficult by the presence of narrow straits of limited depth (e.g., the Danish Straits) in the main ingoing and outgoing transport routes and by the severe weather conditions of the Baltic Sea, which is ice-covered for a large part of the year. The volume and character of the shipping traffic, coupled with the danger of navigation, increase the risk of maritime accidents in the area. The main threat, however, still comes from the operational discharges of oil in violation of existing standards.[166] The potential damage of an oil spillage in the Baltic is increased by the limited water circulation which makes it particularly difficult to eliminate pollution.

Reducing the impact of tanker traffic on the fragile Baltic marine environment and ensuring the safer transport of oil have always been a matter of priority action within the framework of the Helsinki Convention[167] and have received central attention within the annual declarations of the Baltic Environmental Ministers.[168] The 1992 Helsinki Convention deals specifically with the prevention of pollution from ships in Article 8 and Annex IV.[169] The Baltic States, however, have been always aware of the limits of regional initiatives, which do not apply outside the jurisdiction of the contracting

164 See, e.g., 2006 Detention Records, at: www.parismou.org/. See also: 2004 UNGA Resolution, Paras. 44-45.

165 See: www.helcom.fi/manandsea/shipping/oilpollution.html and A.C. Brusendorff and P. Ehlers (2002), pp. 351-5.

166 A.C. Brusendorff and P. Ehlers (2002), p. 353.

167 See, e.g., "International Co-operation for the Baltic Sea Environment: Past, Present and Future", held in Riga, Latvia on 22-24 March 2004, for the 30th anniversary of the Helsinki Convention (Helsinki Convention-30), Session II on the "Environmental Impact of Shipping", available at: www.lva.gov.lv/eng/helcom/conf/VidAgentura-Brosura-Papildus.pdf. See also: A.C. Brusendorff and P. Ehlers (2002), pp. 351-95; P. Ehlers (1993), p. 191.

168 For an overview see: P. Ehlers, "HELCOM Ministerial Declarations- Milestones and Driving Force", in Helsinki Convention-30, *supra* Chapter 1, n. 149.

169 The 1992 Helsinki Convention also covers "pollution response" (Articles 13 and 14 and Annex VII).

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parties nor to foreign ships in transit, and have traditionally recognized the IMO as the most appropriate body to regulate shipping-related matters. The 1992 Helsinki Convention, therefore, does not set out its own technical standards, but requires contracting parties to apply MARPOL 73/78, to cooperate in the development of new uniform international standards within IMO, when necessary, and to effectively implement the existing standards.[170] To avoid discharges taking place in violation of MARPOL 73/78, moreover, the Convention requires that all ships make use of port reception facilities (PRFs) before leaving the port of a Baltic State, and that contracting parties conduct aerial surveillance.[171]

Likewise, the HELCOM's work in the field of maritime safety and vessel-source pollution has mostly been directed at coordinating the joint actions of the contracting parties in IMO, harmonizing the implementation and enforcement of existing IMO Conventions, Guidelines and Codes, and, when necessary, strengthening the implementation of IMO standards in the Baltic Sea area.[172] Only in limited cases (e.g., in the absence of IMO rules, when the latter have not taken the particular needs of the Baltic sufficiently into account, and when there is a need for a speedy reaction) the HELCOM has recommended additional measures, which, however, are mostly related to services to be provided by Baltic maritime administrations (e.g., VTS and AIS). It is worth stressing that, despite their great political weight, HELCOM recommendations are not legally binding.

The relevant work is carried out by the Maritime Group of the HELCOM (HELCOM MARITIME), which, since 2003, is assisted by four expert working groups (EWGs).[173] HELCOM MARITIME, unlike HELCOM itself, is attended by officials from maritime administrations, and environmental ministries of the Baltic coastal States. Its main work consists of preparing joint Baltic submissions in the IMO, drafting relevant HELCOM Recommendations and exchanging and evaluating information presented by contracting parties. In addition, HELCOM MARITIME coordinates the so-called Baltic maritime coordination meetings (BMCM) which take place in preparation of the IMO meetings (especially MEPC).

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170 1992 Helsinki Convention, Annex IV (Regulations 1 and 4).

171 *Ibid.,* Annex IV (Regulation 7) and Annex VII (Regulation 3).

172 See, e.g., Resolution 1 on "Application by Other States of Special Rules for Ships Operating in the Baltic Sea Area", adopted in 1974.

173 In 2003, the HELCOM MARITIME replaced the Sea-based Pollution Group (HELCOM SEA), which, in turn, replaced the Maritime Committee (MC) in 2000. The group meets three times a year at irregular intervals. Currently, it is assisted by four EWGs: AIS, ICE, PILOT and TRANSIT ROUTE. In addition, HELCOM RESPONSE carries out the work on oil pollution response. The meeting documents of HELCOM MARITIME, HELCOM SEA and EWGs are available at: http://www.helcom.fi/dps.html.

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Baltic States have always been particularly active in IMO (especially in the MEPC). So far, most of the Baltic submissions have led to the adoption of IMO Resolutions setting out stricter standards for ships operating in the Baltic Sea area.[174]

Originally, regional cooperation within the Helsinki Convention focused mainly on preventing intentional discharges from ships.[175] First of all, contracting parties have taken joint action in IMO for the designation of the Baltic Sea as a Special Area under, *inter alia*, Annex I of MARPOL 73/78, where all discharges of oil or oil mixtures are prohibited.[176] Second, HELCOM has adopted several recommendations directed at advancing the implementation of MARPOL 73/78 (especially by promoting the use and availability of adequate PRFs[177] and the use of environmental equipment on board of ships[178]), facilitating its enforcement (especially by improving PSC[179]) and ensuring that relevant violations are effectively punished.[180]

Initially HELCOM did not deal extensively with maritime safety, but preferred to leave this matter to IMO (MSC).[181] However, in the wake of recent oil spills, HELCOM has taken a more proactive approach to ensure the safer transport of oil and prevent the occurrence of maritime disasters in the Baltic Sea Area. In September 2001, as a reaction to the *Baltic Carrier* accident, HELCOM held an extraordinary meeting in Copenhagen (HELCOM Extra 2001), which concluded with the adoption of a mile-

174 See, e.g., IMO Recommendation on Navigation Through the Entrance to the Baltic Sea (IMO Res. A. 620(15), 1987, replacing IMO Res. A. 339 (IX), 1975) and IMO Recommendation on the Use of Pilotage Services in the Sound (IMO Res. A. 579(14),1985, replacing Res. A. 427 (XI), 1979).

175 HELCOM MARITIME Recommendations are available at: www.helcom.fi/recommendations/searecs.html.

176 The Baltic Sea has also been designated as a Special Area under Annexes II and V and as a SOX emission control area under Annex VI. See in detail: Chapter 8.6.2.

177 HELCOM Rec. 19/8 (1998) calling for PRF for the delivery of oily wastes from machinery spaces that shall be available at "no special fee". HELCOM Rec. 26/1 (02.03.2005) extended the "no special fee" to cover also garbage and sewage.

178 E.g., HELCOM Rec. 19/10 (26.03.1998) setting out guidelines for holding tankers/oily water-separating or filtering equipment for ships and HELCOM Rec. 25/6 (2.03.2004) on oil-filtering equipment on board ships.

179 HELCOM Rec. 22E/5 (Reg. 11), 10.09.2001, urging contracting parties to carry out PSC under either the Paris MOU or the EC Directive and urging Estonia, Latvia and Lithuania to accede to the 1982 Paris MOU. See also Para. XV of the Copenhagen Declaration, *infra* n. 182.

180 E.g., HELCOM Rec. 19/14 (26.03.1998) on a harmonized system of fines in case a ship violates anti-pollution regulations (MARPOL violations).

181 This is in part due to the fact that officials from the maritime administrations which attend HELCOM MARITIME are particularly active in IMO and were initially reluctant to treat these issues in HELCOM, whose meetings are normally attended by officials from the environmental ministries.

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stone declaration.[182] This was the first time that HELCOM was attended by Transport and Environmental Ministers of the Baltic States as well as representatives of DG TREN of the European Commission. The Baltic Ministers agreed to support new joint initiatives in IMO (MSC or NAV) directed at improving existing routing measures and enhancing the use of pilot services in densely trafficked areas.[183] Moreover, they adopted an additional package of measures to increase the safety of navigation in the Baltic Sea (e.g., compulsory application of Annexes I-V of MARPOL 73/78 and the phasing-out of single-hulled tankers, the use of AIS, and places of refuge). These measures were incorporated into the 1992 Helsinki Convention through amendments of Annex IV and are legally binding.[184] The *Prestige* oil spill off the coast of Spain in November 2002 triggered a call for additional action to prevent the occurrence of a similar catastrophe in the Baltic Sea.[185] As will be discussed in further detail in Chapter 8.8.4.3, as a first reaction, the Baltic coastal States discussed the possibility of putting forward a joint submission in IMO for the designation of the Baltic Sea as a PSSA. From the very beginning, however, this initiative met with strong opposition from the Russian Federation.[186] The EC Baltic States therefore decided to proceed outside the framework of the Helsinki Convention.[187] However, they continued to discuss in HELCOM additional protective measures to be proposed in the Baltic PSSA.[188]

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182 See "Declaration on the Safety of Navigation and Emergency Capacity in the Baltic Sea Area" (Copenhagen Declaration). HELCOM EXTRA 2001 was convened at the request of Denmark in the wake of the collision between the tanker *Baltic Carrier* and the bulk carrier *Tern* which occurred on 29 March 2001 in the deep-water route north-east of Kadetrenden off the Danish coast. The accident caused the biggest oil spill ever in the Baltic.

183 Copenhagen Declaration, Paras. I and II.

184 HELCOM Rec. 22E/5 (10.09.2001) on "Amendments to Annex IV 'Prevention of Pollution from Ships' to the Helsinki Convention". For a detailed analysis of these measures see: A.C. Brusendorff and P. Ehlers (2002), pp. 363-95.

185 See: Resolution adopted at the Helsinki Convention-30 (2004), Para. 1.2; Declaration of the Joint Ministerial Meeting of the Helsinki and OSPAR Commissions (Bremen, 25-26.06.2003), Paras. 28-33; HELCOM Ministerial Declaration (Bremen, 25.06.2003), Para. I.3. See also the Conclusions from the First Joint IMO/HELCOM/EU workshop, 11-2 March 2003, Warnemunde, Germany, Para. 6 and the Chairman's Conclusions at the 5th Baltic States Summit (CBSS), Lusulasmaa, Estonia, 21.06.2004, p. 3.

186 See, e.g., HELCOM Bremen Declaration (25.06.2003), HELCOM Stockholm Declaration (12.09.2003) and OSPAR–HELCOM Ministerial Declaration (Bremen, 26.06.2003).

187 See: joint proposal submitted by Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland and Sweden to the MEPC 51 for the designation of the Baltic Sea area, except the Russian waters, as a PSSA (IMO doc. MEPC 51/8/1, 19.12.2003). The Baltic PSSA was formally designated at MEPC 53, in July 2005.

188 Given the existence of several IMO and HELCOM measures in the area, initially the sponsoring states did not propose any APM. However, an *ad hoc* working group has been established within HELCOM under the leadership of Sweden to discuss APMs building upon the work already carried out by the HELCOM Expert Working Group on Transit Routing. On 3.03.2005, the Baltic sponsoring States submitted to NAV 51 a proposal for a number of routing measures to be adopted as APMs within the Baltic PSSA (i.e., NAV 51/3/6).

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So far, HELCOM has dealt with different aspects of the safety of navigation, such as routing measures for certain parts of the Baltic,[189] enhanced use of pilotage[190] or escort towing,[191] reporting systems,[192] vessel traffic monitoring systems,[193] safety standards for tankers, including double hulls,[194] the safety of winter traffic,[195] and ship-to-ship transfer of oil.[196] All these measures generally implement IMO standards and have been strongly influenced by EC maritime safety legislation which, in many cases, represents maximum standards for most of the Helsinki contracting parties.

According to the latest reports, the level of implementation of the HELCOM Recommendations in the maritime field is far from satisfactory.[197] For the time being, therefore, the Helsinki contracting parties are determined to intensify monitoring, PSC and enforcement in the Baltic Sea (e.g., by reinforcing detection, investigation and the prosecution of violators of anti-pollution regulations). When additional regulatory action is needed (e.g., in the field of places of refuge), this will be done in strict coordination and cooperation with the IMO and the EC.[198]

189 E.g., HELCOM Rec. 15/4 (9.03.1994) on "Additional Maritime Safety and Pollution Prevention Measures in the Baltic Sea Area".

190 E.g., HELCOM Rec. 23/3 (6.03.2002) on enhancing the use of pilots in route T and the Sound as revised by HELCOM Rec. 25/5 (2.03.2004) taking into account IMO Resolution MSC 138 (76).

191 E.g., HELCOM Rec. 25/5 (2.03.2004) on an assessment of the need for escort towing in tanker transport routes to prevent accidents in the Baltic Sea Area.

192 E.g., HELCOM Rec. 1/10 (5.05.1980) on a "Position Reporting System for Ships in the Baltic Sea".

193 E.g. HELCOM Rec. 22E/5 (10.09.2001), Regulation 10, on the use of Automatic Identification Systems (AIS). On 1.07.2005, HELCOM AIS was officially launched.

194 E.g., HELCOM Rec. 22E/5 (10.09.2001), Regulation 4 on double-hull standards for tankers and HELCOM Rec. 12/5 (20.02.1991) on "Promotion of the use of safer tankers while carrying oil". See also: HELCOM Rec. 19/15 (24.03.1998) on minimum requirements for vessels bound for or leaving ports of the Baltic States and carrying dangerous or polluting goods.

195 E.g., HELCOM Rec. 25/7 (2.03.2004) "Safety of winter navigation in the Baltic Sea Area".

196 HELCOM Rec. 24/6 (25.06.2003) on ship-to-ship transfer of oils subject to MARPOL Annex I.

197 See the Status Report on the Implementation of HELCOM Recommendations in the Maritime Field, adopted by HELCOM 24/2003, in June 2003, available at: www.helcom.fi/recommendations/Maritime_Recs.pdf.

198 See, e.g., Minutes of the HELCOM MARITIME 4/2005 (11-13. 10.2005); Outcome of the International HELCOM Conference on Maritime Safety and Response Issues, (Helsinki, 1.03.2005); Resolution adopted at the Helsinki Convention-30 (2004); the Conclusions of the 2003 Joint IMO/HELCOM/EU. See also HELCOM MARITIME Working Programme (2004-2006). All documents are available at: www.helcom.fi/home/en.

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6.5.3 The 1976 BARCON and its Protocol, as amended

The Mediterranean Sea is one of the main shipping routes for the transport of oil from the Middle East, North Africa and the Black Sea towards major ports in Europe and North America.[199] Maritime traffic is particularly intense through the Straits of Gibraltar, Istanbul and Messina in the Sicilian and the Suez Channels and in the proximity of some oil terminals (e.g., Alexandria, Beirut, Genoa and Piraeus), and is expected to increase with the growth of oil production in the Caspian Sea. Like the Baltic Sea, also the Mediterranean is a semi-enclosed sea with a very low water exchange rate and most human activities are concentrated along the coasts. Marine biodiversity is particularly rich in this area, which hosts, *inter alia*, many endangered and migratory species, including marine mammals. The environmental, economic and social consequences of an oil disaster, therefore, may be catastrophic.[200] As already mentioned in Chapter 1, the main legal aspect relating to the Mediterranean Sea is the absence of EEZs. It is worth mentioning that for the purpose of this case study, this is not a relevant factor since the high seas and the EEZ regimes concerning vessel-source pollution are practically the same.

Since the beginning, preventing oil spills has been a priority action within the framework of the BARCON. Originally, however, regional cooperation was confined to accidental pollution and emergency response.[201] Article 6 of the 1976 BARCON, as amended, introduced a general obligation to prevent operational pollution, but this was limited to the adoption of "discharge" standards in conformity with international law and to the effective implementation of existing GAIRAS in the Mediterranean Sea. For a long time, BARCON contracting parties considered that operational pollution should be governed exclusively by global conventions, especially MARPOL 73/78, and Article 6 should form the basis for coordinating joint actions in the IMO.[202] Therefore, they took action for the designation of the Mediterranean Sea as a Special Area under

199 See, in general: EEnvA, "State and Pressure of the Marine and Coastal Mediterranean Environment" (2000), available at: http://reports.eea.eu.int/medsea/en/medsea_en.pdf. Of the estimated 2,000 vessels which cross the Mediterranean every day, around 250-300 are oil tankers, see: http://oils.gpa.unep.org/framework/region-4-next.htm.

200 A list of the major oil spills in the Mediterranean is available at: http://oils.gpa.unep.org/framework/region-4-next.htm.

201 See 1976 BARCON, Article 9 and its 1976 Protocol on "co-operation in dealing with pollution emergencies". Conversely, Article 6 on "Pollution from ships" was not accompanied by an executing Protocol.

202 All Reports of the BARCON-MOPs, from 1983 to 1993, stressed the need to ratify existing IMO instruments, in the first place MARPOL 73/78. See: Report of the MOP-3 (UNEP/IP.43/6 (1983), para. 77); Report of the MOP-4 (UNEP/IG.56/5 (1985), Section III, p. 23); Report of the MOP-5 (UNEP/IG.74/5 (1987), para. 65); Report of the MOP-7 (UNEP(OCA)/MED IG.2/4 (1991), Annex IV, p.15); Report of the MOP-8 (UNEP(OCA)/MEDIG.3/5 (1993), Annex IV, Section I.A.3.2), all available at: http://195.97.36.231/dbtw-wpd/sample/Final/MAPPredefined.htm.

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MARPOL's Annex I where oil discharges are generally prohibited.[203] With the BARCON revision process, however, Mediterranean coastal States took a partially different approach.[204] In 2002, the 1976 Emergency Protocol was replaced by a new Protocol, which includes both accidental and operational pollution.[205] The focus, however, is still placed on pollution response and on promoting the development of global standards in the IMO and their full implementation.[206]

The new Protocol contains requirements on monitoring,[207] exchange of information,[208] PRFs,[209] and an assessment of the environmental risk of maritime traffic,[210] which in essence reproduced existing international rules. In some aspects, however, the 2002 Protocol is more stringent than the international regime. For instance, it adopts a new definition of "pollution incidents" which, in the light of the precautionary approach, includes occurrences which "may" result in "a discharge" of oil (or other harmful substances) and "may pose a threat" to the marine environment.[211] This broad definition entitles the Mediterranean coastal States to take preventive action even before a discharge has occurred and regardless of the gravity of the discharge and/or damage.[212] Finally, the new Protocol contains important clarifications on how to deal with

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203 In addition the Mediterranean Sea is also a Special Area under Annex V. See in detail *infra* Chapter 8.6.2.

204 On the drafting history of the new Emergency Protocol see: E. Raftopoulos (2001), pp. 45-49.

205 The new Protocol Concerning Co-operation to Prevent Pollution by Ships and, in Case of Emergency, to Combat Pollution of the Mediterranean (2002 Emergency Protocol) was concluded and opened for signature on 25.01.2002 and entered into force on 17.05.2004, replacing the 1976 Protocol.

206 2002 Emergency Protocol, Articles 3(1)(a) and 4(2). The Preamble, moreover, expressly acknowledges the role of the IMO and the importance of cooperating within the framework of the IMO in the development of international rules to prevent vessel-source pollution. It also recognizes the contribution of the EC to the implementation of international standards.

207 2002 Emergency Protocol, Article 5.

208 *Ibid.,* Article 7.

209 *Ibid.,* Article 14(1), requires Parties "to take all necessary steps" to ensure that efficient facilities are available at reasonable cost and without causing undue delay to ships.

210 *Ibid.,* Article 15 requires parties to assess the environmental risk of existing international shipping routes and take appropriate measures to reduce the risk or the consequences of accidents, but acting in conformity with international law and the global mandate of the IMO. Appropriate measures may include compulsory ship reporting and other mandatory measures adopted in the Mediterranean Specially Protected Areas (SPAMI) under the 1995 SPA Protocol of the BARCON, which will be examined in Chapter 8.5.4.

211 The new definition of "pollution incidents" introduced by Article 1(b) is much broader than "emergencies" under the 1976 Protocol and "marine casualties" under Article 221(2) of the LOSC. It reproduces the definition of an oil pollution incident provided in Article 2(2) of the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation. The same definition is also contained in Article 2(9) of the Helsinki Convention.

212 According to Article 10(b) of the 2002 Protocol, moreover, Parties shall "take every practicable measure to prevent, reduce and, to the fullest possible extent, eliminate the effects of the pollution incident".

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ships in distress which present a threat to the marine environment, including provisions on places of refuge.[213] These provisions have been influenced to a large extent by the EC's maritime safety legislation.

The new Protocol does not contain provisions on PSC, which is already regulated under the Paris MOU, the Mediterranean MOU and the EC Directive on PSC.[214] Given the fact that some BARCON contracting parties do not participate in any of these PSC systems,[215] there are actually four different PSC regimes which are applicable in the Mediterranean Sea Area. The lack of PSC provisions in the 2002 Protocol, therefore, has been considered a missed opportunity for promoting better coordination between the different PSC regimes.[216]

The Protocol is administered by the Regional Marine Pollution Emergency Centre for the Mediterranean Sea (REMPEC) and its implementation is supervised by the Ordinary Meetings of the Parties to the Protocol.[217]

Following the *Prestige* sinking, at their 13th ordinary meeting, held in Catania, in 2003, the BARCON parties recognized the need to take additional action to ensure the safer transport of oil and to avoid the occurrence of a similar catastrophe in the Mediterranean Sea. The 13th MOP called for urgent ratification of the 2002 Protocol and the development of a Regional Strategy for the Prevention of (and Response) to Marine Pollution from Ships.[218] This Strategy will promote, *inter alia*, the effective implementation of LOSC and IMO Conventions as well as the stricter enforcement and prosecution of illegal discharges and new joint initiatives in the IMO for the adoption of additional measures to better control maritime traffic including, if appropriate, the designation of a PSSA in the Mediterranean Sea (e.g., Adriatic Sea). The 14th MOP, held in November 2005, recommended that contracting parties should adopt and implement the Strategy as endorsed by REMPEC in April 2005.[219]

So far, the BARCON parties have not been as active in the IMO as the Baltic and North Sea coastal States. Apart from the initiatives directed at designating the Mediterranean as a Special Area under Annex I (and V) of MARPOL 73/78, there have been no joint BARCON submissions to IMO and the few submissions put forward by indi-

213 2002 Protocol, Articles 10(2) and 16. In the absence of clear international rules on this matter, the 2002 Protocol seems particularly innovatory.

214 5 BARCON parties (i.e., Croatia, France, Greece, Italy and Spain) are also members of the Paris MOU; 9 BARCON parties (i.e., Algeria, Cyprus, Egypt, Israel, Lebanon, Malta, Tunisia and Turkey) are members of the Mediterranean MOU and 7 BARCON parties are EC member states and are bound by the EC directive on PSC.

215 I.e., Albania, Bosnia and Herzegovina, Libya, Monaco, Syria.

216 For a full discussion on this point see: E. Raftopoulos (2001), pp. 70-72.

217 REMPEC, based in Malta, is administered by the IMO. Its objectives, functions and activities are decided by the BARCON-MOPs. See, in detail: www.rempec.org.

218 Catania Declaration (MOP-13), Paras. 16-7.

219 14th MOP of BARCON (UNEP (DEPI)/MED IG. 16/13), Recommendation II.A.2.

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vidual Mediterranean coastal States have been totally uncoordinated.[220] Submissions from Cyprus, Greece and Turkey have been mainly directed at preserving the freedom of navigation and the interests of the shipping industry. Initiatives from France and Spain have been mostly related to their North Atlantic waters. Such a lack of coordination may be explained by the reluctance of the maritime administrations of the contracting parties (and DG TREN) to talk about operational pollution within the framework of BARCON, which is normally attended by officials from the Environmental Ministries. The BARCON is not considered to be the proper platform to discuss and coordinate positions for the IMO.[221] The entry into force of the 2002 Protocol (in 2004) and the adoption of the new strategy (in 2005), however, seem to suggest that maritime administrations are less sceptical about discussing vessel-source pollution within the framework of BARCON.[222]

6.5.4 The North-East Atlantic

The North-East Atlantic, including the North Sea, is one of the busiest shipping areas in the world and the maritime transport of oil represents a major threat in these waters.[223] Not surprisingly, the main oil tanker disasters, such as the *Erika* and the *Prestige,* occurred in this area.[224] North-East Atlantic coastal States are major importers, but also some of the main producers of oil and derivative products. Some of the main oil terminals (e.g., Antwerp, Hamburg, and Rotterdam) and the straits used for international navigation (e.g., the English Channel) are located in this area. A large proportion of the maritime traffic, however, involves foreign tankers in transit from African, Baltic, and Mediterranean or ports directed towards the North American markets. The potential for damage is increased by the location of major shipping lanes (e.g., the Finisterre TSS) and port facilities (e.g., La Coruña) in close proximity to ecologically

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220 See: submissions brought before the IMO's main committees in the past seven years (i.e., MEPC 43-54, MSC 69-81 and LEG 79-90). The few individual submissions mostly concern routing measures or pollution from vessels other than oil (e.g., harmful organisms in ballast waters or antifouling paints).

221 At the 14th MOP, the IMO, which was present with a large delegation, made it clear that initiatives related to ship-source pollution would be better taken by the IMO, rather than regional seas conventions.

222 Decision 22/2, 7.02.2003, of the 22nd UNEP Governing Council/Global Ministerial Environment Forum, invited governments to broaden participation through the involvement of all relevant national ministries (Para. 8 (c), p.18).

223 E.g., International Tanker Owners Pollution Federation Limited (ITOPF), Regional Profiles, A Summary of the Risk of Oil Spills & State of Preparedness in UNEP Regional Seas Regions, available at: www.itopf.com/country_profiles/profiles/northeastatlantic.pdf. See also: http://oils.gpa.unep.org/framework/region-3.htm.

224 Among the major disasters in the area: *Torrey Canyon* (1967), *Amoco Cadiz* (1978), *Aegean Sea* (1992), *Braer* (1993), *Sea Empress* (1996), *Erika* (1999). See: IMO doc. MEPC 49/8/1, Annex 2, at 4.

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sensitive areas protected under different international regimes and fishing grounds which are important to the economy of coastal States.

At the political level, the North-East Atlantic coastal States have been always strongly committed to reducing the environmental impact of oil tanker traffic in the region. This has always been a priority action within the framework of the NSMCs.[225] Maritime safety issues are regularly on the table at the Committee of the North Sea Senior Officials (CONSSO), which supervises the follow-up to the NSMC Declarations.[226] The accent, however, is always on the need to take coordinated action for the development of legal instruments in the IMO. Coordinated initiatives in the IMO resulted, for instance, in the designation of the North-West European Sea as a Special Area under Annex I of MARPOL 73/78, where no discharges of oil are admitted.[227] On the other hand, national and EC initiatives are supported as long as they do not jeopardize the role of the IMO and contribute to the better implementation and enforcement of IMO standards, especially by promoting PSC and adequate PRFs. NSMC Declarations have a strong influence on the further development of legally binding measures in the IMO and EC maritime safety legislation.

Despite the strong political commitment of the North Sea coastal States, the 1992 OSPAR Convention does not regulate marine pollution from shipping, neither accidental nor operational.[228] The main philosophy in OSPAR is to avoid any duplication of work with other international organizations or efforts undertaken under other agreements.[229] Annex V, for instance, expressly requires the OSPARCOM to refer shipping-related issues to the IMO in order to achieve an appropriate response.[230] However, the OSPAR does not seem to preclude all actions related to shipping.[231] According to the Preamble of Annex V, for instance, all measures taken to implement the Annex need to be consistent with the LOSC provisions on navigation and the exploitation of natural resources. Presumably, therefore, OSPARCOM may adopt shipping-related

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225 See: 5th NSMC Declaration (Bergen, 2002), Part IV; 4th NSMC Declaration (Esbjerg, 1995), Part V, Paras. 41-48; 3rd NSMC Declaration (The Hague, 1990), Paras. 24-27; 2nd NSMC Declaration (London, 1987), Paras. 25-33; 1st NSMC Declaration (Bremen, 1984), Part 2. The 6th NSMC, which will take place on 4-5.05.2006, will focus on the environmental impact of shipping and fisheries.

226 CONSSO meets one or more times a year at irregular intervals and the meetings are attended by senior officials representing the North Sea States and the EC Commission. The CONSSO carries out the preparatory work for the 6th NSMC.

227 The joint initiative was envisaged in the 4th NSMC Declaration (Esbjerg, 1995), Para. 44.1. The designation entered into force on 1.08.1999. The North Sea is also a Special Area under Annex V (garbage) and a SOX Emission Control Area under Annex VI. See in detail: Chapter 8.6.2.

228 See, *inter alia*, L. de La Fayette (1999), p.247; E. Hey, T. IJlstra and A. Nollkaemper (1993), p. 1.

229 See, e.g., OSPAR, Article 7 and Annex V, Article 4(2).

230 The cooperation between the two organizations has been formalized in a Cooperation Agreement between OSPARCOM and IMO concluded in 1999 (IMO doc. A 21/26, 17 July 1999).

231 See: E. Hey (2002), p. 325.

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measures as long as they do not affect the navigation rights of other states under the LOSC. As previously discussed, the LOSC allows coastal States, acting alone or on a regional basis, to control certain aspects of shipping without going through the IMO (e.g., by setting their own port entry conditions, discharge and navigational standards in the territorial sea). However, since a large proportion of the local traffic involves tankers flying the flag of non-OSPAR contracting parties or directed towards ports outside the region, the OSPAR contracting parties decided that operational pollution should continue to be regulated within the framework of the IMO and accidental pollution within the framework of the 1969 Bonn Agreement.[232]

The Bonn Agreement, concluded between 9 North Sea coastal States and the EC, deals primarily with pollution response in cases of maritime disasters involving oil (or other hazardous substances), but also contains some provisions on the prevention and detection of violations of anti-pollution standards.[233] In particular, it requires parties to conduct aerial surveillance and to keep each other informed about any casualty and the presence of oil "likely to constitute a serious threat" to other contracting parties.[234] The agreement makes it clear that its provisions do not prejudice the rights and obligations of the contracting parties under the LOSC and other international conventions in the field of preventing marine pollution.[235]

The North-East Atlantic coastal States (especially the Germany, the Netherlands, Norway, and the UK, are the most active States in all IMO Committees.[236] However, unlike the Baltic States, they lack an institutional framework where their positions can be formally coordinated when preparing IMO meetings. The North Sea Conference may represent an important platform for promoting joint initiatives, but its sporadic and irregular meetings do not offer a proper forum for coordination, while discussions within

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232 See, e.g., Joint Helsinki-OSPAR Ministerial Meeting (Bremen, 2003), Statement on the European Marine Strategy, Paras. 49-54, available at: www.ospar.org/eng/html/welcome.html. See also: OSPARCOM Ministerial Meeting (Sintra, 1998), Statement on Future Action (available at: www.ospar.org/eng/html/md/sintra.htm).

233 Adopted in 1969 in response to the *Torrey Canyon* accident, the Bonn Agreement was revised in 1983 to include the EC and to cover substances other than oil. The current members are Belgium, Denmark, the EC, France, Germany, Ireland, the Netherlands, Norway, Sweden, and the UK. The text of the revised Agreement, which entered into force on 1.09.1989, is available at: www.bonnagreement.org/eng/html/welcome.html. On 17.10.1990, France, Morocco, Portugal, Spain and the EC signed the Lisbon Agreement (see: EC OJ, L 267, 28.10.1993, pp. 22-8), which establishes a similar cooperation in the southern North-East Atlantic. The Agreement has not yet entered into force.

234 Bonn Agreement, Article 1.1; Article 5 and Article 6A. In September 2003, the Bonn Agreement adopted a new Oil Appearance Code for estimating volumes of oil in spills at sea.

235 Bonn Agreement, Article 8. See also the Lisbon Agreement, Articles 11and 14(1).

236 Most of the submissions to the IMO's main committees in the past five years (i.e., MEPC 43-51; MSC 69-79; LEG 79-89) have been made by single States individually, but there are also examples of bilateral or trilateral submissions (e.g., joint submission by Denmark, Germany and the Netherlands for the designation of the Wadden Sea as a PSSA (IMO doc. MEPC 48/7/2)).

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the Bonn Agreement focus almost exclusively on pollution response. The EC, therefore, may provide an effective framework for coordinating the action of the EC North-East Atlantic coastal States in IMO, as indicated by the successful joint initiative for the designation of the Western European Atlantic, including the English Channel, as a PSSA.[237]

6.6 Weaknesses of the Existing International Regime

Despite this complex and articulated international framework, the maritime transport of oil continues to represent a threat to the marine environment and maritime disasters continue to occur. The main problem is that certain flag States, not only FOCs,[238] have so far been unwilling or simply unable to exercise effective control over their vessels and to fully implement and enforce their international obligations.[239] Most of the time, indeed, poor performance is the result of a lack of necessary expertise, experience and resources to comply with the highly technical standards set by the IMO.[240] In addition, the LOSC provisions on the implementation and enforcement of a flag State's obligations are not very precise. To date, moreover, many flag States have had little incentive to comply with international standards. Regrettably, operating substandard ships is profitable and creates a competitive advantage for non-complying registers (and operators) at the expense of the well-performing ones.[241] As already mentioned, the IMO has no enforcement powers and there are no binding mechanisms in place at the international level to force flag States to apply international standards to their ships. As a result, there are great differences in the way rules are implemented and enforced. Available mechanisms to promote effective control by flag States over their vessels have not been very successful either. Regrettably, some classification societies release certificates without adequate inspections and port State controls have not been sufficiently strict to discourage violations.[242]

To address this situation, new efforts have been undertaken within the IMO and the UN framework towards reinforcing the control of flag States, both FOCs and

237 IMO doc. MEPC 49/8/1, 11.04.2003. See, for more details, *infra* Chapter 6.8.3.

238 Even though FOCs have traditionally been known for not complying with international maritime safety, environmental and labour standards, the number of well-performing FOCs is increasing, see, for instance, 2004 Annual Report of the Paris MOU (consultable at: www.parismou.org).

239 For an overview of the root causes of the reluctance of flag States in fulfilling their obligations under the LOSC and IMO instruments see: Report of the Consultative Group on Flag State Implementation (FSI Report), *supra* n. 39.

240 FSI Report, *supra* n. 39; 2004 UNSG Report (Para. 307); IMO Secretariat, "Comprehensive Analysis of Difficulties Encountered in the Implementation of IMO Instruments" (IMO doc. FSI 12/8/1, 19.12.2003).

241 See, OECD (2003), *supra* n. 19.

242 E.g., 2004 Annual Report of the Paris MOU, *supra* n. 238.

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traditional registers, over their vessels, assisting them in better performing their international obligations, clarifying and further elaborating flag State responsibilities in matters of maritime safety and marine environmental protection, and discouraging substandard shipping.[243] These initiatives, however, are not legally binding and their effectiveness will depend on the willingness of flag States to comply.

There is no doubt that merchant shipping is better regulated at the global level and the primacy of the IMO as "the" only competent body in shipping-related matters is not in question. However, the global approach also has its own limits. The adoption of standards in IMO and their entry into force may be a time-consuming process and the organization has sometimes been accused of being "slow" in reacting.[244] The IMO normally works through consensus and reaching agreements among 164 parties upon highly technical standards is not a simple task. The objective of the IMO, moreover, is to establish the highest "practicable" standards which are feasible for global implementation.[245] Negotiations, therefore, normally result in compromise solutions and are frequently criticized for being not sufficiently stringent and for following the "lowest common denominator". IMO instruments often leave ample discretion to maritime administrations and contain derogations and exceptions which jeopardize their uniform implementation.[246] In addition, most IMO standards do not apply to domestic voyages. Finally, the IMO has sometimes been criticized for its strong shipping orientation. The contributions to the IMO budget are paid by IMO Members in amounts proportional to the tonnage of their merchant fleet. As a consequence, States with the largest fleets, including some of the main FOCs, are the main contributors to the organization.[247] Likewise, the entry into force of IMO Conventions normally depends on the ratification by flag States representing the majority of the world's tonnage. These factors create some concerns about the capacity of the IMO to take the interests of coastal States sufficiently into account.

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243 E.g., IMO Voluntary Member State Audit Scheme, *supra* n. 128. The IMO, moreover, is in the process of adopting a Draft Implementation Code which spells out the criteria for the effective and uniform implementation of IMO instruments and the relevant LOSC provisions by flag, port and coastal States (IMO doc. FSI 12/7/2, 12.12.2003). The UNGA (i.e.: 2004 UNGA Resolution (Para. 41) and 2003 UNGA Resolution (Para. 29)) has requested the UNSG to prepare, in collaboration with the relevant agencies, a comprehensive elaboration of flag State responsibilities under the LOSC and related instruments, including the consequences of non-compliance. This exercise has resulted in the FSI Report, *supra* n. 40.

244 In his speech before the EP MARE in January 2004, the IMO SG, Mr. E. Mitropoulos, presented the idea of accelerating the terms of the tacit amendment procedure (e.g., amendments to enter into force after 18 months for the SOLAS and 16 months for MARPOL, following their adoption by the MSC or MEPC), which have been considered for too long.

245 See the speech by the IMO SG Mr. Mitropoulos before the EP MARE, *supra* n. 244.

246 See, for instance, the latest amendments to Reg. 13F and Reg.13G, Annex 1 to MARPOL.

247 The top three contributors are: Panama, Liberia and Bahamas, see: www.imo.org/home.asp.

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6.7 The EC Framework for the Prevention of Oil Pollution from Shipping

6.7.1 The Establishment of the Common Policy on Safe Seas (CPSS)

European waters and coastlines have always been particularly exposed to the threat posed by the maritime transport of oil.[248] Combating oil pollution from shipping and promoting safety at sea have been a priority of the common environmental policy since its inception.[249] In the late 1970s, in the wake of several catastrophic accidents (e.g., the *Amoco Cadiz* disaster in 1978), the European Council[250] and the EP[251] urged the Community and the member states to increase efforts against oil spills and tanker disasters and called for the establishment of a comprehensive EC policy to increase the safety of oil transport along the European coasts. Despite the strong political commitment and several attempts by the Commission, the Community's action in this field has for long time been opposed by the member states.[252] Although after the Single European Act (1987), the Community's competence in maritime safety matters found sufficient legal bases in the EC Treaty and was recognized by the ECJ,[253] such competence was still challenged by the member states. What was contested in the first place was the fact that Article 84(2) (now Article 80(2) EC) of the common transport policy

248 The EU is very dependent on maritime transport. It occupies the number one position in the trade in petroleum products and about 90 per cent of the oil trade with the EU relies on sea transport. About 70 per cent of oil tanker movements in the EU are along the Atlantic and North Sea coasts, while 30 per cent goes via the Mediterranean. See, e.g., Communication from the Commission on the Third Package of Legislative Measures on Maritime Safety in the European Union (COM (2005)585, 23.11.2005), and Communication from the Commission on the safety of oil transported by sea (COM (2000) 142).

249 E.g., First EAP (Para. 25); Third EAP (Para. 16); Fourth EAP (Para. 4.2.2). The accent is always placed on the harmonized and effective enforcement of IMO instruments, especially MARPOL. See: L. Kramer (1997), Chapter 13; S.P. Johnson and G. Corcelle (1989), pp. 102-106; K.R. Simmonds (1989), pp. 75-81. For a full discussion on the CPSS, see: W. Hui (2005), pp. 292-95; J. de Dieu in H. Ringbom (ed.) (1997), pp. 141-163; A. Nollkaemper (1998); E. Hey and A. Nollkaemper (1995), pp. 281-300; L. Pineschi in E.L. Miles and T. Treves (eds.) (1993), pp. 526-538; K.R. Simmonds (1989), pp. 75-81.

250 See, e.g., Council Resolution setting up an action programme on the control and reduction of pollution caused by hydrocarbon discharges at sea (OJ C 162/1, 8.07.1978) and the decisions adopted at the European Council of Copenhagen, 21.12.1978.

251 E.g., EP Resolution 17.03.1989 (OJ C96 (1989)), adopted in the wake of the *Herald of Free Enterprise* disaster and EP Resolution 18.01.1988 (OJ C 38 (1988)) adopted in the wake of the collision between the *Kharg 5th* and *Aragon* tankers.

252 The Council, for instance, rejected the 1980 Commission proposal for a Directive on PSC (OJ C 192/8) and the 1983 Proposal for a Directive on emergency intervention plans to combat accidental discharges of oil at sea (OJ C 7273). See: S.P. Johnson and G. Corcelle (1989), p. 106.

253 I.e., Article 84(2) (now Article 80(2)) on maritime transport and Article 130s (now Article 174) EEC on environmental protection. The ECJ recognized the Community's competence in Case C-167/73, *Commission v. France* (Para. 32) and Case C-379/92, *Peralta* (Para. 14).

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did not make any reference to and was not intended to regulate maritime safety, but maritime transport in general. The Community's action in maritime safety matters, in their view, was not justifiable according to the attribution principle and was not even necessary on the basis of the subsidiarity and proportionality principles. Given the need for uniformity in shipping regulations, maritime safety and anti-pollution standards were better laid down at the global level by the IMO. IMO instruments were considered to be effective enough and there was no need for additional Community legislation.[254] In reality, for most member states shipping is a very sensitive area and for long time they tried to keep the Community away from maritime issues in order to maintain their individual representation and pursue their national interests in the IMO.[255] This trend has been favoured by the unanimity rule for the adoption of transport measures under the EEC Treaty. Given the strong diversity of interests among maritime nations (e.g., Denmark, France, Greece, and the U.K.), member states with mixed interests (e.g., Germany and the Netherlands), and those with more coastal-oriented interests (like Italy in the Mediterranean), agreeing on common maritime safety rules proved to be very difficult. Before the Treaty of Maastricht, therefore, the EC had almost exclusively relied on the implementation of IMO standards by the member states. The Council adopted several Resolutions requiring the member states to ratify the main IMO Conventions,[256] and took some limited regulatory actions in fields which could better be regulated at the EC level, such as pollution response,[257] navigational standards (mainly reporting requirements) in sensitive areas,[258] and measures to avoid the distortion of competition

254 See: P.J. Slot in: E.L. Miles and T. Treves (eds.) (1993), p. 522.

255 In 1987, for instance, the Council rejected the Commission's proposal on the EC's accession to MARPOL 73/78. See: Written Question 2388/87, in: OJ C289/33 (1988).

256 E.g., Council Recommendation 78/584 (26.06.1978, OJ L194/17) urging member states to ratify SOLAS by 1.01.1979, its 1988 Protocol by 30.06.1979, MARPOL 73/78 by 1.06.1980 and ILO Convention 147 on Minimum Standards in Merchant Ships by 1.04.1979. See also Council Recommendation 79/114 (OJ L 33/33) on the signature and ratification of the 1978 STCW and Resolution 19/06/1990 (OJ C 206/1) asking member states to intensify PSC as provided in the Paris MOU in order to ensure stricter compliance with SOLAS and MARPOL.

257 See: Community Action Programme on the control and reduction of pollution caused by hydrocarbons discharged at sea (OJ 1978 C 162) and Council Decision 81/971/EEC setting out a Community information system on marine pollution caused by hydrocarbons (OJ L 355); both replaced by Decision 2850/2000/EC, on the Community framework for cooperation in the field of accidental and deliberate marine pollution for the period 2000-2006. See in detail: H. G. Nagelmackers, (1980), pp. 3-18; L. Pineschi (1992), pp. 526-8; S.P. Johnson and G. Corcelle (1989), pp. 103-6.

258 See: Council Directive 79/115/EEC on the compulsory pilotage of vessels by deep-sea pilots in the North Sea and the English Channel; Council Directive 79/116/EEC on minimum requirements for tankers entering or leaving EC ports; Council Decision 82/887 on an EEC concerted action project on shore-based marine navigation systems; Council Decision 92/143 on radio-navigation systems for Europe. It is interesting to note that the Community Declaration upon the signature of the LOSC (6.12.1984, reproduced in Annex I to this book), unlike the Declaration upon formal confirmation (reproduced in Annex II), does not refer to the aforementioned Directives. This may be indicative of the initial reluctance of member states

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in the maritime transport sector.[259] In addition, the Community acceded to several international agreements in the field of maritime safety.[260]

The situation changed with the entry into force of the Maastricht Treaty, which introduced a specific legal basis for the adoption of transport safety measures (Article 71(1)(c) EC) and extended QMV to maritime transport policy (Article 80(2) EC). In addition, political and economic considerations triggered an increased Community involvement in this field. In the wake of a series of maritime disasters which occurred in the winter of 1992-1993 off the European Atlantic coasts (e.g., the *Aegean Sea* and the *Braer* accidents*),* it became evident that member state implementation of IMO rules was no longer enough to ensure an adequate level of protection in European waters.[261] Besides, the general lack of implementation of international rules was affecting the competitive position of the European merchant fleet.[262] To respond to the public intolerance against oil spills and preserve European competitiveness, in 1993 the Council established a common policy on safe seas (CPSS) with the double objective being to guarantee "safer seas and cleaner oceans" and to protect the competitiveness of the European shipping industry.[263] Although the CPSS envisages some regulatory action by the Community in the field of maritime safety, it does not represent a real departure from the traditional global approach and the IMO is still considered as the competent body for the adoption of shipping-related standards.[264] However, the effectiveness of the IMO regime is severely affected by a series of factors (e.g., the lack of adequate control and enforcement mechanisms, the non-binding nature of many IMO standards and the high level of discretion) which make it difficult to effectively tackle the causes of maritime disasters.[265] Complementary Community regulatory actions, therefore,

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to recognize the EC's competence in maritime safety matters.

259 These measures fall within the scope of EEC Shipping Policy and are not covered in this book. However, it is interesting to mention Council Regulation EEC/613/91 on the transfer of ships from one register to another within the Community, as amended, which requires member states to guarantee a high level of ship safety and environmental protection and provides for the mutual recognition of safety requirements between member states. See, in general P.J. Slot in L. Miles and T. Treves (eds.) (1993), pp. 489-525.

260 The EC acceded to the 1976 BARCON Emergency Protocol (Council Decision 81/420/EEC), the Bonn Convention (Council Decision 84/358/EEC) and the Lisbon Agreement (Council Decision 93/550/EEC).

261 The Fifth EAP for the period 1992-1995 called for new legislative proposals for preventing environmental damage from shipping activities. See, in general, J. de Dieu in H. Ringbom (ed.) (1997), pp. 141-163.

262 See: Communication from the Commission, "Progress Towards a Common Transport Policy", COM (85) 90. See also: A. Nollkaemper (1998), pp. 4-6 and J. de Dieu in H. Ringbom (ed.) (1997), p. 142.

263 Council Resolution, 8.06.1993 (OJ C271/1) endorsing the Commission's communication on safe seas (COM (93) 66, 24.02.1993). See also EP Resolution on a common policy on safe seas (OJ C91/301, 1994).

264 Of a different opinion are: E. Hey and A. Nollkaemper (1995), p. 282.

265 See, e.g., COM (93) 66, p. 12.

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appeared to be justified on the basis of the subsidiarity and proportionality principles. The CPSS set up an Action Programme based on four pillars: 1) the convergent implementation of global international rules within the EC (e.g., by giving effect to IMO instruments, including non-binding resolutions);[266] 2) the uniform enforcement of global (IMO) rules for all ships bound for European ports regardless of their flag (e.g., by enhancing PSC);[267] 3) the development of maritime infrastructures to ensure the safety of navigation and prevent accidental and operational pollution (e.g., traffic restrictions in sensitive areas, reporting systems, VTS, and PRFs);[268] and 4) the enhanced role of the Community in the global rule-making fora, especially in the IMO.[269] These pillars have been further developed by the Commission in its 1996 Communication "Towards a New Maritime Strategy"[270] and still represent the main reference for the EC's actions in this field. The Community's accession to the LOSC in 1998, and the extension of the co-decision procedure with the EP for the adoption of maritime safety legislation (Amsterdam Treaty) had a strong influence on the further development of the CPSS.[271] The *Erika* sinking off the coast of Britain in December 1999 and the *Prestige* disaster off the coast of Galicia in November 2002 occurred when the CPSS had been almost fully implemented. These accidents triggered a more proactive approach by the Community and a significant tightening of the EC maritime safety rules with particular attention being paid to the environmental hazards posed by oil tankers.[272]

6.7.2 EC Decision-Making in Maritime Safety and Environmental Aspects of Shipping

Article 80(2) (ex Article 84(2)) EC on maritime transport has been used as the legal basis for the implementation of the CPSS and the adoption of EC maritime safety legislation. Article 80(2) was introduced in order to create a special regime for transport by sea compared to transport by road, rail or inland waters, which was originally conceived as a common policy (like commercial and fisheries policies) under the

266 CPSS, Chapter 1 *(iii)*, Paras. 19-35.

267 *Ibid.,* Chapter 2, Paras. 57-75.

268 *Ibid.,* Chapter 3, Paras. 83-120.

269 *Ibid.,* Chapter 4, Paras. 146-151. Para. 151 calls for exploring the ways and possibilities for the EC to become a member to the IMO.

270 The 1996 Strategy promotes maritime safety as a fundamental tool to foster competitiveness within the EC shipping sector. See: COM (96)81, 18.03.1996. Serious attention is also being paid to the need to combat the increasing flagging out from EC registers to open registers. The Strategy has been endorsed by the Council in its Resolution on a new strategy to increase the competitiveness of Community shipping, 24.03.1997 (OJ 1997 C109).

271 Since the accession to the LOSC, the Commission has started exploring the rights and duties stemming from the Convention, while the participation of the EP in the decision-making has raised the environmental content of the maritime safety legislation.

272 E.g., the Commission's Report for the Biarritz European Council on the Community's Strategy for safety at sea (COM (2000) 603), and the Commission's Communication on the safety of oil transported by sea (COM (2000) 142).

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exclusive competence of the Community.[273] Conversely, the Council has a right ("may") to decide "whether, to what extent and by what procedure" appropriate provisions may be adopted for sea transport. The Community's competence in the maritime transport sector, therefore, was not intended to be exclusive, but would continue to be shared with the member states unless the Council decided to exhaustively regulate the matter (e.g., by adopting regulations setting out maximum standards). So far, the Council has not made any extensive use of this possibility. Nevertheless, some still defend the exclusive nature of the Community's competence in maritime safety issues on the basis of Article 71(1)(c) EC, which provides the Community with exclusive competence in the field of transport safety.[274] However, both the Treaty (Article 80(1)) and the Court's case law exclude the application of the general rules of maritime transport policy to the field of maritime transport.[275] Besides, EC maritime safety legislation is based on Article 80(2) and not on Article 71(1)(c).

In addition, some environmental aspects of shipping (e.g., the sulphur content of marine fuels, pollution response, ship disposal, and air emissions from ships) have been regulated on the basis of Article 175 EC concerning the common environmental policy.[276] It is worth reiterating that Directives adopted under Article 175 EC always contain minimum standards and allow member states to adopt more stringent rules (Article 176). These pieces of legislation, however, remain outside the scope of the discussion.

Initially, there was some competition within the EC Commission between DG TREN and DG ENV as to who was responsible for maritime safety. Finally, it was decided that DG TREN (at that time DG VII) had to take the lead. Currently, the Maritime Safety Unit carries out most of the work in the field of maritime safety and vessel-source pollution: it drafts the proposals for new EC legislation and supervises the implementation of existing legislation. DG ENV, however, is still responsible for some environmental aspects of shipping.[277]

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273 However, this construction of the EC Treaty has never been implemented. See: L. Kramer (2000), p. 266; J.H. Jans (2000), p. 59; I. Macleod *et al.* (1996), p. 256.

274 Article 71(1)(c) EC places the Council under a legal duty ("shall") to adopt common rules concerning "measures to improve transport safety".

275 E.g., Case C-167/73, *Commission v. France* (Para. 32).

276 See, e.g., Directive 2005/33/EC on the sulphur content of marine fuels; Decision 2850/2000/EC on the Community framework for cooperation in the field of accidental and deliberate marine pollution; EC Regulation 295/93 on Waste Shipment implementing the Basel Convention, as amended; Council Decision 2004/575/EC concluding the 2002 Emergency Protocol to the BARCON. For a general discussion on the proper legal basis for the adoption of EC vessel-source pollution measures see: E. Hey and A. Nollkaemper (1995), pp. 285-7.

277 Within DG ENV, Unit A5 (Civil Protection and Environmental Accidents) is responsible for the implementation of the Community framework on pollution response; Unit C1 (Clean Air & Transport) is responsible for the EU strategy to reduce air emissions from ships; Unit D2 (Protection of Water & Marine Environment) is working in close collaboration with DG TREN on harmful aquatic organisms in ballast waters.

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Maritime safety and vessel-source pollution legislation based on Article 80 (2) EC (or Article 175) is adopted according to the co-decision procedure under Article 251 EC. The Commission's proposals, therefore, are submitted to the Transport Council and the EP for a first, and eventually a second, reading. Within the Transport Council negotiations take place mainly in the Shipping Working Party, which is composed of officials from the maritime authorities of the member states, and in the COREPER.[278] However, maritime safety-related matters may also be incidentally discussed within other working groups (e.g., COMAR and WGIEI). Within the EP, the Committee on Regional Development, Transport and Tourism (Transport Committee) is the main body responsible for transport safety issues.[279] It considers draft legislation and puts forward any eventual amendments, which are adopted by the EP plenary. When the negotiations are concluded, the new legislation is adopted by the Council acting by QMV.

The decision-making process on maritime safety matters may be time-consuming, depending on the political sensitivity of an issue (e.g., the proposal for a Directive on criminal sanctions for pollution offences). Normally, before drafting a new proposal, it is common practice for the Commission to conduct extensive consultations with experts and the industry. Reportedly, in the aftermath of the *Erika* and *Prestige*, because of the need for quick responses, this expert level was not fully involved. As a consequence, most of the technical discussions took place directly within the Shipping Working Party and the COREPER, which are normally not composed of experts (although they may bring their own national experts), and often resulted in political, rather than technical, decisions. Conversely, the expert level has been fully involved in the drafting of the *Erika III* sets of proposals, since there was no need for urgent action.[280]

6.7.3 The EC as a Flag State

Before looking closely at the Community's legislation in the field of oil pollution from ships it is worth making some preliminary observations about its capacity to act as a flag State. Legally speaking the Community cannot be qualified as a real flag State since it lacks its own register and flag. In 1989, the Commission came up with the proposal to establish a European register of shipping (EUROS).[281] The EUROS was not supposed to be a substitute for national registers, but a sort of second register. The main goal was to prevent the flagging out of vessels flying the flag of the member states to non-European registers, mainly by offering favourable tax conditions. The proposal,

278 The SWG carries out the preparatory work for the COREPER.

279 In July 2005, a new Maritime Affairs Intergroup was established to discuss, *inter alia*, shipping issues ahead of or in parallel with the Transport Committee. In addition, the Committee on Environment, Public Health and Food Safety is responsible for issues related to, *inter alia*, international and regional environmental agreements, water pollution, and the restoration of environmental damage.

280 The *Erika III* package of legislative proposals is discussed in Chapter 6.8.8.

281 COM (89) 266, 3.08. 1989 (OJ 1989 C 263/11).

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however, was rejected by the Council which considered it to be an infringement of the member states' exclusive competence in the area of taxation. Since then, the Commission has abandoned the idea of a European register.[282] Currently, therefore, there are 25 member state registers and 25 member state flags.[283]

The Community may be considered as a *sui generis* flag State to which the member states have transferred some of their competence and which exercises rights and duties stemming from the LOSC with regard to vessels flying the flag of the member states.[284] There is no formal definition under EC law of what constitutes a "vessel flying the flag of a member state." The ECJ has never clearly pronounced on the issue, but has left the term to be defined under national legislation.[285] In addition, the ECJ has made it clear that it is for the member states to determine, in accordance with international law, the conditions for the registration of vessels and for granting the right to fly their flag.[286] These conditions, however, have to be consistent with EC law.[287]Currently, the registration criteria are very different within the EC. Member states have always firmly opposed any attempt by the Commission to harmonize registration conditions,[288] although they seem to support such an initiative within the IMO.[289] In the wake of the *Prestige* accident, the EP called on the Commission and the member

282 The main objective of EUROS was to grant certain advantages to shipowners, namely: participation in cabotage within the EC and the easier transfer of ships among member states. The adoption of EC legislation covering both issues made it unnecessary to continue the work on the EUROS.

283 Several EC member states (e.g., Belgium, Denmark, France, Germany, Luxembourg, and the UK) have a second register, providing for more flexible employment conditions. Second or offshore registers are also established in overseas territories (e.g., Bermuda, Cayman Islands and the Isle of Man (UK); the Kerguelen Islands (France), the Netherlands Antilles, and the Faroe Islands). In addition, some member states (e.g., Cyprus and Malta), still maintain open registers. Open registers also exist in overseas territories (e.g., Canary Islands, Gibraltar and the Netherlands Antilles). See, in detail: EP, Opinion of the Committee on Regional Policy, Transport and Tourism for the Committee of Fisheries (PE 301.808, 15.10.2001).

284 See, e.g., Case C-405/92, *Driftnets Case*, (Para. 12).

285 For instance, in Case C-223/86, *Pesca Valentinia* (Para. 13), the ECJ stated that EC law applies to fishing vessels "flying the flag" of a member state "or" registered there, leaving the definition of these terms to national legislation.

286 Case C-221/89, *Factortame* (Para. 13) and Case C 286/90, *Poulsen* (Para 15).

287 Case C-221/89, *Factortame* (paras 14 and 17) and C 62/96, *Commission v. Hellenic Republic,* (Para. 22).

288 See, for instance, the Commission's proposal for a Council Decision on the common position to be adopted by the member states when acceding to the UNCTAD Convention on the Conditions for Registration of Ships (COM (86) 523).

289 The Council, in its Resolution 97/C 109/01, 24.03.1997 on a new strategy to increase the competitiveness of Community shipping (OJ 1997 C109), Para. C.1, urged the IMO to develop internationally binding quality criteria for flag administrations and ship registers.

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states to reconsider the possibility of introducing a European shipping register.[290] However, according to the Commission there seem to be better ways to raise the level of safety of the EC fleet, for instance by setting out minimum criteria for EC flag administrations.[291] This proposal is part of the *Erika III package* which will be briefly discussed in Chapter 6.8.8. Whether this initiative will overcome the traditional opposition of the member states is difficult to say. Recent developments, however, suggest that there is still strong resistance to an excessive intrusion by the Community into their sovereignty.[292]

6.8 EC Legislative Measures to Implement the International Regime on Oil Pollution from Shipping

Currently there are over 20 pieces of legislation in place implementing the international regime for the control of oil pollution from tankers within the Community.[293] For reasons of space the focus will be on the most recent initiatives, such as the *Erika I & II* packages,[294] with particular attention being given to the Community's response to the *Prestige* disaster.[295]

In the aftermath of the *Erika* and *Prestige* accidents, combating vessel-source pollution and preventing new maritime disasters were placed at the top of the EU political agenda[296] and have become priority action for the common transport[297]

290 EP Sterckx Resolution on Improving Safety at Sea in response to the *Prestige* accident (2003/2066(INI)), 23/09/2003, Para. 28. A few months later, however, the EP manifested doubts on the capacity of such a register to ensure the high level of safety in the EC fleet (EP, Report of the Committee on Regional Policy, Transport and Tourism, 26.11.2003, PE 331.347).

291 E.g., R. Salvarani (1996), p. 229.

292 Recently, for instance, a proposal brought by a Spanish MEP to include the EU's symbol on the member state's flags was rejected by both the EP and the UK's Chamber for Shipping. See, *inter alia*, Fairplay, 27.11.2003.

293 An overview and the full text of the maritime safety legislation is available at: http://europa.eu.int/comm/transport/maritime/safety/1993_en.htm.

294 On the pre-*Erika* legislation, see: A. Nollkaemper (1998), pp. 16-20; J. De Dieu in H. Ringbom (ed.) (1997), pp. 141-63. On the post-*Erika* legislation see: H. Ringbom in M.H. Nordquist and J.N. Moore (eds.) (2001), pp. 265-290; Y. Van Der Mensbrugghe (2000), pp. 178-201. On the post-*Prestige* legislation see V. Frank (2005), pp. 1-64; F. Zia-Mansoor (2005), pp. 165-73; U. Jenisch (2004), pp. 67-83; W. Hui (2004), pp. 292-303.

295 EC initiatives directed at strengthening liability and compensation for oil spills (e.g., COPE Fund) are not discussed. The analysis in the following paragraphs builds on: V. Frank (2005), pp. 1-64.

296 E.g., Copenhagen European Council, December 2002 (paras 32-4); Brussels European Council, March 2003 (Para. 13); Nice European Council, December 2000 (paras 41-43); all available at: ue.eu.int/cms3_applications/applications/newsRoom/loadBook.asp?BID=76&LANG=1&cmsid=347. See also the Statements of the EU Presidency at the 59th UNGA; 58th UNGA; 5th ICP; 4th ICP, all available at: http://europa-eu-un.org/articles/articleslist_s11_en.htm.

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and environmental policies.[298] The Commission, supported by the EP,[299] reacted quickly and launched new initiatives, most of them endorsed by the Council, directed at ensuring the safe transport of oil in European waters.[300]

6.8.1 Strengthening the Standards for the Transport of Oil in Single Hull Tankers

According to the classification societies which inspected the *Erika* and *Prestige* tankers shortly before the accidents, both ships were structurally sound and conformed to all relevant IMO standards.[301] Apparently, neither was a "risky ship". Although the effectiveness of double hulls is still contested,[302] it is a matter of fact that most major oil spills involve single-hull tankers. The two accidents raised questions about the adequacy of

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297 See, e.g., Transport Council, December 2002 ("Prestige"- Council conclusions), at: ue.eu.int/cms3_applications/applications/newsRoom/loadBook.asp?BID=87&LANG=1&cmsid=354 and the White Paper on "European Transport Policy for 2010: time to decide", 12.09.2001, available at: europa.eu.int/comm/energy_transport/en/lb_en.html.

298 See, e.g., Sixth EAP, "Environment 2010: Our Future, Our Choice", COM (2001) 31, 24.1.2001, pp. 35-6; Environmental Council, December 2002 available at: ue.eu.int/cms3_applications/applications/newsRoom/loadBook.asp?BID=89&LANG=1&cmsid=356. Initially, the Commission in its Communication "Towards a strategy to protect and conserve the marine environment", COM (2002) 539, set out ambitious targets and a timetable to reduce oil discharges and the environmental impact of shipping (e.g., Objective 7, p. 19, calling for compliance with existing oil discharge limits by 2010 at the latest and the elimination of all discharges by 2020; Objective 9 calling for the development of the concept of a "Clean Ship"). The Marine Strategy, as adopted, however, does not contain any specific target.

299 The EP has adopted several Resolutions on the *Prestige* disaster: i.e., the P5_TA (2002) 0575, 21.11.2002; P5_TA (2002) 0629, 19.12.2002; 2003/20066(INI), 23.09.2003 (EP "Sterckx" Resolution). In November 2003, the EP set up a Temporary Committee on Improving Safety at Sea (EP-MARE) to examine all aspects of the *Prestige* accident and to report to the EP plenary in April 2004. On 27.04.2004, on the basis of this report, the EP adopted a new Resolution 2003/2235(INI) on safety at sea. The text of the Resolutions and the work of the EP-MARE are available at: www.europarl.eu.int/comparl/tempcom/mare/default_en.htm. See also EP resolution 20.01.2000 adopted in the aftermath of the *Erika* accident.

300 In the wake of the *Prestige* accident the Commission adopted two important Communications on "Improving Safety at Sea in Response to the *Prestige* Accident", COM (2002) 681, 3.12.2002; "Action to deal with the effects of the *Prestige* disaster", COM (2003) 105 final, 5.3.2003. See also COM (2000) 142, 21.03.2000, on the safety of oil transported by sea adopted in the wake of the *Erika* accident.

301 For the *Erika*, see, e.g., accident investigation reports released by Malta, at: www.keskom.co.uk/Erika.pdf. For the *Prestige*, see: Report from the American Bureau of Shipping (ABS), available at: www.eagle.org/news/press/prestige/ and the Statement by the delegation of the Bahamas to C89, 27.11.2002, (IMO doc. C 89/INF.4/Rev.2).

302 E.g., INTERTANKO, at www.intertanko.com/pubupload/Phase-out-presentati_001.DOC and International Chamber for Shipping (ICS) at: www.marisec.org/icskeyissues2003/Loss%20of%20the%20Prestige.htm. See also Lord Donaldson Report (1994), Para. 7.40. On the advantages and disadvantages of double hulls, see: E. Galiano (2003), pp. 113-133.

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using these kinds of ships for the transport of oil, especially heavy grades of oil (HGOs), which are the most polluting and difficult to clean up when they are spilled at sea.[303] In the wake of the *Erika* accident, the Commission proposed to align the timetable for the phasing-out of single-hull tankers in the Community with the US' OPA 90, which is more stringent than MARPOL 73/78, in order to prevent the increased pollution risk posed by ships banned from US waters.[304] Given the quick decision of the IMO to accelerate the existing timetable under MARPOL 73/78, the Community decided not to proceed with the Commission's proposal and wait for MARPOL 73/78 amendments. The latter entered into force in September 2002, two months before the *Prestige* disaster. The new catastrophic spill showed that this timetable was still not stringent enough and seemed to require further acceleration.[305]

Soon after the *Prestige* sinking, the EC Transport Council urged the Commission to present a proposal for strengthening the rules for the transport of HGO in single-hulled tankers bound for or leaving European ports and/or flying the flag of an EC member state.[306] At the same time, the Commission was asked to examine ways to limit the transit of older single-hull tankers carrying HGO through the EEZ of the member states acting consistently with the LOSC and the law of the sea.[307] The result has been a three-step approach based on action at the EC, international and regional levels. In the first place, acting in its capacity as both port and flag State, the EC has raised the standards for all tankers regardless of their flag, entering or leaving ports, offshore terminals, and anchorage areas under the jurisdiction of the EC member states or flying the flag of an EC member state.[308] The new EC Regulation 1726/2003[309] has three

303 The HGO involved in the *Erika* and *Prestige* accidents is mainly used to fuel power stations and merchant shipping and only accounts for 10% of all oil carried by sea. Due to its relatively low commercial value and the relatively low risk of fire or an explosion, it is normally carried on older single-hulled tankers. However, due to their low volatility and high viscosity, these types of oils are the most polluting and difficult to clean up when they are spilled at sea. See: COM (2002) 681 and COM (2002) 780, at (2.1).

304 The proposal (COM (200) 802) is part of the *Erika I* package. The US adopted the Oil Pollution Act (OPA 90) in 1990 after the *Exxon Valdez* disaster (Sec 4115, Public Law No. 101-380, 104 Stat at 517-22). The phasing-out date for single hulls under OPA 90 is 2010 (2015 for certain ships); while under MARPOL, at that time, the final date was 2026.

305 According to the amendments of MARPOL, Annex I, Regulation 13G (IMO doc., Resolution MEPC 46/95, 27/04/2001), the 26-year old *Prestige* would have been allowed to continue its operations until 15 March 2005.

306 "*Prestige*"-Council conclusions, at (11), and December 2002 Environmental Council at (8)).

307 See "*Prestige*"-Council conclusions, at (11). The EP Sterckx Resolution, at (24), suggested the extension of the ban on the transport of HGO in single-hull tankers to all ships in transit through EC waters.

308 COM (2003) 105, Para. 2.2.2.1. Reportedly, member states with larger coastal State interests (e.g., France, Italy, Spain, and Portugal) called for an EC regulation, while EC maritime nations (e.g., Denmark, Germany, Greece, and the UK) and Norway were more in favour of acting within IMO.

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main innovative elements compared to MARPOL 73/78. First, it introduces an immediate ban on the transport of HGO in single-hulled tankers and requires that in the future only vessels equipped with a double hull will be entitled to carry HGO within or from the EU.[310] Second, it accelerates the phasing-out of single-hull tankers to 2010 rather than 2015.[311] Third, it strengthens the inspection regime for younger single-hull tankers pending their final phasing-out. In particular, the new Regulation extends the application of the Condition Assessment Scheme (CAS), which is an IMO tool for the periodic assessment of the structural state of single-hull tankers, to all categories of tankers from the age of 15 years, including the smallest ships not originally covered by the scheme.[312] Younger single-hull tankers, therefore, will be allowed to operate in Europe only if they meet the CAS requirements.[313] In addition, to accommodate the concerns of the EC Baltic coastal States over the increasing maritime traffic and the difficult navigation conditions in the Baltic Sea and in the Gulf of Finland, the Regulation invites oil tankers entering or leaving the Baltic ports of the EC member states to observe the special coastal State requirements for ships operating in ice-covered waters.[314]

In parallel, the Council urged the member states to present a joint proposal to the IMO for an amendment to MARPOL 73/78, Annex I, to bring it into line with the EC Regulation.[315] Finally, the Council stressed the need to promote bilateral agreements with neighbouring countries, especially with the Russian Federation and Mediterranean

309 Proposed by COM (2002) 780, 20.12.2002, the new EC Regulation was adopted on 22.07.2003 and entered into force on 21.10.2003 (O.J. L.249/1), amending the previous EC Regulation 417/2002.

310 EC Regulation 1726/2003, Article 1(4) (d). The definition of HGO under Article 1(3)(b) includes heavy fuel, tar, bitumen and heavy crude oil.

311 The new schedule is in line with the one initially proposed by the Commission in the wake of the *Erika* accident. The final date for Category I tankers, like the *Prestige*, 20,000/30,000 tons deadweight and above (so-called pre-MARPOL tankers because they were built before the MARPOL and not complying with its standards) has been moved from 2007 to 2005 or to an age limit of 23 years (Article 1(4)(a)). For Category II, the same size as Category I, but complying with MARPOL safety requirements (so-called MARPOL tankers) and Category III (the smallest tankers below 20,000/30,000 tons and usually operating in regional traffic), the deadline is 2010 or an age limit of 28 years (Article 1(4)(b)).

312 EC Regulation 1726/2003, Article 1(6). The CAS is regulated in MEPC Resolution 94(46), 27.04.2001, as amended.

313 EC Regulation 1726/2003, Article 1(7).

314 The new Recital 11 of EC Regulation 1726/2003 is a compromise to accommodate the request by Finland to introduce stricter standards on ships operating in the area (e.g., Finnish Maritime Administration, "Navigation Requirement in Sub-Arctic Ice-Covered Waters", 3.04.2003 at: www.fma.fi/e/).

315 "*Prestige*"-Council conclusions; Copenhagen European Council; Regulation 1726/2003, at 2nd considerandum. The joint proposal was forwarded to the IMO Secretariat in April 2003 (IMO Circular Letter 2458, 10.04.2003).

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States, for the wider implementation of the EC safety standards and for the support of the member states' proposal in the IMO.[316]

The EC member states' joint proposal on the amendment of Annex I of MARPOL 73/78 was initially discussed during the 49th regular session of the MEPC, in July 2003. To give a prompt response to the EC member states, MEPC 49 agreed to convene an extraordinary session in December 2003 in order to give other Parties the necessary time for further consideration and for the formal adoption of the proposed amendments along the lines of the EC submission.[317] The Community, however, decided to proceed alone without waiting for the outcome of the MARPOL amendment process as it did after the *Erika* accident. The new Regulation 1726/2003 entered into force on 21 October 2003 for the "old" EC member states and in December 2003 for the EEcA countries (e.g., Iceland and Norway),[318] while the ten new member states were strongly recommended to apply EC rules before 1 May 2004.[319] The entry into force of the EC Regulation made it rather difficult for foreign single-hull tankers still conforming to MARPOL 73/78 to operate in the European region.

In order to offset the damage caused by the EC's regulatory action, MEPC 50, held in December 2003, adopted a compromise solution introducing a two-tier system which mirrors the EC Regulation with regard to the schedule for phasing out single-hull tankers[320] and the extension of the CAS to younger single-hull tankers.[321] However, unlike the EC regulation, subject to certain conditions, flag States may authorize single-hull tankers to continue operation until 2015 or until they reach the age of 25 years whichever is earlier.[322] In addition, a new regulation 13H bans the transport of HGO

316 *inter alia*: "*Prestige*"-Council conclusions, at (2) and (19), and December 2002 Environmental Council, at (11). See also COM (2003) 105, at (2.2.3.2), and Joint Statement, 12th EU-Russia Summit, Rome, 6.11.2003, at (10), available at: europa.eu.int/comm/energy_transport/russia/2003_11_06_joint_statement_en.pdf.

317 IMO doc. MEPC 49/16/1. The EC submission raised many concerns on the negative repercussions on global shipping, the security of oil supplies and oil prices as well as their effects on other regions of the world. See: IMO docs MEPC 50/2/1 (Japan); MEPC 50/2/2 (India); MEPC 50/2/3 (Russian Federation); MEPC 50/2/10 (Brazil); MEP C50/2/11 (INTERTANKO); MEPC 50/INF.2 (Secretariat). On the EU position see: COM (2002) 780, at (2.1/2.2); MEPC 49/5, at (13-8); MEPC 50/2/4 (UK).

318 On the basis of Article 2 of the Treaty of Accession (published in O.J. 23.9.2003).

319 See: Vice-President of the Commission, Loyola de Palacio, at the "*Prestige*"-Council, December 2003. See also the controversy over the single-hull tanker *Geroi Sevastopolya*, *supra* n. 18, which at the end of November 2003 left the Latvian port of Ventspils with a load of 50,000 tonnes of HGO. Latvia at that time was not formally bound by the EC Regulation, but the decision to allow the voyage prompted a strong reaction within the EC.

320 Annex I, Resolution MEPC 111/50 amending Regulation 13G, at (4). For a review of the MARPOL amendments see: 2004 UNSG Report, 27.02.2004, Paras. 145-6 and 173-5.

321 Annex I, Resolution MEPC 111/50, at (7) and Resolution MEPC 112/50 amending the CAS.

322 E.g., single-hull tankers fitted with a double bottom or double sides (Annex 1, Resolution MEPC 111/50, at (5) and (6)).

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in single-hull tankers,[323] but provides a number of exceptions for tankers fitted with double bottoms or sides, and for "teenage" tankers or ships engaged in domestic or regional voyages.[324] States, however, are entitled to deny entry into their ports and offshore terminals for single-hull tankers that have been granted the aforementioned exceptions.[325] The EC member states, including Cyprus and Malta, immediately declared that they will not apply the MARPOL exceptions and will make use of their right of port entry denial in order to comply with the EC Regulation.[326] In addition, MARPOL parties may deny the ship-to-ship transfer of HGO in areas under their jurisdiction, including the EEZ, except in cases of distress.[327] This possibility represents an important enhancement of the control of coastal States over their marine environment.

The many exceptions allowed in the new Annex I might lead to considerable confusion as to what standards apply in the different ports or regions of the world. MARPOL's Annex I amendments, moreover, entered into force on 5 April 2005.[328] Before 5 April 2005, therefore, the world fleet was confronted with three major sets of rules: MARPOL 73/78, the EC Regulation and the OPA 90.[329]

IMO members, however, have been particularly concerned by the Community's decision to proceed alone without waiting for the amendments of MARPOL. The EC "regional" approach has been considered as damaging to the uniformity of shipping regulation, undermining the IMO's authority and providing a precedent for other regions to set their own regimes.[330] Legally speaking, however, the EC Regulation is consistent with Articles 25(2) and 211(3) of the LOSC and falls within the right of port States to lay down conditions for the entrance into ports of foreign ships and to deny access

323 Annex 2, Resolution MEPC 111/50. Para. 2 reflects the EC definition of HGO. The inclusion of heavy crude oil in the definition has created particular problems, especially for Latin American countries, which are the larger exporters of crude oil.

324 Exceptions are listed in Annex 2, Resolution MEPC 111/50, at (5), (6) and (7). The regional exception was adopted to accommodate the requests of Latin American countries and the Russian Federation in exchange for the inclusion of crude oil in the HGO definition.

325 Annex 2, Resolution MEPC 111/50, at (8)(b). The right of denial does not apply to domestic and regional voyages (*ibid*, at (7)).

326 IMO doc. MECP 50/3, Annex 6 (Italy on behalf of the 15 EC member states, the EC Commission, Cyprus, Malta and Poland).

327 Annex 2, Resolution MEPC 111/50, at (8)(b). This possibility has been introduced to accommodate Danish concerns about the growing lightering operations in its EEZ due to increased Russian oil exports.

328 In order to bridge the gap between that date and the entry into force of the EC Regulation, the MEPC has adopted a resolution inviting flag States to apply the MARPOL amendments as soon as practically possible prior to their formal entry into force (IMO doc. MEPC 114/50).

329 The time-limits for Category II and III under the EC Regulation are two years in advance compared to the OPA 90, which does not ban the transport of HGO in single-hull tankers.

330 According to the IMO SG, Mr. Mitropoulos, nothing prevents a State or a group of States from adopting higher standards but "any such commendable initiative should be restricted only to ships of their flag", see the Statement by Mr. Mitropoulos before the EP-MARE, *supra* n. 247, p. 4.

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to vessels not complying with these requirements.[331] In exercising its port State regulatory capacity, moreover, the Community conformed to the general principles of international law discussed in Chapter 6.2.3.1. The EC Regulation, indeed, is proportional to the high level of risk posed by the increasing volume of oil transported along the European coasts, there is a direct connection between the new standards and the Community's legitimate environmental interests, and the "extraterritorial" effect of double-hull requirements for foreign vessels before entry into EC ports is purely incidental. Arguably, when foreign ships decide to operate within the Community they implicitly agree to comply with its higher safety and environmental standards, including CDEMs. In addition, the new EC phasing-out schedule is clearly not discriminatory since it applies to all vessels entering or leaving EC and EEcA ports regardless of their flag, including EC and EEcA vessels. The new EC ban, conversely, seems to apply only to ships entering or leaving EC and EEcA ports, but allows EC and EEcA-registered single-hull tankers to continue carrying HGO in other parts of the world until they reach the deadline for their final phasing-out.[332] This could increase pressure on other regions and might be considered discriminatory. Such a possibility, however, is purely theoretical since, reportedly, EC companies already avoid using single-hull tankers for carrying HGO. In addition, after 4 April 2005, the ban introduced by the new Regulation 13H of MARPOL's Annex I entered into force for all flags.

The need to preserve its authority as the only international regulator urged the IMO to react rapidly.[333] The EC's "unilateral" action, moreover, is nothing new, but has several precedents in State practice whose consistency with the LOSC seems to be uncontested.[334] The only difference is the coordinated nature of the EC reaction. The EC regulatory action, therefore, may probably be questioned from a political, but not from a legal point of view.

6.8.2 Classification Societies

Although the *Erika* and the *Prestige* had valid certificates issued by highly respected classification societies,[335] the accidents focused attention on those organizations which

331 These provisions are generally considered as customary international law, see *supra* n. 94.

332 See the Clarification from the European Commission to INTERTANKO, reported in INTERTANKO Weekly News, no. 39 (2003) and B. Reyes, Intertanko told EU-flags single hulls can trade on despite new rules, Lloyd's List, 3/10/2003.

333 Then IMO Secretary-General, W. O'Neil, at MEPC 50, 4/12/2003.

334 The adoption by the US of OPA 90, for instance, led to the amendment of MARPOL 73/78 similar to what happened with EU Regulation 1726/2003.

335 The *Erika* was classified by Registro Italiano Navale (RINA), which had carried out an annual survey on the ship two weeks before the final voyage (e.g., Report from Malta at: www.keskom.co.uk/Erika.pdf, Para. 2.4). The *Prestige* was classified by the American Bureau of Shipping (ABS). See: *Prestige* Casualty Information Update No. 3, available at: www.eagle.org/news/press/nov202002.html.

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release certificates without adequate inspections. Moreover, most of the time, classification societies are paid directly by the shipowner, a practice that raises questions as to their impartiality. Following the *Erika* accident, the EC adopted a new Directive which intends to guarantee neutrality, the better quality and stricter control over the activities of classification societies that are entitled to operate in the Community.[336] Since 1994 there has been a common system in place for the recognition of organizations which may be authorized to conduct inspections of ships and release certificates on behalf of the EC member states.[337] The new Directive intends, first of all, to bring the previous system up to date with the latest international developments, including amendments to IMO Conventions, Annexes and Protocols and new Codes. Second, it strengthens the quality criteria for the recognition of classification societies (e.g., the absence of conflicting interests and independence from the ship owner/operator/industry). Third, the Directive increases the role of the Commission in assessing, next to the member state concerned, whether the classification society meets the requirements for recognition and monitoring its performance. Poorly performing classification societies may be punished with the withdrawal of the recognition. In performing its duties, the Commission is now assisted by the European Maritime Safety Agency. The Directive entered into force in January 2002, two months after the *Prestige* disaster. In the aftermath of the accident, the Council urged the member states to accelerate the implementation of the Directive by 22 July 2003.[338] On that same date, the Commission started an infringement proceeding against the 9 member states which had failed to communicate national implementing measures.

6.8.3 Strengthening Port State Control

The uniform enforcement of international standards through PSC is one of the central pillars of the CPSS.[339] Despite the attempts of the Commission, the adoption of EC legislation on PSC has been opposed by the EC member states for a long time, who were afraid that such legislation could trigger an EC external competence in the IMO. Therefore, they preferred to proceed outside the EC framework by concluding the Paris

336 Directive 2001/105/EC (amending Directive 94/57/EC) on common rules for ship inspection and survey organizations is part of the *Erika I* package. The Directive also harmonizes the rules on the financial liability of recognized societies.

337 Directive 94/57/EC. The quality criteria are more stringent compared to the 1993 IMO guidelines for the authorization of recognized organizations acting on behalf of the administration (IMO Res. A. 739(18)).

338 "*Prestige*"- Council conclusions. Only 6 out of the (at that time) 15 member states (Denmark, France, Germany, the Netherlands, Spain and the UK) had done so. Currently all member states have notified the Commission of the transposition of the Directive. The Commission has only recently started the conformity assessment.

339 CPSS, Chapter 2. See: R. Salvarani (1996), pp. 225-31, and E.J. Molenaar (1996), pp. 242-288.

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MOU.[340] In the early 1990s, however, it became evident that EC member states were not implementing the Paris MOU with the same rigor and the number of substandard ships operating in Europe had drastically increased.[341] The lack of uniformity in the exercise of PSC, moreover, was affecting competition, since it granted those member states conducting weaker inspections a competitive advantage. To reverse this trend, Community harmonization appeared necessary. In 1995 the Council adopted a Directive on Port State Control (PSC Directive) with the main goal being to reduce substandard shipping in EC waters, thereby improving safety and the protection of the marine environment.[342] The Directive transforms the soft commitments under the Paris MOU (e.g., the 25 per cent inspection target) into legally binding obligations and sets out harmonized and strengthened criteria for ship inspections in EC ports.[343] Over the years the PSC regime has undergone several amendments to keep it up to date with new international developments and to extend its scope to EEcA Countries.[344] However, in the wake of the *Erika* accident this regime still appeared to be inadequate to arrest substandard shipping. In the seven months prior to its sinking, indeed, the *Erika* had been inspected four times,[345] showing that the level of inspection was not stringent enough and required further improvement. Following the accident the PSC Directive was strengthened in two main respects. First of all, a new compulsory annual control was introduced for all ships that due to their age, poor condition, flag, classification

340 On the Paris MOU, see Chapter 6.5.1. In 1980, the Council rejected a Commission proposal for a directive on PSC (O.J. 1980 C 192/8). The Paris MOU builds on this proposal and the Commission participated in the negotiations. Although the EC is not a party to the Paris MOU, according to Article 6 (1) the Commission participates in the meetings of the PSC Committee. See: A. Nollkaemper (1998), p. 19; E. Hey and A. Nollkaemper (1995), p. 287; R. Salvarani (1996), p. 228.

341 Annual Report of the Paris MOU, 1992. See also the Commission's Communication on Improving the Effectiveness of PSC in the Community (COM (89) 266, 2.08.1989).

342 Council Directive 95/21/EC, 19.06.1995, concerning the enforcement, in respect of shipping using Community ports and sailing in waters under the jurisdiction of the member states, of international standards for ship safety, pollution prevention and shipboard living and working conditions (OJ 1995 L 157), Preamble. On the main differences between the Paris MOU and the PSC Directive see: E. J. Molenaar (1996) pp. 242-88, and R. Salvarani, pp. 229-31.

343 The Directive sets out obligations to, *inter alia*, maintain competent administrations for the inspection of ships in ports, to inspect at least 25 per cent of foreign ships, except vessels which have already been controlled within the previous six months, to conduct enhanced controls on, *inter alia*, oil tankers, to rectify deficiencies revealed in the course of the inspection, and notify certain information to flag States or other port State authorities.

344 Council Directive 98/25/EC (OJ 1998 L 133); Commission Directive 98/42/EC (OJ 1998 L 184); Commission Directive 1999/97/EC (OJ 1999 L 331); Council and EP Directive 2001/106/EC (OJ 2002 L19). All of them are texts with EEcA relevance.

345 Between 1991 and 1999 the *Erika* underwent 16 PSC inspections and had been detained 5 times, the last in Rotterdam in December 1997. However, it was not considered a targeted ship according to the Paris MOU. See: Malta's Report, at: www.keskom.co.uk/Erika.pdf, Annex 6.

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society, inspection and detention records pose a high risk for the marine environment of the member states.[346] Second, EC/EEcA member states have been required to deny access to their ports to all "high-risk" categories of ships, including oil tankers, which have been repeatedly detained in the previous two to three years, on the basis of a blacklist periodically published by the Commission, unless it can be proved that they can be safely operated.[347] In addition, the Commission was requested to publish periodically a list of ships which will be banned from EC ports if they are detained one more time after the entry into force of the Directive.[348]

The PSC regime established in the Community is far more stringent than the Paris MOU and the broad MARPOL and SOLAS provisions on port State inspection, but is consistent with Article 218 of the LOSC and the safeguards contained in section 7 of Part XII. Targeting badly performing flag States for mandatory expanded inspections, closing EC ports to ships flying their flag, and publishing blacklists of ships are important mechanisms to encourage flag States wishing to operate their vessels in Europe to improve their safety standards and to properly implement international rules. This regime, however, presents some shortcomings. The list of items that require compulsory inspection is not very extensive (especially with regard to cargo and ballast tanks) and inspections are mostly limited to the control of certificates. In addition, the blacklists and the detention records are based on the Paris MOU and do not include dangerous ships which have been detained in ports outside that framework. EC member states, therefore, cannot take detentions which occurred in those countries into account in order to refuse ships access to their ports.

The sinking of the *Prestige* occurred two months before the entry into force of the PSC amendments and triggered a call for the further acceleration of the implementation of the Directive.[349] During the three years before the accident, the tanker had indeed been able to circumvent control in those ports it had called at (within and outside the EC) despite the fact that it had met all the conditions for being a primary target of

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346 Directive 2001/106/EC (amending Directive 95/21/EC) on enforcement of international safety, pollution prevention and working standards on ships calling at EC ports (PSC Directive) adopted as part of the *Erika I* package. Targeting criteria are listed in Annex I.

347 New Article 7b of the PSC Directive. Blacklists and detention records are based on the Paris MOU and are available at: www.parismou.org.

348 In November 2003, the Commission published a list of 10 ships which are banned from EC ports and an indicative list of 143 ships which may be banned in the future. Both lists included ships registered by Cyprus and Malta (see: europa.eu.int/comm/transport/maritime/safety/prestige_en.htm). The subsequent lists did not include ships from EC member states (but did include ships from Turkey). The latest list of ships banned from EC ports was published on 1.01.2006. All lists may be consulted on the EMSA website.

349 The "*Prestige*"- Council conclusions, (Para. 6) and the EP Sterckx Resolution (Para. 43) urged the Commission to reinforce the PSC Directive to reduce the intervals between the inspections of the highest risk vessels, to ensure sufficient inspection rates at all ports to prevent "ports of convenience" and to tighten rules for the refusal of access. In December 2002, moreover, the Commission published an indicative list of ships which would be banned from EC ports if the *Erika I* package were in force (COM (2002) 681, Annex 2).

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inspection. Like the Classification Societies Directive, the implementation of the PSC Directive has also been slow.[350] The Commission promptly started several infringement proceedings against the non-complying member states and, with the assistance of EMSA, is currently assessing the actual implementation of the PSC Directive in each member state.[351]

6.8.4 Vessel Traffic Monitoring and Information System

Some of the major routes for the transport of oil are located in European waters and every day hundreds of tankers carry huge amounts of oil (and other dangerous products) at a very short distance from the coastlines of EC member states, considerably increasing the risk of maritime accidents. In 1979, in the aftermath of the *Amoco Cadiz* accident, the Council adopted a Directive setting out minimum requirements for "tankers" entering or leaving EC ports, including a duty to notify general information about the ship and the cargo to port State authorities.[352] The 1993 CPSS Resolution called for the establishment of a comprehensive maritime traffic monitoring system to increase the safety of navigation in EC waters. That same year, the 1979 Directive was amended to include all cargo vessels, not only tankers, bound for or leaving EC ports and carrying dangerous or polluting goods (including oil), and to reinforce the early notification system (the "Hazmat Directive").[353] The main objective was to harmonize the implementation within the Community of the main ship reporting requirements contained in SOLAS, MARPOL and other relevant IMO instruments, since not all member states were parties to these Conventions.[354] Soon after the adoption of the Hazmat Directive, the Commission presented a new proposal aimed at extending the reporting requirement under that

350 The PSC Directive had to be transposed into national legislation by 22 July 2003. On that date, only 7 out of the (at that time) 15 member states (i.e., Belgium, Denmark, France, Germany, Ireland, Spain and the UK) had done so. See: European Commission, DG TREN, Safer ships – Safer seas, Press package 23.07.2003.

351 On 24.02.2005, the Court delivered its ruling against Finland for missing the deadline for the transposition of the PSC Directive. Currently all member states, except Latvia, have notified the Commission of their transposition. Reportedly the Commission has decided to start an infringement proceeding against Latvia, which should have transposed the PSC Directive by 1.05.2004. On 19.12.2005 the Commission sent a reasoned opinion to Italy and Malta for a failure to comply with the PSC Directive (see: ESPO News, December 2005).

352 Council Directive 79/116/EEC, 21.12.1978.

353 Council Directive 93/75/EC on minimum requirements for vessels bound for or leaving the Community ports and carrying dangerous or polluting goods. The Directive imposes notification requirements specifically on the master and operator and requires more detailed information about the cargo.

354 E.g., the IMO Res. A 648(16) on general principles for ship reporting systems. Annex III, moreover, refers to the international agreements governing intervention in case of maritime incidents in waters within and beyond national jurisdiction. Reportedly, Annex III was intended to put political pressure on member states to ratify international agreements.

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Directive to ships in transit.[355] The Council, however, questioned the legality of mandatory reporting obligations for ships in transit under international law and rejected the proposal.

The *Erika* accident indicated that the existing system was no longer adequate for the level of risk and for the latest legal and technological developments. A new Directive 59/2002/EC, the so-called VTMIS Directive, was adopted as part of the *Erika II package* setting out a Community vessel traffic monitoring and information system with a view to enhancing safety and minimizing the environmental impact of shipping accidents.[356] The Directive contains five main innovative elements compared to the previous system. First of all, it updates and simplifies the notification requirements under the Hazmat Directive.[357] Second, it sets in place a reporting and traffic monitoring system which also applies to foreign vessels not bound for EC ports. The member states are required to monitor and take "all necessary and appropriate measures" to ensure that ships in transit comply with mandatory reporting and routing systems approved by IMO in the area according to SOLAS. However, they cannot adopt mandatory vessel traffic service (VTS) systems concerning foreign vessels in transit beyond their territorial sea.[358] These provisions bring the directive perfectly into line with the LOSC and SOLAS.

Third, the VTMIS Directive requires all ships built after 1 July 2002 and calling at EC ports to carry on board an automatic identification system (AIS) (or transponders) and a voyage data recorder (VDR) system ("black box") to facilitate investigations in the case of accidents. Both requirements are consistent with and implement in the Community the new provisions of Chapter V of SOLAS.[359]

Fourth, the VTMIS Directive introduces additional reporting requirements with regard to high-risk ships,[360] and increases the capacity of the EC member states to take appropriate measures "without prejudice to international law" to prevent significant threats to the marine environment and to deal with incidents or accidents at sea, including areas beyond their territorial sea, with a view to minimizing their consequences.[361]

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355 COM (93) 647.

356 Directive 2002/59/EC of 27.06.2002 establishing a Community vessel traffic monitoring and information system. The VTMIS Directive replaced the Hazmat Directive (Article 30).

357 VTMIS Directive, Title II, Articles 12-15.

358 VTMIS Directive, Articles 5 and 7. According to SOLAS Reg. V/12 States have to "take into account" IMO Guidelines when adopting VTS, but the use of VTS may only be made mandatory within the coastal State's territorial sea, see *supra* n. 144.

359 On 6.12.2000, when the Directive was proposed (COM (2000) 802), the new Regulation 20 in SOLAS's Chapter V on black boxes on board of ships built after 1 July 2002 had not yet been adopted . However, it was introduced shortly afterwards at MSC 73 in December 2000. SOLAS Chapter V entered into force on 1.07.2002. The VTMIS Directive was adopted on 27.06.2002, but member states were only required to apply its provisions by 5.02.2004 at the latest. Therefore, there is no inconsistency between the two regimes.

360 These are defined as ships that have been involved in incidents or accidents at sea, have failed to comply with notification and reporting requirements, have deliberately discharged pollutants or have been refused access to ports. VTMIS Directive, Article 16(1).

361 *Ibid.,* Articles 17 and 19 and Annex IV.

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Finally, the VTMIS Directive requires member states to elaborate and implement plans and procedures to accommodate ships in distress within waters under their jurisdiction, taking into account the existing IMO guidelines (Article 20). This provision represents the only legal basis for the EC regime on "places of refuge".[362] Like the IMO guidelines, however, the VTMIS Directive does not create a legal duty for EC coastal States to open their ports to vessels in trouble, but simply encourages member states to balance interests in order to ensure that ships in distress "may immediately go to a place of refuge". This is also spelt out in the Preamble (Paragraph 16), which recognizes that the non-availability of a place of refuge may have serious consequences in the event of an accident at sea; however, the acceptance of a vessel into a place of refuge is always subject to authorization by the competent port State authority after taking into account operational and environmental considerations. The lack of a legal duty to grant refuge is also confirmed in Article 18.1(b) that, in the case of exceptionally bad weather or sea conditions, allows member states to prohibit foreign ships from entering (or leaving) their ports if this would endanger human life or the environment. These provisions reflect the existing international law on how to deal with ships in distress asking for a place of refuge.[363] It is worth noting that the EP, during the first reading of the Commission's proposal for a Directive on criminal sanctions for ship-source pollution, proposed to make the competent port authority accountable for pollution resulting from denying access to ships in distress.[364] This rather political amendment was not welcomed by the member states, which were the main targets, and it was rejected at first reading. This shows that the member states were still not ready to accept obligations which are too stringent in such a sensitive area.

Finally, Article 25 contains some provisions on implementation, including financial sanctions for shipowners/operators/masters or maritime authorities that fail to comply with the obligations under the Directive. In the wake of the *Prestige* accident, the Commission and the Council urged member states to accelerate the implementation of the Directive by 1 July 2003.[365] However, implementation was very slow and the

362 In addition, the PSC Directive (Article 11(6)) allows port authorities to permit the access of ships to port in the event of *force majeure* or, *inter alia*, in order to reduce or minimize the risk of pollution. The existing "EC framework for cooperation in the field of accidental or deliberate marine pollution" (Decision 2850/2000/EC) does not contain provisions on places of refuge.

363 For a full discussion of the international and EC regimes on places of refuge see: V. Frank (2005), pp. 53-62.

364 EP Resolution (PT_TA-PROV (2004) 0009), 13.01.2004 (Amendment 16). This, however, is "accidental" pollution, which the EP wanted to leave out from the scope of the Directive (i.e., Amendment 10 limits the scope of the Directive to illegal "deliberate" discharges). This fully reflects the critical attitude of the EP vis-à-vis the manner in which the Spanish authorities handled the *Prestige* accident.

365 *Prestige*-Council conclusions, Para. 9. See also: December 2002 Environmental Council, Para. 8; COM (2002) 681, Para. 8, and the Statement by the Commission at the MSC 76, pp. 237-8. The original date for the implementation of the Directive was 5.02.2004.

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Commission promptly started infringement proceedings against non-complying member states.[366]

6.8.5 *European Maritime Safety Agency (EMSA)*

The lack of implementation by member states is a major problem within the Community and jeopardizes the maximum effectiveness of the EC's maritime safety legislation.[367] Like at the global level, poor performance may depend to a large extent on the incapacity of the member states to comply with highly technical standards. In 2002, as part of the *Erika II package,* the European Maritime Safety Agency (EMSA) was created to assist the Commission and the member states in the implementation of EC legislation in the field of maritime safety and the prevention of pollution from ships.[368] Its main tasks are: to provide technical support for the Commission and EC/EEcA member states in implementing relevant EC legislation (e.g., by auditing classification societies, organizing maritime traffic surveillance and PSC inspections), to assess the effectiveness of existing EC rules, and to assist the Commission in updating or drafting new measures along the lines of international developments. In addition, the Agency assists the Commission in monitoring and assessing the implementation of EC Directives by the member states.[369] The EMSA has been operational since early 2003.[370] In 2005, the Commission, with the close assistance of the Agency, launched a specific programme for the monitoring of member states' application of EC maritime safety legislation for the period 2005-2007. This programme has already resulted in an increase in the number of infringement proceedings against non-complying member states.[371] The EMSA

366 In February 2004, the Commission initiated an infringement proceeding against all member states, except Denmark, Germany and Spain, for not respecting the 5.02.2004 deadline. Subsequently, all member states, except Finland and Belgium, notified the transposition of the Directive. In February and March 2005, the Commission started an infringement proceeding against Finland and Belgium. On 15.12.2005, the ECJ ordered the two member states to pay costs.

367 Sixth Annual Survey on the implementation and enforcement of EC environmental law (2005), available at: europa.eu.int/comm/environment/law.

368 Regulation 1406/2002/EC, 27.06.2002.

369 The EMSA, moreover, assists the Commission with regard to the work of the technical bodies of the Paris MOU, and in the publication, every six months, of the list of ships that have been refused access to Community ports. In addition, the Agency will assist the Commission in any other or future task assigned by EC law in the field of maritime safety and the prevention of pollution from ships.

370 The Council in the "*Prestige*"- Conclusions (Para. 7) urged that the full operation of the agency should be accelerated. In the wake of the *Prestige* accident, moreover, the EMSA has been provided with new tasks in the field of marine response (Regulation 24/2004)

371 On 30.09.2005, 68 maritime safety procedures were pending before the ECJ. See: COM(2005)585, p. 5.

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has proven to be an effective ally of the Commission in ensuring the strict implementation of EC maritime safety rules.

6.8.6 Port Reception Facilities

Recent maritime disasters have focused attention on accidental oil pollution, but the main threat still comes from deliberate operational discharges, such as tank-cleaning operations.[372] To reverse this trend the Community adopted the Directive on port reception facilities (PRF) for shipboard waste and cargo residues.[373] The PRF Directive applies to all ships using Community ports, regardless of their flag and including fishing vessels and recreational craft (Article 3). The overall purpose of the Directive is to discourage ships from discharging their waste at sea, by making sure that adequate waste reception facilities are available in ports and that they are easy to use and cost-effective. For this purpose, it introduces a duty for all ships to deliver their waste to a PRF before leaving a Community port, with a few exceptions (Article 7). PRF must be easily accessible and should not cause undue delay to a ship's operations. The Directive does not raise particular concerns regarding consistency with international law since it generally implements the PRF provisions under MARPOL 73/78 and the Helsinki Convention.[374] In addition, it is consistent with the LOSC and falls within the powers of port States to ask all ships entering or leaving their ports to observe special non-discriminatory environmental requirements. The Directive has been implemented with some delays and once again the Commission has promptly taken action against non-complying member states.[375]

6.8.7 Ship-Source Pollution and the Introduction of Penalties for Infringements

Penalties which are currently applicable to violations of existing anti-pollution standards are relatively low compared to the benefits of non-compliance and have so far been unable to discourage violations.[376] In the aftermath of the *Prestige* accident, therefore, the Commission presented a highly controversial proposal that aimed to elevate illegal

372 See, *supra* n 12.

373 Directive 2000/59/EC, which entered into force on 28.12.2000.

374 Para. 8 of the Preamble calls for consistency with the existing regional agreements and expressly mentions the Helsinki Convention.

375 The PRF Directive had to be implemented by 28.12.2002. On 13.05.2003, the Commission initiated infringement proceedings against Austria, Belgium, France, Finland, Italy, Portugal, the Netherlands, and the UK, for not complying with the transposition requirements. On 14.10.2005, the Commission took legal action against Poland and sent reasoned opinions to several other member states.

376 See, e.g., MTC/OECD (2003).

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discharges, including accidental discharges, to criminal offences.[377] This has so far been the most critical proposal ever put forward by the Commission and the legislative process has been long and difficult. Despite strong opposition from some maritime member states (e.g., Greece and Malta), the Directive was finally adopted in September 2005, over two years after the original proposal.[378]

The Directive intends to fill three major gaps: the absence of specific EC discharge standards, the ineffective and inconsistent implementation of MARPOL 73/78 in EC waters, and the absence of effective enforcement mechanisms under international law to ensure compliance. Its main purpose is to incorporate the MARPOL 73/78 discharge standards into EC law and to harmonize their enforcement by ensuring that those who are responsible for marine pollution, both natural and legal persons (e.g., the shipowner, master, the owner of the cargo, classification societies) are subject to adequate penalties.[379] The Directive contains minimum rules and allows member states to take more stringent measures against ship-source pollution in conformity with international law (Article 1(2)).

Originally, the Commission's proposal required member states to treat discharges in violation of MARPOL 73/78 as "criminal offences" to be punished, where appropriate, by means of "criminal sanctions" including, in the gravest case, deprivation of liberty.[380] Although the objective of the proposed Directive was generally supported by the member states in the Council and by the EP, these provisions raised a number of legal issues under EC and international law, which blocked its adoption for a long time.[381]

From an EC law point of view, serious concerns existed concerning using the first pillar (EC Treaty, Article 80(2)) as a legal basis for imposing criminal sanctions.[382] According to the member states, a framework Decision under the third pillar (EU Treaty)

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377 COM (2003) 92, 5.03.2003. The proposed Directive has been supplemented by COM (2003) 227, 2.05.2003, for a Council Framework Decision, based on Article 29 EU (third pillar), which strengthens the criminal law framework for the enforcement of anti-pollution legislation.

378 Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, adopted on 7.09.2005. In June 2004, Transport Council, upon first reading, reached a political agreement on its common position on the Commission's proposal (10503/04), with Greece and Malta voting against. For a full discussion see: V. Frank (2005), pp. 44-9.

379 Ship-Source Pollution Directive, Article 1. The Directive covers discharges of oil under MARPOL Annex I and noxious substances under MARPOL Annex II (Article 2 (2)).

380 Article 6 of the Commission's Proposal. The main idea is that penalties have to be stringent enough to eliminate all advantages resulting from an infringement and to make compliance a more economical solution (e.g., Article 6(3)).

381 "*Prestige*"-Council Conclusions, Para. 13a; October 2003 Transport Council Conclusions, pp. 8-9 and December 2003 Transport Council Conclusions, p. 6. See also EP April 2004 Resolution (Para. 22) and the Sterckx Report, Paras. 46-48.

382 For a recent discussion on whether the first or third pillar is the most appropriate legal basis for criminal environmental sanctions see: D. Walsh (2005), pp. 1999-208; M. Faure (2004), pp. 18-29; F. Comte (2003), pp. 147-56.

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was more appropriate, since criminal matters still fall under their exclusive competence.[383] The Commission, on the other hand, insisted on using the first pillar. As discussed in Chapter 2.2.4, acting within the framework of the third pillar has several disadvantages (e.g., unanimity in the Council (Article 34(2) EU), the limited role of the Commission and the EP in the decision-making process,[384] and the limited jurisdiction of the ECJ and the incapacity of the Commission to initiate infringement proceedings for a violation of third-pillar measures. In addition, a framework Decision is legally binding but, unlike a directive, does not have direct effect (Article 34(2)(b) EU) and individuals cannot bring polluters before national courts for a violation of its provisions. As a result, adopting a Directive appeared to be easier, because of the QMV in the Council, and more effective because of the enforcement mechanisms available under the first pillar and the involvement of the EP in the co-decision procedure. In addition, even if the EC Treaty does not expressly provide for the Community's competence in criminal matters, there are already several precedents under the first pillar (i.e., the CFP) requiring member states to impose criminal sanctions for any violation of EC rules, and the ECJ has never contested the legal basis of these sanctions.[385] In its case law, moreover, the Court has made it clear that the principle of loyal cooperation as set out in Article 10 EC requires member states to take all necessary measures, including criminal sanctions, to ensure the effective implementation of EC law.[386] According to the Court, moreover, member states have to guarantee that violations are punished by sanctions similar to those which apply to breaches of national law, and they have to be effective, proportionate and dissuasive, including criminal penalties.[387] In June 2004, upon the first reading of the proposal, the Council refused this approach and made it clear that it is up to the member states to decide whether to apply criminal or administrative sanctions.[388] There was still no agreement on the proper legal basis of the proposed Directive.[389]

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383 E.g., October 2003 Transport Council Conclusions, p. 8 and the Speech by the Irish Presidency before the EP-MARE, p. 3.

384 The Commission may present a proposal (Article 34 EU) that is adopted by the Council in "consultation" with the EP, which has no right to put forward any amendments (Article 39 EU).

385 See, e.g., Council Regulation 2371/2002 (Article 25(1)) and Council Regulation 2847/1993 (Article 31) and Case C-333/99, *Commission v. Republic of France*, Para. 55, and C-9/89, *Kingdom of Spain v. Council*, Para. 29.

386 E.g., C-50/76, *Amsterdam Bulb BV* . This view was also shared by the other EC institutions, see: Opinions of the Council's Legal Service (i.e., 12471/02JUR 382 PECHE 140, 27.09.2002 and 11196/01JUR 251 COPEN 41, 15.10.2001); Commission's Legal Service, SEC 2001/227, 7.02.2001, and the EP's Committee on Legal Affairs (PE 329.428; 22.05.2003).

387 E.g., Case C-68/88 *Commission v. Greece*, Paras. 23-25; C-186/98 *Nunes*, Paras. 9-14, and C-387/97 *Commission v. Greece*, Para. 24.

388 See: Political Agreement on the common position of the Council on the Commission's proposal, 14.06.2004, (2003/0037 (COD)/ 10503/04), Article 6.

389 E.g., Report on the Transport Council, 10-11 June 2004, p. 18, at europa.eu.int/trans/index_en.htm.

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In September 2005, the Court put an end to the long controversy concerning whether the first or the third pillar is the most appropriate legal basis for imposing criminal sanctions via secondary legislation.[390] According to the Court these kinds of measures may be correctly based on the first pillar whenever "on account of both their aim and their content" they are primarily directed at achieving one of the objectives of the EC Treaty, such as the protection of the environment.[391] This decision opened the door to the adoption of the Commission's Proposal on the basis of Article 80(2) EC. The EC Directive has been supplemented by a Council Framework Decision based on the third pillar, which contains detailed rules on criminal offences and penalties.[392]

From an international law point of view, the main concerns had to do with the consistency of the Commission's proposal with the LOSC and MARPOL 73/78 and its application concerning foreign vessels in transit.[393] What was contested in the first place was the fact that the proposal was far more stringent than MARPOL 73/78, which does not make any reference to "criminal offences" and "criminal sanctions". However, as the Commission pointed out, the proposed Directive did not create new crimes, but simply harmonized the way in which pollution offences under MARPOL 73/78 are punished in the EC. All the EC member states are parties to MARPOL and they are already required under that Convention to ensure that relevant violations, "wherever they occur", are penalized with sanctions that have an adequately dissuasive nature.[394] MARPOL 73/78 does not, in principle, exclude the possibility of imposing criminal sanctions, which, in the view of the Commission, are the most effective deterrent against illegal discharges.[395] There are precedents in some member states (e.g., Italy), and in other parts of the world (e.g., the U.S.), for enforcing MARPOL 73/78 through

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390 C-176/03 *Commission v. Council*. In 2001, the Commission drafted a proposal for a Directive on the protection of the environment through criminal law, based on Article 175 EC. The Council rejected the proposal and on 27.01.2003 it adopted a Framework Decision on the protection of the environment through criminal law based on the third pillar. On 23.03.2003, the Commission, arguing that the first and not the third pillar is the proper legal basis for this kind of measure, brought the Council before the ECJ for violating the division of competences among the EC and the EU.

391 Case C-176/03, *Commission v. Council,* Para. 51. See also: ibid, Paras. 48 and 53. As a result the Court rejected the argument of the Council that there was no legal basis for the Directive proposed by the Commission and annulled the Council's framework decision. See also: the Commission's Communication on the implications of the Court's judgment of 13 September 2005 (Case C-176/03), COM (2005)583, 22.11.2005.

392 Council Framework Decision 2005/667/JHA strengthening the criminal law framework for the enforcement of the law against ship-source pollution.

393 E.g., the "*Prestige*"-Council Conclusions, Para. 8 and the October 2003 Transport Council conclusions, p. 8. For a full discussion of the issues raised by the Commission's Proposal under international law, see: V. Frank (2005).

394 MARPOL 73/78, Article 4(1) and 4(4).

395 However, IMO SG, E. Mitropoulos, talking before the EP-MARE, *supra* n. 244, made it clear that "IMO Conventions have not been drafted with the prospect of non-compliance giving rise to criminal prosecution (…)".

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criminal law, including custodial sentences for illegal discharges.[396] In addition, Article 9(2) of MARPOL 73/78 allows coastal States to enact laws that go beyond the provisions of MARPOL as long as they are consistent with international law (LOSC). The Council did not initially accept the Commission's view and in the first reading it decided to eliminate any reference to "criminal offences" or "criminal sanctions".[397] Eventually a compromise was reached and the adopted Directive qualifies illegal discharges as "infringements" if they are committed with "intent, recklessly or by serious negligence" (Article 4). However, infringements may be regarded as "criminal offences" by and in the circumstances provided for in the Council Framework Decision (ibid.). Infringements have to be punished with "effective, proportionate and dissuasive" penalties, which may include criminal or administrative penalties, but there is no longer any reference to deprivation of liberty in the text of the Directive (Article 8.1). Penalties are regulated in the Council Framework Decision, which, in the worst-case scenario, includes custodial sentences.[398]

In addition, the original Commission proposal has been strongly criticized by the EP, the shipping industry and some member states in the Council for including and treating as criminal offences "accidental discharges resulting from damage to the ship or its equipment", which are explicitly exempted from the MARPOL 73/78 regime.[399] As a result, the adopted Directive does not include accidental discharges, but refers to the definition of a "discharge" under MARPOL 73/78 (Article 2(3)) and provides for the same exceptions as those which exist under MARPOL 73/78 (Article 5).

The Directive (Article 3(1)), like the original proposal, applies to discharges occurring within and beyond the territorial sea of the member states (i.e., straits used for international navigation, the EEZ and the high seas). Initially, the application of the Directive beyond the territorial sea was strongly contested, especially vis-à-vis foreign ships in transit. The provisions of the Directive, however, may only be enforced against

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396 See the Italian Law 979, 31.12.1982 (GIURI 16, 18.01.1983). For the US see: IMO doc. MEPC 51/14, 26.01.2004.

397 The Council's Common Position on the Draft Directive on ship-source pollution (1964/04), 29/09/2004, Para. 8 and Article 4. References to criminal sanctions and offences have also been omitted in the Title and in Article 1. See also: General Secretariat of the Council, Revised Draft of the Commission's proposal discussed within the Shipping Working Group, 30/01/2004; (2003/0037(COD)/5754/04).

398 Framework Decision 2005/667/JHA, Article 4(2) provides for punishment ranging from five to ten years imprisonment for pollution offences which have caused "significant and widespread damage to water quality, to animal or vegetable species or to parts of them and the death or serious injury of persons". Article 6(1) sets out financial penalties for legal persons up to a maximum of 1.5 million Euros.

399 COM (2003) 92, Article 2(3). See, *inter alia*, EP Resolution (PT_TA-PROV (2004) 0009), 13/01/2004, Amendment 10; "Industry Comments on the Council's Political Agreement", available at: www.ecsa.be/publications/043.pdf. See also the December 2003 Transport Council Conclusions, p. 6. The main concern is that sanctioning accidental pollution would excessively criminalize people working in a sector that is already having many problems in attracting new people.

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foreign ships when they are voluntarily in the ports or offshore terminals of a member state (Article 6(1)). Only in this case "shall" member states undertake appropriate inspections, taking into account the relevant IMO guidelines, to detect discharges in violation of MARPOL, wherever they have occurred. This is completely consistent with Article 218(1) of the LOSC on port State enforcement, with the only difference being that under the Directive the exercise of port state enforcement is compulsory.[400] However, it is necessary to keep in mind that, according to Article 230(1) of the LOSC, violations of applicable pollution standards committed by foreign vessels beyond the territorial sea may only be punished with financial penalties. Non-monetary penalties may only be imposed with regard to "wilful and serious pollution" committed in the territorial sea (LOSC, Article 230(2)). Article 9 of the Directive makes it clear that its provisions shall apply in accordance with the safeguard provisions of Section 7, Part XII of the LOSC, which contains Article 230.

The Directive, just as the original proposal, does not provide EC member states with enforcement powers vis-à-vis foreign ships which are not directed towards EC ports, but it simply establishes a system of collaboration and information exchange between the member state holding the information about the suspected discharge and the next (EC or non-EC) port of call (Article 7(1)(a) and (b)).[401] With regard to enforcement measures against foreign ships in transit through the EEZ, Article 7(2) substantially reproduces the text of Article 220(6) of the LOSC, with the only difference being that under the Directive the EC member states do not have a mere right, but a positive legal duty ("shall") to take enforcement action.[402]

The difficulty in detecting and tracing illegal discharges might hamper the effective enforcement of the Directive. Article 10, therefore, requires closer cooperation between the member states, the Commission and the EMSA in the establishment of mechanisms for the identification/monitoring/tracing of pollution. To ensure the full enforcement of the Directive, the EP has put forward a set of amendments, including the establishment of a European Coast Guard equipped with the powers and instruments which are necessary, *inter alia*, to detect discharges and to trace and prosecute polluters.[403] The idea of creating a European Coast Guard along the lines of the US Coast Guard is not new, but has never been supported by the member states in the Council, which rejected

400 Conversely under LOSC, Article 218(1), port States have a right, not an obligation, to investigate discharge offences, including those committed in the EEZ and high seas.

401 In particular: (a) if the next port of call of the ship in transit is in another member state, the member state concerned shall cooperate closely in the inspection referred to in Article 6(1) and in deciding on the appropriate measures, (b) if the next port of call is a port outside the EC, the member state shall inform the State concerned about the suspected discharge and request that State to take appropriate measures.

402 Under Article 220(6) of the LOSC, coastal State enforcement jurisdiction in the EEZ, just like in a port, is only optional.

403 EP Resolution, Amendment 22. See also EP April 2004 Resolution (Para. 15) and the Sterckx Resolution, Para. 34 and, in general, Greens/EFA in the EP at: www.greens-efa.org/en/press/detail.php?id=1738&lg=en.

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it upon first reading. On the other hand, the Commission, which has never been clearly in favour of the establishment of an EC Coast Guard, supported the EP's amendment.[404] As a compromise solution, the Preamble to the Directive invites the Commission to undertake a feasibility study on a European Coast Guard, clarifying all the costs and benefits which could eventually result in a legislative proposal.[405]

In the light of the observations made so far, the Directive seems to be in full conformity with international law and the LOSC. Besides, the safeguard contained in Article 9 guarantees that measures adopted by member states to implement the Directive are not discriminatory or otherwise inconsistent with the LOSC. Foreign vessels know that if they wish to operate in the EC they have to comply with MARPOL 73/78, otherwise they will be severely punished. Nevertheless, even after its adoption, the consistency of the Directive with international law (MARPOL 73/78) continues to be questioned by some. The use of "serious negligence" as a criterion for infringement creates major concerns and is considered to go beyond MARPOL, which only applies to intentional violations or recklessness.[406] In the view of sceptics, this vague, subjective, and ill-defined criterion may have the effect of hampering the right of innocent passage in the territorial sea, which, according to the LOSC, may only be suspended in cases of "wilful and serious pollution". Although the Commission has reassured that only the most serious pollution incidents will be regarded as criminal offences punishable with custodial sentences, the application of the Ship-Source Pollution Directive to ships flying non-EC flags might create some legal problems.

6.8.8 The Way Forward: the Erika III Package

The *Erika I* and *II* legislation considerably strengthened safety and anti-pollution within the Community and drastically reduced the risk of oil pollution from ships. In its 2004 Resolution, however, the EP urged the Commission to continue and reinforce existing efforts toward improving maritime safety and proposed a concrete set of measures. As a response, in November 2005, the Commission presented a new package of legislative proposals (the *Erika III* package) with the double objective of improving safety at sea, along the lines of the *Erika I* and *Erika II* packages, and restoring the competitiveness of European flags by ensuring a level playing field for all operators and eliminating

404 E.g., the Commission's response to the EP-MARE questionnaire (at: www.europarl.eu.int/comparl/tempcom/mare/pdf/quest_answ_ec_en.pdf); Policy Challenges and Budgetary Means of the Enlarged Union 2007-2013 (COM (2004) 101). Conversely, in the White Paper on Transport (2001), p. 91, the Commission does not support the idea of an EC Coast Guard.

405 Ship-Source Pollution Directive, Preamble, Para. 11.

406 See the Speech by Judge T. Mensah at the Eighth Cadwallader Memorial Lecture (2005), and the reply by Mr. F. Karamistos, Director of the Maritime Transport and Intermodality Directorate of DG TREN, reported by INTERTANKO, available at: www.intertank.com/templates/Page.aspx?id=4699.

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competitive advantages for substandard ships.[407] At the same time, the *Erika III* package will strengthen the safety aspects of the future integrated Maritime Policy[408] and will contribute towards achieving the objectives of the Marine Strategy. Reasons of space prevent a full discussion of the *Erika III* package, which contains seven legislative proposals, divided into two main themes: (a) improving accident and pollution prevention and (b) dealing with the aftermath of the accident.[409] Only the main elements of the first set of proposals will be briefly discussed.

First of all, the Commission presented the announced proposal for a Directive on compliance with flag State requirements, with the overall objective of increasing the quality of European flags.[410] In particular, the proposal aims at ensuring that member states effectively and consistently discharge their obligations as flag States in accordance with the IMO Conventions and provides a mechanism for the harmonized interpretation of IMO measures which are left to the discretion of the contracting arties (Article 1(1)).[411] Member states are required ("shall") to ratify IMO Conventions (Article 3(1) and (2)) and to closely monitor compliance with international standards of vessels flying their flags, both before and after registration. For this purpose they need to have maritime administrations in place operating in accordance with high quality criteria set out in the proposal. In addition, the proposed Directive incorporates into EC law and makes mandatory the IMO Code on Compliance and encourages the use of the IMO Voluntary Audit Scheme.[412] Ships registered under the flag of an EC member state which has demonstrated high-quality results (e.g., through the application of the IMO Voluntary Audit Scheme), are granted incentives in the form of simplified controls in EC ports. The same incentives may also apply to ships registered under the flag of third countries,

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407 Communication from the Commission, Third package of legislative measures on maritime safety in the European Union, 23.11.2005, COM(2005) 585. The *Erika III* package is an essential element of the Commission's strategic objectives for the period 2005-2009 (COM (2005) 12, 26.01.2005. On 23 November 2005, the Commission's proposals were transmitted to the EP and the Council, which have not yet started the first reading. Reportedly, the final adoption cannot be expected before late 2007.

408 As discussed in Chapter 3.5.3, the process toward the establishment of a Maritime Policy for the EU is still in a preliminary stage. That Policy should be aimed at ensuring efficient, high-quality maritime transport which respects the environment and human beings.

409 See: the Commission's proposal for a Directive on accident investigations and the Commission's proposal for a Directive on the civil liability of shipowners.

410 I.e., COM(2005) 586, 23.11.2005. The proposed Directive is based on Article 80(2) and Article 3(1) of Directive 94/57/EC (Classification Societies Directive), which already requests member states to comply with IMO Res. A. 847(20) on guidelines to assist flag States in the application of IMO instruments.

411 The proposal foresees the development of harmonised procedures for the application of exceptions under IMO Conventions and the harmonised interpretation of issues left to the discretion of administrations and unified interpretations for provisions laid down in IMO Conventions (Article 3(6)).

412 Article 6(5). However, according to Article 3(4) member states "shall take due account" of the IMO Code on Compliance.

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which, on the basis of an agreement concluded with EC member states, undertake to use the same quality standards. The proposed Directive intends to reinforce and supplement the main weaknesses of the IMO regime (e.g., the lack of IMO control powers, the high degree of discretion, derogations and exceptions contained in IMO instruments, and the non-mandatory character of many IMO measures) and does not raise problems of consistency with international law. Its content, however, is very controversial and is expected to be extensively debated in the Shipping Working Group of the Council. The proposal, indeed, touches upon sensitive issues such as the registration of ships under a flag of a member state (Article 5), which falls within the national sovereignty of the member states. However, in the view of the Commission, whereas flagging is still under the sovereignty of the member states, the responsibility for the harmonized application of rules on granting and maintaining flagging rights rests with the Community as long as no international control systems are in place.[413] The legislative process is at its very early stage and the road ahead may be long and difficult.[414]

In addition, the Commission has presented a proposal amending the VTMIS Directive, with the primary objective being to establish a clear legal framework for places of refuge, thereby filling in the gaps of the previous regime.[415] The proposal, like the VTMIS Directive, does not establish a duty for member states to grant a place of refuge, but requires the establishment of an independent competent authority responsible for assessing the situation, selecting a suitable place of refuge on the basis of an inventory prepared by the member state, and eventually authorizing the access of ships in distress to the selected place (Article 20(2) and 20a (2)(b)). The name of the competent authority has to be made public, while the inventory of potential places of refuge has to be communicated to the Commission (Article 20a(3)). In addition, prior to accommodating a ship in distress in a place of refuge, the member state "may" request the ship's operator, agent or master to present an insurance certificate or a financial guarantee covering his liability for damage caused by the ship (Article 20(b)). The absence of such an insurance or guarantee does not exempt the member states from conducting the prior assessment. The issue of places of refuge is highly sensitive and member states have been very sceptical in the past about accepting strict rules on the accommodation of ships in distress without financial guarantees and have always opposed the publication of an inventory of places of refuge in waters under their jurisdiction. The Commission's proposal takes these concerns into account and this might facilitate the discussions in the Shipping Working Group.

Finally, two additional proposals amend and reinforce the existing Directives on Classification Societies and PSC. The first proposal intends to improve the quality of

413 COM(2005)586, Explanatory Memorandum, p. 8.

414 The EP has only recently (April 2006) appointed the Rapporteur, but has not yet started formal discussions, while the Council has decided that for the time being it will deal with only two of the proposals (the PSC and VTMIS proposals).

415 I.e., COM(2005)589, 23.11.2005. In addition, the proposal introduces the use of AIS on board of fishing vessels and requires member states to further develop the Safe Sea Net database.

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the classification societies authorized to conduct inspections on behalf of the EC member states, by increasing their independence, competence and responsibility. The proposal envisages, *inter alia*, the establishment of an independent system for the auditing and certification of the quality of the recognized organizations, which is complementary to the control exercised by the Commission. In addition, it introduces the possibility for the Commission to impose financial penalties on poorly performing organizations. The proposal for the amendment of the PSC Directive intends to reinforce PSC inspections by introducing a 100 per cent target for inspection, detailed and more frequent controls for high-risk ships and reduced inspections for high-quality ships. In addition, it extends the ultimate sanction of banning ships from EC ports to all types of vessels, not only high-risk ships, which have high detention records.

6.9 EC Action at the International Level

International cooperation is one of the main components of the CPSS and since the very beginning it has been considered as the most effective tool to enhance maritime safety and to reduce the environmental impact of international shipping on EC waters.[416] Today, just like a decade ago, the main threat to European seas is posed by the transit traffic of ships flying the flag of non-EC member states and not directed towards EC ports. In order to be effective, maritime safety and anti-pollution standards should apply to all ships, not only those flying European flags. The Community, therefore, has traditionally been determined to enhance its participation in the competent international fora to promote the adoption of global standards along the lines of those of the EC.

Unlike in its environmental policy, the Community's external competence in the field of maritime transport is not expressly laid down in the EC Treaty, but finds its legal basis in the ECJ's doctrine of the "implicit" external powers discussed in Chapter 2.3.2.2. Such competence, indeed, stems directly from the exercise of internal powers and is "necessary" to achieve the objectives of the EC's maritime safety legislation.

For a long time, however, the member states used the lack of a specific legal basis in the Treaty and the subsidiarity principle to keep the Community away from the international scene and to preserve their individual participation in the IMO. In the last decade, however, the continuous expansion of the scope of EC legislation has progressively eroded the capacity of the member states to act alone. Still, with some reluctance, they had to accept the Community's involvement in international decision-making.

After the accession, on 1 May 2004, of the ten new EC member states, including Cyprus and Malta, about 25 per cent of the world's fleet is currently registered under

416 The CPSS (Para. 61) calls for an enhanced role of the EC in the IMO and other relevant organizations dealing with vessel-source pollution. See also CPSS, Paras. 146-151 and the Commission's Communication, "Community Participation in International Organs and Conferences", SEC (93) 36, 1.03.1993, p. 18.

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EC flags and nearly 40 per cent is beneficially controlled by European companies.[417] Most of the EC maritime safety legislation also applies to the EEcA countries (e.g., Iceland and Norway). In addition, since maritime traffic to and from EC ports represents over 30% of the global traffic, EC safety rules apply to a high percentage of the world's fleet. The EC has become one of the main shipping players and its participation in the multilateral development of maritime safety rules and standards appears to be beneficial to all. In the aftermath of the *Prestige* accident the Community reconfirmed its firm determination to "play a leading role in the international efforts in pursuit of stringent international rules on maritime safety, in particular within the IMO".[418]

6.9.1 Division of External Competence

As already discussed, the Community and the member states share competence in the field of maritime transport and maritime safety. This is reconfirmed in the Declaration of competence deposited by the Community pursuant to Article 5(1) of Annex IX of the LOSC at the time of its accession to the LOSC. The Declaration makes it clear that in the field of maritime transport, safety of navigation and prevention of marine pollution as regulated in Parts II, III, V, VII and XII of the LOSC the competence is shared with the member states.[419] As discussed in Chapter 5.2.4, however, the Declaration, recalling the *ERTA* Doctrine, recognizes the evolving nature of the Community's competence which, as a consequence of pre-emption, may become exclusive. The Declaration lists the existing EC maritime safety legislation covering matters governed by the LOSC and makes it clear that the nature of the Community's competence stemming from existing and future EC legislation must be assessed on a case-by-case basis, looking at the scope and the content of each measure.[420]

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417 Together with EEcA countries, these percentages increase to respectively 28% and 43% - Commission Staff Working Paper (2005) at: http://ec.europa.eu/transport/maritime/safety/doc/package3/en/working_paper_en.pdf. Greece, Malta and Cyprus have respectively the first, fourth and the sixth largest fleets in the world.

418 December 2002, Copenhagen European Council (Para. 33). See also EU Presidency Statement N.2 at the 4th ICP, June 2003, available at: europa-eu-un.org/articleslist.asp?section=11; the March 2003 Transport Council conclusions, p. 12, and COM (2002) 539, Action 22, p. 26.

419 Reportedly, in 1998, the Commission, with the approval of the Council, sent a letter to the UN Secretary-General explaining the division of competence. This letter has not been published.

420 All relevant legislation is listed in an Annex to the Declaration, under the title "*maritime safety* and *prevention of marine pollution*" (reproduced in Annex II to this book). It is interesting to note that EC legislation is listed with titles linked to the IMO Conventions, not to specific issues (e.g., Regulation (EEC) No. 2158/93 on the application of amendments to SOLAS and MARPOL 73/78). Reportedly, this has been done in order to allow third States to immediately recognize the IMO Conventions and to make it clear that the member states are bound by IMO Conventions not only through ratification, but also though EC law.

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Most of the EC maritime safety legislation is in the form of Directives based on Article 80(2) EC. These Directives seek a higher degree of harmonization compared to environmental Directives adopted under Article 175. This is, in particular, the case for all Article 80(2) directives directed at ensuring the uniform and consistent application of IMO standards within the Community.[421] Uniformity and the complete harmonization of rules among the member states is indeed one of the main objectives of the CPSS. Most of the Article 80(2) Directives not only have an environmental or safety objective, but also aim at eliminating all differences which may work as a barrier to trade (e.g. CDEMs) between the member states, thereby protecting competition. Article 80(2), unlike Article 176, does not allow member states to maintain or introduce more stringent protective measures. Unless it is explicitly provided in the Directive, therefore, member states are not entitled to adopt higher standards, which would jeopardize the full achievement of the objective of the EC legislation. Maritime Safety Directives, except the Ship-Source Pollution Directive, do not contain such a possibility and normally lay down maximum standards. In other words, they "totally harmonize" the matter, thereby triggering pre-emption. The same holds true for Maritime Safety Regulations (e.g., the phasing-out of single-hulled tankers), which contain maximum standards.[422]

As discussed in Chapter 4.2.2.2, the fact that EC legislation totally harmonizes the matter is not by itself sufficient to trigger pre-emption and to confer on the Community an external exclusive competence, but is necessary also to look at the international agreement, and especially whether it contains minimum or maximum standards. As already mentioned, it is difficult to apply this criterion in the field of maritime safety. Regional maritime safety standards (e.g., HELCOM shipping rules; the 2002 Emergency Protocol of the BARCON) are normally minimum standards and do not trigger any external exclusive competence on the part of the Community. Member states, therefore, seem to be free to agree on higher standards for ships flying their flag acting within these bodies. Conversely, it is difficult to say whether IMO Conventions contain maximum or minimum standards. Some GAIRAS (i.e., CDEMs, and discharge and navigational standards in straits used for international navigation) represent minimum standards for flag and port States and, at the same time, maximum requirements for coastal States. The IMO Conventions do not normally make a distinction between port, coastal and flag States.[423] However, the matters discussed in the IMO and other relevant bodies have been "largely harmonized" by the Community and that the adoption of higher standards in the IMO may seriously affect the uniform and consistent application of EC rules and the proper functioning of the system that they want to establish.

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421 See, *inter alia*, SEC (2002) 381 on the EC's accession to the IMO, 9 April 2002, Para. 2.

422 E.g., Council Regulation 1726/2003, on transport of oil in single-hulled tankers; Commission Regulation 2158/93 on the application of amendments to SOLAS and MARPOL 73/78; Council Regulation 2978/94 on the implementation of IMO Resolution A.747 (18) on the application of tonnage measurements of ballast spaces in segregated ballast oil tankers.

423 E. Hey and A. Nollkaemper (1995), pp. 291-2 and E. Hey in M. Evans and D. Malcolm (eds.) (1997), pp. 283-284.

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In the light of the Court's latest case law (*Open Skies* and Opinion 1/03), therefore, the EC member states seem to be pre-empted from agreeing on higher international standards for the same subject-matter.[424]

In short, on the basis of its maritime safety legislation, the Community has acquired an exclusive external competence in a large number of matters regulated by the IMO (e.g., in the field of MARPOL's Annex I, Regulations 13 G and H; SOLAS, Chapter V/20) and other relevant bodies, and the member states have lost their capacity to negotiate and take individual decisions in these matters. The lack of a legal status in the IMO and its observer status at the UN, however, makes it impossible for the Community to exercise its competence in these fora, requiring it to act through the coordinated action of its member states.

Member states maintain their exclusive competence with regard to the exercise of jurisdiction over their vessels, the flagging and registration of ships, and the enforcement of administrative or penal sanctions, but they have to act consistently with EC law.[425] Likewise, in the absence of EC legislation or outside its scope, member states are substantially free to participate in the development of international maritime safety rules as long as they do not interfere with intra-Community trade (Article 28 EC). Following the broad interpretation of the Court, some maritime safety standards (CDEMs) might be considered as "measures having an equivalent effect" to trade restrictions and to fall within the scope of that prohibition.[426] As discussed in Chapter 4.2.4.1, member states must closely cooperate with EC institutions on the basis of Article 10 EC. The duty of cooperation requires them, as a minimum, to consult the Commission on shipping-related issues which may affect EC interests and to make an effort to coordinate their positions before discussing these matters at the international level. In the past there have been several attempts to formalize cooperation in the field of maritime transport, but they have not been very successful.[427] In the absence of a "code of conduct", however, the forms of coordination vary depending on the forum and the issues on the agenda.

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424 E.g., Opinion 1/03 (paras 126 and 133). See in detail Chapter 4.2.2.1.

425 See the Community's Declaration upon the formal confirmation of the LOSC. See also: Case C-221/89, *Factortame* (paras 13-4); Case C-286/90, *Poulsen* (Para 15).

426 For a full discussion on the residual powers of member states and "measures having an equivalent effect to trade restrictions" see: Chapter 4.2.3. In Case C-379/92, *Peralta* (paras 23-5), the Court excluded that the Italian legislation introducing more stringent discharge standards compared to MARPOL was contrary to Article 30.

427 Council Decision 77/587/EEC setting up a consultation procedure on relations between member states and third countries in shipping matters and on action relating to such matters in international organizations. The aim of these consultations, however, was to determine whether the shipping-related issues dealt with by an international organization raised problems of common interest, but it was up to the member states to decide whether or not they should coordinate their action (Article 2). In 1996, the Commission tried to reinforce the consultation procedure and proposed a prior Commission authorization for the negotiation by member states of agreements with third countries in the field of maritime transport (COM(1996) 707, OJ C 113, 11.04.1997), but, in 2001, it withdrew the proposal (COM (2001) 763).

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6.9.2 EC Participation and Coordination in the IMO

The Community is not a party to the IMO Convention, which reserves membership exclusively to States, and it does not have observer status in the organization.[428] The Commission participates in the IMO meetings on the basis of an Agreement of Mutual Co-operation concluded between the Commission and the IMO Secretary-General in 1974.[429] At that time, the CPSS was not yet established but it was already clear that the two organizations had to work together and harmonize their policies. However, due to the strong opposition of some member states (especially the UK which acceded in 1973) to the EC's participation in the IMO, the Agreement was concluded by the Commission, as the executive body of the Community, and the Council simply took note of it. Reportedly, the member states had no problems with it since it was not a formal Community agreement. As a result, the Community is not recognized in IMO and the Commission, due to its observer status, cannot negotiate on behalf of the Community, not even in relation to issues under the EC's exclusive competence. Only on one exceptional occasion has the Commission been given a formal mandate from the Council to negotiate within the IMO-LEG two Articles of the 2002 Athens Protocol on behalf of the Community.[430] The Community, therefore, normally participates in the activities of the organization by coordinating the positions of the member states.[431] This coordination between the Community and the member states in preparing for IMO

428 1948 IMO Convention, Article 4. Information about the EC coordination procedure for the IMO is based on interviews with the representatives of DG TREN who chair the coordination meetings and normally attend the IMO sessions (Mr. J. De Dieu and Mr. M. Wieczorkiewicz) and the former permanent representative of the Commission at the IMO (Mr. J. den Boer). The author remains exclusively responsible for the opinions expressed in this section.

429 The Agreement (28/06/1974) contains provisions on technical cooperation and the exchange of information. It has never been changed and it still forms the basis for cooperation between the EC and IMO and for the participation of the Commission, as an observer, at all IMO meetings. See: SEC (2002) 381 on the EC's accession to IMO, 9.04.2002, Annex III. See also: Exchange of letters between the Commission and the IMO Secretariat on consultation, exchange of information, Commission participation as an observer (11.02.1974 and 28.06.1974) and on arrangements for the effective implementation of IMO Conventions (5.01.1983 and 2.02.1983), all collected in: "Relations between the Community and International Organizations ("Relations"), EEC Commission (1989), pp. 163-6.

430 International Conference on the Revision of the 1974 IMO Athens Convention on the Carriage of Passengers and their Luggage by Sea, held on the 18 July 2002. The EC Commission, for the first time, submitted a Draft Protocol "*on behalf* of the European Community and *its Member States*"(emphasis added) (i.e., LEG/CONF.13/7, 18.07.2002). This was necessary to remove a series of legal obstacles for the EC member states to ratify the Athens Protocol, which touched upon issues of the EC's exclusive competence. In 2003, the Commission requested an authorization from the Council on the conclusion by the Community of the Athens Protocol (COM (2003) 575).

431 As the Court has made it clear, when the Community cannot become a party to a Treaty, its external competence may be exercised by the member states acting jointly in the interest of the Community (i.e., ILO Opinion 2/91, Para. 5).

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meetings started on a very informal basis in 1994 during the negotiations of the IMO Convention on the training of seafarers (1995 STWC). Since training is directly linked to safety, the Commission claimed exclusive competence on the basis of Article 71(1)(c) EC. This claim created a clash in the Council and eventually a Gentlemen's Agreement was adopted.[432] According to this Agreement, member states may negotiate in the IMO as long as they do not infringe the EC's competence and EC legislation and as long as they coordinate their positions. EC coordination has to take place at two levels: in Brussels, under the chairmanship of the Commission and on the spot in London, under the chairmanship of the Presidency. The 1994 Gentlemen's Agreement still represents the basis for EC coordination, although the mechanism has developed considerably. Before the *Erika* accident, when there was not much EC maritime safety legislation in place nor strong interests to be defended in the IMO, EC coordination was very informal. With the evolution of the EC maritime safety legislation, the EC interests in the IMO increased and the EC coordination mechanisms have been reinforced and formalized to a large extent. In the period 1995-2000, DG TREN (not the Commission itself), appointed a permanent representative at the IMO.[433] Currently, EC coordination takes place in preparation for the meetings of the IMO Council, the Assembly, the main IMO Committees (i.e., MEPC, MSC and, occasionally, LEG) and, depending on the issues on the agenda, NAV and other sub-committees.[434]

Before convening the meeting in Brussels, representatives of DG TREN prepare and circulate a working document suggesting the EC positions on issues on the IMO agenda to be discussed during the coordination meeting. EEcA countries may participate in the coordination meetings as observers without voting rights.[435] However, they may inform the member states of their positions on specific issues and, if time allows, they may try to get support. Norway is always present and always takes the floor. Agreed positions are then circulated by the Commission to the member states, together with a formal invitation from the Council Secretariat for on-the-spot coordination.

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432 The 1994 Gentlemen's Agreement as a document does not even appear in the proceedings of the Council. The guardian of this Gentlemen's Agreement is the Commission.

433 Mr. J. den Boer was appointed as the permanent representative. Normally, permanent representatives of the Commission in IOs (e.g., FAO, ILO, UN) come from DG RELEX. Having a representative in the IMO resulted in a major financial burden, and DG TREN decided to do this subject on its own responsibility. Mr. den Boer left the post in 2000. In view of the enlargement the post has been frozen. On 1st April 2006, Mr. M. Koopmans was appointed as a new permanent representative of the European Commission to the IMO. The legal basis for this position is still the 1994 Gentlemen's Agreement, See, *inter alia*, SEC (2002) 381 on the EC's accession to the IMO, Para. 5.1.

434 Formal EC coordination for the IMO subcommittees also depends on the interests of the member state holding the Presidency. Sometimes it takes place more informally (e.g., by telephone) without convening a meeting in Brussels. EC coordination for LEG is uncommon since issues relating to EC interests are rarely at stake (e.g., liability issues).

435 However, EEcA countries cannot participate in the adoption of common positions within the Council (see below).

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On the spot, before the opening of the IMO sessions, a general EC coordination meeting takes place under the chairmanship of the Presidency, assisted by the Commission, to endorse the coordinated positions agreed upon in Brussels and to define new common approaches. Formally coordinated positions, when adopted by unanimity, have to be adhered to by all delegations both at the plenary and working group levels. If, in Brussels, it was not possible to agree on all items on the IMO agenda, the Presidency will try to reach common positions on the spot. If it does not succeed, those member states which do not agree with the majority position are invited to keep a low profile. One of the unwritten rules under the 1994 Gentlemen's Agreement is indeed that if a member state is not seriously affected by the position of the majority, it should either support it or remain silent, but should never raise objections or speak against it, especially in plenary session.[436] In September 2004, the Commission laid down these general principles in an informal document circulated to the member states.[437]

The coordinated position is presented by a member state or the Presidency, depending on the circumstances.[438] In the IMO there is some resistance against bloc-forming and occasionally non-EC member states raise objections when the Presidency speaks on behalf of the 25. Most of the time, therefore, the Presidency prefers to allow the member states to take the floor. In both cases, it will always be the position of a single member state since the Community, as a legal entity, is not recognized in the IMO. What is important is to have the support of all the 25. The chairman of the IMO meeting, indeed, does not count votes but ganges support for a position. Although the Commission, on the basis of the 1974 Co-operation Agreement, has the right to speak, it normally does not take an active part in the debate. Representatives of the Commission sit in the back together with other international organizations and observe the member states. The Commission, however, plays a fundamental role in trying to obtain the support of non-EC member states, lobbying in London and around the world.[439]

The level of coordination among member states in IMO has been traditionally rather weak and the mechanism worked as long as there were no strong interests on the table. But when issues of national concern are discussed, some member states, especially shipping nations, tend to express their views and take their own course of action, often

436 Conversely, according to the 1994 Gentlemen's Agreement if a member state is firmly against a coordinated position and its opposition is respected by other member states, it can raise the issue at the IMO meeting. In any case, if a member state is forced to deviate from a common position it shall, as soon as possible, inform the Presidency and the Commission to allow them to raise the issue at the coordination level.

437 These principles have been added as "preliminary remarks" to the Commission's working document for the EC coordination in the preparation of MEPC 52.

438 See, *inter alia*, SEC (2002) 381 on the EC's accession to the IMO, 9.04.2002 (Para. 3).

439 The Commission conducts intense negotiations with other IMO Members (e.g., China, India, and Russia) outside the IMO meetings. Reportedly, negotiations take place more in the hallway of the IMO building and during the coffee breaks rather than in the plenary meetings.

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deviating from what was decided during the EC coordination.[440] The Commission has so far reacted differently: sometimes simply inviting the member state to align with the coordinated position, other times adopting a "name and shame" approach and reporting the issue to the COREPER, but without taking any concrete action.

With the accession, on 1 May 2004, of new member states with strong flag State and ship owner interests (i.e., Cyprus, Malta and Poland) it became evident that in the future it will be more difficult to reach agreements in Brussels and to ensure coordination among the member states in London. After the enlargement, therefore, the Commission took new steps toward reinforcing EC coordination and ensuring that member states do not deviate from agreed positions.[441] A clear distinction was introduced between issues of "Community competence" where there is EC legislation which leads to the EC's exclusive competence (e.g., in the field of Regulations 13 G and H of MARPOL's Annex I) and issues of "Community interest" where the competence is still shared with the member states. On issues of Community interest the member states have to try to achieve a "coordinated position" within the informal meetings chaired by the Commission in Brussels. On issues of Community competence they have to reach "common positions" within meetings chaired by the Council.[442] However, considering the extending scope of EC maritime safety legislation, it might be quite complicated to go to the Council (COREPER) every time that an issue of exclusive competence is discussed in the IMO. As a solution, it has been decided that, if there are diverging views on issues falling within the Community's exclusive competence, it will be up to the Council acting by QMV to adopt the common position on the basis of a suggestion from the Commission.[443] This position is legally binding for all member states, which may be brought to Court if they do not follow what has been agreed. While, in a first stage, this practice

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440 Reportedly, for instance, at MEPC 49 Greece opposed the Western European PSSA proposal presented by 6 member states but subsequently in the coordination meeting in Brussels it agreed to support that proposal. Similarly, during the discussions on ballast waters in MEPC 51, the Netherlands opposed an Italian proposal on the exchange of ballast waters in the high seas after it was agreed on the spot to support it or to remain silent, but not to raise objections.

441 Reportedly, the enlargement has not affected the EC coordination in the IMO since, apart from Cyprus, Malta and Poland, the other new member states do not have strong shipping interests and they are not very active in the IMO. During the coordination meetings they usually remain silent.

442 The opportunity to go to COREPER for issues of exclusive competence has always existed. However, in the past this has not frequently happened because of the limited scope of EC maritime safety legislation. Issues of exclusive competence came up only with regard to accession to a new Treaty or a new Protocol such as, for instance, with the negotiation of the 1993 Torremolinos Protocol.

443 This practice was followed for the first time in the preparation for the MEPC 52, in October 2004. Denmark and the UK had problems with some types of oil listed in Annex I of MARPOL. At the EU coordination meeting the Council endorsed the common position on the interpretations and amendments of the MARPOL 73/78 to be discussed in MEPC 52. See the Report of the Transport Council, 7 October 2004, p.14.

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only applied to matters under the EC's exclusive competence, the Commission has taken new steps towards extending it to matters of shared competence.

In addition, the Commission is firmly determined to eliminate the existing deadlock which impedes the Community from being represented in the IMO. It is worth stressing that it is the Commission, not the Community, which has observer status in the organization. In February 2005, for instance, the MEPC 54 refused to accept a submission to the BLG sub-committee presented on behalf of the Community, because the Community itself is not recognized in the IMO. As a response, on 16 February 2005, on the basis of a decision by the COREPER, a submission was presented to the IMO on behalf of the 25 member states and the Commission using the formula "it is therefore the view of the above-mentioned submitting Contracting parties - *which are all members of the European Community, to which these States have transferred the competence regarding this particular subject-matter - that…*" (emphasis added) (the so-called BLG formula).[444]

The Council, on the basis of a working document submitted by the Commission in April 2005, is currently in the process of establishing a procedural framework for the preparation and presentation of positions to be taken by the member states and the Commission in the IMO.[445] This framework, which intends to serve as a practical guide for improving the influence of the member states and the Community in the IMO, clarifies and reinforces existing coordination mechanisms and increases the role of the EC in the IMO decision-making process. The main innovation is the introduction of a clear distinction between "Community positions" on matters under the EC's exclusive competence, which are adopted by the Council (also at the level of the Shipping Working Party) by QMV on the basis of a proposal from the Commission, "Common positions of the Community and the member states" on matters under shared competence, which are adopted unanimously by the Council on the basis of a proposal from the Commission or the member states, and "Coordinated positions of the member states" on issues under the member states' exclusive competence, which are adopted by unanimity within the Council. If the Council is unable to adopt a "Community position", the member states have to abstain from expressing any position in the IMO on the subject unless this is not necessary to defend the Community *acquis*. Conversely, if the Council does not succeed in adopting a "Common position", the member states maintain their freedom to express their positions in the IMO as long as this does not affect the Community *acquis*. During the discussions in the Council (the Shipping Working Party and the

444 See BLG 9/12 (16.02.2005) on the clarification of the definition of "fuel oil" under the revised Annex I of MARPOL 73/78. The BLG formula has also been used in MSC 80/5/4 (maritime security) and MEPC 53/2/30 (ballast waters).

445 These procedures have been intensively discussed in the Shipping Working Party in its 2005 April, June, July and September sessions and in the COREPER, 19.10.2005. This framework finds its legal basis in Article 10 EC setting out a duty of cooperation, but it is meant to be an informal guide and a practical tool.

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COREPER), all member states stressed the need for flexible positions which allow some margin of manoeuvre in order to avoid excessive rigidity.

Both Community and Common positions will be submitted by [the Presidency] the 25 member states and the Commission, in the first case using the BLG formula. Community and Common positions will be introduced by the Presidency on behalf of the European Community and with the support of the 25 member states. If so agreed during the coordination process, they may be presented by one of the member states or by the Commission, taking into account its technical expertise.[446] Coordinated positions may be submitted by the 25 member states and the Commission if the member states so decide and this should be supported by all member states and the Commission in good faith in order to achieve the given objective.

This procedural framework has not yet been formally adopted by the Council. The most controversial element relates to the formal submission of the Community positions. Reportedly, there is still concern with regard to the use of the BLG formula for the submission of Community positions. Some member states (especially shipping nations) do not accept the explicit reference to the transfer of competence contained in that formula and have prevented its adoption in the latest submissions to IMO.[447] In the view of the Commission, the easier solution would be to require observer status for the Community in the IMO. In this way, it would be possible to present submissions on behalf of the Community to the IMO and the BLG formula would thereby become redundant. This observer status, however, does not prejudice the main objective of ensuring the Community's full membership in the IMO.

For a long time member states, especially those which used to be strong negotiators in the IMO (e.g., the UK and Denmark), firmly opposed having Brussels (especially the Commission) involved in this forum. In the wake of the *Erika* and *Prestige* accidents, however, it became evident that the EC's coordinated action could be very effective especially with regard to highly political issues. Given the extending scope of EC maritime safety legislation, moreover, EC coordination is the necessary and the natural effect of increasing the Community's competence. On the other hand, some member states (especially the shipping nations) are not entirely happy with the recent developments in coordination and accuse the Commission of trying to extend its competence and being too rigid in its positions, leaving the member states with little room for negotiation. Reportedly, they believe that less antagonism and more cooperation between the Commission and the member states would lead to better results.

Inevitably, this EC coordination reduces the member states' margins for negotiation. Unlike 5 years ago, they are no longer free to pursue their own targets, but are blocked by EC positions. If an issue emerges during the meeting on matters under shared

446 Member states and the Commission may introduce additional submissions or speak in support of the Community or the common positions, if so agreed.

447 Reportedly, due to the opposition of Cyprus, supported by Germany, Greece, Malta and Poland, the BLG formula has not been used in the submissions to the MSC 81 and MEPC 54, in 2006.

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competence, member states need to get together on the spot and try to achieve a coordinated position or, if it is an issue within the EC's exclusive competence, they have to refer it to the COREPER.[448] Although the member states have always tried to keep their "house-keeping" outside the IMO meetings (e.g., before/after the meeting or during coffee-breaks), EC coordination inevitably brings along some degree of "rigidity" and makes the IMO decision-making process more tedious and bureaucratic. This causes a certain hostility in the IMO towards the presence of the Community in the negotiation process. Most of the officials attending IMO meetings are technicians with no legal background and do not thoroughly understand the EC integration mechanisms. In the view of the Commission, therefore, it is important to clarify to everybody that the Community's involvement is necessary since the member states can no longer act independently concerning a large range of issues on the table in the IMO.[449]

6.9.2.1 The EC's Accession to the IMO Convention

In the wake of the *Prestige* accident, the IMO Secretary-General recommended that, for the time being, the Community should pursue its objectives vigorously and supportively through the organization, rather than through regional measures.[450] The capacity of the Community to promote its targets in the IMO, however, is limited by its lack of membership in the organization. In the view of the Commission, this status does not reflect the central role currently being played by the Community in the international maritime scene and its increased competence in matters regulated by the IMO. Full IMO membership is necessary for the Community to exercise its external competence and defend its interests at the international level. In April 2002, therefore, the Commission requested a mandate from the Council for negotiating the EC's accession to IMO.[451] The objective is to allow the Community to become a full member on an equal footing with other IMO Parties with the right to speak and vote on behalf of (and not in addition to) the member states within the principal Committees (i.e., MSC, MEPC and LEG) and to assume those rights and duties stemming from IMO instruments in all matters under its exclusive competence.[452] Meanwhile, the Commission proposed

448 Reportedly, this occurred during the discussions on ballast waters in MEPC 52 with regard to an agreement reached in the Working Group on chemicals in ballast waters. Since this agreement "could" be in conflict with EC legislation, the Dutch Presidency had to explain to the Group that EC member states had to seek directions from Brussels.

449 Reportedly, a few years ago the Community prepared a policy paper for the IMO Technical Co-operation Committee (TCC) explaining how EC cooperation works and it proposed to submit a similar document to the IMO Assembly.

450 IMO SG, E. Mitropoulos, before the EP-MARE, 22.01.2004, *supra* n. 244.

451 SEC (2002) 381, 9.04.2002.

452 The EC should have a number of votes equivalent to the number of member states represented in the given IMO body and bound by the Community instruments from which external competence arises, SEC (2002) 381, Para. 6(b). Member states would maintain their individual right to speak and vote on those matters on which there is no EC legislation and which remain

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the adoption of transitional measures to improve EC coordination and ensure stronger Community representation in the organization.[453] Following the *Prestige* accident, the Commission and the EP urged the Council to grant the negotiating mandate.[454] In November 2005, the Commission renewed the request in its communication on the *Erika III* package. However, more than four years after the 2002 submission, the issue of the Community's membership in the IMO is still awaiting consideration by the Council and does not seem to be supported by the member states.[455]

Member states, especially shipping nations, question whether such membership is either desirable or practicable and, although they have already lost their power to act in matters under the EC's exclusive competence, they are still reluctant to give up their individual representation in IMO.[456] Furthermore, they seem afraid that the EC's membership in IMO might open the door to accession by other IOs (e.g., WHO, ICAO, ILO) and they want to prevent this "avalanche effect".

The EC's accession, moreover, would require an amendment to the 1948 IMO Convention allowing REIOs to become members. Since amendments enter into force twelve months after acceptance by two-thirds of the IMO members present in the Assembly (i.e., 109 out of 164 IMO members), the EC's accession may be a difficult and rather long-term process.[457] In addition, non-EC IMO members do not seem to have strong incentives to amend the IMO Convention in order to allow the Community (and other similar international organizations) to become a member.

The EC's accession to the IMO, however, would be beneficial to the Community, the member states (reinforcing their negotiation position), and to the shipping world as a whole. The EC's participation in the IMO's decision-making might, in principle, discourage future EC regional initiatives and strengthen consistency between EC and

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subject to their exclusive competence (ibid. Para. 3.2.2).

453 SEC (2002) 381, Para. 4.

454 E.g., COM (2003) 105, Para. 2.2.3; EP April 2004 Resolution, Para. 34; the Motion for an EP resolution on the external relations of the EU in the field of transport, 2002/2085 (INI), 14.11.2002, at B and M.

455 The EC's membership of the IMO has been included on the agenda of the Transport Council (21.04.2005) under the item "any other business". The issue has only briefly been discussed and was only supported by France, see: ECSA (2004-2005), p. 16.

456 For an overview of the main concerns, see, e.g., the Position of the U.K Parliament (House of Commons, Thirty-Eighth Report (Para. 9), at: www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmeuleg/152-xxxiii/15201.htm) which is the strongest opponent. Reportedly, France is favourable, while the Netherlands is neutral. Reportedly, some Mediterranean States, like Italy, fear that if the EC became an IMO Member, it would not take Mediterranean interests sufficiently into account, but would continue giving preference to the Baltic Sea and the North Sea.

457 For the amendment procedure, see 1948 IMO Convention, Articles 66-68. On average the ratification process for IMO Conventions takes from 8 to 10 years (SEC (2002) 381), see footnote 9. In addition, since the last IMO Assembly met in December 2005, an amendment to the IMO Convention could not be discussed before December 2007.

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IMO standards. But would those reasons be sufficient to convince the other IMO members to go through the complex amendment process?

Despite the undeniable merits, the EC's accession to the IMO does not seem to be a realistic option, at least in the short or medium term. In the opinion of this author, however, accession is not a matter of urgency. Recent developments in IMO have shown that the existing EC coordination may be quite effective and that the interests of the Community may well be defended by the joint action of the member states. Besides, the Community already exercises a significant influence on IMO decision-making even without being a member of the organization since the large majority of the submissions to IMO are presented by EC member states. The Commission, moreover, is already entitled to present joint submissions together with the EC member states or other IMO parties.[458] In addition, the experience with the 2002 Athens Protocol indicates that, if necessary, the Commission, with a mandate from the Council, may already act on behalf of member states in the main IMO Committees (e.g., LEG), even without amending the IMO Convention.[459] The only added value of the Community being a party to the IMO would be that the Commission could be represented in the IMO Council and decide on the agenda for the organization and which instruments to finance.[460] Finally, the ultimate main goal for the Community seems to be to become a party to individual IMO Conventions (e.g., MARPOL and SOLAS), not to the 1948 IMO Convention itself.[461]

Instead of finding a way for the Community to become a member of the IMO, it seems far more realistic, for the time being, to strengthen mechanisms to ensure that all member states speak with "a single voice" and find more pragmatic solutions to allow the Community to exercise its competence and express its view in the IMO without being a full member of the organization (e.g., by seeking observer status). These are the latest developments in the EC's coordination in this direction, although full EC membership in the IMO still remains the ultimate goal.

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458 E.g., joint submissions in the field of flag State implementation (MSC 73/8/3 (3.10.2000); MSC 72/7/2 (1.03.2000), both submitted by Australia, Canada, France, Poland, Portugal, Singapore, the UK and the European Commission; MSC70/9/3 (25.11.1998), submitted by France, Italy, the Netherlands, Spain and the Commission.

459 See, *supra* n. 430.

460 Currently, 14 out of the 40 members of the Council elected by the 24th Assembly for the 2006-2007 biennium are EC or EEcA member states. The EC, therefore, already exercises some indirect influence on the IMO Council.

461 See, *inter alia*, SEC (2002) 381, Attachment 2. The eventual accession of the Community to the 2002 Athens Protocol (not yet into force) may prove that it does not need to be an IMO member in order to accede to IMO Conventions.

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6.9.3 EC Participation in the UN Discussions under the Agenda Item "Oceans and the Law of the Sea"

The Commission (DG TREN) is not particularly active in the discussions related to maritime safety and ship-source pollution in the UN, in contrast to its participation in the IMO. The main reason for this is that, as discussed in Chapter 5.2.7.4, the Community's participation in the UN agenda item "oceans and the law of the sea" is regulated within the framework of the second pillar (CFSP). Therefore, the main role is played by the Presidency and everything is done by EU Statements drafted within the COMAR. The foreign policy format also applies when maritime safety issues concerning EC competence are on the table. So far, this has prevented DG TREN, like other DGs, from playing a strong role in this process.

DG TREN participates in the drafting of the EU Statements for the ICP and in the negotiation of the UNGA Annual Resolution, whenever they cover matters within its interest. Within the Commission, DG FISH and Maritime Affairs (previously DG RELEX) is currently responsible for coordination and it circulates draft positions to the DGs concerned asking for comments. DG TREN submits its contributions to DG FISH indicating the EC priorities and targets in the field of maritime safety and other shipping-related issues. Especially in the past, however, the draft positions were circulated at very short notice and DG TREN, like other DGs, was often consulted at the very last minute, as occurred with the negotiation of the UNGA 58 Resolution in 2003, giving little time for any reaction.

DG TREN does not normally attend the ICP or UNGA meetings in New York, but allows DG FISH (previously DG RELEX) to participate on behalf of the Community even when shipping-related matters are on the agenda. This is mainly due to resource constraints and the need to prioritize actions. Both the ICP and the UNGA take place within a very short time of the IMO meetings (e.g., MEPC and the Assembly), where there is a stronger need for DG TREN to be present. However, its involvement largely depends on the issues on the agenda. For instance, DG TREN was particularly active in the 4th ICP, in June 2003, which focused on maritime safety, but this has, so far, remained an isolated case. Coordination started rather late within the COMAR (in May 2003) where the draft EU Statements were discussed in very broad terms, and proceeded in New York (two days before the ICP), where these Statements were reviewed and reinforced.[462] Representatives from DG TREN contributed actively in the drafting of the EU positions on matters of maritime safety and on the last two days of the ICP they attended the meetings in support of DG RELEX, which, at that time, was still responsible for the EC coordination.

Coordination on the spot proved to be difficult, also because for the first time the EU participated in the new 25-country-format, including Malta and Cyprus, which were quite active in the debate. Coordination was particularly problematic on two specific

462 All information is based on the Commission's Mission Report on the Fourth Meeting of the ICP, held in New York, 2-6 June 2003, not published.

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items: the unilateral restrictions on the transit of single hulls through EEZs adopted by some EC member states in the wake of the *Prestige* accident and the issue of a genuine link. The EU Statements kept a neutral position, which was also supported by the ICP plenary. The EU reaffirmed the primacy of the multilateral framework without expressly condemning unilateral measures and called for stricter flag State control.[463] All EU Statements were presented by the Greek Presidency in the plenary sessions. Although the discussion touched upon issues such as single hulls, port state control and AIS, which are clearly subject to the EC's competence, the Presidency has never allowed the Commission to take the floor. In the plenary, some EC member states (i.e., France, Italy, Portugal and Spain) made independent defensive statements despite the fact that they had been strongly recommended no to do so by both the Presidency and the Commission.

Whereas the IMO remains the proper framework to deal with maritime safety, the UN process (especially the ICP) is an important additional forum to promote EC priorities. The full participation of DG TREN in this process would be a good opportunity to influence the development of global maritime safety policies and the law of the sea in a manner which is consistent with the EC's targets and legislation. Institutional problems, the lack of intra-Commission coordination and resource constraints have so far impeded DG TREN from taking full advantage of this opportunity.

6.9.4 EC Participation in the 1992 Helsinki Convention

So far, the Commission has not shown as much interest in shipping matters discussed in HELCOM. Before 2003, representatives from DG TREN never participated in the meetings of the (at the time) HELCOM SEA.[464] The only exception was HELCOM SEA 2, in 2001, which dealt with PRFs. Since the Community had recently adopted a directive on this matter there was a need to ensure coherence between the HELCOM and EC rules. However, in order to have DG TREN involved the meeting had to take place in Brussels. In addition, representatives of DG TREN took an active role in HELCOM Extra 2001 where issues covered by EC legislation (e.g., the phasing-out of the single-hulls standard and AIS), were on the agenda.[465] Since 2003, in the wake of the *Prestige* accident and the 2004 enlargement, things have partially changed and, currently, representatives of DG TREN or EMSA normally attend the meetings of

463 The EU Statement N. 2 deals specifically with the safety of navigation. All EU Statements presented at the ICP are available at: http://europa-eu-un.org/articles/en/article_1301_en.htm.

464 HELCOM SEA meetings have sometimes been attended by DG ENV. See: Reports of HELCOM SEA and HELCOM MARITIME available at: www.helcom.fi/dps/docs/folders/Sea-based%20Pollution%20Group%20(HELCOM%20SEA)/AIS%20EWG%206,%202003.html

465 As a result, the Copenhagen Declaration (Attachment I) ensures that HELCOM measures (e.g., AIS) will be developed with due regard to forthcoming EC legislation. In addition, it has been decided to support EC actions in the field of maritime safety by, *inter alia*, developing an agreement on technical cooperation between HELCOM and EMSA.

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HELCOM MARITIME and its EWGs. Nevertheless, the Commission does not play a very proactive role. So far, its contribution to the work of HELCOM has mainly focused on ensuring that any steps taken to improve the situation in the Baltic Sea are in line with EC maritime safety legislation.[466]

The Commission's approach in HELCOM has been influenced by a number of factors, which have for a large part been discussed in Chapter 5.4.2. First of all, there is a general tendency to leave the implementation of the Helsinki Convention to the member states, which have a long tradition of individual participation in this forum. Before the *Erika* legislation, moreover, there were no major overlaps between EC and HELCOM rules and the Community had not acquired any (implicit) exclusive competence in maritime safety-related matters covered by HELCOM.[467] The Commission, therefore, had no strong interests to defend in this forum. With the development of the EC maritime safety legislation, the Community has extended the area of competence that might be affected by measures adopted in HELCOM and it partially changed its approach. In general, however, the Commission does not seem to have strong interests in strengthening the work of HELCOM MARITIME. The Helsinki Convention was indeed adopted to preserve the marine environment in the Baltic and to deal with marine environmental problems, but not with shipping issues. The prevalent feeling seems to be that maritime safety issues would be better regulated in the IMO, not HELCOM, and their implementation and enforcement would be better harmonized at the EC level. The adoption of more stringent protective measures in HELCOM may hinder EC-wide harmonization.

Other reasons for the limited involvement of DG TREN in HELCOM are more bureaucratic and procedural in nature. The Helsinki Convention, like other regional agreements, is under the responsibility of DG ENV, which is still the main contact reference for HELCOM MARITIME (and HELCOM in general). There is a single person responsible for HELCOM who receives the documents for all meetings, including HELCOM MARITIME, and then transmits them to DG TREN. Usually documents are sent at the very last moment and there is no time for their careful examination. The representative of the Commission attending the meeting, therefore, may find it more effective to leave the discussion to those member states that normally have stronger expertise and participate with larger delegations.

In HELCOM MARITIME, like in HELCOM, there is no EC coordination as in IMO, but simply mutual information. As discussed in Chapter 5.4.2, this has been, in the first place, a political choice given the strong resistance to the EC's "single voice"

466 See Reports of the HELCOM MARITIME meetings.

467 The only overlapping rules concerned minimum requirements for ships bound to or leaving Baltic State ports and carrying dangerous or polluting goods. In 1998, when HELCOM Rec. 19/15 was adopted, the EC already had legislation in place on the same issue (i.e., Directive 79/116/EEC). However, the HELCOM Rec. mirrors the EC legislation. At the time when HELCOM started adopting measures related to double-hull standards (1991), routing measures (1994), PRF (1998), and a harmonized system of fines in the case of MARPOL violations (1998), there was no EC legislation in place on these issues.

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policy and any form of bloc-building in HELCOM. After the 2004 enlargement, moreover, the HELCOM serves as a bridge between the EC and the Russian Federation and as an important forum for the Community to promote the uniform application of maritime safety and anti-pollution standards throughout the Baltic Sea. The Community is therefore determined to keep HELCOM as a forum for cooperation, not confrontation, with the Russian Federation and for promoting the wider application of EC maritime safety rules.[468] In the past few years, DG TREN (and EMSA) has increased its participation in HELCOM MARITIME, but this has not resulted in stronger EC coordination in this forum.

As already observed, EC coordination in HELCOM does not seem to be necessary either. The final decisions in HELCOM are taken by unanimity and the Commission, just as any other Party, has a veto on matters under EC exclusive competence. Reportedly, there have never been significant conflicts of competence between the Commission and the EC Baltic States with regard to maritime safety matters discussed in HELCOM. In addition, most of the work of the HELCOM in this field has been influenced by[469] and is linked to EC maritime safety legislation.[470] After 1 May 2004, all Baltic contracting parties, except the Russian Federation, are now bound by EC rules, which in some cases (e.g., double-hull standards) contain maximum standards. Especially after the enlargement, therefore, ensuring consistency and coordination between the two regimes has become of paramount importance for HELCOM.[471] During 2005, HELCOM further strengthened its cooperation with EMSA.

The Commission and HELCOM are determined to avoid any duplication of work and to optimize their efforts and resources.[472] For the time being, HELCOM

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468 In the past few years the Commission has intensified dialogue with the Russian Federation to promote the wider implementation of EC's maritime safety standards. E.g., Joint Statement, 12th EU-Russia Summit, Rome, 6.11.2003, at (10), available at: europa.eu.int/comm/energy_transport/russia/2003_11_06_joint_statement_en.pdf.

469 Initially, the influence of EC law in HELCOM was marginal, since only two out of the nine contracting parties to the 1974 Helsinki Convention were also EC member states (Denmark and Germany) and the EC's maritime safety policy had not yet been established. After Finland and Sweden joined the EC in 1995, the influence of EC law on HELCOM started to increase. But it was after the *Erika* accident that EC maritime safety legislation acquired great importance in HELCOM.

470 E.g., HELCOM Rec. 22E/5 urging parties to carry out PSC under either the Paris MOU or the EC Directive.

471 The 2003 Bremen Ministerial Declaration called for a new focus for HELCOM's work in view of the enlargement. See also the interview with Prof. Dr. Inese Vaidere, Chair of HELCOM, 30.04.2004, available at: www.helcom.fi/helcom/news/382.html. See also the Preamble to the Copenhagen Declaration the Joint IMO/EU/HELCOM Workshop, held in March 2003.

472 In 2003, during the drafting of the EC regulation on single-hull tankers, the Commission announced its intention to submit a new proposal to strengthen safety requirements for ships navigating in ice-covered waters in the Baltic Sea and considered the opportunity of an EC-driven submission in IMO for the adoption of analogous measures. This idea was, however,

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MARITIME has decided to concentrate exclusively on activities which bring an added value, keeping in mind the specific needs of the Baltic, acting in strict coordination with the EC.[473] This is in particular the case when there is a need to involve the Russian Federation.

6.9.5 EC Participation in BARCON

Like in HELCOM, DG TREN's participation in the shipping discussions within the framework of BARCON has been generally limited. The reasons are pretty much the same as those discussed in the previous subsection: the long tradition of individual participation by EC member states in BARCON and their reluctance to accept the excessive involvement of the Commission in this forum, the reluctance of DG TREN to discuss maritime safety and operational pollution within the framework of regional "environmental" Conventions, the lack of overlapping rules triggering the EC's exclusive competence, the absence of strong EC interests to be defended in this forum; and the primary responsibility of DG ENV with regard to the BARCON and consequent procedural and bureaucratic problems.

The negotiation of the new Emergency Protocol in 2001 has so far been an exception since, for the first time, issues covered by existing or forthcoming EC legislation (i.e., PRFs, places of refuge and monitoring) were involved. DG TREN therefore took an active part in the negotiations to ensure coherence between the BARCON and EC rules.[474] The participation of DG TREN in this case was necessary in order to defend the EC's interests. Within the BARCON framework decisions are taken by QMV and, unlike in HELCOM, the Community has no power of veto and the member states' autonomous actions may seriously affect the EC's exclusive competence.[475] Initially, DG TREN felt that DG ENV was competent and did not organize any EC coordination in Brussels in preparation for the meetings. Some EC coordination took place on the spot, although this was done in a rather informal way (during the meeting, in the coffee breaks, during lunches).[476] Reportedly, on this occasion the EC member states wanted

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abandoned in the light of the recent developments in HELCOM (i.e., HELCOM Rec. 25/7, 2.03.2004, setting new Guidelines for the Safety of Winter Navigation in the Baltic Sea Area).

473 See the HELCOM MARITIME's Working Programme (2004-2006), *supra* n. 198.

474 See the Commission's Proposal for a Council Decision on the conclusion of the new Pollution Prevention and Emergency Protocol, COM (2003) 588. By the Decision on 24-25.01.2000 (doc. 14243/88 ENV 463 MAR 115) the Council authorized the Commission to participate on behalf of the EC in the negotiations and set out Negotiating Directives.

475 However, as discussed in Chapter 5.5.2, decisions in BARCON require 16 votes out of the 21 Parties. Before 2004, the EC member states had only 4 votes within this framework and had no decisive influence on the decision-making process.

476 The Commission noticed that the common practice in BARCON of holding negotiations on the legal texts immediately before signature causes institutional difficulties for the EC and affects the level of coordination (COM (2003) 588, p. 3).

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to have the Commission involved in the negotiations because it was unclear to them what exactly they were allowed to do under EC legislation. The impression was that, unlike in IMO, the presence of the Commission was generally welcomed and considered helpful by all the parties.

The final text of the 2002 Protocol included different elements of and was largely inspired by EC maritime safety legislation. However, in order to avoid the situation where the Protocol could hinder the further development of EC rules on these subjects, Article 20 makes it clear that the Parties remain free to adopt more stringent standards acting in conformity with international law.

As already mentioned, maritime safety was at the centre of the discussions during the 13th MOP in November 2003. Although issues such as places of refuge, VTS and other matters covered by EC legislation were on the table, representatives from DG TREN did not directly participate in the negotiation of the Ministerial Declaration adopted at the meeting because they felt that DG ENV was competent. As discussed in Chapter 5.5.2, EC coordination for the 13th MOP was very weak. The Commission proposed that the Presidency should convene a meeting in Brussels to inform the member states about the issues on the agenda of the MOP. In the view of the Italian Presidency, however, there was no need for any EC coordination since BARCON is a sub-regional agreement and not all member states are parties. Eventually, a minor point was added to the agenda of a working group on external relations which, however, was not attended by the same officials who participated at the 13th MOP. On the spot, DG ENV, with some resistance from the Presidency, tried to coordinate certain issues, but this coordination was minimal and consisted of brief meetings before the plenary to discuss the main elements. DG ENV, under the direction of DG TREN, insisted on coordinating positions especially on single-hull and HGO issues. This was a great opportunity to promote the wider application of EC maritime safety rules in the entire Mediterranean Sea and to obtain the support of all BARCON Parties in relation to the EC-driven submission in IMO concerning the amendments to MARPOL Annex I. Reportedly, however, there was some resistance by EC member states to coordinating certain positions in BARCON and the results were not particularly positive. As mentioned in Chapter 5, there is a sort of "inertia" on the part of Mediterranean EC member states in acting intergovernmentally in this framework and this is reflected in the actual level of EC coordination.

Representatives from DG TREN did not attend the 14th MOP, in November 2005, where the BARCON Strategy for the Prevention of (and Response to) Marine Pollution from Ships was on the agenda, but once again it relied on DG ENV. The weak involvement of DG TREN in the BARCON's MOPs is the consequence of the need to prioritize action. The EUROMED Transport Forum is considered to be the most appropriate political framework for discussing maritime safety issues and promoting the uniformity

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of rules at the regional level.[477] These meetings are chaired by the Commission (i.e., DG TREN, DG Enlargement and the Aid Cooperation Office (AIDCO)) and, unlike BARCON, they are attended by Transport Ministers. Under the leadership of DG TREN, the Forum has developed the SAFEMED project, launched in November 2005 at the IMO, which is directed at increasing maritime safety and the environmental protection of Mediterranean waters and promoting consistency among the existing IMO, EC and BARCON rules (e.g., flag State implementation and the monitoring of classification societies, VTMs, PRFs and places of refuge).[478] There is no Community coordination in EUROMED, which is a political forum where member states participate in a completely intergovernmental manner.

6.9.6 EC Participation in the North Sea Ministerial Conference and Bonn Agreement

Although maritime safety issues are frequently on the agenda at the NSMC and CNOSSO, so far DG TREN has never participated to the negotiations of the NSMC Declarations or in the meetings of the CNOSSO. These political meetings are normally attended by representatives of DG ENV (plus DG FISH in CNOSSO) and by Environmental Ministers of the North Sea Coastal States. Since all of them are EC/EEcA member states and they are bound by EC maritime safety legislation, DG TREN has no strong interests which should be defended in these fora.

Similar considerations apply to the Bonn Agreement whose contracting parties are all EC member states plus the Community. The Agreement deals primarily with emergency response rather than ship-source pollution and is under the responsibility of DG ENV, which normally attends the meetings. DG TREN has so far never been strongly involved in this forum. Starting from 2003, however, EMSA now attends the COPs and the main WGs when issues related to EC maritime safety legislation are at stake, but there is no EC coordination at all.

6.10 The Duty to Give Effect to Existing GAIRAS and to Enforce Them in the Community

Finally, as a party to the LOSC, the Community is under an obligation to give effect to and enforce the "generally accepted" or "applicable" rules and standards adopted by the competent international organizations (GAIRAS). The Community uses the terms

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477 This forum has been established within the framework of EUROMED, launched in 1995 between the EU and 10 Southern Mediterranean States (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, the Palestinian Authority, Syria, Tunisia and Turkey) and includes a working group on Maritime Transport. So far, seven meetings have taken place, most recently, as of this writing, in Brussels in October 2005.

478 The SAFEMED is implemented by REMPEC. More details on SAFEMED are available at: www.smaprms.net/DOC/Project_summary_SAFEMED.doc.

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"applicable" and "accepted" as synonyms without attaching specific legal significance to the difference between the two expressions.[479] Most EC legislation simply refers to "international instruments" or "international conventions", which include the main IMO Conventions (e.g., MARPOL 73/78 and SOLAS) and their Protocols, non-binding Codes and Resolutions.[480] So far, the Community has "given effect" to IMO standards in two different ways: a) by recommending EC member states to ratify, implement and comply with IMO Conventions;[481] and b) by incorporating most IMO binding and non-binding standards in EC legislation. Most EC maritime safety legislation contains a reference to IMO instruments, which are considered to be applicable in their up-to-date version, including subsequent amendments that after a "conformity checking procedure" result in being compatible with EC rules.[482] This mechanism allows EC maritime safety legislation to be kept constantly up to date with international developments avoiding the delayed application of the most recent and most stringent international safety standards within the Community. Alternatively, a few pieces of EC legislation reproduce, in full or in part, the IMO instruments.[483] In this case, subsequent amendments do not apply automatically, but EC legislation has been amended as well.

Once IMO standards have been incorporated into EC legislation, they become an integral part of the EC legal system and the EC institutions may use the enforcement mechanisms available under the EC Treaty to ensure their full implementation by the member states. With regard to vessels flying non-EC flags, however, it is mainly for the member states to exercise the enforcement jurisdiction according to their national systems, acting consistently with the LOSC. That means that EC legislation incorporating IMO mandatory standards may be enforced against all ships, including non-EC ships, wherever they are. Conversely, outside the territorial sea of the EC member states, EC legislation incorporating non-binding IMO discharge and navigational standards (e.g., routing and reporting recommendatory standards) cannot be enforced against non-EC

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479 For instance, in COM (2003) 92 the Commission defines MARPOL 1973/78 first as "globally accepted" (Para. 3) and immediately afterwards as "widely applicable" (Para. 4.3). EC Regulation 2099/2002, *infra* n. 482 (Article 4), defines "applicable international instruments" as "those which have entered into force, including the most recent amendments thereto, with the exception of the amendments excluded from the scope of the Community maritime legislation […]".

480 E.g., EC Regulation 2099/2002, *infra* n. 482, defines "International Instruments" as "the conventions, protocols, resolutions, codes, compendia of rules, circulars, standards and provisions" adopted by an international conference, IMO, ILO or the parties to a MOU referred to in the provisions of the Community maritime legislation in force" (Article 2(1)).

481 The Commission's proposal for a Directive on Flag State Responsibility, moreover, places States under a positive legal obligation to ratify IMO Conventions.

482 Regulation 2099/2002/EC, 5.11.2002 establishing a Committee on Safe Seas and Prevention of Pollution from Ships (COSS). The COSS centralizes the tasks previously exercised by different Committees and assists the Commission in the implementation of maritime safety legislation.

483 E.g., Regulation 2978/94/EC on the implementation of IMO Resolution A.747 (18) concerning the application of tonnage measurement of ballast spaces in segregated ballast oil tankers.

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ships in transit. In no case may EC legislation incorporating non-binding CDEMs be enforced against non-EC ships in transit.[484]

How far the Community may go to ensure full compliance by member States with IMO Conventions to which it is not a Party and which have not been incorporated in EC law is still unclear. All 25 member states are contracting parties to the main IMO Conventions (e.g., MARPOL 73/78 (Annex I) and SOLAS) and are obliged to comply with the relevant standards. But if they do not do so, is the Commission under an obligation to take enforcement action against member states to ensure full compliance with their obligations under the IMO Conventions? And may the ECJ test the consistency of a member state's actions with these instruments? This brings us back to the controversial issue of whether IMO instruments may form an integral part of EC law and bind the Community regardless of its individual participation on the basis of the rules of reference contained in the LOSC. As discussed in Chapter 1.3.1, this is still a grey area, especially when it comes to very detailed and technical rules contained in Annexes and Regulations. From an international law point of view, it is difficult to maintain that the Community may be bound to such technical rules without its consent and has to enforce them against its member states. Nevertheless, it seems to be largely accepted that all parties, including the Community, which have voluntarily adhered to the LOSC, have indirectly consented to be bound by GAIRAS.[485] The Commission, however, does not seem to consider the LOSC as a backdoor for applying IMO Conventions in EC law.

From an EC law perspective, the situation seems to be slightly different. Although the Court has never clearly pronounced itself on the application of IMO Conventions in EC law, in the *Peralta* Case it incidentally took a stance on MARPOL 73/78. According to the Court, an international instrument to which the Community is not a Party (in that specific case MARPOL 73/78) forms an integral part of EC law only insofar as the EC Treaty has transferred to the Community the powers previously exercised by the member states in the field covered by the agreement.[486] The Court, however, seems to refer exclusively to policy areas, such as the commercial or fisheries policy, which fall under the EC's exclusive competence under the Treaty. This is not the case with MARPOL 73/78, as all IMO instruments cover areas, such as environmental protection and the safety of navigation, which are subject to shared competence. In the opinion of Advocate-General Lenz, however, this is true so long and insofar as the

484 A. Nollkaemper (1998), p. 13. See also CPSS, Chapter 3, Paras. 78-9; VTMIS Directive, Article 11(3) and the Opinion of the Council's Legal Service on the compatibility of the amended proposal for a VTMIS Directive with international law, 17.07.1992 (Para. 4).

485 For a full discussion see: Chapter 1.3.1.

486 See Case C-397/92, *Peralta*, Para. 16, "[…] it does not appear that the Community has assumed, under the EEC Treaty, the powers previously exercised by the Member States in the field to which the Convention applies". The Court has drawn analogous conclusions in Joined Cases 21-24/72, *International Fruit Company,* Para. 18, referring to the GATT Agreement, and in Joined Cases 267-269/81, *Amministrazione delle Finanze dello Stato v. SPI and Sami,* Para. 17.

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Community has not adopted legislation on the same subject .[487] Given that, in 1994, when the judgment was delivered, there was no EC legislation on matters covered by MARPOL 73/78, the Court concluded that the agreement was not part of Community law. Considering the consistent body of EC law covering issues regulated under IMO instruments, there seem to be ample possibilities for the Commission and the ECJ to enforce these IMO standards, including standards that have not been incorporated into EC legislation, vis-à-vis the member states. The Commission, however, does not seem to share this view and still attaches great importance to the EC's accession to the individual IMO Conventions in order to be able to use EC enforcement mechanisms against non-complying member states.

The considerations set out so far, however, are mainly theoretical since most IMO standards have been incorporated into EC law and, in practice, the Community already plays an important role in the enforcement of IMO regulatory instruments within the EC. As discussed in this Chapter, the bulk of the EC's maritime safety legislation is directed at strengthening port and flag State control and ensuring that all vessels entering EC ports or flying the flag of a member state comply with MARPOL 73/78, SOLAS and the main IMO standards. The recently proposed *Erika III* package, especially the proposed Directive on Flag State Responsibilities, represents a further step in this direction. As emerges from the increasing number of infringement proceedings started by the Commission against non-complying member states, the Commission is firmly determined to make full use of its enforcement powers under the Treaty in order to ensure the effective implementation of the EC's maritime safety legislation and, indirectly, IMO standards. In addition, while enforcement has been traditionally left to the member states and the Commission has focused on ensuring full implementation, the latest developments (e.g., Ship-Source Pollution Directive, and the suggestion to create an EU Coast Guard along the lines of the US Coast Guard) point towards the increasing involvement of the Community in the enforcement of maritime safety measures. One author has suggested that the EC is on its way to becoming a real enforcement organ of the IMO in Europe.[488] Without going so far, it is clearly becoming a key player in the regional enforcement of IMO standards.

6.11 The Commission's Suggestion to Amend the LOSC

The *Erika* and *Prestige* accidents triggered a review of the legal options currently available to coastal States under the LOSC to control "hazardous" and/or sub-standard

487 See the Opinion of Advocate-General Lenz in the *Peralta* Case, in: [1994] ECR I-3453, Paras. 29 and 30. See also E. Hey and A. Nollkaemper (1995), p. 295.

488 G. Vitzthum (2002), pp. 179-82.

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ships in transit through waters under their jurisdiction.[489] According to the Commission, the jurisdictional regime contained in the LOSC proved to be ineffective, based on a balance of interests over three decades old and not in line with the current requirements of maritime safety and marine environmental protection.[490] The exclusion from coastal waters of ships "which clearly represent environmental hazards and fail to comply with the most basic safety standards should […] be a duty for coastal States".[491] The limited control over foreign ships in transit under the LOSC appears to conflict with the general duties of all States to protect and preserve the marine environment, to prevent maritime accidents and to take all necessary measures to minimize, to the fullest possible extent, pollution from vessels. In the aftermath of the *Prestige* accident, therefore, the Commission, supported by the EP, called for an adjustment of the provisions of the LOSC relating to the freedom of navigation and the right of innocent passage in order to enhance coastal State protection against the risk posed by dangerous vessels transiting along their coastlines. For this purpose they urged the Community to take the initiative to revise the relevant provisions of the LOSC using the amendment procedures in the Convention.[492]

Amendments may be proposed after the expiry of ten years from the entry into force of the Convention, i.e., as of 16 November 2004. Starting from that date, all parties, including the EC, may propose specific amendments to the UN Secretary-General by requesting the convening of an amendment conference (Article 312). The conference is convened only if, within 12 months, "no less than half" of the parties reply favourably. There are currently 149 parties to the Convention, which means that at least 74 parties would have to support the reopening of the LOSC. Alternatively, according to the simplified procedure under Article 313, a party may propose an amendment that enters into force without convening a conference if, within 12 months from the date of the

489 The "*Prestige*"-Council Conclusions (Para. 11), urge member states to adopt measures, in compliance with the law of the sea, to control and possibly to limit, in a non-discriminatory manner, the traffic of dangerous vessels within 200 n.m. from their coastlines. See also, Copenhagen European Council (Para. 33) and the December 2002 Environmental Council (para.15). See also, COM (2002) 681, p. 13; EP April 2004 Resolution (Para. 42); EP Sterckx Resolution (paras 24-5). For a full discussion, see: V. Frank (2005), pp. 15-18.

490 COM (2002) 681, p. 12, and the letter from the Vice-President of the Commission, Loyola de Palacio, to the UNSG, Kofi Annan, 20/12/2002, quoted in the 2003 UNSG Report, Para. 58.

491 COM (2002) 681, p. 13. The EP Sterckx Resolution (Para. 25) requires member states to refuse access to their coastal waters, including the EEZ, to vessels posing a clear threat to the marine environment and failing to meet basic safety rules. However, in its April 2004 Resolution (Para. 41), the EP rejected the categorical banning of high-risk vessels from the EEZ, because it is legally contentious and impedes rapid and effective assistance in a case of distress.

492 E.g., COM (2003) 105 (Para. 2.2.3.3), EP Sterckx Resolution (paras. 41 and 63) and EP Sterckx Report (Para. 2.5). See also 2003 UNSG Report (Para. 58).

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circulation of the communication, no party has objected.[493] In both cases, the entry into force of the amendments requires ratification by two-thirds of the parties (at present 94 parties) (Article 316).

In order to open amendment procedures of the Convention, either via Article 312 or Article 313, the Commission would need a negotiating mandate from the Council, which has to decide by QMV.[494] Soon after the *Prestige* accident, the Commission, supported by the EP, considered the possibility of requesting this mandate, but it has never submitted any formal demand in this respect.[495] It is very unlikely that the Commission will do so in the near future since it lacks the necessary political support, with a large majority of the member states having clearly expressed their opposition to the idea of reopening the LOSC.[496] Even if the Commission obtained a negotiating mandate from the Council, it would be impossible to reach the majority required under the amendment procedure of the LOSC. The possibility of reviewing the Convention is not supported at the international level.[497] Some states, such as Denmark, Greece, Norway, Russia and the US (even though it is not a Party to the LOSC), with strong maritime interests, firmly oppose any initiative that would compromise the freedom of navigation and the right of innocent passage guaranteed by the Convention. Other states seem to be more concerned with the risks involved in an amendment process. Indeed, once such a process starts, there is no sure way to control its agenda or its outcomes.[498] Thus, reopening the negotiations might lead to a reopening of the overall package, not only maritime safety and anti-pollution provisions. Moreover, under Article 316, amendments would enter into force only for those states that have ratified them, thereby jeopardizing the uniformity which the LOSC tries to achieve. Previous suggestions of using the amendment procedure to revise the LOSC have never progressed in a tangible way, indicating that the international community is not prepared to accept

493 LOSC Article 313 does not expressly require waiting for ten years from the entry into force of the Convention before proposing an amendment. For a full discussion of the LOSC's formal amendment procedures see: D. Freestone and A.G. Oude Elferink in A.G. Oude Elferink (ed.) (2005), pp. 173-83.

494 Article 300(1), (2) and (4) EC.

495 E.g., COM (2003) 105 (Para. 2.2.3.3) and EP Sterckx Resolution (paras. 41 and 63).

496 Reportedly, at the Joint Meeting of the Council's Working Group on Transport and the COMAR, 2.04.2003, and the COMAR meeting in preparation for the 4th ICP, 22.05.2003, Finland, France, Germany, Greece, Italy, Portugal, Sweden, the Netherlands and the UK clearly opposed the LOSC amendment; while Spain has been the only member state to support the idea. Reportedly, some EC member states (e.g., France and Greece) also opposed the idea during the SPLOS-13, 9-13/6/2003.

497 This clearly emerged during the discussions on the safety of navigation within the 4th IPC, in June 2003. For a full discussion, see: D. Freestone and A.G. Oude Elferink (ed.) (2004), pp. 169-221.

498 On the risk of reopening the 1982 LOSC see: B. H. Oxman, Topic VI: The Tools for Change: The Amendment Procedure, 57th UNGA Session on the Commemoration of the 20th Anniversary of the Opening for Signature of the 1982 United Nations Convention on the Law of the Sea, 9.12.2002.

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the risks involved in the amendment process.[499] Likewise, there seems to be a general consensus at the EC level that rather than starting a formal amendment process, EC coastal States should take full advantage of the possibilities already available under the LOSC and IMO Conventions to prevent maritime accidents.[500] At the end of the day, despite the concerns raised by the *Prestige* disaster, the package deal achieved in the LOSC is considered to be fair enough taking into account all the interests involved, especially the heavy dependence of the global economy and national security on the freedom of navigation.

6.12 Final Observations

Much has changed since the CPSS was established in 1993 and most of the major changes have occurred in the past three years. The *Erika* and *Prestige* accidents, the rapid EC response, and the 2004 enlargement are some of the factors which have eliminated many of the obstacles that for a long time prevented the Community from playing a proactive role in the field of maritime safety and ship-source pollution.

In the past decade, however, the Community has been accused of slowly moving from a policy focused on the implementation of international standards towards a policy of prescribing its own maritime safety rules.[501] Despite the allegations of regionalism, the Community has never abandoned its traditional global approach or questioned the IMO's leading role in international shipping matters.[502] On the contrary, it fully recognizes the added value of IMO regulatory action with respect to maritime safety, which is generally preferable to regional action as long as it guarantees sufficiently high levels of protection.[503] EC safety rules are intended to rectify some weaknesses and gaps in the IMO regime by ensuring that IMO standards are implemented more stringently (e.g., by making IMO non-binding instruments mandatory) or in advance (e.g., by accelerating the phasing out of single-hull tankers) within the Community and are

499 For instance, in October 2001, within CCAMLR-XXI/23, the Australian Delegation floated the idea of amending Article 73(2) LOSC. This suggestion, however, found no support among other CCAMLR members and it soon became clear that it could not be pursued at the global level.

500 E.g., Statement by Ambassador Vassilakis on behalf of the EU at the 2003 ICP, at www.greenceun.org/statement?eupr3045.htm.

501 E.g., E. Hey and A. Nollkaemper (1995), p. 282. *Contra*: J. De Dieu in H. Ringbom (ed.) (1997), p. 151 and A. Nollkaemper (1998), p. 7. See also U. Jenisch (2004), pp. 82-83.

502 E.g., EU Presidency Statement on Oceans and the Law of the Sea at the 20th Anniversary of the LOSC, UNGA 57th Session, 10/12/2002, at europa-eu-un.org/article.asp?id=1854; Joint Statement released in the wake of the *Prestige* accident by the IMO-SG, Mr. O'Neil, and the President of the EC Maritime Transport Ministers, Mr. Anomeritis (11/01/2003); the Joint Statement of the Vice-President of the Commission, Ms. de Palacio, and the IMO-SG, Mr. Mitropoulos, before the EP-MARE, in January 2004. See also: Copenhagen European Council (Para. 33), and December 2002 Environmental Council (Paras. 13-5).

503 See: COM (2005)585 (*Erika III* Communication), p. 7.

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extended to vessels which, by virtue of specific exceptions, are not bound by the IMO standards (e.g., as vessels engaged in domestic or regional trade, younger or smaller tankers).[504] The EC's regulatory action in the field of maritime safety, therefore, was never intended as a substitute for, but always as a complement to IMO action at the regional level.

The spate of unilateral and regional initiatives which followed the *Prestige* accident has highlighted once more the importance of having maritime safety and environmental standards set out at the global level, acting within the jurisdictional framework of the LOSC and the IMO regulatory regime. But what happens if the IMO does not take action? It should be stressed that the Community not only has a right, but also a duty under the LOSC to protect EC waters from the threat posed by international shipping. As discussed in section 6.2.3.1, the LOSC leaves some room for regional organizations or single States to take action without waiting for the IMO. Despite a great deal of criticism, regional or unilateral initiatives have played an important role in promoting stricter international standards.[505] In the past decade, indeed, the threat of unilateralism or regionalism has urged the IMO to react rapidly to preserve its authority as the only international regulator and has driven the main "coastal-oriented" developments within the organization. As Lord Donaldson in his famous Inquiry pointed out: "a balance is sometimes needed between consensus and speed, and there may sometimes be good reasons for a single country or group of countries to move faster than the remainder of IMO".[506] As long as they are consistent with the LOSC jurisdictional framework, therefore, regional and national initiatives cannot always be condemned.

The Community has always insisted on the need to improve the protection of European waters, acting within the jurisdictional framework set out in the LOSC and without hindering the freedom of navigation.[507] Most EC maritime safety measures have been adopted by the Community acting in its capacity as a flag State (i.e., by raising safety standards for ships flying the EC (member state) flag and harmonizing rules for classification societies) and port State (i.e., by setting out port access conditions for all ships regardless of their flags and harmonizing PSC to ensure full compliance with IMO rules). Community action in its capacity as a coastal State has been limited to reinforcing the monitoring of dangerous maritime traffic through the territorial sea of the EC member states, but without interfering with the rights of navigation of foreign ships under the LOSC. In no case do higher EC maritime safety standards than IMO rules apply to foreign ships in transit through the EEZ of the EC member states. When, following the *Prestige* accident, the LOSC framework appeared not to be adequate for

504 The vessels used in the North Sea, for instance, are more modest in size, ranging from 5,000 to 50,000 tonnes and would be excluded from the scope of application of MARPOL.

505 See, *inter alia*, D. Bodansky (2000), pp. 339-347 and H. Ringbom (1999), p. 24.

506 Lord Donaldson Report, Para. 2 (11) and 5 (7).

507 See, e.g., EU Statement to the 2004 UNGA plenary inviting coastal States bordering straits used for international navigation to respect the right of passage in straits and requesting port States to do their utmost not to hinder access to ports.

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ensuring effective protection for coastal States, the Commission suggested a revision of the relevant provisions, indicating the Community's determination to play the game according to the rules.

Despite the progress of the international maritime safety regime during the past thirty years, the root of the problem, namely, the lack of flag State implementation, still remains unsolved. It is globally recognized that for the time being there is no need for new rules, but for clarifying and effectively enforcing existing Regulations. The EC maritime safety legislation (e.g., PSC, classification society Directives) and the new *Erika III* legislative proposals (e.g., the proposed Directive on compliance with flag State requirements) may certainly contribute to these results. The Community legal framework, moreover, offers unique tools for controlling and ensuring the full implementation and enforcement of IMO standards in European waters. In the past few years, the Commission, assisted by EMSA, has taken enforcement very seriously and is firmly determined to make full use of these tools. In addition, the newly established EMSA plays a fundamental role in assisting member states (and the Commission) in the correct implementation of EC and, indirectly, IMO standards.

On the other side of the coin, there are clear risks in regional (or unilateral) regulatory actions. As a result of the EC legislation, indeed, the oldest and most dangerous ships might move to regions with lower safety standards and less stringent PSC regimes, such as the Middle East or Asia, increasing the traffic and the potential for accidents in these areas, as occurred in Europe after the adoption by the US of OPA 90. However, it seems quite unrealistic for international shipping to avoid EC ports and the risk, therefore, is minimal. Nevertheless, to ensure uniformity and to avoid safe havens for substandard ships, it is certainly more effective to have the highest possible standards and enforcement mechanisms set out at the global level. The Community fully recognizes that and, in the wake of the *Prestige* accident, has considerably strengthened its external maritime safety policy and is firmly determined to play a leading role in the multilateral development of stringent international rules, in particular within the IMO. After the accession of Cyprus, Malta and Poland, moreover, the interests of flag States and the shipping industry have become stronger within the Community and in the future it will probably be more difficult to agree on higher safety standards at the EC level. It is likely that after the intense regulatory action of the past few years, in the future the Community will further intensify its external policy of trying to achieve its objectives at the international level. For this purpose, the Commission is firmly determined to attain the Community's membership of the IMO.

The Community's involvement in maritime safety issues both at the internal and international levels has traditionally been challenged by member states and viewed with suspicion by third countries that did not really understand what the EC was and how it worked. In the past few years, however, the situation has changed considerably. The member states have largely overcome their traditional opposition to the EC's involvement in shipping-related matters. A decade ago, for instance, talking about EC criminal sanctions for pollution offences or an EC Coast Guard would have been considered as pure science fiction. In the wake of the *Erika* and *Prestige* disasters, member states have realized that Community harmonization and EC coordinated action in the IMO

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may be more effective than national solutions, especially when highly political issues are on the table. So far, however, they have supported the EC's involvement as long as it is beneficial to their commercial interests (e.g., the accelerated phasing-out of single-hull tankers and MARPOL amendments) and does not interfere too much with their sovereignty (e.g., the proposal for negotiating the EC's accession to the 1948 IMO Convention). This approach is reflected in the level of EC coordination in the IMO which, so far, has been good as long as strong national interests have not been involved. As a response, the Commission has recently taken important steps towards strengthening the EC's coordination mechanisms and ensuring that member states speak with "one voice". The Council, on the basis of a proposal by the Commission, is in the process of adopting a framework procedure for EC coordination, which will allow the Community to play a stronger role in the IMO even without being a member and without going through the amendment of the 1948 IMO Convention, which, in the short term, does not seem to be a feasible option.

Compared to ten years ago, the international community has become more familiar with the presence of the EC in the IMO. Third States still become irritated by EC coordination, which brings considerable rigidity to the IMO decision-making process. However, even if there is still a limited understanding of the EC's mechanisms, they now seem to accept that the EC member states are no longer free to negotiate in the IMO, but they need to ask for directions and to coordinate their positions. This is an inevitable consequence of the Community's extended competence in matters covered by the IMO.

Apart from for PSC regimes, regional regulation of shipping-related issues have traditionally remained an exception. Only a few Regional Seas Conventions (i.e., the Helsinki Convention and the BARCON) contain maritime safety and anti-pollution provisions, but these are normally directed at harmonizing the implementation and enforcement of IMO rules and standards. So far, the Community has appeared to be a little reluctant in discussing maritime safety issues within the framework of regional "environmental" Conventions, which are normally attended by Ministers and/or senior officials from the Environmental Ministries and DG ENV. The Commission (DG TREN) does not seem to be keen to strengthen the work of regional bodies in the field of maritime safety, but feels that the relevant standards should be set out by the IMO. If regional rules are needed, it should be for the EC to take the initiative. The weak participation of the Community in the regional maritime safety debate, however, seems to be a missed opportunity for promoting the wider application of EC maritime safety standards and importing into the EC framework instruments and policies which have proved to be successful at the regional level. EC coordination in regional fora has been practically non-existent. The "one voice" policy that the Commission is pursuing in the IMO is not workable in the Regional Conventions, which traditionally have been fora for open discussion and cooperation among contracting parties acting on the same level.

During the past few years, the Community has shown a strong commitment to maritime safety and the prevention of ship-source pollution as well as the ability to influence global developments. In spite of all the criticism, as a matter of fact the

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Community, acting at the EC level and coordinating the positions of its member states in the IMO, has been the catalyst for the most coastal-oriented developments in the IMO and has contributed to a great extent to making the maritime transport of oil safer, cleaner and more environmentally friendly.

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CHAPTER 7

Ocean Dumping

7.1 Introduction

Ocean dumping, unlike vessel-source pollution, only made its first appearance on the international agenda in the 1970s. For a long time, this practice has been considered to be a cheaper, easier and relatively safe alternative to land-based disposal and has been conducted without any control. Currently, ocean dumping (and incineration) is strictly regulated and only a few harmless materials may still be legally disposed of in the sea. The legal framework is not as articulated as the one governing ship-source pollution. The global regime is based on the LOSC, which sets out the jurisdictional framework, Chapter 17 of Agenda 21, which contains general principles, and the IMO-sponsored 1972 London Convention (LC) and its 1996 Protocol, which entered into force in March 2006, which lay down minimum rules for the prevention of marine pollution by the dumping of waste and other matter. Unlike in the field of vessel-source pollution, both the LOSC and the LC strongly encourage the development of regional measures to control ocean dumping. Regional rules, indeed, appear to be more suitable compared to global ones to ensure adequate protection, especially in enclosed and semi-enclosed seas. Ocean dumping is also regulated within the framework of the 1974 Helsinki Convention, as amended, the OSPAR Convention, which replaced the 1972 Oslo Dumping Convention, and the BARCON together with its 1976 Dumping Protocol (BDP), as amended. These regional regimes are generally more stringent than international standards contained in the LC and, in some respects, the 1996 Protocol.

With the sole exception of the Helsinki Convention, which totally bans ocean dumping and incineration in the Baltic Area (except for dredge spoils), the regimes under the 1996 Protocol to the LC and the Regional Seas Conventions show strong similarities. Originally, however, there were considerable differences, for instance, in relation to the types of hazardous substances controlled (e.g., radioactive waste) and the regime for the final disposal of disused offshore installations. In the early 1970s, most EC member states acceded to the LC and Regional Seas Conventions. The existence of conflicting obligations under different legal instruments created competitive advantages for some member states, jeopardizing the establishment of the European single market, which was still in the course of completion. In order to eliminate the discrepancies and harmonize member states' legislation, the European Commission came up with two proposals, in 1976 and in 1985, for the adoption of an EC Directive on ocean dumping. The proposals did not succeed, however, due to the firm opposition of the member states and the different positions of the Commission and the EP, especially in relation to radioactive waste. This Chapter will look at the history of these proposals and discuss

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the reasons for their rejection in the Council. However, even though the Community has never succeeded in adopting specific legislation on ocean dumping, this practice is regulated within the framework of waste management legislation. The Chapter looks at the main EC Directives which are of relevance for the control of ocean dumping and incineration and identifies the factors that have influenced the Community's approach.

In the 1990s, the ocean dumping regime went through a profound revision process that brought it into line with the modern approaches to waste management and the protection of the marine environment as recommended by Agenda 21. This process removed most of the original discrepancies between the existing international Conventions. The international regime on ocean dumping provides a satisfactory level of protection for European seas and the Community decided that it was better to direct its efforts towards trying to accede to the relevant Conventions rather than to adopt its own rules. The attention will subsequently move on to the Community's participation, next to the member states, in the policy and decision-making process related to ocean dumping within the relevant global and regional bodies. The Chapter concludes with some final observations about the added value of the Community's involvement in the field and the manner in which it might contribute to filling the main gaps in the international regime for the control of ocean dumping.

7.2 The Global Legal Framework for the Control of Ocean Dumping and Incineration

7.2.1 Ocean Dumping and Incineration: Extent of the Phenomenon

Ocean dumping refers to an "intentional" disposal into the sea of wastes that are generated normally (but not exclusively) on land. Waste is loaded on to special ships and discharged into the sea, either in its original form or after onboard incineration. Ocean incineration consists of burning, on board of special ships, wastes which are too difficult and costly to dispose of on land and too toxic and persistent to dump directly into the sea. In Europe, as in the majority of the industrialized world, these practices have been commonly and generally accepted based on the incorrect assumption of the ocean's infinite ability to assimilate wastes. All European seas, from the North-East Atlantic to the Baltic and the Mediterranean Sea, have been seriously affected by ocean dumping. Before 1972, there were only a few general rules at the international level and they related exclusively to the dumping of nuclear wastes.[1] For centuries, therefore, oceans

1 The UN High Seas Convention (Article 25(1)), for instance, simply required States to adopt measures to prevent marine pollution by the dumping of radioactive waste "taking into account" any standards and regulations that "may be formulated" by the competent international organization. See also: Recommendation from UNCLOS I to the IAEA to undertake studies on the dumping of radioactive waste (A/CONF.13/L.56 (1958)) and the 1957 IAEA

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have been used as the dumpsites for any kind of garbage, including industrial, chemical and radioactive materials. Since the late 1940s, the nuclear industry (especially in France, Germany, Sweden, the UK, the former USSR, and the US) considered open oceans as "a convenient place to dispose of its inconvenient wastes."[2] Until recently, moreover, dumping has been the most common way to get rid of vessels, aircraft, old oil and gas platforms and disused offshore installations.[3] This diffuse practice started to lose much of its popularity in the 1970s as soon as it became clear that wastes (especially nuclear, industrial and chemical) are very persistent in the marine environment and, through bioaccumulation into the food chain, pose a serious threat to human health, fisheries and other legitimate uses of the sea. The 1972 Stockholm Conference urged governments to take action both at the global and regional level to control this practice.[4] As a response, in the next two decades, dumping and incineration have become among the most discussed and regulated issues on the international agenda.[5]

With some minor variations, all the relevant Conventions regulating ocean dumping adopt the same definition of dumping as the LOSC, which refers to: (i) any "deliberate" discharge at sea of waste and other matter from vessels and aircraft or other man-made structures at sea, and (ii) any "deliberate" disposal at sea of vessels, aircraft, platforms or other man-made structures at sea.[6] Dumping, therefore, is always intentional. Accidental discharges or operational discharges regulated under MARPOL 73/78 are excluded from the definition of dumping.[7] All discharges that do not have a "mere disposal" purpose are also excluded from the definition making it clear that dumping is always the exclusive purpose of the voyage.[8] The LOSC does not define "waste and other matters", while the LC and the Regional Seas Conventions adopt a very broad definition.[9]

Guidelines and Recommendations on the safe disposal of radioactive wastes into the sea (IAEA, Radioactive Waste Disposal into the Sea, in IAEA Safety Series no. 5, Vienna, 1961).

2 R. Parmentier (1999), p. 2.

3 At present, there are about 6,500 offshore platforms around the world and most of them are approaching the time for their decommissioning.

4 I.e., Stockholm Conference Report (A/Conf.48/14/Rev.1 (1973)), Annex III, p. 73 and Recommendations 86 and 92 (*ibid*., pp. 22-23). The Stockholm Conference expected to adopt a global Convention on ocean dumping, but the text was not yet ready.

5 E.g., 2001 UNSG Report (A/56/58), p. 62.

6 LOSC, Article 1(5)(a). See, also: LC, Article III(1)(a)(1) and (ii). The LOSC does not define "ships and aircraft", while the definition under the LC is very broad and refers to any "waterborne or airborne craft of any type whatsoever", including air-cushioned craft and floating craft, whether self-propelled or not (Article III (2)). See also BDP, Article 3(1).

7 E.g., LC, Article III(1)(b)(1).

8 LOSC, Article 1(5)(b)(ii); LC, Article III(1)(b)(2); BDP, Article 3(4)(b); 1992 Helsinki Convention, Article 2(3)(b)(ii); OSPAR, Article 1(f)(ii).

9 LC, Article III(4) and BDP, Article 3(2) include "material and substances of any kind, form or description"; OSPAR, Article 1(o) defines waste as everything but (i) human remains; (ii) offshore installation; (iii) offshore pipelines; (iv) unprocessed fish and fish offal discharged from fishing vessels. Waste is not defined in the 1992 Helsinki Convention.

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Incineration is not defined in the LOSC (nor in the 1972 LC and earlier Regional Seas Conventions), which did not perceive this practice as a threat. Incineration has subsequently been included within the scope of all Conventions governing ocean dumping and is normally defined as the "deliberate combustion of wastes or other matters in the maritime area for the purpose of their thermal destruction" excluding, therefore, incidental incineration in conformity with international law and operational combustion from vessels, aircraft or offshore installations for purposes other than mere incineration.[10]

Currently, ocean dumping and incineration are strictly controlled and only account for 10 per cent of all marine pollution.[11] The disposal at sea of industrial and radioactive wastes has been completely banned and only a few harmless materials may still be dumped into European waters (i.e., dredge material, inert, geological materials (e.g., mine tailings) and fish waste). The absolute majority of dumping operations currently taking place concern dredge materials (e.g., sand and silt), which are relatively clean and do not pose a major threat to the marine environment.[12]

7.2.2 The LOSC Jurisdictional Framework for Controlling Ocean Dumping

The LOSC framework governing ocean dumping is not as articulated as the one on vessel-source pollution. The Convention does not contain technical rules and standards, but establishes the jurisdictional framework for the prescription and enforcement of measures to control and regulate ocean dumping. Article 210(1) places States under a legal duty ("shall") to adopt laws and regulations and any other measure to "prevent, reduce and control" dumping. These measures have to ensure that no dumping will be carried out without a permit from the competent national authority (Article 210(3)). In particular, dumping within the territorial sea, EEZ and onto the continental shelf requires the "express prior approval" of the coastal State (Article 210(5)). Apparently, tacit approval is not enough.[13] Coastal States, moreover, have the right to permit, regulate and control the disposal "after due consideration of the matter with other states which, by reason of their geographical situation may be adversely affected thereby"

10 E.g., OSPAR, Article 1(h); 1992 Helsinki Convention, Article 2(5); BDP, Article 5.

11 See GESAMP Report No. 39, The State of the Marine Environment (1990), p. 88; GESAMP, Sea of Troubles, Report no. 70, (2001), p.26.

12 Initially, about 70% of all dumping permits notified to the LC concerned dredged material. This percentage rose to 80 - 85% following the cessation of incineration at sea and the ban on the dumping of industrial waste, see: www.londonconvention.org/London_Convention.htm#Industrial%20waste. Dredge materials, however, may be contaminated by the output of municipalities and industries (e.g., heavy metals, agricultural materials, organic compounds) which may accumulate in marine organisms and may still pose a threat to human health and fisheries.

13 E.g., S. Rosenne and A. Yankov (eds.) (1991), p. 166. Also the LC requires the prior approval of the coastal state, but this does not need to be "express."

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(*ibid.*). This provision does not oblige states to enter into formal consultation, but it is declaratory of the customary duty to consult in good faith.[14]

National laws and regulations cannot be "less effective […] than global rules and standards" (Article 210(6)). These global rules and standards are generally considered to be those laid down in the LC, which seems to reflect customary international law.[15] In regulating ocean dumping, therefore, all parties have to conform, as a minimum, to the provisions of the LC regardless of their individual participation in that Convention. States, moreover, "shall endeavour" to establish global and "regional" rules, standards and recommended practices and revise them from time to time, acting within the framework of the "competent international organizations" (Article 210(4)). Unlike in the field of vessel-source pollution, competent organizations not only refer to the IMO, but also to the IAEA and regional bodies, such as the OSPARCOM, HELCOM and the BARCON. The LOSC, indeed, seems to recognize that regional rules may be more suitable compared to global regulations to effectively control ocean dumping. The regulation of ocean dumping, unlike vessel-source pollution, does not interfere with the freedom of navigation and does not require strong uniformity.

Article 216 of the LOSC gives jurisdiction to enforce national anti-dumping measures and "applicable international rules and standards" to (i) flag States; (ii) coastal States with regard to dumping activities in their territorial sea, EEZ and onto their continental shelves; and (iii) States in whose territories (or offshore terminals) the waste is loaded. Generally *applicable* rules, unlike the "general rules" mentioned in Article 210, seem to refer to instruments expressly ratified by the parties concerned and customary international law, such as the LC and, since March 2006, also the 1996 Protocol. All global and regional agreements regulating ocean dumping rely on the jurisdictional rules set out in the LOSC.[16]

The LOSC includes the deliberate disposal of platforms or other man-made structures at sea within the definition of dumping (Article 1.1(5)(a)(ii)). Article 60(3) of the LOSC requires coastal States to remove offshore installations in the EEZ and on the continental shelf to ensure the safety of navigation, fishing, and the protection of the marine environment and "taking into account any generally accepted international standards established by the competent international organization", but also envisages the option of partial removal.[17] In 1989, the IMO adopted a set of guidelines to implement Article 60(3).[18]

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14 E.g., S. Rosenne and A. Yankov (eds.) (1991), p. 166.

15 IMO doc. LC 17/14, Para. 2.5. See also 1995 UNSG Report (A/50/713), Para. 107.

16 E.g., LC, Article 12(1)(a)(b)(c); BDC, Article 11; the 1992 Helsinki Convention, Article 9(3).

17 LOSC, Article 60(3). Article 60 applies *mutatis mutandis* to the continental shelf (Article 80). In this way, the LOSC departs from the traditional regime under the 1958 UN Geneva Convention on the Continental Shelf (CCS), which required the entire removal of abandoned or disused offshore installations (Article 5(5)). For a detailed analysis of the regime on the removal and disposal of offshore installations see: E.D. Brown (1992), p. 128.

18 "Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone," IMO Res. A.672 (16), 19.10.1989. It is commonly agreed that the IMO Guidelines represent the generally accepted international

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Total removal is considered the norm, but in special circumstances (e.g., installations meeting certain depth or weight criteria), coastal States may authorize partial removal on the basis of a case-by-case evaluation of the different factors involved (e.g., any potential effect on the safety of navigation, the marine environment and its living resources).[19] The status of the 1989 IMO Guidelines is still controversial.[20] If, on the one hand, Article 60(3) of the LOSC does not make such Guidelines mandatory, then, on the other hand, in view of the consistent practice of states (including the US) and their endorsement in most international and regional agreements, they seem to reflect customary international law.[21]

7.2.3 The 1972 London (Dumping) Convention

The London Dumping Convention was concluded on 29 December 1972 in the aftermath of the Stockholm Conference.[22] It represents the first global Convention regulating ocean dumping, but its regime was profoundly influenced by the 1972 Oslo Convention for the prevention of pollution by dumping in the North-East Atlantic, which was adopted in February 1972.[23] In 1992, the Parties decided to refer to the Convention as the London Convention 1972 (LC).[24]

The LC requires contracting parties "to take all practicable steps" to harmonize their policies in order to prevent pollution by the dumping of wastes and other hazardous matters that may affect human health, harm marine living resources and ecosystems, damage amenities or interfere with any legitimate use of the sea (Articles I and II). Incidental or operational disposal regulated under MARPOL 73/78 is not covered (Article

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standards referred to in Article 60(3) of the LOSC (e.g., UN Doc. A/52/487, Para. 282). For a detailed discussion of the IMO Guidelines see, e.g., J. Woodliffe (1999), pp. 105-6 and E.D. Brown (1992), pp. 129-30.

19 All factors are listed in IMO Res. A.672 (16), Paras. 2.1 and 2.2. In addition, after January 1998, the placement of offshore installations on the continental shelf or in the EEZ is prohibited unless their design, construction and structure allow their total removal upon abandonment.

20 For a general discussion on the topic see: L. de la Fayette (1998), pp. 524-26; E.D. Brown (1992), pp. 128-30; Z. Gao (1997), p. 62.

21 E.g., J. Woodliffe (1999), p. 106.

22 Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter, 29.12.1972, in force on 30.08.1975. On 14.10.2004 the Convention had 80 Parties, including 18 EC member states. Other EC Members: i.e., Austria, the Czech Republic, Hungary Slovakia (all land-locked States) and Estonia, Latvia, and Lithuania are not parties.

23 E.g., S. Rosenne and A. Yankov (eds.) (1991), p. 158. For a detailed discussion of the Oslo Convention see: L. de la Fayette (1998), pp. 515-536.

24 The decision (IMO Doc. LC 15/16, Para. 4.25) was taken on the basis of a proposal from Greenpeace International (IMO Doc. LC 15/5) since the old name suggested the idea of a sort of "dumping club". See also E.J. Molenaar (1997), p. 397.

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III (1)).[25] The definition of dumping mirrors the one under the LOSC. However, unlike the LOSC and the Regional Seas Conventions, the LC expressly excludes from the definition of dumping the disposal of waste or other matter "directly arising from or related to the exploration, the exploitation and associated offshore processing of seabed mineral resources."[26] This exception (which was reconfirmed in the 1996 Protocol[27]) has been strongly criticized for being purely political and for providing the offshore oil and gas industry with preferential treatment since it makes it possible to dump from fixed platforms the same kind of waste that cannot be disposed of from a ship.[28] However, the offshore operations excluded from the LC seem to fall within the scope of "operational discharges" from fixed or floating platforms regulated under MARPOL 73/78.[29]

Another controversial issue is whether or not sub-seabed disposal falls within the definition of dumping under the LC. The controversy initially started in the 1980s in relation to the sub-seabed disposal of radioactive (especially high-level radioactive) materials. The nuclear industry had to accept the ban "on the seabed", but claimed that the LC does not cover disposal "under the seabed".[30] In 1990, the parties to the LC adopted a peculiar resolution banning sub-seabed disposal from the sea, but allowing it from land, through a tunnel.[31]

Incineration was not originally within the scope of the Convention, but was included in 1978 through an amendment to the Annexes.[32]

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25 The exact scope of this exception has been challenged in the IMO. In 2004, LC 26 asked the MEPC to clarify the boundaries between "normal operations of vessels" under MARPOL 73/78 and "dumping" under the LC and its Protocol. The main concerns relate to the broad definition of "cargo-associated wastes" which may be discharged under MARPOL Annex V (garbage). The Parties reviewed the MEPC's response at their 27th meeting in December 2005, but the issue has not yet been resolved (e.g., LC 27/16, 16.12.2005, Para.7.10).

26 LC, Article III (1)(c). Article 2 (b)(ii) of MARPOL 73/78 contains the same exception.

27 1996 Protocol to the LC, *infra* n. 52 (Article 1.3). During the Special Meeting of the Parties, held in November 1996 to sign the Protocol, a large number of countries made it clear that they would not ratify it without this exception.

28 This was a typical political decision because in the 1970s the exploitation of mineral resources (e.g., polymetallic nodules) was considered as an important industrial sector for the future.

29 Article 2(4) of MARPOL 73/78 includes fixed or floating platforms in the definition of "ships".

30 In the early 1980s, Belgium, France, Germany, Japan, the Netherlands, Switzerland, the UK, and the U.S, developed a sub-seabed disposal option for high-level radioactive wastes under the auspices of the Sub-Seabed Disposal Working Group of the Nuclear Energy Agency of the OECD. See, e.g., R. Parmentier (1999), p. 4.

31 Resolution LC 14(7), Para. 207.

32 It was decided to include incineration rules in the LC by amending Annex I and II since the revision of the Convention would have taken too long. The so-called LDC Incineration Amendments were adopted on 12.10.1978 and entered into force in 1979 (1979 UKTS 71). These amendments, however, did not prohibit incineration, not even for substances listed in Annex I, but laid down the criteria for the approval of incineration vessels and required parties to consider the practical availability of land-based alternatives before issuing incinera-

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The Convention applies to "all marine waters other than internal waters of states" (Article III (3)).[33] Article XIII makes it clear that nothing in the LC shall prejudice the codification and development of the law of the sea by UNCLOS III. It is generally accepted that the regime of the LC therefore applies to the EEZ.[34]

Just as do most of the earlier environmental treaties, the LC follows a double-listing approach. The dumping of substances listed in Annex I (the Black List), including high-level nuclear waste, is completely prohibited,[35] while the disposal of substances listed in Annex II (the Grey List), including low-level nuclear waste, is conditional on a special permit being issued by the competent national authority.[36] Wastes and other matters that are not listed in the Annexes require a prior general permit.[37] In issuing special and general permits, the national authorities have to take into account the criteria laid down in Annex III (e.g., the characteristics and composition of the materials, dumping sites, the possible effect of the dumping and the practical availability of land-based disposal alternatives). The LC intends to ensure that no dumping takes place without a prior assessment of all the possible adverse effects. Parties have to keep a record of the dumping activities permitted, monitor the conditions of the sea and report all relevant information to the IMO.[38] So far, only a small percentage of the contracting parties have met their reporting requirement under the Convention.[39]

The LC, as does the LOSC, requires parties to take legislative action to implement the Convention for vessels or aircraft (a) registered in their territory or flying their flag, (b) loading waste in their territory or territorial sea, and (c) engaging in dumping in waters under their jurisdiction (including the continental shelf and the EEZ).[40] The enforcement of the LC is the task of the coastal States in waters under their jurisdiction,

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tion permits.

33 The 1972 LC, like all the early environmental treaties, was mainly concerned with dumping by foreign vessels and contracting parties opposed the establishment of international rules in areas under their absolute sovereignty. See: B. Kwiatkowska (1995), p. 55.

34 Parties agreed to meet after UNCLOS III to define the nature and extent of rights and duties of coastal States (Article XIII). Such a meeting, however, has never been convened. At the 11th Meeting of the LC (1988), Norway, among other countries, called for an amendment of the LC in order to expressly recognize the rights and responsibilities of states to regulate dumping within the EEZ. However, the majority of the parties agreed that since there was no inconsistency between the LC and the LOSC, there was no need to amend the LC. See A. Fretheim (1990), p. 249.

35 LC, Article IV(1)(a). Annex I includes, *inter alia*, organosilicon compounds, mercury and cadmium and their compounds, synthetic materials and persistent plastics, crude oil and hydrocarbons.

36 LC, Article IV(1)(b). Annex II includes, *inter alia*, pesticides and their by-products, arsenic, lead, copper and zinc.

37 LC, Article IV(1)(c).

38 *Ibid.*, Article VI(1).

39 E.g., IMO Doc. LC 27/16, Para. 3 (2005) and LC 22/3/2 (2000).

40 LC, Article VII. See: D. Suman, (1991), p. 567 and R. Churchill and A. Lowe (1999), p. 364.

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while on the high seas such responsibility lies primarily with flag States.[41] Although the provisions on enforcement are poorly drafted and there is no indication as to what the parties may do to enforce the Convention, they seem to be entitled to take all measures that are necessary to verify that no illegal dumping operations are carried out and that the conditions set out in the permits are met. Parties, moreover, agree to cooperate in the development of procedures for the effective application of the LC especially on the high seas, including procedures for the reporting of vessels and aircraft engaged in dumping in contravention of the Convention.[42] The Convention lists a number of exceptions to these general rules (e.g., for vessels entitled to sovereign immunity and in emergency situations).[43]

Like the LOSC, the LC strongly encourages regional cooperation and the adoption of agreements for the control of dumping activities taking into account regional features (Article VIII).

Finally, the Convention sets out an institutional framework governing its future operation. Secretariat duties are carried out by the IMO. Consultative Meetings between the Parties have to be held every two years (but in practice they take place annually) to discuss possible amendments to the Convention and its Annexes, to examine national reports on implementation and to develop guidelines for the operation of the Convention (Article XIV).[44]

7.2.4 The Revision Process and the 1996 Protocol

In the early 1990s, the LC was subject to a revision process that extended its scope and brought the Convention into line with the modern approach to waste management and emerging principles of international environmental law, especially the precautionary principle.[45] This evolution was strongly encouraged by Agenda 21.[46] In 1993, three major amendments were adopted. First, the dumping of industrial waste was completely phased out.[47] Second, following the recommendation of Agenda 21,[48] the sea disposal

41 At their 11th meeting (1988), the parties recognized the possibility to enforce the LC in the EEZ and on continental shelves (IMO Doc. LDC 11/14, Para. 5.4).

42 LC, Article VII(3). So far, however, no action has ever been taken pursuant to Article VII(3).

43 E.g., *force majeure* or when the dumping is necessary to protect the safety of human life and vessels (LC, Articles VII(4) and V).

44 The Consultative Meetings of the Parties (hereinafter LC) are preceded by the meetings of the Scientific Group that take place annually to discuss scientific and technical aspects of dumping. The records of the meetings are available at: www.londonconvention.org/main.htm.

45 For an overview see: E.J. Molenaar (1997), pp. 396-403; L. de la Fayette (1999), pp. 526-7.

46 Agenda 21 (Para. 30 (b)(1)) called for a revision of the existing international regime on ocean dumping.

47 Resolution LC 49(16) concerning Phasing Out Sea Disposal of Industrial Waste by the end of 1995. Australia made a reservation (IMO Doc. LC 17/14, para. 2.2). However, the exact identification of "industrial waste" is still controversial. In particular no consensus has been

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of all classes of radioactive waste was totally banned,[49] putting an end to the long controversy over the dumping of low-level radioactive material.[50] Third, the incineration of industrial waste and sewage sludge was completely phased out.[51]

The revision process which the LC underwent came to an end in 1996 with the adoption of a new Protocol.[52] The 1996 Protocol is far more restrictive than the LC and, in practice, is a completely new Convention. Given that OSPAR contracting parties have always been particularly active in the LC, the Protocol presents strong analogies with the OSPAR dumping provisions. The main objective is not only to prevent and control, but also to eliminate, "where practicable", pollution by dumping and the incineration of wastes and other matter.[53] Incineration at sea is completely prohibited. The 1996 Protocol (Article 3) requires ("shall") Parties to apply the precautionary approach and moves from the traditional black and grey lists towards a so-called "reverse listing" structure whereby all dumping is prohibited unless explicitly permitted.[54] Only matter listed in Annex I may be considered for sea disposal with a prior permit from the national authority. They include: dredged materials, sewage sludge, fish processing wastes, vessels and disused offshore installations, inert, inorganic geological material,

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reached on the conditions under which materials exempted from the definition of "industrial wastes", as listed in Annex I, Paras. 11(a) to (f), would be eligible for disposal at sea. See: LC 25/16 (2003), pp. 23-4; LC 24/17 (2002); LC 22/14 (2000); all available at: www.londonconvention.org/Documents.htm.

48 See: Agenda 21, Para. 22.5.c.

49 Resolution LC 51(16) concerning Disposal at sea of Radioactive Wastes and Other Radioactive Matter. The 1993 ban entered into force on 20.02.1994 for all contracting parties except the Russian Federation which made a reservation (see: IMO doc. LC 17/14, Para. 2.2). Reportedly, it did not have sufficient facilities to store and process low-level radioactive waste and therefore dumped it in the Barents and Kara Seas. Only in May 2005 did the Russian Federation officially accept the 1993 ban.

50 Under the 1972 LC, the dumping of low-level radioactive materials listed in Annex II was still allowed on the basis of a special permit. In 1983, due to strong political pressure, a non-binding moratorium on the dumping of low-level radioactive waste was adopted pending the completion of scientific and technical studies by an independent panel of experts (Resolution LDC 14(17)). The moratorium was extended in 1985 (i.e., Resolution LDC 21(9)).

51 Resolution LC 50(16) concerning Incineration at Sea. The incineration of noxious liquids was phased-out by the end of 1994 (1988 Resolution LDC 35 (11)).

52 Article 23, 1996 Protocol to the London Convention on Dumping of Waste and Other Matter (1996 Protocol). The Protocol was adopted at the Special Meeting of the Parties, held on 7.11.1996, and entered into force in March 2006, see *infra* n. 67.

53 1996 Protocol, Article 2. According to E.J. Molenaar (1997), p. 399, this formulation leaves a great deal of discretion to the states Parties and is quite ambiguous since it is not clear whether states should suspend dumping activities or clean up the existing pollution.

54 1996 Protocol, Articles 4 and 5. The OSPAR, 1992 Helsinki Convention and the 1995 BDP follow the same approach.

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organic material of natural origin, and harmless bulky items.[55] These materials, however, are not eligible for dumping when "they contain levels of radioactivity greater than *de minimis* concentrations as defined by the IAEA and adopted by contracting parties."[56] The permits have to be issued on a case-by-case basis according to Annex 2, which determines the criteria by which to assess the potential impact of dumping activities on the marine environment. Dumping is permitted only if, after the assessment, it emerges as the best environmental option, but preference should always be given to alternatives such as reuse, recycling and land disposal.[57] To assist national authorities in the issuing of permits, the contracting parties adopted different sets of guidelines for the assessment of wastes eligible for dumping.[58]

In practice, however, the "reverse listing" approach does not substantially change the previous regime since the substances listed in Annex I to the 1996 Protocol are the same as those that could be dumped under Annex II to the amended LC. Particularly contested, especially by EC contracting parties, is the retention of the possibility to dump vessels and disused installations.[59] This practice, as will be discussed later, has been put in the spotlight in the aftermath of the Brent Spar controversy in 1995, but the interests of the offshore oil and gas industry always prevented the adoption of a strong regulation within the framework of the LC.[60]

What substantially differentiates the 1996 Protocol from the LC is, first of all, the extension of its geographical scope. The parties to the Protocol may decide to apply

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55 I.e., bulky items primarily comprising iron, steel, concrete and similarly harmless materials for which the concern is physical impact, limited to those circumstances where such wastes are generated at locations, such as small islands with isolated communities, having no practicable access to disposal options other than dumping. See Annex I, point 7.

56 1996 Protocol, Annex 1, Para.3. In 2001, the IAEA adopted Guidelines on the assessment of the level of radioactivity contained in the materials considered for dumping under the LC.

57 Annex 2, opening paragraph and the 1996 Protocol, Articles 2, 3 and 4.2 .

58 The LC 22, in 2000, adopted a set of Guidelines for the assessment of wastes that may be dumped under the 1996 Protocol which also apply to waste under Annex II of the LC. See also the 1997 Guidelines for the assessment of wastes or other matters that may be considered for dumping (LC 19/10, Annex 2), currently under review. In 2005, moreover, LC 25 approved policy guidance for the "placement of matter" (e.g., the construction of artificial reefs), which is exempt from the definition of "dumping" under the LC.

59 Conversely, the dumping of platforms and other man-made structures at sea is conditional upon removal to the maximum extent of material capable of creating floating debris or otherwise contributing to marine pollution and it must not pose a serious obstacle to fishing or navigation (Annex I, para. 2). The Protocol therefore implements the 1989 IMO Guidelines.

60 The LC 18, in 1997, rejected a Danish proposal for a moratorium on the dumping of disused vessels and offshore installations. But with Resolution LC.56(SM) the parties urged future research to be conducted by a scientific group on land-based alternatives, assessments and a procedure for preventing pollution arising from the sea disposal of vessels. For a detailed analysis see: L. de la Fayette (1999), pp. 524-527; J. Woodliffe (1999), pp. 106-109; J. Side (1997), pp. 45-52.

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its provisions to internal waters, which are expressly excluded from the scope of the LC.[61] In addition, the Protocol includes within the definition of dumping: any storage of wastes or other matters "into the seabed and the subsoil thereof" (Article 1(3)), thereby putting an end to the long controversy over whether or not sub-seabed disposal falls within the LC regime. However, it is still not clear whether sub-seabed disposal through a tunnel is still possible.[62]

Another innovative element of the 1996 Protocol is the introduction of a new total ban on the export of waste for dumping or incineration purposes to non-parties (Article 6). This provision creates a bridge between the LC and the Basel Convention on the Control of Transboundary Movement of Waste and their Disposal (Basel Convention).[63] The Basel Convention indeed aims to reduce movements of hazardous waste to a minimum and makes sure that its rules on processing and disposal, including ocean dumping, are not circumvented by exports.[64] The 1996 Protocol therefore reinforces the Basel regime.

Finally, the 1996 Protocol places far more emphasis on compliance than the LC and requires the Meeting of the Parties to establish procedures and mechanisms which are necessary to assess and promote compliance (Article 11), to provide technical assistance (Article 13), and to establish a dispute-settlement procedure (Article 16).[65] The Protocol mirrors the LOSC and the LC with regard to application and enforcement.[66]

The 1996 Protocol entered into force on 24 March 2006, 10 years after its adoption, superseding the LC as between the parties to the Protocol which are also parties to the LC.[67] For the time being, therefore, both instruments will be in force in parallel. This might create some confusion, especially for States parties to the LOSC which did not ratify either of the two instruments (including the Community and some EC member

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61 1996 Protocol, Articles 1(7) and 7. In addition, contracting parties may decide to apply the 1996 Protocol also to vessels and aircraft entitled to sovereign immunity (Articles 8 and 10(4) and (5)).

62 Currently, it is under discussion whether CO2 sequestration in sub-seabed geological structures are compatible with the LC (and the 1996 Protocol), see: LC 27/16, 16.12.2005, Paras. 6.1-33.

63 Basel, 22 March 1989, in force 5 May 1992. The EC is a party to the Basel Convention.

64 Almost all wastes labelled as hazardous under Annex I of the Basel Convention are listed in Annex I of the LC among matters whose dumping is prohibited.

65 In addition, it strengthens monitoring and reporting obligations (Annex 2, Para. 16). The work towards the development of compliance procedures started in 2003.

66 1996 Protocol, Article 10. Article 10(2) requires Parties to adopt "appropriate measures in accordance with international law to prevent and if necessary punish acts contrary to the provisions of this Protocol".

67 The requisite 26 ratifications necessary for its entry into force were achieved on 22.02.2006, when Mexico deposited its instrument of ratification. See: IMO News, No. 1 (2006). Only 10 EC member states have ratified the Protocol (i.e., Belgium, Denmark, France, Germany, Ireland, Luxembourg, Slovenia, Spain, Sweden and the UK), while others (e.g., Finland, Greece, Italy and the Netherlands) are in the process of ratifying. The two acceding countries (Bulgaria and Romania) have not ratified either.

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states),[68] as to whether the "global rules" and the "generally applicable international rules" referred to respectively in Article 210 and Article 216 of the LOSC are those laid down in the Protocol or in the LC.[69] For a long time, the 1996 Protocol has not attracted a large number of ratifications and it is still controversial whether, like the LC, it may be considered to reflect customary international law.[70]

7.3 Regional Conventions and the Control of Ocean Dumping and Incineration

7.3.1 The 1972 Oslo Convention and the 1992 OSPAR Convention

Among all European Seas the North-East Atlantic, in particular the North Sea, has been the most affected by dumping and incineration and for a long time has been used as a dumpsite by the Western European nuclear industry.[71] Offshore gas and mineral extraction is one of the main activities in the area and here there is the highest concentration of oil platforms and other man-made structures at sea. Not surprisingly, dumping has been one of the first sources of marine pollution ever regulated in the North-East Atlantic. The 1972 Oslo Convention for the Prevention of Marine Pollution by Dumping from Ship and Aircraft (Oslo Convention) was the first international agreement regulating ocean dumping.[72] As already mentioned, the Oslo Convention strongly influenced the 1972 LC, which was adopted shortly afterwards. The two instruments, therefore, had a similar structure, but differed with respect to the substances controlled (e.g., high and low-level radioactive wastes were not originally controlled in the Oslo Convention). The Oslo Convention set out a permit system and required parties to submit to the Oslo Commission all records of the dumping permits issued. The Commission therefore had an overview as to who dumped what, where and how much, but could not do much to impede parties from continuing to dump their waste into the North-East Atlantic. At the beginning of the 1990s, in parallel with the global developments, the Oslo

68 I.e., Austria, the Czech Republic, and Slovakia (all land-locked States) and Estonia, Latvia, and Lithuania.

69 E.g., 2001 UNSG Report (A/56/58), Para. 338.

70 See, e.g., E.A. Kirk (1997), p. 959.

71 Between 1949 and 1982, approximately 140,000 tons of low-level radioactive waste were disposed of in ten different dumpsites in this area. In addition, most of the existing incineration vessels operated in the North Sea, see: D. Suman (1991), pp. 560-1 and R. Parmentier (1999), p. 2.

72 Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, adopted in Oslo on 15.02.1972, entered into force on 7.04.1974. For a detailed analysis of the Oslo Convention see: The OSLO and Paris Commissions, "The First Decade", International Co-operation in Protecting the Marine Environment (1984).

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Convention went through a revision process that was largely influenced by the NSMCs.[73] Incineration, which was not originally covered, had been completely phased out by the end of 1990,[74] the dumping of sewage sludge had been totally banned by the end of 1998[75] and by that same date the ban had been extended to industrial waste.[76] In the wake of the *Brent Spar* controversy, moreover, the Oslo Commission adopted a moratorium on the disposal of disused offshore installations at sea.[77] The controversy started in 1995, when the oil multinational Shell decided to dump, with the authorization of the UK government, a disused oil rig, the *Brent Spar,* into the North Sea. At the 4th NSMC, in 1995, the Environmental Ministers of the North Sea coastal States manifested strong concerns about this practice, being aware of the fact that an increasing number of offshore installations in the North Sea were approaching the time of their decommissioning.[78] They agreed that decommissioned offshore installations should be either reused or disposed of on land and invited the Oslo Commission to take steps in this direction. Three weeks later, the Oslo Commission adopted the moratorium, but Norway and the UK made a reservation.[79] Given that both countries license the large majority of all offshore installations in the North Sea, the effectiveness of this moratorium has been strongly questioned.[80] Only in January 1998, due to strong international pressure, did Shell announce a plan to recycle the *Brent Spar*, but the controversy over the dumping of offshore installations was far from over.[81]

In 1998, the dumping regime in the North-East Atlantic was reinforced with the entry into force of the 1992 OSPAR Convention that replaced the 1972 Oslo Convention. Dumping and incineration are regulated in Annex II. As already mentioned, the dumping provisions of the OSPAR Convention shaped the 1996 Protocol, although they are generally more stringent. Unlike the Oslo Convention, the OSPAR Convention expressly applies to internal waters[82] and to the EEZ.[83] But there are no provisions on seabed

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73 In particular, the 2nd NSMC (1987) and 3rd NSMC (1990). See, e.g., E. Hey (2002), pp. 325-51 and E. Hey, T. IJlstra, A. Nollkaemper (1993), p. 2. On the role of the NSMCs see, in general, Chapter 1.4.1.

74 OSCOM Decision 90/2, 23 June 1990. Incineration was regulated in a special Protocol adopted in 1983 and entered into force in 1989 (1989 UKTS 59). That Protocol, however, did not phase out incineration, but considered it as an interim measure pending the development of land-based alternatives.

75 OSCOM Decision 91/1, 23 June 1990.

76 OSCOM Decision 89/1, 14 June 1994.

77 OSCOM Decision 95/1, 4 August 1995. For a full discussion see: L. de la Fayette (1999), pp. 523-32, and J. Woodliffe (1999), pp. 11-114.

78 4th NSMC Declaration (1995), Para. 54.

79 OSCOM Decision 95/1 on the Disposal of Offshore Installations.

80 See, e.g., R. Parmentier (1999), p. 11.

81 Shell decided to reuse the installation as a quay extension near Stavanger in Norway (e.g., Shell Press Release, 29.01.1998). Reuse operations were completed in July 1999. Since the entry into force of the decision on 4.08.1995, 18 platforms have been brought ashore. Greenpeace International played a major role in the controversy.

82 OSPAR, Annex II, Article 10(1)(c).

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disposal. Like the 1996 Protocol, the OSPAR Convention endorses the precautionary principle and moves from the traditional "black and gray list approach" towards "a reverse listing system".[84] Incineration is completely prohibited, while dumping is still permitted on the basis of a prior permit by the national authorities, but only for: dredge materials, inert materials of natural origin, sewage sludge (until 31 December 1998), fish processing waste, vessels and aircraft (until 31 December 2004).[85] Dumping permits, however, cannot be issued whenever vessels and aircraft contain substances that result or are likely to result in harm to or interference with other legitimate uses of the sea.[86] The disposal of all radioactive waste is completely prohibited, but France and the UK made a reservation.[87] The disposal at sea of disused offshore installations and pipelines is regulated in Annex III and may only be permitted on a case-by-case basis according to Decisions, Recommendations and other agreements adopted under the OSPAR Convention.[88] Both Annexes II and III mirror the LC and the LOSC with regard to implementation and enforcement and require parties to report to the Commission all records of authorized dumping operations.[89]

At its first Ministerial Meeting, held in Sintra (Portugal) in July 1998, the OSPAR Commission adopted a number of legally binding decisions that further strengthened the dumping regime. First of all, Decision 98/2[90] removed the exception granted to France and the UK with regard to the dumping of radioactive waste, bringing the OSPAR regime in line with the 1993 amendments to the LC, which had been accepted by both states.

Second, after complex negotiations between Norway and the UK, on one the side, and the other OSPAR contracting parties, on other side, Decision 98/3 was adopted, putting an end to the long controversy over the dumping of offshore installations in the North Sea.[91] The dumping and leaving wholly or partially in place of disused

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83 Article 10(1)(c) refers to the "part of the sea beyond and adjacent to the territorial sea under the jurisdiction of the coastal State to the extent recognized by international law".

84 Accordingly, Annex II, Article 1(o) defines waste by referring to everything except human remains, offshore installations and pipelines, unprocessed fish and offal discharged from vessels.

85 Annex II, Article 2 (incineration) and Article 3 (dumping). The list of materials that may be dumped into the OSPAR Area largely corresponds to that under the 1996 Protocol.

86 Annex II, Article 4(2).

87 Annex II, Article 3(3)(a), has been largely influenced by the 2nd NSMC Declaration (1987), Para. 32. According to Annex II, Article 3(3)(b) France and the UK are exempt from the prohibition.

88 Annex III, Article 5. The regime under Annex III mirrors Annex II. Deliberate disposal from offshore installations are included in the definition of dumping (Article 1(f)(2)) and are expressly prohibited (Annex III, Article 3).

89 Annex II, Articles 4(3) and 10 and Annex III, Articles 5(4) and 9.

90 The OSPAR Decision 98/2 came into force on 9 of February 1999.

91 OSPAR Decision 98/3 implementing the 1989 IMO Guidelines on the Removal of Offshore Installations in the OSPAR area. For a full discussion see: L. de la Fayette (1999), pp. 528-30 and J. Woodliffe (1999), pp. 101-23.

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offshore installations within the maritime area has been completely prohibited, subject to three exceptions.[92] Generally speaking, these exceptions apply whenever the entire or partial removal would be too difficult or even impossible (e.g., the footing of steel installations or concrete anchor bases). Parties which want to make use of these exceptions have to prepare an environmental assessment (according to Annex 2) and consult with other parties (on the basis of a procedure set out in Annex 3).[93] Initially, the OSPARCOM envisaged the possibility to reduce the scope of the exceptions in the light of new technical developments in the decommissioning of offshore installations at its regular meeting in 2003.[94] The relevant work was carried out within the Offshore Industry Committee (OIC), which concluded that decommissioning activity had not developed as quickly as expected in 1998 and there was no rationale for amending the decision.[95]

After 1 January 2005, when the disposal of vessels and aircraft officially came to an end, ocean dumping in the North-East Atlantic was limited to inert material of natural origin, bulky wastes (e.g., steel wire and concrete), fish waste, dredge material,[96] and disused offshore installations. Currently, the absolute majority of the dumping permits concern dredge materials, which are relatively harmless.[97] Ocean dumping, therefore, is no longer a major threat in the North-East Atlantic and is no longer a priority action for OSPAR.[98] It is likely that for the time being OSPAR activities in this field will

92 I.e., (a) the leaving in place of all or part of the footing of a steel installation listed in Annex 1 and placed in the Maritime Area before 9.02.1999; (b) the dumping of or leaving wholly or partially in place a concrete installation listed in Annex 1 or constituting a concrete anchor base (currently, there are 27 such installations in place in the area, see: www.ogp.org.uk/pubs/338.pdf) and (c) the dumping of or leaving wholly or partially in place any other disused offshore installation, when exceptional and unforeseen circumstances resulting from structural damage or deterioration or from some other cause presenting equivalent difficulties may be demonstrated (OSPAR Decision 98/3, Para. 3).

93 Annex 4 lays down conditions for issuing decommissioning permits and for implementation reports to be submitted to the OSPAR Commission.

94 OSPARCOM Decision 98/3, Para. 7. Parties, moreover, will strive to avoid using such derogations for footings of steel installations (Sintra Ministerial Statement, Para. 22).

95 See: Summary Record of the OIC's Meeting, 10-14 March 2003, Annex 4 and Summary Record of OSPAR 2003, para. 7.3, both available at: www.ospar.org/eng/html/welcome.html.

96 In Sintra the Commission adopted two series of Guidelines to Assist Parties in the Management of Dredge Material and in the Dumping of Fish Waste from Land-based Industrial Fish Processing Operations (see: Summary Records OSPAR 98/14/1-E, Annex 43).

97 See: OSPARCOM (2004): Overview of Past Dumping at Sea of Chemical Weapons and Munitions in the OSPAR Maritime Area, and the 2004 Report on dumping of wastes at sea adopted at BDC 05/4/2, both available at: www.ospar.org/eng/html/welcome.html, currently under review.

98 OSPARCOM's Action Plan for the period 1998-2003, as revised in 2003, and the 5th NSMC Declaration (2002) do not include ocean dumping and incineration among priority actions.

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be limited to monitoring, reviewing and assessing the obligations of the Parties.[99] Currently, dumping issues are mainly discussed within the OSPAR Working Group on Environmental Impact of Human Activities (EIHA),[100] but occasionally they are also on the agenda of other OSPAR committees, such as the Biodiversity Committee (CBD) and the OIC.[101]

7.3.2 The 1992 Helsinki Convention

The Baltic Sea was used to dispose of most of the military waste from World War II and, like the North-East Atlantic, has been strongly affected by ocean dumping.[102] Its waters, however, are much shallower than the North-East Atlantic and the rather restricted circulation makes wastes particularly difficult to remove.[103] The dumping regime under the 1974 Helsinki Convention, therefore, was far stricter compared to the 1972 Oslo Convention or the LC. Dumping was completely banned except for dredge material, which required a special permit.[104] Similarly, the dumping provisions of the 1992 Helsinki Convention are similar to the OSPAR Convention (e.g., the precautionary principle and the reverse listing approach), but in some respects they are more stringent. Dumping is completely prohibited with the only exception being dredge materials according to the provisions of Annex V and on the basis of a special permit from the competent national authorities.[105] The prohibition extends to dredge materials containing significant quantities of noxious liquids listed in Annex I. In 1992, the HELCOM adopted Recommendation 13/1 and related Guidelines for the disposal of dredge material inviting parties, *inter alia*, to evaluate different disposal options, select sea disposal sites

99 See, e.g., OSPARCOM recommendation 2003/2 on an OSPAR Framework for Reporting Encounters with Marine Dumped Conventional and Chemical Munitions (available at: www.ospar.org/v_ospar/strategy.asp?v0=1&lang=1).

100 Initially, dumping issues were discussed within the WG on Sea-based activities (SEBA), in the WG on Radioactive Substances (RS) and the WG on Impact on the Marine Environment (IME).

101 Currently, for instance, discussions are going on within the Group of Jurists/Linguists (JL), CBD and OIC as to whether CO2 disposal in the seabed may be considered as dumping or discharge (e.g., Summary records of OSPAR 2005).

102 About 40,000 tonnes of chemical munitions were dumped south-east of Gotland, east of Bornholm and south of the Little Belt; see: State of the Baltic Marine Environment (1998-2002), p. 35, available at: www.helcom.fi/stc/files/Publications/Proceedings/bsep87.pdf. See also the Final Report of the *Ad Hoc* Working Group on Dumped Chemical Munitions (HELCOM CHEMU) to HELCOM 15 (March 1995).

103 For a full discussion see: D. Suman (1991), p. 571 and M. Fitzmaurice (1992), pp. 29-43.

104 1974 Helsinki Convention, Article 9(1).

105 1992 Helsinki Convention, Article 11(1) and (2). Dumping is permitted in emergency situations (Article 11(4)). See : HELCOM Rec. 19/18 on emergency dumping (24.03.1998).

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and assess potential environmental effects before issuing a permit.[106] Incineration, which was not originally covered under the 1974 Convention, is now completely prohibited (Article 10(1)).[107]

Given that offshore activities in the Baltic are rather limited, the Helsinki Convention, unlike OSPAR, does not contain specific provisions on the dumping of disused offshore installations. However, the Convention includes the deliberate disposal of any man-made structure at sea in the definition of dumping. Presumably, on the basis of the general ban on dumping, the Helsinki contracting parties are under an obligation to totally remove disused offshore installations. The Baltic Sea has a maximum depth of 210 meters and there are not many steel installations or concrete anchor bases in the area. This makes the entire removal relatively simple compared to the North-East Atlantic and seems to be in line with the 1989 IMO Guidelines and Article 60(3) of the LOSC.

The Helsinki dumping regime applies to internal waters and the EEZ.[108] Moreover, unlike OSPAR, the Helsinki Convention includes disposal into the seabed within the definition of dumping (Article 2(4)). However, it makes it clear that seabed disposal with access from land by tunnel, pipeline or other means is land-based pollution (Article 2(2)) and, therefore, is not regulated by the dumping regime.

Parties have to report to the HELCOM on all dumping activities permitted in their waters, indicating the location of dumping sites, the quantities and quality of the material disposed and they have to monitor the area (Article 11(5)). In addition, they have to cooperate in the investigation of suspected illegal operations in violation of the Helsinki Convention.[109] Finally, the jurisdictional framework for the control of dumping under the Helsinki Convention mirrors that of the LOSC.[110]

Ocean dumping has practically ceased in the Baltic Sea and is no longer a priority issue in HELCOM. Occasionally, however, dumping issues are still discussed within HELCOM Monitoring and Assessment Group (HELCOM MONA).[111]

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106 Available at: www.helcom.fi/stc/files/Guidelines/guide_rec13_1.pdf. The HELCOM Guidelines are currently under revision so that they can be aligned with the Guidelines adopted within the framework of the LC and OSPAR and to ensure consistency with the EC EIA Directive (HELCOM DREDGED SPOILS 1/2005).

107 Currently, HELCOM only covers land-based incineration (e.g., HELCOM Rec. 27/1, 8.03.2006, on the limitation of emissions into the atmosphere and discharges into water from incineration of waste).

108 1992 Helsinki Convention, Articles 1, 3(1) and 5.

109 Ibid., Article 11(5) and (6). See also HELCOM Rec. 19/16 (24.03.1998) for cooperation in investigating violations or suspected violations of, *inter alia*, dumping and incineration regulations.

110 1992 Helsinki Convention, Articles 10(2) and 11(3).

111 Most of the work on dumping is currently limited to the revision of the HELCOM Guidelines for the Disposal of Dredge Spoils (e.g., Minutes of HELCOM MONAS 8/2005, 21-5.11.2005).

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7.3.3 The 1976 BARCON and its Dumping Protocol, as amended

The Mediterranean Sea, like all semi-enclosed seas, is particularly vulnerable to ocean dumping (and incineration), which has been one of the most regulated sources of marine pollution within the BARCON system. Just as the Baltic, also the Mediterranean Sea, especially the Southern Adriatic, has been strongly affected by dumping and has been used to dispose of chemical weapons from World War II and, more recently, from the Balkans War.[112] The 1976 BARCON requires parties to take all appropriate measures to prevent and abate pollution caused by dumping from ships and aircraft (Article 5). This general provision was further specified in the Protocol for the prevention of pollution of the Mediterranean Sea by dumping from ships and aircraft (BDP) adopted together with the Convention.[113] The 1976 BDP follows the 1972 Oslo Convention and the 1974 Helsinki Convention with regard to the definition of dumping,[114] the absence of provisions on incineration, the listing structure and the permit system,[115] reporting obligations,[116] exceptions,[117] the lack of application to internal waters;[118] and the jurisdictional framework.[119] But unlike other international agreements, the 1976 BDP lists both high and low-level radioactive waste in Annex I (the black list) and prohibits their disposal.

In 1995, within the context of the modernization of the BARCON system, both the 1976 Convention and the 1976 BDP have been amended along the lines of all the international dumping Conventions.[120] The dumping provisions of the revised Convention have been strengthened so as to require parties to "prevent, abate and to the fullest

112 Report on Dumping Activities in the Mediterranean Sea for the Period 1995-2001 (i.e., UNEP (DEC)MED WG.266/2, 19.01.2005, at: http://195.97.36.231/acrobatfiles/03WG231_20_eng.pdf.

113 Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, adopted on 16.02.1976 (1976 BDP).

114 1976 BDP, Article 3(3).

115 *Ibid*., Articles 4, 5, 6 and 7.

116 Parties have to report to UNEP all dumping permits issued (1976 BDP, Article 11.2).

117 1976 BDP, Articles 8, 9 and 11(1).

118 1976 BARCON, Article 1(2), in defining the geographical coverage of the Convention, excludes internal waters, unless parties otherwise decide in any Protocol to the Convention. However, the 1976 BDP made no reference to internal waters.

119 1976 BDP, Article 11(1).

120 Amendments to the Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, Barcelona 9-10 June 1995. For an overview of the revised 1995 BDP see, e.g. R. Churchill and A. Lowe (1999), p. 368. As discussed in Chapter 1.4.4, the revised BARCON, like the OSPAR and 1992 Helsinki Conventions, embraces the modern principles and approaches to waste management (e.g., the precautionary principle (Article 4(3)(a)), the polluter-pays principle (Article 4(3)(b)), the use BAT and BET (Article 4(2)) and the duty to carry out an EIA (Articles 3(c) and 4(3)(d)). In addition, it introduced new provisions on marine pollution arising from the transboundary movement of hazardous wastes and their disposal, which shall be reduced to a minimum and if possible eliminated (Article 11).

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possible extent eliminate pollution" caused by dumping from ships and aircraft (Article 5). The objective of the revised BDP (not yet in force) has been extended to eliminate "to the fullest possible extent" pollution by dumping from ships and aircraft and incineration at sea.[121] The definition of dumping has also been extended to include "any deliberate disposal or storage and burial of wastes or other matters on the seabed or in the marine subsoil from ships and aircraft."[122] The revised BDP follows the same reverse listing approach as the other international Conventions and its regime is similar to the 1996 Protocol of the LC and the OSPAR Convention, but the phasing out timetable is somewhat more stringent.[123] Incineration has been completely prohibited,[124] while dumping is generally banned except for: a) dredge material; b) fish waste or organic materials resulting from the processing of fish or other marine organisms; c) vessels, until 31 December 2000; d) platforms and other man-made structures at sea; and e) inert uncontaminated geological materials the chemical constituents of which are unlikely to be released into the marine environment.[125] The dumping of these materials requires a prior special permit from the competent national authorities after a careful consideration of the factors listed in the Annex.[126] Special Guidelines have been adopted to assist parties in carrying out the dumping operations according to the Protocol.[127] Parties have to keep records of the dumping permits, indicating the nature, quantities and locations where wastes have been dumped, and to submit them to the Secretariat.[128] Moreover, they shall inform any other party concerned about any suspected dumping in violation of the Protocol.[129]

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121 1995 BDP, Article 1. As of 30 April 2006, the Protocol counts 14 Parties, including the Community and all the EC's Mediterranean member states, except Greece. Two extra ratifications are needed for its entry into force.

122 1995 BDP, Article 3(c).

123 These materials are the same as the ones listed in the 1996 Protocol and the OSPAR Convention. The differences in the phasing-out schedule concern sewage sludge and disused vessels, but since the 1995 BBP has not yet entered into force the three regimes are now consistent.

124 1995 BDP, Article 7.

125 *Ibid*., Articles 4(1) and (2).

126 *Ibid*., Articles 5, 6 and 7.

127 I.e., Guidelines for the management of dredge materials (UNEP(OCA)/MED IG.12/4, 1999) and for the management of fish waste or organic materials resulting from the processing of fish and other marine organisms (UNEP(DEC)/MED IG.13/5, 2001). In 2005, the 14th MOP adopted two sets of Guidelines, one on the placement at sea of matter for purposes other than mere disposal (construction of artificial reefs) (UNEP (DEC) MED IG.16/8) and another on inert, uncontaminated geological materials (UNEP(DEC)/MED IG. 16/9).

128 1995 BDP, Article 14.2. Dumping permits must be reported to the Coordination Unit of the Mediterranean Action Plan (MEDU) and the Meeting of the Parties shall study these records. For more on the reporting obligations under the BDP, see: EEnvA, Technical Report n. 45, "Guidelines of the EC reporting obligations under the Barcelona Convention and its Protocols in force" (2001), available at: http://reports.eea.eu.int/Technical_report_No_45/en/tech45.pdf.

129 1995 BDP, Article 12.

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The regime for the decommissioning of offshore installations under the Dumping Protocol is less stringent compared to the OSPAR and the Helsinki Conventions. Offshore activities, indeed, are rather limited in the Mediterranean Sea. The Protocol does not provide for the removal (total or partial) of disused offshore installations, but simply requires parties to remove to the maximum extent all material capable of creating floating debris or otherwise contributing to the pollution of the marine environment.[130] In 2003, however, a set of Guidelines was adopted for the dumping of platforms and other man-made structures at sea; these Guidelines introduce a very detailed regime analogous to that of OSPAR Decision 98/3 and bring the Mediterranean system into line with the 1989 IMO Guidelines.[131]

Like in other regional fora, dumping issues are not at the top of the agenda in the framework of BARCON, but are occasionally discussed within the MOPs, the Meetings of the MED POL National Coordinators[132] and the Meetings of National Focal Points (NFP).

Pending the entry into force of the 1996 BDP, the dumping regime in the Mediterranean framework is far less stringent compared to the OSPAR or Helsinki Convention. Its effectiveness, moreover, is affected by serious implementation and enforcement problems. So far, only a few Mediterranean States have fully complied with their reporting obligations under the 1976 BDP and there seems to be a strong lack of control over dumping activities in the region.[133] As a result, cases of illicit, unregulated and unreported dumping still occur.[134]

7.4 Weaknesses of the Existing International Regime

In the last three decades, the international regime has made giant steps towards the progressive phasing-out of dumping and incineration. Despite its undeniable merits, the existing regime still has some weaknesses. Global rules (the LC and 1996 Protocol) are the result of a high degree of compromise between the conflicting interests involved

130 *Ibid*., Article 4(2)(d). This provision is without prejudice to the provisions of the BARCON Protocol concerning the Pollution Resulting from Exploration and Exploitation of the Continental Shelf, the Seabed and its Subsoil (to which the Community is not a party).

131 The 2003 Guidelines, however, will enter into force at the same time as the new BDP (UNEP(DEC)/MED WG.231/21, 2003, Paras. 2 and 3).

132 The Programme for the Assessment and Control of Pollution in the Mediterranean Region (MED POL) is responsible, *inter alia*, for the implementation of the BDP.

133 UNEP Report on Dumping Activities in the Mediterranean Sea (1995-2001), *supra* n. 11212.

134 There seems to be an extended unreported disposal of obsolete weapons, which is not mandatory under the LC and is mainly carried out by national military authorities; chemical and conventional weapons (especially during the Kosovo conflict) have been dumped in the Adriatic, while some illicit dumping of radioactive wastes (especially from Eastern Europe) have taken place in Italian national waters, see: UNEP Report on Dumping (1995-2001), *supra* n. 11212, pp.15-19.

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and normally result in the lowest common denominator. Global provisions are often vague and leave a high degree of discretion to coastal States. The main concerns relate to the possibility to use existing loopholes under the LC and its 1996 Protocol to continue to dispose of harmful wastes into the sea, for instance through a tunnel or pipelines.[135] In addition, the LC (and the 1996 Protocol) lacks strong enforcement mechanisms and control procedures to ensure full compliance by contracting parties, which so far have fallen short of meeting their reporting obligations.[136] Marine pollution from dumping activities, moreover, cannot be tackled in isolation, but requires efficient waste management policies and the effective regulation of land-based pollution.[137] The LC does not adopt an integrated approach, and does not promote land-based alternatives. The 1996 Protocol represents an improvement in terms of compliance mechanisms and a more integrated approach to waste management. However, so far, the Protocol has not attracted many parties.

The Regional Seas Conventions fill most of the weaknesses of the global regime. Regional rules normally reflect a lower level of compromise, contain more stringent and clear obligations for the contracting parties, and take a more holistic approach that integrates dumping and land-based pollution. In the past two decades, regional regimes governing ocean dumping and incineration have achieved a level of stringency with few equivalents in other environmental areas. However, the regional bodies lack strong enforcement mechanisms to ensure full compliance and to encourage parties to meet their monitoring obligations. As a result, in some regions, illegal dumping still takes place.[138]

7.5 The EC Framework for the Control of Ocean Dumping and Incineration

7.5.1 EC Competence Concerning Ocean Dumping and Incineration

The Community, just as any other Party to the LOSC, has not only a right, but also a legal duty to adopt laws and regulations to prevent, reduce, and control dumping, which cannot be less effective than the LC (Article 210 LOSC). For a long time, the Commission, supported by the EP, has tried to directly adopt measures to implement Article 210, but the Community's regulatory action in the field of ocean dumping has been highly controversial.

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135 As GESAMP pointed out, the overall system "may result in substantial increases in waste disposal through pipelines directly into the coastal seas or into rivers that flow to the sea, bringing additional pressure on the coastal zone" (GESAMP Report No.63, Nairobi, 14-18 April 1997).

136 See, for instance, LC 27/16, para. 4.3 and 4.13.

137 E.g., 2001 UNSG Report (A/56/58), Para. 62.

138 E.g., UNEP Report on Dumping Activities in the Mediterranean Sea (1995-2001), *supra* n. 112.

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The Community's competence in this field may be based on Article 175 EC. This provision has been used for the adoption of all EC legislation on waste disposal on land and, in principle, may serve as a legal basis for regulating waste disposal at sea.[139] Article 95 (ex Article 100) EC and Article 37 EURATOM, moreover, may provide additional legal bases for controlling, respectively, the impact of dumping operations on the market and the sea disposal of radioactive waste. The Declarations of the Community upon signature and formal confirmation of the LOSC do not expressly refer to the Community's competence concerning ocean dumping. However, in listing the EC legislation in the field of the protection of the marine environment, both Declarations include a number of EC Directives on waste disposal that also apply to the sea and the 1976 BDP,[140] implicitly recognizing the capacity of the Community to take action on dumping issues. The Community's regulatory action on dumping and incineration, therefore, is consistent with the principle of attribution of powers.[141] This, however, is not enough.

The Community's competence in environmental matters is shared with the member states and its regulatory action needs to be justified on the basis of the subsidiarity and proportionality principles. As will be discussed later in this Chapter, the member states always firmly opposed the Commission's attempts to regulate ocean dumping and used the subsidiarity and proportionality principles to keep the Community away from dumping issues. What was questioned in the first place was not the existence of a Community competence in ocean dumping matters, but the need for additional legislation in an area that was extensively and effectively regulated in other global and regional frameworks.[142] Moreover, each regional sea requires a different level of protection, according to its oceanographic and ecological characteristics. Shallow seas with a slow circulation and exchange of waters like the Baltic or parts of the Mediterranean are more affected by ocean dumping compared to deep seas like the North Sea whose water circulation makes it relatively easier to remove waste. The effectiveness of uniform EC dumping standards equally applicable to the North Sea, Baltic Sea and Mediterranean Sea, therefore, was firmly contested. Moreover, the effective protection of a regional sea requires close cooperation between neighbouring coastal states. EC standards were not considered to be very effective, especially in the Mediterranean Sea where the EC member states were (and still are) a minority of the coastal States. For all these reasons,

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139 See on the point: L. Kramer (2000), pp. 59-61.

140 The list of "*Community Texts Applicable in the Sector of the Protection and Preservation of the Marine Environment and Relating Directly to Subjects Covered by the Convention*" annexed to both Declarations includes waste disposal legislation: e.g., Council Directive 78/176/EEC on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the TiO2 industry as amended; Council Directive 75/442/EEC on waste; Council Directive 91/689/EEC on hazardous waste; Council Directive 94/67/EEC on the incineration of hazardous waste. In addition, they list the EIA Directive 85/337/EEC and the 1976 BDP.

141 On the principle of attribution, see: Chapter 2.3.1.

142 E.g., UK House of Commons Debate (91 Parl. Deb. H.C (6th ser.) 1986, pp. 245-46.

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regional Conventions appeared more appropriate than uniform EC standards to protect European seas from pollution by dumping. For a long time, therefore, the Community's legislative action was seen as an unnecessary extra layer and a duplication of efforts which were not justifiable according to the subsidiarity and proportionality principles.[143]

7.5.2 The 1976 Proposal for a Directive on Ocean Dumping

In the early 1970s, when the first international agreements on ocean dumping were adopted, the EC environmental policy was at its very beginning and the very existence of a Community competence in environmental matters was still controversial. All the (at that time) member states, except for Luxembourg, acceded to the 1972 LC and the Regional Seas Conventions.[144] The Community was able to accede to the 1976 BARCON and its BDP, but could not ratify the 1972 Oslo and 1974 Helsinki Conventions. Originally there were considerable differences among the substances controlled under the black/grey lists of the Regional Seas Conventions.[145] Some member states, therefore, could continue to dump their waste at sea, while others had to dispose of the same substances through more costly alternatives on land. This situation created a competitive advantage for some member states, jeopardizing the establishment of the single market, which at that time was still in the course of completion.[146] In 1976, therefore, the Commission submitted a proposal to the Council for the adoption of a Directive on ocean dumping, on the basis of Article 100 EEC, with a view to harmonizing the implementation of the existing international rules on dumping within the Community.[147] To this end, the proposal envisaged the establishment of a uniform system for issuing dumping permits by national authorities. The Commission's proposal presents

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143 E.g., D. Suman (1991), p. 605 and T. IJlstra (1988), pp. 181, 197, and 205.

144 I.e., Belgium, Denmark, France, Germany, Ireland, the Netherlands and the UK (1972 Oslo Convention); Germany and Denmark (1974 Helsinki Convention) and France and Italy (1976 BARCON and 1976 BDP).

145 Major differences concerned, e.g., crude oil and hydrocarbons, high and low-level radioactive waste, material produced for biological or chemical warfare, organosilicon compounds, acid and alkalis, possible carcinogens, and substances which may form organohalogen compounds.

146 The Mediterranean paint industry, for instance, was allowed under the 1976 BARCON to dump its titanium dioxide wastes at sea, while the German industry could not do so under the Oslo regime, but had to dispose of its waste in a more expensive landfill. These differences could seriously distort competition in the European paint industry. Similarly, the Italian industry, which was prohibited from dumping low-level radioactive waste in the Mediterranean Sea under the 1976 BDP, could do so in the North Sea, because it was not a party to the Oslo Convention and, under the 1972 LC, the disposal of low-level radioactive waste was still permitted.

147 Proposal for a Council Directive Concerning the Dumping of Waste at Sea (1976 Proposal) (OJ C/40) 3 (1976)), based on Article 100 EEC on approximation of laws that affect the establishment or functioning of the common market.

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strong analogies with the 1972 LC and the Regional Seas Conventions with regard to the definition of dumping,[148] the black and grey listing structure, exceptions,[149] jurisdictional application,[150] and the lack of provisions on incineration. The black list (Annex I), however, was more extensive compared to most existing agreements and, like the 1976 BDP (not yet in force at that time), included both high and low-level radioactive waste.[151] The EP generally welcomed the Commission's proposal and considered it as an important first step, but still far from a satisfactory solution.[152] In the view of the EP, the language was too broad and there was no clear obligation to cease or phase out ocean dumping. In addition, according to the EP, the proposed Directive should have implemented the existing international Conventions at EC level and there should have been stronger consistency between the respective Annexes. In addition, the EP urged the Community to accede to all the relevant international Conventions.

Despite the general support of the EP, the Council rejected the proposal. In the same year, the Council also refused to allow the Commission to begin the negotiations on the EEC's accession to the 1972 Oslo Convention. The need for Community involvement in the field of ocean dumping and its competence in this matter was still highly contested by the member states.

The EP has always firmly supported the need to regulate and harmonize ocean dumping at the EC level, especially with regard to radioactive waste, and it passed several Resolutions calling upon the Commission to prepare a new proposal.[153] In 1984, the EP once again urged the Community and its member states to accede as soon as possible to the 1972 LC, the 1972 Oslo Convention and the 1974 Helsinki Convention.[154] Alternatively, the EP invited the Council to harmonize the matter by transposing the relevant international obligations into EC law. Central to any new proposal should be the prevention of dumping radioactive waste that should be totally harmonized in the form of a Regulation.

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148 1976 Proposal, Article 2.

149 I.e., vessels entitled to sovereign immunity, *force majeure* and in the absence of land-based alternatives (1976 Proposal, Articles 6 and 11).

150 I.e., the directive should apply to vessels registered in a member state, loading within the territory of a member state, carrying on dumping activities within the jurisdiction of a member state (1976 Proposal, Article 3(1)).

151 1976 Proposal, Articles 4, 5 and 6 and Annex I (B).

152 EP Opinion to the Council for a Directive Concerning the Dumping of Waste at Sea (OJ C 293 (1976), p. 60). See also the Opinion of the ESC on the Proposal for a Council Directive Concerning the Dumping of Waste at Sea (OJ C 197 (1976), pp. 54-5).

153 E.g., EP Resolution on the Storage of Nuclear Waste in the Atlantic by the Netherlands, Belgium and the UK (OJ C 267, 1982), Para. 46, urging, *inter alia*, the Commission to prepare a proposal for an EC Directive banning the dumping of radioactive waste; EP Resolution on the Combating of Pollution of the North Sea (OJ C 46, 1984) requesting, *inter alia*, a proposal for a Directive banning incineration.

154 EP Resolution for the Dumping of Chemical and Radioactive Wastes at Sea (OJ C 104, 1984), Paras. 72-75.

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7.5.3 The 1985 Proposal for a Directive on Ocean Dumping and Incineration, as Amended

In 1985, in response to the request of the EP and the 1st NSMC Declaration,[155] the Commission submitted a new proposal to the Council for a Directive on ocean dumping.[156] Like the previous proposal, the 1985 proposal was primarily aimed at avoiding the distortion of competition by harmonizing the member states' laws and setting out a common system of permits. Additionally, it also intended to improve the quality of the marine environment and protect the sea against pollution. Accordingly, the proposal was based on Articles 100 and 235 EEC.

The 1985 proposal is more stringent compared to the 1976 proposal and, to some extent, existing international Conventions. The material scope of the draft Directive has been extended to include within the definition of dumping any deliberate discharge from fixed or floating platforms and other man-made structures at sea and their equipment, any disposal on or in the seabed, interim storage of wastes, and ocean incineration.[157] Due to pressure from the nuclear industry (especially in the UK), however, the Commission excluded the dumping or seabed burial of radioactive substances from the scope of the Directive.[158] The 1985 proposal still adopts a black/grey listing structure, but unlike the 1976 proposal, it does not include high and low-level radioactive wastes in any of its Annexes.[159] Ocean incineration is only allowed for substances listed in Annex IV on the basis of a special permit and only in the absence of practical land-based alternatives.[160] The proposal, moreover, sets out a system for the gradual phasing-out of dumping and incineration of substances listed in Annex II and requires member states to promote land-based disposal alternatives and recycling.[161] Member states, however, are free to adopt more stringent measures, including the total ban of dumping and incineration in particularly vulnerable areas.[162] The 1985 proposal reconfirms the same exceptions as in the previous proposal.[163]

The 1985 proposal only applies to dumping operations conducted by EC or third State vessels in waters within the jurisdiction of the member states, implicitly including

155 The 1st NSMC Declaration (1984) called for the complete prohibition of dumping and incineration of harmful wastes in the North Sea.

156 1985 Proposed Directive, COM (85) 373, 13.08.1985 (O.J C 245, 1985, p.2).

157 1985 Proposal, Article 2.

158 See: Explanatory Memorandum Accompanying the 1985 Proposed Directive, COM (85) 373 final.

159 1985 Proposal, Article 4(1), (2) and (3). Annex I includes all substances listed in the black list of other Conventions (except radioactive wastes), but also includes organotin compounds and drilling muds that were not covered by any other Convention.

160 1985 Proposal, Article 5. Permits have to be issued according to criteria set out in Annex IV.

161 *Ibid.*, Articles 9 and 10.

162 *Ibid* , Article 19.

163 *Ibid.*, Articles 3(2), 13(1), 14(1) and 14(4).

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the EEZ.[164] Conversely, it does not cover dumping activities carried out by vessels flying the flag of EC member states in waters outside their jurisdiction, including the high seas or waters under the jurisdiction of third States. This is probably the weakest point of the proposal.

In general, the EP supported the 1985 proposal,[165] but expressed strong concerns with regard to some provisions and in 1987 put forward a set of amendments.[166] First of all, the EP stressed the importance to include all radioactive wastes in Annex I.[167] Second, it reconfirmed the need to ensure consistency with the existing international Conventions, by incorporating their black and grey lists into the Annexes of the proposed Directive.[168] Third, the proposal would apply to dumping operations, wherever they occur, when carried out by ships loading in the ports of an EC member state or flying the flag of an EC member state. Fourthly, dumping, like incineration, should only be allowed in the absence of available land-based alternatives.[169]

In January 1988, the Commission submitted a revised proposal to the Council.[170] The new proposal was based on Article 130s (environmental policy), recently introduced by the Single European Act. The Commission, however, did not endorse any of the EP's main amendments. First of all, it refused to list radioactive wastes in Annex I but announced that it would soon request a mandate from the Council to negotiate the Community's accession to the LC whereby the dumping of high-level radioactive waste would be automatically banned.[171] The Commission's inflexible position on this point was largely influenced by the political debate on the ocean dumping of radioactive wastes which took place in the 1980s.[172] Although in 1988, the UK was the sole EC member state still supporting this practice, the Commission could not ignore the British position. Since Article 130s EEC still required unanimity in the Council, the inclusion of radioactive waste in Annex I would have blocked the adoption of the Directive.

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164 *Ibid*., Article 3.

165 EP Opinion (*infra* n. 166) and ESC Opinion (CES (86) 964). For a detailed analysis of both opinions see: D. Suman (1991), pp. 587-95.

166 See: Report of the Committee on the Environment, Public Health and Consumer Protection on the Proposal from the Commission of the European Communities to the Council for a Directive on Dumping of Wastes at Sea, (Environmental Committee's First Report), 1986-87 ((P.E. A 2-98) 3 (1986)). See also the Opinion of the EP's Committee on Legal Affairs and Citizen's Rights, 1986-87 (P.E. A 2-98) 39 (1986) and the Environmental Committee's Second Report, 1986-87 ((P.E. A 2-19) 4-5 (1987)).

167 Environmental Committee's First Report, Para. 26.

168 *Ibid*., Paras. 34-36.

169 *Ibid* , Para. 32.

170 Amended Proposal for a Council Directive on Dumping at Sea (COM(1988) 8 in: OJ C72, 1988).

171 1988 Proposal, Para. 10. In the 4th EAP for the period 1987-1992 the Commission reiterated the intention to negotiate the Community's accession to the LC.

172 The UK was the strongest supporter of ocean dumping of nuclear waste, followed by France, Germany, Belgium and the Netherlands, while Ireland, Italy, Portugal and Spain always opposed such a practice. For more on this point see: D. Suman, (1991), pp. 595-97.

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The Commission, moreover, refused to extend the scope of the proposed Directive to vessels flying the flag of member states in waters outside their jurisdiction. This was perceived as an attempt to regulate ocean dumping in waters under the exclusive control of third States and on the high seas in violation of international law.[173] However, as the EP's Environmental Committee pointed out, there would be no conflict with international law and no country would ever demand that foreign ships must start dumping in their territorial seas.[174]

Finally, the Commission did not accept the introduction of a cross-reference to the Annexes of the international Conventions into the proposed Directive but, as a compromise, included a comparative table on substances regulated under the LDC, Oslo and 1976 BDP in a new Annex IX.

In January 1988, the amended proposal was sent to the Council, but the discussions never progressed and three years later, in 1993, the Commission decided to withdraw it.[175]

7.5.4 Communication from the Commission on the Removal and Disposal of Disused Offshore Installations

In the aftermath of the *Brent Spar* controversy, the Community manifested strong concerns about the lack of a coherent legal framework for the decommissioning of offshore installations.[176] The Commission considered this as a matter of Community competence under Article 130r given its potential impact on the marine environment and on fisheries in the North Sea.

In 1995 the Community signed the 4th NSMC Declaration, which urged the Oslo Commission to introduce a moratorium on the ocean dumping of offshore installations. One year later, the Commission published a study on the possible methods of decommissioning and disposing of disused offshore platforms.[177] According to this study, the state of technology allowed the removal of all installations, except for a few extremely heavy concrete structures. In February 1998, the Commission published a communication showing the possible impact of the lack of a coherent legal framework for decommissioning activities on EC legislation in the fields of water quality, waste

173 1988 Amended Proposal, p. 9. See also the Opinion of the EP's Legal Committee in its opinion *supra* n. 166, Para. 43.

174 The EP's Environmental Committee Second Report, Para. 24.

175 The Council's discussion on proposals from the Commission are mostly confidential and it is not possible to know what exactly occurred with the 1988 Proposal.

176 See, e.g., Memo submitted by the Commission to the House of Lords Select Committee on Science and Technology: Decommissioning of Oil and Gas Installations. Session 1995-96 Third Report, p. 178. For a detailed analysis see: J. Woodliffe (1999), pp. 115-118.

177 Technical Review of the Possible Methods of Decommissioning and Disposing of Offshore Oil and Gas Installations, November 1996.

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disposal, protection of marine species and habitats, safety of navigation, and fisheries.[178] Different decommissioning obligations under the regional agreements, moreover, would provide some member states (e.g., the Mediterranean member states) with competitive advantages compared to others (e.g., the North Sea member states, which had to bear the extra costs of removal). In the view of the Commission, therefore, the Community's regulatory action was necessary to ensure uniformity and protect competition.[179] As a consequence, it announced its intention to propose a Directive, which would substantially reproduce the OSPAR regime on the decommissioning of offshore installations. The advantage of such a Directive would have been to bind all member states, including non-contracting parties to OSPAR (i.e., Austria, Greece and Italy). However, it could be perceived as an attempt to exclude other OSPAR contracting parties, especially Norway, and could have been prejudicial to the Community's position in the OSPAR Convention, which had been recently ratified.[180] The Commission probably felt that a proposal for a Directive on the disposal of offshore installations would have been rejected in the Council as had occurred with the previous proposals on ocean dumping. Once again, acting within the framework of the OSPAR Convention, this appeared to be the best option. The Commission, therefore, requested the Council to authorize participation in the negotiation of OSPAR Decision 98/3 on the disposal of offshore installations.[181]

7.5.5 Reasons Behind the Failure of the Proposed Directives

The Commission's attempts to regulate ocean dumping failed because of the strong opposition of the member states. Using the subsidiarity and proportionality principles, they resisted the Community's regulatory action in this field probably more than in any other environmental area. At the time when the Commission presented its proposals, decisions in the Council were taken by unanimity. Environmental protection, moreover, was not yet a primary objective of the EEC, which was still conceived as a purely economic organization by most of its member states (e.g., the UK).[182] Several EC member states, the UK at the forefront, were heavily dependent on ocean dumping and were highly reluctant to give up their sovereign rights in favour of the Community. As one commentator pointed out: "the sovereignty issue, although often unspoken, underlies the ocean dumping debate".[183] In addition, the precautionary principle had

178 Communication from the Commission on the Removal and Disposal of Disused Offshore Oil and Gas Installations COM (98) 49, 18.02.1998 (not published in the OJ).

179 COM (98) 49, Paras. 5.8. and 6.1.

180 See, e.g., Written Question E-2084/95 (Méndez de Vigo) [1996], O.J. C 9/15; L. Kramer (2000) p. 200-201.

181 See, *infra* n. 229.

182 The traditional British "Euro scepticism" was particularly strong under the Thatcher administration in the 1980s.

183 D. Suman (1991), p. 616.

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not yet been established and there was no scientific evidence as to the negative effects of the dumping and incineration of many substances listed in the Annexes.

In addition, the Commission's proposals (especially the 1985 proposal) contained some technical gaps. The timetable for the phasing-out of dumping and incineration was too short and was difficult to adhere to for many member states.[184] Developing land-based disposal alternatives would have been too costly and, in some cases, materially impossible due to the limited land-based capacity to dispose of waste. Furthermore, the Commission included in the black list certain substances (e.g., organotin compounds and drilling muds) which were not controlled under existing international instruments, creating a competitive disadvantage for the EC industry compared to the rest of the world. The prohibition on dumping drilling muds, for instance, would have also applied to disposal from offshore installations.[185] The EC offshore industry, therefore, would have to find more expensive landfill solutions and bear extra costs.[186] In order to avoid serious conflicts with the member states, therefore, the Commission considered it more appropriate to ensure the Community's accession to the 1972 LC, the 1972 Oslo Convention and the 1974 Helsinki Convention.

7.5.6 EC Legislation covering Ocean Dumping and Incineration

After 1988, the Commission did not present further proposals for a Directive specifically addressing ocean dumping and incineration and it never succeeded in establishing an "ocean dumping policy" as it did for other sources of marine pollution (e.g., CPSS). Nevertheless, both practices have been indirectly regulated within the framework of the Community's waste management policy and legislation.[187] This legislation, however, was not specifically designed to implement Article 210 of the LOSC and to address ocean dumping, but was primarily directed at managing and disposing of waste on land.

184 E.g., a 10% annual reduction between the 1990-1995. For the UK, which was responsible for half of the industrial waste dumped in the North Sea, it would have been almost impossible to meet this requirement.

185 According to the ESC in its Opinion (1986:6) the inclusion of drilling mud in Annex I might adversely affect oil prospecting in the North Sea and, to a considerable extent, the EC's energy supply.

186 D. Suman (1991), p. 604.

187 There are no relevant provisions on dumping in the water quality legislation. It is interesting to note that Article 1(2)(e) of Directive 76/464 on pollution caused by discharges into the aquatic environment expressly excludes dumping from ships and the disposal of dredge materials from the definition of "discharges". The exclusion may be explained because in 1976, when the Directive was adopted, the Commission presented the first proposal for a Directive on dumping and wanted to avoid overlaps.

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Improving the final disposal of waste has been one of the main pillars of the EC's waste management policy since the very beginning.[188] The 1989 Community Strategy for Waste Management, as revised in 1996, seems to support dumping and incineration operations as long as they are conducted according to high-level environmental standards.[189] However, the 1991 Waste Framework Directive (1991 WFD), adopted on the basis of Article 130 (now 175) EEC, to implement the strategy, requires member states to take all necessary measures to prohibit the abandonment, *dumping* or any uncontrolled disposal of waste (Article 4).[190] The Directive does not define dumping, but includes the "*release into seas/oceans including sea-bed insertion and incineration at sea*" among the disposal operations listed in Annex IIA, which require previous authorization by the competent authority according to the criteria set out in Article 9.[191] The 1991 WFD applies to a broad range of wastes,[192] including dredge materials,[193] fishing residues,[194] residues from raw material extraction and processing (including inert, geological materials),[195] which represent the absolute majority of wastes that may still be dumped at sea. However, any type of waste may, in principle, fall within the scope of the Directive, including decommissioned offshore installations.[196] Only

188 E.g., First (1973), Second (1977) and Third (1983) EAPs. See also S.P. Johnson and G. Corcelle (1989), pp. 158-86. This objective was confirmed in the Sixth (2002) EAP, Para. 6.2.

189 The Community Strategy on Waste Management (SEC (89) 934 final) lists among its priorities "waste disposal by dumping and incineration, to be ensured by harmonization of standards on the basis of a high level of environmental protection". This priority was confirmed in the new 1996 Strategy (COM (96) 399 final).

190 Directive 91/156/EEC, amending Directive 75/442, which did not cover disposal at sea or incineration. On 21.12.2005, the Commission presented a proposal for a revised Waste Framework Directive (COM (2005) 667, 21.012.2005), which reconfirms the prohibition of the abandonment, *dumping* or uncontrolled disposal of waste (Article 6), but does not substantially change the dumping regime under Directive 91/156. For a full discussion of the main changes see: D. Pocklington (2006), pp. 75-87.

191 Directive 91/156/EEC, Annex II A (D7 and D11). According to Article 9(2) "permits may be granted for a specific period, they may be renewable, they may be subject to conditions and obligations, or, notably if the intended method of disposal is unacceptable from the point of view of environmental protection, they may be refused".

192 Directive 91/156/EEC, Article 2.1. The categories of wastes covered by the Directive are listed in Annex I.

193 Dredge materials expressly fall within the categories of waste under Article 1(a) of Directive 91/156/EEC. In 2001, the Commission adopted a List of wastes that includes, *inter alia*, dredge materials, whether or not they contain dangerous substances (Commission Decision 2001/118/EC). On the EC Directives that may affect the dumping of dredge material see: OSPAR, BDC 05/6/11-E(L), available on the OSPAR web site.

194 Directive 91/156/EEC, Annex I (Q 10).

195 *Ibid.*, Annex I (Q 11).

196 *Ibid.*, Annex I includes "any materials, substances or products which are not contained in the above categories" (Q16). Over the years the Court has adopted a very broad interpretation of waste. In joined cases 206/207/88, *Vessoso and Zanetti*, the Court said that the concept

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a few categories of waste are excluded from the scope of the Directive, such as radioactive waste, waste resulting from prospecting, extraction, treatment and storage of mineral resources, and decommissioned explosives.[197] This is not surprising considering the strong interests of the offshore industry in Europe and the ongoing debate on the dumping of radioactive waste. It is worth mentioning that Article 37 of the EURATOM Treaty requires member states to provide the Commission with all relevant data before authorizing a plan for the disposal of radioactive waste. In the absence of further specification, "disposal" seems to include ocean dumping. After consultation with experts, the Commission gives its opinion including, *inter alia*, on the possible radioactive contamination of waters. However, the Commission's opinion is not binding.[198]

Ocean dumping and incineration, moreover, fall within the scope of several EC Directives concerning specific categories of waste, such as titanium dioxide (TiO2), polychlorinated biphenyls (PCB) and polychlorinated terphenyls (PCT). TiO2, a whitener used mostly in the paint industry, was dumped into the sea without any control until 1978, when the Community took a first step to regulate its disposal.[199] The cost of this disposal had a significant impact on the price of the final product, distorting competition and justifying the Community's regulatory action. EEC Directive 78/176 on the prevention and reduction of waste from the TiO2 industry, which was based on Articles 100 and 235 EEC, expressly covers ocean dumping.[200] The discharge, *dumping,* storage, tipping and injection of TiO2 residues require a prior authorization issued according to the criteria set out in Article 5 by the competent authority of the member state in which the waste has been generated and from whose territory it is dumped (Article 4). Member states have to keep reports and transmit to the Commission information concerning all authorized dumping activities.[201] Directive 82/883, moreover, sets out procedures for the surveillance and monitoring of the disposal of TiO2 into the

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of waste does not presume that the holder disposing of the substance intends to exclude all economic reutilization of the substance by others, explicitly including in the definition also materials that still have some commercial value.

197 The same exceptions are reconfirmed in Directive 91/689/EEC on hazardous wastes (Article 1.3).

198 E.g., Case 187/87, *Cattenom* Case on the interpretation of Article 37 EURATOM.

199 Controlling pollution caused by the TiO2 industry has been a priority action since the First EAP (1973), in the wake of the diplomatic incident between Italy and France caused by discharges of TiO2 from the Montedison factory at Scarlino into Mediterranean waters. On the legislative history of the Directive see: S.P. Johnson and G. Corcelle (1989), pp. 93-7 and L. Kramer (2000), pp. 110-11.

200 Directive 78/176/EEC on waste from the TiO2 industry. Dumping at sea falls within the definition of "disposal" under Article 1(2)(c). As discussed in Chapter 3.4.4, the TiO2 Directive has been adopted within the framework of the common market policy with the primary objective being to prevent the distortion of competition, not to protect the marine environment.

201 *Ibid.*, Articles 13 and 14. In addition, the Directive contains monitoring requirements (Article 7). If the conditions laid down in the permit have not been fulfilled, the member state must immediately cease the discharge or the dumping in question.

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environment, including "dumping into estuaries, coastal waters and open sea".[202] In 1992, after different attempts were blocked in the Council (especially by the UK), the Community succeeded in adopting, on the basis of Article 130s (now 175) EEC, a new Directive 92/112 on the reduction and eventual elimination of pollution caused by wastes from the TiO2 industry.[203] The dumping of all solid waste, strong acid waste, treatment waste, weak acid waste or neutralized waste was completely prohibited as from 15 June 1993 (Article 3).[204] The Directive adopts a definition of dumping which mirrors that of the LOSC and includes "any deliberate disposal into inland surface waters, internal coastal waters, territorial waters or high seas of substances and materials by or from ships and aircraft".[205] The lack of any express reference to the EEZ is due to the fact that, at that time, only a few member states had established an EEZ and the competence of the Community to regulate activities in this maritime zone was still strongly contested. However, the application of the Directive to the high seas seems implicitly to include areas of EEZ. On the other side of the coin, the definition of dumping does not include discharges from platforms or other man-made installations. Once again, this exclusion was a necessary political compromise to overcome the opposition of the North Sea offshore industry (especially the UK).[206] The three TiO2 directives contain minimum standards and explicitly allow member states to adopt more stringent regulations to control dumping activities under their jurisdiction.[207] This may be done by agreeing on more stringent national regulations or accepting higher standards at the international level. TiO2 as such is not specifically regulated under the LC and other Regional Seas Conventions. However, it is a type of "industrial waste" or "acid waste" whose disposal was progressively phased out by all international Conventions, except the BARCON pending the entry into force of the 1995 BDP.[208]

Like the TiO2 Directives, EC Directive 76/403 on the disposal of PCBs and PCT prohibited the uncontrolled dumping of PCBs and objects and equipment containing this substance.[209] Also in this case, the disparity between national regulations on PCB's created unequal conditions of competition among member states, threatening the estab-

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202 Directive 82/883/EEC, based on Articles 100 and 235 EEC, specifying the monitoring duties under Directive 78/176/EEC.

203 Directive 92/112/EEC implementing Directive 78/176/EEC (Article 9). On the legislative history and content on this Directive see: L. Kramer (2000), pp. 110-11 and J.H. Jans (2000), pp. 357-58.

204 All these types of waste are defined in Article 2(1)(a) and (b) of Directive 92/112.

205 Directive 92/112/EEC, Article 2(1)(c).

206 This opposition, as mentioned, contributed to the failure of the Commission's 1985 proposal which included offshore installations in the definition of dumping.

207 E.g., Directive 78/176/EEC (Article 12).

208 The 1976 BDP still allows the dumping of "synthetic organic chemical" (as TiO2) on the basis of a permit. TiO2 falls within the scope of HELCOM Recommendation 23/11 on discharges of wastewaters from the chemical industry. See also the OSCOM Code of Practice for the Dumping of Acid Wastes from the TiO_2 Industry at Sea and the 1977 Methods of Monitoring Sea Areas where Titanium Dioxide Wastes are dumped, 1980 and 1986.

209 Directive 76/403/EEC is based on Articles 100 and 235 EEC.

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lishment of the single market, and required Community harmonization. Originally, the 1976 Directive allowed the dumping of PCBs on the basis of a special permit issued by the competent authority (Articles 2 and 6) and required member states to periodically report to the Commission on the disposal of PCB permitted in their territory (Article 10). In 1996, the Directive was replaced with a new EC Directive 96/59, which does not contain any provision on the dumping of PCBs, which, at that time, had been completely phased out under the LC and all the regional Conventions to which the Community was a party. The Directive, however, requires member states to take all necessary measures to prohibit the incineration of PCBs on ships.[210]

In 2000, the Community adopted Directive 2000/76 setting out the criteria for the safe operation of incineration plants.[211] An incineration plant is defined as "any stationary or mobile technical unit dedicated to the thermal treatment of wastes […]" (Article 3(4)) and could in principle include incineration vessels. The Directive intends to prevent or limit, as far as practicable, negative effects on the environment, including pollution by emission into *surface and ground water*, resulting from the incineration of waste (Article 1). Although EC law generally does not distinguish between the sea and other aquatic environments, the express reference to "surface and ground waters" suggests that the Directive only applies to land-based incineration.[212] As already mentioned, incineration at sea is already regulated under the 1991 WFD and in 2000 the ocean incineration of wastes had already been phased out at the international level, except in the Mediterranean Sea, pending the entry into force of the 1995 BDP.

Outside the waste management legislation, we should mention Decision 2850/2000 setting up a Community framework for cooperation in the field of accidental or deliberate marine pollution. This Decision contains provisions on the dumping of materials such as munitions and requires member states "in accordance with the internal division of competences to exchange information on dumped munitions with the view to facilitating risk identification and preparedness measures".[213]

The EC regime generally mirrors the existing international rules on the prohibition of dumping and incineration of solid waste, strong acid waste, treatment waste from the TiO2 industry, and the dumping of dredge material, fish waste, and inert geological material, which may still be dumped on the basis of a special permit issued by the competent authority. Although there are no specific rules on the dumping of offshore installations, they may, in principle, be brought within the scope of the 1991 WFD. Even though this was probably not its main purpose, the EC waste management legislation indirectly implements Article 210 of the LOSC and ensures a level of protection

210 Directive 96/59/EC, Article 7. The Directive, which is based on Article 130s (now 175) EC, does not include dumping in the definition of "disposal" under Article 2(f).

211 Directive 2000/76/EC on the incineration of waste. Of some relevance may also be Council Directive 96/61/EC concerning Integrated Pollution Prevention and Control, which covers some combustion and waste incineration plants on offshore installations.

212 A.C.H. Kiss and D. Shelton (1997), p. 338.

213 Decision 2850/2000/EC, Article 1.2(b).

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equivalent to that of the LC. All relevant Directives, moreover, contain minimum standards and always allow the member states to adopt more stringent regulations acting at the national or international level.

7.5.7 *Reasons Behind the Regulation of Ocean Dumping within the Framework of the EC Waste Management Legislation*

When discussing dumping issues with representatives from the member states, international bodies and, sometimes, even from the EC institutions, the prevailing feeling is that there are no Community rules on ocean dumping and incineration. The analysis carried out in the previous section shows that this impression is not correct. So, why did the member states that so firmly opposed the adoption of a specific Directive in this area actually allow the Community to regulate ocean dumping and incineration within the framework of waste management legislation? First of all, the earlier Directives (e.g., 1978 TiO2 and 1976 PCB) were necessary to protect competition and the member states had a direct interest in Community harmonization. In addition, all the Directives discussed in the previous section (e.g., 1991 WFD) do not affect the interests of the offshore industry which at the time were very strong. It is interesting to note that the Commission's proposal for the 1991 WFD was submitted to the Council only a few months after the withdrawn 1988 proposal for a Directive on ocean dumping.[214] In drafting the 1991 WFD, therefore, the Commission was very careful not to repeat the same mistakes. The member states, especially those with strong offshore interests, eventually accepted that the Community could take measures on dumping and incineration within the broader context of a waste *framework* Directive, which is much less prescriptive than the previous proposals and does not touch upon the interests of the offshore industry. The Community sets out criteria for the issuing of permits and confers on the Commission some monitoring functions, but leaves member states with ample control concerning national dumping/incineration activities. All Directives considered above contain minimum standards.

In addition, at the beginning of the 1990s, when most of the Directives discussed above had been adopted, the panorama and the political climate had considerably changed compared to three decades previously when the Commission presented its first proposal for a Directive on ocean dumping. The Treaty of Maastricht consolidated the EC's competences in environmental matters and extended the QMV to the adoption of environmental legislation. Agenda 21 called for more effective waste disposal policies and the adoption of a precautionary approach in handling hazardous activities. The risks associated with ocean dumping and incineration became evident and steps had been taken at the international level toward the phasing-out of these practices. These factors

214 As discussed in Chapter 7.5.3, the 1998 proposal touched upon the core interests of the offshore industry.

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changed to a large extent the positions of member states, especially the UK,[215] with regard to ocean dumping and incineration and their traditional opposition to the Community's involvement in these matters.

Finally, it should be reiterated that EC waste management legislation was not specifically designed to address ocean dumping and the Commission has never paid serious attention to its full application at sea.

7.6 EC Action at the International Level

7.6.1 The Division of External Competence

In the field of waste management and disposal, including ocean dumping and incineration, the Community and the member states have shared competence. All relevant EC waste legislation contains minimum standards and allows member states to adopt more stringent regulations for the control of ocean dumping activities acting at the national level or within the framework of existing international Conventions. This is the case for both Directives based on Article 175 (ex Article 130s) EC (e.g., 1991 WFD and 1996 TiO2 Directive) and those based on Article 100 (now Article 95) on the approximation of laws affecting the single market (e.g., 1978 TiO2 Directive and 1976 PCB Directive), which explicitly provide the possibility to adopt higher standards. As discussed in Chapter 4.2.2.1, the Court has made it clear that the mere fact that a Directive lays down minimum standards does not mean that the subject-matter has not been "exhaustively" harmonized, but it is necessary to look at the specific "scope" of the Directive.[216] As already mentioned, the EC's waste legislation has not been designed to "exhaustively" harmonize ocean dumping and incineration. In addition, although these matters have been "largely harmonized" at the Community level, the adoption by member states of higher standards at the international level does not seem to affect the uniform application of the EC's minimum Directives and does not jeopardize the full achievement of their objective.

As discussed in Chapter 4.2.2.2, in order to determine the nature of the EC's external competence it is also necessary to assess whether the international agreement contains minimum or maximum standards. According to Article 210 of the LOSC, global and regional ocean dumping standards represent minimum standards for both flag and coastal States. By agreeing on higher standards at the international level, the member states do not preclude the further development of EC rules and do not affect the Community's competence.

The EC waste management legislation does not trigger any exclusive external competence of the Community in ocean dumping and incineration issues discussed within the LC, the 1996 Protocol, or Regional Seas Conventions and the member states are

215 In 1990, the Thatcher administration and its anti-EC policies came to an end.

216 E.g., C-1/96 *Compassion in World Farming* [1998] ECR I, 1251.

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not pre-empted from taking decisions within these frameworks. As a general rule, however, the Community and the member states have to cooperate closely, on the basis of Article 10EC, in the negotiation, adoption and implementation of international standards.

7.6.2 EC Participation in Global Decision-Making

Ocean dumping and incineration issues are not a priority action within the UN and are no longer on the agenda of the UNGA under the item "oceans and the law of the sea". In the late 1980s/early 1990s, the Community did not take an active part in the UN discussions on the phasing-out of ocean dumping mainly because of the strong opposition of the member states and the controversy surrounding the existence of the Community's competence in these matters.

The Community is not a party to the LC and its 1996 Protocol, which reserve accession exclusively to States. In the late 1980s, the Commission expressed the intention to request a mandate from the Council to negotiate the accession of the Community to the LC.[217] This accession was considered to be the best method for introducing a ban on the ocean dumping and incineration of all radioactive wastes, thereby overcoming the opposition of some member states (especially the UK). However, the Commission had never submitted a formal request to the Council and in the light of the successive developments (e.g., the complete ban on radioactive waste disposal at sea), the Community's accession to the LC was no longer considered necessary. Besides, the large majority of the EC member states are parties to the LC and those who have not ratified (i.e., Austria, the Czech Republic, Slovakia (all land-locked States) and Estonia, Latvia and Lithuania) are bound by the Regional Seas Conventions, which are far more stringent compared to the LC. Moreover, since they are parties to the LOSC, they seem to be bound by the LC on the basis of the rule of reference contained in Article 210 of the LOSC.

When the 1996 Protocol was negotiated, the EC's accession was not even discussed, since the participation of the EC in the dumping regimes was still highly controversial. At present, the Community's accession would require an amendment of the 1996 Protocol, which has only recently entered into force. It is very unlikely that the current contracting parties would go through the complex ratification process to allow the Community to become a party. Furthermore, acceding to the 1996 Protocol does not seem to be a priority for the Community in contrast to, for instance, acceding to MARPOL 73/78 or SOLAS. The Community is a party to all Regional Seas Conventions, whose dumping and incineration rules are similar, but somewhat even more stringent, than the 1996 Protocol. The fact that only a few EC member states (i.e., Belgium, Denmark, France, Germany, Ireland, Luxembourg, Slovenia, Spain, Sweden and the UK) have ratified the 1996 Protocol does not therefore seriously affect uniform-

217 See, *supra* n. 171.

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ity. On the other hand, the Community's accession would contribute to filling the compliance and reporting gaps in the existing LC regime.

The Commission has a standing invitation to attend meetings of the parties of the LC on the basis of its observer status at the IMO.[218] Nevertheless, the Commission has never been particularly involved in the LC. Before 1993, the Commission attended the LC meetings because the ocean dumping of radioactive wastes was regularly on the agenda and the Community had a clear competence concerning radioactive materials on the basis of the EURATOM Treaty. However, since 1993, when the dumping of nuclear waste was completely phased out, representatives of the Commission no longer attend the meetings of the parties. Unlike in other IMO matters, the Commission has never attempted to play a stronger role within the framework of the LC and there is no EC coordination in preparation for the LC meetings. Sporadically there is some informal EC coordination on the spot, in London, under the chairmanship of the Presidency.[219] This, however, depends on the issue on the agenda and the priorities of the State holding the Presidency and it only takes place when formal decisions, such as amendments, must be taken. This occurred during the negotiations on the 1996 Protocol, when the EC member states took similar positions to promote the OSPAR model. Otherwise, the EC member states do not normally coordinate their positions, but rather defend their interests as parties to the OSPAR, the Helsinki Convention or BARCON.[220] The Commission does not seem to be particularly interested in increasing EC coordination in the LC as it is in other IMO meetings, since it does not have strong interests to defend in this forum.

7.6.3 EC Participation in the 1972 Oslo Convention and OSPAR

The Community was a party to the 1974 Paris Convention, but despite the attempts of the Commission, has never succeeded in acceding to the 1972 Oslo Convention.[221] The Community's accession has been blocked by a number of factors, including the controversy over the Community's competence concerning ocean dumping, the lack of a proper legal basis in the EEC Treaty for the Community's regulatory action in environmental matters, and the principles of subsidiarity and proportionality.[222] In

218 The Commission participates in the meetings of the parties on the basis of the 1974 Cooperation Agreement discussed in Chapter 6.9.3. The LC has its own rules for granting observership status to NGOs, but follows the general practice of IMO with regard to international governmental organizations.

219 Conversation with Mr. R. Coenen, Head of Legal Office, London Convention, 15.03.2005.

220 See: Records of the Meetings of the Parties to the London Convention, *supra* n. 44.

221 E.g., Fourth EAP (1987-1992), Para. 7.16. For a full discussion see: Oslo and Paris Commissions (1984), Chapter 15; E. Hey, T. IJlstra, A. Nollkaemper (1993), p. 37; J. Side (1986), pp. 290-94; L. Kramer (1988), p. 336; D. Suman (1991), pp. 560-618 and J.L. Prat in D. Freestone and T. IJlstra (eds.) (1990), pp. 100-10.

222 E.g., A. Nollkaemper (1987), pp. 73-75. See also the discussion in Chapter 5.3.1.

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1972, moreover, the ECJ's case law on external powers was at its very early stage. According to the *ERTA Case,* the Community could not accede to an international Convention covering subjects which were not covered by EC legislation.[223] Since there were no EC measures on ocean dumping, the Commission first drafted the three proposals for a Directive on this matter, trying to open the door to the Community's accession to the 1972 Oslo Convention. Since none of these proposals were adopted, the Commission tried to demonstrate the "necessity" of the Community's accession to the Convention on the basis of the *Kramer/Opinion 1/76 Doctrine*.[224] However, this attempt also failed, due to resistance on the part of the member states.[225] In addition, the negative experience with the Community's participation in the 1974 Paris Convention created strong concerns about the added value of the Community's accession to the 1972 Oslo Convention. This accession, moreover, required an amendment to Article 22 of the Oslo Convention, in order to allow regional economic organizations to become parties and the Oslo contracting parties had little incentive to go through the complicated amendment process.

Even though it was not a party to the Oslo Convention, the Community could exercise some influence on the work of the Oslo Commission (OSCOM). The EC Commission had observer status in the Convention and as a member of PARCOM could participate in the joint meetings of the OSCOM and PARCOM Commissions (OSPARCOM). In addition, the Commission and OSPARCOM's officials used to meet to coordinate their policies and avoid duplications.[226] Representatives of the EC Commission (DG ENV, at that time DG XI), moreover, actively participated in the NSMCs, which had a strong influence on the Oslo dumping regime.

When, in 1990, the parties to the Paris and the Oslo Conventions decided to merge the two Conventions and to address all sources of pollution in a single instrument, the full participation of the Community appeared to be necessary, given its extensive competence on land-based pollution. The Community, therefore, acceded to the OSPAR Convention with the right to speak and vote on matters under its exclusive competence.[227] Since the Community has no exclusive competence in ocean dumping and incineration, its participation in the relevant discussions within the OSPARCOM has been traditionally very limited. The Commission never had strong ocean dumping interests to defend in OSPAR and the member states' autonomous actions in this body are not likely to affect the EC's minimum rules. Member states, moreover, have a long tradition of individual participation in the Convention. Therefore, the Commission normally prefers to allow the member states to discuss ocean dumping matters freely

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223 The ECJ's *Case 22/70 ERTA* . For a full discussion see: Chapter 4.4.2.

224 *Kramer Case*, 3/4 and 6/76 (1976) and *Opinion 1/76* which justified the EC's external action even in the absence of EC measures when it was necessary to achieve the EC's objectives.

225 However, the Council, in principle, agreed to the Community's accession, but its Decision was never implemented (Bull. Of the E.C. 1978, No.12, 02.01.80). See also: A. Nollkaemper (1987), p. 69.

226 E.g., M. Fitzmaurice (1992), p. 222.

227 OSPAR, Article 25(d). For a full discussion see: Chapter 5.3.1.

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and to concentrate its efforts on issues which have Community priority, like hazardous substances or land-based pollution.[228] Representatives from DG ENV do not always attend the meetings where ocean dumping and incineration issues are still discussed (e.g. EIHA) and on the few occasions in which they are present, they do not normally take the floor. To the knowledge of this author on only two occasions has the Commission attempted to play a more proactive role in OSPARCOM, which was in Sintra during the negotiation of OSPAR Decision 98/3 on the disposal of disused offshore installations and in regard to OSPAR Decision 92/2 on the dumping of radioactive waste at sea. The Commission required a mandate for the Council to conclude both Decisions on behalf of the EC, but due to resistance from the member states, the Council did not grant the mandate.[229]

7.6.4 EC Participation in the 1992 Helsinki Convention

The role of the Commission in the decision- and policy-making related to ocean dumping in HELCOM has been even more limited than in OSPAR. As discussed in Chapter 5.4.1, the Community was able to accede to the 1992 Helsinki Convention only in 1994, after a long controversy over the necessity of its participation. Since 1990, the Commission has been invited to attend the HELCOM meeting as an observer. This observer status, however, did not allow the Commission to take an active part in the negotiating process that led to the complete ban on dumping and incineration except for the dumping of dredge material. In the 1992 Helsinki Convention, like in OSPAR, the Commission, acting on behalf of the EC, participates in the meetings of HELCOM and its committees as an equal party with the right to vote on matters under the EC's exclusive competence.[230] Although the Commission takes part in the discussions on dredge spoils in HELCOM, it does not take a very proactive role and normally leaves the member states free to speak and to take decisions in ocean dumping matters (e.g., HELCOM 19/18 on emergency dumping; HELCOM 13/1 and related Guidelines on the disposal of dredge

228 The OSPAR Commission at its 2001 meeting, held in Valencia, referred to the EC legislation in the field of dumping and expressly mentioned the Directives on sewage sludge, EIA and urban waste-water treatment (Summary Record OSPAR 2001, OSPAR 01/18/1, Para. 7.5). However, the sewage sludge Directive 86/278 intends to ensure the safe use of sewage sludge in agriculture, but does not contain provisions on final disposal; while Directive 91/271 covers the discharge of urban waste from industrial sectors and does not cover dumping.

229 See: Proposal for a Council Decision concerning the approval, on behalf of the Community, of OSPAR Decision 98/3 on the disposal of disused offshore installations and the Proposal for a Council Decision concerning the approval, on behalf of the Community, of OSPAR Decision 98/2 on radioactive waste (COM (1999) 190, in: OJ C 158/03, 4.06.1999).

230 1992 Helsinki Convention, Article 23(2). For a full discussion see: Chapter 5.4.1.

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materials).[231] The reasons for this are the same as those discussed in the previous section: the lack of the EC's exclusive competence in ocean dumping matters, the lack of strong EC interests to defend and the need to prioritize action and concentrate its resources and efforts on land-based pollution and hazardous discharges, as well as the long tradition of the individual participation of EC member states in the Convention. As already mentioned, moreover, especially after the 2004 enlargement, there is a particularly strong resistance in HELCOM against bloc-forming. However, even though the Commission does not take an active part to the discussions, the policy-making related to the dumping of dredge material in HELCOM is inevitably influenced by EC legislation and policies on waste management and water quality.

7.6.5 EC Participation in the BARCON

In 1977, despite initial resistance by most of the non-EC contracting parties, the Community acceded to the BARCON and its 1976 BDP.[232] The signature of the Convention and the Protocol preceded, by a few months, the 1976 Commission proposal for a Directive on ocean dumping and its rejection in the Council. The existence of Community competence in the field of ocean dumping was still very controversial. As discussed in Chapter 5.5.1, the Community's accession to the 1976 BARCON was necessary since the Convention covered matters falling within the scope of EC water quality legislation.[233] The accession to the Convention, however, was conditional on the ratification of any other Protocol not yet in force (Article 27(2)) and at that time BDP was the only one available.

Like the OSPAR and Helsinki Conventions, the Community participates in BARCON and the 1976 BDP as an equal party with the right to vote on matters under its exclusive competence. Since the Community does not have exclusive competence in ocean dumping matters, its participation within the framework of the BDP has always been rather limited.[234] As in the other Regional Seas Conventions, the Commission does not have strong dumping interests to defend in this forum and prefers to concentrate

231 The Commission does not seem to be particularly active in the discussions on the revision of the HELCOM Guidelines for the Disposal of Dredge Spoils. Representatives from DG ENV and the Joint Research Centre (JRC) were present at MONAS 2004 to discuss the revision of the Guidelines, but did not produce any substantial input on that matter (Minutes of HELCOM MONAS 7/2004). The Commission was not present at the Expert Workshop that took place in January 2005 for the revision of HELCOM Guidelines.

232 See: Council Decision 77/585/EEC. For a full discussion see: Chapter 5.5.1.

233 As discussed in Chapter 5.5.1, the Council authorized the Commission to negotiate the EEC's accession to the 1976 BARCON and its BDP with a view to determining standards for bathing waters and shellfish waters which were covered by EC legislation (see: Council Decision 77/585/EEC).

234 See the Reports of the activities related to the Dumping Protocol available at: www.unepmap.org/home.asp.

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its actions on other Protocols which are of major interest to the Community. The sovereignty issue, moreover, has always been particularly strong within the BARCON framework and the Mediterranean EC member states are still reluctant to accept the excessive involvement of the Commission in this framework. The Community, therefore, decided to concentrate its actions on Protocols (e.g., the Land-based Pollution Protocol) in which it has an extended competence and to rely on the member states for the implementation of the BDP.

In 1999, the Council accepted the 1995 amendments to the Convention and the BDP.[235] The Commission (DG ENV) took part on behalf of the Community in the two expert working groups set up to negotiate the revision of both the Convention and the BDP.[236] However, the role of the Commission in the drafting of the amendments to the BDP was marginal. This is also apparent from the discrepancies among the revised BDP and the dumping provisions of the OSPAR and Helsinki Convention with regard to the timetable for the phasing-out of certain substances and the decommissioning of offshore installations. Apparently the Commission did not negotiate strongly enough to ensure full uniformity between the regional regimes, which was the rationale behind the 1976 and 1985 proposals for a Directive on ocean dumping.

7.7 Final Observations

Under the LOSC (Article 210) the Community is under a legal duty to adopt legislative measures which are no less effective than the international rules to prevent, reduce and control dumping. In spite of several attempts by the Commission, the Community has never been able to adopt a Directive specifically addressing ocean dumping and incineration and directly implementing its obligation under the LOSC. The Community's regulatory action in the field of ocean dumping has indeed always been opposed by the member states. What was contested, however, was not the Community's competence in these matters, but rather the necessity of having additional legislation at the EC level in a field that was already extensively and effectively regulated at the global and regional levels. Instead of adding new law and duplicating the work of and the efforts undertaken by the member states under other international bodies, the Community preferred to become a party to the relevant Regional Conventions.

After three decades, the global and regional regimes have succeeded in halting industrialized nations from using oceans and seas as dumpsites and uncontrolled dumping and incineration have officially ceased. Currently, therefore, the control of ocean dumping is no longer a priority on the global and regional agendas. Illegal dumping, however, still takes place in different parts of the world, including European seas. The

235 On the participation of the Community in the BARCON revision process see: Chapter 5.5.2.

236 Two meetings of legal and technical government-designated experts were held in Barcelona on 14-18.11.1994 (UNEP(OCA)/MED WG.82/4) and on 7-11.02.1995 (UNEP(OCA)/MED WG.91/7).

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main challenge for the future is therefore to strengthen the implementation and enforcement of existing standards.

Currently, the only matter that may be dumped into European seas (except in the Baltic where nothing but harmless dredge spoils may be dumped) are: dredge material, fish waste, inert, geological materials, and decommissioned offshore installations. Although the EC has never adopted legislation specifically addressing ocean dumping and incineration, the marine disposal of these materials falls within the scope of the EC waste management legislation. In particular, the 1991 WFD specifically prohibits the uncontrolled dumping of dredge materials, fish waste, and inert, geological materials. In principle, decommissioned offshore installations may also be captured within the scope of that Directive and fall within the broad definition of waste as adopted by the Court. Even though the EC waste management legislation was not specifically designed to regulate disposal at sea, it indirectly contributes to meeting the Community's obligations under Article 210 of the LOSC.

The 1996 Protocol of the LC, which recently entered into force, and the Regional Seas Conventions offer a higher level of protection compared to EC minimum rules, but they lack strong mechanisms to ensure full compliance. As a matter of fact, dumping operations continue to take place illegally in waters under the jurisdiction of the contracting parties. The Community has the necessary instruments to fill most the existing implementation gaps. As a result of the Community's accession, the dumping regimes under the OSPAR, the 1992 Helsinki Convention and the 1976 BDP form an integral part of EC law binding the EC institutions and member states.[237] The question is whether the Commission may use the strong enforcement instruments which exist under EC law to ensure that EC member states comply with their ocean dumping obligations under the Regional Seas Conventions. As discussed in Chapter 4.4, the Court has recently recognized the possibility for the Commission to start an infringement action against a member state for a violation of the provisions of a Regional Convention (in this specific case the BARCON Protocol on Land-based pollution) which cover matters under shared competence and concern a field covered "in large measure by Community legislation".[238] It seems that ocean dumping and incineration are covered "in large measure" by the EC waste management legislation and the Commission, in principle, could play an important role in ensuring the full compliance of the EC member states with the regional dumping regimes, thereby improving their effectiveness. In practice, however, serious resource constraints make it difficult for the Commission to effectively exercise its monitoring functions. In addition, the Commission has to prioritize its actions and, lately, ocean dumping does not seem to be a top priority on the EC agenda.

Recently, ocean dumping has received some attention at the EC level. The 6th EAP lists the dumping at sea of harbour sludge and sediments as one of the main threats that the Community will address in the coming years.[239] Also the Commission, in

237 Article 300(7) EC.

238 See: Case C-239/03, *Commission v. French Republic*, [2004], Paras. 29-31.

239 See the Sixth EAP, p. 36.

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its 2002 Communication on the marine strategy pointed attention towards the dumping of waste as one of the main threats to European seas.[240] In the future, therefore, the Commission may decide to take stronger enforcement action to ensure the full implementation of the EC's waste management legislation at sea and the Regional Conventions. The Commission may also decide to take some regulatory action within the framework of the WFD (e.g., by including the dumping of harbour sludge and sediments within those disposal activities which require previous authorization), but it is very unlikely that it will ever propose a Directive on ocean dumping. The reasons which led, in the 1970s and 1980s, to the EC's attempts to regulate this practice are no longer valid. There is no longer a need to harmonize member states' laws to protect competition. The revision process that all the Regional Seas Conventions have undergone has eliminated most of the original differences, ensuring a large degree of uniformity for the system. Even though some slight discrepancies still exist with regard to the substances controlled and the dumping of offshore installations, these are justified by the different characteristics of each regional sea. Despite their weaknesses, Regional Seas Conventions still seem to be the most suitable framework to introduce dumping standards tailored to the needs of regional seas, and Community regulatory action could not be justified under the subsidiarity and proportionality principles. However, the proposed Marine Strategy Directive, which is now being examined by the EC legislators, and the current work towards the establishment of an integrated Maritime Policy, may provide an appropriate framework for specifying and reinforcing the ocean dumping obligations of member states under the Regional Seas Conventions.

So far, the Community has not been very active in the ocean dumping discussions within the regional bodies. The reasons for this are similar to those discussed in the previous chapter with regard to vessel-source pollution, in the first place the absence of exclusive competence in ocean dumping matters and the lack of strong EC ocean dumping interests to defend in the regional fora. The Commission, therefore, preferred to leave the member states free to discuss ocean dumping issues and to play a more incisive role in matters which have EC priority, such as land-based pollution. It is highly improbable that this situation will change in the future, but the Commission could play a central role in ensuring the full implementation and enforcement of the regional dumping regimes by the member states.

240 See COM (2002)539 (Para. 1.1).

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CHAPTER 8

Marine Habitat Protection through the Establishment and Management of Marine Protected Areas (MPAs)

8.1 Introduction

In the past two decades the concept of Marine Protected Areas (MPAs) has received increasing attention in all political and legal fora dealing with ocean affairs. MPAs are considered to be key tools to conserve critical habitats, to foster the recovery of overexploited and endangered species, including depleted fish stocks, and to promote the sustainable use of marine living resources, and have become a central element of all marine biodiversity conservation strategies at the global, regional and national level. The present Chapter focuses in particular on areas designed to protect marine biodiversity and the habitats of endangered species, while sites directly established for the conservation of species, including commercial stocks or marine mammals, will be covered only incidentally.

The international regime on MPAs is based, in the first place, on the LOSC, which sets out global obligations and the jurisdictional framework for all uses and activities at sea. The Convention, therefore, represents a fundamental starting point for examining the extent to which coastal States are entitled to designate and manage MPAs. Agenda 21 and the WSSD Plan of Implementation establish global principles and targets, which are implemented in a variety of global and regional instruments. Most MEAs designed to protect biodiversity (i.e., the Convention on Biological Diversity), habitats (e.g., the 1972 RAMSAR Convention on Wetlands), or threatened species (e.g., the 1979 Bonn Convention on Migratory Species of Wild Animals) and all Regional Seas Conventions applying to European seas (i.e., the OSPAR Convention, the 1992 Helsinki Convention and the BARCON) have developed mechanisms for the designation and management of MPAs as a means to achieve their objectives. Many of these agreements combine an obligation to create and manage a network of protected areas with the duty to conserve species. The provisions on species' conservation, however, remain outside the scope of this Chapter.

A central element of the MPA concept is the management of human activities and extractive uses taking place in the area. As discussed in Chapter 6, the LOSC places considerable restrictions on the capacity of coastal States to control the shipping activities of third States in waters under their jurisdiction. This Chapter, therefore, looks closely at the regime for special areas under Articles 211(6) and 234 of the LOSC and the IMO regulatory regime for shipping, namely: Special Areas under MARPOL and Particularly Sensitive Sea Areas (PSSAs). These represent important complementary instruments to ensure full legal protection for vulnerable sites against the threat posed by maritime transport.

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At the Johannesburg WSSD, in 2002, the international community committed themselves to establishing a coherent network of MPAs by 2012. This target has been endorsed in a multiplicity of political instruments at the global (e.g., UNGA resolutions) and regional level (e.g., Joint OSPAR/Helsinki Bremen Declaration, 2002 5th NSMC Declaration) and has triggered new developments within the main decision-making bodies competent for ocean issues. The EC has signed the WSSD Plan and all relevant declarations and is a party, alongside its member states, to most of the global and regional agreements which have been implemented by means of two Directives (i.e.: the Wild Birds and Habitats Directives). The Habitats (and Birds) Directives provide the framework for the designation and management of sites of Community importance within a coherent network of protected areas called Natura 2000. The present Chapter looks closely at the way in which existing EC legislation may contribute to meeting the WSSD target and the steps taken by the Community in this direction.

In the past few years, the establishment and management of MPAs in the high seas (HSMPAs) have been put at the top of the agenda within and outside the UN. There is currently a legal gap with regard to the protection of marine biodiversity beyond the limits of national jurisdiction. The Community is actively involved in the discussion. Reasons of space do not allow a full discussion, but the main developments will be briefly discussed.

The following analysis provides an overview of the legal regime for the designation and management of MPAs within and outside national jurisdiction under the LOSC, global and regional agreements, as well as the main political processes, and showing the main gaps and weakness. The focus is on the manner in which the Community implements these commitments and how it may contribute to filling the gaps. Particular attention is given to existing EC legislation, with a brief reference to the relevant instruments under the CFP and the possible contributions of the proposed Marine Strategy Directive. The Chapter looks closely at the Community's participation alongside its member states in the international policy and decision-making related to MPAs.

8.1.1 Marine Protected Areas (MPAs)

The generally accepted definition of an MPA refers to "any area of intertidal or subtidal terrain, together with its overlying water and associated flora and fauna, historical and cultural features, which has been reserved by law or other effective means to protect part or all of the enclosed environment".[1] The concept of MPAs is not clearly defined in a legal context. It refers to different types of geographically defined marine and coastal

1 I.e., General Assembly of the IUCN, Resolution 17.38, February 1988, in: G. Kelleher and R. Kenchington (1992), p. 6. The IUCN definition of MPA has been challenged see: www.iucn.org/themes/wcpa/wpc2003/pdfs/Proceedings/emergingissues.pdf. See also the definition adopted in 2002 by the CBD SBSBTTA *Ad-Hoc* Technical Expert Group on Marine and Coastal Protected Areas (UNEP/CBD/SBSTTA/8/9/Add.1, 27.11.2002).

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areas established to reduce the pressure posed by certain human activities on the marine environment by means of appropriate and necessary measures.[2] MPAs may have diverse names and serve a variety of purposes.[3] They may be established to conserve marine biodiversity by protecting particular habitats, to increase fishing productivity by ensuring safe havens for species under threat or for research purposes. MPAs may be designed in isolation or within a coherent network, especially in the case of enclosed or semi-enclosed seas, when the threat originates in part beyond national jurisdiction, or when transboundary natural ecosystems or migratory species are involved.[4]

Central elements of the MPA regime are the protective measures to control human activities within the site. Initially these measures focused on the prohibition of fishing,[5] but they have been progressively extended to all offshore activities and extractive uses which may potentially affect the site, including navigation, mining operations, sand and gravel extraction, seabed exploitation, dumping and land-based discharges.[6] Depending on the objective they want to fulfil, MPAs may assume different forms, ranging from fully protected reserves where all human activities are generally banned, to areas where several activities are prohibited, to large marine ecosystems where only sustainable uses of natural resources may be allowed.

There are currently around 4,000 MPAs worldwide, covering less than half of one percent of the global ocean surface.[7] The largest number of MPAs is concentrated in European waters, but most of them are very small and not effectively managed. The majority of existing MPAs have been established in close proximity to the coasts to protect wetlands, lagoons or estuaries and only a few areas are truly offshore. This is

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2 For a full discussion on the concept of MPAs see: H. Thiel and J.A. Koslow (eds.) (2001).

3 In 1997, the IUCN developed a list of categories of protected areas according to the different levels of protection and the various objectives they want to pursue (IUCN World Commission on Protected Areas, (1998), Gland, at xviii), i.e.: *Category Ia*, Strict Natural Reserve: protected areas managed mainly for science; *Category Ib*, Wilderness Area: protected areas managed mainly for wilderness protection; *Category II*, National Parks: protected areas managed mainly for ecosystem protection and recreation; *Category III*, Natural Monument: protected areas managed mainly for conservation of specific natural features; *Category IV*, Habitat/Species Management Area: protected area managed mainly for conservation through management intervention; *Category V*, Protected Landscape/Seascape: protected area managed mainly for landscape/seascape conservation and recreation; and *Category VI*, Managed Resources Protected Area: protected areas managed mainly for the sustainable use of natural ecosystems.

4 The establishment of a network of MPAs is a priority action for all global and regional fora as well in the EC. See, e.g., 5th IUCN World Parks Congress, Durban (South Africa), 2003, Rec.V.22 on Building a Global System of Marine and Coastal Protected Area Networks, at: www.iucn.org/themes/wcpa/wpc2003/pdfs/Proceedings/recommendations.pdf. See also, 4th IUCN World Parks Congress (Caracas, Venezuela, 1992), Rec. 11.

5 The first international Convention establishing specially protected areas of marine space, i.e., whaling sanctuaries, was the 1946 International Convention for the Regulation of Whaling.

6 See: F. Spadi (2000), pp. 285-302.

7 See: UNEP/World Conservation Monitoring Center (WCMC), 2005, at: http://sea.unep-wcmc.org/wdbpa/toptwenty.cfm.

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in part because of the lack of proper administrative and legal frameworks, political will, and the difficulty of managing and monitoring offshore activities, partly due to the fact that knowledge about offshore habitats and ecosystems has been traditionally rather limited compared to the coastal or terrestrial ones.[8] In the past decade, however, scientific and technical developments have made gigantic steps and focused the attention of the international community on vulnerable marine ecosystems, deep-water species, communities and habitats including those located beyond national jurisdiction (e.g., seamounts, hydrothermal vents, cold-water coral reefs or submarine canyons).[9] Technological developments have extended human activities deeper and further offshore. Overfishing, by-catches, bottom trawling, habitats degradation, shipping, deep seabed mining, and bio-prospecting place increasing pressure on the biodiversity of high seas and deep seas. Currently, several sectoral instruments at the global and regional levels provide for the designation of specific types of MPAs in areas beyond national jurisdiction (e.g., fishing closures, whaling sanctuaries and PSSAs).[10] They may provide a possible framework for the establishment and management of HSMPAs, but a global legal instrument to protect the high seas' biodiversity in an integrated manner, including the establishment of MPAs, is still lacking. The international community is currently exploring the possibility and necessity of developing such an instrument.[11]

8.2 The Jurisdictional Framework under the LOSC

8.2.1 Establishment of MPAs under the LOSC

The LOSC contains limited express references to marine areas and never uses the term "marine protected areas" or any similar expression. During the UNCLOS III, the concept of special areas met with considerable hostility, given the strong interference with legitimate uses of the sea, in the first place fisheries and navigation.[12] It is still controversial whether the Convention provides a clear and sufficient legal basis for the establishment of all types of protected areas, especially in the EEZ and areas beyond national

8 E.g., G.C. Ray in E.O. Wilson (ed.), pp. 36-50. See also the Sixth EAP, p. 35.

9 See, e.g.: S. Gubbay (2003), pp. 47-79 and H. Thiel in A. Kirchner (ed.) (2003), pp. 169-92.

10 The 1946 International Whaling Convention, 1995 UNFSA, 1993 FAO Compliance Agreement and several RFMOs envisage the possibility of establishing high seas areas. These instruments, however, remain outside the scope of this Chapter.

11 For a full discussion on HSMPAs see: L.A. Kimball (2005); T. Scovazzi (2004); K.M. Gjerde and C. Breide (eds.) (2003); H. Thiel in A. Kirchner (ed.) (2003), pp. 169-92; K.M. Gjerde (2001), pp. 515-28; H. Thiel and J.A. Koslow (eds.) (2001).

12 See, for instance, the legislative history of Article 234 on ice-covered areas, which has been reluctantly included in the LOSC because of the insistence of Canada which was worried about the Arctic marine environment. See S. Rosenne and A. Yankov (eds.) (1991), pp. 392-98.

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jurisdiction.[13] The only detailed LOSC provisions on special areas relate to the control of vessel-source pollution in clearly defined areas of the EEZ (Article 211(6)) and in ice-covered areas (Article 234).

However, the LOSC provisions on the protection of the marine environment may provide an indirect legal basis for the designation of all types of MPAs directed at preserving marine biodiversity.[14] The Convention indeed lays down a positive legal duty to protect and preserve the marine environment (Article 192), including *rare or fragile ecosystems* as well as the *habitat* of depleted, threatened or endangered species or other forms of *marine life* (emphasis added) (Article 195(4)). This general obligation does not contain any particular geographical or material restrictions, but seems to cover all kinds of vulnerable marine ecosystems, habitats and species regardless of their location, including areas beyond national jurisdiction.[15] Although the LOSC does not clarify the meaning of "marine life", it seems to refer to all species of flora and fauna that are not commercially exploitable (e.g., some species of marine mammals and corals).[16] Presumably, the rare or fragile ecosystems, habitats and other forms of marine life mentioned in Article 195(4) are those which have been identified pursuant to other global, regional or EC instruments which are consistent with the Convention.[17] Articles 237 and 311(2) of the LOSC, indeed, create a link between the Convention and the obligations assumed by States under compatible MEAs, such as, for instance, the CBD.

In addition, Article 194 requires States, acting individually or jointly, as appropriate, to take "all measures necessary" to prevent, reduce and control marine pollution from any source "using the best practicable means at their disposal".[18] These measures and means may certainly include MPAs which are considered among the most effective tools for ocean preservation and management.

The Convention places States under a positive legal duty to take measures based on the best available scientific evidence for the conservation and sound management

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13 According to R. Platzöder in: H. Thiel and J. A. Koslow (2001) (eds.), p. 138, the LOSC does not provide a legal basis for the establishment of MPAs either in zones under the coastal state's sovereignty or jurisdiction, or in the high seas or in the Area. According to R. Lagoni in A. Kirchner (ed.) (2003), pp.157-67, the LOSC does not provide a legal basis for MPAs in the EEZ. Among the States, Norway is one of the stronger opponents to high seas MPAs. Norway argues that they would be inconsistent with Articles 89 and 137(1) of the LOSC (e.g., Report of the Working Group on the Future of NEAFC, 26.04.2005, Annex 1, p. 7).

14 *Inter alia*, T. Scovazzi (2005) and C. de Fontaubert (2001), p. 79.

15 According to D. Owen (2001), pp. 49-51, Article 195(4) focuses exclusively on habitats and ecosystems, and cannot be used to protect species directly.

16 The definition of pollution under LOSC, Article 1(4) refers to harm to "living resources" and "marine life", suggesting that a difference exists between the two concepts. It is generally accepted that the LOSC refers to "marine living resources" to indicate commercially exploitable stocks. See on this point: D. Owen, p. 50.

17 E.g., L.A. Kimball (2001), p. 35.

18 The LOSC does not explain the meaning of "necessary", but seems to imply that the decision does not rest exclusively with the coastal State(s) concerned. See: S. Rosenne and A. Yankov (eds.) (1991), p. 64.

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of marine living resources (including highly migratory stocks and marine mammals) in the EEZ and, acting directly or through appropriate subregional or regional organizations, in areas beyond national jurisdiction.[19] It is still controversial whether the LOSC provisions on the conservation of marine living resources may provide an indirect legal basis for the creation of all types of MPAs.[20] Although the Convention does not contain a definition of "marine living resources", it seems to refer exclusively to commercial stocks and other exploitable species which are of immediate value for mankind.[21] However, the Convention specifically integrates marine environmental protection with the conservation of marine living resources by requiring that conservation and management measures must take into account environmental factors, the interdependence of stocks and the effects on associated or dependent species, including marine mammals and seabirds.[22] Therefore, even though the conservation provisions of the LOSC are directed at maintaining the availability of commercial stocks for fishing purposes and do not seek to protect marine ecosystems, presumably they might provide an indirect legal basis for establishing MPAs as effective tools for fisheries conservation and management.

The LOSC, moreover, requires coastal States to exercise their exclusive rights to exploit natural resources in all waters under their sovereignty and jurisdiction in accordance with their duty to protect and preserve the marine environment (Article 193). However, even though the LOSC may provide an indirect legal basis for the establishment of MPAs in waters within and beyond national jurisdiction, it does not set out a positive legal duty for States to do so.

8.2.2 Management of MPAs under the LOSC

The LOSC restricts to some extent the capacity of coastal States to take management measures within MPAs and unilaterally to control human activities of other States within the sites. First of all, in taking environmental measures pursuant to Part XII, Article 194(4) requires States to refrain from "unjustifiable interference" with legitimate rights

19 These include, *inter alia*, measures designed to maintain and restore depleted stocks in the EEZ (Article 61); regulating seasons and areas of fishing (Article 62(4)(c)); conserving stocks occurring within the EEZ of two or more coastal States (Article 63); highly migratory species (Article 64); marine mammals (Article 65), anadromous stocks (Article 66); and catadromous species (Article 67); conservation of marine living resources in the high seas (Articles 117-119), including marine mammals (Article 120). Provisions on the conservation and management of straddling and highly migratory fish stocks are also regulated under the 1995 UNFSA.

20 For a full discussion see: N. Wolff (2002), pp. 65-6.

21 E.g., D. Owen (2001), pp. 49-51. The definition of biological resources under the CBD, BARCON, Helsinki Convention and OSPAR is also based on the concept of use or value for humanity.

22 E.g., LOSC Articles 61(3) and 119(1), suggest that the relevant decisions have to include the impact on non-target marine and coastal species other than commercial stocks.

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and activities carried out by third States in accordance with the Convention. Second, as discussed in Chapter 1.2.2.1, coastal States have limited capacity to unilaterally control the environmental impact of international shipping and their powers decrease progressively towards the high seas.

Generally speaking, coastal States may control and eventually prohibit all kinds of activities within MPAs located in their internal waters, which are under their exclusive sovereignty. This sovereignty extends to the territorial sea where coastal States are free to designate MPAs and to adopt and enforce all protective measures they so wish as long as they do not result in discriminatory limitations on the right of innocent passage and do not impose on foreign ships in transit ship construction standards (CDEMs) which are higher than international standards .[23]

On the continental shelf, coastal States have exclusive sovereign rights for the purpose of exploring and exploiting natural resources (Article 77(1)), which include mineral and other non-living resources of the seabed and subsoil together with "living organisms belonging to sedentary species" (e.g., corals and sponges).[24] These sovereign rights of exploitation seem to implicitly embrace the right to manage and conserve the natural resources of the continental shelf.[25] The Convention, moreover, makes it clear that coastal States may prohibit the exploration and exploitation of their continental shelves by third States (Article 77(2)). Presumably, they may also regulate and set out conditions for the exploration and exploitation of the shelf, including activities such as mining, oil and gas operations, sand and gravel extraction, and fishing for sedentary species. It follows that in exercising their sovereign rights on the continental shelf, coastal States may establish MPAs and prohibit all activities that are potentially damaging to sedentary species, including destructive fishing practices (e.g., bottom trawling).[26] In doing so, however, they "must not infringe or result in any unjustifiable interference" with navigation and other freedoms granted by the LOSC (Article 78(2)).[27]

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23 See: Chapter 6.2.2.1. According to some authors, Article 21(1) would entitle coastal States to ban navigation within MPAs located in the territorial sea. See: F. Spadi (2000), p. 289 and T. Scovazzi (1995), pp. 837-55.

24 Sedentary species are defined as "organisms which at the harvestable stage either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or subsoil" (LOSC, Article 77(4)). See also: R.R. Churchill and A.V. Lowe (1999), p. 153.

25 See, e.g., E.J. Molenaar (2005), p. 558. *Contra:* R. Long and A. Grehan (2002), p. 243 and D. Owen (2001), pp. 49-51.

26 See, e.g., Report of the *Ad-Hoc* Open Ended Informal Working Group to study issues related to the conservation and sustainable use of marine biodiversity beyond national jurisdiction (A/61/65), Para. 22. There are already several precedents, see: *infra* n. 29. See for a full discussion E.J. Molenaar (2005), pp. 557-62.

27 States fishing in the high seas, however, have to take into account the rights and interests of the coastal States vis-à-vis, *inter alia*, their sedentary species (LOSC, Article 116(b)) and the effect of fishing practices on sedentary species (*ibid.*, Article 119(a)).

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This requires a process of weighing all conflicting interests involved on a case-by-case basis.[28]

Within the EEZ, coastal States have jurisdiction with regard to, *inter alia*, the protection and preservation of the marine environment (Article 56(1)(b)(iii)). In addition, they have explicit sovereign rights not only to explore and exploit, but also "to conserve and manage natural resources" (Article 56(1)(a)). These include both living and non-living resources of the water superjacent to the seabed and of the seabed and its subsoil. The EEZ regime, therefore, includes that of the continental shelf.[29] In the exercise of their sovereign rights, coastal States may prohibit fishing activities and ban destructive fishing practices in areas of their EEZ. They may also allow other States to fish in their EEZ (or equivalent Exclusive Fishing Zones (EFZs)), but they may impose conditions and terms and adopt conservation measures (e.g., area closure or the prohibition of destructive fishing practices) that foreign ships must observe (Article 62.4).[30] Generally speaking, therefore, coastal States may designate MPAs in the EEZ and unilaterally regulate all extractive uses (including fishing and mining) and human activities (e.g. dumping, offshore and land-based pollution, marine scientific research) which may harm the marine environment and its natural resources as long as they do not interfere with the traditional freedoms of navigation, overflight and the laying of submarine cables by other States. However, the delineation of the course of submarine pipelines is subject to the consent of the coastal State, which may always decide to divert its trajectory outside the MPA (Article 79(2)). As extensively discussed in Chapter 6.2.2.3, coastal States have limited capacity to control the passage of foreign ships through the EEZ and cannot require them to observe national standards which are more stringent than international ones during the transit through MPAs located in this area. As will be examined later in this chapter, only under specific conditions does the LOSC allow coastal States to promote the adoption of more stringent measures in clearly defined areas of their EEZ.

Finally, coastal States cannot unilaterally regulate and control the activities of third States in waters beyond national jurisdiction. On the high seas all states enjoy the

28 See: North Atlantic Coast Fisheries Arbitration (*UK v. US*), Permanent Court of Arbitration, 1910, J.B. Scott, The Hague Court Reports, Vol. 1, p. 171.

29 Some States relied on the EEZ regime to designate deep-sea areas in their EEZ and prohibit certain human activities therein. Australia, for instance, has prohibited fishing, drilling for oil and gas and the exploitation of oil and gas within the Tasmanian Seamounts Marine Reserve; Norway banned all fishing activities within the Marine Reserve northwest of Trondheim to protect cold-water coral reefs; Portugal and the US designated deep-sea areas respectively in the south-west of the Azores and the Hawaiian Islands; the UK is considering taking similar steps in the Darwin Mounds. Iceland has prohibited bottom trawling in an extended part of its EEZ to protect vulnerable marine habitats (see also the 2005 revised Act on Fishing in Iceland's Exclusive Fishing Zone).

30 For a full discussion on the fisheries regime in the EEZ see: R.R Churchill and A.V. Lowe (1999), pp. 289-94.

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traditional freedoms.[31] These freedoms, however, cannot affect the rights of other States and must be exercised under the conditions laid down in the LOSC and other rules of international law (LOSC, Article 87). These conditions include the duty to protect and preserve the marine environment, to conserve natural resources, and cooperate with other States for these purposes.[32] All environmental and conservation measures in such areas need to be established through multilateral cooperation among States directly or within the competent international organizations (e.g., CBD, IMO).

8.3 The Global Political Debate on MPAs

8.3.1 Chapter 17 of Agenda 21

At the beginning of the 1990s, the progressive loss of marine biodiversity and the depletion of fish stocks showed the limits of the traditional approach to ocean management. Chapter 17.1 of Agenda 21 expressly recognizes that international law, as codified in the LOSC, provides the basis for the protection and sustainable use of the marine environment, but it strongly requires the international community to take a new approach at the national, sub-regional, regional and global level. This new approach needs to be "integrated in content", "precautionary and anticipatory in ambit", and based on the ecosystem approach.[33] Integrated ocean management requires, in the first place, strong integration between fisheries management and biodiversity conservation.[34] The concept of MPAs embodies the new approaches to ocean management.[35] Chapter 17 of Agenda 21 therefore strongly supports the establishment and management of MPAs and encourages states to identify marine ecosystems with a high level of biodiversity and productivity and other critical areas and to limit human activities and extractive uses at these sites.[36] To this end, States should designate protected areas with particular priority to be accorded to coral reefs, estuaries, wetlands (including mangroves), and sea grass. Agenda 21, moreover, recommends that coastal States undertake, with the support of international organizations, measures to maintain biological diversity and

31 As discussed in Chapter 1.2.2.1, the exploration and exploitation of mineral resources of the seabed are subjected to a separate regime, which is set out in Part XI of the LOSC and is under the competence of the ISBA. This regime is not covered here. On the regime for the conservation and management of high-seas fisheries see: N. Wolff (2002), pp. 59-61 and R.R. Churchill and A.V. Lowe (1999), pp. 296-305.

32 See: T.R. Young, "Developing a Legal Strategy for High Seas Marine Protected Areas", Legal Background Paper", prepared for the Malaga Workshop (2003).

33 See Agenda 21, Chapter 17, Paras. 17.1; 17.5; 17.6; 17.21; 17.22.

34 This new approach is endorsed, *inter alia*, by the CBD (e.g., Decision II/10); OSPAR, Article 2(1)(a); Helsinki Convention, Article 3(1); 1996 SPA Protocol of the BARCON, Article 3(1) (a) and (b) and in the Sixth EAP, Para. 35.

35 See T. Scovazzi (1999), p. 21; K.M. Gjerde and D. Freestone (1994), p. 435.

36 Agenda 21, Chapter 17.85.

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productivity of marine species and habitats under national jurisdiction, including the designation of protected areas.[37] In addition, States are encouraged to "preserve rare or fragile ecosystems, as well as habitats and other ecologically sensitive areas", both under their jurisdiction and in the high seas, in order to conserve and sustainably use marine living resources.[38] Finally, Agenda 21 recommends that all States ensure respect for areas designed by coastal States within their EEZ consistently with international law, in order to protect and preserve rare and fragile ecosystems.[39]

8.3.2 The WSSD Plan of Implementation and its Follow-Up in the UN

Ten years after the adoption of Agenda 21, it became evident that the general recommendations of Chapter 17 had not been able to arrest the loss of marine biodiversity and States had made little progress towards the establishment and management of offshore MPAs. The WSSD Plan of Implementation, adopted in Johannesburg in 2002, sets out new clear-cut and time-bound targets, urging the international community to increase efforts to preserve marine life. In particular it requires States to halt the decline of biodiversity by 2010 and "to establish MPAs consistent with international law and based on scientific information, including representative networks by 2012 and time/area closures for the protection of nursery grounds and periods".[40] Despite its non-legally binding nature, the WSSD Plan has the major merit of giving a new political impetus to the MPAs debate and triggered new developments at the global and regional level.[41]

At the global level, WSSD targets have been endorsed in all subsequent UNGA Annual Resolutions which call upon States to continue their efforts towards the establishment of representative networks of MPAs by 2012, acting consistently with international law and on the basis of the best scientific information available.[42] It is worth mentioning that in the past few years the UNGA has dedicated increasing attention to marine biodiversity issues in areas beyond national jurisdiction. For that purpose, in 2004 an *Ad-Hoc* Open-ended Informal Working Group was established to study issues relating to the conservation and sustainable use of marine biodiversity beyond areas of national

37 *Ibid., Chapter 17, Paras. 17.7 and 17.6(c).*

38 *Ibid., Paras. 17.74(f) and 17.46(f). These recommendations eventually led to the conclusion of the 1995 UNFSA.*

39 Agenda 21, Chapter 17.30 (a)(v).

40 WSSD Plan, Paras. 42 and 31(c). Other relevant targets are: to apply the ecosystem approach by 2010 (*ibid.*, Paras. 29(d) and 31(c)); to maintain or restore stocks where possible not later than 2015 (*ibid.,* para. 30(a)); to eliminate destructive fishing practices (*ibid.,* Paras. 32(a) and (c)).

41 For a critical analysis of the outcome of the WSSD in relation to ocean issues see: M. Gianni, Greenpeace International (2002), at: www.udel.edu/CMS/csmp/globaloceans/pdf/Gianni.pdf.

42 I.e., 2005 UNGA Resolution 60/30 (Paras. 74-5); 2004 UNGA Resolution 59/24 (Para. 72); 2003 UNGA Resolution 58/240 (Para. 54); 2002 UNGA Resolution 57/141 (Para. 53). Resolutions adopted before 2002 do not contain any reference to MPAs.

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jurisdiction, including the possibility to establish MPAs in this area.[43] The UN ICP, in all its sessions, has also strongly encouraged the use of MPAs as an effective management tool for the conservation and integrated management of biodiversity in areas within and beyond national jurisdiction,[44] as well as for fisheries purposes.[45] Similarly, the UN Secretary-General gave a great deal of attention to MPAs in his annual reports.[46]

In addition, the WSSD commitment towards establishing a representative network of MPAs has been endorsed in a variety of ocean fora outside the UN,[47] and has been translated into clear targets within the framework of the CBD, regional agreements and the EC.

8.4 The Global Regulatory Regime

8.4.1 The Convention on Biological Diversity (CBD)

The Convention on Biological Diversity (CBD), adopted at UNCED in 1992,[48] sets out the legal framework for the conservation and the sustainable use of biodiversity, including marine biodiversity.[49] The CBD complements and reinforces the general

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43 E.g., 2004 UNGA Resolution 59/24 (Para. 73). The Group met for the first time in February 2006 (see: Report of the meeting in: A/61/65). See also UNGA Resolution 59/25 (Para. 66) calling upon States either by themselves or through RFMOs to take action urgently, and to consider on a case-by-case basis and on a scientific basis, the interim prohibition of destructive fishing practices, including bottom trawling, which have adverse impacts on vulnerable marine ecosystems located beyond national jurisdiction.

44 E.g., 5th ICP (A/59/122), Paras. 84; 88 and 89; 4th ICP (A/58/95), Paras. 22 and 104; 3rd ICP (A/57/80), para. 25; 2nd ICP (A/56/121), para. 84; 1st ICP (A/55/274), Paras. 28 and 73.

45 6th ICP, Para. 11(e) encouraging, *inter alia*, cooperation with the CBD, available at: www.un.org/Depts/los/reference_files/new_developments_and_recent_adds.htm.

46 E.g. 2006 UNSG Report (A/61/63), Paras. 254-57; 2005 UNSG Report (A/60/63), Paras. 152, 164 and 185; A/60/63/Add.1; 2004 UNSG Report (A/59/62), Paras. 223-28; Add. (Paras. 278, 291); 2003 UNSG Report (A/58/65), Paras. 224-27; 2002 UNSG Report (A/57/57), Paras. 472-85.

47 WWF, IUCN and the IUCN's World Commission on Protected Areas (WCPA) are in the process of developing an Action Plan for the establishment of HSMPAs. The first IUCN, WCPA and WWF High Seas MPAs Workshop took place in Malaga, Spain in 2003. See also the 5th meeting of the World Park Congress (WPC), held in Durban (South Africa, 2003), WPC Rec. V.4 (Para. 1(h)); WPC Recs. V.22 and 23, available at: www.iucn.org/wpc2003/pdfs/Proceedings/recommendations.pdf.

48 UNEP, Convention on Biological Diversity, signed in Rio de Janeiro 5 June 1992 and entered into force on 29.12.1993, text available at: www.biodiv.org/convention/articles.asp. At the present the CBD has 188 contracting parties, including the EC and its 25 member states. For a general analysis of the CBD see, e.g., P. Sands (2003), p. 515-23; A. Boyle in: M. Bowman and C. Redgwell (eds.) (1996), pp. 33-49; D. Freestone in *ibid., pp. 91-107.*

49 *Biodiversity is defined in Article 2 as the "variability amongst living organisms from all sources including…marine and other aquatic ecosystems* and the ecological complexes of

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obligations for the preservation of marine life and the conservation of marine living resources under the LOSC.[50] In particular, contracting parties are under a legal duty to take *in situ* conservation measures,[51] including "*as far as possible and as appropriate"* the establishment of a system of protected areas or areas where special measures are needed and the development of guidelines for the selection, establishment and management of those areas (CBD, Article 8(a) and (b)).[52] Annex I provides an indicative list of habitats and ecosystems, which could be used to assist parties in the development of criteria for the selection of MPAs.[53] The CBD is the only global Treaty, together with the Ramsar Convention, setting out a positive legal duty to create protected areas. However, the "*as far as possible and as appropriate*" clause makes the implementation of this duty highly discretionary.[54]

The CBD explicitly endorses the ecosystem approach and, implicitly, the precautionary principle[55] and contains general duties which have relevance for the management of MPAs, such as the duty to integrate biodiversity considerations into other policies (Articles 6 and 10) and to carry out an EIA of all projects likely to have significant adverse effects on biodiversity (Article 14).[56] The "*as far as possible and as appropriate*" clause also applies to most of these obligations, however.

Contracting parties must apply the provisions of the CBD to components of biological diversity in waters under their jurisdiction (Article 4(a)), as well as to processes and activities carried out under their jurisdiction and control that take place both within or beyond national jurisdiction and wherever their effects occur (Article 4(b)). In other words, parties have to take measures to conserve and sustainably use marine biodiversity

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which they are a part" (emphasis added). For a critical analysis of the applicability of this definition to marine biodiversity see: D. Freestone in M. Bowman and C. Redgwell (eds.) (1996), pp. 92-3.

50 See 1999 UNSG Report (A/54/429), Para. 493.

51 CBD, Article 8 (f). *In situ* conservation is defined in Article 2 as "the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings".

52 Protected areas are defined as "geographically defined areas designed or regulated and managed to achieve specific conservation objectives" (CBD, Article 2).

53 Annex I urges, *inter alia*, special attention to be paid to critical habitats for marine living resources as an important selection criterion. See, e.g., M. Vierros, S. Johnston and D. Ogalla in H. Thiel and J.A. Koslow (eds.) (2001), p. 172.

54 See A. Boyle (1994), p. 118.

55 The CBD does not expressly refer to the precautionary principle. However, the Preamble makes it clear that measures should not be avoided or postponed where there is a *lack of full scientific certainty*.

56 See also the duty to identify and monitor critical components of biodiversity and potentially dangerous activities (Article 7) and provisions on reporting (Article 26); consultation on activities likely to have a significant adverse effect on the biodiversity of other states or areas beyond national jurisdiction (Article 14 (1)(c) to (e)); financial resources (Article 20); financial mechanism (Article 21). The Global Environmental Facility (GEF) is the financial mechanism established by the CBD (Article 39).

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in waters under national jurisdiction and to prevent the impact of national activities, such as shipping, dumping or fishing, on marine biodiversity outside their jurisdiction, including the high seas (and the seabed). However, they cannot take unilateral measures directed at the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, but they shall, "*as far as possible and as appropriate*", cooperate directly or through competent international organizations (Article 5). Presumably, such measures may include the designation and management of MPAs. The CBD, therefore, seems to provide the legal basis for the multilateral establishment of MPAs in waters beyond national jurisdiction.[57] Contracting parties, however, have to "implement the Convention with respect to the marine environment consistently with the rights and obligations of States under the Law of the Sea", implicitly referring to the LOSC (including the freedom of navigation regime).[58] In addition, the CBD does not affect rights and obligations stemming from other international agreements, "except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity".[59]

The governing body of the CBD is the Conference of the Parties (COP) which meets every two years and is responsible for monitoring the implementation and steering the further development of the Convention.[60] The COP may adopt decisions, Amendments, new Protocols and Annexes. COP decisions, unlike formal Amendments, Annexes and Protocols, are non-legally binding, but have strong political force. In its work the COP is assisted by the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA), which gives advice in the form of Recommendations on scientific, technical and technological aspects related to the implementation of the Convention.[61] In addition, the COP may establish additional subsidiary bodies or working groups with time-limited and defined mandates.[62]

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57 See, e.g., M. Vierros, S. Johnston and D. Ogalla in H. Thiel and J.A. Koslow (eds.) (2001), pp. 169-73; K.M. Gjerde (2001), pp. 515-28; C. de Fontaubert (2001), p. 81. *Contra:* Norwegian submission to ICP 2003, "Protection and conservation of vulnerable marine ecosystems in areas beyond national jurisdiction (A/AC.259/10).

58 CBD, Article 22(2). See: D. Freestone in M. Bowman and C. Redgwell (eds.) (1996), p. 91 and R. Wolfrum and N. Matz in J.A. Frowein and R. Wolfrum (eds.) (2000), p. 445.

59 CBD, Article 22(1). This might be the case for some fishing agreements.

60 The COP and its functions are regulated in Article 23. To date, there have been eight COPs, and the last one was held in Curitiba (Brazil), on 20-31 March 2006. All COP decisions are available at: www.biodiv.org/convention/cops.asp#.

61 The SBSTTA and its functions are regulated in Article 25. Normally, the COP endorses the SBSTTA recommendations in whole or in part in its decisions.

62 See, e.g., the *Ad-Hoc* Technical Expert Group on Marine and Coastal Protected Areas established in 2000 to assist the SBSTTA (Decision IV/5). The Group met twice (in 2001 and 2002) and presented its key findings to SBSTTA-8 in 2003, which endorsed them in Rec. VIII/3.

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The CBD has been criticized for being poorly drafted in relation to marine biodiversity.[63] Strengthening the Convention's regime on the conservation and sustainable use of marine and coastal biodiversity has been something of a priority since the beginning.[64] In the past decade, MPA issues have been placed at the top of the agendas of all COPs and SBSTTAs.[65] The so-called Jakarta Mandate on Marine and Coastal Biological Diversity adopted at the COP-2 (1995),[66] and the multi-year working programme adopted at the COP-4 (1998) to assist the implementation of the Jakarta Mandate,[67] are evidence of the importance of marine and coastal protected areas (MCPAs) to achieve the objectives of the CBD and to encourage the establishment of MCPAs as part of an ecosystem-based precautionary and integrated approach to the conservation and sustainable use of marine biodiversity.[68] The programme sets out the key operational objectives and priority activities within five thematic areas, including MCPAs, and calls for the development of criteria for the establishment and management of such areas.[69]

MCPAs were a priority issue at COP-7, held in Kuala Lumpur in February 2004, which fully endorsed the WSSD targets.[70] Taking note of the limited progress in the designation and effective management of MCPAs,[71] the COP-7 urged parties to increase efforts towards the establishment of marine protected areas in waters under their jurisdiction, including representative networks by 2012 and time/area closures for the protection of nursery grounds and periods (Decision VII/5).[72] In addition, it called

63 Apparently, the weakness of the CBD obligations in relation to the marine environment was one of the reasons why the US signed, but has not yet ratified the CBD. See: T. Scully in: E.L. Miles and T. Treves (ed.) (1993), p. 148.

64 E.g., COP-1 (1994), Decision I/9, Para. 5.3.

65 See, in particular, SBSTTA Rec. VIII/3 on "Marine and coastal biodiversity: review, further elaboration and refinement of the programme of work" (2003). See also, Rec. X/4 (2005); Rec. IX/4 (2003); Rec. VI/2 (2001); Rec. V/6 (2000); Rec. III/2 (1997); Rec. II/10 (1996); Rec. I/8 (1995). All SBSTTA Recommendations are available at:www.biodiv.org/convention/sbstta.asp.

66 CBD Decision II/10. The Jakarta Mandate, however, does not make explicit reference to MPAs, but calls for the integrated management of marine and coastal ecosystems following an ecosystem and precautionary approach (Paras. 2 and 3 and Annex II, Para. 3(a)).

67 CBD Decision IV/5, for the period 1998-2004.

68 *Ibid.,* Programme element 3, especially Para. B. 1 and 2.

69 CBD Decision IV/5, operational objective 3(2). The critical habitat for marine living resources is identified as an important selection criterion.

70 CBD Decision VII/5 (UNEP/CBD/COP/7/21).

71 *Ibid*., Paras. 9-15. See also the Report of the *Ad-Hoc* Technical Expert Group on Marine and Coastal Protected Areas (UNEP/CBD/SBSTTA/8/INF/7) and (UNEP/CBD/SBSTTA/9/5).

72 CBD Decision VII/5, Paras. 16-19. In addition, Paras. 20-28 offer guidance for the development of a national framework of MCPAs and identify two main categories: a) MCPAs where threats are managed for the purpose of biodiversity conservation and/or sustainable use and where extractive uses may be allowed; (b) Representative MCPAs where extractive uses are excluded, and other significant human pressures are removed or minimized, to enable the integrity, structure and functioning of ecosystems to be maintained or recovered.

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for strengthening international cooperation to improve the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, also through the establishment of MPAs.[73] Protected areas, both within and beyond national jurisdiction, have to be consistent with international law and based on scientific information. The COP-7 recognizes the LOSC as the proper legal framework for regulating activities in areas beyond national jurisdiction and supports any work by the UNGA in identifying the appropriate mechanisms for the establishment and effective management of MPAs in the high seas.[74] The working programme on marine and coastal protected areas has been extended to 2010, further elaborated,[75] and translated into clear and time-bound targets.[76] Additionally, Decision VII/28 established an *Ad-Hoc* Open–ended Group on Protected Areas with the task of, *inter alia*, supporting and reviewing the implementation of the working programme on MCPAs and exploring options for cooperation in the establishment of MPAs in areas beyond national jurisdiction.[77] How to proceed and which forum should take the lead in addressing MPAs in areas beyond the limits of national jurisdiction have been the most controversial issues during the first meeting of the Working Group, held in June 2005 in Montecatini (Italy).[78] The EC has been trying to gather support for an implementing agreement to the LOSC, but it has met with strong opposition from states like Norway and Iceland.[79] According to others, high seas MPAs should be addressed within the framework of the CBD, albeit not as a leading agency. The designation of PSSAs in high seas was another option on the

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73 *Ibid.,* Paras. 29-31.

74 *Ibid.*, VII/5, Para. 31 (and Paras. 57-62) which also urges the CBD Secretariat to collaborate with the UN Secretary-General and other competent international and regional bodies in drafting a report on how better to address the risk for vulnerable ecosystems beyond national jurisdiction as requested by UNGA Resolution 58/42 (Para. 52).

75 CBD Decision VII/5, Programme element 3, pp. 146-49, elaborates the operational objectives (e.g., to establish and strengthen national and regional systems of MCPAs integrated into a global network and as a contribution to globally agreed goals (objective 3.1); to enhance the conservation and sustainable use of biological diversity in marine areas beyond the limits of national jurisdiction (objective 3.2.); to achieve effective management of existing MCPAs (objective 3.3)). It also identifies the suggested activities, and the ways and means to achieve these objectives.

76 See the 2004 Programme of Work on Protected Areas (UNEP/CBD/COP/7/21 (Annex I)), pp. 349-65. For example, Goal 4.1 requires the development and adoption of standards, criteria, and best practices for planning, selecting, establishing, managing and governance of national and regional systems of MPAs by 2008.

77 CBD Decision VII/28 (UNEP/CBD/COP/7/21).

78 See: Report of the First Meeting of the Ad Hoc Open-ended Working Group on Protected Areas (UNEP/CBD/WG-PA/1/6, Annex I), available at: www.biodiv.org/doc/meeting.aspx?mtg=PAWG-01.

79 See the Statement by Norway: "[…] To negotiate amendments to existing international law would be time consuming and difficult, and it would take valuable resources and focus away from implementing specific measures with practical results" (Report of the First Meeting, Para. 160).

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table.[80] The COP-8, held in Curitiba (Brazil) in March 2006, did not progress much on this issue, which is therefore still far from being settled.[81]

Since its adoption, moreover, the CBD has advocated better cooperation and coordination with existing global and regional legal instruments, including regional fisheries management organizations and international bodies whose mandate includes MPAs with the view of promoting synergies and avoiding unnecessary duplications.[82]

8.4.2 Other MEAs Providing a Legal Basis for the Designation and Management of MPAS

The 1971 Convention on Wetlands of International Importance, Especially for Waterfowl (Ramsar Convention) aims at the conservation and wise use of wetlands, *inter alia*, by establishing a system of protected areas.[83] Like the CBD, the Ramsar Convention also sets out a positive legal obligation to designate and manage special areas. In particular, contracting parties are required to designate at least one site within their territory for inclusion in the *List of Wetlands of International Importance*[84] on the basis of specific selection criteria.[85] The selected sites may include areas of marine water no more than six meters deep at low tide and may extend to adjacent islands and coastal zones.[86] Marine and coastal wetlands include mangroves, sea-grass beds, coral reefs, intertidal zones and estuaries and are considered as a critical component in marine conservation and an important support system for marine life. The Convention devotes

80 See: Options for Cooperation for the Establishment of Marine Protected Areas in Marine Areas Beyond the Limits of National Jurisdiction (Doc. UNEP/CBD/WG-PAS/1//2) and L.A. Kimball (2005), pp. 40-48. PSSAs, however, only relate to shipping and in order to provide a comprehensive level of protection, they should be integrated with additional international and/or national instruments.

81 The COP-8 adopted Decision VII/21 on the conservation and sustainable use of deep seabed genetic resources beyond the limits of national jurisdiction, which identifies the establishment of MPAs as one of the possible options to protect deep-sea genetic resources beyond national jurisdiction (Para. 5). The issue is also being examined by the *Ad-Hoc* Group established by UNGA Resolution 59/24, *supra* n. 42.

82 E.g., CBD Decision IV/5; Decision VII/5 and 2004 Programme of Work on Protected Areas (Para. 3). Also the WSSD highlighted the need to integrate the objectives of the CBD into global, regional and national policies.

83 Signed in Ramsar, Iran, 2.02.1971, in force on 21.12.1975, text available at: www.ramsar.org/index_very_key_docs.htm. The Convention, as amended, has 145 contracting parties, including the EC and its 25 member states. For an overview of the Convention: P. Sand (2003), 543-45 and Lee A. Kimball (2001), pp. 35-6.

84 Ramsar Convention, Article 2. The List is administered and updated by IUCN (*ibid.,* Article 8).

85 Criteria for selection have been adopted by Ramsar Convention, COP-4 (1982), as amended by COP-6 and 7, and are available at: www.ramsar.org/key_criteria.htm.

86 See the definition of wetlands in Ramsar Convention, Article 1(1).

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particular attention to wetlands which are transboundary or which represent important habitats for migratory species and requires Parties to cooperate in their conservation, especially with regard to shared water-dependent species, migratory species other than water birds, including marine turtles and fish stocks.[87]

Inclusion in the list brings a number of positive management obligations for states parties, including the establishment of natural reserves,[88] the formulation and implementation of wetland conservation plans and policies, an EIA of all human activity conducted in the site, as well as monitoring and reporting.[89] Inclusion in the list is without prejudice to the sovereignty of the state concerning its wetlands, but provides the site with an international legal status. States, indeed, are placed under an "international responsibility for the conservation, management and wise use of migratory stocks of waterfowl" and must "compensate for any loss of wetland resources, such as the establishment of additional natural reserves".[90] Ramsar sites are located in close proximity to shores and are not likely to interfere with the traditional freedoms of the high seas, including shipping and fisheries. Their management, therefore, does not create particular concerns from a law of the sea viewpoint and virtually all human activity may be controlled in the area.

The Conference of the Parties (COP) is held every three years to review the implementation and further development of the Convention. In the exercise of its functions the COP adopts Resolutions and Recommendations on the conservation, management and wise use of wetlands. Despite their non-legally binding nature, the COP Resolutions (and Recommendations) have a great deal of political force.[91]

Originally, the Ramsar Convention, like the CBD, was primarily intended to protect terrestrial wetlands, but in the past decade, its scope has been progressively extended to marine and coastal waters. Currently, more than one-third of all the designated sites have a marine component.[92] In 1996, the COP-6 included wetlands important as fish habitats within the selection criteria and called for the designation of new sites to protect under-represented wetlands (e.g., coral reefs, mangroves and sea-grass beds.).[93] The COP-7 (1999) adopted a new comprehensive Framework and Guidelines to assist parties

87 Ramsar Convention, Article 5 and Ramsar COP-7, Res. VII.19.

88 Ramsar Convention, Article 4(1). P.van Heijnsbergen ("International Legal Protection of Wild Fauna and Flora", 1997, p. 183) notes the term "nature reserve", apparently meaning a wide range of protected areas.

89 Obligations within the listed sites are laid down in the Ramsar Convention, Articles 3 and 4.

90 See, respectively, Articles 2(5)(6) and 4(2). As will be discussed later, the EC Habitats Directive also provides for an analogous compensatory mechanism.

91 All the functions of the COP are listed in Article 6. In its work the COP is assisted by a Scientific and Technical Review Panel (STRP). In 1990, a special *Wetland Conservation Fund* was established in order to provide financial and technical assistance to the parties, especially developing countries.

92 The Directory of Wetlands is available at: www.wetlands.org/RDB/Directory.html.

93 See the Strategic Plan for the period 1997-2002 (Action 6.2.3) and Ramsar COP-6 Resolution VI 2, available at: www.ramsar.org/key_res_vi.2.htm.

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in the establishment of a global network of sites representing all types of wetlands, including marine wetlands.[94] COP-8 (2002) and COP-9 (2005) provided further indications as to how to apply these Guidelines to under-represented wetlands (e.g., coral reefs) and coastal and marine biodiversity.[95] Since its adoption, the Ramsar COPs attached great importance to increasing cooperation with the CBD and all relevant international, regional and sub-regional bodies (including EC) which are competent for the conservation of biodiversity and COP-9 expressly called for the full integration of the Ramsar sites into the CBD programme of work on MCPAs.[96]

In addition, it is worth making a brief reference to the 1979 Bonn Convention on the Conservation of the Migratory Species of Wild Animals (CMS) which sets out the framework for the conservation and effective management of migratory species and their habitats.[97] The Convention makes a distinction between migratory species in danger of extinction, which are listed in Appendix I, and migratory species with an "*unfavourable conservation status*" which need or would significantly benefit from international cooperation and are listed in Appendix II.[98] Over the years, an increasing number of marine species, especially cetaceans, sea turtles and migratory seabirds, have been listed in both Appendixes.[99]

Unlike the CBD and Ramsar Convention, the CMS does not contain a positive legal duty to designate and manage MPAs but calls on "range States" to take immediate action to protect Appendix I species by, *inter alia*, conserving and, where feasible and appropriate, restoring their habitats.[100] Since the definition of "range state"[101] includes "states, flag vessels of which are engaged outside national jurisdictional limits in taking migratory species", these provisions also apply to the high seas. In addition, the Convention requires range States to conclude international agreements in order to achieve and maintain a favourable conservation status for Annex II (and other migratory) species.[102]

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94 Ramsar COP-7, Resolution VII-11 (see: www.ramsar.org/key_guide_list2002_e.htm).

95 Ramsar COP-8, Resolutions VIII-11 and VIII-33 and Ramsar COP-9, Resolution IX-1, Annex A. COP-9, moreover, devoted particular attention to the management of sustainable fisheries in wetlands (e.g., Resolution IX-4).

96 COP-9, Resolution IX.22.

97 Article II.1 of the CMS, adopted on 23.06.1979, in force 1.11.1983, text available at: www.cms.int/documents/convtxt/cms_convtxt.htm. As of 1.02.2005 the CMS has 89 Parties, including the EC and its 25 member states.

98 Article IV.1. Some species can be listed in both the Appendixes.

99 Various species of cetaceans and sea turtles are included in Appendix I, while a variety of small cetaceans, including dolphins, are included in Appendix II. At the COP-8, in November 2005, six new marine species were included in the Appendixes. The CMS Appendixes are available at: www.cms.int/documents/appendix/cms_app1_2.htm#appendix_I.

100 All measures that parties have to take to conserve Annex I species are listed in CMS, Article III.

101 CMS, Article I.1(h).

102 CMS, Article IV(3) and (4). These Agreements are open to all range States regardless of their participation in the CMS (Article V.2). In addition, Parties may adopt less formal agreements in the form of Memoranda of Understanding (MOUs). So far three Article IV(4)

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Each Agreement adopted pursuant to the Convention should provide for the maintenance of a network of suitable habitats appropriately disposed in relation to migration routes (Article V.5 (f)). As will be discussed later, one of the CMS agreements (i.e., the ACCOBAMS) contains a positive legal obligation to establish and manage a network of specially protected areas.[103] The CMS serves as an umbrella mechanism for the review of all the Agreements concluded within its framework. The Conference of the Parties (COP) is the main decision-making organ and is responsible for monitoring and reviewing the implementation of the Convention. It may adopt Resolutions and make Recommendations to states parties for the improvement of the Conservation status of the migratory species and of the effectiveness of the convention.[104] The COP-8 (November 2005) adopted a number of Resolutions and Recommendations concerning marine species and devoted attention to the need to reduce the impact of fishing activities on marine species. Just like the CBD and Ramsar, the CMS also recognizes that its aims and objectives complement and reinforce those of other international Conventions and calls for strong cooperation and synergies in areas of mutual interest.[105]

8.5 The Regional Regime for the Designation and Management of MPAs

8.5.1 OSPAR's Annex V and the OSPAR Network of MPAs

The OSPAR Convention deals with the protection and conservation of the ecosystems and biological diversity in Annex V. This Annex was adopted at the first meeting of the OSPARCOM (Sintra, 1998)[106] to implement the CBD in the OSPAR marine area.[107] Its adoption was a direct response to the call for action contained in the Third

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Agreements have been concluded: the 1996 ACCOBAMS, the 1992 Agreement on the Conservation of Small Cetaceans in the Baltic and North Sea (ASCOBANS) and the 1990 Agreement on the Conservation of Seals in the Wadden Sea (36 ILM 777).

103 Conversely, the ASCOBANS and the Wadden Sea Agreement do not contain specific obligations to establish MPAs.

104 CMS, Article VII. The COP meets every three years and is assisted by a Scientific Council (Article VIII) and a Standing Committee. All CMS Resolutions and Recommendations are available at: www.cms.int/bodies/cop_mainpage.htm

105 See, e.g., UNEP/CMS Res.7.11, 2.09.2002, calling on all international organizations and the EC to cooperate with the CMS in efforts to prevent accidental oil pollution and to minimize its negative impact on migratory species.

106 Annex V entered into force on 30.08.2000. As of February 2005, it has 15 CPs: Denmark, Finland, France, Germany, Luxembourg, Iceland, Ireland, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the UK and the EC. Ratification by Belgium is still expected. The Text of Annex V is available at: www.ospar.org/eng/html/welcome.html.

107 Summary Record of the Sintra Ministerial Meeting (OSPAR 98/14/1-E, Annex 3). All OSPAR contracting parties are also parties to the CBD and, by means of Annex V, they implement their duty under the CBD to develop strategies for the conservation and sustainable use of biological diversity (Article 2). Article 1, Annex V refers to the CBD for the definition of

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(1990) and Fourth (1995) NSMC Declarations, which urged the OSPARCOM to take further steps to ensure the conservation, restoration and protection of the biodiversity and ecosystems in the North Sea.[108] The Annex, like the CBD, covers the preservation of both habitats and species.[109] Its provisions apply to waters under the jurisdiction of contracting parties as well as to the high seas (Article 1(a)). Annex V has been adopted together with an Appendix 3 setting out the criteria for the identification of human activities that may have adverse effects on the marine environment; a Biodiversity Strategy and an Action Plan, both revised in 2003.[110] The Annex, like the OSPAR Convention, follows a two-step approach. It first requires the OSPARCOM to develop means and programmes and to draft specific measures that, in a second stage, have to be implemented by the contracting parties.[111]

Annex V does not contain detailed obligations for contracting parties, but leaves them with ample discretion concerning whether and how to act. Recalling Article 5 of the CBD, it requires parties to take "*all necessary measures* to protect and conserve the ecosystems and the biological diversity of the maritime area, and to restore, *where practicable*, marine areas which have been adversely affected" (Article 2(a)). Parties, moreover, shall cooperate in adopting programmes and measures for controlling human activities identified according to the criteria laid down in Appendix 3 (Article 2(b)). This cooperation takes place primarily within the Biodiversity Committee (BDC), established in 2000 to assist the OSPARCOM in the implementation of Annex V and the Biodiversity Strategy.

The duties of the OSPARCOM are more detailed, but also leave ample discretion for the Commission as to when and how to exercise its regulatory powers.[112] The main idea is to avoid duplication with the work of other international organizations. Hence, the OSPARCOM is subject to two sets of obligations. First of all, it has to collect and assess information on initiatives concerning marine species and habitats under other global and regional bodies and determine whether further action is needed at the OSPAR level. Only when further action is needed does it have to draw up programmes and measures for controlling human activities which meet the criteria set out in Appendix 3 and develop "means, consistent with international law, for instituting protective, conservation, restorative *or precautionary measures related to specific areas or sites*

"biological diversity", "ecosystems" and "habitat". See also Annex V, Preamble (Paras. 5 and 6).

108 As discussed in Chapter 1.4.2, Article 7 of OSPAR envisages the possibility to adopt additional Annexes in the future to address new issues as long as they are not "already subject of effective measures agreed by other international organizations or prescribed by other international Conventions".

109 See also the definition of marine pollution under OSPAR, Article 1(4), which refers to the harm to living resources and marine ecosystems. The work on species preservation remains outside the scope of this Chapter.

110 All documents are available at: www.ospar.org/eng/html/welcome.html.

111 See: *infra* Chapter 1.4.2, at n. 135.

112 Duties of the OSPARCOM are defined in Annex V, Articles 3 and 4.

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or related to particular species or habitats (emphasis added)". In its work the OSPARCOM shall "aim towards the application of an *integrated ecosystem approach* (emphasis added)".

Although the OSPARCOM has no competence to regulate fishing (including "the management of marine mammals"[113]) and shipping**,** it may still consider the impact of these activities on the marine ecosystem and biodiversity within its assessments on the "quality status" of the marine environment in the region (under Annex IV). Fisheries issues must be brought to the attention of the competent fisheries management organizations, but the OSPARCOM may cooperate with them if supplementary action is needed (Annex V, Article 4(1)).[114] In the North Sea, the competent organizations are the Norwegian Fisheries Authority and the EC, which by means of the CFP has exclusive competence over conservation and management of fisheries resources in waters of the EC member states.[115] As already discussed in Chapter 6.5.4, shipping-related issues shall be referred to the IMO to achieve an appropriate response (Annex V, Article 4(2)). However, this does not necessarily preclude the possibility for OSPARCOM to take some measures to limit the impact of shipping in sensitive areas, as long as they are consistent with the LOSC.

There is no legal requirement under the OSPAR Convention and Annex V to establish MPAs or manage and assess the environmental impact of human activities therein.[116] Nevertheless, the OSPARCOM has always considered the establishment of a coherent network of well-managed MPAs as a main tool to implement Annex V and it adopted it as a separate agenda item of the BDC.[117] The work conducted so far has been mostly preparatory in nature.

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113 1998 OSPAR Agreement on the meaning of certain concepts in Annex V, Para. 15.2. Reportedly, marine mammals have been excluded in order to meet the requests of Denmark, Iceland and Norway.

114 The competent organizations are identified in the 1998 Agreement, *supra* n. 113, and include the EC, the North East Atlantic Fisheries Commission, the North Atlantic Salmon Commission, and the Norwegian and Icelandic fisheries authorities.

115 The EC Council Resolution (3.11.1976) provided that, starting from 1977, member states should extend their fishing zones up to 200 miles from their North Sea and Atlantic coasts. In this area the EC has exclusive jurisdiction over fisheries conservation and management and member states cannot take unilateral decisions on these matters.

116 Annex V, Article 3(1)(b)(i) simply requires the OSPARCOM to collect and review information on human activities identified pursuant to Appendix 3 and their effects on ecosystems and biological diversity. Parties have to undertake and publish at regular intervals joint assessments of the "quality status" of the marine environment, including an evaluation of the effectiveness of the measures taken and planned (OSPAR, Article 6).

117 The 1998 Sintra Ministerial Statement encouraged the OSPARCOM to promote initiatives in this direction and the "establishment of specific areas or sites which need to be protected and plans to manage these areas or sites" have been included in the OSPAR Action Plan for 1998-2003. The OSPAR Strategy also called for the adoption of guidance for the selection and establishment of a system of MPAs and the management of human activities in these sites.

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At the Fifth NSMC, in 2002, the North Sea Environmental Ministers endorsed the WSSD targets and agreed that by 2010 relevant areas of the North Sea will be designated as MPAs within a network of well-managed sites for the protection of representative, threatened and declining species, habitats and ecosystems. In addition, they urged the OSPAR and the EC to assess the necessity of complementary measures to the existing ones and to improve cooperation between the two regimes.[118] As a response, the OSPARCOM, at its 2003 Meeting in Bremen, recommended contracting parties to establish an ecologically coherent network of well managed MPAs by 2010 and adopted two sets of guidelines on the selection of MPAs and their management.[119] The definition of MPAs[120] and the objectives of the OSPAR MPA network[121] are quite broad and areas may be established within national jurisdiction (including the EEZ) and on the high seas.[122] However, both the 2003 Recommendation and the Guidelines leave it completely to contracting parties to identify the sites (according to ecological criteria), to select the sites (according to practical criteria), and to determine their legal status and the human activities to be controlled or prohibited therein.[123] In addition, unlike in the CBD and the Ramsar Convention, there is no clear obligation to conduct an EIA within the sites.[124] Natura 2000 sites under the EC Habitats and Bird Directives may be proposed for inclusion in the OSPAR MPA Network, but that would not imply management obligations other than those already prescribed by the EC Directives. Despite its great political weight, the 2003 Recommendation on MPAs is not legally

118 Bergen Ministerial Declaration, Paras. 6 and 7, available at http://odin.dep.no/md/nsc/.

119 Recommendation 2003/03, in: Summary Records OSPAR 2003 (OSPAR 03/17/1-E, Annex 9).

120 I.e., "an area for which protective, conservation, restorative or precautionary measures, consistent with international law have been instituted for the purpose of protecting and conserving species, habitats, ecosystems or ecological processes of the marine environment" (2003 Rec., Para. 1.1).

121 I.e., (a) protect, conserve and restore species, habitats and ecological processes which have been adversely affected by human activities; (b) prevent degradation of and damage to species, habitats and ecological processes according to the precautionary principle; (c) protect and conserve areas which best represent the range of species, habitats and processes in the OSPAR Area.

122 The "OSPAR Network of Marine Protected Areas" is defined as "areas which have been reported by a Contracting Party […] together with any other area in the maritime area outside the jurisdiction of the Contracting parties which has been included as a component of the network by the OSPAR Commission" (2003 Rec., Para. 1).

123 On the basis of the criteria set out in Appendix 3, the OSPARCOM identified a non-exhaustive list of human activities that should be controlled within the sites: e.g., sand and gravel extraction, dredging for navigational purposes, other than within harbours, the placement of structures for the exploitation of oil and gas, the construction of artificial islands, artificial reefs, installations and structures (including offshore wind-farms), the placement of cables and pipelines, the deliberate or unintentional introduction of alien or genetically modified species, and land reclamation (2003 Biodiversity Strategy, Para. 2.2).

124 See *supra* n. 11616.

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binding and its effectiveness mainly depends on the political will of individual governments.

Contracting parties are still at the stage of selecting sites to be included in the OSPAR MPA network. The selection process is progressing very slowly, but should be completed by 2006.[125] So far, only six OSPAR parties (France, Germany, Norway, Portugal (the Azores), Sweden, and the UK) have selected sites as OSPAR MPAs, but most of these areas are either already existing or are proposed Natura 2000 sites and they are all located in the territorial sea.[126] However, a number of Parties (e.g., Germany, Ireland, the Netherlands, Norway, Portugal, and Sweden) are in the process of identifying potential MPAs in their EEZ.[127] So far, no MPAs have been nominated beyond national jurisdiction.[128]

The BDC plays a role in the coordination and guidance of the national initiatives and since 2003 has been assisted by a Working Group on Marine Protected Areas and Species and Habitats (MASH). Most of the work of the OSPARCOM/BDC/MASH is directed at identifying areas where additional action is needed and promoting consistency between the OSPAR MPAs Network and other international instruments (notably, the EC Natura 2000 Network). In this way, OSPAR represents an effective framework to coordinate the work of different bodies and instruments. Most of the preparatory work foreseen by the Biodiversity Strategy has been completed; it is now up to both the OSPARCOM and the contracting parties to implement it fully. The lack of resources and political will may represent a major problem.

8.5.2 The 1992 Helsinki Convention

The MPAs regime under the 1992 Helsinki Convention presents many similarities with that under the OSPAR Convention. Starting from the early 1990s the HELCOM devoted increasing attention to the development of a comprehensive programme on nature

125 Parties were expected to report to the OSPARCOM on measures adopted to implement the 2003 recommendation by 31 December 2005, but only 5 out of the 12 OSPAR coastal contracting parties have done so. Reportedly, parties are currently focusing on the implementation of the EC Habitats and Birds Directives.

126 See, e.g., Summary Records of the BDC 2006, 13-7.03.2006 (Paras. 3.33-48) and the Intersessional Correspondence Group on Marine Protected Areas (ICG-MPA 2006), 24-26.01.2006 (BDC 06-3.info.1). In addition, the ICG-MPA 2005, 4-8.04. 2005 (i.e., Summary Records ICG-MPAs, Agenda item 3, Paras. 3.2-3.17) reported that most OSPAR parties are reluctant to nominate sites for the OSPAR Network that are not yet protected under national law or Natura 2000 (*ibid.*, Para. 3.2).

127 At the BDC 2006, Germany reported the selection of two MPAs in its EEZ which will be shortly included in the OSPAR Network.

128 At the 2005 ICG-MPA, the WWF presented a Draft High Seas MPA Proposal for the Rainbow Hydrothermal Vent Field (ICG-MPA 5/3/1), which was welcomed by a number of participants. However, at the 2006 ICG-MPA, Portugal indicated that the area is under its national jurisdiction according to Article 76 of the LOSC (BDC 2006, Para. 3.35 (d)).

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conservation, including the establishment of a representative system of MPAs.[129] Like OSPAR, the 1992 Helsinki Convention does not contain specific requirements to designate and manage MPAs, but the work conducted so far is merely of a recommendatory nature and is still in a preliminary phase.

Unlike the OSPAR Convention, the Helsinki Convention does not contain a separate Annex or Protocol on Biodiversity Preservation. However, a new Article 15 has been included in the 1992 Convention requiring contracting parties to take all appropriate measures to conserve natural habitats and biological diversity and to protect ecological processes.[130] In 1993, HELCOM set up a permanent Working Group on Nature Protection and Biodiversity (EC Nature, now HELCOM HABITAT) with the special task of coordinating the implementation of Article 15.[131] In 1994, HELCOM adopted Recommendation 15/5 calling on Baltic States to take "all appropriate measures" to establish a System of Coastal and Marine Baltic Sea Protected Areas (BSPAs).[132] BSPA is not purely a conservation tool; its objective is "to protect representative ecosystems of the Baltic as well as to guarantee sustainable use of natural resources […]." The Recommendation lists 62 marine and coastal areas that should represent the first step in establishing such a system.[133] This system should be gradually developed with special attention being given to marine areas outside territorial waters.[134] HELCOM should adopt appropriate Guidelines for the selection of new sites incorporating the IMO's criteria for the designation of PSSAs.[135] In addition, States are recommended to adopt management plans for each BSPA taking into account Guidelines appropriately developed by HELCOM.[136] Any decision that could affect the size, the management, quality, or level of protection of the BSPA should be previously notified to HELCOM and contracting parties should report on the state of the BSPAs at regular intervals.[137]

In 1995, HELCOM adopted two sets of Guidelines for the designation of new BSPAs and their management. Both Recommendation 15/5 and the Guidelines leave it completely to the contracting parties to identify the sites (according to the IUCN categories of

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129 E.g., Baltic Sea Declaration (Ronneby, 1990), Para. 14; HELCOM 14, Para. 5.38.

130 Moreover, Article 2(1) of the 1992 Convention adopts a definition of pollution that, like the OSPAR Convention, includes harm to living resources and marine ecosystems.

131 HELCOM HABITAT replaced EC NATURE in 2000 (see: HELCOM HABITAT 1/2000, 13/2, Annex 2). Reports of the meetings of the HELCOM HABITAT are available at: http://sea.helcom.fi/dps/docs/folders/Nature%20Protection%20and%20Biodiversity%20Group%20(HABITAT).html.

132 HELCOM Recommendation 15/5, 10 March 1994, Para. 1.1.

133 *Ibid.*, Para. (a). In 1998, HELCOM proposed 23 additional sites.

134 *Ibid.*, Para. (b).

135 *Ibid.,* Para. (b).

136 *Ibid.,* Para. (d). In some areas, a zoning system is encouraged and monitoring programmes should be incorporated into the management plans (e).

137 HELCOM has 6 months to express its opinion (*ibid., Para. (c)). This appears to be a simplified form of EIA although the recommendation is silent on the legal effects of the HELCOM opinion.*

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protected areas), their designation (according to ecological criteria),[138] to determine their legal status (for instance, national legal protection; Natura 2000 sites; PSSA status) and select the human activities to be controlled or banned within the BSPA.[139] When selecting new BSPAs, the interests of fisheries and aquaculture should be taken into account (Designation Guidelines, Para. 2). Some areas, therefore, may be opened to small-scale, non-destructive fisheries. It is worth reiterating that unlike the OSPARCOM, the HELCOM may take measures related to fisheries (and shipping).[140] However, all parties, except the Russian Federation, are bound by the CFP of the EC and they cannot take decisions on fisheries issues at this forum.

In 2005, HELCOM HABITAT decided that the designation of Natura 2000 sites by the EC member states is accepted as an adequate implementation measure with regard to Recommendation 15/5, making it clear that contracting parties are not under an obligation to take any further actions with respect to these sites other than those which arise from EC legislation.[141]

The implementation of Recommendation 15/5 has proceeded very slowly. In the follow-up to the 2002 WSSD, however, there has been some progress in the establishment of the BSPA network in order to meet the 2012 target. At present, of the 98 sites indicated for designation, only 32 have been officially designated as BSPAs: they are for the most part Natura 2000 sites and most of them are located in the territorial sea, some in close proximity to the shores.[142] In addition, not all sites have been protected under national legislation and only a few of them have a management plan or monitoring programmes in place. The effectiveness of the regime depends on the will of the Baltic States and the HELCOM does not have strong instruments at its disposal to bring about

138 The area can be designated as a BSPA if it meets the specific criteria mentioned in Para. 2 of the Designation Guidelines and its proposed status corresponds with the IUCN Categories of protected areas.

139 The Management Guidelines (Para. 6) identify harmful human activities that should be regulated in the management plans: a) restriction of activities in extent; b) restriction of activities in space (including zoning); c) restriction of activities in time (e.g., during breeding seasons or spawning periods); d) maintenance of sustainable and traditional uses when appropriate; e) alteration of procedures (e.g., the reintroduction of traditional sea-use practices); f) substitution of materials or substances; g) a total ban on activities or the demolition of constructions; and h) restoration, reintroduction.

140 In the past few years, the HELCOM has paid increasing attention to promoting sustainable fisheries practices and intensified cooperation with the International Baltic Fishery Commission (IBSFC), the new Baltic Regional Advisory Council under the EC Common Fisheries Policy and the EC Commission (DG FISH).

141 See Decision of the 18th meeting of the Heads of Delegations (HELCOM HOD), 12-3.12.2005. The same conclusions apply to the designation of Emerald Network sites by the Russian Federation.

142 Report on "Initial analysis on the status of ecological coherence of the BSPA Network", prepared by the Secretariat on 3.05.2006 for HELCOM HABITAT 8, which will take place on 15-19.05.2006. BSPAs have been designed by Finland (20 sites), Germany (2 sites), Latvia (3 sites), Lithuania (3 sites), Poland (1 site) and Sweden (3 sites).

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full compliance with its recommendation. In 2004, HELCOM HABITAT announced its intention to adopt a new Annex on the "Sustainable use of marine natural resources, nature conservation and biodiversity".[143] This Annex may transform the political commitments under Recommendation 15/5 into legally binding obligations. However, there are no records of any subsequent developments.

Like OSPARCOM, HELCOM plays a central role in coordinating the work and promoting consistency and uniformity among the different MPA regimes applying to the Baltic Sea. In 2004, HELCOM HABITAT adopted a HELCOM Project for the implementation of the Joint HELCOM/OSPAR Working Programme on MPAs, which will be discussed below. This Project intends to ensure, *inter alia*, the full implementation of HELCOM Recommendation 15/5 and the consistent implementation of the BSPA system, the Natura 2000 network and the Emerald Network in the Russian Federation.

8.5.3 Joint HELCOM/OSPAR Network of MPAs

In 2003, at the First Joint Meeting of the OSPARCOM and HELCOM (Joint HELCOM/OSPAR Meeting) held in Bremen, Ministers of the contracting parties to the two Conventions endorsed their commitments under HELCOM Recommendation 15/5 and the 2003 OSPAR Recommendation. In particular, they agreed to identify the first set of sites by 2006 and to complete by 2010 a joint network of well-managed marine protected areas that, together with the NATURA 2000 network, is ecologically coherent.[144] Moreover, they adopted a joint working programme to ensure that the Declaration is implemented consistently across the Helsinki and OSPAR marine areas as well as with the envisaged future cooperation with the BARCON (and the Arctic Council) on these issues.[145] The relevant work is coordinated respectively by MASH in OSPAR and HELCOM HABITAT in the Helsinki system.

The joint HELCOM/OSPAR network will be developed and implemented in close collaboration with the EC and will be consistent with the EC Natura 2000 network and the European Marine Strategy. This represents an important framework to strengthen cooperation and ensure consistency between these regimes. Despite their political weight, however, these initiatives are non-legally binding and, considering the slow progress discussed in previous paragraphs, a real commitment seems to be still lacking.

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143 See HELCOM HABITAT 6/2004, Annex 7, p. 28. The draft Annex should be submitted to HELCOM HABITAT 7/2005 and HELCOM 27/2006.

144 See: Joint HELCOM/OSPAR Bremen Declaration, Para. 17, available at: www.helcom.fi/stc/files/MinisterialDeclarations/HelcomOsparMinDecl2003.pdf

145 *Ibid.,* Para. 18.

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8.5.4 *The 1995 Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean (SPA Protocol)*

The Special Areas regime under the BARCON is particularly detailed compared to the OSPAR and Helsinki systems.[146] Article 10 of the BARCON, which can be seen as an implementation of Article 194(5) of the LOSC, requires parties to take "all appropriate measures" to protect and preserve biological diversity, rare and fragile ecosystems as well as species of wild flora and fauna which are rare, depleted, threatened or endangered and their habitats.[147] This broad obligation has been further specified in the 1982 Special Protocol Concerning Mediterranean Specially Protected Areas. In 1995, this Protocol was replaced by a new Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean (1995 SPA Protocol).[148] The new Protocol was adopted to implement the CBD in the Mediterranean Sea and it incorporates many elements of that Convention. The Regional Activities Centre (RAC/SPA) assists contracting parties in the implementation of the SPA Protocol, while the annual meetings of the National Focal Points supervise the implementation.[149]

Unlike the previous Protocol, which only applied to the territorial sea, the 1995 SPA Protocol extends to all Mediterranean waters irrespective of their legal status, including internal waters, territorial seas, high seas, the seabed and its subsoil (Article 2(1)). The application of the SPA Protocol to the high seas appeared to be necessary, in the first place, to protect highly migratory species, such as marine mammals,[150] but its provisions are without prejudice to the traditional freedoms and rights of navigation belonging to third States under customary international law and the law of the sea (Article 2(2)).[151] At the same time, the Protocol recognizes that the exercise of traditional rights and freedoms by third States in the Mediterranean Sea may compromise the effectiveness of its regime. Contracting parties, therefore, "shall invite" third States

146 For a detailed discussion of the BARCON regime, see: C. Chevalier (2004); T. Scovazzi in H. Thiel and J.A. Koslow (eds.) (2001), pp. 185-93; T. Scovazzi (1999), pp. 82-99; T. Scovazzi (1996), p. 95.

147 Unlike the LOSC, Article 10 expressly refers to species. See D. Owen (2001), p. 63.

148 The 1995 SPA Protocol, adopted on 10.06.1995, to force on 12.12.1999, is not an amendment to the 1982 Protocol, but an entirely new treaty. The Text is available at: www.oceanlaw.net/texts/unepmap2.htm. In 2004, the Strategic Action Plan for Biodiversity in the Mediterranean Region (SAP-BIO) was adopted to facilitate the implementation of the SPA Protocol.

149 See: "The SPA Protocol and the activities carried out by the RAC/SPA" available at: www.faocopemed.org/reports/mpas/rac_spa.pdf.

150 See Doc. UNEP (OCA)/MED/WG. 73/6, 18 September 1993.

151 1995 SPA Protocol, Article 2(2) reads: "Nothing in this Protocol nor any act adopted on the basis of this Protocol shall prejudice the rights, the present and future claims or legal views of any state relating to the law of the sea, in particular, the nature and the extent of marine areas, the delimitation of marine areas between states with opposite or adjacent coasts, freedom of navigation on the high seas, the right of innocent passage in territorial seas, as well as the nature and extent of the jurisdiction of coastal states, the flag state and the port state".

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and international organizations to cooperate in the implementation of the Protocol (Article 28.1) and undertake to adopt appropriate measures, consistent with international law, to ensure that no one engages in any activity which is contrary to the principles or purposes of the Protocol (Article 28.2).

Article 3 of the SPA Protocol places contracting parties under a number of general obligations, including the duty to protect, preserve and manage, in a sustainable and environmentally sound way, areas of particular natural or cultural value, "*notably by the establishment of specially protected areas*".[152] These obligations have to be implemented without prejudice to the sovereignty or jurisdiction of other parties or third States, and any measure taken to enforce these measures must be in conformity with international law (Article 3(6)).

The Protocol, however, does not lay down any positive legal duty to establish protected areas. It is up to each contracting Party to take the initiative in choosing between two kinds of areas, namely: "Specially Protected Areas" (SPAs) and "SPAs of Mediterranean Interest" (SPAMIs) with the purpose being to achieve one of the conservation objectives laid down in Article 4.[153] SPAs may be established "unilaterally" by coastal States in areas under their sovereignty or jurisdiction and they present strong similarities to OSPAR MPAs and BSPAs. Within the SPAs the proposing State(s) shall take all the necessary protective measures (Article 6)[154] as well as planning, management, supervision and monitoring measures (Article 7) acting in conformity with international law.

With regard to the second category of areas the SPA Protocol is particularly innovatory. SPAMIs may be established "multilaterally" by contracting parties in order to promote cooperation in the management and conservation of the natural heritage of

152 In addition, Article 3 contains a duty to protect, preserve and manage threatened or endangered species of flora and fauna. This duty is further specified in Part III of the 1995 Protocol dedicated to the protection and conservation of species, which was completely absent in the 1982 Protocol. Part III, however, does not contain specific provisions on special areas and remains outside the scope of this chapter. In addition, Article 3 contains general duties similar to those under the CBD.

153 These objectives mirror the ones under the CBD. Article 4 expressly refers to SPAs, but it is generally agreed that it also applies to SPAMIs.

154 The protective measures which may be adopted within the SPA are very broad and include, *inter alia*: (b) the prohibition on dumping wastes and other dangerous substances; (c) the regulation of the passage, stopping and anchoring of ships; (e) the regulation of activities involving the exploitation of the soil, subsoil, and seabed; (g) the regulation of fishing, hunting, taking of animals, plants, part of plants, which originate in the SPA; (h) the regulation of any activity likely to harm or disturb the species or the state of conservation of the ecosystems or the natural and cultural characteristics of the SPA; (i) "*any other measures aimed at safeguarding ecological and biological processes and the landscape*" (emphasis added).

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the region.[155] A SPAMI may be established in the territorial waters of one or more parties or on the high seas (Article 9.1) and should be the core of a network aiming at the effective conservation of the Mediterranean heritage.[156] Parties are under a legal duty to draw up a special list of sites that fulfill at least one of the ecological criteria set out in the Protocol and are representative of the Mediterranean region and its biodiversity (the so-called SPAMI List).[157]

The proposal for inclusion in the SPAMI List may be submitted by the concerned party or by more parties, when the SPAMI lies wholly or in part in the high seas, but the final decision to incorporate the site into the list is taken by the Meeting of the Parties to the SPA Protocol (SPA MOP).[158] When the SPAMI is situated on the high seas this decision has to be taken by consensus. The SPA MOPs may revise the SPAMI List and, in certain cases, may entirely or partially de-list a site.[159] SPAMIs should represent models for protection and good management practices. Hence, parties "shall" ensure that all areas included in the SPAMI List are provided with an adequate legal status, protective measures, management and monitoring plans and means for their implementation, which must be clearly indicated in each proposal.[160] Contracting parties undertake to comply with all measures adopted in the SPAMI and not to authorise nor commence any activities that might be contrary to the objectives of the area.[161] Finally, parties are expressly required to carry out EIAs before planning any projects or activities that may "significantly" affect protected areas (both SPAs and SPAMIs), species and their habitats (Article 17).

It is worth mentioning that the General Fisheries Commission for the Mediterranean (GFCM), of which the EC is a Member,[162] is responsible for the conservation and

155 The SPAMI regime is specifically regulated in Section II (Articles 8-10) and Annex I of the SPA Protocol. Annex I was adopted in Monaco on 24.11.1996 together with an Annex II (list of endangered and threatened species) and an Annex III (list of species whose exploitation needs to be regulated).

156 See Annex I, Para. A (d) laying down the guiding principles for the establishment of the SPAMI list.

157 Detailed criteria are listed in Article 8(2) and Appendix I of the 1995 SPA Protocol and mirror the criteria under the CBD.

158 The procedure for the establishment and listing of SPAMIs is set out in the 1995 SPA Protocol, Article 9.

159 *Ibid.*, Articles 9(6) and 10.

160 *Ibid.*, Article 9 (3) and (5) and Annex I, para. C (1). Annex I, Para. D, identifies some of the protection, planning, management and monitoring measures which parties must take in the area. Protection measures include, *inter alia*, the strengthening of the regulation of: (a) dumping; (b) introduction or reintroduction of any species into the area; (c) any activity or act likely to harm or disturb the species, or that might endanger the conservation status of the ecosystems or species or might impair the natural, cultural or aesthetic characteristics of the area.

161 *Ibid.*, Article 8(3) (a) and (b).

162 See Council Decision 98/416/EC.

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management of fisheries in the region. All conservation measures adopted within the SPAs/SPAMIs must therefore be consistent with GFCM recommendations.

The Mediterranean Network of SPAMIs was launched at the 12th MOP of the BARCON, in November 2001. Originally, the SPAMI List contained 12 sites, including the International Sanctuary for the Mediterranean Marine Mammals (Cetacean Sanctuary) between France, Italy and Monaco, a very large area (about 90,000 km2) extending to the high seas.[163] However, the SPAMI listing process is progressing very slowly and, since 2001, only six new sites have been included in the List.[164] In addition, the 18 sites inscribed so far do not even fulfill the basic requirement for being part of the List. Only a few of them have been fully protected and have a management plan in place. Except for the Cetacean Sanctuary, existing areas have small moderate sizes, are not well distributed and are not representative of the wide Mediterranean region and its biodiversity.[165] The 14th MOP of the BARCON, in November 2005, invited the contracting parties to consider the establishment of new MPAs, in particular in the high seas, on the basis of existing scientific knowledge and in accordance with the commitments undertaken at the COP-7 of the CBD.[166] In addition, it called for further work to facilitate the development, before 2012, of a representative network of MPAs.

This limited progress is the result of different factors. From a legal point of view, the regime under the 1995 SPA Protocol is rather weak and its effectiveness largely depends on the political will of the Mediterranean States. It is entirely up to the single Party to take the initiative to designate SPAs/SPAMIs and to decide on how to protect the site. There is no strong mechanism under the BARCON to ensure full compliance with this regime and the lack of implementation and enforcement, together with resource constraints, is a major problem in the Mediterranean Sea. Despite these limits, the 5th UN ICP (2004) indicated the 1995 SPA Protocol as a possible model for a global mechanism for the designation and management of MPAs in the high seas.

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163 The Sanctuary was established by the 1999 Agreement between France, Italy and Monaco (into force on 21 February 2002). For a full discussion on the Sanctuary see: T. Scovazzi (2001).

164 E.g., G. Notarbartolo di Sciara (2003). At the 14th MOP, in November 2005, three additional sites were proposed for inclusion in the SPAMI list. See: UNEP (DEPI)/MED IG.16/13, Annex III (Recommendation II.B.2, Para. 1).

165 Existing SPAMIs are mainly located in France, Spain, and Tunisia. Existing SPAs are also mainly concentrated in the North and Western Mediterranean Sea.

166 14th MOP, Recommendation II.B.2, *supra* n. 164, Para. 3. The MOP also invited the parties to assess and identify SPAMIs which are exposed to risks by shipping activities and could be proposed for designation as PSSAs by IMO (*ibid., Para. 4).*

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8.5.5 Other Regional MEAs Providing a Legal Basis for the Establishment and Management of MPAs

To complete the picture of the complex regime governing the establishment and management of MPAs in European seas it is important to briefly mention two additional Regional Agreements. First of all, the Agreement on Conservation of Cetaceans of the Black Sea, Mediterranean and Contiguous Atlantic Area (ACCOBAMS), concluded in November 1996 under the umbrella of the 1979 CMS, reinforces the regime under the 1995 SPA Protocol of the BARCON.[167] Although the EC is not a Party to the ACCOBAMS, some Mediterranean member states and candidate countries have ratified it, and briefly outlining its main characteristics is therefore worthwhile.[168] The primary objective of the Agreement is "to achieve and maintain a favourable conservation status for cetaceans" by, *inter alia*, establishing a network of specially protected areas (Article II.1).[169] The SPA Protocol is indicated as the most appropriate framework for establishing such areas.[170] The ACCOBAMS, like the SPA Protocol, applies to all maritime waters of the Mediterranean (and the Black Sea) independently from their juridical status, including high seas and internal waters (Article I.1(a)) and is without prejudice to the freedom of navigation and other rights and duties of States under the law of the sea (Article I.1(b)). As far as fisheries activities are concerned, parties may apply protective measures in waters within their sovereignty and/or jurisdiction, and outside these waters in respect of vessels flying their flag (Article II.3). Fisheries-related measures under ACCOBAMS, however, must be consistent with GFCM recommendations.

The work on protected areas under ACCOBAMS is still at the very beginning. At their Second Meeting, held in November 2004, the contracting parties charged the Scientific Committee with, *inter alia*, drafting criteria for the selection of the sites, identifying putative sites containing habitats important for cetaceans, including areas located in the high seas, and drafting Guidelines for their management. Like in the SPA Protocol, parties have to take the initiative and submit their proposal for the designation of ACCOBAMS sites to the Meeting of the Parties. In the meantime, Mediterranean

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167 ACCOBAMS has been concluded on the basis of Article IV (4) of the CMS (see Article I (4) ACCOBAMS) and it entered into force on 1.06.2001. The Text is available at: www.oceanlaw.net/texts/accobams.htm.

168 Currently ACCOBAMS has 20 Parties: Albania, Bulgaria, Croatia, Cyprus, France, Georgia, Greece, Italy, Lebanon, Libya, Malta, Monaco, Morocco, Portugal, Romania, Slovenia, Spain, Syria, Tunisia, and Ukraine, including eight EU Member States. The EC is a party to the CMS, but has not acceded to ACCOBAMS. Probably, given the strong synergy between ACCOBAMS and the 1996 SPA Protocol of BARCON, the EC does not consider accession to ACCOBAMS to be a priority.

169 In particular, parties "shall endeavour" to establish and manage specially protected areas for cetaceans corresponding to their critical habitat and feeding grounds (Annex II, Article 3).

170 Similarly, the SPA Protocol lists all cetacean species protected under ACCOBAMS. In 2001 RAC/SPA and the ACCOBAMS Secretariat concluded a cooperation agreement to ensure consistency between the two regimes.

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parties are urged to make wide use of the SPAMI concept to protect areas which are important for cetacean conservation, especially in the high seas.

Second, it is worth mentioning the Bern Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention), which was adopted in 1979 under the auspices of the Council of Europe.[171] The aim of the Convention is to conserve species of wild flora and fauna listed in Appendices I and II and their habitats, with particular attention being paid to migratory species listed in Appendix III.[172] For this purpose the Convention requires Parties to take "appropriate and necessary legislative and administrative measures"[173], but leaves them free to determine the specific means to achieve the Convention's objective.[174] The Standing Committee is responsible for monitoring the application of the Convention and may adopt Recommendations and Resolutions regarding the implementation and further development of the Convention.[175] Originally, the Bern Convention focused on terrestrial and freshwater habitats and species and gave little attention to the marine environment. At its 19th meeting (1999), the Standing Committee urged the Bern Convention to provide leadership in marine nature conservation in the European region by concentrating on marine habitats, biotypes and species, particularly those important to fish, invertebrates and seaweeds, and including offshore and deep-sea areas.[176] As a response, a growing number of marine species of flora and fauna have been listed in the Appendices to the Convention.[177]

The Bern Convention does not contain any specific provision on the establishment and management of protected areas. However, it provided the legal basis for the development of programmes that, despite their recommendatory nature, have significant political force. In June 1989, the Standing Committee launched the idea of establishing a pan-

171 Bern, 19.09.1979, in force on 1.06.1982. The Text is available at: http://conventions.coe.int/Treaty/en/Treaties/Word/104.doc.

172 Bern Convention, Article 1.

173 All obligations are laid down in *ibid.,* Articles 2, 3, 4, 5 and 6.

174 *Ibid.*, Article 12.

175 *Ibid.*, Articles 13, 14 and 15. The Standing Committee consists of representatives of each contracting Party. In addition, the Convention has set up a Group of Experts and a Secretariat.

176 See 19th Standing Committee, Strasbourg 29.11/3.12.1999, Draft Report on "Conservation of Marine Habitats and Species in Europe" (Doc. T-PVS (99) 56, Para. 4). The Reports of the Meetings of the Standing Committee are available at: www.coe.int/T/E/Cultural_Co-operation/Environment/Nature_and_biological_diversity/Nature_protection/meetings_reports.asp#.

177 Certain species of sea grass, such as the *Posidonia oceanica* and the *Zostera marina*, and many species of seaweeds, are now listed in Appendix I (strictly protected flora species); marine seals, whales, dolphins, reptiles, many fish which migrate through estuaries, most marine birds, sponges, corals and different varieties of molluscs are listed in Appendix II (strictly protected fauna species) and in Annex III (protected fauna species).

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European network of protected areas.[178] For this purpose it recommended the Parties to the Bern Convention to take steps towards the designation of Areas of Special Conservation Interest (ASCIs) and to ensure that the necessary and appropriate conservation measures are taken for each area.[179] However, the relevant work has been delayed in order to ensure coherence with the regime under the EC Habitats Directive, adopted in 1992. In 1996, when the work on the creation of the Natura 2000 was already at an advanced stage, the Standing Committee launched the Emerald Network of ASCIs as the common operative tool for the protection of habitats under the Bern Convention.[180] Ten years later, however, the establishment of the Network is still in a preliminary phase.[181] This is mainly due to the fact that the Emerald Network is based on a non-legally binding Resolution, which merely has recommendatory force.[182] Given that most parties to the Bern Convention are also EC member states, they have given priority to the implementation of their legal obligations under the Habitats Directive. However, since Natura 2000 under the Habitats Directive and the Emerald Network have the same objectives and are based on the same principles and criteria, the full implementation of Natura 2000 by EC member parties may provide the Emerald Network with a legal status.[183]

Given the strong synergy between the two networks, the Emerald Network may be considered as an extension of Natura 2000 to non-EC countries, including the Russian Federation.[184] Such a synergy may greatly contribute to the development of a uniform system of protected areas in the wider European region.

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178 Resolution No.1, 1989; and Recommendations No. 14, 15, 16 and 25 (1989), all available at: www.coe.int/T/E/Cultural_Co-operation/Environment/Nature_and_biological_diversity/Nature_protection/Recommendations.asp#.

179 See Recommendation No.16 (1989) on Areas of Special Conservation Interest (ASCIs).

180 See Resolution No. 3 (1996) setting up the Emerald Network which would include the ASCIs under Recommendation No. 16 and Resolution No. 5 (1998) on rules for the Emerald Network.

181 On the progress in setting up the Emerald Network see: www.coe.int/T/e/Cultural_Co-operation/Environment/Nature_and_biological_diversity/Ecological_networks/The_Emerald_Network/02General_information.asp#P173_24745.

182 The Standing Committee examined the possibility to integrate the Emerald Network into the text of the Convention to reinforce its legal status, but, to date, it has not taken a decision in this direction.

183 See Resolution No. 5 (1998) which stipulates that "for contracting parties which are Member States of the European Union Emerald Network sites are those of the Natura 2000".

184 The Russian Federation is a party to the Bern Convention. Given the fact that the conservation of migratory species requires cooperation with non-European countries, Article 20 invites African States to accede to the Convention.

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8.6 The Protection of Areas Particularly Vulnerable to International Shipping

Before concluding the discussion on the international regime on the establishment and management of MPAs, it is important to address a *sui generis* category of protected areas, namely: Special Areas under the IMO's regulatory regime for shipping. Generally speaking, the LOSC provides coastal States with ample possibilities to manage activities (e.g., dumping) and extractive uses (including mining and fisheries) within waters under their sovereignty or jurisdiction as long as they do not interfere with the freedom of navigation and do not unilaterally restrict international shipping.[185]

Since the early 1970s, it became evident that some marine areas due to their ecological, oceanographic and socio-economic characteristics are particularly exposed to the threat posed by maritime transport and require special protection. Of particular concern are areas located beyond the territorial sea (i.e., the EEZ and high seas) and in international straits where the capacity of coastal States to adopt mandatory measures which are more stringent than international standards is significantly restricted. Global safety and anti-pollution standards might be insufficient to reduce the risk in these regions. This situation may limit to a great extent the effectiveness of existing MPA regimes in regional seas, such as the Mediterranean, Baltic and North-East Atlantic, which are among the most trafficked seas in the world.

International law offers three main multilateral mechanisms for increasing control over international shipping in particularly vulnerable areas, namely: special areas in the EEZ under Articles 211(6) and 234 of the LOSC, Special Areas under MARPOL 73/78 and PSSAs under the IMO Guidelines.[186] All these mechanisms, except Article 234, have one element in common: they always need the IMO's approval. It is important to stress that these Special Areas are not designed to provide comprehensive protection for sensitive sites, but their scope is exclusively restricted to controlling certain aspects of shipping. Therefore, they cannot be classified as real MPAs, but they are important tools to complement the action taken under existing MPA regimes and to ensure an effective and integrated control of all hazardous activities in the area, including shipping.

8.6.1 Special Areas under Articles 211(6) and 234 of the LOSC

The possibility to establish a more stringent regime for the control of shipping in exceptionally vulnerable areas was a highly controversial issue during the UNCLOS

185 E.g., A. Merialdi in: T. Scovazzi (1999), p. 43. See also the submission by Australia in MEPC 30/19/4, 19.09.1990.

186 Routing measures (e.g., ATAs, TTSs and sea lanes) and traffic surveillance (e.g., SRSs and VTSs) are other effective means to reduce the impact of shipping on sensitive areas. For a detailed discussion on these measures, see J. Roberts (2005), pp. 139-59 and H. Ringbom (1996), pp. 50-72.

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III negotiations and met with firm opposition from maritime states.[187] What was contested, however, was not the concept of protected areas *per se* or the necessity for a special regime, but the capacity of coastal states to take unilateral action.[188] As a compromise solution, the establishment of special areas in the EEZ and the adoption of mandatory measures therein have been placed under the control of the IMO.

According to Article 211(6) of the LOSC, when coastal States prove that existing international standards do not meet the special requirements of a "clearly defined area" of their EEZ which due to oceanographic, ecological and socio-economic factors and the particular character of the maritime traffic requires special protection, they may submit a proposal to IMO for the adoption of special mandatory measures. It is up to the IMO to verify whether the area meets all the conditions for the creation of the area and for the adoption of special measures.[189] These conditions are cumulative. Article 211(6) simply requires that it must be an area of the EEZ clearly defined by geographical coordinates, but it does not impose size restrictions.[190]

Two kinds of measures may be adopted within the special area. The first category includes "laws and regulations for the prevention, reduction and control of pollution from vessels implementing such rules and standards or navigational practices as are made applicable, through the organization, for special areas" (Article 211(6)(a)).[191] These measures do not seem to be restricted to Special Areas under MARPOL 1973/78,[192] but may include all measures that may be adopted by the IMO for the protection of vulnerable areas from the impact of shipping (e.g., mandatory ATBAs, precautionary areas under Regulation V/8 SOLAS, SRSs and VTSs).[193] The second category includes: "additional laws and regulations" previously approved by IMO (Article 211 (6)(c)). These additional measures may relate to discharge standards and/or navigational practices and may be more stringent than international standards, but they shall not require foreign vessels to observe CDEMs other than the generally accepted international standards. These "additional" laws and regulations may be defined by coastal States also outside the existing IMO regulatory regime and, presumably, may include measures which are

187 See, e.g., Caracas Session (1974), Canada [and others]: draft articles on a zonal approach to the preservation of the marine environment (A/CONF.62/C.3/L.6, 3.7.1974, in Official Records, III, 249).

188 See e.g., Belgium [and others] draft article on prevention, reduction and control of marine pollution (A/CONF.62/C3/L.24 of 21.031975, in: Official Records, IV, 210-12).

189 The detailed procedure for approval by the IMO is laid down in LOSC, Article 211(6)(a).

190 E.g., comments by DOALOS on the consistency of the WE PSSA with Article 211(6), *infra* n. 229.

191 For a more detailed analysis: E.J Molenaar (1998), pp. 404-6 and H. Ringbom (1996), pp. 30-2.

192 According to some authors these measures are limited to MARPOL Special Areas. E.g., A.E. Boyle (1985), p. 36; K. Hakapää (1981), p. 254; A. Merialdi (1999), p. 33.

193 K.M. Gjerde and D. Ong (1993), p. 11; B. Kwiatkowska (1989), p. 174; E. Molenaar (1998), p. 405; H. Ringbom (1996), p. 32; F. Spadi (2000), p. 295; G. Timagenis (1980), pp. 612-3. See also "Follow-up Action to UNCED", Note by the IMO Secretariat (1993), MEPC 34/INF.6, p. 9.

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not yet available in any existing IMO instrument.[194] According to the LOSC Commentary, indeed, Article 211(6) "does not *impose any limitation upon the organization's [IMO] freedom of action in the matter, or on that of the States members of the organization in their participation in the organization*"(emphasis added).[195] It is possible to conclude that measures pursuant to Article 211(6) may be determined on a case-by-case basis choosing within the general categories of rules, standards and navigational practices designed to prevent vessel-source pollution. These measures always require the IMO's approval, which ensures the consensus of the international community as a whole.

Once approved, the special mandatory measures may be enforced against all vessels entering the area regardless of their flag and port of destination. However, Article 220(8) makes it clear that the status of special areas under Article 211(6) does not alter the enforcement jurisdiction of coastal States in the EEZ. So far, no coastal state has applied for Special Areas under Article 211(6) and the IMO has not taken any action in this direction.[196]

Only in ice-covered areas located within the EEZ does the LOSC allow coastal States to unilaterally increase safety and anti-pollution requirements, including CDEMs, without going through the IMO (Article 234).[197] It must be an area in which particularly severe climatic conditions exist, where the presence of ice for most of the year creates obstructions or exceptional hazards to navigation and where the pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance.[198] In these special areas, coastal States may adopt their own national laws and regulations and enforce them against all ships in transit as long as they are non-discriminatory, have due regard to navigation and are based on the best available scientific evidence.

194 Indeed, there is no reference to "implementing IMO rules and standards" as in Para. (a); see: E. Molenaar (1998), p. 407. H. Ringbom (1996), p. 33, provides some examples of Para. (c) measures, such as rules for the Black Sea on the limitation of grey waters or compulsory pilotage which are not regulated in any IMO instrument.

195 S. Rosenne and A.Yankov (1991) (eds.), p. 205.

196 This is probably due to the complexity of and the lack of clarity concerning the procedure under Article 211(6).

197 Article 234 is the only real exception to the EEZ regime. According to E.J Molenaar (1998), p. 419 and H. Ringbom (1996), p. 25, this regime may also apply to ice-covered areas in the territorial sea.

198 There is no definition of ice-covered areas in the LOSC and there is no clarification as to what is meant by "most of the year". Given that local ice conditions may vary to a great extent from year to year, what has to be considered is the general characteristics of the climate and its relation both to ecology and navigation in the region (S. Rosenne and A. Yankov (eds.) (1991), p. 397).

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8.6.2 Special Areas under MARPOL 73/78

MARPOL 73/78 recognizes that some areas of the sea, especially enclosed or semi-enclosed seas, due to their oceanographic and ecological conditions and vessel traffic characteristics, are particularly vulnerable to vessel-source pollution and need a higher level of protection.[199] The Convention therefore provides for the establishment of Special Areas where more stringent discharge standards will apply for substances regulated in Annexes I (oil and oily mixtures), II (noxious liquid substances) and V (garbage).[200]

The conditions for the identification of Special Areas under MARPOL are similar to those for Special Areas under Article 211(6) of the LOSC.[201] The proposal for designation may be submitted by one or more coastal States to the MEPC, which verifies whether the area meets all the criteria. The designation of Special Areas occurs through a formal amendment of the Annexes of MARPOL.[202] This ensures the full participation of all States potentially affected by the multilateral establishment of the Area.

Special Areas under MARPOL differ from the Special Areas under Article 211(6) of the LOSC in two main aspects. On the one hand, their material scope is narrower and limited to controlling discharges of specific substances.[203] On the other hand, their geographical scope is broader and not restricted to the EEZ, but may encompass an entire enclosed or semi-enclosed sea, including waters beyond the limits of national jurisdiction.[204]

All European seas, including the Baltic Sea area, the Mediterranean Sea area and the North-West European Waters (and the Black Sea) are Special Areas under Annex I. Thereby, all discharges of oil or oily mixtures (including oil sludge and discharges from

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199 The debate over special areas was one of the most contentious during the MARPOL Conference in 1978 and the concept met with strong opposition from flag States, the shipping industry and oil companies (e.g., Statement by the Oil Companies International Marine Forum in IMCO Doc. MP/CONF/8/2, p. 5). For a full discussion on MARPOL's Special Areas: E.J. Molenaar (1998), pp. 431-35 and H. Ringbom (1996), pp. 46-50.

200 A Special Area under MARPOL is defined as "a sea area where for recognized technical reasons in relation to its oceanographical and ecological condition and the particular character of its traffic, the adoption of special mandatory methods for the prevention of sea pollution is required" (i.e., Annex I, Reg. 1(19); Annex II, Reg. 1(7) and Annex V, Reg. 1(3)). There are no stricter discharge provisions for Annex III (packaged harmful substances) and Annex IV (sewage). Areas may also be designated as SOx Emission Control Areas (SECA) under Annex VI. On SECA see: E.J. Molenaar (1998), pp.432-33.

201 These criteria are specified in detail in the IMO Guidelines for the Designation of Special Areas under MARPOL in Res.A 927(22), November 2001, Annex I (amending Res. A.720 (17); November 1991), Paras. 2.3 to 2.6.

202 Res. A 927(22), Annex I, Para. 3.4. The amendment procedure is set out in Article 16 of MARPOL.

203 E.g., S. Rosenne and A.Yankov (eds.) (1991), p. 181; A. Merialdi in T. Scovazzi (1999), p. 34; B. Kwiatkowska (1989), p. 174.

204 Res. A 927(22), Annex I, Para. 2.2. See S. Rosenne and A.Yankov (eds.) (1991), p. 181.

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the machinery spaces of ships)[205] exceeding 15 ppm are prohibited and stricter requirements for port reception facilities apply in these areas.[206] Moreover, ships operating in Special Areas under Annex I have to be fitted with special equipment, such as oil separation equipment or filters, and must retain on board or deliver to port reception facilities all oil residues that cannot be discharged into the sea.[207] The Baltic Sea is also a Special Area under Annex II of MARPOL where more stringent controls on tank washing and residue discharge procedures with regard to noxious liquid substances apply.[208] Additionally, the Baltic Sea, the Mediterranean Sea and the North Sea are Special Areas under Annex V, where the discharge of "garbage", including all kinds of victual, domestic and operational waste generated during the normal operation of the ship, is strictly regulated and the disposal of any kind of plastic is totally prohibited.[209] Finally, the Baltic Sea area and the North Sea have been designated as SOx Emission Control Areas (SECA) under Annex VI with more stringent controls on sulphur emissions from ships.[210]

8.6.3 Particularly Sensitive Sea Areas (PSSAs) and the adoption of Associated Protective Measures (APMs)[211]

The concept of PSSAs is not a legal one and it emerged in the IMO's practice in the late 1970s.[212] Unlike MARPOL Special Areas, PSSAs are not regulated in a Convention, but in a 1991 IMO Assembly Resolution setting out the Guidelines for Designation of Special Areas under MARPOL 73/78 and the Identification of Particularly Sensitive Sea Areas.[213] These Guidelines were updated and simplified in 2001.[214] Given the

205 However, there is an exception for discharges of processed bilge water from machinery spaces unless they meet specific conditions. See: MARPOL, Annex I, Regulation 10(3)(b)).

206 Moreover, all discharges at sea shall not contain chemicals or other substances in quantities or concentrations that are hazardous to the marine environment. See, for details, MARPOL, Annex I, Regulations 9 and 10.

207 MARPOL, Annex I, Regulations 16-19.

208 See MARPOL, Annex II, Regulation 5.

209 See MARPOL, Annex V, Regulations 3 and 5.

210 Annex VI and the Baltic SECA entered into force on 19.05.2005, while the North Sea SECA will enter into force on 21.11.2006.

211 This section builds on V. Frank (2005), pp. 28-38.

212 The concept was formulated for the first time in Resolution 9 during the 1978 International Conference on Tanker Safety and Pollution Prevention. For a legal analysis of PSSAs see, e.g., L. de La Fayette (2001), pp. 185-94; K.M. Gjerde in H. Thiel and J.A. Koslow (2001), pp. 123-31; K.M. Gjerde and D. Freestone (1994), p. 431-68; E.J. Molenaar (1998), pp. 438-43; H. Ringbom (1996), pp. 72-83.

213 Resolution, A.720 (17), 6. 11. 1991. On the drafting history of the PSSA Guidelines see: G. Peet (1994), pp. 469-506.

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lack of any legal basis, the PSSA regime and its effects have always been quite controversial.[215] Until recently, Governments have not taken full advantage of this instrument.[216] However, in the aftermath of the *Prestige* accident in 2002, the trend has changed. Six new areas have been designated as PSSAs[217] including the Western European Atlantic (MEPC 52),[218] the Baltic Sea (MEPC 53)[219] and the Canary Islands (MEPC 53),[220] and new PSSA proposals may be submitted in the future, *inter*

214 Resolution, A.927 (22), 29.11.2001, amending Resolution A.720 (17), on the Designation of Special Areas under MARPOL 73/78 and Guidelines for the Identification *and Designation* of Particularly Sensitive Sea Areas (emphasis added). In March 2003, MEPC adopted a guidance document for the submission of PSSA proposals to IMO (MEPC/Circ.398, 27.03.2003). For a critical analysis of the 2001 Guidelines see: L. de La Fayette (2001), pp. 143-44 and K.M. Gjerde (2001), pp. 123-31.

215 See: First, Second and Third Meeting of Legal Experts on PSSAs in: MEPC 33/INF.27 (1992); MEPC 35/INF.17 (1993) and MEPC 36/21/4 (1994) all available in IJMCL (1995), Special Edition on PSSAs, pp. 437-68. According to H. Ringbom (1996), p. 73, the concept of PSSA does not necessarily provide any completely new methods for tackling pollution from ships beyond those already available under the LOSC, IMO instruments and existing international law. See also MEPC 51/8/4, submitted by BIMCO, ICS, INTERCARGO, INTERTANKO, OICF, and IPTA (Para. 4), questioning the legal basis of PSSAs.

216 Before the *Prestige*, there were five PSSAs in place: the Great Barrier Reef, Australia (1990), Sabana-Camaguey Archipelago, Cuba (1997), Malpelo Islands, Colombia (2002), Florida Keys, US (2002), and the Wadden Sea, Denmark, Germany and the Netherlands (2002).

217 See: Paracas National Reserve PSSA (MEPC 49), Galápagos Archipelago PSSA (MEPC 53), and the extension of the Great Barrier Reef PSSA to include the Torres Strait (MEPC 53).

218 MEPC 49/8/1, 11.04.2003, submitted by six EC member states (i.e., Belgium, France, Ireland, Portugal, Spain and the UK) to MEPC 49. See V. Frank (2005), p. 31.

219 MEPC 51/8/1, 19.12.2003, submitted by 9 EC Baltic States (Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland and Sweden) to MEPC 51. See on that V. Frank (2005), p. 32 and Chapter 6.5.2. The Baltic PSSA was designated "in principle" at MEPC 51 (March 2004). In July 2005, NAV 51 approved the proposed APMs (NAV 51/3/6) and MEPC 53 (July 2005) formally designated the Baltic Sea as a PSSA. Until the very last minute, the Russian Federation opposed the designation. Eventually the US delegation came up with a compromise text which makes it clear that the Baltic PSSA does not include marine areas within the sovereignty of the Russian Federation, or subject to its sovereign rights and jurisdiction under Article 56 LOSC and does not prejudice the sovereign rights and jurisdiction of the Russia Federation under international law in the area (MEPC 53J/10). In December 2005, the IMO Assembly adopted the APMs in the Baltic PSSA, which will become operational on 1.07.2006. The Russian Federation informed the Assembly that it would support and implement the new measures as routing measures, not as APMs, since it did not associate itself with the decision to designate the Baltic Sea as a PSSA (see 2006 UNSG Report, Para. 216).

220 MEPC 51/8, 24.10.2003, submitted by Spain. NAV 51 approved new APMs in the area: i.e., a new TSS, recommendatory ATBAs and a mandatory SRS for certain kinds of tankers (MEPC 53/8/5). At MEPC 53 the area was formally designated as PSSA.

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alia, in the Mediterranean Sea.[221] The increase in PSSA submissions prompted a strong reaction by maritime States and the shipping industry, worried about the negative repercussions of these initiatives on the traditional freedom of navigation.[222] In January 2004, the Russian Federation, Liberia and Panama, supported by the shipping industry, called for a revision of the existing PSSA Guidelines which were considered to be too broad and vague in their wording and open to different and excessively liberal interpretations.[223] At MEPC 53, in July 2005, the PSSA Guidelines were reviewed with the objective of clarifying and, where appropriate, strengthening certain aspects and procedures for the identification and designation of PSSAs and the adoption of associated protective measures (APMs) therein.[224] The revised Guidelines were formally adopted by the 24th IMO Assembly in November 2005.[225]

Under the revised Guidelines, PSSAs are defined as "areas which need special protection through action by IMO because of their significance for recognized ecological or socio-economic or scientific attributes where such attributes may be *vulnerable to damage by international shipping activities*" (emphasis added).[226] Unlike MARPOL's Special Areas, therefore, the concept of PSSA is not restricted to pollution, but extends to any potential impact from international shipping on the marine environment including, for instance, noise, the introduction of alien species through ballast waters and dumping.[227]

A PSSA may be designated in areas "within and beyond the limits of the territorial sea".[228] The IMO guidelines implicitly recognize the possibility to designate PSSAs

221 See the 14th MOP of the BARCON (Recommendation II.B.2), *supra* n. 166. Reportedly, France and Italy are working on a submission for a PSSA in the Bonifacio Strait; Croatia, Italy, and Slovenia are exploring the possibility of a PSSA in the Adriatic Sea, and this is also true of Spain in the Balearic Islands, and Norway in the Barents Sea.

222 On the flag states' and the shipping industry's reactions see: V. Frank (2005), pp. 34-7.

223 MEPC 51/8/3, submitted by the Russian Federation, Liberia and Panama and MEPC 51/8/4, submitted by BIMCO, ICS, INTERCARGO, INTERTANKO, OICF, and IPTA.

224 In March 2004, MEPC 51 approved the possibility of reviewing the Guidelines on the basis of specific proposals. Three proposals have been submitted, respectively, by the US (MEPC 52/8), the Russian Federation (MEPC 52/8/1) and the shipping industry (MEPC 52/8/3). MEPC 52 in October 2004 set up a Correspondence Group to revise the Guidelines using the US proposal as a basic text. The Group reported to MEPC 53 in July 2005 (MEPC 53/8/X). At MEPC 53 a Technical Group was instructed to prepare a draft final text of the revised Guidelines (MEPC 53/WP.15), which was approved in plenary session.

225 Resolution A.982 (24) amending Resolution, A.927 (22).

226 Revised PSSA Guidelines, Annex I (Para. 1.2).

227 According to the Revised PSSA Guidelines (Para. 7.5.2.4), for instance, APMs adopted in the area may relate to ship routing measures, reporting requirements, discharge restrictions, operational criteria and prohibited activities.

228 Revised PSSA Guidelines (Para. 4.3). All PSSAs established before the *Prestige* accident are located in the territorial sea, with the only exception being the Great Barrier Reef, which partially extends to the EEZ.

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in the high seas and do not impose any particular restriction on the size of an area.[229] To be eligible as a PSSA an area has to fulfill three conditions. First, it must meet at least one of the ecological, socio-economic and scientific criteria extensively articulated in the IMO guidelines.[230] These criteria are less stringent than the ones for MARPOL and LOSC Special Areas and are not cumulative. Second, the area must be at risk from international shipping.[231] Third, the associated protective measures (APMs) proposed in the area must have a clear legal basis and be within the competence of the IMO.[232] It is for the MEPC to determine whether the area meets these conditions. Governments with common interests in the area are invited to submit a coordinated proposal.[233]According to the revised guidelines, at least one APM has to be appended to a PSSA proposal at the time of the submission.[234] Each APM has to be adopted or approved by the competent committee or subcommittee (e.g., MSC or NAV) before the MEPC may formally designate the area as a PSSA.[235] The designation takes place by means of an MEPC resolution which, in a second stage, has to be endorsed by the IMO Assembly. It is worth recalling that all 164 IMO Members may participate in the adoption of MEPC/Assembly Resolutions, which are normally adopted by consensus.

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229 According to the PSSA Guidelines (Para. 4.5), a PSSA may be identified within a Special Area under MARPOL 73/78 "and *vice-versa*". Since Special Areas may include entire regional seas (e.g., the Baltic or the Mediterranean), it follows that a PSSA may also have a rather extended dimension. During the 2005 revision process, the Russian Federation (MEPC 52/8/1, p. 13) proposed to delete the words "and *vice-versa*" from the text of Para. 4.5. See also the comments by DOALOS on the consistency of the WE PSSA with Article 211(6) of the LOSC (LEG 87/WP.3, reproduced in LEG 87/17, Annex 7); L. de La Fayette (2001), p. 185 and K.M. Gjerde (2001), p. 127.

230 Revised PSSA Guidelines (Para. 4). The ecological criteria were amended in 2001 in order to incorporate the CBD criteria.

231 Revised PSSA Guidelines (Para. 5) and MEPC/Circ.398 (Paras. 3(3) and 3 (4)).

232 Revised PSSA Guidelines (Paras. 1.5 and 7.5.2) and MEPC/Circ.398 (Para. 1.2). The legal basis for APMs was one of the overarching issues during the 2005 revision process.

233 During the 2005 revision process some flag States (e.g., the Russian Federation) insisted on the need to obtain the consensus of all neighbouring coastal States before submitting a PSSA proposal. The majority of the correspondence group, however, did not support this requirement.

234 Revised PSSA Guidelines, Para. 7.1. This has been one of the main changes brought about by the 2005 Guidelines, which removed the possibility under the previous regime to submit PSSA proposals without any APM attached and propose APMs at a later stage (i.e., two years after the designation of the PSSA "in principle"). The two-stage approach has been maintained in cases where States need technical assistance in preparing PSSA proposals with an APM attached. In this case, they are encouraged to request assistance from the IMO (Para. 3.3). The concept of "designation in principle" now refers exclusively to the situation in which the MEPC has already reviewed the PSSA proposal and is awaiting approval or adoption of the APM by the appropriate body (Para. 8.3.2).

235 E.g., Para. 8.3.2.

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APMs may include measures already adopted by IMO to protect the area[236] or entirely new measures and it is always possible to introduce additional APMs in the future in order to address identified vulnerabilities.[237] APMs may include MARPOL Special Areas or special discharge restrictions for vessels operating in the PSSA, ships' routing (e.g., ATBAs) and reporting measures and "the development and adoption of other measures aimed at protecting specific sea areas against environmental damage from ships, provided that they have an identified legal basis".[238]

There are three possible legal bases for APMs. First, "any measure already available in an existing instrument" (Para. 7.5.2.3*(i)*). The term "*instrument*" does not seem to refer exclusively to IMO Conventions, but also to recommendatory instruments such as non-legally binding IMO Codes and IMO Resolutions.[239] Second, measures which do not yet exist, but "could become available through amendment of an IMO instrument or adoption of a new IMO instrument. The legal basis for any such measure would only be available after the IMO instrument was amended or adopted, as appropriate" (Para. 7.5.2.3*(ii)*).[240] Presumably, this category may also include CDEMs higher than international standards for ships operating "exclusively" in the PSSA, even though within existing PSSAs there are no examples of APMs directly regulating CDEMs.[241] Third, "any measure proposed for adoption in the territorial sea or in the EEZ pursuant to Article 211(6) of the UNCLOS where existing measures or generally applicable measures (as set forth in subparagraph (ii) above) would not adequately address the particularized need of the proposed area" (Para. 7.5.2.3*(iii)*). It is worth recalling that the LOSC (e.g., Articles 21(1), 22, 23, 25(2), 211(2), (4) and (6)) allows for the adoption of compulsory measures that may be more stringent than international standards except for CDEMs on foreign ships in transit. It is also interesting to note that most existing PSSAs lie entirely within 12 nm and in this area coastal States do not need the IMO's approval to adopt stricter discharge or navigational standards as long as they do not impede the right of innocent passage. So, why would States go through the complex and time-

236 Revised PSSA Guidelines (Para. 7.2). This has been the case of the Wadden Sea PSSA where no new APMs have been proposed in addition to the existing ones.

237 Revised PSSA Guidelines (Paras. 7.1 and 7.3). The latter possibility has been firmly opposed by some Flag states, especially the Russian Federation.

238 Revised PSSA Guidelines (Paras. 6.1.1; 6.1.2 and 6.1.3).

239 See, for instance, MEPC Resolution 45(30) recommending compliance with the Australian system of compulsory pilotage in the Great Barrier Reef PSSA.

240 An example of these kinds of APMs is the "no anchoring zone" proposed by the US around the Florida Keys PSSA and adopted through an amendment of SOLAS. The 2001 PSSA Guidelines referred to measures which do not yet exist, but "should be available as a generally applicable measure".

241 In 2003, six European States proposed a ban on single-hull tankers as APM in the WE PSSA. In the light of the forthcoming amendments to MARPOL, this measure, however, has been withdrawn before the MEPC could pronounce on its legality. In addition, there are several examples of APMs that indirectly touch upon CDEMs, such as compulsory ATBAs for certain classes of ships. See also the Comments of IUCN on the 2001 revised PSSA Guidelines (in: MEPC 43/6/3, Annex 2, p. 3).

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consuming PSSA process instead of taking unilateral action? The reason seems to be that through the PSSA designation coastal States obtain the international endorsement of measures that are particularly controversial, like some compulsory routing (e.g., ATBAs) and reporting measures which have strong implications for the traditional freedom of navigation. In addition, measures adopted by the IMO are more likely to be observed than national measures.

As the recent PSSA debate indicates, there is still some confusion concerning the relationship between PSSAs and special areas under Article 211(6) LOSC.[242] Article 211(6) provides the legal basis for the adoption of APMs in the EEZ; it does not contain the criteria for the designation of a PSSA.[243] The latter are far more flexible and are set out in the IMO Guidelines. It is clear, however, that APMs based on Article 211(6) need to meet all the more stringent requirements set forth in the Article.[244]

APMs need to be specifically tailored to meet the need of the area and to prevent, reduce or eliminate the identified vulnerability from international shipping.[245] It is up to the IMO to decide on a case-by-case basis which APMs are the most suitable to address such a vulnerability and this choice is not necessarily restricted to existing IMO instruments.[246] The establishment of a PSSA could indeed justify the adoption of measures that have not received general acceptance and which are not regulated in any IMO Convention. In principle, there is no limit to the kind of measures that the IMO may approve or adopt in the PSSA as long as they have a clear legal basis in the LOSC or other IMO instruments and enter within the competence of the organization.[247] It is important to stress that PSSA status does not increase the coastal State's jurisdiction in the area, but confers on the proposing State the mere role of the initiator

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242 See, e.g., the concerns expressed by Liberia, the Russian Federation, BIMCO, ICS, INTERCARGO, INTERTANKO and IPTA with regard to the WE PSSA (in: LEG 87/16/1), as discussed in LEG 87, in October 2003 (see: LEG 87/17). See: V. Frank (2005), pp. 34-5.

243 On the relationship between PSSA and Special Areas under Article 211(6) LOSC see: L. de La Fayette (2001), pp. 190-2, and E.J. Molenaar (1998), pp. 436-7 and 441-2. See also the Comments by DOALOS on the consistency of the WE PSSA with Article 211(6), *supra* n. 229.

244 So far LOSC, Article 211(6), has been explicitly adopted as the legal basis for the compulsory pilotage proposed within the Torres Strait PSSAs (MEPC 49/8, Para. 5.14) and for the compulsory notification requirement within the Galápagos PSSA (MEPC 51/8/2). Both measures, however, have been adopted as "recommendatory".

245 Revised PSSA Guidelines (Para. 7.5.2.4).

246 According to the Third International Meeting of Legal Experts on PSSA (in: MEPC 36/21/4, Paras. 10-17) the identification of a PSSA can serve to "provide the basis for the approval of exceptional measures which, although justified by internationally recognized exceptional circumstances, cannot find a precise legal basis in existing international instruments." During the 2005 revision process, many delegations shared the view that APMs should not be limited to measures that now exist in IMO instruments. See the Report of the Correspondence Group (MEPC 53/8/X, Para. 14).

247 On the broad "environmental" mandate of the IMO under the 1948 IMO Convention (Articles 1(a) and 15 (j)) see: Chapter 6.4.1.

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of the multilateral development of protective measures within the IMO. Any proposed measure will have to be assessed by the competent IMO committees taking into account all the interests involved, including those of flag States, and its adoption will always require the consent of the international community as a whole through the approval by the MEPC and the Assembly. The PSSA designation process therefore allows the level of protection in particularly vulnerable areas to be increased without altering the jurisdictional balance set out in the LOSC.

Once approved, APMs have to be implemented in accordance with international law as reflected in the LOSC and coastal States may enforce them consistently with the Convention vis-à-vis all ships transiting the area.[248]

Only APMs are legally binding, while the PSSA designation has no legal effect. However, the added value of the designation cannot be underestimated.[249] Among other things, it confers a special status on an area that can be marked on nautical charts, informing vessels of the importance of taking extra care when approaching the area. That is extremely important since over 50% of all maritime accidents are caused by human error. The PSSA status, moreover, may influence and eventually change the behaviour of users of the area and increase awareness regarding the sensitivity of the region. This may stimulate action at the international, regional or national levels towards a more comprehensive protection of the area from sources other than shipping.[250] Designation as a PSSA, therefore, is in itself an important preventive instrument in line with the precautionary approach endorsed by IMO.[251]

8.7 Weaknesses of the Existing International Regime

There are currently (too) many international and regional instruments governing the designation and management of MPAs. Despite their analogies, global and regional instruments differ to a considerable extent with regard to their legal or political nature, their scope of application (high seas or waters under national sovereignty or jurisdiction), and their selection, designation and management criteria. This patchwork regime creates confusion and brings overlapping obligations for coastal States, making it quite difficult to correctly implement their international commitments. Although, in the past few years, new efforts have been undertaken to promote consistency and strengthen cooperation among the different instruments and competent bodies, overregulation and confusion still remain.

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248 Revised PSSA Guidelines (Paras. 9.2 and 7.9).

249 On the non-legal effects of the PSSA designation see: IMO doc. MEPC 34/INF.6.

250 The CBD, for instance, is considering PSSAs in its work on the establishment of HSMPAs, *supra* n. 80. See also the 14th BARCON MOP, *supra* n. 164.

251 See, *inter alia*, Resolution MEPC.67 (37) setting out Guidelines on the Application of the Precautionary Approach that requires the MEPC to apply the precautionary approach in its activities. Additionally, the PSSA status raises the standards of care that may be expected in the assessment by courts in claims for damage to PSSAs.

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Most of the international instruments, moreover, do not contain straightforward obligations and the duty to establish and manage MPAs is not always formulated in legally binding terms. Their implementation therefore strongly depends on the political will of each State. Institutional fragmentation at the national level often represents an additional obstacle to proper implementation. Normally, biodiversity policies come under the responsibility of the Ministry for the Environment, but marine biodiversity and MPA issues may be dealt with by different sectoral departments.[252] In some cases, the Ministries for Agriculture, Fisheries and Water Resources may be in charge of MPA policies. Normally it is for central governments to implement international regimes, but when local issues are at stake, it may be up to regional authorities to take action. The effective management of MPAs, moreover, requires a strong coordination among different administrative levels and among departments dealing with environmental protection, water management, fisheries, pollution control, public health, tourism and maritime transport. The current level of coordination seems to be generally rather low.[253]

In addition, there are no strong compliance and enforcement mechanisms in place at the international level to ensure that state Parties meet their international commitments, and monitoring and reporting are still ineffective. Finally, there are considerable funding problems and the existing multilateral financing mechanisms (e.g., GEF) are still inadequate.

8.8 EC Regime

8.8.1 The EC's Objective to Establish a Coherent Network of MPAs

The establishment of a coherent network of protected areas that would ensure the protection of habitats and native European species has been a primary objective of the EC's environmental policy since its establishment.[254] In the course of the 1970s and 1980s, it became evident that the deterioration and progressive loss of habitats was threatening European wildlife. In the First (1972) and Second (1977) EAPs the Commission, supported by the EP, highlighted the need to take an integrated approach towards the conservation of endangered species and the protection of their habitats.[255] However, before the introduction of Article 130 (now 174) in the EC Treaty in 1987, the existence

252 In Italy, for instance, MPAs and biodiversity issues are mainly dealt with by the Ministry of the Environment, within two different departments: a sea protection department and a nature conservation department; however the Ministry of Agricultural and Forestry Policy may also be involved via its fishing and agriculture department. In certain cases, moreover, the protection of local coastal areas falls within the ambit of the regional authorities.

253 E.g., the 5th IUCN World Parks Congress, Durban (South Africa), 2003, Rec. V.22.

254 For an overview of the EC's Nature Conservation and Biodiversity Policy see: J.H. Jans (2000), pp. 410-24; L. Kramer (2000), pp. 131-49; and EC Commission (DG ENV) at: http://europa.eu.int/comm/environment/nature_biodiversity/index_en.htm.

255 The Second EAP also called for the proper implementation of the Bern Convention in the EC.

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of Community competence in matters of nature conservation was challenged by most of the member states because of the lack of relevance to the market integration objective.[256] Member states therefore preferred the Community to accede to existing international Conventions, such as the Bern Convention, rather than adopting its own rules.[257] In 1979, however, due to strong public pressure, the Council adopted the Birds Directive with the objective being to guarantee uniform and effective protection for wild birds, especially migratory species, and their habitats.[258] For this purpose member states are required to classify Special Protection Areas (SPAs)[259] and take appropriate steps to avoid any significant pollution or deterioration of habitats or any disturbance affecting the birds.[260] In order to protect habitats hosting species other than birds and to properly implement the Bern Convention within the Community, both the Third (1983) and the Fourth (1987) EAPs called for the adoption of a Directive on Habitats Conservation. As a response, the Commission presented a proposal for a Directive with the main objective of establishing, by the year 2000, a comprehensive network of protected areas aimed at ensuring the maintenance of threatened species and habitats.[261] Initially, the proposal did not meet with the enthusiasm of all the member states which were afraid that such a Directive could threaten their exclusive competence in the field of land-use planning. It was only in 1991, in the preparation for the 1992 UNCED, that the text of the Habitats Directive was agreed upon.[262] The Community was indeed willing to play a leading role at the Rio Conference and the adoption of the Habitats Directive would have enhanced its position in the negotiation of the CBD. A central element of the Habitats Directive is the establishment of a coherent network of protected areas called Natura 2000. However, as will be discussed later, the Natura 2000 network was mainly designed to protect nature on land and it dedicated little attention to marine biodiversity. Similarly, the EC Biodiversity Strategy and the Biodiversity Action Plan (BAP), adopted in 1998 to facilitate the implementation of

256 S.P. Johnson and G. Corcelle (1989), p. 237; L. Kramer (2000), p. 131 and J.H. Jans (2000), p. 410.

257 The EC acceded to the Bern Convention in 1982 on the basis of Article 235 EEC.

258 Council Directive 79/409/EEC on the Conservation of Wild Birds was adopted on the basis of the Commission proposal of 20.10.1976. Since the Habitats Directive has replaced most of the provisions of the Birds Directive, the two regimes will be examined together in the next section. For more details on the Birds Directive see J.H. Jans (2000), p. 411; L. Kramer (2000), p. 134; S.P. Johnson and G. Corcelle (1989), p. 238.

259 SPAs shall represent the most suitable territories, in number and size, for the conservation of particularly threatened species listed in Annex I (Article 4(1)) or regularly occurring migratory species (Article 4(2)). In addition to conservation measures, the Directive requires member states to take measures restricting hunting and the trade in species (Articles 5 and 6).

260 Birds Directive, Article 4(4). According to the ECJ, member states can only derogate from that obligation in exceptional cases when an interest superior to the Directive's conservation objective is at stake (e.g., the danger of flooding or the protection of coastlines), but never for economic reasons (C-57/89, Leybucht Case).

261 Commission Proposal in: O.J. C247, 21.09.1988.

262 P.W. Birnie in: M. Bowman and C. Redgwell (ed.) (1996), pp. 214-5.

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the CBD, did not include the preservation of marine habitats and species among their priority actions.[263]

Both the Fifth (1992) and the Sixth (2001) EAPs consider the full implementation of the Natura 2000 network as a key tool for protecting biodiversity within the Community. In particular, the Sixth EAP notes that as a consequence of the loss and degradation of habitats, fish stocks are under the threat of complete collapse and some marine life, other than commercial fish, has been decimated in almost all regional seas.[264] To reverse this trend the EAP identifies a set of priority actions including, *inter alia*, the extension of Natura 2000 to the marine environment and the development of an integrated European Marine Strategy.[265] In its 2003 Communication, the Commission identifies halting the biodiversity decline by 2010 and restoring degraded marine ecosystems as two of the overall goals of the future Marine Strategy and indicates the full implementation of the Habitats Directive in the marine environment as a means to achieve these targets.[266] These objectives have been endorsed by the Council in its Conclusions.[267]

At the international level, the Community is fully committed to the target of establishing a network of MPAs by 2012 (and halting biodiversity loss by 2010) as endorsed in Johannesburg, within the framework of the CBD and in other global (ICP and UNGA) and regional fora (OSPAR, HELCOM, Joint HELCOM/OSPAR, BARCON). In 2003, the EP urged the Community to take immediate steps towards the creation of such a network meeting its global and regional commitments.[268] The Environmental Council has also expressly supported the establishment, by 2012, of a system of representative networks of MPAs both in coastal waters and the high seas, consistent with international law.[269] Similarly, the European Council has called for an effective follow-up to the

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263 See: COM (98) 42, in O.J. C 341, 9.11.1998. The Commission is currently reviewing the Biodiversity Strategy and the BAP in the light of the global and regional targets, including the establishment of a coherent network of MPAs by 2012. The output should be a 2010 Delivery Plan which identifies priority objectives toward meeting these targets.

264 The Sixth EAP, p. 30, reports the alarming data published in 1999 by the EEnvA in "Environment in the European Union at the Turn of the Century", available at: http://reports.eea.eu.int/92-9157-202-0/en/.

265 The Sixth EAP also calls for the revision of the CFP. See, in general, *supra* Chapter 3.5.1.

266 COM (2002) 539, 20.10.2002, Objectives 1 and 2 and Action 2.

267 See, in particular, the Conclusions of the ENV Council (March 2003), Para. 7 (d). See also: ENV Council (March 2005, Para. 13); ENV Council (December 2004, p. 22); ENV Council (June 2004, pp. 19-23); ENV Council (December 2003, p. 16-8); ENV Council (March 2003, pp. 8-10); ENV Council (December 2002, pp. 20-4); ENV Council (June 2002, p. 11); ENV Council (December 2001, p. 18).

268 E.g., EP Report on the Commission Communication: "Towards a strategy to protect and conserve the marine environment" (PE 328.753, 7.05.2003, Para. 20). According to the EP, the full implementation of Natura 2000 in the marine environment should not be the only tool to protect marine biodiversity.

269 E.g., ENV Council (December 2003, Paras. 14 and 25) and ENV Council (December 2004, p. 22).

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Johannesburg objectives on the protection of the marine environment, but without making express reference to the 2012 target on the MPA network.[270] Surprisingly, the Commission in its 2003 and 2005 Communications on the Marine Strategy, unlike in the Preamble to the proposed Marine Strategy Directive, also does not explicitly refer to the 2012 target. Nevertheless, as will be discussed later in this Chapter, the Community, driven by the Commission, has taken the lead in the international efforts towards the full achievement of this target.

8.8.2 The EC Legal Framework for the Establishment and Management of MPAs

The Community's competence concerning MPAs and marine biodiversity conservation issues has clear legal bases in the EC Treaty.[271] With regard to the protection and preservation of natural habitats, such competence is based on Article 175 EC and is shared with the member states. However, with regard to the conservation and management of fisheries resources, the EC's competence is exclusive and is based on Article 37 EC on the CFP.[272] According to Article 102 of the 1972 Act of Accession of the United Kingdom, Ireland and Denmark, the EC's exclusive competence in the field of fisheries also includes the conservation of the biodiversity of the sea.[273] The identification of the proper legal basis for Community action may therefore be problematic, especially with regard to the conservation of marine biodiversity other than commercial species and the adoption of fisheries-related measures that serve environmental objectives, such as the establishment of protected sites to conserve certain species or the ban on destructive fisheries practices in a particularly sensitive area. The choice of the correct legal basis for these kinds of measures is particularly critical since Article 175 and Article 37 provide for different decision-making procedures, which cannot be combined.[274] The ECJ in its case law has made it clear that measures primarily related to fisheries, such as the prohibition of drift-netting, bottom trawling or other destructive techniques, which serve both resource conservation and marine environmental protection

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270 See, in particular, Presidency Conclusions (Brussels, March 2003), Para. 60. See also: Presidency Conclusions (Brussels, March 2005, p. 7); Presidency Conclusions (Brussels, June 2004, Para. 43); Presidency Conclusions (Brussels, March 2003, Para. 54). The target of halting biodiversity loss by 2010 is identified as the main component of the EU's Strategy on Sustainable Development discussed in Chapter 3.4.5.

271 For a detailed discussion on the EC's competence in matters of nature conservation see, e.g., N. Wolff (2002), pp. 26-32; J.H. Jans (2000) p. 410; P.W. Birnie in: M. Bowman and C. Redgwell (eds.) (1996).

272 Council Regulation EEC 3760/92 setting out the legal framework for the conservation and protection of fisheries resources, as replaced by Regulation 2731/2002.

273 In Case 804/79, *Commission v. UK* (Para. 17), the ECJ makes it clear that this provision confers on the Community an "implied" exclusive external competence in these matters since effective and equitable conservation measures could only be taken at the supranational level.

274 See discussion in Chapter 2.3.1.2, especially at n. 92.

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objectives, still have to be based on Article 37.[275] Presumably, the same reasoning may also apply the other way around and measures directed at conserving non-commercial stocks (e.g., coral reefs and other forms of aquatic wildlife) which only indirectly touch upon fisheries, may still be based on Article 175.[276] In addition, the Community's Declarations upon signature and formal confirmation of the LOSC make it clear that the EC has exclusive competence in the field of "*conservation and management of sea fishing resources*", which seem to refer to commercial stocks.[277] The Community, therefore, does not seem to have exclusive competence concerning the conservation of marine biodiversity other than commercial species.

Measures based on Article 175 (shared competence), unlike fisheries-related measures under Article 37, need to be justified on the basis of the subsidiarity and proportionality principles. Since the beginning, the Community's regulatory action for the preservation of marine habitats (and species), including the creation of a coherent European ecological network, appeared to be more effective than isolated national initiatives, and were consistent with the subsidiarity and proportionality principles.[278]

Marine biodiversity legislation based on Article 175 is adopted by QMV according to the co-decision procedure between the Council and the EP on the basis of a proposal from the Commission (Article 251 EC).

Within the Commission, issues related to marine biodiversity, including MPAs, are primarily subject to the responsibility of DG ENV, Nature and Biodiversity Unit (B2). However, the same issues are partially dealt with by the Protection of Water and Marine Environment Unit (D2), which is in charge of the European Marine Strategy and the Marine Strategy Directive. In addition, the International Affairs Unit (E2) is responsible for the Community's external policy on biodiversity-related matters. Given the intersectoral nature of MPA issues, moreover, some aspects related to the establishment or management of marine areas may fall under the responsibility of other DGs (e.g., DG FISH, TREN, Development, Enterprise) which have to be fully involved in the drafting process. As already discussed in Chapter 2.2.4, the Commission has to act as a single

275 In Case C-405/92 (*Driftnets* Case) the Court held that Article 37 (former Article 43), and not Article 175 (former 130s), was the correct legal basis for Regulation 345/92 banning the use of drift-nets in order to protect aquatic wildlife. Other examples of "conservation measures" based on Article 37 are: Council Regulation 973/2001 on technical measures for conservation of migratory stocks, Council Regulation 602/2004 banning bottom trawling in the Darwin Mounds, and the similar ban proposed by the Commission to protect coral reefs around the Azores, Madeira and Canary Islands (COM (2004) 58). See also A. Berg (1999), p. 74.

276 For instance, Annex I of the EC Treaty includes marine mammals within the living resources that fall under the CFP. Nevertheless, as will be discussed later, some species of cetaceans are listed in the Annexes of the Habitats Directive, meaning that the Community may still take action on the basis of Article 175 to conserve marine species.

277 Both Declarations are reproduced in Annexes I and II of this book.

278 See the Preamble to the Habitats Directive.

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body and each proposal needs to be prepared in close coordination between all interested DGs and units.

Within the Council the adoption of legislation related to marine biodiversity is under the responsibility of the Environmental Council. The relevant discussions take place primarily within the Council's Working Party on the Environment and the COREPER. As will be discussed later, marine biodiversity-related matters are frequently on the agenda of the Biodiversity Group of the WPIEI, which coordinates the EC's positions in international environmental negotiations and of the COMAR in which the EC coordinates its positions for the UNGA and ICP, and of the Fisheries Council, with regard to conservation measures.

Within the EP, the Commission's proposals on biodiversity issues are mainly discussed by the Committee for Environment, Public Health and Food Safety, but biodiversity issues may be incidentally brought to the table of other EP Committees, such as the Fisheries Committee or the Transport Committee.

On the other hand, fisheries-related measures based on Article 37 are adopted by the Fisheries Council acting on QMV in simple consultation with the EP on the basis of a proposal from the Commission (DG FISH).[279] The EP, therefore, does not have a decisive role in the decision-making related to fisheries and has limited opportunity to influence more environmental by friendly decisions in the Council.[280]

8.8.3 EC Regulatory Action Towards the Establishment and Management of MPAs

8.8.3.1 The Natura 2000 Network

The 1992 Habitats Directive together with the 1979 Birds Directive set out the legal framework for the designation and management of marine protected areas with the Community.[281] Although the Habitats Directive was intended to implement the Bern Convention, it was drafted during the run-up to UNCED and incorporates many of the elements of the CBD.[282] Its most ambitious objective is to establish and manage a coherent ecological network of special areas of conservation (SACs) called "Natura 2000" to maintain or restore native European habitats and species with a "favourable

279 Article 37(2) of the EC Treaty.

280 However, it is worth mentioning that the EP, especially the Fisheries Committee, is heavily lobbied by the fishing industry. Its stronger involvement in the decision-making process, therefore, would not necessarily result in more environmentally friendly regulations in the field of fisheries.

281 Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora. Like the Birds Directive and the Bern Convention, the Habitats Directive contains two sets of measures on "Conservation of Natural Habitats and Habitats of Species" and on "Protection of Species". The latter remain outside the scope of this Chapter.

282 See: A. Boyle (1994), p. 114.

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conservation status".[283] Such a network also includes the areas classified as Special Protection Areas (SPAs) under the Birds Directive.

Annex I lists natural habitats of "Community interest" that require protection,[284] including eight open seas, coastal and tidal habitat types (e.g., sandbanks, reefs and *Posidonia* beds.). Annex II lists species of wild animals and plants of Community interest whose habitat requires protection, including a few marine species (e.g., Bottlenose dolphins, Grey seals, *Carretta carretta, Monacus monacus)*. Additionally, some species of marine mammals are also listed in Annex IV (species whose deliberate killing is prohibited) and Annex V (species whose deliberate killing is regulated).[285] All the marine habitats and species listed in the Annexes are also included in the Annexes of the international and regional Conventions discussed in this Chapter.

The Habitats Directive lists the criteria for the selection of SACs (Annex III) and sets out a three-step procedure for their designation (Article 4). First, member states "shall" propose a list of habitats and species of Community interest occurring in their territories that meet the criteria of Annex III.[286] Such a list had to be transmitted to the Commission by 1995. Second, on the basis of the national lists the Commission "shall" establish a List of Sites of Community Importance (SCIs).[287] Third, once the site is on the SCI List, the member state had to designate it as a SAC by June 2004 at the latest and take the necessary measures to achieve their favourable conservation status.[288]

In its consistent case law, the ECJ has made it clear that member states have a positive legal duty to classify a site that meets the criteria set out in the Birds and Habitats Directives and cannot escape from this duty by adopting other conservation measures.[289] In practice, however, member states have considerable margins of discretion in selecting SACs under the Habitats Directive. Indeed, if the Commission considers that a national list fails to include a site hosting priority habitats or species,

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283 Habitats Directive, Article 3(1). Favourable conservation status is broadly defined in Article 1(e).

284 "Natural habitats of Community interest" are defined in Article 1(c) and include priority habitats (i.e., habitats "in danger of disappearance in their natural range"); habitats that have a "small natural range"; or that are "outstanding examples of typical characteristics of one or more of the seven bio-geographic regions: Alpine, Atlantic, Boreal, Continental, Macaronesian, Mediterranean and Pannonian.

285 Member states must guarantee strict protection for species listed in Annex IV prohibiting, *inter alia*, the deterioration or destruction of breeding sites and resting places.

286 Habitats Directive, Article 4(1).

287 *Ibid.*, Article 4(2).

288 *Ibid.*, Article 4(4).

289 As for the Habitats Directive see: e.g., Case C-67/99, *Commission v. Ireland*; Case C-71/99, *Commission v. Germany;* Case C-220/99, *Commission v. France*. As for the Birds Directive, see: C-334/89, *Commission v. Italy (1991)*, (Para. 10); C-3/96, *Commission v. Netherlands* (1998), (Paras. 55 and 63); C-355/90, *Commission v. Spain* (1993); C-44/95 *R. v. Secretary for Environment ex Parte Royal Society for the Protection of Birds* (1996), C-166/97; C-96/98, *Commission v. France (*1999).

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it may initiate bilateral consultations with the interested state. If, after the consultation, the dispute remains unresolved, the Council may decide by unanimity to place the site on the list (Article 5(1)). Hence, the consent of the member state concerned is always necessary to place the site on the SCI List.[290]

Article 6 identifies three kinds of measures that member states shall adopt to manage and conserve Natura 2000 sites.[291] These are: special conservation measures, including, when necessary, management plans (Article 6(1)), all necessary steps to avoid the deterioration of habitats or disturbance to species (Article 6(2)), and EIAs of all plans or projects not directly linked to the management of the site (including projects and plans carried on outside the SAC, but having effect therein (Article 6(3)).[292] Member states and the Commission, however, may authorise plans or projects serving "imperative reasons of overriding public interest, including those of a social and economic nature" (Article 6(4)).[293] The exception, however, only applies if there are no available alternative sites and member states must always compensate for the loss of habitat ensuring the overall coherence of the Natura 2000 network.[294] The ECJ has given a rather stringent interpretation of the management and conservation duties.[295] In particular, the Court has made clear that the mere inclusion of the site on the SCI List triggers the obligation for member states to adopt protection measures under Article 6(2) and (3) even before formal designation as a SAC.[296] In addition, even before the inclusion of the site in the SCI List, member states have to act in conformity with the conservation objectives of the Directive and should abstain from all activities that may cause deteriora-

290 See: J.H. Jans (JEL, 2000), p. 388.

291 Article 6(2), (3) and (4) replace the obligations arising under Article 4(4) of the Birds Directive (see: Habitats Directive, Article 7). For a detailed discussion, see: EC Commission, "Managing Natura 2000 sites. The Provisions of Article 6 of the Habitats Directive 92/43/EEC", 2000, at: http://europa.eu.int/comm/environment/nature/art6_en.pdf.

292 In its ruling on the Waddenzee Cockle Fishery, 7.09.2004, the ECJ clarified that "plan or project" also includes activities whose licence is being renewed.

293 The Habitats Directive, unlike the Birds Directive, does not automatically rule out economic and recreational plans and projects within the sites. These "imperative reasons of overriding public interest" are not defined in the Directive and the ECJ has never clearly pronounced on the point. However, when the site in question hosts priority natural habitats or species, the plan or project can be authorized only on the basis of health or safety considerations, or when it brings beneficial consequences for the environment.

294 These compensatory measures are similar to those under the Ramsar Convention. See EC Commission (2000), p. 38.

295 See, e.g., Case C-103, *Commission v. Hellenic Republic* (2002) on the failure of Greece to establish and implement an effective system of strict protection for the sea turtle as requested under the Habitats Directive.

296 Habitats Directive, Article 4(5). See, e.g., Case C 117/03, *Società Italiana Dragaggi SpA v. Ministero delle Infrastrutture e dei Trasporti, Regione Autonoma del Friuli Venezia Giulia*, Para. 31.

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tion of a site which is eligible for identification as a SAC and is included in the national list.[297]

Finally, the Habitats Directive sets out monitoring and reporting obligations for member states and the Commission.[298] The LIFE nature provides financial support for nature conservation projects that contribute to meeting the objectives of the Habitats Directive and is the main financial mechanism to implement Natura 2000.[299] So far, however, implementation has progressed very slowly and the listing process is still not complete.[300]

8.8.3.2 Implementing Natura 2000 in the Marine Environment

The possibility to apply the provisions of the Habitats and Birds Directives in the marine environment, especially in areas beyond the territorial sea, has for a long time been controversial.[301] Article 2 of the Habitats Directive and Article 1 of the Birds Directive, indeed, do not specify their geographical scope but generally refer to the "territory of member states where the Treaty applies". As already mentioned in Chapter 2.5, the EC Treaty applies to the member states, without making specific reference to their territory (Article 299 of the EC Treaty), but it seems to implicitly include all terrestrial and marine areas under their sovereignty and jurisdiction.[302] In addition, the Court on several occasions (e.g., *Kramer Case* and *Driftnets Case)* has made it clear that the Community may adopt conservation measures beyond the territorial sea as far as its member states are allowed to do so under international law.[303] Following this approach the EC Commission maintains that as far as the member states have declared an EEZ and are entitled under international law to enforce their regulations therein, the Habitats Directive also applies to the area since EC law is an integral part of national legislation.[304] Until recently, however, the Court has never clearly pronounced on this point and the offshore application of the Directive has only been confirmed by one national court (i.e., the High Court of England and Wales in *The Queen v. The Secretary of State*

297 *Ibid.*, Case C 117/03, Para. 31. This is the case, in particular, for sites hosting priority natural habitat types or priority species. The ECJ, however, does not identify the legal basis for this obligation. Arguably, such a legal basis is Article 10 EC setting out the duty to cooperate.

298 Habitats Directive, Articles 9, 11 and 17.

299 Council Regulation 1973/92/EEC establishing LIFE, as amended by EC Regulation 1655/2000, (LIFE III).

300 E.g., Report from the Commission on the implementation of the Habitats Directive (COM(2003)845, 5.01.2004). SCI Lists have been compiled only for the Macaronesian region (2001), the Alpine region (2003) and the Atlantic and Continental regions (2004). No List has as yet been adopted for the Mediterranean region.

301 For a full discussion on that topic see J.H. Jans (2000), p. 72; D. Owen (2000), pp. 46-8.

302 See the discussion in Chapter 2.5.

303 E.g., Joined Cases 3, 4 and 6/76 (Kramer) and *Case C-405/92 (Driftnets Case).*

304 See, *inter alia*, Communication from the Commission, "Fisheries Management and Nature Conservation in the Marine Environment", COM (1999) 363, p. 10.

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for Trade and Industry ex Parte Greenpeace Case in 1999).[305] Only in October 2005, the Court has made it clear that the Habitats Directive applies and must be implemented in the EEZ (and in the continental shelf) insofar the member states exercise rights in these areas.[306] In the light of this judgment and of the recent practice of the member states in the implementation of the Habitats Directive, it seems to be largely accepted that Natura 2000 sites may be designated in the territorial sea, continental shelf and, when declared by the member state, the EEZ or analogous fishing zones.

The Habitats Directive in its present form, however, does not provide an effective legal framework for the designation and effective management of MPAs, especially beyond the territorial sea.[307] The Directive, like the Birds Directive, was primarily intended to protect terrestrial biodiversity and does not adequately address marine habitats and species (especially highly migratory species) which are still largely unrepresented in its Annexes. Only three of the marine habitats listed in Annex I (i.e., reefs, submerged sandbanks and submarine structures made by leaking gas) and a few species listed in Annex II (e.g., harbour porpoises, bottlenose dolphins and monk, common and grey seals) are found beyond the 12 n.m. limit.[308] In addition, the scientific criteria under Annex III are ill-suited for the selection of marine sites and the lack of sufficient data and scientific information makes it particularly difficult to apply these criteria to marine habitats and species. The Directive, moreover, focuses on small sites and is inappropriate to protect migratory species. Indeed, for aquatic species ranging over wide areas, SACs may only be proposed in a "clearly identifiable area" which presents the physical or biological factors essential to their life and reproduction (Article 4(1)). This may prove to be very difficult considering that most the marine species listed

305 See *R. v. Secretary of State for Trade and Industry ex Parte Greenpeace Case*, 5.11.1999, Environmental Law Reports 2000, at (221). On the judgment see: D. Owen (2000), pp. 46-8 and J.H. Jans (2000), pp. 385-7. The judgment refers to the application of the Habitats Directive to the UK Continental Shelf and to the superjacent waters up to a limit of 200 miles from the baseline. This is explained by the fact that the UK has not yet declared an EEZ. The British Court, moreover, notes that the original proposal from the Commission clearly referred to the European territory of the member states, including maritime areas under their sovereignty or jurisdiction.

306 In Case C-6/04, *Commission v. United Kingdom* (20.10.05), the Court makes clear that: "as the Advocate-General has rightly observed in points 132 and 133 of her Opinion, it is common ground between the parties that the United Kingdom exercises sovereign rights in its exclusive economic zone and on the continental shelf and that the Habitats Directive is to that extent applicable beyond the Member States' territorial waters. It follows that the Directive must be implemented in that exclusive economic zone" (Para. 117).

307 See, *inter alia*, the 19th meeting of the Standing Committee of the Bern Convention, Draft Report on "Conservation of Marine Habitats and Species in Europe", (T-PVS (99) 561), 3.10.1999, at 14.

308 For a comprehensive analysis see: Report by WWF, "Implementation of the EU Habitats Directive Offshore: Natura 2000 sites for reefs and submerged sandbanks", June 2001, available at: www.ngo.grida.no/wwfneap/Projects/Reports/Reefs_Sandbanks_Vol1.pdf.

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in the Annex are dispersed over wide areas sometimes as large as the entire North Sea.[309] Member states have encountered major difficulties in implementing the Natura 2000 network for the marine environment (e.g., the lack of clarification as to the geographical application of the Directive, the lack of data and scientific information, difficulties in defining and selecting appropriate marine sites; deficiencies in national legislative and administrative frameworks) and of the over 18,000 sites designated so far, only around 800 have marine components and very few of them are truly offshore.[310] Nevertheless, in the past few years the member states have taken new steps towards the application of the Directive to the marine environment and some of them (e.g., Denmark, Germany and Portugal) have designated or selected Natura 2000 sites in their EEZ.

The Commission is firmly committed to ensuring the full implementation of the Habitats Directive in waters under the sovereignty "and jurisdiction" of the member states and the adjustment of its Annexes is considered as one of the main tools to achieve this objective.[311] Recently, the Habitats Committee, which assists the Commission in the implementation of the Habitats Directive, established an expert group on marine issues under the Habitats and Birds Directives with the mandate, among other things, to set out criteria for the designation of marine sites under the Natura 2000 Network and to investigate possible management measures within these sites. In addition, most member states (at least those which are Parties to OSPAR and/or HELCOM) agree on the need to adjust the Annexes of the Habitats Directive in order to include additional marine habitats, species and ecological processes. MASH (OSPAR) and HELCOM HABITAT are currently working on common suggestions in this direction. Apparently, the Commission takes inputs by these bodies seriously into consideration since they have the marine expertise, data and studies that the Commission is short of. Also the Council expressly called for the full implementation of the Habitats Directive at sea, indicating the willingness of the member states to take action in this direction.[312] The Commission is currently working on the compilation of the SCI List for the Boreal and Mediterranean bio-regions and the territories of the new member states. However, considering the delays of the past, it will probably take some time before the listing process will be completed. In the short term, therefore, the Commission is determined to make use of the enforcement and financial (LIFE) mechanisms available under EC

309 Conversely, the Birds Directive does not contain a similar requirement, but calls on member states to classify "the most suitable territories in number and size" (Article 4(1)).

310 See: Report from the Commission (2003), *supra* n. 300. R. Long and A. Grehan (2002), p. 250, also refer to the difficulty in delimiting sites in offshore areas.

311 E.g., the Commission's Communication on the Marine Strategy (COM (2005) 504, Para. 6.2.1); Communication (COM (2002) 539, Action 2); the Sixth EAP, p. 30; the Communication on "Fisheries Management and Nature Conservation in the Marine Environment" (COM (1999) 363), p. 11.

312 See, in particular, Conclusions of the ENV Council (March 2003), Para. 7 (d).

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law to bring about full compliance with the Directive.[313] It seems that the Commission will start revising the Annexes only after the SCI Lists are completed and the Natura 2000 network is implemented. Adjusting the Annexes, therefore, may be a time-consuming process and it does not seem to be enough to eliminate all the shortcomings of the Habitats Directive. A few member states (e.g., Germany and the UK) seem to support a more radical revision to make it more suitable to protect the marine environment, but so far they are still a large minority.

The future Marine Strategy Directive could provide a good opportunity to reinforce the obligation of the member states to establish and properly manage Natura 2000 sites in waters under their sovereignty and jurisdiction as a measure to achieve good environmental status in each marine region. However, the proposal, in its present form, does not explicitly identify the full implementation of Natura 2000 as a means to achieve this objective.[314] The Preamble simply notes that the future Directive should support the position taken by the Community in the context of the CBD and should contribute to the achievement of the objective of the COP 7 of establishing and maintaining ecologically representative national and regional systems of marine protected areas by 2012 and that the obligations of the member states to designate Natura 2000 sites in the marine environment will make an important contribution to this process.[315]

8.8.3.3 The Management of Natura 2000 Marine Sites

As far as the duty of classification is concerned, the EC legislation does not raise any issue of consistency with international law. The Habitats (and Birds) Directive indeed implements and further specifies the general duties under Article 194(5) of the LOSC and Article 8 of the CBD and contributes to achieving the objectives of OSPAR Annex V, the Helsinki Convention and the 1995 SPA Protocol.

Conversely, the management of Natura 2000 marine sites might give rise to some legal issues under both EC law and the law of the sea. The Habitats Directive places the member states under a duty to manage the sites and to take all necessary measures to maintain habitats and species with a favourable conservation status. Member states may regulate all human activities and extractive uses that may possibly affect habitats and species within the sites in question, but they have to act in accordance with EC

313 In October 2004 the Commission issued a Reasoned Opinion against Greece for its failure to comply with Case C-103, *Commission v. Hellenic Republic* (2002) and to establish and implement an effective system of strict protection for the sea turtle as requested under the Habitats Directive. This is the final step, giving Greece a two-month deadline before the Commission can ask the ECJ to impose penalties on Greece similar to the ones imposed earlier in the *Chania waste* case C-387/97 and the *Spanish bathing water* case C-287/01.

314 As discussed in Chapter 3.5.2, the MSD (Article 12(2)) simply requires member states, in respect of each Marine Region, to develop programmes of measures in order to achieve good environmental status, "taking into account" measures required under relevant EC legislation and international agreements.

315 MSD, Preamble (Para. 10).

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law. That means that within marine sites member states cannot unilaterally regulate matters under the EC's exclusive competence, such as, *inter alia*, the management and conservation of fisheries (with a few exceptions) and aspects of shipping which are covered by EC legislation. However, they are still able to regulate a wide range of activities that remain within their competence, such as sand and gravel extraction, oil and gas exploitation, energy production from wind and some aspects of shipping that are not totally harmonized at the EC level. In doing so, however, they have to act consistently with the LOSC.[316] This means that beyond the territorial sea they cannot unilaterally regulate shipping activities, as they need to act through the IMO.

8.8.3.4 Natura 2000 and the EC's Common Fishery Policy (CFP)

The CFP sets out the legal framework for the management and conservation of fisheries resources in waters under the jurisdiction of the member states, including EEZs and fishing zones.[317] In this matter the member states have transferred their powers to the Community, which is exclusively competent both at the internal and international level. Therefore, they can no longer act unilaterally, but they may only take measures expressly provided for under the CFP and only insofar as they do not breach EC rules.[318] However, it is still controversial whether member states may unilaterally adopt measures which are necessary to ensure that fishing activities within Natura 2000 sites are conducted consistently with the requirements of the Habitats Directive. It is largely agreed that there is still some room left for unilateral action outside the CFP with regard to measures related to environmental aspects of fishing that are not primarily directed at fisheries conservation and/or management.[319] According to the Commission (DG FISH), however, these measures still fall within the CFP and whenever the protection of a Natura 2000 site requires the regulation of fishing, it is for the Community to take action. The ECJ, however, has never clarified whether DG FISH has exclusive competence to control fishing in Natura 2000 sites.

So far, the CFP has paid little attention to the environmental effects of fisheries. The Commission (DG ENV) has stressed the importance of integrating marine bio-

316 However, the Habitats (and Birds) Directive, unlike the 1995 SPA Protocol, Annex V of the OSPAR and the Helsinki Convention, does not contain any explicit reference to the law of the sea.

317 The CFP is currently regulated in "basic" Regulation 2371/2002, which entered into force in January 2003, amending Regulation 3760/92, and which sets out the framework for, *inter alia*, the conservation and management of resources (Article 1). The overall objective, however, is to maintain fish stocks in an exploitable state (Article 2(1)). For a general overview on the CFP and its relationship with environmental policy, see: N. Wollf (2002), pp. 144-94 and R.R. Churchill in A.H.A. Soons (ed.) (1990), pp 344-62.

318 E.g., Article 102 of the 1972 Accession Treaty.

319 E.g., Conclusion of the International Experts Workshop on "Marine Protected Areas and Fisheries", Isle of Vilm, July 2004, available at: www.horta.uac.pt/intradop/noticias1/Proceedings/MPA_and_fisheries-workshop_proceedings_2004.pdf, p.62.

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diversity concerns into fisheries management and urged a reform of the CFP to reduce the impact on non-target species, marine and coastal ecosystems.[320] In the follow-up to the Sixth EAP, DG FISH appeared willing to better integrate environmental considerations into the fisheries decisions.[321] It has recognized the existence of a direct link between Natura 2000 and the CFP and made it clear that disturbance by fishing "should not have an effect contrary to the aims of conservation of the habitats pursued by the Habitats directive".[322] The revised CFP, however, does not contain any reference to the regulation of fisheries in Natura 2000 sites in keeping with the purpose of the Birds and Habitats Directives. Nevertheless, there are different types of measures available under the new CFP Regulation 2371/2002 that may serve this purpose. These include: "fisheries closures" (or boxes) which may be used to close, seasonally or permanently, certain areas to fishing activities (Article 4 (g)(*ii*)), special measures to limit the impact of fishing on marine ecosystems or non-target species such as the ban on bottom trawling to protect cold-water coral reefs in the Darwin Mounds[323] and in waters around the Azores, Madeira and the Canary Islands[324] (Article 4 (g)(iv)), emergency measures (Article 7),[325] and multi-annual recovery or management plans (Articles 5 and 6).[326] All these measures, however, have to be proposed by the Commission (DG FISH) and agreed upon by the Council, but both institutions have no legal obligation to do so. Traditionally, DG FISH and most member states in the Council (e.g., France, Ireland, Spain, Portugal, and lately also Poland) have not been very keen to incorporate environ-

320 See, for instance, Sixth EAP, p. 36 and the EC's Biodiversity Strategy, Paras. 17-20.

321 See the Communication of the Commission on "Fisheries Management and Nature Conservation in the Marine Environment": COM (1999) 363, 14.07.1999, and the Green Paper on the Future of the Common Fisheries Policy, COM (2001) 135.

322 E.g., Communication on the Reform of the CFP (COM (2002) 181, p. 9, and the Community Action Plan to integrate environmental protection requirements into the CFP (COM (2002) 186, pp. 4-5).

323 The Darwin Mounds are located in the UK EEZ and are among the largest cold-water coral reefs in Europe. The area is a candidate for designation as a Natura 2000 site. In 2003 the Commission proposed a permanent ban on bottom trawling in the area (COM (2003) 519), explicitly referring to the Habitats Directive and OSPAR Annex V (Preamble). The proposal has been adopted by Council Regulation 602/2004.

324 On 3.02.2004 the Commission submitted a similar proposal to the Council making reference to the Habitats Directive and OSPAR's Annex V (COM (2004) 58). The ban has been adopted by the Council on 22.09.2005.

325 Emergency measures are temporary and may be taken by the Commission on its own initiative or at the request of a member state. In June 2003, for instance, upon a request by the UK, DG FISH, after consulting DG ENV, adopted a 6-month ban on bottom trawling in the area (Commission Regulation 1475/2003 (OJ L211)). The regulation makes explicit reference to the Habitats Directive.

326 These plans intend to keep stocks within safe limits, which may include targets relating to other living resources and the maintenance or improvement of the conservation status of the marine ecosystem (Articles 5(2) and 6(2)).

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mental considerations into fisheries management decisions.[327] The new CFP Regulation 2371/2002 requires the Community to apply the precautionary approach in taking measures designed to protect and conserve living aquatic resources, to provide for their sustainable exploitation, to minimize the impact of fishing activities on marine ecosystems, and to aim at the progressive implementation of an ecosystem-based approach to fisheries management (Article 2.1). These broad obligations, however, still leave the Council with ample discretion as to "how" to integrate environmental concerns into the CFP.

Under the new CFP, moreover, the member states have retained some limited capacity to act unilaterally. They may introduce non-discriminatory measures to minimize the effect of fishing on the conservation of marine ecosystems within the territorial sea as long as the Community has not taken similar action (Article 9), temporary emergency measures to conserve resources in waters under their sovereignty and jurisdiction (up to 200 nm) as long as the threat is "serious" and "unforeseen" (Article 8), and measures solely applicable to fishing vessels flying their flag (Article 10).

In principle, therefore, the CFP offers several opportunities to adopt measures to protect Natura 2000 sites from the impact of fishing activities. In practice, the availability and effectiveness of these measures will depend on the willingness of the Commission and member states to act. However, it might be argued that whenever fisheries activities affect the favourable conservation status of marine habitats and species within a Natura 2000 site, member states are required under Article 6(2) of the Habitats Directive to take all necessary measures available under the CFP to protect the site. The current work on the development of an integrated EC ocean policy, moreover, may improve the situation by imposing more stringent obligations for the Community to regulate the environmental impact of fishing, especially within Natura 2000 sites. However, as emerged during the drafting of the MSD, both DG FISH and the member states are not willing to discuss fisheries issues outside the CFP.[328]

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327 So far, DG FISH has appeared unwilling to introduce proposals which might affect the interests of the fishing industry and fishing member states. In the Darwin Mounds case, for instance, there is little fishing in the area (see: COM (2003)519, p. 2). In the EC, fishing interests are particularly strong and measures which are too restrictive would hardly reach the necessary number of votes in the Council. Among the member states Germany, Sweden and, to a lesser extent, the UK and the Netherlands are the most likely to accept the introduction of environmental measures restricting fishing.

328 The proposed MSD indeed makes it clear that measures regulating fisheries management can only be taken in the context of the CFP and are not addressed in the Directive (Preamble, Para. 28).

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8.8.4 EC Action at the International Level

8.8.4.1 The Division of External Competences

The Community's competence concerning the preservation of marine habitats and species other than commercial stocks, including the establishment of MPAs, is shared with the member states. This is also confirmed in the Community Declaration upon the formal confirmation of the LOSC, which lists the Habitats Directive among the Community acts on matters under shared competence regulated under the LOSC.[329] As already discussed, the Community's Declaration recognizes the evolutionary nature of the Community's external competence on the basis of the *ERTA* doctrine developed by the Court.[330] However, the Birds and Habitats Directives do not seem to trigger any exclusive external competence on the part of the Community according to the pre-emptive criteria discussed in Chapter 4.2. First of all, both Directives are based on Article 175, they set out minimum standards and do not intend to totally harmonize the subject-matter. The adoption by member states of stricter protective measures at the international level is not likely to affect the objective of the two Directives and does not affect the uniform and consistent application of EC rules and the proper functioning of the system which they establish. Second, the CBD, other relevant MEAs and the Regional Seas Conventions contain minimum standards and do not preclude contracting parties, including the Community, from increasing the level of protection in waters under their sovereignty or jurisdiction. By agreeing on higher standards at the international level, the member states do not affect the EC minimum rules and do not preclude the further development of stricter EC measures. Therefore, the member states' concurrent action within the framework of the international and regional Conventions cannot be pre-empted. However, they are under a general duty under Article 10 EC to cooperate with the Commission. Moreover, when fisheries-related matters are under consideration, they cannot take decisions, but have to refer those matters to the Community, which is exclusively competent to act.

Unlike in other environmental areas, such as vessel-source pollution or ocean dumping, the member states and the Community have always been strongly united and coordinated in the global debate on marine biodiversity and MPAs. These issues, except for aspects related to fisheries management, do not generally give rise to problems of competence. The interests of the member states in these matters are not as strong as in other fields, such as shipping or fisheries, and they had no problem in accepting the Community's participation in the international negotiations.

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329 The Community's Declarations upon signature and formal confirmation, however, do not list the Birds Directive, probably because it was not considered to be a matter regulated under the LOSC.

330 The *ERTA* doctrine and the pre-emptive effect of EC law are discussed in Chapter 4.2.2.

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8.8.4.2 EC Participation in the UN Discussions on MPAs

The EU actively participated in the WSSD and its preparatory work (especially in PrepCom IV) with a rather ambitious agenda.[331] The coordination started quite early in Brussels within the framework of the General Affairs and External Relations Council (Development Council), where the EU Statements were agreed upon. Given the variety of issues on the agenda of the Summit, officials from different ministries (*inter alia*, foreign affairs and the environment) of the 15 member states participated in the coordination. Likewise different DGs (*inter alia*, DG RELEX, DG Development and DG FISH) were involved in the drafting of the EU Statements under the coordination of DG ENV. Initially, the Commission was of the opinion that the ocean and seas and marine biodiversity should not be on the agenda, and that the Summit should focus exclusively on those natural resources issues that are of particular importance to economic development (including fish stocks) and are not effectively dealt with by other intergovernmental processes.[332] Eventually, halting and reversing by 2015 the current loss of natural resources and biodiversity, including marine biodiversity, and establishing coastal and marine protected areas were included among the EU priorities for the Summit, although not as key targets.[333]

Day-by-day coordination continued on the spot in Johannesburg outside the meeting sessions under the chairmanship of the Presidency and with the assistance of the Commission. The EU participated in the Summit with an extended delegation composed of the former, present and next Presidencies, and representatives from the Secretariat of the Council and the Commission (*inter alia*, DG ENV, DG RELEX, DG DEV, and DG FISH) (the *Troika* format). Members of the EP (MEPs) were invited to participate as observers in the EU delegation, but without taking part directly in the negotiations. Although MEPs were regularly consulted and briefed by the Commission, they questioned the limited involvement of the EP in the discussions.[334]

In Johannesburg, as in all political fora (especially within the UN framework), it was the task of the (Danish) Presidency to represent and speak on behalf of the EU. The Commission generally had an assisting role, except concerning a few matters under

331 At the WSSD, like in UNGA in general, it was the EU (meaning the EC and the 15 member states) as a political entity which took action. See: Development Council Conclusions, 30.05.2002, available at: http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/gena/70867.pdf. See also ENB 22/51, available at: http://www.iisd.ca/download/pdf/enb2251e.pdf, and http://europa.eu.int/comm/environment/wssd/documents/agenda_en.pdf.

332 Communication from the Commission, "Ten Years After Rio: Preparing for the World Summit on Sustainable Development in 2002", COM (2001) 53, p. 16.

333 Development Council Conclusions (Para. 4.5). However, there is no clear time frame and no reference to a coherent network of MPAs. Restoring stocks to a sustainable level by 2015 was another EU priority. The EU Presidency Statements and Speeches in Johannesburg are available at: http://europa-eu-un.org/articles/articleslist_s11_en.htm

334 On the role of the EP in WSSD, see the Speech by Commissioner Nielson on post-WSSD at: http://europa-eu-un.org/articles/en/article_1630_en.htm.

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the EC's exclusive competence. The EC institutions and the 15 member states appeared to be particularly united during the negotiations.[335] They succeeded in advancing the EU's priorities and promoting ambitious and time-framed targets towards reversing the trend of biodiversity loss, including the establishment of a MPA network by 2012,[336] restoring stocks by 2015 and combating illegal and unregulated fisheries.[337]

The Community has attached great importance to the full achievement of the WSSD biodiversity targets and in the follow-up to the Summit, it has constructively participated in the relevant debate within the UN.[338] Since the 4th ICP (June 2003), the Community has been particularly active in the global discussions on the protection of marine biodiversity within and beyond the limits of national jurisdiction, including the establishment and management of HSMPAs.[339] The EU co-ordination for the 4th ICP started quite late (on 22 May 2003) within the framework of the COMAR. Under the coordination of DG RELEX, DG ENV, after consulting DG FISH and other DGs concerned, drafted the EU Statement on "protection of vulnerable marine ecosystems", which was one of the main topics of the meeting. This draft was agreed upon within the COMAR and subsequently revised in New York, including a reference to the forthcoming European Marine Strategy, but without making any reference to the target of establishing a coherent network of MPAs. Day-by-day coordination of marine biodiversity issues continued on the spot under the chairmanship of the Hellenic Presidency with the assistance of the Commission (DG RELEX and DG ENV). Although fisheries-related matters (such as bottom trawling) were on the agenda, representatives from DG FISH could not attend the meetings mostly due to a lack of human resources. However, they were actively involved in the drafting of the EU Statement.

At UNGA 58, in October 2003, the EU Presidency highlighted the importance of MPAs as an instrument to protect marine biodiversity. In addition, it pointed to PSSAs and other regional instruments (e.g. OSPAR MPAs and SPAMIs) as examples to be

335 General Secretariat of the Council, Information for the Press, 4.09.2002. See also ENB 22/51.

336 However, the 2012 target does not seem to be a key EU priority within the WSSD framework and has not been included within the Community strategy in preparation for the 2005 UN Summit (COM (2005) 259, 15.06.2005). Neither the EU Presidency nor the Commission referred to the 2012 target in their comments on the outcome of the WSSD; see, for instance, EU Presidency Statement (16.9.2002) and Commissioner Wallstrom's Speech on the results of WSSD (11.09.2002).

337 E.g., Speech by Commissioner Fisher on the WSSD agreement to prevent overfishing (29.08.2002).

338 E.g., EU Presidency Statement to the 5th ICP (8.06.2004); EU Position Paper to the UNGA Second Committee (Economic and Financial Affairs, Environment), 16.10.2003, item 94(c); EU Presidency Statement to the UNGA Second Committee (Special Session on the Law of the Sea), 9.04.2002; and EU Presidency Statement to the UNGA Sixth Committee (Legal Affairs), 11.04.2002.

339 See: EU Presidency Statement to the 4th ICP (4.06.2003). Reportedly, negotiations were difficult due to the strong opposition of Norway which questioned the very need for establishing HSMPAs.

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used, in accordance with the LOSC, for the establishment of HSMPAs in other parts of the world.[340]

HSMPAs have been one of the main issues on the agenda of the 5th ICP (June 2004), which focused on "new sustainable uses of the oceans".[341] This time the EU coordination within the framework of the COMAR started earlier, in February 2004, and was rather effective. The Irish Presidency circulated a draft statement which was discussed in the COMAR and then transmitted to the WPIEI and to the External Fisheries Group of the Council to finalize the EU Statement. In the COMAR, DG ENV put forward the idea of developing a LOSC Implementing Agreement on the conservation of marine biodiversity in the high seas along the lines of the Fish Stock Agreement. This idea met with the general support of the member states and the Irish Presidency. At the meeting in New York the Presidency announced that "in principle" the EU would support the development of an instrument within the framework of the LOSC to protect and manage marine biodiversity beyond the limits of national jurisdiction, including the establishment and regulation of MPAs where there is a scientific case for establishing these areas.[342] The common position was consistently upheld by all member states, but met with firm opposition from the G77 countries.[343] On the other hand, the Community did not appear very united with regard to other critical issues, such as the moratorium on bottom trawling in the high seas proposed by NGOs. Due to the strong opposition of Spain, the Irish Presidency could not support the proposal but favoured the use of the same language agreed upon at the COP-7 of the CBD.[344] Representatives from DG FISH did not participate at the meetings, but were actively involved in the drafting process.

High seas biodiversity issues were brought back on the agenda of the 6th ICP (June 2005), which focused, *inter alia*, on "fisheries and their contributions to sustainable development".[345] The EU coordination took place mainly within the COMAR, but the Dutch Presidency took supplementary steps to get all interested groups of the Council (the External Fisheries Group and WPIEI) involved in the drafting of the EU Statement.

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340 See also UNGA 58, Official Records, A/58/PV.63 (24.1.2003), pp. 12-14.

341 For a Report of the 5th ICP negotiations see: ENB 25/12 (14.06.2006), available at: http://www.iisd.ca/download/pdf/enb2512e.pdf.

342 EU Presidency Statement to the 5th ICP (4.06.2004). Outside the plenary, in the discussion panel on new sustainable uses, Italy suggested drafting a legal instrument on HSMPAs. The idea was supported by France and Greece, which stressed the need to balance the protection of biodiversity and freedom of the high seas. Portugal pointed to the work on HSMPAs within the framework of OSPAR (ENB, 25/12).

343 The G77 countries oppose any regime which does not clearly set up a mechanism for sharing benefits from the exploitation of genetic resources of the seabed (ENB, 25/12).

344 Spain questioned the exclusive focus of the moratorium on the high seas since the majority of fishing activities are concentrated in the EEZ. However, in the plenary, it supported temporary fishing bans in specific areas of the high seas. Outside the plenary, Italy supported the moratorium.

345 For a Report of the 6th ICP negotiations, see: ENB 25/18 (13.06.2005), available at: http://www.iisd.ca/download/pdf/enb2518e.pdf.

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Starting from January 2005, DG FISH is responsible for coordinating the work of the Commission within the COMAR. Reportedly, DG FISH supported the idea put forward by DG ENV to promote the development of a new international instrument (either a LOSC Implementation Agreement or a new Protocol to the CBD) which also addresses the designation and management of HSMPAs. Reportedly, EU coordination on this matter did not give rise to particular problems and there was a strong uniformity of views among the member states. At the meeting in New York, the Dutch Presidency reiterated the EU's support for an Implementation Agreement within the framework of the LOSC.[346] Once again, EU coordination was particularly difficult with regard to the control of destructive fishing practices and due to the resistance of some member states (e.g., Spain), the EU opposed a temporary moratorium on bottom trawling.[347] However, the EU was united in supporting the establishment of criteria on the objectives and management of MPAs for fisheries and urged close coordination and cooperation with relevant international organizations, including the CBD. On these matters it was the task of the Commission (DG FISH) to speak on behalf of the Community. This is quite exceptional within the UNGA framework where the EC merely has observer status and normally the Commission plays a secondary role in the negotiations.[348] However, since issues under the EC's exclusive competence (sustainable fisheries) were on the agenda, the Presidency and the chairman of the ICP agreed that DG FISH could intervene on behalf of the Community. This, however, was a pragmatic and informal solution. Since nobody objected, DG FISH sat next to the Presidency and took the floor whenever EC issues were on the table. Reportedly, during the negotiation of the 2005 UNGA Resolution, the Commission tried to formalize this formula, but did not succeed. Still, this may represent an important precedent to strengthen the future role of the Commission in the ICP.

8.8.4.3 EC Participation in the CBD and other MEAs

The Community participated in the Preparatory Commission for the negotiation of the CBD as a full member.[349] Since the beginning, the Commission, acting on behalf of the Community on the basis of a mandate of the Council, has stressed the importance of *in situ* conservation and has advanced the creation of a coherent network of protected

346 EU Presidency Statement to the 6th ICP (9/06/2005). The Netherlands spoke on behalf of Luxembourg, which had the Presidency, but lacked the necessary expertise to deal with biodiversity issues. Italy, moreover, reiterated its call for a new international instrument on HSMPAs.

347 The EC recommended that the *Ad-Hoc* Open-Ended Working Group set out by UNGA Resolution 59/24 should examine options for the management of high seas fisheries (ENB, 25/18).

348 The ICP works according to the rules and procedures of subsidiary bodies of UNGA.

349 On the EC's participation in the CBD negotiations see: P.W. Birnie in: M. Bowman and C. Redgwell (eds.) (1996), p. 215. Reports of negotiations are available in ENB, Vol. 09, at: www.iisd.ca/vol09/.

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areas along the lines of the Natura 2000 network.[350] Like the LOSC, the CBD also required the Community to make a Declaration at the time of accession indicating those matters within the Community's competence (Article 34(4)). The Declaration includes a cross-reference, *inter alia*, to the Habitats and Birds Directives.[351] The Commission and the member states were not entirely satisfied with the outcome of the negotiations on protected areas and at the time of the signature of the CBD committed themselves to start, as soon as possible, further work to strengthen the relevant provisions of the Convention. As a consequence, in the past two decades, the Community has driven the CBD's work on the protection of marine biodiversity, including the creation of a coherent network of marine and coastal protected areas within and beyond the limits of national jurisdiction.

The Community coordination within the CBD is a consolidated and formalized practice and the EC normally speaks with a single voice.[352] The coordination starts with the preparation of so-called position papers, which are generally drafted by the Commission in collaboration with the current and next Presidency or by the Presidency itself, depending on the subject matter and their respective competence. Before going to the Council the position paper drafted by the Commission must go through the Commission Inter-Service Consultation.[353] In particular, DG ENV submits a position paper to the Inter-service Group on Biodiversity, which is formed by 25 representatives from different DGs concerned with biodiversity issues. The position paper, therefore, always reflects the position of the Commission as a whole. Once finalized, the position

350 See: Council Doc. 7486/91 ENV, 18 July 1991.

351 The EC Declaration makes it clear that the Community has competence in relation to different matters covered by the Convention and has adopted several legal instruments, both as part of its environmental policy and within the framework of other sectoral policies. These include Council Decision 82/72/EEC on the conclusion of the Bern Convention; Council Decision 82/461/EEC on the conclusion of the CMS; Council Regulation 3626/82/EEC on the implementation of CITES within the Community; the Habitats and Birds Directives and the EIA Directive; Council Regulation 2078/92/EEC on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside (OJ L 215, 30.07.1992); Council Decision 89/625/EEC on a European Programme on Science and Technology for Environment Protection (STEP) (OJ L 359, 8.12.1989); Council Regulation 3760/92/EEC establishing a Community system for fisheries and aquaculture (OJ L 389, 31.12.1992); Council Directive 90/219/EEC on the contained use of genetically modified micro-organisms (OJ L 117, 8.05.1990); Council Directive 90/220/EEC on the deliberate release into the environment of genetically modified organisms (OJ L 117, 8.05.1990); Council Regulation 1973/92/EEC establishing LIFE.

352 It is worth mentioning that within the CBD it is common practice to refer to the EU. Information about the coordination procedure is based on interviews with representatives of DG ENV (Unit E2) who normally attend the CBD meetings (Mr. C. Berrozpe, Mr. N. Notaro and Mr. S. Leiner). The author remains exclusively responsible for the opinions expressed in this section.

353 On the Inter-service Consultation see: European Commission, "Putting MEA/WTO governance into practice: the EC experience in the negotiation and implementation of MEAs, 27.06.2005, pp. 3-5, available at: http://trade-info.cec.eu.int/doclib/docs/2005/august/tradoc_124258.pdf.

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papers are circulated to the member states and then discussed within the Biodiversity Group of the Council's Working Party on International Environmental Issues (WPIEI) where the Commission and all member states work closely together to refine the common positions. Discussions within the WPIEI may last for several months and particularly controversial issues may eventually go to the COREPER. In preparation for the COPs of the CBD a common practice is to have common positions adopted by (Environmental) Council Conclusions fixing the political objectives which the EU wants to achieve in the negotiations.[354] It should be noted that this practice has no legal basis in the EC Treaty, but has developed over time. Council Conclusions are normally unanimous. However, since biodiversity and environmental issues in general are subject to shared competence, QMV, not unanimity, would apply should a formal vote be requested by a member state.[355]

In preparation for CBD meetings, moreover, there is always an intensive e-mail exchange between the Commission and the member states and between the different DGs involved. Reportedly, there is strong coordination between DG ENV and DG FISH on marine biodiversity issues discussed within the CBD. The EC coordination continues on the spot under the chairmanship of the Presidency and in close collaboration with the Commission. The relevant meetings take place outside the CBD sessions or whenever new issues come up and there is a need to coordinate positions. Once adopted, common positions are legally binding for the member states. Occasionally, they still express their views directly, but they normally align with the EC positions, especially in plenary.

Common positions are more often presented by the Presidency, but the Commission may speak on behalf of the Community when issues falling within the EC's exclusive or predominant competence are on the agenda (e.g., agriculture, fisheries or trade-related matters). However, this practice has not been consistently followed within the CBD.[356] Sometimes there are informal agreements between the Commission and the Presidency on who will present the common positions, whether in plenary or in smaller negotiation groups. There is close cooperation between the EC institutions in this forum and normally the Commission is the strongest ally of the Presidency. The EP is kept informed by the Commission, but its role in the CBD remains marginal. Normally, the Commission attends all major CBD meetings in its institutional role as the representative of the Community, unless there is a lack of human or financial resources. In this case the Presidency participates alone with the member states that are able to attend.

This formal EC coordination takes place in preparation for COPs or other meetings which have strong political weight (e.g., open-ended Groups or WG on protected areas).

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354 E.g., the ENV Council Conclusions on the CBD COP-VII (December 2003, p. 16-8).

355 Reportedly, the issue was brought to the attention of Council during the discussions on the Commission mandate to negotiate the EC's accession to the Cartagena Protocol and the Arhus Convention. Some member states proposed that there should be Council "conclusions" instead of a formal "mandate" (see Chapter 4.3.2.2).

356 Member states still speak individually in matters under their exclusive competence (e.g., national experiences in the various fields)

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Generally, there is no formal coordination for *ad hoc* technical experts groups discussing only technical issues and where experts intervene on their personal capacity and do not formally represent parties. The coordination procedure is more complicated with regard to the adoption of amendments or new Protocols. In this case the Commission requests a formal negotiating mandate from the Council and usually holds external consultations to make sure that all interested stakeholders are involved in the development of the common positions.[357]

The Community spoke with a single voice in all relevant COPs discussing coastal and marine biodiversity and MPA issues, such as COP-2 (1995) and COP-4 (1998).[358] EC coordination was particularly intense in preparation for the COP 7 (2004). During the negotiations on Decision VII/5 concerning marine and coastal biodiversity the Community stressed the urgent need for international cooperation to protect marine biodiversity beyond the limits of national jurisdiction, including the establishment of MPAs acting consistently with the LOSC.[359] As within the ICPs, coordination has been more difficult with regard to the control of destructive fishing practices on the high seas.[360] Due to the resistance of Greece and Spain the Community could not agree upon the NGOs' proposal for a moratorium on bottom trawling in the high seas but supported the possibility of considering an interim prohibition in these areas, on a case-by-case basis, whenever there is attested damage to marine biodiversity.

The Community was particularly active and played a major role at the first meeting of the open-ended Working Group on Protected Areas (WGPA-I), held in Montecatini in June 2005. There was no formal coordination in preparing for the meeting, but the EC decided to follow the same position taken at the 6th ICP. DG ENV was present, while representatives from DG FISH did not attend the meetings, but were directly involved in the preparatory work. The Dutch Presidency, on behalf of the EU, Bulgaria and Romania, proposed the development of an implementing agreement under the LOSC addressing, *inter alia*, the conservation of marine species and ecosystems beyond national jurisdiction, the establishment of a global MPA network and the prohibition of de-

357 Prior to the COP-2, for instance, the Council provided the Commission with a mandate for the negotiation of the Biosafety Protocol. This mandate was revised several times during the negotiations.

358 At the COP-2 the Spanish Presidency made a statement on behalf on the EU in addition to Italy, the Netherlands and Sweden (Report of COP-2, UNEP/CBD/COP/2/19, Para. 92). At the COP-4 the UK Presidency made a statement on behalf on the EU in addition to Finland, Italy, Portugal, Spain and Sweden (Report of COP-2; UNEP/CBD/COP/4/27, Paras. 85-92). All available at: www.biodiv.org/convention/cops.asp#.

359 At the COP-7, the Irish Presidency made several statements on marine biodiversity and MPAs on behalf on the EU, the acceding countries, and Bulgaria and Romania as candidate countries. Member states made individual statements aligning themselves with the EU positions. See Report of COP-2, UNEP/CBD/COP/7/21 (Paras. 168-88).

360 Decision VII/5, Paras. 61-62.

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structive fishing practices.[361] The Community, moreover, called for the establishment, by 2008, of some MPAs in the high seas acting within the framework of Regional Seas Conventions (such as OSPAR or the BARCON SPA Protocol) or RFMOs. This proposal, however, was bracketed due to a lack of consensus. Eventually, at the COP-8 (March 2006), the Community succeeded in including in Decision VIII/21 an indirect reference to a LOSC Implementing Agreement for the protection of marine biodiversity, including the establishment of MPAs in areas beyond national jurisdiction, as a possible follow-up to the February 2006 meeting of the UN *Ad-Hoc* Working Group on Marine Biodiversity.

The same coordination mechanism for the CBD may also apply in the preparation for the meetings of the other MEAs discussing MPAs and marine biodiversity issues, such as Ramsar or the CMS. However, this happens very rarely. Traditionally, indeed, the Commission preferred to concentrate its efforts and scarce human resources on the CBD, leaving to the Presidency the task of co-ordinating as necessary the member states within those MEAs. In the aftermath of the WSSD Summit, however, the situation has partially changed and the Community has reinforced its participation in these fora, which are increasingly involved in the achievement of the WSSD biodiversity targets. However, Community coordination has so far been much looser within these frameworks.

The Community is not a party to the Ramsar Convention, which reserves membership exclusively to States, but it has observer status. Since 1980 representatives from the Commission (DG ENV) and occasionally from the Secretariat of the Council and the EP attend the meetings.[362] All 25 member states are contracting parties and normally participate individually in the discussion. At the COP-8 (in 2002), the Irish Presidency spoke on behalf of the EU on several fisheries-related matters and other issues within the EC's exclusive competence which were on the agenda.[363] However, there was no formal coordination in preparation for this meeting. Also at the COP-9 (in 2005), there were some common statements and informal coordination, but exclusively in relation to fresh water.

Although the Community is a party to the CMS alongside all the member states and may participate as a full member,[364] it has never been particularly active within this framework. Member states have been traditionally freer to act in the CMS compared to the CBD and the EC does not always speak with one voice. Since COP 6, in 1999, however, matters of EC interest, including fisheries-related issues, are increasingly on

361 The EU wanted to see a reference to such an implementing agreement in the final document of the WGPA. However, due to the strong resistance of some states (i.e., Iceland, Japan, and Norway), the text remains in brackets, see: ENB 9/326 (PAWG-1) at: www.iisd.ca/biodiv/wgpa/.

362 See Official Records of the Ramsar COPs, at: www.ramsar.org/index_key_docs.htm#conf. Starting from 1980 the Commission always attended the meetings except in COP 2 (1984) and COP 3 (1987).

363 Reports of the Ramsar COPs are available at: www.iisd.ca/vol17/.

364 See Council Decision 82/461/EEC, 24.06.1982 (O.J. L210, 19.07.1982).

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the CMS agenda and the Community has increased its participation and coordination in this forum (e.g., COP 7 (2002) and COP 8 (2005)).[365]

8.8.4.4 EC Participation in the IMO's Work on PSSAs

The Community coordination in preparation for IMO meetings has been exhaustively discussed in Chapter 6.9.2 and will not be repeated here.[366] In the past few years this coordination mechanism has been formalized and strengthened to a great extent along the lines of the CBD. At present when issues under the EC's exclusive competence are on the agenda of IMO (e.g., double-hull standards) the common positions are adopted by the Council by QMV and are legally binding for the member states. This is a major difference compared to the EC coordination for the CBD where common positions are endorsed in the Council's (unanimous) conclusions. So far, when matters subject to shared competence have been on the IMO table, such as PSSA issues, the Commission and the member states have had to do their best to achieve coordinated positions, which, however, are not legally binding. The (Transport) Council is in the process of strengthening the coordination mechanism and it is expected that the future common positions on matters subject to shared competence (e.g., PSSA issues) will be taken within the Council by unanimity, as occurs in the framework of the CBD. These positions will be legally binding and it will be impossible for member states to deviate from them. In practice, however, there has always been a strong uniformity of views among member states on PSSA issues.

In the wake of the *Prestige* disaster, the Community and the member states highlighted the PSSA regime as an effective instrument to enhance the protection of vulnerable sea areas against the threats posed by international shipping while remaining within the framework of the LOSC and safeguarding the freedom of navigation granted by the Convention.[367] Soon after the disaster, the EU Council, supported by the Commission and the EP, urged the member states to identify common sensitive areas particularly vulnerable to international shipping and to formulate coordinated proposals for their designation as PSSAs by IMO.[368] In addition, the EC institutions urged the full implementation of the Natura 2000 network in areas particularly vulnerable to shipping,

365 At the COP 8 (2005), for instance, the EU (next to Denmark, on behalf of the Faroe Islands, and Portugal on behalf of the Azores), made a reservation to the listing of the Basking Shark in Appendix I. The Presidency, on behalf of the EC, said it had to make a reservation until EC legislation was in place to ensure compliance with the Convention time-frame. The Report of CMS COPs are available in: ENB Vol 18, at: www.iisd.ca/vol18/.

366 The following section builds on V. Frank (2005), pp. 30-8.

367 E.g., the Statement of the EU Presidency, Mr. Nesi, on behalf of the EU at the 58th UN General Assembly, 63rd plenary meeting, 24 November 2003, New York (A/58/PV.63, at 13), available at: europa-eu-un.org/articleslist.asp?section=11.

368 *"Prestige"*- Council Conclusions (Para. 10) and the December 2002 ENV Council (Para. 12); EP Sterckx Report (Para. 25) and the Sterckx Resolution (Paras. 16 and 42).

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including the EEZ, and called for a reinforced link between PSSAs under the IMO and Natura 2000 sites.[369]

Following the Council Recommendations, in April 2003, six EC member states submitted a proposal to the MEPC 49 for the designation of a PSSA in the Western European Atlantic (WE PSSA) which includes certain parts of their EEZs (and equivalent zones) and the English Channel.[370] Similarly, in December 2003, the EC Baltic States submitted a proposal to be considered during MEPC 51 (in March 2004) for the designation of the Baltic Sea area, except for Russian waters, as a PSSA in the same vein as the WE PSSA.[371] Given the firm opposition of the Russian Federation, the Baltic States decided to proceed outside the framework of HELCOM and this has impeded the formal involvement of the Community in the process.[372] Although the WE and Baltic PSSA proposals cannot strictly be considered as Community initiatives, they are characterized by the strong coordinated action of member states and have been firmly supported by the EC institutions.[373] Both proposals, moreover, include Natura 2000 sites, thereby making an important link between the two regimes. The Commission, therefore, has played an important coordinating role and its work has been crucial in ensuring the support of the other member states in the IMO. PSSA issues have been regularly on the agenda of the EC coordination meetings since MEPC 49. Reportedly, except for the initial opposition of Greece to the WE PSSA, there have been no major conflicts among the member states on PSSA matters and they have been generally united in supporting the commonly agreed positions in London.[374] The Community appeared particularly united at the MEPC 53 (July 2005), where the revision of the PSSA Guidelines and the formal designation of the Baltic PSSA and the Canary Islands PSSA were on the agenda. The Community has supported the possibility of clarifying and strengthening, if appropriate, the Guidelines as long as the revision did not affect existing

369 COM (2002) 539 on the Marine Strategy, p. 21; December 2002 ENV Council (Para. 12) and EP Sterckx Report (Paras. 88 and 89).

370 IMO doc. MEPC 49/8/1, 11.04.2003, submitted by Belgium, France, Ireland, Portugal, Spain and the UK. For a full discussion see: V. Frank (2005), pp. 30-32.

371 IMO doc. MEPC 51/8/1, submitted by Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland and Sweden, 19.12.2003.

372 It is worth recalling that the EC is not a member of the IMO. However, since the eight proponents were EU and acceding countries, the Commission has been able to exercise a coordinating role.

373 See, e.g., COM (2003) 105, at (2.2.3.3); March 2003 Transport Council; March 2003 ENV Council, at (17); December 2002 ENV Council, at (31), and EU Statement No. 2 for the 4th ICP. The Irish Presidency has renewed its support for the WE PSSA and has envisaged the idea of new PSSAs to be identified in the Mediterranean and the Baltic, see the Speech by Minister D. Ahern before the EP-MARE, 18.02.2004, at: www.europarl.eu.int/comparl/tempcom/mare/default_en.htm.

374 Reportedly, during the EC coordination meeting in preparation for the MEPC 49, some member states, such as Germany and the Netherlands did not fully agree with the WE PSSA, but they still supported the proposal in the IMO. Conversely, Greece expressed its reservation against the WE PSSA and made a unilateral statement at the MEPC 49.

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or proposed PSSAs. There has been EC coordination in Brussels and on the spot in London on this matter, but no EU Statements. At the meeting member states spoke individually but they all expressed the same view. Representatives from DG TREN were present at the plenary, but they did not take part in the Technical Group established to revise the Guidelines. Very few member states attended the Group, mainly due to a lack of human resources.[375] However, they were rather active at the plenary. In addition, all the 25 member states have been particularly united in supporting the designation of the Baltic Sea as a PSSA which until the very last minute was contested by the Russian Federation. Reportedly, some member states are in the process of preparing proposals for new PSSAs in the Mediterranean.[376] It is likely, therefore, that PSSA issues will remain on the table of the EC coordination for the next MEPC meetings and the Community will continue to be actively involved in the PSSA work within IMO.

8.8.4.5 EC Participation in the Regional Work on MPAs

Unlike at the global level, the Community is not actively involved in the work on MPAs carried out within the Regional Seas Conventions. The Commission (DG ENV) participates in the relevant discussions but generally plays a marginal role. As in the field of maritime transport and ocean dumping, the Commission does not seem to be particularly interested in strengthening the regional regimes on MPAs; its priority remains the full implementation of Natura 2000 under the Habitats Directive. Most of the Community's action in the regional fora, therefore, is directed toward promoting consistency between the regional and EC rules and safeguarding the EC's exclusive competence. In particular, the Commission makes sure that EC member states do not discuss fisheries issues and do not undertake commitments with non-EC countries without a specific mandate. Representatives from DG FISH do not normally participate in the relevant meetings, but they are regularly consulted by DG ENV whenever fisheries issues are on the agendas of the regional bodies.

Due to resource constraints, the Commission cannot attend all the relevant meetings, but generally gives priority to the bodies where decisions are taken. Besides, the EC delegation, unlike those of the EC member states, is normally formed by a single representative from DG ENV who has to deal with all items under discussion. Although the regional secretariats normally circulate the relevant documents a couple of months before the meetings, it is very difficult for the Commission delegate to be fully prepared

375 Only Denmark, France, Finland, Greece, Ireland, Italy, Spain, Sweden and the UK attended the Group. Several Working Groups were running in parallel with the plenary and especially for small delegations it was impossible to participate in all the discussions.

376 Reportedly, France and Italy are preparing a PSSA proposal for the Bonifacio Strait; Croatia, Italy, and Slovenia are discussing the possibility of a new PSSA in the North East Adriatic; Spain is considering a PSSA in the Balearic Islands.

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concerning all the items on the agenda and he/she often allows member states to play the leading role.

Member states, for their part, have been traditionally keen to preserve their individual participation in the regional bodies and have always opposed an excessive involvement of the Community. The need for regional differentiation is particularly strong in relation to marine biodiversity and regional measures specifically tailored to the characteristics of the area are considered to be more effective in protecting regional habitats, species and ecosystems than EC-wide harmonized standards. The most environmentally minded member states, moreover, are afraid that the Community's participation in the regional decision-making could result in lower protective standards and importing into the regional sea in question certain problems that do not exist there and which are proper to another sea.[377]

As already extensively discussed in the previous chapters, there is no EC coordination whatsoever in the preparation for or during the regional meetings discussing MPAs and biodiversity issues. Regional Conventions intend to set out a framework for intergovernmental cooperation among contracting parties on the same level and have traditionally opposed any kind of bloc-forming and co-ordination.

The Community is a party to Annex V of the OSPAR Convention together with all the EC OSPAR contracting parties.[378] A representative from DG ENV normally attends the meetings of the BDC (and OSPARCOM) on behalf of the EC as a full member, but does not participate in the meetings of MASH or other sub-committees.[379] For the reasons discussed before, the member states generally play the main role in this forum. In order to avoid a duplication of work and efforts there is a well-established cooperation between the DG ENV and the OSPARCOM.[380] Although fisheries issues remain outside the scope of the OSPAR Convention, they are occasionally discussed within the BDC.[381] Representatives from DG FISH never attend the OSPAR meetings, but DG ENV always consults them on the position to be taken and defends the EC's fisheries interests in OSPAR. Generally, the role of OSPAR in fisheries issues is to

377 Reportedly, this happened within the framework of ACCOBAMS where the Commission pushed for the introduction of a whaling exception because of the insistence of Denmark. The latter has strong whaling interests in the Faroe Islands but there is no whaling in the Mediterranean Sea.

378 See Council Decision 2000/341/EC concerning the approval, on behalf of the Community, of the New Annex V of the OSPAR Convention and Appendix 3 and the Proposal from the Commission (COM (1999) 190, in: O.J. C 158/1, 4.06.1999). Belgium ratified Annex V on 25.08.2005 and Portugal on 25.03.2006.

379 See OSPAR Summary Records, available at: www.ospar.org/eng/html/welcome.html.

380 See, e.g., Summary Records of the OSPARCOM meeting held in Valencia, June 2001, Agenda item 10 "Cooperation with the European Community" (OSPAR 01/18/1-E) and Annex 17 "Considerations on Strategic Cooperation between OSPAR and the European Community".

381 See, for instance, the inclusion of some commercial stocks (e.g., cod and salmon) in the OSPAR lists of threatened species and habitats. Reportedly, DG ENV referred the issue to DG FISH, asking if it was appropriate to have cod on the OSPAR List. Since the listing has no legal consequences, DG FISH agreed.

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identify the problem and possible solution and then to ask the EC Commission (and other competent regional organizations) to take legislative action. Traditionally, the level of cooperation between OSPARCOM and DG FISH has been rather weak, but in the past few years it has improved to a great extent.[382]

The Commission is not particularly involved in the HELCOM work on BSPAs either. Due to a lack of human resources, DG ENV only occasionally attends the meetings of HELCOM HABITAT, but it normally participates in the meetings of HELCOM where biodiversity-related decisions are taken.[383] However, normally the member states exercise their voting right on MPA issues, as in the case of Recommendation 15/5 setting out the BSPA network. The role of the Commission in HELCOM, like in OSPARCOM, is mainly directed at controlling whether member states infringe the EC's competence by adopting fishing management measures. Like in OSPAR, there is a strong level of coordination between the HELCOM and DG ENV on MPAS and biodiversity issues.[384] After the 2004 EU enlargement, the Habitats and Birds Directives are legally binding for all Baltic States except the Russian Federation, which, however, adopted a similar regime.[385] Therefore, there is no need for the Commission to participate in HELCOM in order to defend Community interests.

On the other hand, the Community actively participated next to the member states in the MPA discussions within the main regional political fora, especially within the framework of the NSMCs. Representatives from DG ENV, and lately also from DG FISH, have been fully involved in the drafting of the 5th NSMC Declaration, which endorsed the WSSD target on the MPA network.[386] Similarly, DG ENV took part in the drafting of the 2003 Joint OSPAR-HELCOM Ministerial Declaration that reinforced the MPA targets in the North-East Atlantic and Baltic areas.[387] In both cases, however, the role of the Commission was mainly directed at promoting EC targets and there was no EC coordination in the preparation or during these meetings.

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382 In the case of the Darwin Mounds, for instance, DG FISH followed a recommendation from OSPAR and used it as a ground for closing the area to fishing. According to E. Hey (2002), pp. 346-48, the revision of the CFP was a missed opportunity for formalizing and improving this cooperation.

383 So far, DG ENV has only participated in HABITAT 3 (2002), HABITAT 4 (2003) and HABITAT 7 (2005).

384 See, e.g., HELCOM HOD 12/2003, Document 2.1/4, 30.04.2003 on the Future Role of HELCOM.

385 The Emerald Network, which applies in Russian waters, like the BSPAs Network, builds upon and presents strong similarities with Natura 2000.

386 In Bergen, moreover, the EC member states confirmed their intention to fully implement the Natura 2000 network without delay and to "study the practicability" of its application beyond the territorial sea. The Summary Records of the CONSSO meetings are available at: http://odin.dep.no/md/nsc/p10003262/bn.html.

387 Summary Records of the Helsinki and OSPAR Commissions (JHOD 1-02), available at: http://sea.helcom.fi/dps/docs/documents/Response%20Group/HELCOM%20RESPONSE%202,%202003/2_2.pdf. The environmental impact of fisheries was also discussed at the meeting, but representatives from DG FISH were not present.

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The EC is a party to the 1995 SPA Protocol of the BARCON, together with all seven Mediterranean member states.[388] The Commission (DG ENV), acting on behalf of the Community, took part in the drafting process on the basis of a formal mandate from the Council. Since the Protocol covered areas of Community competence under the Habitats and Birds Directives and concerned species whose exploitation is regulated under the CFP, the Commission's participation in the negotiation was necessary in order to ensure consistency between the EC and the BARCON regimes.[389] However, the implementation of the SPA Protocol has been mainly left to the member states and, so far, the Commission has not been particularly active in the MPA discussions in this framework. DG ENV normally attends the Meetings of the National Focal Points for SPAs and the BARCON MOPs. Like in other regional fora, the role of the Commission is to control that the EC member states do not address fisheries and that they do act consistently with EC law.[390] The situation may change in the near future. In the past few years, the Commission has become more involved in marine biodiversity and MPA discussions within the BARCON framework and DG ENV is intending to strengthen EC coordination in this forum. Traditionally, the level of cooperation between the BARCON and DG ENV has been rather weak. This has to some extent improved with the accession in 2004 of Cyprus, Malta and Slovenia and will strengthen further with the next enlargement with the accession of Croatia and Turkey. The 14th MOP (2005) and the 13th MOP (2003) stressed the need to achieve synergy on strategic matters of common interest and to promote consistency between the SPA Protocol, Natura 2000 and the EMS in order to avoid duplication of efforts.[391]

Finally, the role of the Community within the framework of the Bern Convention has been traditionally more active than within the regional seas agreements discussed before.[392] This is probably because of the existence of a clear competence for the Community in matters covered by the Bern Convention, which has been directly implemented by means of the Habitats Directive. Representatives from DG ENV normally attend the meetings of the Standing Committee, occasionally accompanied by representatives from DG FISH, the Commission's Legal Service and the Council Secretariat. The Commission votes and speaks on behalf of the Community in matters under the EC's exclusive competence, which, however, are not normally discussed in this forum, while

388 See Council Decision 1999/800/EC. The EEC was a party to the 1982 Protocol as well (i.e., Council Decision 84/132/EEC).

389 However, it has been up to the member states to negotiate and adopt the Annexes as the Commission had no mandate for this.

390 In 2002, the EC adopted an Action Plan for the conservation and sustainable exploitation of fisheries resources in the Mediterranean Sea under the CFP (COM (2002) 535).

391 E.g., the 14th MOP (UNEP(DEPI)/MED IG. 16/13 (Annex III, Para. I.A.5.2) and the 13th MOP calling on the EC to take full account of the characteristics of the Mediterranean Sea in the drafting of the EMS (UNEP (DEC)/MED IG.15, Annex V, Paras. 8-10).

392 The Community signed the Bern Convention in 1979 and ratified it in 1982 with Council Decision 82/72/EEC. All 25 member states are parties to the Bern Convention, which sets out an alternative voting system analogous to the one under the LOSC (Article 13 (2)).

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the Presidency is responsible for matters of shared competence. After the 2004 enlargement, the Community has the majority of votes in the Bern Convention and may lead the decision-making process. Most of its efforts have been directed towards ensuring consistency between the Emerald Network and Natura 2000 and between the Annexes of the Bern Convention and Habitats Directive. There is strong coordination between the Community and the Bern Institutions in order to avoid any duplication of work and efforts.

8.9 Final Observations

In the past two decades, the establishment and management of a coherent network of MPAs has become one of the main priorities of the global and regional bodies dealing with the protection of marine biodiversity. At the WSSD the international community committed themselves to establish, by 2012, representative networks of MPAs consistent with international law. The establishment of MPAs finds a legal basis in different MEAs, including the CBD and the Regional Seas Conventions and seems to be supported by the LOSC which requires States to protect and preserve rare and fragile ecosystems as well as the habitats of depleted, threatened and endangered species or other forms of marine life (Article 194(5)). In the aftermath of the WSSD Summit, the MPAs target has been endorsed in all political ocean fora and new steps have been taken within the CBD, OSPAR, Helsinki Convention and BARCON toward the full achievement of this goal. Most of these commitments, however, are not formulated in legally binding terms and their implementation largely depends on the political will of the contracting parties. In addition, there are no strong enforcement mechanisms and effective funding instruments at the global and regional level to ensure compliance. Moreover, there are currently (too) many international and regional instruments governing the designation and management of MPAs and there has been overregulation in this area. Within European waters, for example, a variety of MPAs may be established (e.g., Natura 2000 sites, MCPAs under the CBD, Ramsar sites, OSPAR MPAs, BSPAs, SPA/SPAMIs, ACCOBAMS sites, and ASCIs within the framework of the Bern Convention). Despite their analogies, global and regional instruments differ to a considerable extent with regard to their legal or political nature, their scope of application (high seas and/or water under national sovereignty or jurisdiction) and their selection, designation and management criteria. This patchwork regime may create confusion and bring overlapping obligations for coastal States, making it quite difficult to correctly implement their international commitments. Current efforts, therefore, are directed toward ensuring consistency among existing regimes and creating a coherent network of MPAs which is consistent with the law of the sea.

In principle, the Community, through its institutions, legally binding instruments, and enforcement and funding mechanisms would offer a particularly effective framework to fill most of these gaps and transform the broad political commitments into legally binding obligations and clear enforceable targets.

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The Community, as a party to the LOSC, CBD, Annex V of OSPAR, the Helsinki Convention, and the SPA Protocol, is under a legal duty to protect marine biodiversity. In addition, it has fully endorsed the WSSD target and regional commitments to establish a coherent network of MPAs by 2012. The Habitats and Birds Directives indirectly implement the Community's obligations under the LOSC and other instruments and may contribute to achieving their objectives. In their present form, however, they do not provide an adequate framework for the Community to fully comply with its international obligations and to meet the MPA targets completely. In the aftermath of the WSSD, however, the Commission, with the assistance of OSPAR and HELCOM, has taken new steps to make the Habitats Directive more suitable for protecting the marine environment and marine wildlife. Nevertheless, the relevant work is proceeding quite slowly. Likewise, the recent Commission's proposal for a Marine Strategy Directive, in its present form, represents a missed opportunity for the Community to fully meet its international duty to protect marine biodiversity and achieve the WSSD biodiversity-related targets.

The Habitats and Birds Directives are based on Article 175 EC and contain minimum standards. The member states are free to raise the level of protection, for instance, by agreeing on higher standards within the framework of the CBD and other global or regional Conventions. Their individual action in these fora is indeed not likely to jeopardize the achievement of the objectives of the EC Directives. The EC legislation, therefore, does not trigger any Community exclusive competence to act at the international level, but, according to the general rule, member states and the EC institutions, on the basis of Article 10 EC, have to cooperate within the relevant bodies.

In the past few years, the Community, next to the member states, has been particularly active in the global discussions on MPAs within the UN, CBD, and IMO. Speaking with a single voice, they have taken the lead in the current efforts toward the establishment of a coherent network of MPAs both within and beyond national jurisdiction. On the other hand, the Community plays a marginal role in the MPA work within the regional bodies and there is no EC coordination in these frameworks. In these fora it is normally the member states which play the leading role, while the Commission simply controls that they do not violate EC law (e.g., by discussing fisheries management issues), and promotes consistency with the EC rules. The Commission does not seem to be particularly interested in strengthening the regional MPA networks, but seems to give strong priority to the full implementation of the Natura 2000 network.

The work on MPAs under the Regional Conventions is still at a preparatory stage and is largely political in nature. The large majority of the contracting parties to the Helsinki Convention and OSPAR's Annex V as well as some Parties to the SPA Protocol are also EC member states and they are under a legal obligation to designate and manage Natura 2000 sites under the Habitats Directive. Given the strong synergy between the EC and the regional regimes, the implementation of the Natura 2000 network in the regional seas may provide the OSPAR MPAs, BSPAs and SPA/SPAMIs networks with full legal protection. For some contracting parties, moreover, the lack of resources represents a major obstacle to full compliance with their regional commitments. How-

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ever, they may take advantage of the financial instruments which are available under EC law to assist them in the implementation of Natura 2000.

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CHAPTER 9

Conclusions

9.1 Summary of the Objectives of this Book

The European Community and its member states have shared competences in marine environmental matters. That means that, within their respective spheres of power, they may both act. As a consequence, they have jointly acceded to the LOSC and the main marine environmental agreements and they jointly participate in the work of the bodies established by these Conventions. The purpose of the present study was to establish how the existence of shared competence between the Community and its member states and the difficulty in clearly dividing the respective spheres of powers affect the implementation of their international obligations for the protection and preservation of the marine environment. Particular attention has been paid to the global and regional Conventions and bodies in which they jointly participate. Secondly, the research intended to establish whether the Community's regulatory actions and approaches are in conformity with the existing international rules for the protection and preservation of the marine environment (hereinafter: the international ocean regime), especially looking at the jurisdictional framework established by the LOSC. The material scope of the research has been limited to the prevention of oil pollution from ships, the regulation of ocean dumping and the protection of marine habitats through the establishment of MPAs. These three topics have been discussed in separate case-study Chapters.

9.2 Implementing the International Regime for the Protection and Preservation of the Marine Environment

As discussed in Chapter 1, the LOSC places all States under the positive legal duty to protect and preserve the marine environment. The Convention sets out the framework for the multilateral development of rules, primarily through competent international organizations, and their uniform implementation and enforcement. Chapter 17 of Agenda 21 establishes the objectives, principles and approaches (e.g., the precautionary principle and an ecosystem-based approach), which have to guide States in implementing their obligations under the LOSC. The WSSD Plan of Implementation, adopted in Johannesburg in 2002, set out new clear-cut and time-bound targets with important implications for the preservation of the marine environment and marine life. Both the LOSC and Agenda 21 place particular emphasis on regional cooperation, especially with regard to enclosed and semi-enclosed seas, like the Baltic Sea, parts of the North-East Atlantic,

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including the North Sea, and the Mediterranean Sea, which, due to their poor circulation and the shallowness of their waters, are highly vulnerable to marine degradation.

In European seas, the environmental provisions of the LOSC have been primarily implemented by means of three comprehensive agreements (i.e., the OSPAR Convention, the 1992 Helsinki Convention, and the BARCON). In addition, in the past three decades the LOSC has provided the legal basis for the adoption of an extensive corpus of global, regional and sub-regional instruments of a different legal nature and covering a wide range of pressures on the marine environment and its components. These instruments set out the framework for further cooperation between the contracting parties. This cooperation takes place primarily within the decision-making bodies established by these Conventions, Preparatory Committees and Working Groups.

The implementation of the environmental provisions of the LOSC requires contracting parties, including the Community and its member states, to take action at three different levels:

(a) at the global level, within the competent international organizations (e.g., IMO and UNEP); the decision-making bodies established by the relevant Conventions (e.g., COP/MOPs), and the main political fora (e.g., UNGA and ICP);
(b) at the regional level, within the Regional Seas Conventions (e.g., the 1992 Helsinki Convention, OSPAR, and BARCON and related Protocols) and the main regional political fora (e.g., NSMCs, Ministerial Conferences of the Baltic Environmental Ministers); and
(c) at the national level.

The implementation of the international ocean regime in European seas must be considered in the light of the unique legal and political structure of the European Community and the special relationship with its member states. As discussed in Chapter 2, with the evolution of the European integration process, the EC member states have explicitly or implicitly, completely or partially transferred their competence to the Community in several areas covered by the LOSC and related global and regional instruments. In implementing their obligations, therefore, they cannot act in isolation; but they must proceed in accordance with EC law. In the same way, the Community's competence is not unlimited and must be exercised consistently with the fundamental principles of EC law.

In implementing their Treaty obligations, contracting parties, including the Community and the member states, have to act in conformity with the jurisdictional framework set out by the LOSC, which establishes the rights and duties of States in the different maritime zones. As discussed in Chapter 1.2.2.1, the Convention places some limits on the capacity of coastal States to control unilaterally the potentially dangerous activities of foreign vessels within waters under their national jurisdiction, especially in relation to shipping. Furthermore, both the LOSC and Chapter 17 recognize that marine environmental problems are closely interrelated and cannot be tackled in isolation. The implementation of the global ocean regime therefore requires an integrated and comprehensive approach, which takes into consideration all forms of pressures on the marine environment and its components.

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9.3 How Does the EC Implement the Marine Environmental Provisions of the LOSC and the Related International Agreements?

9.3.1 A Multilateral Approach to Ocean Preservation

As discussed in Chapter 2.3 and 2.4, the EC principles governing the "existence" and the "exercise" of the Community's competence are so broadly formulated as to leave the EC institutions with ample discretion to decide "whether", "in which manner" and "how far" to act. Generally speaking, in matters under shared competence, such as the environment, the Community may only act on the basis of powers explicitly conferred by the EC Treaty (attribution), as long as its action appears to be more "effective" than member states' individual actions (subsidiarity) and insofar as it does not go beyond what is "necessary" to achieve the common objective (proportionality). These principles are based on general concepts such as "effectiveness" or "necessity" and are linked to the Community's objectives as broadly defined in the EC Treaty (Chapter 2.3.1.1). In the absence of more clearly defined legal criteria, therefore, the determination of whether and how the Community may act is often a matter of political choices. As a consequence, most of the Community's action in the field of the marine environment has been primarily driven by political and economic, rather than legal considerations.

In spite of the existence of a proper legal basis in the EC Treaty (Chapter 2.3.1.2), so far the Community has never established a comprehensive policy or specific legislation on oceans and seas as it has done in other environmental areas (e.g., waste or water quality), but it has always taken a multilateral approach (Chapter 3.2.4). Oceans and marine resources play a vital role in the life and economy of most EC member states, which have traditionally opposed the direct involvement of the Community in marine environmental issues that could affect their core national interests.[1] Member states, especially maritime nations, wanted to preserve their autonomous role and their visibility at the international level and were afraid that the adoption of EC rules could trigger an exclusive competence on the part of the Community in the main ocean bodies, as occurred in the field of fisheries. From an economic point of view, moreover, the adoption of EC standards which are more stringent than international standards risked placing the EC industry at a competitive disadvantage with respect to the rest of the world. Furthermore, the very existence of the Community's environmental competence beyond the territorial sea of the member states has always been strongly contested (Chapter 2.5). Before the Treaty of Maastricht, the Community's regulatory actions in marine-related matters were hindered by the unanimity rule in the Council. The extension of qualified majority voting (QMV) to the adoption of all environmental legislation and the enhancement of the EP's role in the environmental decision-making have, in part, removed the obstacle. However, relying on the "effectiveness" of the existing inter-

1 On the other hand, member states accepted the Community's involvement in the field of fisheries because different national regulations could have had a serious impact on the establishment of the single market.

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national rules and standards, member states have used the principles of subsidiarity and proportionality to limit the Community's involvement in marine-related matters to a minimum.

To avoid a serious confrontation with the member states and because of the need to prioritize its action, the Commission has decided to concentrate its efforts and limited resources on the protection of nature on land and to rely on existing international instruments for the protection and preservation of the marine environment. Therefore, as discussed in Chapter 5, the Community, acting alongside its member states, has become a party to the LOSC and it has signed Agenda 21 and acceded to all the relevant MEAs (e.g., CBD) and regional Conventions implementing the LOSC and Agenda 21 in the European seas. In addition, it directly participates in the decision-making within the bodies established by these Conventions and, when it is not a party (e.g., IMO's regulatory instruments), it acts through the coordinated positions of its member states (Chapter 6.9.3). Moreover, the Community and the member states actively participate in the development of ocean policies within the main political fora, within and outside the UN. On the other hand, the Community's regulatory action in the field of the marine environment has so far been limited, indirect and rather fragmented.

9.3.2 The Sector-by-Sector Approach

Given the cross-sectoral nature of marine issues, important aspects related to the protection of the marine environment have been directly or indirectly regulated within the framework of different EC policies and legislation (e.g., water quality, transport or fishing). Still, as discussed in Chapter 3.4.4, this sectoral legislation is primarily directed at ensuring the proper functioning of the internal market (e.g., water quality legislation), protecting human health (e.g., waste legislation and EURATOM legislation) and enhancing safety (e.g., maritime transport legislation) rather than halting marine degradation. The conflict of interests among member states and the internal tensions among EC institutions (especially the Council and the Commission) and within the Commission itself, make it particularly difficult to harmonize views and adopt comprehensive and uniform rules. The sector-by-sector approach, moreover, is the direct consequence of the strong institutional fragmentation existing within the EC and the member states and of the lack of an overall structure specifically and comprehensively responsible for dealing with marine environmental issues (Chapter 3.2.1). The level of interinstitutional coordination has been traditionally rather weak, increasing the risk of a duplication of work and a waste of resources.

As discussed in Chapter 2.4.3, after the Treaty of Amsterdam codified the principle of integration (Article 6 EC), the EC institutions are legally required to integrate (marine) environmental considerations within the definition and implementation of all Community policies and activities. The EC Treaty, however, leaves ample discretion to the EC institutions in deciding what has to be integrated and in what manner. As a result, environmental considerations are not yet taken fully into account in the adoption of sectoral legislation, as in the field of fisheries management (Chapter 8.8.3.4).

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9.3.3 Towards a Comprehensive Ocean Policy?

As a result of the Community's multilateral and sector-by-sector approach to ocean preservation, EC waters are currently governed by a patchwork of global, regional, EC and national rules, standards and practices. This "patchwork regime" has made it difficult to reconcile competing uses of the seas and does not respond to the need to take a comprehensive and integrated approach as strongly recommended by the LOSC and Agenda 21. As discussed in Chapter 3.5, in the past few years, in response to the increasing pressure on European seas, the Community has partially changed its traditional approach and has taken new steps towards the adoption of a coherent and integrated oceans policy. Since January 2005, DG Fisheries has also become responsible for Maritime Affairs, laying down the basis for stronger institutional integration. In October 2005, moreover, the Commission presented a proposal for a European "Marine" Strategy together with a Marine Strategy Directive (MSD) and is currently in the process of developing a comprehensive "Maritime" Policy. Once again, this partial change of approach has been mainly influenced by political and economic considerations. On the one side, member states seem to have realized the benefits of harmonized EC rules compared to diverging national standards and have largely overcome their traditional opposition vis-à-vis the Community's involvement in marine environmental matters. On the other side, they seem to be willing to accept the Community's regulatory action in this field as long as it is not too prescriptive and too prejudicial to their sovereign interests. This approach clearly emerged during the drafting of the Marine Strategy and is evident in the weak provisions of the proposed MSD.[2] In addition, the key challenge of the future "Maritime" Policy is primarily economic rather than environmental.[3] The European economy is heavily dependent on the oceans and their resources and in order to preserve its competitiveness it needs to take a more integrated approach along the lines of other States such as Australia, Canada and US.

Despite these recent initiatives, the Community has not abandoned its traditional multilateral approach to ocean preservation and still attaches great importance to international cooperation. This clearly emerges from the Community's increasing involvement in the international discussions on marine issues and ocean affairs (e.g., in the UN, IMO and CBD). The Community recognizes the importance of the work being done at the international level, especially within the framework of the Regional Seas Conventions. However, in order to avoid inconsistencies and duplications, it promotes effective coordination among all the bodies involved in marine protection and coherence among different instruments and policies at the global, regional and EC level. A central element of the Marine Strategy, the MSD and the future Maritime Policy is to enhance the

2 The overall idea was to have a framework directive that is ambitious in its scope, but not too prescriptive in its tools. The limits of the MSD in its present form are discussed in Chapter 3.5.2.

3 For a full discussion on the Maritime Policy and its objectives see Chapter 3.5.3.

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implementation of existing EC and international legislation in a coherent, coordinated and integrated manner.

9.3.4 EC Participation in the LOSC, Marine-related MEAs and Regional Seas Conventions

As discussed in Chapter 5.2.7.4, the role played by the Community in the LOSC implementation process is quite marginal. Unlike the COP/MOPs of other multilateral agreements, the Meeting of the States Parties of the LOSC (SPLOS), in which the Community participates as a full member, only has administrative and budgetary functions. In practice, the supervision of the implementation of the Convention takes place within the framework of the UN under the agenda item "oceans and the law of the sea" (ICP and UNGA). Since the Community is not a member of the UN, its role in this process is very limited. At the EC level, moreover, given the tendency to consider law of the sea issues as matters of foreign policy, the participation of the Community and the member states in the UN ocean debate is regulated within the framework of the 2nd pillar of the EU Treaty (CFSP). As a consequence, the main role is played by the Presidency and everything is done by EU Statements adopted within the Council (COMAR) and drafted in coordination with the Commission's DG RELEX. The foreign policy format also applies when matters under the first (EC) pillar are on the table, including issues under the EC's exclusive competence (e.g., fisheries). This makes it impossible for the Commission to play its institutional role of the external representative of the EC (Article 300(1) EC). This approach, moreover, does not seem to be completely consistent with the EU Treaty (e.g., Article 47) and the latest Court case law (e.g., the judgement of 13 September 2005), which exclude the possibility of using EU mechanisms and instruments for regulating EC matters. This potential anomaly is partly the product of what may be defined as a sort of "power of the precedents" (or the "inertia" factor), which strongly influences the functioning of the Community. Just like in all administrative processes, what is most relevant is the precedent. Once the Commission and the member states start to act in a certain manner and a precedent is established, it will be very difficult to change it. In reality, the EU format seems to be justified by the political nature of the discussions and the lack of EU membership in the UN.

The recent transfer of responsibility from DG RELEX to DG FISH might strengthen the role of the Commission in the UNGA-ICP process; perhaps, it might move it back to the EC pillar, and restore the institutional balance within the EU. This does not necessarily imply that a stronger role for the Commission would increase the weight of the EC in the LOSC discussions. Over the past decade, indeed, under the lead of the Presidency, the EU has become one of the most influential players in the development of ocean policies within and outside the UN. EU Statements presented by the Presidency have substantial political weight and a growing number of countries, including candidate and acceding countries alongside Iceland and Norway, have increasingly associated themselves with EU positions. From a substantive point of view, however, the EU Statements are not always as concrete and specific as the common positions

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taken by the Commission, especially on matters under the EC's exclusive competence. The Commission, indeed, tends to clearly define the priorities and results that the EC wants to achieve out of the negotiations and normally brings more technical input to the discussions.

The role played by the Community in other marine-related agreements largely depends on its priorities and interests. The Community (and the Commission), for instance, participates as a full member and plays a leading role in the CBD, where issues are discussed which may affect its trade-related and fisheries interests. In the past few years, moreover, the Community has also been increasingly active in the IMO, even though it is not a member of this organization. Conversely, the Community involvement in other international instruments (e.g., the CMS and LC) has so far been minimal since the Community has no strong interests to defend in these fora.

Likewise, the Community is not very proactive in the discussions related to shipping, ocean dumping and marine biodiversity within the Regional Seas Conventions. The Community, represented by the Commission, participates in the work of the bodies established by these Conventions (OSPARCOM, HELCOM and BARCON-MOPs) as a full member with the right to vote on matters under the EC's exclusive competence. However, except for some maritime safety (and land-based pollution) standards which have been totally harmonized at the EC level, Regional Seas Conventions do not normally discuss matters under the EC's exclusive competence and the Community does not have strong interests to defend in these frameworks. Member states, moreover, have a long tradition of individual participation in these Conventions and wish to preserve their autonomous representation in these frameworks. The power of precedent (or the "inertia factor"), moreover, is particularly strong in the Regional Seas Conventions. For political reasons, therefore, the Commission prefers to allow the member states to have a free rein in speaking and voting in the regional bodies. Besides, the Commission does not seem to be particularly keen to strengthen regional standards. EC legislation is primarily directed at harmonizing rules and approaches within the Community and the adoption of higher regional standards is likely to affect this harmonization. Especially in the field of maritime safety, the Commission seems to be of the idea that the relevant standards should be set out at the global level (by IMO) and if regional rules are needed, then it should be for the EC to take the initiative (Chapter 6.9, sections 4, 5 and 6). Likewise, in the field of marine habitat preservation, the Commission seems to believe that priority should be given to the full implementation of the Natura 2000 network, rather than regional MPA regimes (Chapter 8.8.4.5). For all these reasons, the Community normally plays a defensive role in the Regional Seas Conventions and its action is limited to ensuring that member states do not violate the EC's exclusive competence as well as promoting consistency between the EC and regional rules. The weak participation of the Community within the framework of the Regional Seas Conventions, however, seems to be a missed opportunity for promoting the application of EC standards in the wider European region (e.g., the Russian Federation in the Baltic Sea) and importing instruments and policies which proved to be successful at the regional level within the EC.

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In addition, the EC's role in the regional discussions is influenced by a series of practical factors. Within the Commission, DG ENV is the main body responsible for all Regional Seas Conventions. As discussed in Chapter 1.4, the agenda of the regional bodies (especially OSPARCOM and HELCOM) is very demanding and the Commission, due to a serious shortage of personnel, cannot attend all meetings, but has to prioritize its action. Normally, representatives from DG ENV (and exceptionally from DG TREN and DG FISH) participate in meetings at the decision (or high political) level and only occasionally at the working level.[4] Moreover, the EC's delegation, unlike the ones of the EC member states, is usually very small, commonly composed of a single representative. It might be very difficult for a single representative to be fully informed about all items under discussion and he/she might prefer to allow the member states to take the lead. All the considerations so far mentioned also apply with regard to global discussions within the UN, CBD and IMO. In general, the Commission always follows a pragmatic approach in marine environmental negotiations.

9.4 In What Manner Does the Existence of a Division of Competences between the EC and the Member States Influence the Implementation of the Marine Environmental Provisions of the LOSC and Related Agreements?

The Community participates in the LOSC and related marine environmental agreements alongside its member states. As a general rule, member states and the Community exercise the rights, including the voting rights, and perform the duties stemming from the Conventions in matters within their respective spheres of competence. Within marine environmental Conventions, however, it is not always possible to clearly allocate the respective spheres of power. Uncertainties or disputes concerning the division of competences between the Community and its member states may affect the correct implementation of their respective obligations, it may result in a lack of action, duplications or inconsistencies and bring conflicting obligations for the member states. In the past decade, however, the situation has considerably improved and today the existence of a division of competence does not seem to seriously affect the implementation of the international ocean regime.

Especially in the past, the joint accession and participation of the Community and the member states in marine environmental agreements confronted third States with problems of an unprecedented nature as regards the question of who had to exercise the rights and perform the duties stemming from the Convention. As discussed in Chapter 4.3.1, most of the agreements allowing the Community to become a party

4 For a full discussion on the Community's participation in the regional bodies see: Chapter 6.9, Paras. 4, 5 and 6 (oil pollution from shipping); Chapter 7.5, Paras. 2, 3 and 4 (ocean dumping); Chapter 8.8.4.4 (establishment and management of MPAs).

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contain some relevant indications (so-called "participation clauses").[5] These clauses intend to safeguard the good operation of the agreement and to provide a guarantee to third States against any privileged position of the Community and/or its member states. They generally acknowledge the existence of a division of competence and set forth an alternative system whereby the Community or the member states exercise the rights and perform the duties concerning matters under their respective spheres of power. However, they do not provide any clear indication as to how competences are to be divided. The LOSC and the CBD, moreover, require the Community and its member states to release a declaration at the time of the signature and accession indicating the allocation of the respective spheres of competence. The EC institutions, including the ECJ, as well as the member states in the Council have always been reluctant to proceed toward a clear delimitation of competence (Chapter 5.2.2.3). A rigid demarcation would affect the flexibility of the external action and prevent the further development of the Community's competences. Normally, therefore, these declarations make explicit reference to the evolutionary nature of the EC's competences and are so broadly formulated that they are not very useful. Currently, however, third States are becoming more and more used to the presence of the Community on the international scene. Although they are not yet entirely familiar with the EC mechanisms and processes, they know that no matter what struggle the Community and the member states are facing internally with regard to the division of competence, externally their mutual relations are governed by international law.

Also at the EC level, the division of competence between the Community and the member states in marine environmental matters does not seem to be as disputed as it used to be in the past. The member states seem to have largely overcome their traditional resistance to the Community's involvement in the international ocean debate, as long as it does not touch upon core national interests. They have also started to see the benefits of the "one voice" policy pursued by the Community at the international level, especially when highly political issues are on the table. On the other hand, the division of competence concerning marine environmental matters is still a critical issue, because of the absence of clear legal rules in the EC Treaty, the ambiguity of the ECJ's case law and its difficult application to ocean matters.

The Community and its member states have shared competences to act at the international level for the protection of the marine environment. As discussed in Chapter 4.2.4, the notion of "shared competence" is still quite vague and, unlike in areas within the EC's exclusive competence, it is not entirely clear how things should work in practice. According to the Court, in these matters member states are free to decide whether to enter into multilateral relations with third States by acting alone or through the Community, but it is still highly controversial in which circumstances and to what extent they may take autonomous action. The Court has never defined shared competence and has always been quite reluctant to fully clarify its legal consequences. Supported

5 For a full description of the EC participation clauses see: Chapter 5.2.2 (LOSC); 5.3.2 (OSPAR); 5.4.2 (Helsinki Convention); 5.5.2 (BARCON); Chapter 8.8.4.2 (CBD).

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by the other EC institutions and the member states, the Court has traditionally opposed the establishment of rules which are too rigid in areas under shared competences where member states' individual actions are less likely to affect the vital interests of the Community. In these areas they have wanted to keep the division of powers as dynamic and flexible as possible.

Given the cross-sectoral nature of ocean issues, however, marine environmental agreements may cover areas, such as fisheries and trade, which fall within the exclusive competence of the Community. In these areas it is quite clear how things should work. As discussed in Chapter 4.2.1, by means of the EC Treaty or Acts of Accession, member states have definitely transferred their legislative powers to the Community, which is solely responsible for negotiating, concluding and implementing Conventions. Only in clearly defined circumstances may the member states be expressly authorized to act on behalf of the Community. Sometimes, especially within the framework of the Regional Seas Conventions, member states try to discuss fisheries-related issues, but they know that they are not entitled to take decisions on these matters.

The same legal consequences of "exclusivity" under primary law seem to apply also to "pre-emption" under secondary law. As discussed in Chapter 4.2.2, according to the Court every time the Community adopts common rules on the basis of its internal powers, the member states are "pre-empted" from assuming, outside the EC framework, any international obligations which would "affect" these rules or "alter their scope" (the *ERTA Doctrine*). On these subjects the Community acquires implicit exclusive competence to negotiate and adopt international standards. However, the pre-emption criteria developed by the Court (e.g., "total" harmonization and maximum standards at the international level) do not seem to be entirely applicable to marine environmental negotiations and are open to discretionary interpretations (e.g., "exhaustive" harmonization or "largely" covered by EC legislation).[6] These criteria may apply to maritime safety Directives based on Article 80(2) EC which clearly aim at "total harmonization". Conversely, environmental Directives based on Article 175 EC (e.g. the Habitats and Birds Directives; the proposed MSD; waste management legislation) contain minimum standards which do not intend to "exhaustively" harmonize the matter. On the basis of Article 176 EC member states are always free to agree on more stringent protective measures, acting at the national or the international level. Likewise, most marine environmental agreements (e.g., the CBD, the LC and all Regional Seas Conventions) contain minimum standards and always allow contracting parties, including the EC,

6 Pre-emption occurs when international negotiations cover matters that have been "totally" harmonized. It does not occur whenever EC legislation sets out minimum standards, unless it intends to "exhaustively" harmonize the subject-matter. Recently the Court has introduced two new pre-emption criteria: the international agreement has to cover an area which has been "largely harmonized" at the EC level "and" must affect the uniform and consistent application of EC rules and the proper functioning of the system which they establish (see: Chapter 4.2.2.1).

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to adopt higher standards.[7] The individual actions of the member states within the framework of these agreements would not preclude the application and further development of stricter EC rules and cannot be pre-empted. Conversely, the LOSC and IMO regulatory instruments may contain minimum or maximum standards depending on whether they apply to flag, port or coastal States and on the maritime zone and the activities or standards concerned. This makes it very difficult to draw a clear allocation of external powers between the Community and the member states on the basis of the "minimum or maximum standards" criterion.

The pre-emption criteria discussed so far, moreover, have been formulated by the Court in relation to commercial and association agreements, which largely cover policy areas, such as trade and fisheries, under the EC's exclusive competence and where it is possible to clearly separate the parts of the agreement under the respective spheres of competence of the Community and the member states. This is not the case with regard to marine environmental agreements, which cover matters under shared competence and where the member states never completely lose their powers.

In general, therefore, EC marine-related legislation does not seem to trigger an implicit exclusive competence on the part of the Community within marine environmental Conventions. However, even in fields where pre-emption may occur, such as maritime safety and vessel-source pollution, the Community, for practical or political reasons, does not strictly apply the ECJ's criteria, but wishes to retain a maximum level of flexibility. At the end of the day, in marine environmental matters neither the Community nor the member states are fully competent and the allocation of their respective spheres of power requires pragmatic and case-by-case solutions.

9.5 How Does Community Coordination Work?

To overcome the difficulty in proceeding towards a clear allocation of powers between the member states and the Community in areas of shared competence, the Court has diverted attention to the duty of cooperation under Article 10 EC and its application in the negotiation, conclusion and implementation of mixed agreements and in joint participation in the activities of IOs.[8] The Court has intentionally avoided providing a strict formulation of the duty of cooperation and establishing uniform rules and rigid procedures on how the EC institutions and the member states should behave at the international level. Especially in matters subject to shared competence, the Community and the member states wish to take a pragmatic approach. Political and practical considerations, conflicts of interest between the EC and the member states and internal

7 Pre-emption only occurs when an international agreement sets out maximum standards, which would make it impossible for EC member states to comply with the more stringent EC requirements (see: Chapter 4.2.2.2).

8 For a full discussion on the duty of cooperation and "mixed agreements" see respectively: Chapter 4.2.4.1 and 4.2.4.2.

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tensions among EC institutions influence to a large extent the manner in which the Community and the member states participate in mixed agreements calling for flexible solutions tailored to the circumstances of each case.

As discussed in Chapter 4.3.2, in the absence of specific rules under EC law, coordination mechanisms and procedures have been developed in the day-by-day practice of the Community's external relations. It is worth stressing that these are mainly practical rules and are largely driven by political and practical considerations. In some cases, the Commission, due to a lack of personnel, expertise or simply to avoid confrontation with member states, might find it more convenient to allow them to conduct the negotiations on specific subjects. Conversely, in areas where there is a stronger uniformity of interests (e.g., the preservation of marine biodiversity), member states might find it more effective to allow the Community to take the lead. The forms of mixed participation may therefore change from forum to forum and sometimes even during the same negotiations or within the same meeting. Although the Commission always tries to put some order into this chaotic reality, both EC institutions and the member states want to maintain this flexibility to the maximum extent.

On the other side, the absence of clear and uniform rules and the ambiguity of the ECJ's case law create uncertainty among member states with regard to whether and how far they have to coordinate their positions. This, in turn, increases the risk of member states taking unilateral action in areas that should be regarded as falling within the EC's implicit exclusive competence (pre-emption). The risk is particularly high in fora like the UN or the IMO, where the Community is not a member and may only defend its interests through the coordinated action of its member states. In addition, the lack of uniform rules may create some confusion for third States with regard to "who is speaking for whom". Uncertainties, ambiguities and a lack of coordination may limit the role of the EU in marine environmental negotiations and affect the entire decision-making process. As a response, in the past few years, the cooperation mechanisms have been strengthened and currently the Community speaks with a single voice on most marine environmental issues.

Coordination mechanisms are well consolidated for the CBD meetings and other high-level marine biodiversity discussions (Chapter 8.4.4.1 and 8.4.4.2), in preparation for UNGA and ICP discussions on the law of the sea (Chapter 5.2.7.2), and, in the past few years, they have been enhanced and formalized to a great extent also in preparation for the IMO (especially MEPC) meetings (Chapter 6.9.3 and 8.4.4.3). Conversely, there is normally no coordination for the IMO discussions on ocean dumping since the Community has never adopted specific legislation on the matter (Chapter 7.5).

Normally, there is no formal Community coordination within the Regional Seas Conventions, with very limited exceptions in the OSPAR and BARCON. The "one voice" policy that the Community is pursuing in other global fora is not welcome in regional bodies, which are venues for open discussions and cooperation among parties at the same level and always oppose any form of bloc-forming. Community coordination in these regional frameworks, moreover, does not seem to be necessary either. Here, the Community acts within its own rights in all matters which come under its exclusive (explicit or implicit) competence (e.g., some maritime safety standards). Especially after

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the 2004 enlargement, moreover, the EC member states represent the large majority of the contracting parties in the Helsinki Convention and OSPAR, and with the future accession of Croatia (and potentially also Albania, Bosnia and Herzegovina, Serbia and Montenegro and Turkey) the Community will also increase its representation in BARCON. EC member states are bound by EC legislation and know that they have to act consistently with EC law, otherwise the Commission may bring them to Court.

Even though forms of mixed participation vary to a great extent according to the agreement and the issue on the table, it is possible to identify some common patterns in the manner in which the Community and the member states coordinate their action in marine environmental negotiations. In preparation or during negotiations, representatives of the member states and the Commission coordinate their positions within so-called "Community co-ordination" meetings.[9] When matters under the EC's (explicit or implicit) exclusive competence are on the agenda, the Commission and the member states are under the duty to reach common positions.[10] Once adopted, common positions become binding on member states which cannot deviate from them by taking different positions at the international level. If they do so, the Commission may bring them to Court for a violation of their obligations under Article 10 EC. In matters under shared competence, on the other hand, the Commission and the member states must coordinate their actions and try their best to reach common positions. However, they are not legally required to do so. Common positions in matters under shared competence are normally adopted by unanimity. This may prove to be very difficult especially concerning matters (e.g., maritime safety) where the conflict of interests is particularly strong. The unanimity rule, moreover, is not completely understandable with regard to marine environmental matters, which normally require QVM for the adoption of EC legislation, showing that member states are still reluctant to lose their individual representation at the international level. If, in spite of their efforts, it is not possible to reach common positions, member states may express their own views. However, they are strongly discouraged from doing so because the presentation of different positions may seriously undermine the Community's negotiation role.

The Community and the member states continue to coordinate their positions on the spot during early-morning and late-evening sessions or coffee/lunch breaks. In this way they try to avoid excessively delaying the international decision-making process.

The external representation of the common positions is a matter of traditional tension between the Commission and the Council. As discussed in Chapter 4.3.2.5, as a general rule, it is up to the Commission, on the basis of a mandate from the Council, to negotiate on behalf of the Community and present common positions when issues concerning the EC's (explicit or implicit) exclusive competence are on the table (Article 300(1) EC). Concerning matters under shared competence, as is normally the case in the CBD,

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9 For a full discussion on EC coordination and the adoption of common positions see: Chapter 4.3.2.3.

10 Common positions on matters under exclusive (explicit or implicit) competence are normally adopted by the Council acting on QMV.

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it is for the Presidency to represent the Community. This general rule, however, does not consistently apply in marine environmental negotiations. There might be internal agreements between the Commission and the Presidency as to who presents common positions. Normally within the main ocean bodies, such as the IMO, UNGA and ICP, the Presidency speaks on behalf of the EU also when matters under the EC's exclusive competence are on the table. It might be argued that the Presidency, as a political organ of the EU, should not be entitled to speak on these matters. However, the role of the Presidency within the framework of the UNGA and the IMO is justified by the observer status of the Community in both organizations. Likewise, the role of the Presidency in the ocean debate within the UN is justified by the political nature of the discussions and is a direct consequence of the fact that this process is carried out within the framework of the EU Treaty (CFSP). Despite this traditional tension, there is normally close cooperation between the Commission and the Presidency during marine environmental negotiations.

The EP is kept informed and may be consulted by the Commission, but its role in the (marine environmental) negotiations is rather marginal. The limited involvement of the EP creates a sort of democratic deficit in the negotiation process, but is justified by the need for flexibility and speedy decisions.

So far, Community coordination has proved to be successful as long as it does not interfere too much with the sovereignty of the member states and there is a strong uniformity of interests (e.g., in the CBD). But when core national interests are on the table, as is frequently the case in the IMO, some member states tend to proceed unilaterally, sometimes deviating from previously agreed positions. The Commission, however, seems firmly determined to make full use of its enforcement powers to correct any violations and ensure the uniform representation of the Community at the international level.

9.6 Are the Approaches and Measures Adopted by the EC to Implement its International Ocean Obligations in Conformity with the LOSC?

The Community has attached great importance to the need to act consistently with the jurisdictional framework set out by the LOSC. The three case studies conducted in Chapters 6, 7 and 8 reveal that, in general, the Community's regulatory action toward the implementation of its international ocean obligations in the fields of oil pollution from shipping, ocean dumping, and habitats preservation through the establishment of MPAs seems perfectly in line with this framework.

As far as oil pollution from shipping is concerned, the LOSC limits to a great extent the capacity of coastal States to take unilateral action, but calls for the multilateral development of rules within the IMO and their uniform implementation and enforcement (Chapter 6.2). The Community has always recognized that all regulatory actions to prevent the risk of oil pollution and further improve maritime safety must be taken within the IMO. As a consequence, it has implemented its obligations under the LOSC, first of all, by coordinating the action of its member states in the IMO. Second, the Com-

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munity has adopted legislation within the framework of its Common Policy on Safe Seas (CPSS), which is primarily directed at ensuring the uniform and full application of IMO standards within the EC (Chapter 6.7.1 and 6.8). In the aftermath of the *Erika* and *Prestige* accidents and the 2004 enlargement, the Community has become increasingly proactive in the field of oil pollution from shipping (e.g., the Erika I and II legislation and the new Erika III proposals). EC regulatory action has been mostly directed at strengthening the application of IMO rules in European seas (e.g., PRF), anticipating their implementation (e.g., the phasing out of single-hulled tankers) or making IMO non-legally binding rules mandatory (e.g., VTS and VRD). EC maritime safety legislation was not intended as a substitute for, but as a complement to the IMO's regulatory action. Despite the allegation of "unilateralism", the Community has never questioned the IMO's leading role in shipping-related matters and never wanted to replace that organization. However, in the absence of an adequate IMO response, the Community felt that it not only has a right, but also a duty under the LOSC to take regulatory action to protect European waters. Therefore, acting in its capacity as port State, it has set out conditions for the transportation of the most polluting type of oil (HGOs) in European ports, which are more stringent than existing IMO rules (e.g., an immediate ban on the transportation of HGO in single-hulled tankers). Despite the strong criticism, the EC's reaction seems to be fully consistent with the exercise of port state legislative jurisdiction under the LOSC (Chapter 6.8.1). As discussed in Chapter 6.2.3.1, the LOSC leaves some room for regional organizations or single States to take action without waiting for the IMO. Despite the great deal of criticism, over the years regional or unilateral initiatives have urged the IMO to react rapidly and have driven the main "coastal-oriented" developments within the organization. As long as they are consistent with the LOSC's jurisdictional framework, therefore, regional and national initiatives cannot always be condemned. As Lord Donaldson in his famous Inquiry pointed out: "a balance is sometimes needed between consensus and speed, and there may sometimes be good reasons for a single country or group of countries to move faster than the remainder of IMO".[11]

In addition, the Community has always insisted on the need to act within the jurisdictional framework set out in the LOSC and without hindering the freedom of navigation. As a result, most of the EC maritime safety legislation has been adopted by the Community acting in its capacity as flag and port State, while the Community's action in its capacity as a coastal State has been limited to reinforcing the monitoring of dangerous maritime traffic in EC waters. EC legislation in the field of oil pollution from shipping does not interfere with the rights of navigation of foreign vessels under the LOSC and in no case do EC oil pollution standards higher than IMO rules apply to foreign vessels in transit.

Unlike in the field of shipping, the LOSC leaves substantial power to coastal States to control dumping activities in waters under their sovereignty and jurisdiction (Chapter 7.2.1). In these waters coastal States have to comply with existing international standards (i.e., LC) which, however, always represent minimum standards. As long as they are

11 Lord Donaldson Report, Para. 2 (11).

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not discriminatory, therefore, national ocean dumping standards do not create problems of conformity with the LOSC's jurisdictional framework. In addition, the LOSC encourages the development of regional rules, which seem to be more effective compared to global ones to control ocean dumping. The regulation of this practice, moreover, does not interfere with the rights of passage. Due to the firm opposition of the member states, the Community has never been able to establish an "ocean dumping policy" and has never succeeded in adopting *ad-hoc* legislation on that matter (Chapter 7.4, Paras. 1, 2 and 3). What was contested was the necessity of having additional EC rules in a field that was already extensively and effectively regulated at the global and regional level. The Community, therefore, has implemented its global obligations in the field of ocean dumping mainly by acceding to existing Regional Conventions. The regional approach is in line with the LOSC, LC and Chapter 17 of Agenda 21.

According to existing global and regional rules, outside the Baltic where nothing but harmless dredge spoils may be dumped, the only matters that may be disposed of in European seas are: dredge material; fish waste; inert, geological materials; and decommissioned offshore installations. As discussed in Chapter 7.4.5, ocean dumping (and incineration) of these materials (probably including offshore installations) are incidentally caught within the scope of the EC waste management legislation even if they were not specifically designed to apply to the marine environment. The relevant EC rules are minimum standards and mirror, to a large extent, existing international rules.

The Community, as a party to the LOSC, CBD and Regional Seas Conventions (i.e., Annex V of OSPAR, the Helsinki Convention, and the SPA Protocol), is under a positive legal duty to protect and preserve rare and fragile ecosystems as well as the habitats of depleted, threatened and endangered species and other forms of marine life. As discussed in Chapters 8.3, 8.4 and 8.5, these Conventions may provide the legal basis for the establishment of a coherent network of MPAs, but they do not contain any positive duty in this direction. Conversely, the relevant provisions are broadly formulated and the current work on the establishment of an MPA network is still in a preparatory stage and is mainly political in nature. Nevertheless, the Community has fully endorsed these political commitments and the target to establish a coherent network of MPAs by 2012 (e.g., WSSD, CBD COP-7, the HELCOM/OSPAR Ministerial Declaration). The Community has implemented its international obligations to protect marine biodiversity within the framework of the Habitats (and Birds) Directive, whose main component is the establishment and management of a coherent network of MPAs of Community importance (Natura 2000 network). As discussed in Chapter 8.8.3.1, this Directive, in principle, may be a useful instrument to translate political commitments into clear and enforceable targets. However, the Habitats Directive was not expressly designed to apply to the sea and is mainly directed at protecting nature on land. Marine species and habitats are still largely unrepresented and most of the existing Natura 2000 sites are located on land or in close proximity to the coasts. As discussed in Chapter 8.8.3.2, in its present form, the Habitats Directive does not provide an adequate framework for the Community to fully comply with its international obligations to protect marine biodiversity and to meet the international targets on MPAs. In the wake of the

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WSSD, the Commission has appeared firmly determined to correct these weaknesses and is currently in the process of making the Directive more suitable for protecting the marine environment (e.g., by amending its Annexes). However, the work in this direction is progressing very slowly. Likewise, the recent Commission's proposal for a MSD represents a missed opportunity for reinforcing the member states' obligation to implement the Natura 2000 network for the marine environment. In its present form, moreover, the proposal does not ensure the Community's full compliance with its international duty to protect marine biodiversity and achieve the WSSD biodiversity-related targets.

After the Court clearly pronounced itself on the point, there is currently no doubt that the Habitats Directive also applies in the EEZ. From a jurisdictional point of view, the designation of Natura 2000 sites in the EEZ may create some problems as regards the management of human activities within the sites. Generally speaking, according to the LOSC, outside their internal waters (i.e., in the territorial sea and EEZ) coastal States, including the Community and the member states, are free to regulate all extractive uses, including fishing and mining, and other potentially dangerous human activities as long as they do not interfere with shipping. The Habitats Directive places the EC member states under a duty to protect and manage the Natura 2000 sites, but makes no reference to the specific activities that have to be managed therein. In principle, therefore, there is no conflict with the jurisdictional regime set out by the LOSC.

From an EC law point of view, the management of Natura 2000 sites may create some problems with regard to the control of fishing, which is under the exclusive competence of the EC. Member states are not entitled to regulate unilaterally the environmental impact of fishing within Natura 2000 sites, but all relevant measures have to be adopted within the framework of the CFP. As discussed in Chapter 8.8.3.3, although there are several instruments available under the CFP which may be used to protect marine biodiversity, the revised CFP has not properly integrated environmental concerns into fisheries management as requested by the LOSC and Agenda 21. Once again, the Commission (DG ENV) intends to correct this failure and, recently, DG FISH has appeared to be more open to adopting fisheries restrictions to protect marine ecosystems (e.g., the Darwin Mounds and the Azores Archipelago). The future Maritime Policy, moreover, may provide a good opportunity to better integrate fisheries and environmental considerations and further specify the duty of the Commission to regulate the environmental impact of fishing, especially within Natura 2000 sites.

9.7 EC Contribution Towards the Effective Implementation of the International Ocean Regime

The Community legal framework may contribute to a great extent to the effective implementation of the international ocean regime in European waters. As discussed in Chapter 1.5, global and Regional Seas Conventions suffer from strong implementation and enforcement deficits. The global rules agreed, normally by consensus, by a large number of states generally reflect a high level of compromise, which often results in the lowest common denominator, weak, broad and unclear obligations, and increasing

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resort to recommendatory instruments. Likewise, a large part of the work carried out within the Regional Seas Conventions, especially as regards MPAs, is mainly political in nature. In addition, the lack of adequate monitoring and funding mechanisms at the global and regional levels has influenced the existing implementation deficit to a great extent. The Community with its strong legal framework has the potential to transform broad political commitments into clear and enforceable targets. Community rules adopted by QMV by 25 member states are easier to agree on and normally result in higher standards of protection compared to global ones. However, due to the conflict of interests among member states and EC institutions, the level of compromise of Community legislation is often rather high. This compromise results in a lack of clarity, the frequent use of derogation clauses, soft law and policy instruments, especially when highly political issues or important national interests are on the table. The Commission's proposed MSD is an example of the high level of compromise.

The adoption of EC standards which are higher than international ones would certainly benefit the local environment and make EC waters definitely safer and cleaner. Of course, there is nothing wrong with this. However, by increasing protective standards in EC waters there is a higher risk of diverting dangerous activities (e.g., shipping) or unsustainable practices (e.g., destructive fishing methods) to regions with lower environmental standards, shifting the problem from one area to another. To ensure an effective and uniform level of marine environmental protection, especially in the field of vessel-source pollution, the highest possible standards and enforcement mechanisms should be set out at the international level.

As discussed in Chapter 2.2.3, international agreements concluded by the Community according to the procedure laid down in the Treaty, as well as decisions of their bodies, form an integral part of Community law. Once ratified, the provisions of agreements which are under the EC's competence (either exclusive or shared) acquire the same characteristics as EC legislation (e.g., supremacy over conflicting national rules and, in some cases, direct effect). In addition, by means of their incorporation within the EC legal order, the international instruments may avail themselves of the strong compliance mechanisms of EC law discussed in Chapter 2.2.6 (e.g., monitoring, enforcement, funding instruments, and infringement proceedings under Article 226 EC). These mechanisms have the potential to fill most of the existing compliance gaps, especially with regard to Regional Seas Conventions where EC member states are the majority of the contracting parties (except in BARCON). Nevertheless, the Commission (DG ENV), due to its workload and a shortage of personnel, has to prioritize its action. So far, its record in monitoring the application of (marine) environmental Conventions has been rather poor and mostly limited to hazardous substances which have been totally harmonized at the EC level, leaving the member states free to decide whether and to what extent to apply the other provisions.[12] The proper implementation and enforcement

12 To the knowledge of this author, so far the Commission has only once taken action against a member state for not complying with the provisions of a regional sea convention: the Land-based Pollution Protocol of the BARCON.

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of international agreements concluded by the Community, therefore, ultimately depends on the willingness of the member states.

The proliferation of global, regional, and sub-regional instruments and the resulting patchwork of rules make the implementation of the international ocean regime increasingly complex and result in duplications, overlaps and a waste of resources. One of the main challenges for the future, therefore, is to enhance coordination and cooperation among all international instruments and bodies involved in marine environmental issues. As already mentioned, this is also one of the primary objectives of the EC Marine Strategy. In the drafting of the Strategy, the Community has considerably enhanced cooperation with the regional bodies, especially OSPARCOM and HELCOM, and it is firmly committed to promoting full consistency between EC and regional rules.

The EC's regulatory action toward the implementation of its international ocean obligations may influence significantly the progressive development of the international law in the field of the marine environment in terms of state practice. EC marine-related legislation is binding on the 25 member states, plus the acceding (Bulgaria and Romania) and candidate countries (Croatia and Turkey), and most of the maritime safety rules also apply to the EEcA countries (Norway and Iceland).[13] All these countries (except Turkey) are parties to the LOSC and most marine environmental agreements. By complying with EC rules, they will contribute to the formation of state practice. The Community's influence is particularly evident in the field of vessel-source pollution where the fleets of EC member states, plus acceding, candidate and EEcA countries represent over 30% of the world tonnage and a large part of the international shipping traffic is directed towards EC ports and is thereby bound by EC rules.

The 2004 enlargement has significantly increased the ability of the Community to influence the international decision- and policy-making in the field of marine environmental protection, especially within the Regional Seas Conventions. From an environmental perspective, the increased numerical weight of the Community in the international decision-making process may have both positive and negative effects. As experience indicates, the high environmental orientations of the Community may encourage the development of greener ocean policies and legislation at the global level. In the past few years, by advancing its own targets, the Community has driven the main coastal-oriented developments in the UN, CBD and IMO and has promoted the global application of the objectives, principles and approaches recommended by Agenda 21 (e.g., the ecosystem-based approach and the precautionary principle). On the other hand, the Community tends to prevent the adoption of regional environmental standards stricter than those of the EC. However, although the 2004 enlargement created significant opportunities for strengthening the participation of the EC within the Regional Seas Conventions, the tendency of the member states to act intergovernmentally in these fora is still predominant. In addition, if the enlargement has increased the numerical weight of the Community in the international decision-making process, on the other

13 The Former Yugoslav Republic of Macedonia is also a candidate country, but is not a coastal State.

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hand, it has made EC coordination even more difficult, especially in shipping-related matters.

With the consolidation of the Community coordination mechanisms, the existence of a division of competence between the Community and the member states in marine environmental matters does not seem to affect the international decision-making process as much as it did in the past. Community coordination, however, has both positive and negative implications. By speaking with a single voice and presenting itself as united vis-à-vis the rest of the world, the Community and the member states play a stronger role in international negotiations, as is proved by the successes obtained by the EU in the past few years. Good coordination at the EC level, moreover, may facilitate and speed up the decision-making process to the advantage of all. For third States it is certainly easier to negotiate with a single entity, rather than with 25 uncoordinated member states. On the other side, EC coordination brings some rigidity to the negotiation process and may be a source of major delays and great frustration for third States. Even though the Community and the member states try their best to maintain their "house-keeping" outside the negotiations, Community coordination may be particularly irritating for third States which have to wait until the EU has put its house in order. Today, however, the international community has become more familiar with the presence of the EC on the international scene and although there is still comparatively little understanding of the EC's mechanisms and a strong resistance to bloc-forming, other States know that the EC member states can no longer act in isolation, but need to coordinate positions. Maybe they do not like this, but they seem to accept it as an inevitable corollary of the Community's participation in the international decision-making and a point of no return.

In conclusion, the Community may contribute to the effective implementation of the international ocean regime in two ways. From a legal point of view, the EC offers a strong legal framework to correct the weakness of and ensure full compliance with international rules. From a political point of view, the enlarged EU has become one of the most influential players on the international scene and by moving its targets and priorities up the international agenda it may lead to the development of cleaner, safer and more environmentally sound ocean policies and legislation.

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ANNEX I

Declaration of the European Community on Signature of the United Nations Convention on the Law of the Sea of 10 December 1982

On signing the United Nations Convention on the Law of the Sea, the European Economic Community declares that it considers that the Convention constitutes, within the framework of the Law of the Sea, a major effort in the codification and progressive development of international law in the fields to which its declaration pursuant to Article 2 of Annex IX of the Convention refers. The Community would like to express the hope that this development will become a useful means for promoting co-operation and stable relations between all countries in these fields.

The Community, however, considers that significant provisions of Part XI of the Convention are not conducive to the development of the activities to which that Part refers in view of the fact that several Member States of the Community have already expressed their position that this Part contains considerable deficiencies and flaws which require rectification. The Community recognises the importance of the work which remains to be done and hopes that conditions for the implementation of a sea bed mining regime, which are generally acceptable and which are therefore likely to promote activities in the international sea bed area, can be agreed. The Community, within the limits of its competence, will play a full part in contributing to the task of finding satisfactory solutions.

A separate decision on formal confirmation[1] will have to be taken at a later stage. It will be taken in the light of the results of the efforts made to attain a universally acceptable Convention.

Competence of the European Communities with regard to matters governed by the Convention on the Law of the Sea *(Declaration made pursuant to article 2 of Annex IX to the Convention)*

Article 2 of Annex IX to the Convention on the Law of the Sea stipulates that the participation of an international organisation shall be subject to a declaration specifying the matters governed by the Convention in respect of which competence has been transferred to the organisation by its member states.

The European Communities were established by the Treaties of Paris and of Rome, signed on 18 April 1951 and 25 March 1957, respectively. After being ratified by the Signatory States the Treaties entered into force on 25 July 1952 and 1 January 1958[2](**).

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1 "Formal confirmation" is the term used in the Convention for ratification by international organisations (see Article 306 and Annex IX, Article 3).

2 The Treaty of Paris establishing the European Coal and Steel Community was registered at the Secretariat of the United Nations on 15.3.1957 under No. 3729; the Treaties of Rome establishing the European Economic Community and the European Atomic Energy Community (Euratom) were registered on 21 April and 24 April 1958, respectively under Nos 4300 and 4301. The current members of the Communities are the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Nether-

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In accordance with the provisions referred to above this declaration indicates the competence of the European Economic Community in matters governed by the Convention.

The Community points out that its Member States have transferred competence to it with regard to the conservation and management of sea fishing resources. Hence, in the field of sea fishing it is for the Community to adopt the relevant rules and regulations (which are enforced by the Member States) and to enter into external undertakings with third states or competent international organisations.

Furthermore, with regard to rules and regulations for the protection and preservation of the marine environment, the Member States have transferred to the Community competences as formulated in provisions adopted by the Community and as reflected by its participation in certain international agreements (see Annex).

With regard to the provisions of Part X, the Community has certain powers as its purpose is to bring about an economic union based on a customs union.

With regard to the provisions of Part XI, the Community enjoys competence in matters of commercial policy, including the control of unfair economic practices.

The exercise of the competence that the Member States have transferred to the Community under the Treaties is, by its very nature, subject to continuous development. As a result the Community reserves the right to make new declarations at a later date.

ANNEX

Community Texts Applicable in the Sector of the Protection and Preservation of the Marine Environment and Relating Directly to Subjects Covered by the Convention

Council Decision of 3 December 1981 establishing a Community information system for the control and reduction of pollution caused by hydrocarbons discharged at sea (81/971/EEC) (OJ No L 355, 10.12.1981, p. 52);

Council Directive of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (76/464/EEC) (OJ No L 129, 18.5.1976, p. 23);

Council Directive of 16 June 1975 on the disposal of waste oils (75/439/EEC)(OJ No L 194, 25.7.1975, p. 23);

Council Directive of 20 February 1978 on waste from the titanium dioxide industry (78/176/EEC) (OJ No L 54, 25.2.1978, p. 19);

Council Directive of 30 October 1979 on the quality required of shellfish waters (79/923/EEC) (OJ No L 281, 10.11.1979, p. 47);

Council Directive of 22 March 1982 on limit values and quality objectives for mercury discharges by the chlor-alkali electrolysis industry (82/176/EEC) (OJ No L 81, 27.3.1982, p. 29);

Council Directive of 26 September 1983 on limit values and quality objectives for cadmium discharges (83/513/EEC) (OJ No L 291, 24.10.1983, p. 1 *et seq.*);

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lands and the United Kingdom of Great Britain and Northern Ireland. The United Nations Convention on the Law of the Sea shall apply, with regard to matters transferred to the European Economic Community, to the territories in which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty.

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Council Directive of 8 March 1984 on limit values and quality objectives for mercury discharges by sectors other than the chlor-alkali electrolysis industry (84/156/EEC) (OJ No L 74, 17.3.1984, p. 49 *et seq*.).

The Community has also concluded the following Conventions

Convention for the prevention of marine pollution from land-based sources (Council Decision 75/437/EEC of 3 March 1975 published in OJ No L 194, 25.7.1975, p. 5);

Convention on long-range transboundary air pollution (Council Decision of 11 June 1981 published in OJ No L 171, 27.6.1981, p. 11);

Convention for the protection of the Mediterranean Sea against pollution and the Protocol for the prevention of pollution of the Mediterranean Sea by dumping from ships and aircraft (Council Decision 77/585/EEC of 25 July 1977 published in OJ No L 240, 19.9.1977, p. 1);

Protocol concerning co-operation in combating pollution of the Mediterranean Sea by oil and other harmful substances in cases of emergency (Council Decision 81/420/EEC of 19 May 1981 published in OJ No L 162, 19.6.1981, p. 4);

Protocol of 2 and 3 April 1983 concerning Mediterranean specially protected areas (OJ No L 68/36, 10.3.1984).

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ANNEX II

Declaration Concerning the Competence of the European Community with Regard to Matters Governed by the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 28 July 1994 Relating to the Implementation of Part XI of the Convention

(Declaration made pursuant to Article 5 (1) of Annex IX to the Convention and to Article 4 (4) of the Agreement)

Article 5 (1) of Annex IX of the United Nations Convention on the Law of the Sea provides that the instrument of formal confirmation of an international organization shall contain a declaration specifying the matters governed by the Convention in respect of which competence has been transferred to the organization by its member States which are Parties to the Convention ([3]).

Article 4 (4) of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 ([4]) provides that formal confirmation by an international organisation shall be in accordance with Annex IX of the Convention.

The European Communities were established by the Treaties of Paris (ECSC) and of Rome (EEC and EURATOM), signed on 18 April 1951 and 25 March 1957 respectively. After being ratified by the signatory States the Treaties entered into force on 25 July 1952 and 1 January 1958. They have been amended by the Treaty on European Union, which was signed in Maastricht on 7 February 1992 and entered into force, after being ratified by the Signatory States, on 1 November 1993, and most recently by the Accession Treaty signed in Corfu on 24 June 1994, which entered into force on 1 January 1995 ([5]).

The current Members of the Communities are the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

The United Nations Convention on the Law of the Sea and the Agreement relating to the implementation of Part XI of the Convention shall apply, with regard to the competences transferred to the European Community, to the territories in which the Treaty establishing the European

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3 When it signed the Convention the Community made the requisite declaration, in accordance with Article 2 of Annex IX, in which it specified the matters dealt with by the Convention for which competence had been transferred to it by its Member States.

4 Signed by the Community on 29 July 1994 and applied by it provisionally with effect from 16 November 1994.

5 The Treaty of Paris establishing the European Coal and Steel Community was registered with the Secretariat of the United Nations on 15 March 1957 under No 3729; the Treaties of Rome establishing the European Economic Community and the European Atomic Energy Community (Euratom) were registered on 21 April and 24 April 1958 respectively under Nos 4300 and 4301. The Treaty on European Union was registered on 28 December 1993 under No 30615; the Accession Treaty of 24 June 1994 was published in OJ No C 241 of 29 August 1994. Questions falling under the European Union's foreign policy are governed by Title V of the Treaty on European Union.

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Community is applied and under the conditions laid down in that Treaty, in particular Article 227 thereof.

This declaration is not applicable to the territories of the Member States in which the said Treaty does not apply and is without prejudice to such acts or positions as may be adopted under the Convention and the Agreement by the Member States concerned on behalf of and in the interests of those territories.

In accordance with the provisions referred to above, this declaration indicates the competence that the Member States have transferred to the Community under the Treaties in matters governed by the Convention and the Agreement.

The scope and the exercise of such Community competence are, by their nature, subject to continuous development, and the Community will complete or amend this declaration, if necessary, in accordance with Article 5 (4) of Annex IX to the Convention.

The Community has exclusive competence for certain matters and shares competence with its Member States for certain other matters.

1. Matters for which the Community has exclusive competence

- The Community points out that its Member States have transferred competence to it with regard to the conservation and management of sea fishing resources. Hence in this field it is for the Community to adopt the relevant rules and regulations (which are enforced by the Member States) and, within its competence, to enter into external undertakings with third States or competent international organizations. This competence applies to waters under national fisheries jurisdiction and to the high seas. Nevertheless, in respect of measures relating to the exercise of jurisdiction over vessels, flagging and registration of vessels and the enforcement of penal and administrative sanctions, competence rests with the Member States whilst respecting Community law. Community law also provides for administrative sanctions.
- By virtue of its commercial and customs policy, the Community has competence in respect of those provisions of Part X and XI of the Convention and of the Agreement of 28 July 1994 which are related to international trade.

2. Matters for which the Community shares competence with its Member States

- With regard to fisheries, for a certain number of matters that are not directly related to the conservation and management of sea fishing resources, for example research and technological development and development cooperation, there is shared competence.
- With regard to the provisions on maritime transport, safety of shipping and the prevention of marine pollution contained *inter alia* in Parts II, III, V, VII and XII of the Convention, the Community has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof affect common rules established by the Community. When Community rules exist but are not affected, in particular in cases of Community provisions establishing only minimum standards, competence is shared between the Community and its Member States. A list of relevant Community acts is in the Annex. The extent of Community competence ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish common rules.
- With regard to the provisions of Parts XIII and XIV of the Convention, the Community's competence relates mainly to the promotion of cooperation on research and technological development with non-member countries and international organizations. The activities carried out by the Community here complement the activities of the Member States. Competence in this instance is implemented by the adoption of the programmes listed in the Annex.

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3. Possible impact of other Community policies

- Mention should also be made of the Community's policies and activities in the fields of control of unfair economic practices, government procurement and industrial competitiveness as well as in the area of development aid. These policies may also have some relevance to the Convention and the Agreement, in particular with regard to certain provisions of Parts VI and XI.

Appendix

COMMUNITY ACTS WHICH REFER TO MATTERS GOVERNED BY THE CONVENTION AND THE AGREEMENT

- In the maritime safety and prevention of marine pollution sectors

Council Decision 92/143/EEC of 25 February 1992 on radio-navigation systems for Europe (OJ No L 59, 4 March 1992, p. 17);

Council Directive 79/115/EEC of 21 December 1978 concerning pilotage of vessels by deep sea pilots in the North Sea and English Channel (OJ No L 33, 8 February 1979, p. 32);

Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods (OJ No L 247, 5 October 1993, p. 19);

Council Directive 93/103/EC of 23 November 1993 concerning the minimum safety and health requirements for work on board fishing vessels (13th individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) (OJ No L 307, 13 December 1993, p. 1);

Council Directive 94/57/EC of 22 November 1994 on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations (Classification Societies Directive) (OJ No L 319, 31 December 1994, p. 20);

Council Directive 94/58/EC of 22 November 1994 on the minimum level of training of seafarers (OJ No L 319, 12 December 1994, p. 28);

Council Directive 95/21/EEC of 19 June 1995 concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port State control) (OJ No L 157, 7 July 1995, p. 1);

Council Directive 96/98/EC of 13 December 1996 on marine equipment (OJ No L 46, 17 February 1997, p. 25);

Council Regulation (EEC) No 613/91 of 4 March 1991 on the transfer of ships from one register to another within the Community (OJ No L 68, 15 March 1991, p. 1) and Commission Regulation (EEC) No 2158/93 of 28 July 1993 concerning the application of amendments to the International Convention for the Safety of Life at Sea, 1974, and to the International Convention for the Prevention of Pollution from Ships, 1973, for the purpose of Council Regulation (EEC) No 613/91 (OJ No L 194, 3 August 1993, p. 5);

Council Regulation (EC) No 2978/94 of 21 November 1994 on the implementation of IMO Resolution A.747(18) on the application of tonnage measurements of ballast spaces in segregated ballast oil tankers (OJ No L 319, 12 December 1994, p. 1);

Council Regulation (EC) No 3051/95 of 8 December 1995 on the safety management of roll-on/roll-off passenger ferries (ro-ro ferries) (3051/95/EC) (OJ No L 320, 30 December 1995, p. 14).

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- In the field of protection and preservation of the marine environment - Part XII of the Convention

Council Decision 81/971/EEC of 3 December 1981 establishing a Community information system for the control and reduction of pollution caused by hydrocarbons discharged at sea (OJ No L 355, 10 December 1981, p. 52);

Council Decision 86/85/EEC of 6 March 1986 establishing a Community information system for the control and reduction of pollution caused by the spillage of hydrocarbons and other harmful substances at sea (OJ No L 77, 22 March 1986, p. 33);

Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils (OJ No L 194, 25 July 1975, p. 23);

Council Directive 75/442/EEC of 15 July 1975 on waste (OJ No L 194, 25 July 1975, p. 34);

Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ No L 31, 5 February 1976, p. 1);

Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ No L 129, 18 May 1976, p. 23);

Council Directive 78/176/EEC of 20 February 1978 on waste from the titanium dioxide industry (OJ No L 54, 25 February 1978, p. 19);

Council Directive 79/923/EEC of 30 October 1979 on the quality required of shellfish waters (OJ No L 281, 10 November 1979, p. 47);

Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates (OJ No L 229, 30 August 1980, p. 30);

Council Directive 82/176/EEC of 22 March 1982 on limit values and quality objectives for mercury discharges by the chlor-alkali electrolysis industry (OJ No L 81, 27 March 1982, p. 29);

Council Directive 82/50/EEC of 24 June 1982 on the major-accident hazards of certain industrial activities (OJ No L 230, 5 August 1982, p. 1);

Council Directive 82/883/EEC of 3 December 1982 on procedures for the surveillance and monitoring of environments concerned by waste from the titanium dioxide industry (OJ No L 378, 31 December 1982, p. 1);

Council Directive 82/884/EEC of 3 December 1982 on a limit value for lead in the air (OJ No L 378, 31 December 1982, p. 15);

Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges (OJ No L 291, 24 October 1983, p. 1);

Council Directive 84/156/EEC of 8 March 1984 on limit values and quality objectives for mercury discharges by sectors other than the chlor-alkali electrolysis industry (OJ No L 74, 17 March 1984, p. 49);

Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants (OJ No L 188, 16 July 1984, p. 20);

Council Directive 84/491/EEC of 9 October 1984 on limit values and quality objectives for discharges of hexachlorocyclohexane (OJ No L 274, 17 October 1984, p. 11);

Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide (OJ No L 87, 27 March 1985, p. 1);

Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ No L 175, 5 July 1985, p. 40);

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Council Directive 86/280/EEC of 12 June 1986 on limit values and quality objectives for discharges of certain dangerous substances included in List I of the Annex to Directive 76/464/EEC (OJ No L 181, 4 July 1986, p. 16);

Council Directive 88/609/EEC of 24 November 1988 on the limitation of emissions of certain pollutants into the air from large combustion plants (OJ No L 336, 7 December 1988, p. 1);

Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants (OJ No L 163, 14 June 1989, p. 32);

Council Directive 89/429/EEC of 21 June 1989 on the reduction of air pollution from existing municipal waste incineration plants (OJ No L 203, 15 July 1989, p. 50);

Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment (OJ No L 135, 30 May 1991, p. 40);

Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ No L 375, 31 December 1991, p. 1);

Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ No L 377, 31 December 1991, p. 20);

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ No L 206, 22 July 1992, p. 7);

Council Directive 92/112/EEC of 15 December 1992 on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry (OJ No L 409, 31 December 1992, p. 11);

Council Directive 94/67/EEC of 16 December 1994 on the incineration of hazardous waste (OJ No L 365, 31 December 1994, p. 34);

Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ No L 30, 6 February 1993, p. 1).

- In the marine environment research and scientific and technological cooperation sector

Marine Science and Technology Programme;

Environment and Climate Programme;

Cooperation with third countries and international organizations: Scientific and technological cooperation with developing countries Programme (INCO-DC).

- Conventions to which the Community is a party

Convention for the prevention of marine pollution from land-based sources, Paris, 4 June 1974 (Council Decision 75/437/EEC of 3 March 1975, published in OJ No L 194, 25 July 1975, p. 5);

Protocol amending the Convention for the prevention of marine pollution from land-based sources, Paris, 26 March 1986 (Council Decision 87/57/EEC of 28 December 1986, published in OJ No L 24, 27 January 1987, p. 47);

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