Chapter 5
Accession and Participation of the Community, Next to its Member States, in the UN Law of the Sea Convention 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 the 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 guarantee 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 the Community coordination in these forums (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 in the LOSC and regional seas conventions and the pragmatic approach taken by the Commission in these frameworks.

5.2 The Community and the 1982 LOSC

5.2.1 Participation of the Community in the 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".[664] Since the beginning, the

[664] UNGA Res. 3067, 28 UN GAOR, Supp. (No. 30) 13, UN Doc. A/9030 (1973).

Community's participation appeared necessary because the negotiations covered areas, such as fisheries conservation and commercially-related matters, under the EC's exclusive competence.[665] 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 from the Caracas Session in 1974, therefore, the EEC was invited to participate in UNCLOS III as an observer.[666] This observer status, however, provided it with the 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.[667] 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.[668] 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.

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.[669] 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).[670]

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[665] 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; and D. Vignes in: S Houston Lay; R. Churchill, M. Nordquist; K.R. Simmonds and J. Welch (eds.) (1973), pp. 335-47.

[666] See UNGA Resolution 3208 (XXIX), 11.10.1974, UN. Doc. A/L.743.

[667] 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.

[668] 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.

[669] Coordination was particularly difficult with regard to the definition of the outer limits of the continental shelf; marine scientific research and 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 and T. Treves (1983), pp. 177-81.

[670] 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

The Council and the Commission also appeared divided on some important procedural issues including who should be responsible for introducing common positions in matters with EEC exclusive competence.[671] 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.[672] Since the beginning of the Conference, therefore, the Community appeared rather disunited and its participation created confusion and uncertainties among the Conference at large.[673]

Apparently the only issue with total agreement between the Community and its member states was the need to become a party to the LOSC.[674] It soon become evident that observer status was not enough to protect the Community's growing interests in areas governed by the future Convention. The full participation in UNCLOS III and accession 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.[675] 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" have been matters of informal discussion since 1976.[676]

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are reproduced in R. Platzöder X, pp. 407-13; 414-418; 442 (Article 25 bis ISNT); 447 (Article 19(3) ISNT and 472 (Article 21(5) RSNT).

[671] 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.

[672] 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.

[673] See: K.R. Simmonds (1989), p. 112.

[674] *Ibid*, p. 115.

[675] *Ibid*.

[676] 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)).

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.[677]

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)).[678] The negotiation of the final provisions of the Convention and on 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.[679]

The EEC's participation as an equal party to the Convention next to its member states confronted third Parties 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 Parties 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 Parties appeared particularly fearful that the accession of the Community without the totality of its member states could confer on those member states which decided not to ratify, rights and benefits under the Convention without the corresponding obligations. 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.[680] 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 competence

[677] 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. Malcom (eds.) (1997), A.W. Koers (1979), pp. 439-40; K.R. Simmonds (1989), pp. 115-23; and T. Treves (1983), p. 182.

[678] See K.R. Simmonds (1986), p. 524.

[679] On problems raised by the EEC's participation see, in general, and 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; and T. Treves (1983), p. 182.

[680] E.g., M.J Dolmans (1985), p. 64.

(e.g., the Part XI).[681] 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.[682]

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.[683] 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".[684] Arab States linked the EEC's participation to the accession of national liberation movements.[685] 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.[686]

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 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"[687] were agreed upon and included in Annex IX governing the participation of international organizations.[688] As a

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[681] See, *e.g.*, G. Gaja (1981), p. 111.

[682] LOSC, Article 309. The EEC explicitly recognized this risk in the 1976 Draft Memorandum on Final Clauses, supra n. 14, which made it clear that: "the Convention will be the result of a package deal. Accordingly, it should contain a provision which, in so far 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)".

[683] T. Treves in E. Canizzaro (ed.) (2002), p. 279. Conversely other delegations (e.g., Egypt, Iceland, Greece and Portugal) supported the EEC's accession.

[684] 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 Right and Duties of States (UNGA Res 3281 (XXIX) of 12 December 1974).

[685] 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.

[686] See, e.g., A.W. Koers (1979), p. 439.

[687] 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.

[688] 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

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.[689]

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 ensure third Parties as regards the full implementation of the obligations stemming from the Convention. Secondly, 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.[690] 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 Parties. For the Community, on the other hand, this option could have created a deadlock situation and blocked its accession to the LOSC.[691] 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 under the exclusive competence of the Community. Given the fact that the Convention does not allow for reservations, the majority solution could in practice impede an individual member state's accession.[692] The Commission therefore repeatedly urged member states to sign the LOSC and to deposit their instrument of ratification simultaneously with the Community.[693] 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

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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.

[689] See: H. da Fonseca-Wollheim, representative of the Commission (DG RELEX) in: E.L. Miles and T. Treves (eds.) (1993), p. 174.

[690] See G. Gaja (1981), p. 111.

[691] 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.

[692] See, in general, H. da Fonseca-Wollheim (1993), pp. 176-7 and K. R. Simmonds (1989), pp.131-2.

[693] 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; and OJ C 8, 9.4.1986, p. 27. 1) and the Commission's Communication to the Council, 24.11. 1987, COM (87) 403.

law and could be brought before the Court.[694] Despite the Commission's call there was no coordination among the member states and the Community in the signature[695] and deposit of their instruments of confirmation.[696]

5.2.2.2 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 states which are parties to the Convention.[697] 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.[698]

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."[699] 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.[700] The acquisition of some benefits to 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 for its member states.[701]

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

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[694] *Ibid.*

[695] 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 respectively on 5 and 7 December 1984 opening the door to the Community's signature that was deposited on 7.12.1984. See: K.R. Simmonds (1989), p. 132.

[696] 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. 67.

[697] 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.

[698] T. Treves (2002), p. 279 and B. Oxman (1980), p. 41.

[699] Report of the President on the question of participation, in Patzoder XV, p. 528. See also M. H. Nordquist, S. Rosenne, and L.B. Sohn (eds.) (1989), p. 459.

[700] 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.

[701] See G. Gaja (1981), p. 112 and M.J. Dolmans (1985), p. 65.

LOSC cannot avoid performing its obligations under the Convention in order to comply with EC law.[702]

5.2.2.3 Declaration of Competences

During the UNCLOS III, third Parties insistently asked for clarification concerning the division of competence between the Community and its member states.[703] In order to 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, both the EC institutions and the member states have always been reluctant to issue this type of declaration.[704] Therefore, they tried to avoid the introduction of a similar requirement in the text of the LOSC.[705] 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.[706] 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.[707] 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

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[702] See: C.D. Ehlremann (1983), p. 20 and M. J. Dolmans (1985), pp. 81-2.

[703] 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); 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*); and the USSR (*ibid*).

[704] See, in general, G. Gaja (1981), pp. 113-114 and M.J. Dolmans (1985), p. 79.

[705] Report of the President on the question of participation, in R. Platzöder XV, p. 528.

[706] 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.

[707] E.g., H.G. Schermers (1983), pp. 26-27.

signature of the Convention, 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.[708] 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.[709] 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 Parties 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).[710] 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.[711] 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)).[712] 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.[713] In principle, therefore, the Court may influence to a great extent the interpretation and application of the LOSC within the EU. In practice, the rulings of the Court relating to the LOSC have so far been quite exceptional.[714]

5.2.3 The Community'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.[715] However, there was an internal obstacle which

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[708] M.H. Nordquist, S. Rosenne, and L. B. Sohn (eds.) (1989), p. 462.

[709] 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).

[710] 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.

[711] See: Council Decision 98/392/EC, infra n. 68.

[712] See, in general, T. Treves (2002), pp. 291-96 and K.R. Simmonds (1989), pp. 139-42.

[713] See: Case C-459/03, *MOX Plant, paras. 121-126* and Chapter 4.4.

[714] 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* and C-459/03, *MOX Plant*.

[715] 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,

still impeded the Community from signing the Convention.[716] At that time, the signature of an international agreement required unanimity in the Council (Article 228, now Article 300, EC).[717] The firm opposition of the Federal Republic of Germany and the United Kingdom to Part XI on the deep-sea-bed 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.[718] 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.[719] 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.[720]

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 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.[721] 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

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while the other six abstained because of their dissatisfaction with Part XI. See UN. Doc A/CONF.62/SR.182, pp. 138-9.

[716] On 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. Griorgi (1985), pp. 91-2.

[717] 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.

[718] 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.

[719] 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.

[720] 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 Study, pp. 351-53. See also the EP's Resolution, 11.06.1983 (OJ C 184).

[721] Some member states (the Netherlands, Belgium, France, Italy and Luxembourg) expressed their dissatisfaction with Part XI in their individual declarations upon signature. See: K.R.Simmonds (1989), p. 142.

with third parties or competent international organizations, but the enforcement power rests on member states.[722]

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 sea-bed 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.[723] 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, 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.[724]

5.2.4 The Community'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 for the ratification of the LOSC.[725] 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")[726], 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.[727] On 23 March 1998, the Council, on the

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[722] 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.

[723] See, e.g., K.R. Simmonds (1989), p. 144 and K.R. Simmonds (1986), p. 537.

[724] 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 the Treaties).

[725] 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."

[726] 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).

[727] 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); and the UK (25.07.1995). For Belgium, Luxembourg and Denmark see infra n. 730. 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); and Estonia (26.08.2005). The chronological lists of ratifications is

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.[728] That decision was based on Articles 43 (fisheries); 113 (commercial policy); and 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) in view of the specific institutional framework created by the Convention and the Agreement (e.g., ISBA).[729]

The Community acceded to the LOSC and the Agreement alongside all (at the time fifteen) member states except Belgium, Denmark and Luxembourg.[730] 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.[731]

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,[732] 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.[733]

The Declaration of competence under Article 5(1) is much more elaborate and precise compared to the one released 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.[734] With regard to territories outside the geographical scope of the EC Treaty, the Declaration does not apply and is

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available at: www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea.

[728] 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).

[729] C. Nordmann in: D. Vidas and W. Østreng (eds.) (1999), p. 356; and Chapter 4.3.2.7 of this study.

[730] Belgium deposited its instrument of formal confirmation on 13.11.1998; Luxembourg on 5.10.2000; and Denmark on 16.11.2004.

[731] 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 study, 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.

[732] 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.

[733] 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.

[734] 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.

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 Convention." So far, however, the Community has never issued any new declarations in this respect.[735]

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 upon signature and indicates the increased involvement of the Community in marine environmental issues both at internal and external levels.

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

[735] 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.

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 third 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.[736] 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 has made such a declaration of competence. Only Belgium, Denmark and Estonia which had acceded to the Convention after the Community, makes 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.[737] The compromise formula, indeed, did not bring about sufficient clarity and left most of the concerns of third Parties 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.[738] 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.[739]

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[736] See: <www.un.org/Depts/los/convention_agreements/convention_declarations.htm>

[737] 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.

[738] K.R Simmonds (1986), p. 527.

[739] 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 Chapter 4.3.1.1 of this study, at n. 85.

5.2.7 The Community's Participation, next to the Member States, in the Implementation of the LOSC[740]

5.2.7.1 The Community's 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.[741]

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.[742]

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.[743] 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 Community 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

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[740] 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.

[741] 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.

[742] C. Nordmann in D. Vidas and W. Østreg (eds) (1999), p. 361.

[743] 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.

and the law of the sea.[744] In addition, it has been among the main promoters of the establishment, and the prolongation of the mandate, of the ICP.[745] 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 the observer status and its competence, whether exclusive or shared, with respect to many issues discussed in the ICP.[746]

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 forums 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).[747] 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.[748] 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.[749][750] The Group meets regularly in Brussels, normally

[744] 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.

[745] 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.

[746] See, e.g., Speech by EU Commissioner Borg and the Statement by Mrs. L. Lijnzaad, supra n.745. See also, Statement by B. Bradshaw on behalf of the UK Presidency to the 60th session of the UNGA, 20.11.2005.

[747] 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.

[748] 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 Chapter 4.3.2.3 of this study.

[749] 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

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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.[751] Normally the Presidency or, when matters under the EC's exclusive competence are on the table, the Commission draft EU statements or make 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.[752] Community coordination, moreover, continues on the spot, outside the meetings, under the chairmanship of the Presidency and with the close assistance of the Commission.[753]

5.2.7.4 The "Common Foreign Policy" Format and the Limited Role of the Community

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.[754] 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.[755] 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 September 2005), which exclude the possibility to

[751] 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 established 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.

[752] 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.

[753] 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.

[754] According to the COMAR's mandate, supra n. 747, 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.

[755] 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.

absorb EC issues into the EU Treaty and to use EU working mechanisms for regulating EC issues.[756]

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.[757] 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".[758] 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 "sectorial" 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 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,

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[756] 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.

[757] 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).

[758] 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.

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 Community and the 1992 OSPAR Convention

5.3.1 The Community'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.[759] 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.

The 1974 Paris Convention was the first environmental agreement adopted by the Community alongside some of its member states.[760] 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.[761] 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.[762] The Community, therefore, was held to be competent for the subject-matters 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".[763] As a result, the

[759] 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.

[760] The Paris Convention was concluded by the Council, on the basis of a proposal from the Commission, with Decision 75/437/EEC.

[761] See: First EAP (1973), Chapter 6, at 25.

[762] 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.

[763] 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

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 Parties over the 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,.[764] 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.[765]

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 of the new OSPAR Convention were EC member states[766] and many EC directives also applied to EEA countries, such as Iceland and Norway, and to a certain extent, to Switzerland.[767] 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.[768] As a guarantee for non-EC parties, the OSPAR membership was

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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.

[764] See: PARCOM, Eighth Annual Report, point 13 and J.L. Prat (1991), p. 107. See also: M. Fitzmaurice (1992), p. 222.

[765] 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 and T. IJlstra in: J. Lebullenger and D. Le Morvan (eds.) (1990), pp. 384-94.

[766] 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.

[767] The Agreement of the European Economic Area (EEA), 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 aplicable EC legislation listed in an Annex XX, which includes many environmental directives. Also Switzerland 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.

[768] 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.

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 has been introduced not only to avoid double representation, but also to eliminate the risk of the Community forcing or blocking decisions as it 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 will decide to join the EU, the EC will be able to block decisions in OSPARCOM.[769] 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 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 The Community's participation in the 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.[770] 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.[771] 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.[772] 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

[769] See: A. Nollkaemper (1993), p. 38.

[770] 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).

[771] 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).

[772] Reportedly, the Commission for the first time used its permanent mandate 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.

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.

The issue of competence is still particularly controversial in OSPAR, especially with regard to the control of hazardous substances.[773] 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.[774] 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, 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.[775] Both EC member states and non-EC Parties become very irritated 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.

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[773] 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.

[774] See, for instance, the controversy between the Netherlands and the Commission on restricting the use of short-chain chlorinated paraffin (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).

[775] 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.

There are many overlaps between the EC and the OSPAR regimes in matters such as euthrophication, hazardous and radioactive substances, and environmental quality objectives.[776] 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.[777] 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.[778] 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 Community and the 1992 Helsinki Convention

5.4.1 The Community's Accession to the Helsinki Convention

The history of the Community's accession to the Helsinki regime has been a long and difficult one.[779] In 1977, the Council, on the basis of a proposal from the Commission, applied for membership to the original 1974 Helsinki Convention claiming the existence of extended Community competence in matters regulated by that Convention.[780] 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.[781] 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

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[776] 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 euthophication in the Water Framework Directive is slightly different from the one under OSPAR.

[777] 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.

[778] "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.

[779] See, in general, M. Fitzmaurice (1992), Chapter 7, pp. 201-25.

[780] The 1977 Council Decision has not been published.

[781] COM (1977) 48, pp. 4-5.

given that only two contracting Parties (i.e., Denmark and Germany) were also EC member states.[782] 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 against the Community's participation. Last but not least, as discussed in Chapter 4, the Community's accession was for a long time opposed 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 desires to accede to the Convention.[783] 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 east considerably changed the attitude toward the Community.[784] Furthermore, the Commission's participation in HELCOM, albeit only as an observer, was not as negative and obstructive as in PARCOM.[785]

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.[786] 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

[782] M. Fitzmaurice (1992), p. 222.
[783] Published in OJ 328, 7.12.1978, p. 37.
[784] M. Fitzmaurice (1992), p. 215.
[785] 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.
[786] 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.

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.

5.4.2 The Community's Participation in the 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[787] 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).[788] 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.

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[787] 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.

[788] 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, *Drifnets Case* (Para. 55) and Regulation 345/92, 22nd recital).

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 instead of cooperation. After the 2004 enlargement all of 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 bock-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 Community and the 1976 Barcelona Convention (BARCON) and its Protocols, as Amended

5.5.1 The Community'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.[789] 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 obtain, 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.[790] 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.[791] In addition, the accession to a Convention which brings together all

[789] 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 and T. Scovazzi (1999).
[790] See: Council Decision 77/585/EEC, infra n. 134.
[791] 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

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."[792] 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.[793] 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,[794] and subsequently acceded to all of BARCON's Protocols currently in force.[795] In 1999, moreover, the Council, on the basis of a proposal from the Commission and having regard to the opinion of the EP, accepted the 1995 amendments to the BARCON.[796]

5.5.2 The Community's 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,[797] and the EU plays a leading role in the political cooperation in the area,[798] the Community's involvement in the BARCON has been traditionally 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

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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. 134).

[792] 1976 BARCON, Article 24.

[793] Ibid, Article 19.

[794] 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.

[795] 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

[796] 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.

[797] 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.

[798] 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.

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 minimum 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 Convention.[799] 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.[800] 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 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).[801] Like in other regional forums, 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.[802] 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

[799] 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).

[800] See: UNEP(OCA)/MED WG.91/7, Para. 12. Curiously, according to the Council Decision 1999/802/EC, supra n. 136, the Commission participated on behalf of the EC in the working party that negotiated the amendments.

[801] 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.

[802] 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.

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-Barcelona Parties. Moreover, on a few occasions (e.g., MOP 13) there had been some *de minimis* coordination on the spot, but this was done in a rather informal way with brief meetings held immediately before the plenary, during the coffee breaks or lunches.[803]

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 intergovernamental 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.[804] 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 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

[803] 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).

[804] See, for instance, Declaration made by the Community at the Izmir Conference limiting the application of the BARCON Protocol on Prevention of Pollution by Trasboundary 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.

relation 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 forums 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 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 forums and the Commission's resources 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 of 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.