Chapter 6
Preventing Oil Pollution from Shipping

6.1 Introduction

Combating oil pollution from merchant shipping has been among the first environmental issues ever discussed at the international level and its global regime has now reached coverage and a level of specificity with few equivalents in other environmental areas.[805] This articulated and comprehensive regime is based on two interdependent bodies consisting of an "umbrella" framework (i.e., customary law, the LOSC and Chapter 17 of Agenda 21) and a special regulatory regime which is contained almost exclusively in instruments adopted by the IMO. Due to its global nature, shipping is better regulated at the global level and regional maritime safety and anti-pollution standards have traditionally been an exception. In the past few years, however, new steps have been taken at the regional level (e.g., the Helsinki Convention and BARCON) to raise the level of protection in regional seas, like the Baltic and the Mediterranean Seas, which are particularly exposed to the risk of oil pollution from international shipping.

The Chapter starts by discussing the main characteristics of the regime for the prevention of oil pollution from maritime transport, which presents its own peculiarities compared to the regulation of other sources of marine pollution. The attention subsequently moves to the relevant provisions of the LOSC and the main international standards, including the regional agreements to which the EC is a party. The main purpose is to identify the rights and duties of the Community in its quality of flag, coastal and port State control and the legal possibilities available under international law to protect EC waters against the risk posed by oil tankers transiting along European coasts. The Chapter identifies the main shortcomings of the existing international regime.

The focus of the discussion then moves to the manner in which the Community implements its international obligations under the LOSC. In particular, like other LOSC contracting Parties, the Community is subject to three main sets of obligations: a) to adopt the necessary measures to "minimize to the fullest possible extent" pollution from vessels; b) to cooperate in the multilateral development of international standards in IMO to "prevent, reduce and control" vessel-source pollution; to promote the adoption of routing systems to minimize the risk of accidents; and to re-examine these standards from time to time; and c) to give effect to existing GAIRAS and enforce them in the Community. The Chapter looks at the steps taken by the Community to comply with these three sets of obligations. In exercising the rights and performing the duties stemming from the LOSC, however, the Community has to act consistently with the EC Treaty. Particular attention, therefore, is paid to the manner in which the fundamental principles of EC law have shaped the Community action in this field. After a general overview of the EC Common Policy on Safe Seas (CPSS), the Chapter looks at the recent EC legislative initiatives to reduce the risk of oil pollution from tankers and their conformity with international rules. Particular attention is given to the joint participation of the Community next to its member states in the relevant decision making and political forums at the global (e.g., UN, IMO) and regional (e.g., HELCOM and BARCON) levels and the manner in which they coordinate their action in these bodies. The issue of the Community's membership of the IMO and the recent Commission suggestion to amend the LOSC's provisions on freedom of navigation are

[805] See, in general: H. Ringbom (ed.) (1997), pp. 1-9.

also discussed. The Chapter concludes with some final observations about the consistency of the EC's regulatory action in maritime safety issues with the international legal framework, indicating main advantages and disadvantages.

The Chapter exclusively discusses the public international law aspects of oil pollution from tankers, leaving aside private international law issues (e.g., liability and compensation for damage; emergency response and salvage).[806] Since preventing maritime disasters is the most effective way to avoid ship-source pollution,[807] the Chapter covers both anti-pollution and maritime safety rules, especially looking at three types of standards: a) discharge standards, which intend to combat operational pollution fixing the maximum amount of oil which can be released from ships;[808] b) navigation standards (e.g., routing and reporting), which intend to reduce the likelihood of collisions and regulate maritime traffic in particularly congested or vulnerable areas;[809] and c) construction, design, equipment and manning standards (CDEMs), which intend to improve the safety of ships in order to prevent or reduce the risk of oil spills or minimize their environmental consequences.[810] For reasons of space, the Chapter does not cover air emission standards (e.g., sulphur limits for marine fuel) nor social standards (e.g., minimum qualifications and training of seafarers), although the Community has taken regulatory action on both matters. Following the EC terminology, the Chapter will often refer to "maritime safety" in a broad sense to include the prevention of pollution from ships.

6.1.1 Pollution from the Maritime Transport of Oil: Extent of the Phenomenon

Reasons of space do not permit me to cover all aspects of vessel-source pollution. The scope of the Chapter, therefore, is limited exclusively to rules and standards for the control of "oil" discharges from ships,[811] bearing in mind that oil is not the only and not even the most dangerous of all marine pollutants.[812] However, it is the marine pollutant with the greatest visual impact, "you can see it, taste it and smell it", it spreads rapidly over large areas and it has dramatic and long-lasting environmental and socio-economic consequences.[813] Catastrophic spills involving tankers, such as the *Exxon Valdez*, the *Erika* or the *Prestige* have attracted public attention to the problem of oil pollution. They provoked a strong political reaction and in the past three decades have worked as a catalyst for the main developments in the law of the sea. Combating

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[806] However, it is worth noting that the EC pays a great deal of attention to liability and compensation for oil pollution and to oil pollution response. Likewise, market-based initiatives and the contributions of the private sector are not discussed.

[807] See: "Safer Ships, Cleaner Seas", Report of Lord Donaldson's Inquiry into the prevention of pollution from merchant shipping (hereinafter Lord Donaldson's Report), 1994, Para. 1.11.

[808] For a full discussion on discharge standards see: E. J. Molenaar (1998), pp. 21-2 and D. Bodansky (1991), p. 729.

[809] For a full discussion on navigation standards see: G. Plant in H. Ringbom (Ed.) (1997), pp. 11-29; G. Plant (1985), pp. 134-147 and 332-3; E.J. Molenaar (1998), pp. 24-5 and D. Bodansky (1991), pp. 730-1.

[810] For a full discussion on CDEMs, see E. J. Molenaar (1998), pp. 23-4 and D. Bodansky (1991), pp. 729-30.

[811] The definition of oil adopted in MARPOL 73/78, Annex I, Reg. I, is rather broad and refers to petroleum in any form, including crude oil, fuel oil and all refined products other than petrochemicals.

[812] Over the past decades the international regime on vessel-source pollution has extended considerably to cover new hazardous and noxious substances (e.g., chemicals and anti-fouling paints), air emissions from ships, sewage, garbage and alien organisms carried in ballast waters.

[813] See Lord Donaldson's Report (1994), Para 1/12. Detailed information on oil pollution is available at: http://oils.gpa.unep.org/facts/operational.htm; and US National Research Council, "Oil in the Sea III. Inputs, Fates and Effects" (2003), consultable at: www.nap.edu/catalog/10388.html?onpi_newsdoc052302.

oil pollution from shipping has become a priority for action in all main forums involved with ocean affairs at the global, regional, EC and national level. Among all shipping-generated pollutants, oil is definitely the most regulated one. This complex regime, therefore, offers an interesting example of coordination between different legislative levels.

About 90 per cent of oil supplies at the EC and global level are currently carried by sea.[814] Given the strong dependency of the global economy on maritime transport, the regime for the control of oil pollution from vessels offers the best example of how to strike a balance between conflicting environmental and navigational interests.

Oil discharges may be operational or accidental. Although accidents involving oil tankers are the most visible and dramatic cause of marine pollution, they only account for 10 per cent of all oil spilled into the ocean and they are responsible for less than ¼ of all vessel-source pollution.[815] The major threat still comes from deliberate discharges, such as tank-cleaning operations.[816] In spite of existing regulations, operational discharges continue to take place illegally. This is in part due to the significant lack of reception facilities in ports where ships may discharge their oil residues, but also because it is easier and less costly for tankers to dispose of their dirty waters in the open sea.

Although tanker disasters brought maritime transport to the spotlight, shipping is currently considered as the safest, cleanest and cheapest mode of transportation.[817] Over the past decades, indeed, new safety and environmental standards and advances in technology have considerably reduced the amount of oil spilled intentionally or accidentally into the ocean as a result of shipping activities and today vessel-source pollution accounts for only 12 per cent of overall marine pollution.[818] Despite this progress, the maritime transport of oil continues to cause alarm. The main concern is the existence of too many substandard ships which considerably increase the risk of maritime disasters.[819] Combating substandard shipping and reinforcing flag State control, therefore, have become a primary objective of the ocean policy at the global and regional levels.[820]

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[814] For an overview see: European Community Shipowner Association (ECSA), Annual Report, 2004-2005, p. 7, available at: www.ecsa.be/ar/Rapport%202004-2005.pdf and UNCTAD, Review of Maritime Transport, (2005), UNCTAD/RMT/2005. See also: UNSG Report (A/61/632), March 2006, Para. 207.

[815] See, e.g., <www4.nas.edu/onpi/webextra.nsf/web/oil?OpenDocument>.

[816] According to the US, each year an amount of oil larger than the total amount of oil spilled from the *Prestige*, *Erika*, *Sea Empress*, *Braer* and *Aegean Sea* is deliberately discharged into the ocean (IMO doc. MEPC 51/14, 26.01.2004, at (1)). See also COM (2003) 92, at (1). See also UNSG Report (A/61/632), March 2006; Para. 208.

[817] *E.g.*, Addendum to the UNSG Report (A/59/62/Add.1), 18.08.2004, Para. 218. See also the speech by the IMO Secretary General (hereinafter IMO-SG), E. Mitropolos, at the EP MARE, 22/01/2004, available at: www.imo.org/home.aspat.

[818] See GESAMP Report No. 39, The State of the Marine Environment (1990), p. 88; GESAMP, Report of the Thirtieth Session, Principality of Monaco, 22-26 May 2000; and GESAMP, Sea of Troubles, Report no. 70, (2001), p.26.

[819] The term "substandard ship" has been defined as "a vessel that, through its physical condition, its operation or activities of its crew, fails to meet basic standards of seaworthiness and thereby poses a threat to life and/or the environment. This would be evidenced by the failure of the vessel to meet regulations contained in international maritime conventions to the extent that it would be considered unfit to sail by a reasonable flag state or port state inspection". See: MTC/OECD Policy Statement on Substandard Shipping (2002), at www.oecd.org/dataoecd/18/37/2080990.pdf.

[820] See, *e.g.*, UNGA Resolution (A/60/30), 8.03.2006, paras. 47-49; 2005 UNGA Resolution (A/59/L.22), 5.11.2004, paras 34, 38, 41, 42, 46; Report of the 5th UN-ICP (A/59/122), June 2004;

6.1.2 The Need to Strike a Balance between Conflicting Interests, Uniformity and Flexibility

Before discussing the specific rules for the control of oil pollution from shipping it is important to look at the peculiarities which differentiate this regime from that of other sources of marine pollution.

The global economy is heavily dependant on maritime transport and on the traditional freedom of navigation and this dependency is likely to increase in the future as a result of the globalization of markets. The growing volume of maritime traffic coupled with the major changes which occurred in the maritime transport sector in the past 30 years (e.g., the hazardous nature of the materials transported by sea, the size and increasing speeds of tankers) have increased the risk for coastal States. The threat is particularly high in closed or semi-enclosed seas (as are all European waters) where oil spills may have devastating and long-lasting environmental and socio-economic consequences. The environmental interests of coastal States, however, have to be carefully balanced against the interest of flag States, and of the international community as a whole, in preserving the traditional freedom of navigation.

Due to its international character shipping, more than any other source of pollution, has much to gain from uniform standards and it is better regulated at the global, rather than at the national or regional level.[821] Global standards applicable everywhere ensure legal certainty and facilitate international navigation. Conversely, the existence of different national or regional regulations, especially CDEMs, creates great confusion for flag States, operators and crew as to which standards apply, thereby making it extremely difficult to operate a vessel internationally and significantly increasing the costs of the voyage.[822] Uniform standards, moreover, ensure a level playing field for all operators and eliminate competitive advantages for substandard ships.[823] Anti-pollution requirements bring about new considerable costs for the maritime industry and flag States are generally reluctant to adopt stricter environmental standards for their ships unless other states do the same.[824]

Besides, global standards are more effective from an environmental point of view and ensure a uniform level of protection worldwide.[825] Conversely, the adoption of stricter national or regional requirements may transfer the risk to regions with lower safety and anti-pollution standards. Moreover, due to its transboudary nature marine pollution is more effectively tackled by collective action at the international level, while national or regional initiatives may be frustrated by the unsafe and environmentally unfriendly practices in other marine regions.

UNSG Report (A/59/62), February 2004, paras 151 and 308. See also, 2003 UNGA Resolution (A/58/L.19), Para. 23, all available at: www.un.org/Depts/los/general_assembly/general_assembly.htm. See also the G8 Action Plan on "Marine Environment and Tanker Safety", Para. 2(3), Evian Summit (2003); Joint HELCOM/OSPARCOM Declaration (Bremen, 25-26/06/2003), paras 28-33; Declaration of the 13th MOP of BARCON, Catania, 11-14/11/2003 (UNEP-DEC0/MED IG.15/4-CRP.4/COR.1), paras 16-20, and MTC/OECD Policy Statement on Substandard Shipping (2002).

[821] H. Ringbom (1997), p. 2.

[822] In December 2003, for instance, under the threat of a Spanish ban, the 24-year old Russian-flagged single-hulled *Geroi Sevastopolya* en route from Ventspils to Singapore with a load of 55,000 tonnes of heavy grade oil (renamed "the new Prestige" for the strong analogies with the sunken tanker), was forced to circumnavigate Cape of Good Hope adding 14 days to the voyage to avoid passing through the Strait of Gibraltar (Lloyd List, 22/12/2003).

[823] E.g., OECD/MTC Report on Costs Saving from Non-Compliance with International Environmental Regulations in the Maritime Sector (2003), at: www.oecd.org/dataoecd/4/26/2496757.pdf.

[824] E. J. Molenaar (1998), pp. 27-28 and R.R. Churchill and A.V. Lowe (1999), p. 338.

[825] E.g., 2003 ICP Report, Para. 53.

Finally, in order to be effective the regulation of vessel-source pollution requires the maximum level of flexibility and a legal system able to adapt to the environmental changes and to the rapid technological developments in the maritime transport sector.

The existing international, regional and EC rules for the prevention of oil pollution from shipping have to be examined against this background. Any new initiative to strengthen maritime safety and pollution prevention from maritime transport must take all these considerations into account.

6.1.3 The Global Legal Framework for the Prevention of Oil Pollution from Shipping

Not surprisingly the regulation of vessel-source pollution has been among the most debated and controversial issues during the UNCLOS III negotiations.[826] The failure of the traditional framework and the need to contrast the unilateral initiatives of coastal States triggered a revision of the existing rules. Serious efforts have been made to create a global regime based on a maximum level of uniformity and flexibility and where the conflicting interests involved are carefully balanced. The jurisdictional framework of that regime is laid down in the LOSC which distributes the power to adopt and enforce vessel-source pollution standards between flag, coastal and port States. Part XII pays substantial attention to the prevention of marine pollution from ships compared to other sources and the relevant provisions are among the most detailed in the entire Convention. The consistent practice of states, including non-parties to the LOSC, indicates that these provisions are generally considered as reflecting customary international law.[827]

The LOSC recognizes that shipping activities place strong pressure on the marine environment and require all States to take the necessary measures to "minimize to the fullest possible extent" pollution from vessels.[828] These measures, however, have to be taken while avoiding "unjustifiable interference" with the exercise of the rights of other States according to the Convention.[829]

In order to ensure the maximum level of uniformity the LOSC places considerable restraints on the capacity of coastal States to act unilaterally and sets out the framework for the multilateral development of the relevant rules within "the" competent international organization: namely the IMO. The IMO is considered to be the only body which is entitled to adopt measures interfering with shipping and the proper forum in which to balance coastal State demands for more stringent protection with flag State needs to preserve the freedom of navigation.[830] Article 211(1), therefore, requires all States to cooperate within the IMO or general diplomatic

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[826] See, in general: R. Platzöder (1987); B.H. Oxman (1979); D. Bodansky (1991), pp. 719-777; E. J. Molenaar (1998), p. 51; T. Keselj (1999), p. 127 and B. Kwiatkowska (1989), p. 170.

[827] See Chapter 1.2.2 of this study, n. 33 The customary nature of the LOSC provisions in the field of vessel-source pollution has been expressly recognized by the ECJ in the *Poulsen* Case (Para. 9).

[828] LOSC Article 194(3)(b) requiring States to adopt measures for preventing accidents and dealing with emergencies; ensuring the safety of operation at sea; preventing intentional and unintentional discharges; and regulating the design, construction, equipment, operation and manning of vessels. In addition, the LOSC contains a number of cooperation requirements to prevent or minimize accidental pollution and to respond effectively to emergency situations (e.g., Articles 198, 199 and 211(7).

[829] *Ibid*, Article 194(4).

[830] S. Rosenne and A. Yankov (eds) (1991), pp. 176-207. On the IMO as "the" competent international organization see, *inter alia*, "Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization", IMO doc. LEG/MISC/3/Rev.1, 6.1.2003. For a general discussion see: A. Blanco Bazán (2003), pp. 31-47.

conferences[831] in the multilateral development of standards to "prevent, reduce and control" vessel-source pollution and to promote the adoption of routing systems to minimize the risk of accidents. States are required to re-examine these standards from time to time as necessary in order to keep the overall system constantly up to date.

The LOSC does not contain technical requirements, but by means of "rules of reference" requires flag States to give effect to existing GAIRAS.[832] As will be discussed in Chapter 6.4.2, the main GAIRAS relating to vessel-source pollution are contained in the global regulatory instruments adopted by the IMO.[833] The "rule of reference" contained in the LOSC does not only ensure uniformity, but also great flexibility, since, as will be discussed later, IMO standards may be rapidly updated by means of a tacit acceptance procedure.

6.2 The Jurisdictional Framework under the LOSC

6.2.1 Flag States

The LOSC strongly guarantees the traditional rights of navigation of flag States. The Convention does not only reconfirm the customary freedom of navigation of flag States in the high seas[834] and the right of innocent passage through the territorial sea;[835] but it goes further, by establishing the right of passage through the EEZ,[836] the right of transit passage through straits used for international navigation[837] and the right of sea-lane passage through archipelagic sea lanes.[838] These new rights of passage have been introduced to mitigate the effects of the nationalization of waters which were previously subjected to the freedom of navigation regime and coastal States have very limited powers vis-à-vis foreign ships in these areas also in relation to potentially hazardous or even substandard ships.

To counterbalance these extended rights of navigation, the LOSC places flag States under the positive legal duty to ensure that ships flying their flag, wherever they are located, do comply with all safety, anti-pollution and seaworthiness standards established by the IMO.[839] In particular, flag States must adopt national vessel-source pollution regulations which are at least as stringent as the existing GAIRAS and must enforce them in the case of vessels flying their flag.[840] For flag States, therefore, international standards represent the minimum standards that they must adopt and enforce for their vessels if they want to operate them internationally. Nothing in the Convention prevents States from applying to ships flying their flag stricter national safety and anti-pollution standards, including CDEMs.

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[831] On the meaning of "general" diplomatic conferences (GDC) see: Chapter 1.2.2.1 of this study. According to B. Kwiatkowska (1989), at n. 33, the reference to GDC was introduced to meet the concerns of some developing states which saw the IMO as an organization of maritime States.

[832] On the meaning of GAIRAS see Chapter 1.3.1 of this study.

[833] In addition, some GAIRAS related to vessel-source pollution have been adopted by ILO and IAEA

[834] LOSC, Article 87(1)(a). Such a freedom has to be exercised with "due regard for the interests of other states" (*Ibid*, Article 87(2)).

[835] *Ibid*, Article 17. See infra Chapter 6.2.2.1.

[836] *Ibid*, Article 58.

[837] *Ibid*, Article 38.

[838] *Ibid*, Article 54. There are no archipelagic waters according to the LOSC in Europe and the regime of archipelagic passage will not be discussed.

[839] LOSC, Articles 94(5), 211(2) and 217(1). This is an important change compared to the pre-LOSC regime in which the prescriptive and enforcement jurisdiction of the flag State with regard to anti-pollution standards were merely discretionary. See, *inter alia*, R.R. Churchill and A.V. Lowe (1999), pp. 344-5.

[840] LOSC, Articles 211(2) and 217(1).

Furthermore, Article 94 requires States to exercise effective jurisdiction and control over ships registered under their flags, by ensuring that they conform, *inter alia*, to existing pollution prevention rules and are constructed and equipped according to IMO safety and seaworthiness standards.[841] For that purpose, before registration and periodically thereafter, the LOSC requires flag States to inspect their vessels through qualified surveyors and to issue certificates attesting compliance with IMO standards.[842] It is common practice to delegate the verification and issuing of the certificates to classification societies that, therefore, play a major role in ensuring safe and environmentally sound shipping.

Article 94, however, is not entirely clear as to the manner in which jurisdiction should be exercised over the vessel. The UN General Assembly has recommended that in order to exercise effective control, flag States should not register any vessels unless they have truly effective means of enforcing international rules and standards.[843] Flag States should have, *inter alia*, adequate maritime legislation in place complying with GAIRAS; an effective maritime administration; an adequate organization to inspect ships; and adequate mechanisms to investigate possible accidents.

When, after inspection, a vessel is discovered not to be in compliance with existing IMO seaworthiness standards the LOSC requires the flag States to detain the ship and prohibit it from sailing until it corrects the violations.[844] In addition, flag States have to investigate alleged violations committed by their ships,[845] institute proceedings for violations of GAIRAS wherever they have occurred,[846] and impose penalties of adequate severity to discourage violations.[847]

Despite the general dissatisfaction with the traditional regime, the LOSC reconfirms the principle that primary responsibility for the regulation of vessel-source pollution lies with the flag State.[848] The main problem with this approach is that flag States are normally not directly affected by pollution and they have little incentives to adopt anti-pollution standards.[849] The situation is aggravated by the fact that an increasing number of shipowners register their ships in countries which do not require a particular link between the vessel and the flag (i.e., flags of convenience (FOCs) or open registers) and generally have far less stringent safety, environmental and labour

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[841] LOSC, Articles 94(3) requires flag States to take measures to ensure safety with regard to, *inter alia*: (a) construction, equipment, and seaworthiness of ships; (b) the manning of ships, labour conditions and training of crew, taking into account the international instruments; and (c) the use of signals, maintenance of communication and prevention of collision. See also Articles 94(5) and 217(1). In addition LOSC Article 94(4) requires flag states to ensure that (a) their vessels carry adequate charts, publications and navigation equipment, and (b and c) the captain and crew are fully aware of existing international maritime safety and anti-pollution regulations.

[842] LOSC Articles 94(4) (a) and 217(3). Similar provisions are contained in MARPOL 73/78, Article 5; MARPOL Annex 1, Reg. 4-8 and SOLAS Chapter 1, Reg. 6-13.

[843] See, 2005 UNGA Resolution (Para. 47); 2004 UNGA Resolution (Para. 38) and 2003 UNGA Resolution (Para. 27). See also Report from the Consultative Group on Flag State Implementation set up by the UNSG to explore all flag State-related issues raised by the *Prestige* accident (UN doc. A/59/63), 2 June 2004 (FSI Report), Para. 118, available at: www.un.org/Depts/los/general_assembly/documents/flagstateimpl.pdf.

[844] LOSC, Article 217(2). See also SOLAS, Chapter 1, Reg. 19(c).

[845] LOSC, Article 217(6). See also MARPOL 73/78, Article 6(4).

[846] LOSC, Article 217(4).

[847] *Ibid*, Article 217(8). See also MARPOL 73/78, Article 4(1).

[848] These provisions reflect the existing customary law, see, e.g., S. Rosenne and A. Yankov (eds) (1991), p. 255; R.R. Churchill and A.V. Lowe (1999), p.346; D. Bodansky (1991), p.741 and C. Allen, p. 568.

[849] R.R. Churchill and A.V. Lowe (1999), p. 346 and D. Bodansky (1991), pp. 737 and 742.

legislation.[850] Since these vessels almost never call at the ports of their States of registration, FOCs are generally suspected of not exercising real powers of enforcement over their ships. This phenomenon has been favoured by the lack of a definition under international law of the criteria for the registration of ships. Article 91(1) of the LOSC, reflecting customary law, simply requires that a "genuine link" must exist between the State and the vessel flying its flag, but leaves flag States entirely free to determine the conditions for granting their nationality to ships.[851] The proliferation of FOCs has questioned once more the adequacy of the primary responsibility of flag States for controlling vessel-source pollution.

6.2.2 Coastal States

The LOSC recognizes that coastal States are more directly affected by international shipping compared to flag States and have the greatest interest in establishing an effective system to combat vessel-source pollution.[852] As a result the LOSC extends the capacity of coastal States to control dangerous traffic and defend their marine environment and related interests from hazardous ships as long as they do not interfere too much with the freedom of navigation of other States.[853] Outside ports and internal waters, therefore, the level of control of coastal States is limited by the traditional rights of navigation and decreases proceeding toward the high seas, where ships are under the exclusive jurisdiction of the flag State.[854]

6.2.2.1 Territorial Sea

In the territorial sea the sovereignty of the coastal State is limited by the right of innocent passage of foreign ships.[855] For security reasons the coastal State may suspend the passage of all foreign ships in specific areas of its territorial sea, but this suspension must be temporary and duly published.[856] Otherwise, the right of innocent passage can never be denied unless it is considered prejudicial to the peace, good order or security of the coastal State.[857] That is the case when the foreign vessel is engaged, *inter alia*, in acts of "wilful and serious pollution".[858] The transport of oil and other hazardous materials in the absence of a clear polluting intent as well as violations of CDEMs or accidental discharges do not seem to be *per se* sufficient to qualify the

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[850] Even though FOCs have traditionally been known for not complying with international maritime safety, environmental and labour standards, the number of well performing FOCs is increasing. See, e.g., 2003 Annual Report of the Paris MOU.

[851] The 2004 UNGA Resolution (Para. 42) requests the UNSG to further examine and clarify the role of the genuine link in relation to the duty of flag States to exercise effective control over their ships. For a detailed analysis of the "genuine link" see: A.G. Oude Elferink in: I.F. Dekker and H.H.G. Post (eds) (2003), pp. 41-63 and E.J. Molenaar (1998), pp. 76-7 and 89.

[852] D. Bodansky (1991), p. 737. As E.J. Molenaar (1998), p. 92, has pointed out that coastal (and port) State jurisdiction "always implies jurisdiction over foreign vessels. Jurisdiction over a State's own vessel implies acting in the capacity as flag State".

[853] *E.g.*, LOSC Articles 192, 194, 195, 198, 199, 211, 221, 225.

[854] *Ibid*, Article 92.

[855] Innocent passage is defined in *ibid*, Article 17. That passage has to be continuous and expeditious, but in case of distress or *force majeour* it may include stopping and anchoring (*ibid*, Article 18(2)). Innocent passage also applies to internal waters enclosed by straight baselines (*ibid*, Article 8(2)).

[856] LOSC, Article 25(3).

[857] In this case the vessel may be expelled from the territorial sea. LOSC, Articles 25(1), 27 and 28. See R.R. Churchill and A.V. Lowe (1999), p. 349 and E.J. Molenaar (1998), p. 249 and, in general, L.S. Johnson (2004), pp. 62-7.

[858] LOSC, Article 19(2)(h).

passage as "not innocent", but a positive and "wilful act" is always needed.[859] It follows that only intentional discharges may justify the exclusion of the vessel from the territorial sea, but they must still be "serious". This would exclude operational discharges, such as tanker cleaning operations.[860] However, in the absence of a clear definition of "serious pollution" coastal States have a large margin of discretion to determine the seriousness of the pollution. The passage, moreover, ceases to be innocent when a foreign ship engages in "any other activity not having a direct bearing on passage".[861] This seems to be the case when a ship is involved in a maritime casualty.[862]

Coastal States have the right ("may"), but not the duty, to regulate innocent passage for the purpose, *inter alia*, of the safety of navigation and the regulation of maritime traffic; environmental protection and the prevention, reduction and control of pollution; and conservation of the living resources of the sea.[863] In particular, they may require foreign oil tankers to confine their passage to special sea-lanes and traffic separation schemes[864] and to comply with special discharge standards, which may also go beyond existing GAIRAS.[865] However, they cannot require foreign vessels to observe national CDEMs which are more stringent than international standards.[866] In no circumstance, moreover, may national legislation result in *de facto* or discriminatory limitations to the right of innocent passage.[867]

As far as enforcement is concerned, coastal States have unrestricted jurisdiction over foreign vessels which are not engaged in innocent passage.[868] Otherwise, they may exercise their enforcement powers only if there are "clear grounds" for believing that a foreign vessel during its passage has violated the conditions for access into ports and internal waters or other international vessel-source pollution requirements.[869]

6.2.2.2 Straits used for International Navigation

The environmental jurisdiction of coastal States diminishes to a considerable extent in straits used for international navigation, such as the English Channel, the Dover or

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[859] *Inter alia*, D. Bodansky (1991), p. 754; R.R. Churchill and A.V. Lowe (1999), p. 72; E.J. Molenaar (1998), pp.197-8 and M. Valenzuela (1999), p. 493. However, according to J.M. Van Dyke (1996), p. 384, the traditional navigational freedoms do not apply to ultra hazardous cargoes.

[860] According to E.J. Molenaar (1998), p. 197, however, an operational discharge could, under certain conditions, be regarded as "serious" if it takes place in a heavily polluted enclosed sea.

[861] LOSC, Article 19(2) (l). In addition, according to K. Hakapää (1981), pp. 184-5, violations of navigation standards, such as national routing schemes, may render the passage not innocent.

[862] See, for instance, LOSC, Article 221. According to E.J. Molenaar (1998), p. 198, maritime casualties cannot be qualified as "passage" under Article 18 and ships involved in such casualties lose their right of innocent passage.

[863] LOSC, Article 21(1)(a), (d) and (f). Foreign ships exercising the right of innocent passage shall comply with *all such laws and regulations* and all GAIRAS relating to the prevention of collisions at sea, *ibid,* Article 21(4).

[864] *Ibid*, Articles 22 and 23. TSS and sea-lanes have to be clearly indicated on charts and be given due publicity. Moreover, they have to be established taking into account the existing IMO recommendations. For a full discussion of this subject, see: J. Roberts (2005), pp. 137-8; L.S. Johnson (2004), pp. 69-71; E. J. Molenaar (1998), pp. 24-5; G. Plant, in H. Ringbom (ed.) (1997), pp. 11-29; G. Plant (1985), pp. 134-147 and 332-3; and D. Bodansky (1991), pp. 730-1.

[865] LOSC Articles 21(3), 24 and 211(4).

[866] *Ibid*, Article 21(2).

[867] *Ibid,* Articles 21(2), (4) and 24.

[868] See supra n. 857.

[869] In this case the coastal State may board, inspect and eventually detain the ship (LOSC, Articles 25(2) and 220(2)).

Gibraltar Straits, where foreign ships enjoy a right of transit passage.[870] This right, unlike the right of innocent passage in the territorial sea, can never be suspended and shall not be impeded unless there is an alternative route of similar convenience.[871] The regulatory powers of the coastal States bordering the strait are limited to the prescription of navigational rules (e.g, sea lanes, TSS or reporting requirements) which have to conform to "applicable" international rules and need to be approved by the IMO, and discharge standards for oil, oil waste (and other noxious substances), which have to give effect to "applicable" international standards.[872] In the strait, therefore, navigational and discharge standards contained in instruments to which coastal States are contracting parties, represent maximum standards.[873] National measures cannot cover CDEMs and in no circumstance can they hamper transit.[874]

During the passage through such straits foreign ships are requested to comply with existing maritime safety and discharge GAIRS and national environmental measures adopted in conformity with the LOSC.[875] But the Convention is silent as to the consequences of a lack of compliance with these standards. The LOSC makes it clear that coastal States may take "appropriate" enforcement measures against foreign ships which violate "national discharge or navigational standards" causing or threatening "major" pollution damage to the marine environment of the straits, but it is not entirely clear what this broad provision entails in practice.[876] Arguably, coastal States cannot use their enforcement powers to correct violations of CDEMs and they cannot impede transit passage through an international strait.

6.2.2.3 The Exclusive Economic Zone (EEZ)

The level of control of coastal States is particularly limited when foreign tankers are transiting through the EEZ.[877] All coastal States can do in this area is to prescribe, for the purpose of enforcement, national safety and environmental measures giving effect to existing GAIRAS and promote routeing systems to minimize the threat of accidents,

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[870] For a detailed analysis of this regime see: E. J. Molenaar (1998), pp. 283-360. See also S.N. Nandan and D. H. Anderson (1989), pp. 159-185.

[871] LOSC Articles 38(1) and 44. It is worth mentioning that in the cases specified in Article 45(1), the right of innocent passage discussed in Chapter 6.2.2.1 shall also apply in straits used for international navigation, but it can never be suspended (ibid, 45(2)).

[872] LOSC Articles 41and 42(1)(a) and (b). On the meaning of "applicable" standards, see: Chapter 1.3.1 of this Study. According to G. Plant (1992), p. 249-50, navigational standards must be approved by IMO and accepted by all States bordering the strait.

[873] See, e.g., the controversial proposal by Australia and Papua New Guinea for compulsory pilotage in the Torres Strait PSSA, which has been strongly challenged in IMO. Although the submitting States made it clear that the pilotage would apply to an area entirely located within the territorial sea, in NAV 50 (July 2004), this measure was strongly opposed by maritime States (e.g., Panama, the Russian Federation and the US) and the shipping industry as an impediment to the right of transit passage in violation of Article 38 of the LOSC. According to the opponents there are no IMO instruments which may be used as a legal basis for such a measure and the IMO has never approved compulsory pilotage in an international strait. The issue has been referred to LEG 89 (October 2004), which was unable to decide on the legality of such a measure. At MEPC 53 (July 2005), the US, supported by the large majority of shipping nations, forcefully expressed opposition to compulsory pilotage in international straits and, eventually, the MEPC approved non-compulsory pilotage in the Torres Strait.

[874] National laws, moreover, cannot be discriminatory and must be duly publicized, LOSC, Article 42(2) and (3)).

[875] *Ibid,* Articles 39(2) (a) and (b) and 42(4).

[876] *Ibid,* Article 233. For a full discussion see: E.J. Molenaar (1998), pp. 295-8.

[877] In the EEZ coastal States must have due regard to the rights of navigation of flag States (LOSC, Article 56 (2)). For a full discussion on coastal state jurisdiction in the EEZ see: L.S. Johnson (2004), pp. 95-135; E. J. Molenaar (1998), pp. 361-99 and B. Kwiatkowska (1989), pp. 171-9.

which, however, have to be approved by the IMO.[878] As will be discussed in further detail in Chapter 8.6.1, in certain circumstances coastal States may adopt stricter standards (except CDEMs) for "clearly defined" vulnerable areas of their EEZ, but they always need the IMO's approval.[879] Only in ice-covered areas within their EEZ may coastal States "unilaterally" increase safety and anti-pollution requirements, including CDEMs, without going through the IMO.[880] Outside ice-covered areas, therefore, the legislative power of the coastal States vis-à-vis foreign vessels in transit through the EEZ is limited to the adoption of rules which have to be agreed at the international level. It is for flag States to ensure that vessels flying their flag comply with these standards,[881] but if they do not, the coastal State has limited capacity to correct violations.

Most of the enforcement mechanisms available to coastal States in the EEZ relate to the violation of discharge or navigational standards, not CDEMs.[882] The availability of these enforcement mechanisms, moreover, depends on the gravity of the discharge and/or damage and little can be done before the pollution occurs. Generally speaking, coastal States may physically inspect a foreign ship in transit only if they have "clear grounds for believing" that during the passage the ship has committed a violation of international anti-pollution standards resulting in a "substantial discharge" causing or threatening "significant pollution" of the marine environment.[883] But in order to institute proceedings and eventually to detain that vessel, a coastal State must have "clear objective evidence" that such a violation has occurred and has resulted in a discharge causing or threatening "major damage" to its marine environment and related interests.[884] In the absence of any discharge, coastal States' enforcement powers are mainly limited to requesting the information necessary to determine whether a violation has taken place.[885]

Conversely, the LOSC recognizes the extensive enforcement powers of coastal States vis-à-vis foreign ships involved in "maritime casualties".[886] In this case they may take all proportionate measures within and beyond the territorial sea, including the high seas, to protect their coastline or related interests from actual or possible damage.[887] Although the definition of "maritime casualty" is rather broad, coastal States' powers only arise after a casualty has occurred.

The coastal States' enforcement capacity is further restricted by a series of "safeguards" which are intended to ensure that in exercising their powers, States do not

[878] LOSC, Articles 211(1) and 211(5).
[879] *Ibid,* Article 211(6)(c).
[880] *Ibid*, Article 234. This is the only real exception to the EEZ regime. However, the margin of discretion of coastal States is limited by the duty to have "due regard" to the freedom of navigation and to act on the basis of the best available scientific evidence.
[881] LOSC, Article 58(3).
[882] On coastal States enforcement jurisdiction in the EEZ: L.S. Johnson (2004), pp. 118-22 and E.J. Molenaar (1998), pp. 382-8.
[883] LOSC, Article 220(5).
[884] *Ibid*, Article 220(6). The LOSC, however, does not explain the difference between "significant pollution" justifying an inspection and "major damage" justifying proceedings and, eventually, the arrest of the vessel.
[885] *Ibid,* Article 220(3)).
[886] Maritime casualties are defined as the "collision of vessels, stranding or other incidents of navigation or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo", LOSC, Article 221(2).
[887] *Ibid*, Article 221(1).

endanger the safety of navigation, expose the marine environment to an unreasonable risk or affect too much the commercial interests of ships.[888]

The LOSC does not seem to favour coastal States' enforcement in the EEZ and outside the territorial sea in general. Stopping, boarding and inspecting large tankers in these waters, especially in highly congested maritime areas, is a complex and highly risky operation and has a strong impact on the freedom of navigation. The Convention, therefore, tries to limit these operations as much as possible.

However, it is worth mentioning that coastal States may employ the entire range of mechanisms available in Part XV of the LOSC to deal with flag States that are in breach of their international obligations. Article 297(1)(b) LOSC, indeed, allows coastal States to start a procedure against a flag State which, in exercising its rights of navigation, has acted in contravention of the LOSC or national and international standards adopted in conformity with the Convention.[889] Presumably, therefore, coastal States may initiate a legal action against a badly performing flag State that does not comply with its obligations under Articles 94 and 217 of the LOSC. For various reasons, including the costs of commencing such procedures, coastal States have so far not taken advantage of this possibility.

6.2.3 Port States[890]

6.2.3.1 Legislative Jurisdiction

The LOSC, reflecting customary international law, confirms that over their internal waters States have plenary jurisdiction which is equivalent to that over their land territory.[891] States have the right ("may") to lay down special environmental requirements as a condition for access into their ports and to take all the necessary steps vis-à-vis vessels regardless of their flag to prevent any violation of these conditions.[892] Groups of States, moreover, may also establish common access conditions.[893] In the absence of any express limits in the LOSC, it is commonly agreed that port-access requirements may cover all kinds of safety, anti-pollution and seaworthiness standards including CDEMs.[894]

In the wake of the *Prestige* accident, a number of EC coastal States and the Community itself, acting in their capacity as port States, unilaterally strengthened CDEMs for the safe transport of heavy grades of oil (HGOs) without going through the IMO.[895] These unilateral and regional initiatives go far beyond MARPOL 73/78 and

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[888] These safeguards are contained in Section 7, Part XII of the LOSC.

[889] On the scope of Article 297(1) see E.J. Molenaar (1998), pp 485-8.

[890] The LOSC makes reference to port States only in Article 218 with regard to enforcement jurisdiction. Some authors (e.g., D. Bodansky (1991), p. 740 and G. Kasoulides, p. 122), therefore, refer to port States only to indicate enforcement against foreign vessels present in port. The present study refers to both prescriptive and enforcement jurisdiction based on the presence of the vessel in port.

[891] LOSC, Article 2(1).

[892] *Ibid*, Articles 25(2) and 211(3); these requirements must be given due publicity and be communicated to the IMO. See also: *Nicaragua Case* (Nicaragua v. United States), 27/06/1986, ICJ Reports 1986, p. 14-101, Para. 213.

[893] LOSC, Article 211(3).

[894] See, *inter alia*, L.S. Johnson (2004), p 40; E. J. Molenaar, pp. 103-104 and K. Hapaaka (1981), p. 169.

[895] Spain (24343 Royal Decree-law 9/2002, 13/12/2002), Italy (Italian Ministerial Decree 21/02/2003), France and Portugal (Malaga Agreement, 26/11/2002, which also includes Spain). These requirements, which are *per se* consistent with Articles 25(2) and 211(3) of LOSC, have been complemented by the practice of escorting foreign single hulls out of the EEZ, including ships in transit. This practice had the practical effect of denying the passage of foreign merchant vessels perfectly conforming to IMO standards and with good port control records through several European EEZs and some of the major straits used for international navigation, such as the English Channel and the Strait of Gibraltar, and has

have attracted a great deal of criticism.[896] This strong reaction raises once again the delicate question as to how far States may go in using their right to regulate the access of foreign ships to their ports and, in particular, whether their legislative jurisdiction also covers CDEMs, given the extraterritorial effects and far-reaching implications of these standards on international shipping.

Although this is not the appropriate place properly to address such a highly delicate issue, it is worth making some general observations.[897] The right of port States to set conditions for the entrance into port of foreign ships going beyond international standards and to deny access to vessels not complying with these requirements is widely recognized as reflecting customary international law.[898] Port State regulatory capacity, however, is not unlimited, as it may be restricted, first of all, by treaty obligations.[899] IMO instruments, such as MARPOL 73/78, do not regulate the legislative jurisdiction of coastal States, but they generally refer to the regime contained in the LOSC.[900] By acceding to an IMO convention, therefore, coastal States do not seem to renounce their right to regulate port access as granted by the LOSC in relation to all matters covered by the IMO instrument. Additionally, according to Article 31(1) of the Vienna Convention on the Law of Treaties a convention shall be interpreted "in accordance with the terms of the treaty" and "in the light of its object and purpose".[901] In the absence of provisions on legislative jurisdiction in the IMO conventions, it is necessary to look at their objective.[902] Generally, the IMO conventions have a double aim: (a) promoting maritime safety and/or marine environmental protection; and (b) ensuring uniformity of regulation in international shipping. However, it is generally accepted that these conventions, unlike the LOSC, do not represent a "package deal" between different interests. As already mentioned, they are generally addressed to flag States and require them to implement and enforce the relevant standards, but do not intend to limit the capacity of coastal or port States

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been condemned as a restriction of the freedom of navigation that is totally inconsistent with the LOSC. *Inter alia*, 2003 UNSG Report, at (57); 2003 ICP Report, at (71-3); Joint Statement of the Round Table of International Shipping Organizations (INTERTANKO, the ICS, the Baltic and the International Maritime Council and INTERCARGO), 12/12/2002, available at: www.intertanko.com/artikkel.asp?id=5045. The EC institutions have never supported this practice. The Community, on the other hand, adopted the Regulation 1726/2003, 22.07.2003, infra n. 1113.

[896] See, e.g., Speech of the IMO SG, E. Mitropulos, before the EP-MARE, 22/01/2004, available at: www.imo.org/home.aspat and shipping industry, supra n. 895.

[897] For a full discussion of the subject: L.S. Johnson (2004), pp. 38-46; L. de La Fayette (1996), pp. 1-22; E.J. Molenaar in H. Ringbom (ed.) (1997), pp. 201- 216; E.J. Molenaar (1998), pp. 101-4 and 110-7; H. Ringbom (1999), pp. 23-24; M. Valenzuela in: A.H.A. Soons (ed.) (1991), pp. 213-215; and A.V. Lowe (1977), pp. 597-622.

[898] L.S. Johnson (2004), p. 39; L. de La Fayette (1996), pp 2-3 and 11-12; E.J. Molenaar (1998), p. 101; A.V. Lowe (1977), p. 607, M. Valenzuela (1999), p. 493. See also *Nicaragua Case*, supra n. 892.

[899] See: H. Ringbom (1999), p. 23.

[900] MARPOL Article 9(2) makes it clear that "Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea […] not the present or future claims and legal views of any State concerning the law of the sea and the nature and the extent of coastal and flag State jurisdiction".

[901] See E.J. Molenaar in H. Ringbom (1997), pp. 204-6.

[902] However, SOLAS, Article VI(d), for instance, provides that: "all matters that are not expressly provided for in the present Convention remain subject to the legislation of the Contracting Governments". According to E.J. Molenaar, in Ringbom (ed), pp. 204-5, on the one hand, this provision seems to exclude the capacity of states Parties to go beyond the standards contained in SOLAS but, on the other , the terms "expressly provided for" give Parties ample room to adopt their own standards in matters not regulated by SOLAS. The absence of such a provision in other IMO conventions, such as MARPOL 73/78, moreover, seem to imply that, as a rule, Parties can go beyond IMO standards when exercising their port State jurisdiction.

to adopt protective measures in accordance with international law.[903] It seems that port States, in principle, are entitled to adopt safety and environmental requirements which may be stricter than those contained in IMO instruments if this is necessary to ensure the achievement of the objectives pursued by these instruments.

However, port State requirements cannot hamper the rights of passage as guaranteed by the LOSC and must be consistent with the general principles of international law, such as proportionality, non-discrimination and the prohibition of abusing rights.[904] Generally speaking, there must be a direct connection between access requirements and the legitimate interests of port States to ensure maritime safety and marine environmental protection and the access requirements have to apply to all vessels entering ports regardless of their flag. In excluding the abuse of rights, moreover, the environmental rights of port States should be carefully balanced against the navigation rights of flag States.[905] The "extra-territorial" effects of port access conditions concerning CDEMs are purely incidental since these standards by their very nature cannot exclusively apply when the ship is in port but necessarily extend to vessels before entry. Presumably, when foreign ships decide to operate in a particular country or region they accept the sovereignty of the port State and implicitly agree to comply with its higher safety and environmental standards, including CDEMs.

All considerations mentioned so far seem also to apply to regional organizations. Although the LOSC provisions on vessel-source pollution make no explicit reference to regional organizations as they do for other sources of marine pollution (e.g., dumping), Article 211(3) seems to entitle port States to exercise their legislative jurisdiction on a regional basis. In principle, nothing in the LOSC or in the IMO conventions excludes the possibility for a regional organization, such as the EC, to which member states have transferred their competence, to establish special safety or environmental requirements for the access of all ships, including foreign vessels, into the ports of its member state.[906] As a contracting Party to the LOSC, indeed, the Community has the right to act on the basis of Article 211(3). The regional exercise of port State legislative jurisdiction, therefore, may probably be challenged from a political point of view because of its strong impact on the uniformity of shipping regulations, but it seems to be consistent with the existing legal framework.

6.2.3.2 Enforcement Jurisdiction

While the LOSC provisions on port State legislative jurisdiction generally reflect customary law, it is in respect of port State enforcement jurisdiction that the Convention is quite innovatory.[907] To correct the deficiencies of flag State enforcement and implementation and to compensate for the limited enforcement powers of the coastal State, the LOSC grants States greater authority over foreign vessels which are voluntarily in their ports.[908] Port State enforcement, indeed, has a smaller interference

[903] See: L.S. Johnson (2004), pp. 43-46; E.J. Molenaar, in H. Ringbom (1997), p. 204-5.
[904] E.g., LOSC, Article 300. For a full discussion see: H. Ringbom (1999), pp. 23-4; E. J. Molenaar (1998), pp. 115-7 and E.J. Molenaar in H. Ringbom (1997), pp. 209-11.
[905] The abuse of rights is the exercise of a right for a purpose different from that for which it was created. See: E.J. Molenaar (1998), p. 43 and E.J. Molenaar in H. Ringbom (1997), pp. 209-10.
[906] Some IMO instruments expressly call for regional action see, e.g., Article 3 (5) of the 1993 Torremolinos Protocol on safety of fishing vessels.
[907] On the evolution of port state enforcement jurisdiction see: D. Anderson in A. Boyle and D. Freestone (eds.) (1996), pp. 325-337. For an in-depth analysis of port State jurisdiction see also D. Bodansky (1991), pp. 759-754, E.J. Molenaar (1998), 186-91, G.C. Kasoulides in H. Ringbom (ed.) (1997), pp. 121-39 and T. Keselj (1999), pp. 127-59.
[908] E.g., D. Bodansky (1991), pp 738-40; E.J. Molenaar (1998), pp. 104-10; Valenzuela (1999), p. 496.

with the freedom of navigation and can be performed more safely compared to enforcement at sea.

In particular, Article 218 confers a right on port States to investigate, correct and eventually punish violations by foreign ships of international "discharge" standards in the high seas or areas under the jurisdiction of another State.[909] In addition, Article 219 places port States under a positive legal duty (not a mere right) to detain a foreign ship which does not comply with international standards related to "seaworthiness"[910] and represents a risk for the marine environment and to prevent it from sailing until failures have been corrected.[911] It is worth noting that both provisions refer to "applicable" international standards, which are contained in conventions applying to the vessel in question.[912] Port inspections, however, are limited to the control of the certificates issued by the flag States or classification societies to attest compliance with relevant standards unless there are clear grounds for believing that the conditions of the vessel and/or its equipment do not correspond substantially with what has been attested in the certificates.[913] In addition, in exercising their extended enforcement powers port States must observe a set of safeguards which intend to protect the commercial interests of the foreign ships and prevent an excessive or discriminatory exercise of port State authority over the ship.[914] The LOSC provisions on port State jurisdiction formed the basis for the development of Port State Control (PSC) regimes, which, as will be discussed later in this Chapter, have become the main tool to ensure flag State compliance with international safety and anti-pollution standards. However, it is generally agreed that PSC was not intended and should not be a substitute for effective flag State implementation and enforcement.[915] In an ideal world PSC should not even be necessary. In reality, it has become the "the first line of defence" for coastal States.[916]

6.3 Chapter 17 of Agenda 21 and Oil Pollution from Shipping

Like the LOSC, Chapter 17 of Agenda 21 pays particular attention to the degradation of the marine environment from shipping compared to other human activities and confirms the need to take multilateral action. Agenda 21 invites States, acting within the framework of the IMO and other relevant international organizations, whether sub-regional, regional or global, to assess the need for additional measures to control activities related to shipping and ports which still create particular concerns. Additional measures, when necessary, must be adopted by the IMO.

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[909] LOSC Article 218(1) and (2). So far, however, port States have made little use of their enforcement powers with regard to discharge violations in the high seas. See: D. Bodansky (1991), p. 763 and M. Valenzuela (1999), p. 497.

[910] Article 219 raises questions with regard to the exact meaning of "seaworthiness conditions". It is largely accepted that seaworthiness is a subcategory of CDEMs. On the issue see T. Keselj (1999), pp. 139-40.

[911] This duty, however, is tempered by the clause "as far as practicable". A similar duty was already regulated in SOLAS, Reg. 19(c) and 4 and in MARPOL 73/78, Article 5(2).

[912] On the meaning of "applicable" standards see: Chapter 1 of this Study. See also D. Bodansky (1991), pp. 760-3.

[913] LOSC Articles 217(3) and 226; MARPOL 73/78, Article 5 and SOLAS, Chapter I, Reg.19 (b).

[914] LOSC, Part XII, Section 7, Articles 223-231.

[915] See, e.g., 2003 UNSG Report, Para. 92 and the Statement by Mr. Smyth on behalf of the EU at the 5th ICP, 11.06.2004, available at: europa-eu-un.org/articleslist.asp?section=11. See also the Preamble to the Paris MOU, infra n. 960, which recognizes as a fundamental principle the flag State's primary responsibility for the effective application of international standards and the EU directive on Port State Control, Para. 3 of the Preamble.

[916] Lord Donaldson's Report (1994), Para. 11.5, p. 135.

In particular, States are invited to promote the wider ratification and implementation of the relevant shipping conventions and protocols; to assist governments in overcoming obstacles in the implementation of existing standards; to enhance the monitoring of illegal discharges (especially by aerial surveillance) and to strengthen the enforcement of MARPOL standards;[917] to increase the protection of particularly sensitive sea areas;[918] to promote navigational safety by adequate ship-routing;[919] and to facilitate the establishment of port reception facilities for the collection of, inter alia, oily residues.[920]

Agenda 21, moreover, urges the IMO to assess, upon a request by the States concerned, the state of marine pollution in areas of congested shipping, such as heavily trafficked international straits, with a view of ensuring compliance with existing GAIRAS, especially MARPOL 73/78, in accordance with the LOSC.[921]

Chapter 17 has triggered new developments and played an important role in enhancing the international regime on maritime safety and pollution prevention.[922] In 2002, ten years after the Rio Conference, however, the level of ratification, implementation and enforcement of existing conventions appeared to be far from satisfactory. The WSSD Plan of Implementation adopted in Johannesburg therefore urged the IMO to promote wider ratification and to secure full flag State compliance with internationally agreed standards.[923]

6.4 The Global Implementing Regime

6.4.1 The International Maritime Organization (IMO)

The IMO was established in 1948 as the UN special agency responsible for improving maritime safety and preventing pollution from international shipping.[924] One of the primary objectives of the organization is to "[…] encourage and facilitate *the general adoption* of *the highest practicable standards* in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships […]" (emphasis added).[925]

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[917] Agenda 21, Para. 17.30.a (i), (ii) and (iii).

[918] *Ibid*, Para. 17.30.a (iv), calls for assessing the state of pollution caused by ships in particularly sensitive areas identified by IMO and taking action to implement applicable measures, where necessary, within such areas to ensure compliance with generally accepted international regulations. *Ibid*, Para. (v) encourages action "to ensure respect of areas designed by coastal states, within their EEZ, consistent with international law, in order to protect and preserve rare and fragile ecosystems".

[919] Agenda 21, Para. 17.30.a (vii).

[920] Especially in MARPOL Special Areas (i.e., Agenda 21, Para. 17.30.d). In addition, Agenda 21 calls for the development of new measures for ballast water discharges; cargo ships, including bulk carriers; carriage of irradiated nuclear fuel in flasks on board of ships; an IMO Code on Safety for Nuclear Merchant Ships; air pollution from ships; compensation for pollution damage caused by substances other than oil (Para. 17.30.a); a reduction of pollution by organotin compounds used in antifouling paints (Para. 17.32); and an oil pollution response (paras. 17.33 and 17.34).

[921] Agenda 21, para. 17.31.

[922] A. Boyle and D. Freestone (2001), pp. 292-95 and A. Nollkaemper (1993), pp. 537-56.

[923] WSSD Implementation Plan, Para. 33(a). The Plan also calls for further action on ballast water and safe transport of radioactive wastes and material (Para. 33 (b)) and effective liability mechanisms (Para. 33.bis).

[924] 1948 Geneva Convention establishing the International Maritime Consultative Organization (IMCO), which in 1982 became the IMO.

[925] 1948 Geneva Convention, Article 1(a). See also Article 15(j). For the meaning of "highest practicable standards" see infra n. 1049. The other IMO objective is to promote international shipping by removing national discriminatory and unnecessary restrictions (ibid, Article 1(b)). See, in general, A. Blanco Bazán (2003), pp. 31-47 and R. Wolfrum (1999), pp. 223-236.

The IMO currently has 164 Members, including all 25 EC member states and acceding countries as well as all candidate countries, except Macedonia. Its main bodies are the Assembly, the Council, the Secretariat and the five main committees, which undertake most of the work of the organization. The Assembly which is the governing body of the organization is composed of all IMO Members and meets once every two years. It has an approval role with regard to the programme of work, the budget and IMO instruments and makes recommendations to contracting Parties on maritime safety and pollution prevention matters. The Council is the IMO's executive body and is composed of 40 Members elected by the Assembly for a two-year term among contracting Parties having larger interests in international shipping services; international sea-borne trade; maritime transport or navigation. It supervises and coordinates the work of the organization and in between Assembly sessions acts as the IMO's governing body.[926]

The Maritime Safety Committee (MSC) is composed of all IMO Members and addresses a wide range of safety-at-sea issues.[927] It is responsible for keeping SOLAS and other IMO safety instruments under review and adopts recommendations and guidelines on safety matters which, in certain cases, are submitted to the Assembly for approval. In addition, the MSC is responsible for approving routing measures proposed by coastal States outside the territorial sea.[928] The Marine Environment Protection Committee (MEPC) is composed of all IMO Members and coordinates the IMO's activities related to the prevention and control of pollution from ships. It supervises the implementation of MARPOL 73/78 and other IMO environmental instruments and keeps them under review. The MEPC, moreover, is responsible for the designation of Particularly Sensitive Sea Areas (PSSAs) and the adoption therein of associate protective measures (APMs).[929] The MSC and MEPC are assisted by nine sub-committees, such as the sub-committee on the Safety of Navigation (NAV), which carry out the preparatory work and are open to the participation of all IMO Members. Particularly relevant, moreover, is the Legal Committee (LEG), which is responsible for legal issues related to the IMO's activities.[930] All IMO committees meet regularly twice a year but, when necessary, they may also convene extraordinary sessions. All decisions in IMO are normally taken by consensus.

The IMO has no enforcement mandate. In the past few years, however, the organization has been increasingly involved in supervising the implementation and enforcement of IMO instruments.[931] In November 2005, the 24th IMO Assembly formally adopted the IMO Voluntary Member State Audit Scheme in order to assess

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[926] The Council, inter alia, considers the draft work programme, the budget and proposals of the committees and submits them to the Assembly and appoints the Secretary-General with the approval of the Assembly. Since 1 January 2004, the IMO's SG has been Mr. Efthimios E. Mitropoulos, from Greece.

[927] MSC deals with the construction and equipment of ships, aids to navigation, the prevention of collisions, handling of dangerous cargoes, safety in ship manning, safety procedures and requirements, hydrographic information, casualty investigation, navigation records, salvage and rescue and other factors directly affecting maritime safety.

[928] See: IMO Resolution A. 858(20), 1977, and IMO Guidelines on Ship Routeing (IMO Resolution A.574 (14), 1989, as amended). See: G. Plant, in H. Ringbom (1997), pp. 11-29.

[929] The PSSAs and APMs under the IMO regime are discussed in detail in Chapter 8.6.3.

[930] In addition, there are also the Technical Co-operation Committee (TCC), which proves technical assistance to governments in implementing IMO instruments, and the Facilitation Committee (FC) which is a subsidiary body of the Council responsible for reducing and simplifying formalities for ships when entering and leaving ports.

[931] See, e.g., Opening Statement by the then IMO SG, Mr. O'Neil, to the 23rd IMO Assembly, 24.11.2003, in IMO doc. A/23/INF.6, p. 7.

the manner in which flag States implement and enforce IMO safety-related standards and provide follow-up advice and technical assistance to correct non-conformities. The scheme has been established "in such a manner as not to exclude the possibility in the future of it becoming mandatory".[932] Alongside the Audit Scheme, the Assembly has adopted a Code for the implementation of mandatory IMO instruments, which spells out the criteria for the uniform implementation of IMO mandatory instruments.[933]

6.4.2 Global Regulatory Instruments

The maritime safety and anti-pollution GAIRAS referred to in the LOSC are mainly contained in IMO regulatory instruments of a various legal nature.[934] As the LEG has pointed out, in order to establish whether parties to the LOSC are obliged to implement IMO instruments it is decisive to look at their degree of international acceptance.[935] Relevant GAIRAS, therefore, do not only include binding conventions (e.g., SOLAS or MARPOL), but also a large number of IMO recommendations, codes and guidelines which are adopted by the IMO by consensus.[936] The present analysis, however, is limited to the main IMO regulatory conventions. This is not the proper place for a technical analysis of these instruments, but it is worth making some general observations and identifying some common features.

Adopted in 1973 in the wake of the 1967 *Torrey Canyon* accident, MARPOL 73/78 was established with the ambitious objective to eliminate completely any intentional pollution by oil and other hazardous substances and to minimize accidental discharges.[937] The Convention sets out the standards to prevent both operational[938] and accidental[939] discharges by oil and other harmful pollutants.[940] Pollution by oil is regulated in Annex I, which contains three main sets of standards.[941] First of all, discharge standards determine the maximum amount of oil which may be released into the marine environment (Regulation 9), except in "special areas" where oil discharges

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[932] IMO Resolution A. 974(24) on the framework and procedures for the Voluntary IMO Member State Audit Scheme, 1.12.2005 and IMO Resolution A.946(23), 25.02.2004, Para. 1.

[933] IMO Resolution A. 973 (24), 1.12.2005.

[934] The IMO regulatory instruments may be divided into two categories: those containing vessel safety and anti-pollution standards and those covering pollution response, compensation and liability. The latter are not discussed in this Chapter.

[935] IMO doc. LEG/MISC/3/Rev.1, supra n. 830, p. 6.

[936] Since all 164 IMO Members may participate in the negotiation of IMO resolutions, these represent GAIRAS and LOSC Parties are expected to comply with them. See: IMO doc. LEG/MISC/3/Rev.1, supra n. 830, p. 5. See also P.W. Birnie in H. Ringbom (ed.) (1997), pp. 31-57.

[937] The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto, as amended, and its 1997 Protocol are available at: www.admiraltylawguide.com/interconv.html#MP. For an overview of MARPOL 73/78, its history and all its subsequent amendments see: www.imo.org/home.asp

[938] MARPOL, Article 2(3)(a) defines "discharge" as "any release howsoever caused from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting or empting."

[939] MARPOL, Article 2(6) adopts a broad definition of "incident" as "an event involving the *actual or probable* discharge into the sea of a harmful substance, or effluents containing such a substance". Annex I (Regulation 11) lists a number of exceptions.

[940] In addition to oil, MARPOL regulates discharges of noxious liquid substances carried in bulk (Annex II); harmful substances carried in packages (Annex 3); sewage (Annex IV); and garbage (V). In 1997, the IMO adopted an Annex VI on prevention of air pollution from ships, which entered into force on 19.05.2005. Only Annexes I and II are compulsory, while the others are optional and contracting Parties are free not to accept them by means of a declaration.

[941] The original Annex I, which entered into force on 2.10.1983, has been recently revised. The revised Annex I will enter into force on 1.1.2007.

are completely prohibited.[942] Contracting Parties, moreover, have to ensure the availability of adequate port reception facilities for the collection of oil residues and oil mixtures (Regulations 10 and 12). Finally, Annex I contains several CDEMs for tankers in order to prevent accidental spillage of oil.[943] In the past three decades, as a response to several disastrous maritime accidents and to the threat of unilateral and regional initiatives, the MEPC has strengthened MARPOL safety standards, especially those related to the progressive phasing out of single-hull tankers.[944] By 30 April 2006, a total of 137 States, including all EC member and acceding states, representing over 97 per cent of the world's tonnage are now parties to MARPOL 73/78 (Annexes I and II), which, therefore, may be considered as generally accepted.[945]

The 1974 *SOLAS,* together with its 1978 and 1988 Protocols, is considered as the most important and comprehensive international instrument on ship safety.[946] The Convention contains, *inter alia*, CDEMs for oil carriers engaged in international voyages and navigational requirements for all ships in all voyages. In particular, the new Chapter V on the "Safety of Navigation" regulates ship routeing systems[947] and establishes new mandatory ship reporting requirements.[948] Ships, including tankers, are required to carry, on board, new mandatory reporting systems such as "black boxes" (voyage data recorders (VDRs)) similar to those used in the aviation sector, or automatic identification systems (AIS) which provide information about the ship to other vessels or to coastal authorities on shore. Over the years the MSC has progressively strengthened the SOLAS standards to improve tanker safety and reduce the risk of pollution.[949] By 30 April 2006, SOLAS had 156 Parties, representing over 98 per cent of the world's tonnage.[950] There is no doubt about its degree of general acceptance.

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[942] These areas which are particularly vulnerable to vessel-source pollution include the Mediterranean Sea, the Baltic Sea and now also the North Sea (Annex I, Regulation 10).

[943] These include, for instance, segregated ballast tanks in protective locations, double bottom tanks and equipment to retain oily residues on board until they can be safely discharged on shore (e.g., oily water separation, crude oil tank washing and discharge monitoring equipment). See Annex I, Regulations 13 to 17.

[944] The latest amendments to MARPOL's Annex I will be discussed in section 6.7 of this Chapter.

[945] The status of MARPOL 73/78 may be consulted at: http://www.imo.org/home.asp. Some EC member states have not yet ratified Annex IV and V.

[946] The 1974 International Convention for the Safety of Life at Sea and its Protocols, as amended, are available at: www.admiraltylawguide.com/interconv.html#SS. For an overview of the SOLAS amendments see: www.imo.org/home.asp.

[947] Chapter V was revised in December 2000 by MSC and the amendments entered into force on 1 July 2002. According to the new Reg. V/8 (a) and (j) ship routeing should be established bearing in mind the need to protect the marine environment and it must comply with LOSC. See also IMO Guidelines on Ship Routeing (IMO Res. A.574 (14), 1989, as amended).

[948] Reg. V/11 makes it mandatory for all ships entering areas covered by reporting systems to give coastal State authorities detailed information about their sailing plans. Reg. V/12 provides that the use of vessel traffic services (VTS) may only be made mandatory within the coastal State's territorial sea. See also: IMO General Principles for Ships' Reporting Systems (IMO Res. A. 851 (20), 1997) and IMO Guidelines and Criteria for Ships' Reporting Systems (IMO Res. MSC 43(64), 1994).

[949] Perhaps the most important amendment has been the introduction in 1994 of a new Chapter IX requiring vessel operators, starting from 1 July 1998, to implement the International Safety Management Code (ISM Code) for the safe management and operation of ships and for pollution prevention (adopted in 1993 with IMO Res. A.741(18)).

[950] All EC member states are parties to the 1978 Protocol. Not all EC member states are parties to the 1988 Protocol (e.g., Austria, Belgium, the Czech Republic, Hungary, and Poland), which entered into force on 3.02.2000.

Finally, the 1972 Convention on the International Regulations for Preventing Collisions at Sea (COLREG) is worth mentioning as it contains the relevant standards for the adoption of traffic separation schemes (TSS).[951]

In the early 1970s, when MARPOL and SOLAS were negotiated, the issue of coastal State jurisdiction was still quite controversial. Negotiating Parties, therefore, decided to leave such a critical issue to UNCLOS III by referring to the codification and development of the law of the sea being undertaken by that conference.[952] It is important to stress once more that IMO conventions do not intend to deal with jurisdictional aspects regulated in the LOSC.

Generally speaking, IMO conventions require flag States to implement and enforce their technical standards and to issue certificates attesting that ships flying their flags comply with the relevant requirements.[953] To correct the deficiencies of flag States, they also contain port State control (PSC) rules which mirror the LOSC provisions of port State enforcement, but in some respects are more stringent.[954] During the past three decades, indeed, the scope of port inspections under the IMO conventions has expanded to cover operational requirements, including the performance of the crew.[955] MARPOL 73/78, moreover, regulates the institution of proceedings and requires States Parties to punish MARPOL violations wherever they occur with penalties adequate in severity to discourage future infringements.[956]

In order to ensure the maximum level of uniformity and to eliminate unfair competition derived from the non-acceptance of the international standards, both MARPOL 73/78 and SOLAS contain a "no more favourable treatment clause" which allows contracting Parties to apply the MARPOL/SOLAS standards also to ships flying the flag of non-Parties when in ports.[957]

Technical standards contained in the Annexes to the IMO conventions are constantly kept under review by the competent IMO committees by means of a "tacit acceptance procedure" whereby amendments enter automatically into force on a fixed date without the need to wait for formal ratification by contracting Parties.[958] This procedure ensures the maximum degree of flexibility and allows the IMO regulatory regime to respond rapidly to the new requirement of maritime safety and marine environmental protection.

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[951] Rules 1(d) and 10 of COLREG 1972, as amended. See also IMO Guidelines for Vessel Traffic Services (IMO Res. A 857(20), 1997, replacing IMO Res. A. 578(14), 1985).

[952] E.g., MARPOL 73/78, Article 9(2).

[953] See: MARPOL, Annex I, Reg. 5 - 8 on the International Pollution Prevention (IOPP) certificate. SOLAS Reg. I/19 (a) (b) and Reg. I/4 require different certificates (e.g., Minimum Safe Manning Document, Safety Construction Certificate, Safety Equipment Certificate and, from July 1998, a certificate of compliance with the ISM Code).

[954] E.g., SOLAS, Reg. I/19, Reg. IX/6 and Reg. XI/4; MARPOL 73/78, Articles 5 and 6, and Annex I, Reg. 8A. See also IMO Procedure for Port States Control (IMO Res. A. 882(21), 2000).

[955] E.g., SOLAS Reg. XI/4; and MARPOL 73/78 Annex I, Reg. 8A. See also IMO Procedures for the Control of Operational Requirements related to Safety of Ships and Pollution Prevention (IMO Res. A. 742 (18), 1993) and IMO Res. A. 882(21). For a full discussion see: E.J Molenaar (1998), Para. 3.4 and G. Kasoulides (1993).

[956] MARPOL 73/78, Article 4.

[957] E.g., MARPOL 73/78, Article 5(4); 1978 SOLAS Protocol, Article II(3) and 1988 SOLAS Protocol, Article I(3). For a detailed examination of this clause see E.J. Molenaar (1998), pp. 119-21.

[958] More precisely, amendments enter into force unless within a certain period of time they are expressly rejected by one-third of the contracting Parties or by contracting Parties whose combined fleets represent al least 50 per cent of the world's gross tonnage. Amendments to IMO conventions, on the other hand, still require ratification by two thirds of the contracting parties.

6.5 Regional Implementing Regime

6.5.1 Paris Memorandum of Understanding on Port State Control (Paris MOU)

In the course of the 1980s, as a response to the general lack of control of flag States over their vessels and the increasing numbers of substandard ships, maritime authorities in different regions started to coordinate their PSC systems in order to effectively exercise their port State enforcement powers and to reduce the possibility for substandard ships to escape inspections.[959] PSC, indeed, may be more effectively conducted at the regional level to avoid that operators divert their ships to ports that carry out less stringent or no inspections (port of convenience). The existence of ports of convenience not only favours substandard shipping, but also places those port States that carry out proper inspections at a competitive disadvantage.

In 1982, the ministers responsible for maritime safety from 13 European coastal States adopted, in Paris, a regional administrative agreement, the so-called Memorandum of Understanding on Port State Control (Paris MOU)[960] to verify and ensure that all foreign ships entering their ports comply with international maritime safety and anti-pollution standards regardless of their participation in the relevant conventions.[961] The Paris MOU sets out an organizational structure[962] and establishes common inspection procedures, including an inspection rate (i.e., 25 per cent of all foreign ships entering their ports), targeting criteria for "high risk vessels" (e.g., age, category, flag or classification society, detention and inspection records); reporting requirements and exchange of information between parties.[963] In addition, port State authorities have to ensure that ships not complying with existing standards correct their deficiencies before leaving port and they may impose penal or administrative sanctions.[964]

From a legal point of view the Paris MOU is not a treaty, but a regional cooperative arrangement among shipping administrations implementing Article 211(3) LOSC and PSC provisions of the IMO conventions. Therefore, it does not establish legal rights and duties for States parties. In the early 1990s, it became apparent that the Paris MOU was not being applied correctly and uniformly by all States participating in the scheme.[965] In the past few years, therefore, the Paris MOU has undergone a revision process which has been strongly influenced by the EC regime on PSC and, as will be discussed later, there is a strong synergy between the two regimes.

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[959] On the Paris MOU and the evolution of PSC agreements see: G. Kasoulides (1993); G. Kasoulides in H. Ringbom (ed.), pp. 129-39; G. Kasoulides in D. Freestone and T. IJlstra (eds) (1990), pp. 180-92; D. Anderson in A. Boyle and D. Freestone (eds.) (2001), pp 332-337; E.J. Molenaar (1996), pp. 241-288.

[960] The Paris MOU was adopted on 26.01.1982, (1982) 21 ILM 1, as amended. The current Member States are: Belgium; Canada; Croatia; Denmark; Finland; France; Germany; Greece; Iceland; Ireland; Italy; the Netherlands; Norway; Poland; Portugal; the Russian Federation; Slovenia; Spain; Sweden and the U.K. These include 14 EC member states and 2 EEA Countries. Estonia, Lithuania, Latvia, Cyprus and Malta are not parties, but have "cooperative status" in the Paris MOU.

[961] Like the IMO conventions, the Paris MOU includes the "no more favourable treatment" clause (Section 2.4 and Annex I, Para. 1.3). Relevant instruments are laid down in Section 2.1 and they include the main IMO conventions and ILO 1976 Convention No. 147 on Minimum Standards. The IMO ISM Code has also recently been included.

[962] The main bodies are: the Port State Control Committee, which is the executive body of the MOU and is composed of representatives of the participating maritime authorities and of the EC Commission; a Secretariat, based in The Hague, which prepares the meetings and reports; and a Computer Centre, which contains all inspection records.

[963] Inspection procedures are contained in the Paris MOU, Annex I. See, in details: E.J. Molenaar (1996), pp. 249-57.

[964] Paris MOU, Section 3.7.

[965] See, e.g., R. Salvarani (1996) pp. 225-231.

The IMO has strongly promoted the adoption of MOUs in different regions along the lines of the Paris MOU.[966] As a result, analogous MOUs are currently in place in all major regions, including the Mediterranean Sea.[967] In principle, PSC schemes may be an extremely valuable tool for combating substandard shipping ensuring that non-complying vessels have no place to hide. In practice, however, the existing rate of inspections and current penalties have not been sufficiently severe to discourage violations. In addition, the lack of human and financial resources, superficial controls and inconsistencies between different inspection and targeting procedures have prevented this mechanism from being completely successful.[968] Parties to the Paris MOU are currently in the process of adopting a new inspection regime, which will reinforce the existing rules to a great extent.

6.5.2 The 1992 Helsinki Convention

The Baltic Sea is particularly exposed to the threat of oil pollution from shipping. In the last few years tanker traffic in the area has risen considerably and it is expected to rise further as a consequence of increasing oil exports from Russia.[969] Navigation in these waters is rendered particularly difficult by the presence of narrow straits of limited depth (e.g., the Danish Straits) in the main ingoing and outgoing transport routes and by the severe weather conditions of the Baltic Sea, which is ice-covered for a large part of the year. The volume and character of the shipping traffic, coupled with the danger of navigation, increase the risk of maritime accidents in the area. The main threat, however, still comes from the operational discharges of oil in violation of existing standards.[970] The potential damage of an oil spillage in the Baltic is increased by the limited water circulation which makes it particularly difficult to eliminate pollution.

Reducing the impact of tanker traffic on the fragile Baltic marine environment and ensuring the safer transport of oil have always been a matter of priority action within the framework of the Helsinki Convention[971] and have received central attention within the annual declarations of the Baltic Environmental Ministers.[972] The 1992 Helsinki Convention deals specifically with the prevention of pollution from ships in Article 8 and Annex IV.[973] The Baltic States, however, have been always aware of the limits of regional initiatives, which do not apply outside the jurisdiction of the contracting Parties nor to foreign ships in transit, and have traditionally recognized the IMO as the most appropriate body to regulate shipping-related matters. The 1992 Helsinki Convention, therefore, does not set out its own technical standards,

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[966] E.g., Regional Cooperation in the Control of Ships and Discharges (IMO Res. A.682(17), 1991). In 1995, the IMO Assembly adopted new Procedures for Port State Controls (IMO Res. A. 787(19)) which builds on the 1982 Paris MOU.

[967] For an overview of existing MOUs see E.J. Molenaar (1998), pp. 121-31.

[968] See, e.g., 2006 Detention Records, at: www.parismou.org/. See also: 2004 UNGA Resolution, Paras 44-45.

[969] See: www.helcom.fi/manandsea/shipping/oilpollution.html and A.C. Brusendorff and P. Ehlers (2002), pp. 351-5.

[970] A.C. Brusendorff and P. Ehlers (2002), p 353.

[971] See, e.g., "International Co-operation for the Baltic Sea Environment: Past, Present and Future", held in Riga, Latvia on 22-24 March 2004, for the 30th anniversary of the Helsinki Convention (Helsinki Convention-30), Session II on the "Environmental Impact of Shipping", available at: www.lva.gov.lv/eng/helcom/conf/VidAgentura-Brosura-Papildus.pdf. See also: A.C. Brusendorff and P. Ehlers (2002), pp. 351-95; and P. Ehlers (1993), p. 191.

[972] For an overview see: P. Ehlers, "HELCOM Ministerial Declarations- Milestones and Driving Force", in Helsinki Convention-30, supra n. 971.

[973] The 1992 Helsinki Convention also covers "pollution response" (Articles 13 and 14 and Annex VII).

but requires contracting Parties to apply MARPOL 73/78; to cooperate in the development of new uniform international standards within IMO, when necessary; and to effectively implement the existing standards.[974] To avoid discharges from taking place in violation of MARPOL 73/78, moreover, the Convention requires that all ships make use of port reception facilities (PRFs) before leaving the port of a Baltic State, and that contracting Parties conduct aerial surveillance.[975]

Likewise, the HELCOM's work in the field of maritime safety and vessel-source pollution has mostly been directed at coordinating the joint actions of the contracting Parties in IMO; harmonizing the implementation and enforcement of existing IMO conventions, guidelines or codes; and, when necessary, strengthening the implementation of IMO standards in the Baltic Sea area.[976] Only in limited cases (e.g., in the absence of IMO rules, or when the latter have not taken the particular needs of the Baltic sufficiently into account, or when there is a need for a speedy reaction) the HELCOM has adopted its own measures, which, however, are mostly related to services to be provided by Baltic maritime administrations (e.g., VTS or AIS). It is worth reiterating that, despite their great political weight, HELCOM recommendations are not legally binding.

The relevant work is carried out by the Maritime Group of the HELCOM (HELCOM MARITIME), which, since 2003, is now assisted by four expert working groups (EWGs).[977] HELCOM MARITIME, unlike HELCOM itself, is attended by officials from both maritime administrations and environmental ministries of the Baltic coastal States. Its main work consists of preparing joint Baltic submissions in IMO, drafting relevant HELCOM Recommendations and exchanging and evaluating information presented by contracting Parties. In addition, HELCOM MARITIME coordinates the IMO meetings (especially MEPC), which take place during the so-called Baltic maritime coordination meetings (BMCM).

Baltic States have always been particularly active in IMO (especially in the MEPC). So far, most of the Baltic submissions have led to the adoption of IMO resolutions setting out stricter standards for ships operating in the Baltic Sea area.[978]

Originally, regional cooperation within the Helsinki Convention focused mainly on preventing intentional discharges from ships.[979] First of all, contacting Parties have taken joint action in IMO for the designation of the Baltic Sea as a Special Area under, *inter alia*, Annex I of MARPOL 73/78 where all discharges of oil or oil mixtures are prohibited.[980] Secondly, HELCOM has adopted several recommendations directed at advancing the implementation of MARPOL 73/78 (especially by promoting

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[974] 1992 Helsinki Convention, Annex IV (Regulations 1 and 4).
[975] Ibid, Annex IV (Regulation 7) and Annex VII (Regulation 3).
[976] See, e.g., Resolution 1 on "Application by Other States of Special Rules for Ships Operating in the Baltic Sea Area", adopted in 1974.
[977] In 2003, the HELCOM MARITIME replaced the Sea-based Pollution Group (HELCOM SEA), which, in turn, replaced the Maritime Committee (MC) in 2000. The group meets three times a year at irregular intervals. Currently, it is assisted by four EWGs: AIS, ICE, PILOT and TRANSIT ROUTE. In addition, HELCOM RESPONSE carries out the work on oil pollution response. The meeting documents of HELCOM MARITIME, HELCOM SEA and EWGs are available at: http://www.helcom.fi/dps.html.
[978] See, e.g., IMO Recommendation on Navigation Through the Entrance to the Baltic Sea (IMO Res. A. 620(15), 1987, replacing IMO Res. A. 339 (IX), 1975) and IMO Recommendation on the Use of Pilotage Services in the Sound (IMO Res. A. 579(14),1985, replacing Res. A. 427 (XI), 1979).
[979] HELCOM MARITIME Recommendations are available at: www.helcom.fi/recommendations/searecs.html.
[980] The Baltic Sea has also been designated as a Special Area under Annexes II and V and as a SOX emission control area under Annex VI. See in detail: Chapter 8.6.2.

the use and availability of adequate PRFs[981] and the use of environmental equipment on board of ships[982]), facilitating its enforcement (especially by improving PSC[983]) and ensuring that relevant violations are effectively punished.[984]

Initially HELCOM did not deal extensively with maritime safety, but preferred to leave this matter to IMO (MSC).[985] However, in the wake of recent oil spills, HELCOM has taken a more proactive approach to ensure the safer transport of oil and prevent the occurrence of maritime disasters in the Baltic Sea Area. In September 2001, as a reaction to the *Baltic Carrier* accident, HELCOM held an extraordinary meeting in Copenhagen (HELCOM Extra 2001), which was concluded with the adoption of a milestone declaration.[986] This was the first time that HELCOM was attended by both transport and environmental ministers of the Baltic States as well as representatives of DG TREN of the European Commission. The Baltic ministers agreed to support new joint initiatives in IMO (MSC or NAV) directed at improving existing routeing measures and enhancing the use of pilot services in densely trafficked areas.[987] Moreover, they adopted an additional package of measures to increase the safety of navigation in the Baltic Sea (e.g., compulsory application of Annexes I-V of MARPOL 73/78 and the phasing out of single-hulled tankers, the use of AIS, and places of refuge). These measures were incorporated into the 1992 Helsinki Convention through amendments of Annex IV and are legally binding.[988] The *Prestige* oil spill off the coast of Spain in November 2002, triggered a call for additional action to prevent the occurrence of a similar catastrophe in the Baltic Sea.[989] As will be discussed in further detail in Chapter 8.8.4.3, as a first reaction, the Baltic coastal States discussed the possibility of putting forward a joint submission in IMO for the designation of the Baltic Sea as a PSSA. From the very beginning, however, this

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[981] HELCOM Rec. 19/8 (1998) calling for PRF for the delivery of oily wastes from machinery spaces that shall be available at "no special fee". HELCOM Rec. 26/1 (02.03.2005) extended the "no special fee" to cover also garbage and sewage.

[982] E.g., HELCOM Rec. 19/10 (26.03.1998) setting out guidelines for holding tankers/oily water separating or filtering equipment for ships and HELCOM Rec. 25/6 (2.03.2004) on oil filtering equipment on board ships.

[983] HELCOM Rec. 22E/5 (Reg. 11), 10.09.2001, urging contracting Parties to carry out PSC under either the Paris MOU or the EC Directive and urging Estonia, Latvia and Lithuania to accede to the 1982 Paris MOU. See also Para. XV of the Copenhagen Declaration, infra n. 986.

[984] E.g., HELCOM Rec. 19/14 (26.03.1998) on a harmonized system of fines in case of in case a ship violates anti-pollution regulations (MARPOL violations).

[985] This is in part due to the fact that officials from the maritime administrations which attend HELCOM MARITIME are particularly active in IMO and were initially reluctant to treat these issues in HELCOM, whose meetings are normally attended by officials from the environmental ministries.

[986] See "Declaration on the Safety of Navigation and Emergency Capacity in the Baltic Sea Area" (Copenhagen Declaration). HELCOM EXTRA 2001 was convened at the request of Denmark in the wake of the collision between the tanker *Baltic Carrier* and the bulk carrier *Tern* which occurred on 29 March 2001 in the deep-water route north-east of Kadetrenden off the Danish coast. The accident caused the biggest oil spill ever in the Baltic.

[987] Copenhagen Declaration, Paras I and II.

[988] HELCOM Rec. 22E/5 (10.09.2001) on "Amendments to Annex IV 'Prevention of Pollution from Ships' to the Helsinki Convention". For a detailed analysis of these measures see: A.C. Brusendorff and P. Ehlers (2002), pp. 363-95

[989] See: Resolution adopted at the Helsinki Convention-30 (2004), Para. 1.2; Declaration of the Joint Ministerial Meeting of the Helsinki and OSPAR Commissions (Bremen, 25-26.06.2003), paras. 28-33;, and HELCOM Ministerial Declaration (Bremen, 25.06.2003), Para. I.3. See also the Conclusions from the First Joint IMO/HELCOM/EU workshop, 11-2 March 2003, Warnemunde, Germany, Para. 6 and the Chairmain's Conclusions at the 5th Baltic States Summit (CBSS), Lusulasmaa, Estonia, 21.06.2004, p. 3.

initiative met with strong opposition from the Russian Federation.[990] The EC Baltic States therefore decided to proceed outside the framework of the Helsinki Convention.[991] However, they continued to discuss in HELCOM additional protective measures to be proposed in the Baltic PSSA.[992]

So far, HELCOM has dealt with different aspects of the safety of navigation, such as routeing measures for certain parts of the Baltic;[993] enhanced use of pilotage[994] or escort towing;[995] reporting systems;[996] vessel traffic monitoring systems;[997] safety standards for tankers, including double hulls;[998] the safety of winter traffic;[999] and ship-to-ship transfer of oil.[1000] All these measures generally implement IMO standards at the regional level and have been strongly influenced by EC maritime safety legislation which, in some cases, represents maximum standards for most of the Helsinki contracting Parties.

According to the latest reports, the level of implementation of the HELCOM recommendations in the maritime field is far from satisfactory.[1001] For the time being, therefore, the Helsinki contracting Parties are determined to intensify monitoring, PSC and enforcement in the Baltic Sea (e.g., by reinforcing detection, investigation and the prosecution of offenders of anti-pollution regulations). When additional regulatory action is needed (e.g., in the field of places of refuge), this will be done in strict coordination and cooperation with the IMO and the EC.[1002]

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[990] See, e.g., HELCOM Bremen Declaration (25.06.2003), HELCOM Stockholm Declaration (12.09.2003) and OSPAR–HELCOM Ministerial Declaration (Bremen, 26.06.2003).

[991] See: joint proposal submitted by Denmark, Estonia, Germany, Finland, Latvia, Lithuania, Poland and Sweden to the MEPC 51 for the designation of the Baltic Sea area, except the Russian waters, as a PSSA (IMO doc. MEPC 51/8/1, 19.12.2003). The Baltic PSSA has been formally designated at MEPC 53, in July 2005.

[992] Given the existence of several IMO and HELCOM measures in the area, initially the sponsoring states did not propose any APM. However, an *ad hoc* working group has been established within HELCOM under the leadership of Sweden to discuss APMs building upon the work already carried out by the HELCOM Expert Working Group on Transit Routeing. On 3.03.2005, the Baltic sponsoring States submitted to NAV 51 a proposal for a number of routeing measures to be adopted as APMs within the Baltic PSSA (i.e., NAV 51/3/6).

[993] E.g., HELCOM Rec. 15/4 (9.03.1994) on "Additional Maritime Safety and Pollution Prevention Measures in the Baltic Sea Area".

[994] E.g., HELCOM Rec. 23/3 (6.03.2002) on enhancing the use of pilots in route T and the Sound as revised by HELCOM Rec. 25/5 (2.03.2004) taking into account IMO Resolution MSC 138 (76).

[995] E.g., HELCOM Rec. 25/5 (2.03.2004) on an assessment of the need for escort towing in tanker transport routes to prevent accidents in the Baltic Sea Area.

[996] E.g., HELCOM Rec. 1/10 (5.05.1980) on a "Position Reporting System for Ships in the Baltic Sea".

[997] E.g. HELCOM Rec. 22E/5 (10.09.2001), Regulation 10, on the use of Automatic Identification Systems (AIS). On 1.07.2005, HELCOM AIS was officially launched.

[998] E.g., HELCOM Rec. 22E/5 (10.09.2001), Regulation 4 on double-hull standards for tankers and HELCOM Rec. 12/5 (20.02.1991) on "Promotion of the use of safer tankers while carrying oil". See also: HELCOM Rec. 19/15 (24.03.1998) on minimum requirements for vessels bound for or leaving ports of the Baltic States and carrying dangerous or polluting goods.

[999] E.g., HELCOM Rec. 25/7 (2.03.2004) "Safety of winter navigation in the Baltic Sea Area".

[1000] HELCOM Rec. 24/6 (25.06.2003) on ship-to-ship transfer of oils subject to MARPOL Annex I.

[1001] See the Status Report on the Implementation of HELCOM Recommendations in the Maritime Field, adopted by HELCOM 24/2003, in June 2003, available at: www.helcom.fi/recommendations/Maritime_Recs.pdf.

[1002] See, e.g., Minutes of the HELCOM MARITIME 4/2005 (11-13. 10.2005); Outcome of the International HELCOM Conference on Maritime Safety and Response Issues, (Helsinki, 1.03.2005); Resolution adopted at the Helsinki Convention-30 (2004); and the Conclusions of the 2003 Joint IMO/HELCOM/EU. See also HELCOM MARITIME Working programme (2004-2006). All documents are available at: www.helcom.fi/home/en.

6.5.3 The 1976 BARCON and its Protocol, as amended

The Mediterranean Sea is one of the main shipping routes for the transport of oil from the Middle East, North Africa and the Black Sea towards major ports in Europe and North America.[1003] Maritime traffic is particularly intense through the Straits of Gibraltar, Messina and Istanbul, in the Sicilian and the Suez Channels and in the proximity of some oil terminals (e.g., Genoa, Piraeus, Beirut and Alexandria), and is expected to increase with the growth of oil production in the Caspian Sea. Like the Baltic Sea, also the Mediterranean is a semi-enclosed sea with a very low water exchange rate and most human activities are concentrated along the coasts. Marine biodiversity is particularly rich in this area, which hosts, inter alia, many endangered and migratory species, including marine mammals. The environmental, economic and social consequences of an oil disaster, therefore, may be catastrophic.[1004] As already mentioned in Chapter 1, the main legal aspect relating to the Mediterranean Sea is the absence of EEZs. It is worth mentioning that for the purpose of this case study, this is not a relevant factor since the high seas and the EEZ regimes concerning vessel-source pollution are practically the same.

Since the beginning, preventing oil spills has been a priority action within the framework of the BARCON. Originally, however, regional cooperation was confined to accidental pollution and emergency response.[1005] Article 6 of the 1976 BARCON, as amended, introduced a general obligation to prevent operational pollution, but this was limited to the adoption of "discharge" standards in conformity with international law and to the effective implementation of existing GAIRAS in the Mediterranean Sea. For a long time, BARCON contracting Parties considered that operational pollution should be governed exclusively by global conventions, especially MARPOL 73/78, and Article 6 should form the basis for coordinating joint actions in the IMO.[1006] Therefore, they took action for the designation of the Mediterranean Sea as a Special Area under MARPOL's Annex I where oil discharges are generally prohibited.[1007] With the BARCON revision process, however, Mediterranean coastal States took a partially different approach.[1008] In 2002, the 1976 Emergency Protocol was replaced by a new Protocol (not yet in force), which includes both accidental and operational pollution.[1009] The focus, however, is still placed on pollution response and on

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[1003] See, in general: EEA, "State and Pressure of the Marine and Coastal Mediterranean Environment" (2000), available at: http://reports.eea.eu.int/medsea/en/medsea_en.pdf. Of the estimated 2,000 vessels which cross the Mediterranean every day, around 250-300 are oil tankers, see: http://oils.gpa.unep.org/framework/region-4-next.htm.

[1004] A list of the major oil spills in the Mediterranean is available at: http://oils.gpa.unep.org/framework/region-4-next.htm.

[1005] See 1976 BARCON, Article 9 and its 1976 Protocol on "co-operation in dealing with pollution emergencies". Conversely, Article 6 on "Pollution from ships" was not accompanied by an executing Protocol.

[1006] All Reports of the BARCON-MOPs, from 1983 to 1993, stressed the need to ratify existing IMO instruments, in the first place MARPOL 73/78. See: Report of the MOP-3 (UNEP/IP.43/6 (1983), para. 77); Report of the MOP-4 (UNEP/IG.56/5 (1985), Section III, p. 23); Report of the MOP-5 (UNEP/IG.74/5 (1987), para. 65); Report of the MOP-7 (UNEP(OCA)/MED IG.2/4 (1991), Annex IV, p.15); Report of the MOP-8 (UNEP(OCA)/MEDIG.3/5 (1993), Annex IV, Section I.A.3.2), all available at: http://195.97.36.231/dbtw-wpd/sample/Final/MAPPredefined.htm.

[1007] In addition the Mediterranean Sea is also a Special Area under Annex V. See in detail: Chapter 8.6.2 of this study.

[1008] On the drafting history of the new Emergency Protocol see: E. Raftopoulos (2001), pp. 45-49.

[1009] The new Protocol Concerning Co-operation to Prevent Pollution by Ships and, in Case of Emergency, to Combat Pollution of the Mediterranean (2002 Emergency Protocol) was concluded and opened for signature on 25.01.2002 and entered into force on 17.05.2004, replacing the 1976 Protocol.

promoting the development of global standards in the IMO and their full implementation.[1010]

The new Protocol contains requirements on monitoring;[1011] exchange of information;[1012] PRFs;[1013] and an assessment of the environmental risk of maritime traffic,[1014] which in essence reproduced existing international rules. In some aspects, however, the 2002 Protocol is more stringent than the international regime. For instance, it adopts a new definition of "pollution incidents" which, in the light of the precautionary approach, includes occurrences which "may" result in "a discharge" of oil (or other harmful substances) and "may pose a threat" to the marine environment.[1015] This broad definition entitles the Mediterranean coastal States to take preventive action even before a discharge has occurred and regardless of the gravity of the discharge and/or damage.[1016] Finally, the new Protocol contains important clarifications on how to deal with ships in distress which present a threat to the marine environment, including provisions on places of refuge.[1017] These provisions have been influenced to a large extent by the EC's maritime safety legislation.

The new Protocol does not contain provisions on PSC, which is already regulated under the Paris MOU, the Mediterranean MOU and the EC Directive on PSC.[1018] Given the fact that some BARCON contracting Parties do not participate in any of these PSC systems,[1019] there are actually four different PSC regimes which are applicable in the Mediterranean Sea Area. The lack of PSC provisions in the 2002 Protocol, therefore, has been considered a missed opportunity for promoting better coordination between the different PSC regimes.[1020]

[1010] 2002 Emergency Protocol, Articles 3(1)(a) and 4(2). The Preamble, moreover, expressly acknowledges the role of the IMO and the importance of cooperating within the framework of the IMO in the development of international rules to prevent vessel-source pollution. It also recognizes the contribution of the EC to the implementation of international standards.

[1011] 2002 Emergency Protocol, Article 5.

[1012] *Ibid*, Article 7.

[1013] *Ibid*, Article 14(1), requires Parties "to take all necessary steps" to ensure that efficient facilities are available at reasonable costs and without causing undue delay to ships.

[1014] *Ibid*, Article 15 requires parties to assess the environmental risk of existing international shipping routes and take appropriate measures to reduce the risk or the consequences of accidents, but acting in conformity with international law and the global mandate of the IMO. Appropriate measures may include compulsory ship reporting and other mandatory measures adopted in the Mediterranean Specially Protected Areas (SPAMI) under the 1995 SPA Protocol of the BARCON, which will be examined in Chapter 8.5.4.

[1015] The new definition of "pollution incidents" introduced by Article 1(b) is much broader than "emergencies" under the 1976 Protocol and "marine casualties" under Article 221(2) of the LOSC. It reproduces the definition of an oil pollution incident provided in Article 2(2) of the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation. The same definition is also contained in Article 2(9) of the Helsinki Convention.

[1016] According to Article 10(b) of the 2002 Protocol, moreover, Parties shall "take every practicable measure to prevent, reduce and, to the fullest possible extent, eliminate the effects of the pollution incident".

[1017] 2002 Protocol, Articles 10(2) and 16. In the absence of clear international rules on this matter, the 2002 Protocol seems particularly innovatory.

[1018] 5 BARCON Parties (i.e., Croatia, France, Greece, Italy and Spain) are also members of the Paris MOU; 9 BARCON Parties (i.e., Algeria, Cyprus, Egypt, Israel, Lebanon, Malta, Tunisia and Turkey) are members of the Mediterranean MOU and 7 BARCON Parties are EC member states and are bound by the EC directive on PSC.

[1019] I.e. Albania; Bosnia and Herzegovina; Libya; Monaco; and Syria.

[1020] For a full discussion on this point see: E. Raftopoulos (2001), pp. 70-72.

The Protocol is administered by the Regional Marine Pollution Emergency Centre for the Mediterranean Sea (REMPEC) and its implementation is supervised by the Ordinary Meetings of the Parties to the Protocol.[1021]

Following the *Prestige* sinking, at their 13th ordinary meeting, held in Catania, in 2003, the BARCON Parties recognized the need to take additional action to ensure the safer transport of oil and to avoid the occurrence of a similar catastrophe in the Mediterranean Sea. The 13th MOP called for urgent ratification of the 2002 Protocol and the development of a Regional Strategy for the Prevention of (and Response) to Marine Pollution from Ships.[1022] This strategy shall promote, *inter alia*, the effective implementation of LOSC and IMO conventions as well as the stricter enforcement and prosecution of illegal discharges and new joint initiatives in the IMO for the adoption of additional measures to better control maritime traffic including, if appropriate, the designation of a PSSA in the Mediterranean Sea (e.g., Adriatic Sea). The 14th MOP, held in November 2005, recommended that contracting Parties should adopt and implement the strategy as endorsed by REMPEC in April 2005.[1023]

So far, the BARCON Parties have not been as active in the IMO as the Baltic and North Sea coastal States. Apart from the initiatives directed at designating the Mediterranean as a Special Area under Annex I (and V) of MARPOL 73/78, there have been no joint BARCON submissions to IMO and the few submissions put forward by individual Mediterranean coastal States have been totally uncoordinated.[1024] Submissions from Greece, Cyprus and Turkey have been mainly directed at preserving the freedom of navigation and the interests of the shipping industry. Initiatives from France and Spain have been mostly related to their North Atlantic waters. Such a lack of coordination may be explained by the reluctance of the maritime administrations of the contracting Parties (and DG TREN) to talk about operational pollution within the framework of BARCON, which is normally attended by officials from the Environmental Ministries. The BARCON is not considered as the proper platform to discuss and coordinate positions for the IMO.[1025] The entry into force of the 2002 Protocol (in 2004) and the adoption of the new strategy (in 2005), however, seem to suggest that maritime administrations are less sceptical about discussing vessel-source pollution within the framework of BARCON.[1026]

6.5.4 North-East Atlantic

The North-East Atlantic, including the North Sea, is one of the busiest shipping areas worldwide and the maritime transport of oil represents a major threat in these waters.[1027] Not surprisingly, the main oil tanker disasters, such as the *Erika* or the

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[1021] REMPEC, based in Malta, is administered by the IMO. Its objectives, functions and activities are decided by the BARCON-MOPs. See, in detail: www.rempec.org.

[1022] Catania Declaration (MOP-13), supra n. 820, paras. 16-7.

[1023] 14th MOP of BARCON (UNEP (DEPI)/MED IG. 16/13), Recommendation II.A.2.

[1024] See: submissions brought before the IMO's main committees in the past seven years (i.e. MEPC 43-54, MSC 69-81 and LEG 79-90). The few individual submissions mostly concern routing measures or pollution from vessels other than oil (e.g., harmful organisms in ballast waters or antifouling paints).

[1025] At the 14th MOP, the IMO, which was present with a large delegation, made it clear that initiatives related to ship-source pollution would be better taken by the IMO, rather than regional seas conventions.

[1026] Decision 22/2, 7.02.2003, of the 22nd UNEP Governing Council/Global Ministerial Environment Forum, invited governments to broaden participation through the involvement of all relevant national ministries (Para. 8 (c), p.18).

[1027] E.g., International Tanker Owners Pollution Federation Limited (ITOPF), Regional Profiles, A Summary of the Risk of Oil Spills & State of Preparedness in UNEP Regional Seas Regions, available at: www.itopf.com/country_profiles/profiles/northeastatlantic.pdf. See also: http://oils.gpa.unep.org/framework/region-3.htm.

Prestige occurred in this area.[1028] North-East Atlantic coastal States are major importers, but also some of the main producers of oil and derivative products. Some of the main oil terminals (e.g., Antwerp, Rotterdam, and Hamburg) and the straits used for international navigation (e.g., the English Channel) are located in this area. A large proportion of the maritime traffic, however, involves foreign tankers in transit from Baltic, Mediterranean or African ports directed towards the North American markets. The potential for damage is increased by the location of major shipping lanes (e.g., the Finisterre TSS) and port facilities (e.g., La Coruña) in close proximity to ecologically sensitive areas protected under different international regimes and fishing grounds which are important to the economy of coastal States.

At the political level, the North-East Atlantic coastal States have been always strongly committed to reducing the environmental impact of oil tanker traffic in the region. This has always been a priority action within the framework of the NSMCs.[1029] Maritime safety issues are regularly on the table at the Committee of the North Sea Senior Officials (CONSSO), which supervises the follow-up to the NSMC Declarations.[1030] The accent, however, is always on the need to take coordinated action for the development of legal instruments in the IMO. Coordinated initiatives in the IMO resulted, for instance, in the designation of the North-West European Sea as a Special Area under Annex I of MARPOL 73/78, where no discharges of oil are admitted.[1031] On the other hand, national and EC initiatives have been supported as long as they do not jeopardize the role of the IMO and contribute to the better implementation and enforcement of IMO standards, especially by promoting PSC and adequate PRFs. NSMC Declarations had a strong influence on the further development of legally binding measures in the IMO and EC maritime safety legislation.

Despite the strong political commitment of the North Sea coastal States, the 1992 OSPAR Convention does not regulate marine pollution from shipping, neither accidental nor operational.[1032] The main philosophy in OSPAR is to avoid any duplication of work with other international organizations or efforts undertaken under other agreements.[1033] Annex V, for instance, expressly requires the OSPARCOM to refer shipping-related issues to the IMO in order to achieve an appropriate response.[1034] However, the OSPAR does not seem to preclude all actions related to shipping.[1035] According to the Preamble of Annex V, for instance, all measures taken to implement the Annex need to be consistent with the LOSC provisions on navigation and the exploitation of natural resources. Presumably, therefore, OSPARCOM may

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[1028] Among the major disasters in the area: *Torrey Canyon* (1967); *Amoco Cadiz* (1978); *Aegean Sea* (1992); *Braer* (1993); *Sea Empress* (1996); and *Erika* (1999). See: IMO doc. MEPC 49/8/1, Annex 2, at 4.

[1029] See: 5th NSMC Declaration (Bergen, 2002), Part IV; 4th NSMC Declaration (Esbjerg, 1995), Part V, paras. 41-48; 3rd NSMC Declaration (The Hague, 1990), paras 24-27; 2nd NSMC Declaration (London, 1987), paras 25-33; 1st NSMC Declaration (Bremen, 1984), Part 2. The 6th NSMC, which will take place on 4-5.05.2006, will focus on the environmental impact of shipping and fisheries.

[1030] CONSSO meets one or more times a year at irregular intervals and the meetings are attended by senior officials representing the North Sea States and the EC Commission. The CONSSO carries out the preparatory work for the 6th NSMC.

[1031] The joint initiative was envisaged in the 4th NSMC Declaration (Esbjerg, 1995), Para. 44.1. The designation entered into force on 1.08.1999. The North Sea is also a Special Area under Annex V (garbage) and a SOX Emission Control Area under Annex VI. See in detail: Chapter 8.6.2.

[1032] See, *inter alia*, L. de La Fayette (1999), p.247; E. Hey, T. IJlstra and A. Nollkaemper (1993), p. 1.

[1033] See, e.g., OSPAR, Article 7 and Annex V, Article 4(2).

[1034] The cooperation between the two organizations has been formalized in a Cooperation Agreement between OSPARCOM and IMO concluded in 1999 (IMO doc. A 21/26, 17 July 1999).

[1035] See: E. Hey (2002), p. 325.

adopt shipping-related measures as long as they do not affect the navigation rights of other states under the LOSC. As previously discussed, the LOSC allows coastal States, acting alone or on a regional basis, to control certain aspects of shipping without going through the IMO (e.g., by setting their own port entry conditions, discharge and navigational standards in the territorial sea). However, since a large proportion of the local traffic involves tankers flying the flag of non-OSPAR contracting Parties or directed towards ports outside the region, the OSPAR contracting Parties decided that operational pollution should continue to be regulated within the framework of the IMO and accidental pollution within the framework of the 1969 Bonn Agreement.[1036]

The Bonn Agreement concluded between 9 North Sea coastal States and the EC deals primarily with pollution response in cases of maritime disasters involving oil (or other hazardous substances), but contains also some provisions on the prevention and detection of violations of anti-pollution standards.[1037] In particular, it requires Parties to conduct aerial surveillance and to keep each other informed about any casualty and the presence of oil "likely to constitute a serious threat" to other contracting Parties.[1038] The agreement makes it clear that its provisions do not prejudice the rights and obligations of the contracting Parties under the LOSC and other international conventions in the field of preventing marine pollution.[1039]

The North-East Atlantic coastal States (especially the UK, Norway, Germany and the Netherlands) are the most active States in all IMO committees.[1040] However, unlike the Baltic States, they lack an institutional framework where their positions can be formally coordinated when preparing IMO meetings. The North Sea Conference may represent an important platform for promoting joint initiatives, but its sporadic and irregular meetings do not offer a proper forum for coordination, while discussions within the Bonn Agreement focus almost exclusively on pollution response. The EC, therefore, may provide an effective framework for coordinating the action of the EC North-East Atlantic coastal States in IMO, as indicated by the successful joint initiative for the designation of the Western European Atlantic, including the English Channel, as a PSSA.[1041]

6.6 Limits of the Existing International Regime

Despite this complex and articulated international framework the maritime transport of oil continues to represent a threat to the marine environment and maritime disasters

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[1036] See, e.g., Joint Helsinki-OSPAR Ministerial Meeting (Bremen, 2003), Statement on the European Marine Startegy, paras 49-54, available at: www.ospar.org/eng/html/welcome.html. See also: OSPARCOM Ministerial Meeting (Sintra, 1998), Statement on Future Action (available at: www.ospar.org/eng/html/md/sintra.htm).

[1037] Adopted in 1969 in response to the Torrey Canyon accident, the Bonn Agreement was revised in 1983 to include the EC and to cover substances other than oil. The current members are Belgium, Denmark, the EC, France, Germany, the Netherlands, Norway, Sweden, the UK and Ireland. The text of the revised agreement, which entered into force on 1.09.1989, is available at: www.bonnagreement.org/eng/html/welcome.html. On 17.10.1990, France, Morocco, Portugal, Spain and the EC signed the Lisbon Agreement (see: EC OJ, L 267, 28.10.1993, pp. 22-8), which establishes a similar cooperation in the southern North-East Atlantic. The agreement has not yet entered into force.

[1038] Bonn Agreement, Article 1.1; Article 5 and Article 6A. In September 2003, the Bonn Agreement adopted a new Oil Appearance Code for estimating volumes of oil in spills at sea.

[1039] Bonn Agreement, Article 8. See also the Lisbon Agreement, Articles 11and 14(1).

[1040] Most of the submissions to the IMO's main committees in the past five years (i.e. MEPC 43-51; MSC 69-79; and LEG 79-89) have been made by single States individually, but there are also examples of bilateral or trilateral submissions (e.g., joint submission by Denmark, Germany and the Netherlands for the designation of the Wadden Sea as a PSSA (IMO doc. MEPC 48/7/2)).

[1041] IMO doc. MEPC 49/8/1, 11.04.2003. See, for more details: Chapter 6.8.3 of this study.

continue to occur. The main problem is that certain flag States, not only flags of convenience (FOCs),[1042] have so far been unwilling or simply unable to exercise effective control over their vessels and to fully implement and enforce their international obligations.[1043] Most of the time, indeed, poor performance is the result of a lack of necessary expertise, experience and resources to comply with the highly technical standards set by the IMO.[1044] In addition, the LOSC provisions on the implementation and enforcement of a flag State's obligations are not very precise. To date, moreover, many flag States have had little incentive to comply with international standards. Regrettably, operating substandard ships is profitable and creates a competitive advantage for non-complying registers (and operators) at the expense of the well-performing ones.[1045] As already mentioned, the IMO has no enforcement powers and there are no binding mechanisms in place at the international level to force flag States to apply international standards to their ships. As a result, there are great differences in the way rules are implemented and enforced. Available mechanisms to promote flag State effective control over their vessels have not been very successful either. Regrettably, some classification societies release certificates without adequate inspections and port State controls have not been sufficiently strict to discourage violations.[1046]

To address this situation new efforts have been taken within the IMO and the UN framework towards reinforcing the control of flag States, both FOCs and traditional registers, over their vessels; assisting them in better performing their international obligations; clarifying and further elaborating flag State responsibilities in matters of maritime safety and marine environmental protection and discouraging sub-standard shipping.[1047] These initiatives, however, are not legally binding and their effectiveness will depend on the willingness of flag States to comply.

There is no doubt that merchant shipping is better regulated at the global level and the primacy of the IMO as "the" only competent body in shipping-related matters is not in question. However, the global approach also has it own limits. The adoption of standards in IMO and their entry into force may be a time-consuming process and the organization has sometimes been accused of being "slow" in reacting.[1048] The IMO

[1042] Even though FOCs have traditionally been known for not complying with international maritime safety, environmental and labour standards, the number of well performing FOCs is increasing, see, for instance, 2004 Annual Report of the Paris MOU (consultable at: www.parismou.org).

[1043] For an overview of the root causes of the reticence of flag States in fulfilling their obligations under the LOSC and IMO instruments see: Report of the Consultative Group on Flag State Implementation (FSI Report), supra n. 40.

[1044] FSI Report, supra n. 40; 2004 UNSG Report (Para. 307); and IMO Secretariat, "Comprehensive Analysis of Difficulties Encountered in the Implementation of IMO Instruments" (IMO doc. FSI 12/8/1, 19.12.2003).

[1045] See, OECD (2003), supra n. 19.

[1046] E.g., 2004 Annual Report of the Paris MOU, supra n. 241.

[1047] E.g., IMO Voluntary Member State Audit Scheme ,supra n. 131. The IMO, moreover, is in the process of adopting a Draft Implementation Code which spells out the criteria for the effective and uniform implementation of IMO instruments and the relevant LOSC provisions by flag, port and coastal States (IMO doc. FSI 12/7/2, 12.12.2003). The UNGA (i.e.: 2004 UNGA Resolution (Para. 41) and 2003 UNGA Resolution (Para. 29)) has requested the UNSG to prepare, in collaboration with the relevant agencies, a comprehensive elaboration of flag State responsibilities under the LOSC and related instruments, including the consequences of non-compliance. This exercise has resulted in the FSI Report, supra n. 40.

[1048] In a speech before the EP MARE in January 2004, the IMO SG, Mr. E. Mitropoulos, presented the idea of accelerating the terms of the tacit amendment procedure (e.g., amendments to enter into force after 18 months for the SOLAS and 16 months for MARPOL, following their adoption by the MSC or MEPC), which have been considered for too long.

normally works through consensus and reaching agreements among 164 Parties upon highly technical standards is not a simple task. The objective of the IMO, moreover, is to establish the highest "practicable" standards, which are feasible for global implementation.[1049] Negotiations, therefore, normally result in compromise solutions and are frequently criticized for being not sufficiently stringent and for following the "lowest common denominator". IMO instruments often leave ample discretion to maritime administrations and contain derogations and exceptions which jeopardize their uniform implementation.[1050] In addition, most IMO standards do not apply to domestic voyages. Finally, the IMO has sometimes been criticized for its strong shipping orientation. The contributions to the IMO budget are paid by IMO Members depending on the tonnage of their merchant fleet. As a consequence, States with the largest fleets, including some of the main FOCs, are the main contributors to the organization.[1051] Likewise, the entry into force of IMO conventions normally depends on the ratification by flag States representing the majority of the world's tonnage. These factors create some concerns about the capacity of the IMO to take the interests of coastal States sufficiently into account.

6.7 The Community Framework for the Control of Oil Pollution from Shipping

6.7.1 The Establishment of the Common Policy on Safe Seas (CPSS)

European waters and coastlines have always been particularly exposed to the threat posed by the maritime transport of oil.[1052] Combating oil pollution from shipping and promoting safety at sea have been a priority of the common environmental policy since its inception.[1053] In the late 1970s, in the wake of several catastrophic accidents (e.g., the *Amoco Cadiz* disaster in 1978), the European Council[1054] and the EP[1055] urged the Community and the member states to increase efforts against oil spills and tanker disasters and called for the establishment of a comprehensive EC policy to increase the safety of oil transport along the European coasts. Despite the strong political commitment and several attempts by the Commission, the Community's action in this

[1049] See the speech by the IMO SG Mr. Mitropoulos before the EP MARE, supra n. 247.
[1050] See, for instance, the latest amendments to Reg. 13F and Reg.13G, Annex 1 to MARPOL.
[1051] The top three contributors are: Panama, Liberia and Bahamas, see: www.imo.org/home.asp.
[1052] The EU is very dependent on maritime transport. It occupies the number one position in the trade in petroleum products and about 90 per cent of the oil trade with the EU relies on sea transport. About 70 per cent of oil tanker movements in the EU are along the Atlantic and North Sea coasts, while 30 per cent goes via the Mediterranean. See, e.g., Communication from the Commission on the Third Package of Legislative Measures on Maritime Safety in the European Union (COM (2005)585, 23.11.2005); and Communication from the Commission on the safety of oil transported by sea (COM (2000) 142).
[1053] E.g., First EAP (Para. 25); Third EAP (Para. 16); and Fourth EAP (Para. 4.2.2). The accent is always placed on the harmonized and effective enforcement of IMO instruments, especially MARPOL. See: L. Kramer (1997), Chapter 13; S.P. Johnson and G. Corcelle (1989), pp. 102-106; and K.R. Simmonds (1989), pp. 75-81. For a full discussion on the CPSS, see: W. Hui (2005), pp. 292-95; J. de Dieu in H. Ringbom (ed.) (1997), pp. 141-163; A. Nollkaemper (1998); E. Hey and A. Nollkaemper (1995), pp. 281-300; L. Pineschi in L. Miles and T. Treves (eds.) (1993), pp. 526-538; and K.R. Simmonds (1989), pp. 75-81.
[1054] See, e.g. Council Resolution setting up an action programme on the control and reduction of pollution caused by hydrocarbon discharges at sea (OJ C 162/1, 8.07.1978) and the decisions adopted at the European Council of Copenhagen, 21.12.1978.
[1055] E.g., EP Resolution 17.03.1989 (OJ C96 (1989)), adopted in the wake of the *Herald of Free Enterprise* disaster and EP Resolution 18.01.1988 (OJ C 38 (1988)) adopted in the wake of the collision between the *Kharg 5th* and *Aragon* tankers.

field has for long time been opposed by the member states.[1056] Although after the Single European Act (1986), the Community's competence in maritime safety matters found sufficient legal bases in the EC Treaty and was recognized by the ECJ,[1057] such competence was still challenged by the member states. What was contested in the first place was the fact that Article 84(2) (now Article 80(2) EC) of the common transport policy did not make any reference to and was not intended to regulate maritime safety, but maritime transport in general. The Community's action in maritime safety matters, in their view, was not justifiable according to the attribution principle and was not even necessary on the basis of the subsidiarity and proportionality principles. Given the need for uniformity in shipping regulations, maritime safety and anti-pollution standards were better laid down at the global level by the IMO. IMO instruments were considered to be effective enough and there was no need for additional Community legislation.[1058] In reality, for most member states shipping is a very sensitive area and for long time they tried to keep the Community away from maritime issues in order to maintain their individual representation and pursue their national interests in the IMO.[1059] This trend has been favoured by the unanimity rule for the adoption of transport measures under the EEC Treaty. Given the strong diversity of interests among maritime nations (e.g., Greece, Denmark, France and the U.K.), member states with mixed interests (e.g., Germany and the Netherlands), and those with more coastal-oriented interests (like Italy in the Mediterranean), agreeing on common maritime safety rules proved to be very difficult. Before the Treaty of Maastricht, therefore, the EC had almost exclusively relied on the implementation of IMO standards by the member states. The Council adopted several resolutions requiring the member states to ratify the main IMO conventions,[1060] and took some limited regulatory actions in fields which could better be regulated at the EC level, such as pollution response,[1061] navigational standards (mainly reporting requirements) in sensitive areas,[1062] and

[1056] The Council, for instance, rejected the 1980 Commission proposal for a Directive on PSC (OJ C 192/8) and the 1983 Proposal for a Directive on emergency intervention plans to combat accidental discharges of oil at sea (OJ C 7273). See: S.P. Johnson and G. Corcelle (1989), p. 106.

[1057] I.e. Article 84(2) (now Article 80(2)) on maritime transport and Article 130S (now Article 174) EEC on environmental protection. The ECJ recognized the Community's competence in Case C-167/73, *Commission v. France* (Para. 32) and Case C-379/92, *Peralta* (Para. 14).

[1058] See: P.J. Slot in: L. Miles and T. Treves (eds.) (1993), p. 522.

[1059] In 1987, for instance, the Council rejected the Commission's proposal on the EC's accession to MARPOL 73/78. See: Written Question 2388/87, in: OJ C289/33 (1988).

[1060] E.g., Council Recommendation 78/584 (26.06.1978, OJ L194/17) urging member states to ratify SOLAS by 1.01.1979, its 1988 Protocol by 30.06.1979, MARPOL 73/78 by 1.06.1980 and ILO Convention 147 on Minimum Standards in Merchant Ships by 1.04.1979. See also Council Recommendation 79/114 (OJ L 33/33) on the signature and ratification of the 1978 STCW and Resolution 19/06/1990 (OJ C 206/1) asking member states to intensify PSC as provided in the Paris MOU in order to ensure stricter compliance with SOLAS and MARPOL.

[1061] See: Community Action Programme on the control and reduction of pollution caused by hydrocarbons discharged at sea (OJ 1978 C 162) and Council Decision 81/971/EEC setting out a Community information system on marine pollution caused by hydrocarbons (OJ L 355); both replaced by Decision 2850/2000/EC, on the Community framework for cooperation in the field of accidental and deliberate marine pollution for the period 2000-2006. See in detail: H. G. Nagelmackers, (1980), pp. 3-18; L. Pineschi (1992), pp. 526-8, and S.P. Johnson and G. Corcelle (1989), pp. 103-6.

[1062] See: Council Directive 79/115/EEC on the compulsory pilotage of vessels by deep-sea pilots in the North Sea and the English Channel; Council Directive 79/116/EEC on minimum requirements for tankers entering or leaving EC ports; Council Decision 82/887 on an EEC concerted action project on shore-based marine navigation systems; and Council Decision 92/143 on radio-navigation systems for Europe. It is interesting to note that the Community Declaration upon the signature of the LOSC (6.12.1984, reproduced in Annex I to this study), unlike the Declaration upon formal confirmation

measures to avoid the distortion of competition in the maritime transport sector.[1063] In addition, the Community acceded to several international agreements in the field of maritime safety.[1064]

The situation changed with the entry into force of the Maastricht Treaty, which introduced a specific legal basis for the adoption of transport safety measures (Article 71(1)(c) EC) and extended QMV to maritime transport policy (Article 80(2) EC). In addition, political and economic considerations triggered an increased Community involvement in this field. In the wake of a series of maritime disasters which occurred in the winter of 1992-1993 off the European Atlantic coasts (e.g., the *Aegean Sea* and the *Braer* accidents*),* it became evident that member state implementation of IMO rules was no longer enough to ensure an adequate level of protection in European waters.[1065] Besides, the general lack of implementation of international rules was affecting the competitive position of the European merchant fleet.[1066] To respond to the public intolerance against oil spills and preserve European competitiveness, in 1993 the Council established a common policy on safe seas (CPSS) with the double objective being to guarantee "safer seas and cleaner oceans" and to protect the competitiveness of the European shipping industry.[1067] Although the CPSS envisages some regulatory action by the Community in the field of maritime safety, it does not represent a real departure from the traditional global approach and the IMO is still considered as the competent body for the adoption of shipping-related standards.[1068] However, the effectiveness of the IMO regime is severely affected by a series of factors (e.g., the lack of adequate control and enforcement mechanisms, the non-binding nature of many IMO standards and the high level of discretion) which make it difficult to effectively tackle the causes of maritime disasters.[1069] Complementary Community regulatory actions, therefore, appeared to be justified on the basis of the subsidiarity and proportionality principles. The CPSS set up an Action Programme based on four pillars: 1) the convergent implementation of global international rules within the EC (e.g., by giving effect to IMO instruments, including non-binding resolutions);[1070] 2) the uniform enforcement of global (IMO) rules for all ships bound for European ports regardless of their flag (e.g., by enhancing PSC);[1071] 3) the development of maritime infrastructures to ensure the safety of navigation and prevent

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(reproduced in Annex II), does not refer to the aforementioned Directives. This may be indicative of the initial reluctance of member states to recognize the EC's competence in maritime safety matters.

[1063] These measures fall within the scope of EEC Shipping Policy and are not covered in this study. However, it is interesting to mention Council Regulation EEC/613/91 on the transfer of ships from one register to another within the Community, as amended, which requires member states to guarantee a high level of ship safety and environmental protection and provides for the mutual recognition of safety requirements between member states. See, in general P.J. Slot in L. Miles and T. Treves (eds.) (1993).

[1064] The EC acceded to the 1976 BARCON Emergency Protocol (Council Decision 81/420/EEC), the Bonn Convention (Council Decision 84/358/EEC) and the Lisbon Agreement (Council Decision 93/550/EEC).

[1065] The Fifth EAP for the period 1992-1995 called for new legislative proposals for preventing environmental damage from shipping activities. See, in general, J. de Dieu in H. Ringbom (ed.) (1997), pp. 141-163.

[1066] See: Communication from the Commission, "Progress Towards a Common Transport Policy", COM (85) 90. See also: A. Nollkaemper (1998), pp 4-6 and J. de Dieu in H. Ringbom (ed.) (1997), p. 142.

[1067] Council Resolution, 8.06.1993 (OJ C271/1) endorsing the Commission's communication on safe seas (COM (93) 66, 24.02.1993). See also EP Resolution on a common policy on safe seas (OJ C91/301, 1994).

[1068] Of a different opinion are: E. Hey and A. Nollkaemper (1995), p. 282.

[1069] See, e.g., COM (93) 66, p. 12.

[1070] CPSS, Chapter 1 *(iii)*, paras 19-35.

[1071] Ibid, Chapter 2, paras 57-75.

accidental and operational pollution (e.g., traffic restrictions in sensitive areas, reporting systems, VTS, and PRFs);[1072] and 4) the enhanced role of the Community in the global rule-making forums, especially in the IMO.[1073] These pillars have been further developed by the Commission in its 1996 communication "Towards a New Maritime Strategy"[1074] and still represent the main reference for the EC's actions in this field. The Community's accession to the LOSC in 1998, and the extension of the co-decision procedure with the EP for the adoption of maritime safety legislation (Amsterdam Treaty) had a strong influence on the further development of the CPSS.[1075] The *Erika* sinking off the coast of Britain in December 1999 and the *Prestige* disaster off the coast of Galicia in November 2002 occurred when the CPSS had been almost fully implemented. These accidents triggered a more proactive approach by the Community and a significant tightening of the EC maritime safety rules with particular attention being paid to the environmental hazards posed by oil tankers.[1076]

6.7.2 The Decision-Making in Maritime Safety and Environmental Aspects of Shipping

Article 80(2) (ex Article 84(2)) EC on maritime transport has been used as the legal basis for the implementation of the CPSS and the adoption of EC maritime safety legislation. Article 80(2) was introduced in order to create a special regime for transport by sea compared to transport by road, rail or inland waters, which was originally conceived as a common policy (like commercial or fisheries policies) under the exclusive competence of the Community.[1077] The Council has a right ("may") to decide "whether, to what extent and by what procedure" appropriate provisions may be adopted for sea transport. The Community's competence in the maritime transport sector, therefore, was not intended to be exclusive, but would continue to be shared with the member states unless the Council decided to exhaustively regulate the matter (e.g., by adopting regulations setting out maximum standards). So far, the Council has not made any extensive use of this possibility. Nevertheless, some still defend the exclusive nature of the Community's competence in maritime safety issues on the basis of Article 71(1)(c) EC Treaty, which provides the Community with exclusive competence in the field of transport safety.[1078] However, both the Treaty (Article 80(1)) and the Court's case law exclude the application of the general rules of

[1072] Ibid, Chapter 3, paras 83-120.
[1073] Ibid, Chapter 4, paras 146-151. Para. 151 calls for exploring the ways and possibilities for the EC to become a member to the IMO.
[1074] The 1996 Strategy promotes maritime safety as a fundamental tool to foster competitiveness within the EC shipping sector. See: COM (96)81, 18.03.1996. Serious attention is also being paid to the need to combat the increasing flagging out from EC registers to open registers. The Strategy has been endorsed by the Council in its Resolution on a new strategy to increase the competitiveness of Community shipping, 24.03.1997 (OJ 1997 C109).
[1075] Since the accession to the LOSC, the Commission has started exploring the rights and duties stemming from the Convention, while the participation of the EP in the decision-making has raised the environmental content of the maritime safety legislation.
[1076] E.g., the Commission's Report for the Biarritz European Council on the Community's Strategy for safety at sea (COM (2000) 603), and the Commission's Communication on the safety of oil transported by sea (COM (2000) 142).
[1077] However, this construction of the EC Treaty has never been implemented. See: L. Kramer (2000), p. 266; J.H. Jans (2000), p. 59; and I. Macleod et al. (1996), p. 256.
[1078] Article 71(1)(c) EC places the Council under a legal duty ("shall") to adopt common rules concerning "measures to improve transport safety".

maritime transport policy to the field of maritime transport.[1079] Besides, the EC maritime safety legislation is based on Article 80(2) and not on Article 71(1)(c).

In addition, some environmental aspects of shipping (e.g., the sulphur content of marine fuels; pollution response; ship disposal; and air emissions from ships) have been regulated on the basis of Article 175 EC concerning the common environmental policy.[1080] It is worth reiterating that directives adopted under Article 175 EC always contain minimum standards and allow member states to adopt more stringent rules (Article 176). These pieces of legislation, however, remain outside the scope of this Study.

Initially, there was some competition within the EC Commission between DG TREN and DG ENV as to who was responsible for maritime safety. Finally, it was decided that DG TREN (at that time DG VII) had to take the lead. Currently, the Maritime Safety Unit carries out most of the work in the field of maritime safety and vessel-source pollution: it drafts the proposals for new EC legislation and supervises the implementation of existing legislation. DG ENV, however, is still responsible for some environmental aspects of shipping.[1081]

Maritime safety and vessel-source pollution legislation based on Article 80 (2) EC (or Article 175) is adopted according to the co-decision procedure under Article 251 EC. The Commission's proposals, therefore, are submitted to the Transport Council and the EP for a first, and eventually a second, reading. Within the Transport Council negotiations take place mainly in the Shipping Working Party, which is composed of officials from the maritime authorities of the member states, and in the COREPER.[1082] However, maritime safety-related matters may also be incidentally discussed within other working groups (e.g., COMAR and WGIEI). Within the EP, the Committee on Regional Development, Transport and Tourism (Transport Committee) is the main body responsible for transport safety issues.[1083] It considers draft legislation and puts forward any eventual amendments, which are adopted by the EP plenary. When the negotiations are concluded, the new legislation is adopted by the Council acting by QMV.

The decision-making process on maritime safety matters may be time-consuming, depending on the political sensitivity of an issue (e.g., the proposal for a directive on criminal sanctions for pollution offences). Normally, before drafting a new proposal, it is common practice for the Commission to conduct extensive consultations with experts and the industry. Reportedly, in the aftermath of the *Erika* and *Prestige*, because of the need for quick responses, this expert level was not fully

[1079] E.g., Case C-167/73, Commission v. France (Para. 32).

[1080] See, e.g., Directive 2005/33/EC on the sulphur content of marine fuels; Decision 2850/2000/EC on the Community framework for cooperation in the field of accidental and deliberate marine pollution; EC Regulation 295/93 on Waste Shipment implementing the Basel Convention, as amended; and Council Decision 2004/575/EC concluding the 2002 Emergency Protocol to the BARCON. For a general discussion on the proper legal basis for the adoption of EC vessel-source pollution measures see: E. Hey and A. Nollkaemper (1995), pp. 285-7.

[1081] Within DG ENV, Unit A5 (Civil Protection and Environmental Accidents) is responsible for the implementation of the Community framework on pollution response; Unit C1 (Clean Air & Transport) is responsible for the EU strategy to reduce air emissions from ships; and Unit D2 (Protection of Water & Marine Environment) is working in close collaboration with DG TREN on harmful aquatic organisms in ballast waters.

[1082] The SWG carries out the preparatory work for the COREPER.

[1083] In July 2005, a new Maritime Affairs Intergroup was established to discuss, *inter alia*, shipping issues ahead or in parallel with the Transport Committee. In addition, the Committee on Environment, Public Health and Food Safety is responsible for issues related to, *inter alia*, international and regional environmental agreements, water pollution, and the restoration of environmental damage.

involved. As a consequence, most of the technical discussions took place directly within the Shipping Working Party or the COREPER, which are normally not composed of experts (although they may bring their own national experts), and often resulted in political, rather than technical, decisions. Conversely, the expert level has been fully involved in the drafting of the Erika III sets of proposals, since there is no need for urgent action.[1084]

6.7.3 The Community as a Flag State

Before looking closely at the Community's legislation in the field of oil pollution from ships it is worth making some preliminary observations about its capacity to act as a flag State. Legally speaking the Community cannot be qualified as a real flag State since it lacks its own register and flag. In 1989, the Commission came up with the proposal to establish a European register of shipping (EUROS).[1085] The EUROS was not supposed to be a substitute for national registers, but a sort of second register. The main goal was to prevent the flagging out of vessels flying the flag of the member states to non-European registers, mainly by offering favourable tax conditions. The proposal, however, was rejected by the Council which considered it to be an infringement of the member states' exclusive competence in the area of taxation. Since then, the Commission has abandoned the idea of a European register.[1086] Currently, therefore, there are 25 member state registers and 25 member state flags.[1087]

The Community may be considered as a *sui generis* flag State to which the member states have transferred some of their competence and which exercises rights and duties stemming from the LOSC with regard to vessels flying the flag of the member states.[1088] There is no formal definition under EC law of what constitutes a "vessel flying the flag of a member state." The ECJ has never clearly pronounced on the issue, but has left the term to be defined under national legislation.[1089] In addition, the ECJ has made it clear that it is for the member states to determine, in accordance with international law, the conditions for the registration of vessels and for granting the right to fly their flag.[1090] These conditions, however, have to be consistent with EC law. [1091] Currently, the registration criteria are very different within the EC. Member states have always firmly opposed any attempt by the Commission to harmonize

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[1084] The Erika III package of legislative proposals is discussed in Chapter 6.8.8.
[1085] COM (89) 266, 3.08. 1989 (OJ 1989 C 263/11).
[1086] The main objective of EUROS was to grant certain advantages to shipowners, namely: participation in cabotage within the EC and the easier transfer of ships among member states. The adoption of EC legislation covering both issues made it unnecessary to continue the work on the EUROS.
[1087] Several EC member states (e.g., Belgium, Denmark, France, Luxembourg, Germany, and the UK) have a second register, providing for more flexible employment conditions. Second or offshore registers are also established in overseas territories (e.g., Bermuda, Cayman Islands and the Isle of Man (UK); the Kerguelen Islands (France), the Netherlands Antilles, and the Faroe Islands). In addition, some member states (e.g., Cyprus and Malta), still maintain open registers. Open registers also exist in overseas territories (e.g., Canary Islands, Gibraltar and the Netherlands Antilles). See, in detail: EP, Opinion of the Committee on Regional Policy, Transport and Tourism for the Committee of Fisheries (PE 301.808, 15.10.2001).
[1088] See, e.g., Case C-405/92, *Driftnets Case*, (Para. 12).
[1089] For instance, in Case C-223/86, *Pesca Valentinia* (Para. 13), the ECJ stated that EC law applies to fishing vessels "flying the flag" of a member state "or" registered there, leaving the definition of these terms to national legislation.
[1090] Case C-221/89, *Factorame* (Para. 13) and Case C 286/90, *Poulsen* (Para 15).
[1091] Case C-221/89, *Factorame* (paras 14 and 17) and C 62/96, Commission v. Hellenic Republic, (Para. 22).

registration conditions,[1092] although they seem to support such an initiative within the IMO.[1093] In the wake of the *Prestige* accident, the EP called on the Commission and the member states to reconsider the possibility of introducing a European shipping register.[1094] However, according to the Commission there seem to be better ways to raise the level of safety of the EC fleet, for instance by setting out minimum criteria for EC flag administrations.[1095] This proposal is part of the *Erika III package* which will be briefly discussed in Chapter 6.8.8. Whether this initiative will overcome the traditional opposition of the member states is difficult to say. Recent developments, however, suggest that there is still strong resistance against an excessive intrusion by the Community into their sovereignty.[1096]

6.8 The Community's Legislative Measures to Implement the International Regime on Oil Pollution from Shipping

Currently there are over 20 pieces of legislation in place implementing the international regime for the control of oil pollution from tankers within the Community.[1097] For reasons of space the focus will be on the most recent initiatives, such as the *Erika I & II* packages,[1098] with particular attention being given to the Community's response to the *Prestige* disaster.[1099]

In the aftermath of the *Erika* and *Prestige* accidents, combating vessel-source pollution and preventing new maritime disasters have been placed at the top of the EU political agenda[1100] and have become priority action for the common transport[1101] and

[1092] See, for instance, the Commission's proposal for a Council Decision on the common position to be adopted by the member states when acceding to the UNCTAD Convention on the conditions for registration of ships (COM (86) 523).

[1093] The Council, in its Resolution 97/C 109/01, 24.03.1997 on a new strategy to increase the competitiveness of Community shipping (OJ 1997 C109), Para. C.1, urged the IMO to develop internationally binding quality criteria for flag administrations and ship registers.

[1094] EP Sterckx Resolution on Improving Safety at Sea in response to the Prestige accident (2003/2066(INI)), 23/09/2003, Para. 28. A few months later, however, the EP manifested doubts on the capacity of such a register to ensure the high level of safety in the EC fleet (EP, Report of the Committee on Regional Policy, Transport and Tourism, 26.11.2003, PE 331.347).

[1095] E.g., R. Salvarani (1996), p. 229.

[1096] Recently, for instance, a proposal brought by a Spanish MEP to include the EU's symbol on the member state's flags was rejected by both the EP and the UK's Chamber for Shipping. See, *inter alia*, Fairplay, 27.11.2003.

[1097] An overview and the full text of the maritime safety legislation is available at: http://europa.eu.int/comm/transport/maritime/safety/1993_en.htm.

[1098] On the pre-Erika legislation, see: A Nollkaemper (1998), pp. 16-20; and J. De Dieu in H. Ringborm (ed.) (1997), pp. 141-63. On the post-Erika legislation see: H. Ringbom in M.H. Nordquist and J.N. Moore (eds) (2001), pp.265-290; and Y. Van Der Mensbrugghe (2000), pp. 178-201. On the post-Prestige legislation see V. Frank (2005), pp. pp. 1-64; F. Zia-Mansoor (2005), pp.165-73, U. Jenisch (2004), pp. 67-83; and W. Hui (2004), 292-303.

[1099] EC initiatives directed at strengthening liability and compensation for oil spills (e.g., COPE Fund) are not discussed. The analysis in the following paragraphs builds on: V. Frank (2005), pp. 1-64.

[1100] E.g., Copenhagen European Council, December 2002 (paras 32-4); Brussels European Council, March 2003 (Para. 13); and Nice European Council, December 2000 (paras 41-43); all available at: ue.eu.int/cms3_applications/applications/newsRoom/loadBook.asp?BID=76&LANG=1&cmsid=347. See also the Statements of the EU Presidency at the 59th UNGA; 58th UNGA; 5th ICP; and 4th ICP, all available at: http://europa-eu-un.org/articles/articleslist_s11_en.htm.

[1101] See, e.g., Transport Council, December 2002 ("Prestige"- Council conclusions), at: ue.eu.int/cms3_applications/applications/newsRoom/loadBook.asp?BID=87&LANG=1&cmsid=354 and the White Paper on "European Transport Policy for 2010: time to decide", 12.09.2001, available at: europa.eu.int/comm/energy_transport/en/lb_en.html.

environmental policies.[1102] The Commission, supported by the EP,[1103] reacted quickly and launched new initiatives, most of them endorsed by the Council, directed at ensuring the safe transport of oil in European waters.[1104]

6.8.1 Strengthening the Standards for the Transport of Oil in Single Hull Tankers

According to the classification societies which inspected the *Erika* and *Prestige* tankers shortly before the accidents, both ships were structurally sound and conformed to all relevant IMO standards.[1105] Apparently, neither was a "risky ship". Although the effectiveness of double hulls is still contested,[1106] it is a matter of fact that most major oil spills involve single-hull tankers. The two accidents raised questions about the adequacy of using these kinds of ships for the transport of oil, especially heavy grades of oil (HGOs), which are the most polluting and difficult to clean up when they are spilled at sea.[1107] In the wake of the *Erika* accident, the Commission proposed to align the timetable for the phasing out of single-hull tankers in the Community with the US' OPA 90, which is more stringent than MARPOL 73/78, in order to prevent the increased pollution risk posed by ships banned from US waters.[1108] Given the quick

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[1102] See, e.g., Sixth EAP, "Environment 2010: Our Future, Our Choice", COM (2001) 31, 24.1.2001, pp. 35-6; and Environmental Council, December 2002 available at: ue.eu.int/cms3_applications/applications/newsRoom/loadBook.asp?BID=89&LANG=1&cmsid=356. Initially, the Commission in its communication "Towards a strategy to protect and conserve the marine environment", COM (2002) 539, set out ambitious targets and a timetable to reduce oil discharges and the environmental impact of shipping (e.g, Objective 7, p. 19, calling for compliance with existing oil discharge limits by 2010 at the latest and the elimination of all discharges by 2020; and Objective 9 calling for the development of the concept of a "Clean Ship"). The Marine Strategy, as adopted, however, does not contain any specific target.

[1103] The EP has adopted several Resolutions on the *Prestige* disaster: i.e., the P5_TA (2002) 0575, 21.11.2002; P5_TA (2002) 0629, 19.12.2002; and 2003/20066(INI), 23.09.2003 (EP "Sterckx" Resolution). In November 2003, the EP set up a Temporary Committee on Improving Safety at Sea (EP-MARE) to examine all aspects of the *Prestige* accident and to report to the EP plenary in April 2004. On 27.04.2004, on the basis of this report, the EP adopted a new Resolution 2003/2235(INI) on safety at sea. The text of the Resolutions and the work of the EP-MARE are available at: www.europarl.eu.int/comparl/tempcom/mare/default_en.htm. See also EP resolution 20.01.2000 adopted in the aftermath of the *Erika* accident.

[1104] In the wake of the *Prestige* accident the Commission adopted two important communications on "Improving Safety at Sea in Response to the Prestige Accident", COM (2002) 681, 3.12.2002; and "Action to deal with the effects of the *Prestige* disaster", COM (2003) 105 final, 5.3.2003. See also COM (2000) 142, 21.03.2000, on the safety of oil transported by sea adopted in the wake of the *Erika* accident.

[1105] For the *Erika*, see, e.g., accident investigation reports released by Malta, at: www.keskom.co.uk/Erika.pdf. For the *Prestige*, see: Report from the American Bureau of Shipping (ABS), available at: www.eagle.org/news/press/prestige/ and the Statement by the delegation of the Bahamas to C89, 27.11.2002, (IMO doc. C 89/INF.4/Rev.2).

[1106] E.g., INTERTANKO, at www.intertanko.com/pubupload/Phase-out-presentati_001.DOC and International Chamber for Shipping (ICS) at: www.marisec.org/icskeyissues2003/Loss%20of%20the%20Prestige.htm. See also Lord Donaldson Report (1994), Para. 7.40. On the advantages and disadvantages of double hulls, see: E. Galiano (2003), pp. 113-133.

[1107] The HGO involved in the *Erika* and *Prestige* accidents is mainly used to fuel power stations and merchant shipping and only accounts for 10% of all oil carried by sea. Due to its relatively low commercial value and the relatively low risk of fire or an explosion, it is normally carried on older single-hulled tankers. However, due to their low volatility and high viscosity, these types of oils are the most polluting and difficult to clean up when they are spilled at sea. See: COM (2002) 681 and COM (2002) 780, at (2.1).

[1108] The proposal (COM (200) 802) is part of the *Erika I* package. The US adopted the Oil Pollution Act (OPA 90) in 1990 after the *Exxon Valdez* disaster (Sec 4115, Public Law No. 101-380, 104 Stat at 517-

decision of the IMO to accelerate the existing timetable under MARPOL 73/78, the Community decided not to proceed with the Commission's proposal and wait for MARPOL 73/78 amendments. The latter entered into force in September 2002, two months before the *Prestige* disaster. The new catastrophic spill showed that this timetable was still not stringent enough and seemed to require further acceleration.[1109]

Soon after the *Prestige* sinking, the EC Transport Council urged the Commission to present a proposal for strengthening the rules for the transport of HGO in single-hulled tankers bound for or leaving European ports and/or flying the flag of an EC member state.[1110] At the same time, the Commission was asked to examine ways to limit the transit of older single-hull tankers carrying HGO through the EEZ of the member states acting consistently with the LOSC and the law of the sea.[1111] The result has been a three-step approach based on action at the EC, international and regional levels. In the first place, acting in its capacity as both port and flag State, the EC has raised the standards for all tankers regardless of their flag, entering or leaving ports, offshore terminals, and anchorage areas under the jurisdiction of the EC member states or flying the flag of an EC member state.[1112] The new EC Regulation 1726/2003[1113] has three main innovative elements compared to MARPOL 73/78. First, it introduces an immediate ban on the transport of HGO in single-hulled tankers and requires that in the future only vessels equipped with a double hull will be entitled to carry HGO within or from the EU.[1114] Secondly, it accelerates the phasing out of single-hull tankers to 2010 rather than 2015.[1115] Thirdly, it strengthens the inspection regime for younger single-hull tankers pending their final phasing out. In particular, the new regulation extends the application of the Condition Assessment Scheme (CAS), which is an IMO tool for the periodic assessment of the structural state of single-hull tankers, to all categories of tankers from the age of 15 years, including the smallest ships not originally covered by the scheme.[1116] Younger single-hull tankers, therefore, will be allowed to operate in Europe only if they meet the CAS

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22). The phasing out date for single hulls under OPA 90 is 2010 (2015 for certain ships); while under MARPOL, at that time, the final date was 2026.

[1109] According to the amendments of MARPOL, Annex I, Regulation 13G (IMO doc., Resolution MEPC 46/95, 27/04/2001), the 26-year old *Prestige* would have been allowed to continue its operations until 15 March 2005.

[1110] "Prestige"-Council conclusions, at (11), and December 2002 Environmental Council at (8)).

[1111] See "Prestige"-Council conclusions, at (11). The EP Streckx Resolution, at (24), suggested the extension of the ban on the transport of HGO in single-hull tankers to all ships in transit through EC waters.

[1112] COM (2003) 105, Para. 2.2.2.1. Reportedly, member states with larger coastal State interests (e.g., Spain, France, Italy and Portugal) called for an EC regulation, while EC maritime nations (e.g., Denmark, the United Kingdom, Germany and Greece) and Norway were more in favour of acting within IMO.

[1113] Proposed by COM (2002) 780, 20.12.2002, the new EC Regulation was adopted on 22.07.2003 and entered into force on 21.10.2003 (O.J. L.249/1), amending the previous EC Regulation 417/2002.

[1114] EC Regulation 1726/2003, Article 1(4) (d). The definition of HGO under Article 1(3)(b) includes heavy fuel, tar, bitumen and heavy crude oil.

[1115] The new schedule is in line with the one initially proposed by the Commission in the wake of the *Erika* accident. The final date for Category I tankers, like the *Prestige*, 20,000/30,000 tons deadweight and above (so-called pre-MARPOL tankers because they were built before the MARPOL and not complying with its standards) has been moved from 2007 to 2005 or to an age limit of 23 years (Article 1(4)(a)). For Category II, the same size as Category I, but complying with MARPOL safety requirements (so-called MARPOL tankers) and Category III (the smallest tankers below 20,000/30,000 tons and usually operating in regional traffic) the deadline is 2010 or an age limit of 28 years (Article 1(4)(b)).

[1116] EC Regulation 1726/2003, Article 1(6). The CAS is regulated in MEPC Resolution 94(46), 27.04.2001, as amended.

requirements.[1117] In addition, to accommodate the concerns of the EC Baltic coastal States over the increasing maritime traffic and the difficult navigation conditions in the Baltic Sea and in the Gulf of Finland, the Regulation invites oil tankers entering or leaving the Baltic ports of the EC member states to observe the special coastal State requirements for ships operating in ice-covered waters.[1118]

In parallel, the Council urged the member states to present a joint proposal to the IMO for an amendment to MARPOL 73/78, Annex I to bring it into line with the EC Regulation.[1119] Finally, the Council stressed the need to promote bilateral agreements with neighbouring countries, especially with the Russian Federation and Mediterranean States, for the wider implementation of the EC safety standards and for the support of the member states' proposal in the IMO.[1120]

The EC member states' joint proposal on the amendment of Annex I of MARPOL 73/78 was initially discussed during the 49th regular session of the MEPC, in July 2003. To give a prompt response to the EC member states, MEPC 49 agreed to convene an extraordinary session in December 2003 in order to give other Parties the necessary time for further consideration and for the formal adoption of the proposed amendments along the lines of the EC submission.[1121] The Community, however, decided to proceed alone without waiting for the outcome of the MARPOL amendment process as it did after the *Erika* accident. The new regulation 1726/2003 entered into force on 21 October 2003 for the "old" EC member states and in December 2003 for the EEA countries (e.g. Norway and Iceland),[1122] while the ten new member states have been strongly recommended to apply EC rules before 1 May 2004.[1123] The entry into force of the EC regulation made it rather difficult for foreign single-hull tankers still conforming to MARPOL 73/78 to operate in the European region.

In order to offset the damage caused by the EC's regulatory action, MEPC 50, held in December 2003, adopted a compromise solution introducing a two-tier system which mirrors the EC regulation with regard to the schedule for phasing out single-hull

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[1117] EC Regulation 1726/2003, Article 1(7).

[1118] The new Recital 11 of EC Regulation 1726/2003 is a compromise to accommodate the request by Finland to introduce stricter standards on ships operating in the area (e.g., Finnish Maritime Administration, "Navigation Requirement in Sub-Artic Ice Covered Waters", 3.04.2003 at: www.fma.fi/e/).

[1119] "Prestige"-Council conclusions; Copenhagen European Council, and Regulation 1726/2003, at 2nd considerandum. The joint proposal was forwarded to the IMO Secretariat in April 2003 (IMO Circular Letter 2458, 10.04.2003).

[1120] Inter alia: "Prestige"-Council conclusions, at (2) and (19), and December 2002 Environmental Council, at (11). See also COM (2003) 105, at (2.2.3.2); and Joint Statement, 12th EU-Russia Summit, Rome, 6.11.2003, at (10), available at: europa.eu.int/comm/energy_transport/russia/2003_11_06_joint_statement_en.pdf.

[1121] IMO doc. MEPC 49/16/1. The EC submission raised many concerns on the negative repercussions on global shipping, the security of oil supplies and oil prices as well as their effects on other regions of the world. See: IMO docs MEPC 50/2/1 (Japan); MEPC 50/2/2 (India); MEPC 50/2/3 (Russian Federation); MEPC 50/2/10 (Brazil), MEP C50/2/11 (INTERTANKO), MEPC 50/INF.2 (Secretariat). On the EU position see: COM (2002) 780, supra n. 1113, at (2.1/2.2); MEPC 49/5, at (13-8) and MEPC 50/2/4 (UK).

[1122] On the basis of Article 2 of the Treaty of Accession (published in O.J. 23.9.2003).

[1123] See: Vice President of the Commission, Loyola de Palacio, at the "Prestige"-Council, December 2003. See also the controversy over the single-hull tanker *Geroi Sevastopolya*, supra n. 18, which at the end of November 2003 left the Latvian port of Ventspils with a load of 50,000 tonnes of HGO. Latvia at that time was not formally bound by the EC Regulation, but the decision to allow the voyage prompted a strong reaction within the EC.

tankers[1124] and the extension of the CAS to younger single-hull tankers.[1125] However, unlike the EC regulation, subject to certain conditions, flag States may authorize single-hull tankers to continue operation until 2015 or until they reach the age of 25 years whichever is earlier.[1126] In addition, a new regulation 13H bans the transport of HGO in single-hull tankers,[1127] but provides a number of exceptions for tankers fitted with double bottoms or sides, and for "teenage" tankers or ships engaged in domestic or regional voyages.[1128] States, however, are entitled to deny entry into their ports and offshore terminals for single-hull tankers that have been granted the aforementioned exceptions.[1129] The EC member states, including Cyprus and Malta, immediately declared that they will not apply the MARPOL exceptions and will make use of their right of port entry denial in order to comply with the EC Regulation.[1130] In addition, MARPOL parties may deny the ship-to-ship transfer of HGO in areas under their jurisdiction, including the EEZ, except in cases of distress.[1131] This possibility represents an important enhancement of the control of coastal States over their marine environment.

The many exceptions allowed in the new Annex I might lead to considerable confusion as to what standards apply in the different ports or regions of the world. MARPOL's Annex I amendments, moreover, entered into force on 5 April 2005.[1132] Before 5 April 2005, therefore, the world fleet was confronted with three major sets of rules: MARPOL 73/78, the EC Regulation and the OPA 90.[1133]

IMO members, however, have been particularly concerned by the Community's decision to proceed alone without waiting for the amendments of MARPOL. The EC "regional" approach has been considered as damaging to the uniformity of shipping regulation, undermining the IMO's authority and providing a precedent for other regions to set their own regimes.[1134] Legally speaking, however, the EC Regulation is consistent with Articles 25(2) and 211(3) of the LOSC and falls within the right of port States to lay down conditions for the entrance into ports of foreign ships and to deny access to vessels not complying with these requirements.[1135]

[1124] Annex I, Resolution MEPC 111/50 amending regulation 13G, at (4). For a review of the MARPOL amendments see: 2004 UNSG Report, 27.02.2004, paras. 145-6 and 173-5.

[1125] Annex I, Resolution MEPC 111/50, at (7) and Resolution MEPC 112/50 amending the CAS.

[1126] E.g., single-hull tankers fitted with a double bottom or double sides (Annex 1, Resolution MEPC 111/50, at (5) and (6)).

[1127] Annex 2, Resolution MEPC 111/50. Para. 2 reflects the EC definition of HGO. The inclusion of heavy crude oil in the definition has created particular problems, especially for Latin American countries, which are the larger exporters of crude oil.

[1128] Exceptions are listed in Annex 2, Resolution MEPC 111/50, at (5), (6) and (7). The regional exception was adopted to accommodate the requests of Latin American countries and the Russian Federation in exchange for the inclusion of crude oil in the HGO definition.

[1129] Annex 2, Resolution MEPC 111/50, at (8)(b). The right of denial does not apply to domestic and regional voyages (*ibid*, at (7)).

[1130] IMO doc. MECP 50/3, Annex 6 (Italy on behalf of the 15 EC member states, the EC Commission, Cyprus, Malta and Poland).

[1131] Annex 2, Resolution MEPC 111/50, at (8)(b). This possibility has been introduced to accommodate Danish concerns about the growing lightering operations in its EEZ due to increased Russian oil exports.

[1132] In order to bridge the gap between that date and the entry into force of the EC regulation, the MEPC has adopted a resolution inviting flag States to apply the MARPOL amendments as soon as practically possible prior to their formal entry into force (IMO doc. MEPC 114/50).

[1133] The time-limits for Category II and III under the EC Regulation are two years in advance compared to the OPA 90, which does not ban the transport of HGO in single-hull tankers.

[1134] According to the IMO SG, Mr. Mitropoulos, nothing prevents a State or a group of States from adopting higher standards but "any such commendable initiative should be restricted only to ships of their flag", see the Statement by Mr. Mitropoulos before the EP-MARE, supra n. 247, p.4.

[1135] These provisions are generally considered as customary international law, see supra n. 97.

In exercising its port State regulatory capacity, moreover, the Community conformed to the general principles of international law discussed in Chapter 6.2.3.1. The EC Regulation, indeed, is proportional to the high level of risk posed by the increasing volume of oil transported along the European coasts, there is a direct connection between the new standards and the Community's legitimate environmental interests and the "extraterritorial" effect of double-hull requirements for foreign vessels before entry into EC ports is purely incidental. Arguably, when foreign ships decide to operate within the Community they implicitly agree to comply with its higher safety and environmental standards, including CDEMs. In addition, the new EC phasing-out schedule is clearly not discriminatory since it applies to all vessels entering or leaving EC and EEA ports regardless of their flag, including EC and EEA vessels. The new EC ban, conversely, seems to apply only to ships entering or leaving EC and EEA ports, but allows EC and EEA-registered single-hull tankers to continue carrying HGO in other parts of the world until they reach the deadline for their final phasing out.[1136] This could increase pressure on other regions and might be considered discriminatory. Such a possibility, however, is purely theoretical since, reportedly, EC companies already avoid using single-hull tankers for carrying HGO. In addition, after 4 April 2005, the ban introduced by the new regulation 13H of MARPOL's Annex I entered into force for all flags.

The need to preserve its authority as the only international regulator urged the IMO to react rapidly.[1137] The EC's "unilateral" action, moreover, is nothing new, but has several precedents in State practice whose consistency with the LOSC seems to be uncontested.[1138] The only difference is the coordinated nature of the EC reaction. The EC regulatory action, therefore, may probably be questioned from a political, but not from a legal point of view.

6.8.2 Classification Societies

Although the *Erika* and the *Prestige* had valid certificates issued by highly respected classification societies,[1139] the accidents focused attention on those organizations which release certificates without adequate inspections. Moreover, most of the time, classification societies are paid directly by the shipowner, a practice that raises questions as to their impartiality. Following the *Erika* accident, the EC adopted a new Directive which intends to guarantee neutrality, the better quality of and stricter control over the activities of classification societies that are entitled to operate in the Community.[1140] Since 1994 there has been a common system in place for the recognition of organizations which may be authorized to conduct inspections of ships

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[1136] See the Clarification from the European Commission to INTERTANKO, reported in INTERTANKO Weekly News, no. 39 (2003) and B. Reyes, *Intertanko told EU-flags single hulls can trade on despite new rules,* Lloyd's list, 3/10/2003.

[1137] Then IMO Secretary-General, W. O'Neil, at MEPC 50, 4/12/2003.

[1138] The adoption by the US of OPA 90, for instance, led to the amendment of MARPOL 73/78 similar to what happened with EU Regulation 1726/2003.

[1139] The *Erika* was classified by Registro Italiano Navale (RINA), which had carried out an annual survey on the ship two weeks before the final voyage (e.g., Report from Malta at: www.keskom.co.uk/Erika.pdf, Para. 2.4). The *Prestige* was classified by the American Bureau of Shipping (ABS). See: *Prestige* Casualty Information Update No. 3, available at: www.eagle.org/news/press/nov202002.html.

[1140] Directive 2001/105/EC (amending Directive 94/57/EC) on common rules for ship inspection and survey organizations is part of the *Erika I* package. The Directive also harmonizes the rules on the financial liability of recognized societies.

and release certificates on behalf of the EC member states.[1141] The new Directive intends, first of all, to bring the previous system up to date with the latest international developments, including amendments to IMO conventions, annexes and protocols and new codes. Secondly, it strengthens the quality criteria for the recognition of classification societies (e.g., the absence of conflicting interests and independence from the ship owner/operator/industry). Thirdly, the Directive increases the role of the Commission in assessing, next to the member state concerned, whether the classification society meets the requirements for recognition and monitoring its performance. Poorly performing classification societies may be punished with the withdrawal of the recognition. In performing its duties, the Commission is now assisted by the European Maritime Safety Agency. The Directive entered into force in January 2002, two months after the *Prestige* disaster. In the aftermath of the accident, the Council urged the member states to accelerate the implementation of the Directive by 22 July 2003.[1142] On that same date, the Commission started an infringement proceeding against the 9 member states which had failed to communicate national implementing measures.

6.8.3 Strengthening Port State Control

The uniform enforcement of international standards through PSC is one of the central pillars of the CPSS.[1143] Despite the attempts of the Commission, the adoption of EC legislation on PSC has for a long time been opposed by the EC member states, afraid that such legislation could trigger an EC external competence in the IMO. Therefore, they preferred to proceed outside the EC framework by concluding the Paris MOU.[1144] In the early 1990s, however, it became evident that EC member states were not implementing the Paris MOU with the same rigor and the number of substandard ships operating in Europe had drastically increased.[1145] The lack of uniformity in the exercise of PSC, moreover, was affecting competition since it granted those member states conducting weaker inspections a competitive advantage. To reverse this trend, Community harmonization appeared necessary. In 1995 the Council adopted a Directive on Port State Control (PSC Directive) with the main goal being to reduce substandard shipping in EC waters, thereby improving safety and the protection of the marine environment.[1146] The Directive transforms the soft commitments under the Paris MOU (e.g., the 25 per cent inspection target) into legally binding obligations and

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[1141] Directive 94/57/EC. The quality criteria are more stringent compared to the 1993 IMO guidelines for the authorization of recognized organizations acting on behalf of the administration (IMO Res. A. 739(18)).

[1142] "Prestige"- Council conclusions. Only 6 out of the (at that time) 15 member states (Denmark, France, Germany, the Netherlands, Spain and the UK) had done so. Currently all member states have notified the Commission of the transposition of the Directive. The Commission has only recently started the conformity assessment.

[1143] CPSS, Chapter 2. See: R. Salvarani (1996), pp. 225-31; and E.J. Molenaar (1996), pp 242-288.

[1144] On the Paris MOU, see Chapter 6.5.1 of this study. In 1980, the Council rejected a Commission proposal for a directive on PSC (O.J. 1980 C 192/8). The Paris MOU builds on this proposal and the Commission participated in the negotiations. Although the EC is not a party to the Paris MOU, according to Article 6 (1) the Commission participates in the meetings of the PSC Committee. See: A. Nollkaemper (1998), p. 19, E. Hey and A. Nollkaemper (1995), p. 287 and R. Salvarani (1996), p. 228.

[1145] Annual Report of the Paris MOU, 1992. See also the Commission's Communication on Improving the Effectiveness of PSC in the Community (COM (89) 266, 2.08.1989).

[1146] Council Directive 95/21/EC, 19.06.1995, concerning the enforcement, in respect of shipping using Community Ports and sailing in waters under the jurisdiction of the member states, of international standards for ship safety, pollution prevention and shipboard living and working conditions (OJ 1995 L 157), Preamble. On the main differences between the Paris MOU and the PSC Directive see: E. J. Molenaar (1996) pp. 242-88, and R. Salvarani, pp. 229-31.

sets out harmonized and strengthened criteria for ship inspections in EC ports.[1147] Over the years the PSC regime has undergone several amendments to keep it up to date with new international developments and to extend its scope to EEA Countries.[1148] However, in the wake of the *Erika* accident this regime still appeared to be inadequate to arrest substandard shipping. In the seven months previous to its sinking, indeed, the *Erika* has been inspected four times[1149] showing that the level of inspection was not stringent enough and required further improvement. Following the accident the PSC directive was strengthened as regards two main aspects. First of all, a new compulsory annual control has been introduced for all ships that due to their age, poor condition, flag, classification society, or inspection and detention records pose a high risk for the marine environment of the member states.[1150] Secondly, EC/EEA member states have been required to deny access into their ports to all "high risk" categories of ships, including oil tankers, which have been repeatedly detained in the previous two to three years on the basis of a blacklist periodically published by the Commission, unless it can be proved that they can be safely operated.[1151] In addition, the Commission has been requested to publish periodically a list of ships which will be banned from EC ports if they are detained one more time after the entry into force of the Directive.[1152]

The PSC regime established in the Community is far more stringent than the Paris MOU and the broad MARPOL and SOLAS provisions on port State inspection, but is consistent with Article 218 of the LOSC and the safeguards contained in section 7 of Part XII. Targeting badly performing flag States for mandatory expanded inspections, closing EC ports to ships flying their flag and publishing blacklists of ships are important mechanisms to encourage flag States wishing to operate their vessels in Europe to improve their safety standards and to properly implement international rules. This regime, however, presents some shortcomings. The blacklists and the detention records are based on the Paris MOU and do not include dangerous ships which have been detained in ports outside that framework. EC member states, therefore, cannot take detentions which occurred in those countries into account in order to refuse ships access into their ports. In addition, the list of items that require compulsory inspection is not very extensive (especially with regard to cargo and ballast tanks) and inspections are mostly limited to the control of certificates.

[1147] The Directive sets out obligations to, inter alia, maintain competent administrations for the inspection of ships in ports; to inspect at least 25 per cent of foreign ships, except vessels which have already been controlled within the previous six months; to conduct enhanced controls on, *inter alia*, oil tankers; and to rectify deficiencies revealed in the course of the inspection and notify certain information to flag States or other port State authorities.

[1148] Council Directive 98/25/EC (OJ 1998 L 133); Commission Directive 98/42/EC (OJ 1998 L 184); Commission Directive 1999/97/EC (OJ 1999 L 331); Council and EP Directive 2001/106/EC (OJ 2002 L19). All of them are texts with EEA relevance.

[1149] Between 1991 and 1999 the *Erika* underwent 16 PSC inspections and had been detained 5 times, the last in Rotterdam in December 1997. However, it was not considered a targeted ship according to the Paris MOU. See: Malta's Report, at: www.keskom.co.uk/Erika.pdf, Annex 6.

[1150] Directive 2001/106/EC (amending Directive 95/21/EC) on enforcement of international safety, pollution prevention and working standards on ships calling at EC ports (PSC Directive) adopted as part of the *Erika I* package. Targeting criteria are listed in Annex I.

[1151] New Article 7b of the PSC directive. Blacklists and detention records are based on the Paris MOU and are available at: www.parismou.org.

[1152] In November 2003, the Commission published a list of 10 ships which are banned from EC ports and an indicative list of 143 ships which may be banned in the future. Both lists included ships registered by Cyprus and Malta (see: europa.eu.int/comm/transport/maritime/safety/prestige_en.htm). The subsequent lists did not include ships from EC member states (but did include ships from Turkey). The latest list of ships banned from EC ports was published on 1.01.2006. All lists may be consulted on the EMSA website.

The sinking of the *Prestige* occurred two months before the entry into force of the PSC amendments and triggered a call for the further acceleration of the implementation of the directive.[1153] During the three years before the accident the tanker had indeed been able to circumvent control in those ports it had called at (within and outside the EC) despite the fact that it had met all the conditions for being a primary target of inspection. Like the Classification Societies Directive the implementation of the PSC Directive has also been slow.[1154] The Commission promptly started several infringement proceedings against the non-complying member states and, with the assistance of EMSA, is currently assessing the actual implementation of the PSC Directive in each member state. [1155]

6.8.4 Vessel Traffic Monitoring and Information System

Some of the major routes for the transport of oil are located in European waters and every day hundreds of tankers carry huge amounts of oil (and other dangerous products) at a very short distance from the coastlines of EC member states, increasing considerably the risk of maritime accidents. In 1979, in the aftermath of the *Amoco Cadiz* accident, the Council adopted a Directive setting out minimum requirements for "tankers" entering or leaving EC ports, including a duty to notify general information about the ship and the cargo to port State authorities.[1156] The 1993 CPSS Resolution called for the establishment of a comprehensive maritime traffic monitoring system to increase the safety of navigation in EC waters. That same year, the 1979 Directive was amended to include all cargo vessels, not only tankers, bound for or leaving EC ports and carrying dangerous or polluting goods (including oil), and to reinforce the early notification system (the "Hazmat Directive").[1157] The main objective was to harmonize the implementation within the Community of the main ship reporting requirements contained in SOLAS, MARPOL and other relevant IMO instruments, since not all member states were Parties to these conventions.[1158] Soon after the adoption of the Hazmat Directive, the Commission presented a new proposal aimed at extending the

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[1153] The "Prestige"- Council conclusions, (Para. 6) and the EP Streckx Resolution (Para. 43) urged the Commission to reinforce the PSC Directive to reduce the intervals between the inspections of the highest risk vessels, to ensure sufficient inspection rates at all ports to prevent "ports of convenience" and to tighten rules for the refusal of access. In December 2002, moreover, the Commission published an indicative list of ships which would be banned from EC ports if the *Erika I* package were in force (COM (2002) 681, Annex 2).

[1154] The PSC Directive had to be transposed into national legislation by 22 July 2003. On that date, only 7 out of the (at that time) 15 member states (i.e., Belgium, Denmark, France, Germany, Ireland, Spain and the UK) had done so. See: European Commission, DG TREN, Safer ships – Safer seas, Press package 23.07.2003.

[1155] On 24.02.2005, the Court delivered its ruling against Finland for missing the deadline for the transposition of the PSC Directive. Currently all member states, except Latvia, have notified the Commission of their transposition. Reportedly the Commission has decided to start an infringement proceeding against Latvia, which should have transposed the PSC Directive by 1.05.2004. On 19.12.2005 the Commission sent a reasoned opinion to Italy and Malta for a failure to comply with the PSC Directive (i.e., ESPO News, December 2005).

[1156] Council Directive 79/116/EEC, 21.12.1978.

[1157] Council Directive 93/75/EC on minimum requirements for vessels bound for or leaving the Community ports and carrying dangerous or polluting goods. The directive imposes notification requirements specifically on the master and operator and requires more detailed information about the cargo.

[1158] E.g., the IMO Res. A 648(16) on general principles for ship reporting systems. Annex III, moreover, refers to the international agreements governing intervention in case of maritime incidents in waters within and beyond national jurisdiction. Reportedly, Annex III was intended to put political pressure on member states to ratify international agreements.

reporting requirement under that Directive to ships in transit.[1159] The Council, however, questioned the legality of mandatory reporting obligations for ships in transit under international law and rejected the proposal.

The *Erika* accident indicated that the existing system was no longer adequate for the level of risk and for the latest legal and technological developments. A new Directive 59/2002/EC was adopted as part of the *Erika II package* setting out a Community vessel traffic monitoring and information system with a view to enhancing safety and minimizing the environmental impact of shipping accidents: the so-called VTMIS Directive.[1160] The Directive contains four main innovative elements compared to the previous system. First of all, it updates and simplifies the notification requirements under the Hazmat Directive.[1161] Second, it sets in place a reporting and traffic monitoring system which also applies to foreign vessels not bound for EC ports. The member states are required to monitor and take "all necessary and appropriate measures" to ensure that ships in transit comply with mandatory reporting and routing systems approved by IMO in the area according to SOLAS, but outside their territorial sea where they cannot adopt the mandatory vessel traffic service (VTS) systems concerning foreign vessels in transit.[1162] These provisions bring the directive perfectly into line with the LOSC and SOLAS.

Secondly, the VTMIS Directive requires all ships built after 1 July 2002 and calling at EC ports to carry on board an automatic identification system (AIS) (or transponders) and a voyage data recorder (VDR) system ("black box") to facilitate investigations in the case of accidents. Both requirements are consistent with and implement in the Community the new provisions of Chapter V of SOLAS.[1163]

Thirdly, the VTMIS Directive introduces additional reporting requirements with regard to high risk ships,[1164] and increases the capacity of the EC member states to take appropriate measures "without prejudice to international law" to prevent significant threats to the marine environment and to deal with incidents or accidents at sea, including areas beyond their territorial sea, with a view to minimizing their consequences.[1165]

Fourthly, the VTMIS Directive requires member states to elaborate and implement plans and procedures to accommodate ships in distress within waters under their jurisdiction, taking into account the existing IMO guidelines (Article 20). This provision represents the only legal basis for the EC regime on "places of refuge".[1166]

[1159] COM (93) 647.

[1160] Directive 2002/59/EC of 27.06.2002 establishing a Community vessel traffic monitoring and information system. The VTMIS Directive replaced the Hazmat Directive (Article 30).

[1161] VTMIS Directive, Title II, Articles 12-15.

[1162] VTMIS Directive, Articles 5 and 7. The IMO has no approval role with regard to VTS systems. According to SOLAS Reg. V/12 States have to "take into account" IMO guidelines when adopting VTS, but they cannot adopt compulsory VTS outside the territorial sea, see supra n. 948.

[1163] On 6.12.2000, when the directive was proposed (COM (2000) 802), the new Regulation 20 in SOLAS' Chapter V on black boxes on board of ships built after 1 July 2002 had not yet been adopted . However, it was introduced shortly afterwards at MSC 73 in December 2000. SOLAS Chapter V entered into force on 1.07.2002. The VTMIS Directive was adopted on 27.06.2002, but member states were only required to apply its provisions by 5.02.2004 at the latest. Therefore, there is no inconsistency between the two regimes.

[1164] These are defined as ships that have been involved in incidents or accidents at sea, have failed to comply with notification and reporting requirements, have deliberately discharged pollutants or have been refused access to ports. VTMIS Directive, Article 16(1).

[1165] Ibid, Articles 17 and 19 and Annex IV.

[1166] In addition, the PSC Directive (Article 11(6)) allows port authorities to permit the access of ships into port in the event of force majeure or, inter alia, in order to reduce or minimize the risk of pollution.

Like the IMO guidelines, however, the VTMIS Directive does not create a legal duty for EC coastal States to open their ports to vessels in trouble, but simply encourages member states to balance interests in order to ensure that ships in distress "may immediately go to a place of refuge". This is also spelt out in the Preamble (Paragraph 16), which recognizes that the non-availability of a place of refuge may have serious consequences in the event of an accident at sea; however, the acceptance of a vessel into a place of refuge is always subject to authorization by the competent port State authority after taking into account operational and environmental considerations. The lack of a legal duty to grant refuge is also confirmed in Article 18.1(b) that, in the case of exceptionally bad weather or sea conditions, allows member states to prohibit foreign ships from entering (or leaving) their ports if this would endanger human life or the environment. These provisions reflect the existing international law on how to deal with ships in distress asking for a place of refuge.[1167] It is worth noting that the EP, during the first reading of the Commission's proposal on a directive on criminal sanctions for ship source pollution, proposed to make the competent port authority accountable for pollution resulting from denying access to ships in distress.[1168] This rather political amendment was not welcomed by the member states, which were the main targets and was rejected at first reading. This shows that the member states were still not ready to accept obligations which are too stringent in such a sensitive area.

Finally, Article 25 contains some provisions on implementation, including financial sanctions for shipowners/operators/masters or maritime authorities that fail to comply with the obligations under the Directive. In the wake of the *Prestige* accident, the Commission and the Council urged member states to accelerate the implementation of the Directive by 1 July 2003.[1169] However, implementation was very slow and the Commission promptly started infringement proceedings against non-complying member states.[1170]

6.8.5 European Maritime Safety Agency (EMSA)

The lack of implementation by member states is a major problem within the Community and jeopardizes the maximum effectiveness of the EC's maritime safety legislation.[1171] Like at the global level, poor performance may depend to a large extent on the incapacity of the member states to comply with highly technical standards. In 2002, as part of the *Erika II package,* the European Maritime Safety Agency (EMSA)

The existing "EC framework for cooperation in the field of accidental or deliberate marine pollution" (Decision 2850/2000/EC) does not contain provisions on places of refuge.

[1167] For a full discussion of the international and EC regimes on places of refuge see: V. Frank (2005), pp. 53-62.

[1168] EP Resolution (PT_TA-PROV (2004) 0009), 13.01.2004 (Amendment 16). This, however, is "accidental" pollution, which the EP wanted to leave out from the scope of the Directive (i.e., Amendment 10 limits the scope of the Directive to illegal "deliberate" discharges). This fully reflects the critical attitude of the EP vis-à-vis the manner in which the Spanish authorities handled the *Prestige* accident.

[1169] Prestige-Council conclusions, Para. 9. See also: December 2002 Environmental Council, Para. 8; COM (2002) 681, Para. 8, and the Statement by the Commission at the MSC 76, pp. 237-8. The original date for the implementation of the Directive was 5.02.2004.

[1170] In February 2004, the Commission initiated an infringement proceeding against all member states, except Denmark, Germany and Spain, for not respecting the 5.02.2004 deadline. Subsequently, all member states, except Finland and Belgium, notified the transposition of the Directive. In February and March 2005, the Commission started an infringement proceeding against Finland and Belgium. On 15.12.2005, the ECJ ordered the two member states to pay costs.

[1171] Sixth Annual Survey on the implementation and enforcement of EC environmental law (2005), available at: europa.eu.int/comm/environment/law.

was created to assist the Commission and the member states in the application of EC legislation in the field of maritime safety and the prevention of pollution from ships.[1172] Its main tasks are: to provide technical support for the Commission and EC/EEA member states in implementing relevant EC legislation (e.g., by auditing classification societies, organizing maritime traffic surveillance and PSC inspections); to assesses the effectiveness of existing EC rules; and to assist the Commission in updating or drafting new measures along the lines of international developments. In addition, the Agency assists the Commission in monitoring and assessing the implementation of EC directives by the member states.[1173] The EMSA has been operational since early 2003.[1174] In 2005, the Commission, with the close assistance of the agency, launched a specific programme to monitor the conformity and application of the maritime safety legislation for the period 2005-2007. This programme has already resulted in an increase in the number of infringement proceedings against non-complying member states.[1175] The EMSA has proven to be an effective ally of the Commission in ensuring the strict implementation of EC maritime safety rules.

6.8.6 Port Reception Facilities

Recent maritime disasters have focused attention on accidental oil pollution, but the main threat still comes from deliberate operational discharges, such as tank cleaning operations.[1176] To reverse this trend the Community adopted the Directive on port reception facilities (PRF) for shipboard waste and cargo residues.[1177] The PRF Directive applies to all ships using Community ports, regardless of their flag and including fishing vessels and recreational craft (Article 3). The overall purpose of the Directive is to discourage ships from discharging their waste at sea, by making sure that adequate waste reception facilities are available in ports and that they are easy to use and cost-effective. For this purpose, it introduces a duty for all ships to deliver their waste to a PRF before leaving a Community port, with a few exceptions (Article 7). PRF must be easily accessible and should not cause undue delay to a ship's operations. The Directive does not raise particular concerns regarding consistency with international law since it generally implements the PRF provisions under MARPOL 73/78 and the Helsinki Convention.[1178] In addition, it is consistent with the LOSC and falls within the powers of port States to ask all ships entering or leaving their ports to observe special non-discriminatory environmental requirements. The Directive has been implemented with some delays and once again the Commission has promptly taken action against non-complying member states.[1179]

[1172] Regulation 1406/2002/EC, 27.06.2002.

[1173] The EMSA, moreover, assists the Commission with regard to the work of the technical bodies of the Paris MOU, and in the publication, every six months, of the list of ships that have been refused access to Community ports. In addition, the Agency will assist the Commission in any other or future task assigned by EC law in the field of maritime safety and the prevention of pollution from ships.

[1174] The Council in the "Prestige"- Conclusions (Para. 7) urged that the full operation of the agency should be accelerated. In the wake of the *Prestige* accident, moreover, the EMSA has been provided with new tasks in the field of marine response (Regulation 24/2004)

[1175] On 30.09.2005, 68 maritime safety procedures were pending before the ECJ. See: COM(2005)585, p. 5.

[1176] See, supra n 12.

[1177] Directive 2000/59/EC, which entered into force on 28.12.2000.

[1178] Para. 8 of the Preamble calls for consistency with the existing regional agreements and expressly mentions the Helsinki Convention.

[1179] The PRF Directive had to be implemented by 28.12.2002. On 13.05.2003, the Commission initiated infringement proceedings against the UK, Belgium, France, Italy, Finland, Portugal, Austria and the

6.8.7 Ship-Source Pollution and the Introduction of Penalties for Infringements

Penalties which are currently applicable to violations of existing anti-pollution standards are relatively low compared to the benefits of non-compliance and have so far been unable to discourage violations.[1180] In the aftermath of the *Prestige* accident, therefore, the Commission presented a highly controversial proposal that aimed to elevate illegal discharges, including accidental discharges, to criminal offences.[1181] This has so far been the most critical proposal ever put forward by the Commission and the legislative process has been long and difficult. Despite strong opposition from some maritime member states (e.g., Greece and Malta), the Directive was finally adopted in September 2005, over two years after the original proposal. [1182]

The Directive intends to fill three major gaps: the absence of specific EC discharge standards; the ineffective and inconsistent implementation of MARPOL 73/78 in EC waters; and the absence of effective enforcement mechanisms under international law to ensure compliance. Its main purpose is to incorporate the MARPOL 73/78 discharge standards into EC law and to harmonize their enforcement by ensuring that those who are responsible for marine pollution, both natural and legal persons (e.g., the shipowner, master, the owner of the cargo, classification societies) are subject to adequate penalties.[1183] The Directive contains minimum rules and allows member states to take more stringent measures against ship-source pollution in conformity with international law (Article 1(2)).

Originally, the Commission's proposal required member states to treat discharges in violation of MARPOL 73/78 as "criminal offences" to be punished, where appropriate, by means of "criminal sanctions" including, in the gravest case, deprivation of liberty.[1184] Although the objective of the proposed Directive was generally supported by the member states in the Council and by the EP, these provisions raised a number of legal issues under EC and international law, which for a long time have blocked its adoption.[1185]

From an EC law point of view, serious concerns existed concerning using the first pillar (EC Treaty, Aricle 80(2)) as a legal basis for imposing criminal sanctions.[1186] According to the member states a framework decision under the third pillar (EU Treaty) was more appropriate since criminal matters still fall under their

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Netherlands for not complying with the transposition requirements. On 14.10.2005, the Commission took legal action against Poland and sent reasoned opinions to several other member states.

[1180] See, e.g., MTC/OECD (2003).

[1181] COM (2003) 92, 5.03.2003. The proposed Directive has been supplemented by COM (2003) 227, 2.05.2003, for a Council Framework Decision, based on Article 29 EU (third pillar), which strengthens the criminal law framework for the enforcement of anti-pollution legislation.

[1182] Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, adopted on 7.09.2005. In June 2004, Transport Council, upon first reading, reached a political agreement on its common position on the Commission's proposal (10503/04), with Greece and Malta voting against. For a full discussion see: V. Frank (2005), pp. 44-9.

[1183] Ship Source Pollution Directive, Article 1. The Directive covers discharges of oil under MARPOL Annex I and noxious substances under MARPOL Annex II (Article 2 (2)).

[1184] Article 6 of the Commission's Proposal. The main idea is that penalties have to be stringent enough to eliminate all advantages resulting from an infringement and to make compliance a more economical solution (e.g., Article 6(3)).

[1185] "Prestige"-Council Conclusions, Para. 13a; October 2003 Transport Council Conclusions, pp. 8-9 and December 2003 Transport Council Conclusions, p. 6. See also EP April 2004 Resolution (Para. 22) and the Sterckx Report, paras 46-48.

[1186] For a recent discussion on whether the first or third pillar is the most appropriate legal basis for criminal environmental sanctions see: D. Walsh (2005), pp. 1999-208; M. Faure (2004), pp. 18-29 and F. Comte (2003), pp. 147-56.

exclusive competence.[1187] The Commission, on the other hand, insisted on using the first pillar. As discussed in Chapter 2.2.4, acting within the framework of the third pillar has several disadvantages (e.g., unanimity in the Council (Article 34(2) EU): the limited role of the Commission and the EP in the decision-making process;[1188] and the limited jurisdiction of the ECJ and the incapacity of the Commission to initiate infringement proceedings for a violation of third pillar measures. In addition, a framework decision is legally binding but, unlike a directive, does not have direct effect (Article 34(2)(b) EU) and individuals cannot bring polluters before national courts for a violation of its provisions. As a result, adopting a Directive appeared to be easier, because of the QMV in the Council, and more effective because of the enforcement mechanisms available under the first pillar and the involvement of the EP in the co-decision procedure. In addition, even if the EC Treaty does not expressly provide for the Community's competence in criminal matters, there are already several precedents under the first pillar (i.e., the common fisheries policy) requiring member states to impose criminal sanctions for any violation of EC rules while the ECJ has never contested the legal basis of these sanctions.[1189] In its case law, moreover, the Court has made it clear that the principle of loyal cooperation as set out in Article 10 EC requires member states to take all necessary measures, including criminal sanctions, to ensure the effective implementation of EC law.[1190] According to the Court, moreover, member states have to guarantee that violations are punished by sanctions similar to those which apply to breaches of national law, and they have to be effective, proportionate and dissuasive, including criminal penalties.[1191] In June 2004, upon the first reading of the proposal, the Council refused this approach and made it clear that it is up to the member states to decide whether to apply criminal or administrative sanctions.[1192] There was still no agreement on the proper legal basis of the proposed directive.[1193]

In September 2005, the Court put an end to the long controversy concerning whether the first or the third pillar is the most appropriate legal basis for imposing criminal sanctions via secondary legislation.[1194] According to the Court these kinds of measures may be correctly based on the first pillar whenever "on account of both their aim and their content" they are primarily directed at achieving one of the objectives of

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[1187] E.g., October 2003 Transport Council Conclusions, p. 8 and the Speech by the Irish Presidency before the EP-MARE, p. 3.

[1188] The Commission may present a proposal (Article 34 EU) that is adopted by the Council in "consulation" with the EP, which has no right to put forward any amendments (Article 39 EU).

[1189] See, e.g., Council Regulation 2371/2002 (Article 25(1)) and Council Regulation 2847/1993 (Article 31) and Case C-333/99, *Commission v. Republic of France*, Para. 55, and C-9/89, *Kingdom of Spain v. Council*, Para. 29.

[1190] E.g., C-50/76, *Amsterdam Bulb BV* . This view was also shared by the other EC institutions, see: Opinions of the Council's Legal Service (i.e., 12471/02JUR 382 PECHE 140, 27.09.2002 and 11196/01JUR 251 COPEN 41, 15.10.2001); Commission's Legal Service, SEC 2001/227, 7.02.2001, and the EP's Committee on Legal Affairs (PE 329.428; 22.05.2003).

[1191] E.g., Case C-68/88 *Commission v. Greece*, paras 23-25; C-186/98 *Nunes*, paras 9-14, and C-387/97 *Commission v. Greece*, Para. 24.

[1192] See: Political Agreement on the common position of the Council on the Commission's proposal, 14.06.2004, (2003/0037 (COD)/ 10503/04), Article 6.

[1193] E.g., Report on the Transport Council, 10-11 June 2004, p. 18, at europa.eu.int/trans/index_en.htm.

[1194] C-176/03 *Commission v. Council*. In 2001, the Commission drafted a proposal for a Directive on the protection of the environment through criminal law, based on Article 175 EC. The Council rejected the proposal and on 27.01.2003 it adopted a framework decision on the protection of the environment through criminal law based on the third pillar. On 23.03.2003, the Commission, arguing that the first and not the third pillar is the proper legal basis for this kind of measure, brought the Council before the ECJ for violating the division of competences among the EC and the EU.

the EC Treaty, such as the protection of the environment.[1195] This decision opened the door to the adoption of the Commission's Proposal on the basis of Article 80(2) EC. The EC Directive has been supplemented by a Council Framework Decision based on the third pillar, which contains detailed rules on criminal offences and penalties.[1196]

From an international law point of view, the main concerns had to do with the consistency of the Commission's proposal with the LOSC and MARPOL 73/78 and its application concerning foreign vessels in transit.[1197] What was contested in the first place was the fact that the proposal was far more stringent than MARPOL 73/78, which does not make any reference to "criminal offences" and "criminal sanctions". However, as the Commission pointed out, the proposed Directive did not create new crimes, but simply harmonized the way in which pollution offences under MARPOL 73/78 are punished in the EC. All the EC member states are parties to MARPOL and they are already required under that convention to ensure that relevant violations, "wherever they occur", are penalized with sanctions that have an adequately dissuasive nature.[1198] MARPOL 73/78 does not, in principle, exclude the possibility of imposing criminal sanctions, which, in the view of the Commission, are the most effective deterrent against illegal discharges.[1199] There are precedents in some member states (e.g., Italy), and in other parts of the world (e.g., the U.S.), for enforcing MARPOL 73/78 through criminal law, including custodial sentences for illegal discharges.[1200] In addition, Article 9(2) of MARPOL 73/78 allows coastal States to enact laws that go beyond the provisions of MARPOL as long as they are consistent with international law (LOSC). The Council did not initially accept the Commission's view and in the first reading it decided to eliminate any reference to "criminal offences" or "criminal sanctions".[1201] Eventually a compromise was reached and the adopted Directive qualifies illegal discharges as "infringements" if they are committed with "intent, recklessly or by serious negligence" (Article 4). However, infringements may be regarded as "criminal offences" by and in the circumstances provided for in the Council Framework Decision (ibid.). Infringements have to be punished with "effective, proportionate and dissuasive" penalties, which may include criminal or administrative penalties, but there is no longer any reference to deprivation of liberty in the text of the Directive (Article 8.1). Penalties are regulated in the Council

[1195] Case C-176/03, *Commission v. Council,* Para. 51. See also: ibid, paras 48 and 53. As a result the Court rejected the argument of the Council that there was no legal basis for the Directive proposed by the Commission and annulled the Council's framework decision. See also: the Commission's Communication on the implications of the Court's judgment of 13 September 2005 (Case C-176/03), COM (2005)583, 22.11.2005.

[1196] Council Framework Decision 2005/667/JHA strengthening the criminal law framework for the enforcement of the law against ship-source pollution.

[1197] E.g., the "Prestige"-Council Conclusions, Para. 8 and the October 2003 Transport Council conclusions, p. 8. For a full discussion of the issues raised by the Commission's Proposal under international law, see: V. Frank (2005), pp.

[1198] MARPOL 73/78, Article 4(1) and 4(4).

[1199] However, IMO SG, E. Mitropoulos, talking before the EP-Mare, supra n. 247, made it clear that "IMO Conventions have not been drafted with the prospect of non-compliance giving rise to criminal prosecution (…)".

[1200] See the Italian Law 979, 31.12.1982 (GIURI 16, 18.01.1983). For the US see: IMO doc. MEPC 51/14, 26.01.2004.

[1201] The Council's Common Position on the Draft Directive on ship-source pollution (1964/04), 29/09/2004, Para. 8 and Article 4. References to criminal sanctions and offences have also been omitted in the Title and in Article 1. See also: General Secretariat of the Council, Revised Draft of the Commission's proposal discussed within the Shipping Working Group, 30/01/2004; (2003/0037(COD)/5754/04).

Framework Decision, which, in the worst case scenario, includes custodial sentences.[1202]

In addition, the original Commission proposal has been strongly criticized by the EP, the shipping industry and some member states in the Council for including and treating as criminal offences "accidental discharges resulting from damage to the ship or its equipment", which are explicitly exempted from the MARPOL 73/78 regime.[1203] As a result, the adopted Directive does not include accidental discharges, but refers to the definition of a "discharge" under MARPOL 73/78 (Article 2(3)) and provides for the same exceptions as those which exist under MARPOL 73/78 (Article 5).

The Directive (Article 3(1)), like the original proposal, applies to discharges occurring within and beyond the territorial sea of the member states (i.e., straits used for international navigation, the EEZ and the high seas). Initially, the application of the Directive beyond the territorial sea was strongly contested, especially vis-à-vis foreign ships in transit. The provisions of the Directive, however, may only be enforced against foreign ships when they are voluntarily in the ports or offshore terminals of a member state (Article 6(1)). Only in this case "shall" member states undertake appropriate inspections, taking into account the relevant IMO guidelines, to detect discharges in violation of MARPOL, wherever they have occurred. This is completely consistent with Article 218(1) of the LOSC on port State enforcement, with the only difference being that under the Directive the exercise of port state enforcement is compulsory.[1204] However, it is necessary to keep in mind that, according to Article 230(1) of the LOSC, violations of applicable pollution standards committed by foreign vessels beyond the territorial sea may only be punished with financial penalties. Non-monetary penalties may only be imposed with regard to "wilful and serious pollution" committed in the territorial sea (LOSC, Article 230(2)). Article 9 of the Directive makes it clear that its provisions shall apply in accordance with the safeguard provisions of Section 7, Part XII of the LOSC, which contains Article 230.

The Directive, just as the original proposal, does not provide EC member states with enforcement powers vis-à-vis foreign ships which are not directed towards EC ports, but it simply establishes a system of collaboration and information exchange between the member state holding the information about the suspected discharge and the next (EC or non-EC) port of call (Article 7(1)(a) and (b)).[1205] With regard to enforcement measures against foreign ships in transit through the EEZ, Article 7(2) substantially reproduces the text of Article 220(6) of the LOSC, with the only

[1202] Framework Decision 2005/667/JHA, Article 4(2) provides for punishment ranging from five to ten years imprisonment for pollution offences which have caused "significant and widespread damage to water quality, to animal or vegetable species or to parts of them and the death or serious injury of persons". Article 6(1) sets out financial penalties for legal persons up to a maximum of 1.5 million Euros.

[1203] COM (2003) 92, Article 2(3). See, *inter alia*, EP Resolution (PT_TA-PROV (2004) 0009), 13/01/2004, Amendment 10; and "Industry Comments on the Council's Political Agreement", available at: www.ecsa.be/publications/043.pdf. See also the December 2003 Transport Council Conclusions, p. 6. The main concern is that sanctioning accidental pollution would excessively criminalize people working in a sector that is already having many problems in attracting new people.

[1204] Conversely under LOSC, Article 218(1), port States have a right, not an obligation, to investigate discharge offences, including those committed in the EEZ and high seas.

[1205] In particular: (a) if the next port of call of the ship in transit is in another member state, the member state concerned shall cooperate closely in the inspection referred to in Article 6(1) and in deciding on the appropriate measures, (b) if the next port of call is a port outside the EC, the member state shall inform the State concerned about the suspected discharge and request that State to take appropriate measures.

difference being that under the Directive the EC member states do not have a mere right, but a positive legal duty ("shall") to take enforcement action.[1206]

The difficulty in detecting and tracing illegal discharges might hamper the effective enforcement of the Directive. Article 10, therefore, requires closer cooperation between the member states, the Commission and the EMSA in the establishment of mechanisms for the identification/monitoring/tracing of pollution. To ensure the full enforcement of the Directive, the EP has put forward a set of amendments, including the establishment of a European coastguard equipped with the powers and instruments which are necessary, *inter alia*, to detect discharges and to trace and prosecute polluters.[1207] The idea of creating a European coastguard along the lines of the US coastguard is not new, but has never been supported by the member states in the Council, which rejected it upon first reading. On the other hand, the Commission, which has never been clearly in favour of the establishment of an EC coastguard, supported the EP's amendment.[1208] As a compromise solution, the Preamble to the Directive invites the Commission to undertake a feasibility study on a European coastguard, clarifying all the costs and benefits which could eventually result in a legislative proposal.[1209]

In the light of the observations made so far, the Directive seems to be in full conformity with international law and the LOSC. Besides, the safeguard contained in Article 9 guarantees that measures adopted by member states to implement the Directive are not discriminatory or otherwise inconsistent with the LOSC. Foreign vessels know that if they wish to operate in the EC they have to comply with MARPOL 73/78, otherwise they will be severely punished. Nevertheless, even after its adoption, the consistency of the Directive with international law (MARPOL 73/78) continues to be questioned by some. The use of "serious negligence" as a criterion for infringement creates major concerns and is considered to go beyond MARPOL, which only applies to intentional violations or recklessness.[1210] In the view of sceptics, this vague, subjective, and ill-defined criterion may have the effect of hampering the right of innocent passage in the territorial sea, which, according to the LOSC, may only be suspended in case of "wilful and serious pollution". Although the Commission has reassured that only the most serious pollution incidents will be regarded as criminal offences punishable with custodial sentences, it is likely that the application of the Ship-Source Pollution Directive to ships flying non-EC flags will give raise to some legal problems.

6.8.8 The Way Forward: the Erika III Package

The Erika I and II legislation has considerably strengthened safety and anti-pollution within the Community and has drastically reduced the risk of oil pollution from ships.

[1206] Under Article 220(6) of the LOSC, coastal State enforcement jurisdiction in the EEZ, just like in a port, is only facultative.

[1207] EP Resolution, Amendment 22. See also EP April 2004 Resolution (Para. 15) and the Sterckx Resolution, Para. 34 and, in general, Greens/EFA in the EP at: www.greens-efa.org/en/press/detail.php?id=1738&lg=en

[1208] E.g., the Commission's response to the EP-MARE questionnaire (at: www.europarl.eu.int/comparl/tempcom/mare/pdf/quest_answ_ec_en.pdf); Policy challenges and Budgetary means of the Enlarged Union 2007-2013 (COM (2004) 101). Conversely, in the White Paper on Transport (2001), p. 91, the Commission does not support the idea of an EC coastguard.

[1209] Ship Source Pollution Directive, Preamble, Para 11.

[1210] See the Speech by Judge T. Mensah at the Eighth Cardwallader Memorial Lecture (2005), and the reply by Mr. F. Karamistos, Director of the Maritime Transport and Intermodality Directorate of DG TREN, reported by INTERTANKO, available at: www.intertank.com/templates/Page.aspx?id=4699.

In its 2004 Resolution, however, the EP urged the Commission to continue and reinforce existing efforts toward improving maritime safety and proposed a concrete set of measures. As a response, in November 2005, the Commission presented a new package of legislative proposals (the Erika III package) with the double objective of improving safety at sea, along the lines of the Erika I and Erika II packages, and restoring the competitiveness of European flags by ensuring a level playing field for all operators and eliminating competitive advantages for substandard ships.[1211] At the same time, the Erika III package will strengthen the safety aspects of the future integrated Maritime Policy[1212] and will contribute towards achieving the objective of the Marine Strategy. Reasons of space prevent a full discussion of the Erika III package, which contains seven legislative proposals, divided into two main themes: (a) improving accident and pollution prevention and (b) dealing with the aftermath of the accident.[1213] Only the main elements of the first set of proposals will be briefly discussed.

First of all, the Commission presented the announced proposal for a directive on compliance with flag State requirements, with the overall objective of increasing the quality of European flags.[1214] In particular, the proposal aims at ensuring that member states effectively and consistently discharge their obligations as flag States in accordance with the IMO conventions and provides a mechanism for the harmonized interpretation of IMO measures which are left to the discretion of the contracting Parties (Article 1(1)).[1215] Member states are required ("shall") to ratify IMO conventions (Article 3(1) and (2)) and to closely monitor compliance with international standards of vessels flying their flags, both before and after registration. For this purpose they need to have maritime administrations in place operating in accordance with high quality criteria set out in the proposal. In addition, the proposed Directive incorporates into EC law and makes mandatory the IMO Code on compliance and encourages the use of the IMO Voluntary Audit Scheme.[1216] Ships registered under the flag of an EC member state, which has demonstrated high quality results (e.g., through the application of the IMO flag audit scheme), are granted incentives in the form of simplified controls in EC ports. The same incentives may also apply to ships registered under the flag of third countries, which, on the basis of an agreement concluded with EC member states, undertake to use the same quality standards. The proposed directive intends to reinforce and supplement the main

[1211] Communication from the Commission, Third package of legislative measures on maritime safety in the European Union, 23.11.2005, COM(2005) 585. The Erika III is an essential element of the Commission's strategic objectives for the period 2005-2009 (COM (2005) 12, 26.01.2005. On 23 November 2005, the Commission's proposals were transmitted to the EP and the Council, which have not yet started the first reading. Reportedly, the final adoption cannot be expected before late 2007.

[1212] As discussed in Chapter 3.5.3, the process toward the establishment of a Maritime Policy for the EU is still in a preliminary stage. That Policy should be aimed at ensuring efficient, high quality maritime transport which respects the environment and human beings.

[1213] See: the Commission's proposal for a Directive on accident investigations and the Commission's proposal for a Directive on the civil liability of shipowners.

[1214] I.e., COM(2005) 586, 23.11.2005. The proposed Directive is based on Article 80(2) and Article 3(1) of Directive 94/57/EC (Classification Societies Directive), which already requests member states to comply with IMO Res. A. 847(20) on guidelines to assist flag States in the application of IMO instruments.

[1215] The proposal foresees the development of harmonised procedures for the application of exceptions under IMO conventions and the harmonised interpretation of issues left to the discretion of administrations and unified interpretations for provisions laid down in IMO conventions (Article 3(6)).

[1216] Article 6(5). However, according to Article 3(4) member states "shall take due account" of the IMO Code on compliance.

weaknesses of the IMO regime (e.g., the lack of IMO control powers, the high degree of discretion, derogations and exceptions contained in IMO instruments, and the non-mandatory character of many IMO measures) and does not raise problems of consistency with international law. Its content, however, is very controversial and is expected to be extensively debated in the Shipping Working Group of the Council. The proposal, indeed, touches upon sensitive issues such as the registration of ships under a flag of a member state (Article 5), which falls within the national sovereignty of the member states. However, in the view of the Commission, whereas flagging is still under the sovereignty of the member states, the responsibility for the harmonized application of rules on granting and maintaining flagging rights rests on the Community as long as no international control systems are in place.[1217] The legislative process is at its very early stage and the road ahead may be long and difficult.[1218]

In addition, the Commission has presented a proposal amending the VTMIS Directive with the primary objective being to establish a clear legal framework for places of refuge thereby filling in the gaps of the previous regime.[1219] The proposal, like the VTMIS Directive, does not establish a duty for member states to grant a place of refuge, but requires the establishment of an independent competent authority responsible for assessing the situation; selecting a suitable place of refuge on the basis of an inventory prepared by the member state; and eventually authorizing the access of ships in distress into the selected place (Article 20(2) and 20a (2)(b)). The name of the competent authority has to be made public, while the inventory of potential places of refuge has to be communicated to the Commission (Article 20a(3)). In addition, prior to accommodating a ship in distress in a place of refuge, the member state "may" request the ship's operator, agent or master to present an insurance certificate or a financial guarantee covering his liability for damage caused by the ship (Article 20(b)). The absence of such an insurance or guarantee does not exempt the member states from conducting the prior assessment. The issue of places of refuge is highly sensitive and member states have in the past been very sceptical in accepting strict rules on the accommodation of ships in distress without financial guarantees and have always opposed the publication of an inventory of places of refuge in waters under their jurisdiction. Although the Commission's proposal takes these concerns into account, it is expected to give rise to some controversies in the Shipping Working Group.

Finally, two additional proposals amend and reinforce the existing directives on classification societies and PSC. The first proposal intends to improve the quality of the classification societies authorized to conduct inspections on behalf of the EC member states, by increasing their independence, competence and responsibility. The proposal envisages, inter alia, the establishment of an independent system for the auditing and certification of the quality of the recognized organizations, which is complementary to the control exercised by the Commission. In addition, it introduces the possibility for the Commission to impose financial penalties on poorly performing organizations. The proposal for the amendment of the PSC Directive intends to reinforce PSC inspections by introducing a 100 per cent target for inspection, detailed and more frequent controls for high-risk ships and reduced inspections for high-quality

[1217] COM(2005)586, Explanatory Memorandum, p. 8. See also infra n. 428.

[1218] The EP has only recently (April 2006) appointed the Rapporteur, but has not yet started formal discussions, while the Council has decided that for the time being it will deal with only two of the proposals (the PSC and VTMIS proposals).

[1219] I.e., COM(2005)589, 23.11.2005. In addition, the proposal introduces the use of AIS on board of fishing vessels and requires member states to further develop the Safe Sea Net database.

ships. In addition, it extends the ultimate sanction of banning ships from EC ports to all types of vessels, not only high-risk ships, which have high detention records.

6.9 The Community's Action at the International Level

International cooperation is one of the main components of the CPSS and since the very beginning has been considered as the most effective tool to enhance maritime safety and to reduce the environmental impact of international shipping on EC waters.[1220] Today, just like a decade ago, the main threat to European seas is posed by the transit traffic of ships flying the flag of non-EC member states and not directed towards EC ports. In order to be effective, maritime safety and anti-pollution standards should apply to all ships, not only those flying European flags. The Community, therefore, has been traditionally determined to enhance its participation in the competent international forums to promote the adoption of global standards along the lines of those of the EC.

Unlike in the environmental policy, the Community's external competence in the field of maritime transport is not expressly laid down in the EC Treaty, but finds its legal basis in the ECJ's doctrine of the "implicit" external powers discussed in Chapter 2.3.2(b). Such competence, indeed, stems directly from the exercise of internal powers and is "necessary" to achieve the objectives of the EC maritime safety legislation.

For a long time, however, the member states used the lack of a specific legal basis in the Treaty and the subsidiarity principle to keep the Community away from the international scene and to preserve their individual participation in the IMO. In the last decade, however, the continuous expansion of the scope of EC legislation has progressively eroded the capacity of the member states to act alone. Still with some reluctance, they had to accept the Community's involvement in international decision-making.

After the accession, on 1 May 2004, of the ten new EC member states, including Malta and Cyprus, about 25 per cent of the world's fleet is currently registered under EC flags and nearly 40 per cent is beneficially controlled by European companies.[1221] Most of the EC maritime safety legislation also applies to the EEA countries (e.g, Norway and Iceland). In addition, since maritime traffic to and from EC ports represents over 30% of the global traffic, EC safety rules apply to a high percentage of the world's fleet. The EC has become one of the main shipping players and its participation in the multilateral development of maritime safety rules and standards appears to be beneficial to all. In the aftermath of the *Prestige* accident the Community reconfirmed its firm determination to "play a leading role in the international efforts in pursuit of stringent international rules on maritime safety, in particular within the IMO".[1222]

[1220] The CPSS (Para. 61) calls for an enhanced role of the EC in the IMO and other relevant organizations dealing with vessel-source pollution. See also CPSS, Paras 146-151 and the Commission's Communication, "Community Participation in International Organs and Conferences", SEC (93) 36, 1.03.1993, p. 18.

[1221] Together with EEA countries these percentages increase to respectively 28% and 43% - Commission Staff Working Paper (2005) at: http://ec.europa.eu/transport/maritime/safety/doc/package3/en/working_paper_en.pdf. Greece, Malta and Cyprus have respectively the first, fourth and the sixth largest fleets in the world.

[1222] December 2002, Copenhagen European Council (Para. 33). See also EU Presidency Statement N.2 at the 4th ICP, June 2003, available at: europa-eu-un.org/articleslist.asp?section=11; the March 2003 Transport Council conclusions, p. 12, and COM (2002) 539, Action 22, p. 26.

6.9.1 Division of External Competence in the Field of Oil Pollution from Shipping

As already discussed, the Community and the member states share competence in the field of maritime transport and maritime safety. This is reconfirmed in the Declaration of competence deposited by the Community pursuant Article 5(1) of Annex IX of the LOSC at the time of the accession to the LOSC. The Declaration makes it clear that in the field of maritime transport, the safety of navigation and the prevention of marine pollution as regulated in Parts II, III, V, VII and XII of the LOSC the competence is shared with the member states.[1223] As discussed in Chapter 5.2.4, however, the Declaration, recalling the *ERTA* Doctrine, recognizes the evolving nature of the Community's competence which, as a consequence of pre-emption, may become exclusive. The Declaration lists the existing EC maritime safety legislation covering matters governed by the LOSC and makes it clear that the nature of the Community's competence stemming from existing and future EC legislation must be assessed on a case-by-case basis looking at the scope and the content of each measure.[1224]

Most of the EC maritime safety legislation is in the form of directives based on Article 80(2) EC. These directives seek a higher degree of harmonization compared to environmental directives adopted under Article 175. This is, in particular, the case for all Article 80(2) directives directed at ensuring the uniform and consistent application of IMO standards within the Community.[1225] Uniformity and the complete harmonization of rules among the member states is indeed one of the main objectives of the CPSS. Most of the Article 80(2) directives do not only have an environmental or safety objective, but also aim at eliminating all differences which may work as a barrier to trade (e.g. CDEMs) between the member states thereby protecting competition. Article 80(2), unlike Article 176, does not allow member states to maintain or introduce more stringent protective measures. Unless it is explicitly provided in the Directive, therefore, member states are not entitled to adopt higher standards, which would jeopardize the full achievement of the objective of the EC legislation. Maritime safety directives, except the Ship-Source Pollution Directive, do not contain such a possibility and normally lay down maximum standards. In other words, they "totally harmonize" the matter thereby triggering pre-emption. The same holds true for maritime safety regulations (e.g., the phasing out of single-hulled tankers), which contain maximum standards.[1226]

As discussed in Chapter 4.2.2.2, the fact that EC legislation totally harmonizes the matter is not by itself sufficient to trigger pre-emption, but is necessary also to look at the international agreement, whether it contains minimum or maximum standards. As already mentioned, it is difficult to apply this criterion in the field of maritime safety. Regional maritime safety standards (e.g., HELCOM shipping rules; the 2002 Emergency Protocol of the BARCON) are normally minimum standards and do not

[1223] Reportedly, in 1998, the Commission, with the approval of the Council, sent a letter to the UN Secretary General explaining the division of competence. This letter has not been published.

[1224] All relevant legislation is listed in an Annex to the Declaration, under the title "*maritime safety* and *prevention of marine pollution*" (reproduced in Annex II to this study). It is interesting to note that EC legislation is listed with titles linked to the IMO Conventions, not to specific issues (e.g., Regulation (EEC) No. 2158/93 on the application of amendments to SOLAS and MARPOL 73/78). Reportedly, this has been done in order to allow third States to immediately recognize the IMO Conventions and to make it clear that the member states are bound by IMO Conventions not only through ratification, but also though EC law.

[1225] See, *inter alia*, SEC (2002) 381 on the EC's accession to the IMO, 9 April 2002, Para. 2.

[1226] E.g., Council Regulation 1726/2003, on transport of oil in single-hulled tankers; Commission Regulation 2158/93 on the application of amendments to SOLAS and MARPOL 73/78; and Council Regulation 2978/94 on the implementation of IMO Resolution A.747 (18) on the application of tonnage measurements of ballast spaces in segregated ballast oil tankers.

trigger any exclusive competence on the part of the Community. Member states, therefore, seem to be free to agree on higher standards for ships flying their flag acting within these bodies. Conversely, it is difficult to say whether IMO conventions contain maximum or minimum standards. Some GAIRAS (i.e., CDEMs, or discharge and navigational standards in straits used for international navigation) represent minimum standards for flag and port States and, at the same time, maximum requirements for coastal States. The IMO conventions do not normally make a distinction between port, coastal and flag States.[1227] However, in the light of the Court's latest case law, given the fact that the matters discussed in the IMO and other relevant bodies have been "largely harmonized" by the Community and that the adoption of higher standards in MO standards may affect the uniform application of EC rules, its member states are pre-empted from assuming conflicting obligations or agreeing on higher standards for the same subject matters.[1228]

In short, on the basis of its maritime safety legislation the Community has acquired exclusive competence in a large number of matters regulated by the IMO (e.g., in the field of MARPOL's Annex I, Regulations 13 G and H; and SOLAS, Chapter V/20) and other relevant bodies and the member states have lost their capacity to negotiate and take individual decisions in these matters. The lack of a legal status in the IMO and the observer status at the UN, however, makes it impossible for the Community to exercise its competence in these forums, requiring it to act through the coordinated action of its member states.

Member states maintain their exclusive competence with regard to the exercise of jurisdiction over their vessels, the flagging and registration of ships and the enforcement of administrative or penal sanctions, but they have to act consistently with EC law.[1229] Likewise, in the absence of EC legislation or outside its scope, member states are substantially free to participate in the development of international maritime safety rules as long as they do not interfere with intra-Community trade (Article 28 EC). Following the broad interpretation of the Court, some maritime safety standards (CDEMs) might be considered as "measures having an equivalent effect" to trade restrictions and to fall within the scope of that prohibition.[1230]

Nonetheless, on the basis of Article 10 EC they must closely cooperate with EC institutions in order to defend the Community's interests. As discussed in chapter 4.2.4.1, Article 10 requires member states, as a minimum, to consult the Commission on shipping-related issues which may affect EC interests and to make an effort to coordinate their positions before discussing these matters at the international level. In the past there have been several attempts to formalize cooperation in the field of maritime transport, but they have not been very successful.[1231] In the absence of a

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[1227] E. Hey and A. Nollkaemper (1995), pp. 291-2 and E. Hey in M. Evans and D. Malcom (eds.) (1997), pp. 283-284

[1228] E.g., Opinion 1/03 (paras 126 and 133). See in detail Chapter 4.2.2.1.

[1229] See the Community's Declaration upon the formal confirmation of the LOSC. See also: Case C-221/89, *Factorame* (paras 13-4); and Case C-286/90, *Poulsen* (Para 15). See also supra n. 1217.

[1230] For a full discussion on the residual powers of member states and "measures having an equivalent effect to trade restrictions" see: Chapter 4.2.3. In Case C-379/92, *Peralta* (paras 23-5), the Court excluded that the Italian legislation introducing more stringent discharge standards compared to MARPOL was contrary to Article 30.

[1231] Council Decision 77/587/EEC setting up a consultation procedure on relations between member states and third countries in shipping matters and on action relating to such matters in international organizations. The aim of these consultations, however, was to determine whether the shipping-related issues dealt with by an international organization raised problems of common interest, but it was up to the member states to decide whether or not they should coordinate their action (Article 2). In 1996, the Commission tried to reinforce the consultation procedure and proposed a prior Commission

"code of conduct", however, the forms of coordination vary depending on the forum and the issues on the agenda.

6.9.2 The Community's Participation and Coordination in IMO

The Community is not a party to the IMO Convention, which reserves membership exclusively to States, and it does not have observer status in the organization.[1232] The Commission participates in the IMO meetings on the basis of an Agreement of Mutual Co-operation concluded between the Commission and the IMO Secretary-General in 1974.[1233] At that time, the CPSS had just been established but it was already clear that the two organizations had to work together and harmonize their policies. However, due to the strong opposition of some member states (especially the UK which acceded in 1973) to the EC's participation in the IMO, the Agreement was concluded by the Commission, as the executive body of the Community, and the Council simply took note of it. Reportedly, the member states had no problems with it since it was not a formal Community agreement. As a result, the Community is not recognized in IMO and the Commission, due to its observer status, cannot negotiate on behalf of the Community, not even in relation to issues under the EC's exclusive competence. Only on one exceptional occasion has the Commission been given a formal mandate from the Council to negotiate within the IMO-LEG two Articles of the 2002 Athens Protocol on behalf of the Community.[1234] The Community, therefore, normally participates in the activities of the organization by coordinating the positions of the member states.[1235] This coordination between the Community and the member states in preparing for IMO meetings started on a very informal basis in 1994 during the negotiations of the IMO convention on the training of seafarers (1995 STWC). Since training is directly linked to safety, the Commission claimed exclusive competence on the basis of Article 71(1)(c) EC. This claim created a clash in the Council and

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authorization for the negotiation by member states of agreements with third countries in the field of maritime transport (COM(1996) 707, OJ C 113, 11.04.1997), but, in 2001, it withdrew the proposal (COM (2001) 763).

[1232] 1948 IMO Convention, Article 4. Information about the EC coordination procedure for the IMO is based on interviews to the representatives of DG TREN who chair the coordination meetings and normally attend the IMO sessions (Mr. J. De Dieu and Mr. M. Wieczorkiewicz) and the former permanent representative of the Commission at the IMO (Mr. J. den Boer). The author remains exclusively responsible for the opinions expressed in this section.

[1233] The Agreement (28/06/1974) contains provisions on technical cooperation and the exchange of information. It has never been changed and it still forms the basis for cooperation between the EC and IMO and for the participation of the Commission, as an observer, at all IMO meetings. See: SEC (2002) 381 on the EC's accession to IMO, 9.04.2002, Annex III. See also: Exchange of letters between the Commission and the IMO Secretariat on consultation, exchange of information, Commission participation as an observer (11.02.1974 and 28.06.1974) and on arrangements for the effective implementation of IMO conventions (5.01.1983 and 2.02.1983), all collected in: "Relations between the Community and International Organizations ("Relations"), EEC Commission (1989), pp. 163-6.

[1234] International Conference on the Revision of the 1974 IMO Athens Convention on the Carriage of Passengers and their Luggage by Sea, held on the 18 July 2002. The EC Commission, for the first time, submitted a Draft Protocol "*on behalf* of the European Commission and *its Member States*"(emphasis added) (i.e., LEG/CONF.13/7, 18.07.2002). This was necessary to remove a series of legal obstacles for the EC member states to ratify the Athens Protocol, which touched upon issues of the EC's exclusive competence. In 2003, the Commission requested an authorization from the Council on the conclusion by the Community of the Athens Protocol (i.e.., COM(2003) 575).

[1235] As the Court has made it clear, when the Community cannot become a party to a Treaty, its external competence may be exercised by the member states acting jointly in the interest of the Community (i.e., ILO Opinion 2/91, Para. 5).

eventually a Gentlemen's Agreement was adopted.[1236] According to this Agreement, member states may negotiate in the IMO as long as they do not infringe the EC's competence and EC legislation and as long as they coordinate their positions. EC coordination has to take place at two levels: in Brussels, under the chairmanship of the Commission and on the spot in London, under the chairmanship of the Presidency. The 1994 Gentlemen's Agreement still represents the basis for EC coordination, although the mechanism has developed considerably. Before the *Erika* accident, when there was not much EC maritime safety legislation in place nor strong interests to be defended in the IMO, the EC coordination was very informal. With the evolution of the EC maritime safety legislation the EC interests in the IMO increased and the EC coordination mechanisms have been reinforced and formalized to a large extent. In the period 1995-2000, DG TREN (not the Commission itself), appointed a permanent representative at the IMO.[1237] Currently, EC coordination takes place in preparation for the meetings of the IMO Council, the Assembly, the main IMO committees (i.e., MEPC, MSC and, occasionally, LEG) and, depending on the issues on the agenda, NAV and other sub-committees.[1238]

Before convening the meeting in Brussels, representatives of DG TREN prepare and circulate a working document suggesting the EC positions on issues on the IMO agenda to be discussed during the coordination meeting. EEA countries may participate in the coordination meetings as observers without voting rights.[1239] However, they may inform the member states of their positions on specific issues and, if time allows, they may try to get support. Norway is always present and always takes the floor. Agreed positions are then circulated by the Commission to the member states, together with a formal invitation from the Council Secretariat for on the spot coordination.

On the spot, before the opening of the IMO sessions, a general EC coordination meeting takes place under the chairmanship of the Presidency assisted by the Commission to endorse the coordinated positions agreed upon in Brussels and to define new common approaches. Formally coordinated positions, when adopted by unanimity, have to be adhered to by all delegations both at the plenary and working group levels. If, in Brussels, it was not possible to agree on all items on the IMO agenda, the Presidency will try to reach common positions on the spot. If it does not succeed, those member states which do not agree with the majority position should keep a low profile. One of the unwritten rules under the 1994 Gentlemen's Agreement is indeed that if a member state is not seriously affected by the position of the majority, it should either support it or remain silent, but should never raise objections or speak

[1236] The 1994 Gentlemen's Agreement as a document does not even appear in the proceedings of the Council. The guardian of this Gentlemen's Agreement is the Commission.

[1237] Mr. J. den Boer was appointed as the permanent representative. Normally, permanent representatives of the Commission in IOs (e.g., FAO, ILO, UN) come from DG RELEX. Having a representative in the IMO resulted in a major financial burden, and DG TREN decided to do this subject to its own responsibility. Mr. Den Boer left the post in 2000. In view of the enlargement the post has now been frozen. Now there are discussions in Brussels on appointing a new permanent representative in the IMO, but it is uncertain whether he/she will be a representative of DG TREN or DG RELEX. The legal basis for this position is still the 1994 Gentlemen's Agreement, See, *inter alia*, SEC (2002) 381 on the EC's accession to the IMO, Para. 5.1.

[1238] Formal EC coordination for the IMO subcommittees also depends on the interests of the member state holding the Presidency. Sometimes it takes place more informally (e.g., by telephone) without convening a meeting in Brussels. EC coordination for LEG is uncommon since issues relating to EC interests are rarely at stake (e.g., liability issues).

[1239] However, EEA countries cannot participate in the adoption of common positions within the Council (see below).

against it, especially in plenary session.[1240] In September 2004, the Commission laid down these general principles in an informal document circulated to the member states.[1241]

The coordinated position is presented by a member state or the Presidency, depending on the circumstances.[1242] In the IMO there is some resistance against bloc-forming and occasionally non-EC Members raise objections when the Presidency speaks on behalf of the 25. Most of the time, therefore, the Presidency prefers to allow the member states to take the floor. In both cases, it will always be the position of a single member state since the Community, as a legal entity, is not recognized in the IMO. What is important is to have the support of all the 25. The chairman of the IMO meeting, indeed, does not count votes but supports for a position. Although the Commission, on the basis of the 1974 Cooperation Agreement, has the right to speak, it normally does not take an active part in the debate. Representatives of the Commission sit in the back together with other international organizations and control the member states. The Commission, however, plays a fundamental role in trying to obtain the support of non-EC Members, lobbying in London and around the world.[1243]

The level of coordination among member states in IMO has been traditionally rather weak and the mechanism worked as long as there were no strong interests on the table. But when issues of national concern are discussed, some member states, especially shipping nations, tend to express their views and take their own course of action, often deviating from what has been decided during the EC coordination.[1244] The Commission has so far reacted differently: sometimes simply inviting the member state to align with the coordinated position, other times adopting a "name and shame" approach and reporting the issue to the COREPER, but without taking any concrete action.

With the accession, on 1 May 2004, of new member states with strong flag State and ship owner interests (i.e., Cyprus, Malta and Poland) it became evident that in the future it will be more difficult to reach agreements in Brussels and to ensure coordination among the member states in London. After the enlargement, therefore, the Commission has taken new steps toward reinforcing EC coordination and ensuring that member states do not deviate from agreed positions.[1245] A clear distinction has been introduced between issues of "Community competence" where there is EC legislation which leads to the EC's exclusive competence (e.g., in the field of

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[1240] Conversely, according to the 1994 Gentlemen's Agreement if a member state is firmly against a coordinated position and its opposition is respected by other member states, it can raise the issue at the IMO meeting. In any case, if a member state is forced to deviate from a common position it shall, as soon as possible, inform the Presidency and the Commission to allow them to raise the issue at the coordination level.

[1241] These principles have been added as "preliminary remarks" to the Commission's working document for the EC coordination in the preparation of MEPC 52.

[1242] See, *inter alia*, SEC (2002) 381 on the EC's accession to the IMO, 9.04.2002 (Para. 3).

[1243] The Commission conducts intense negotiations with other IMO Members (e.g., Russia, China, India) outside the IMO meetings. Reportedly, negotiations take place more in the hallway of the IMO building and during the coffee breaks rather than in the plenary meetings.

[1244] Reportedly, for instance, at MEPC 49 Greece opposed the Western European PSSA proposal presented by 6 member states but subsequently in the coordination meeting in Brussels it agreed to support that proposal. Similarly, during the discussions on ballast waters in MEPC 51, the Netherlands opposed an Italian proposal on the exchange of ballast waters in the high seas after it was agreed on the spot to support it or to remain silent, but not to raise objections.

[1245] Reportedly, the enlargement has not effected the EC coordination in the IMO since, apart from Cyprus, Malta and Poland, the other new member states do not have strong shipping interests and they are not very active in the IMO. During the coordination meetings they usually remain silent.

Regulations 13 G and H of MARPOL's Annex I) and issues of "Community interest" where the competence is still shared with the member states. On issues of Community interest the member states have to try to achieve a "coordinated position" within the informal meetings chaired by the Commission in Brussels. On issues of Community competence they have to reach "common positions" within meetings chaired by the Council.[1246] However, considering the extending scope of EC maritime safety legislation, it might be quite complicated to go to the Council (COREPER) every time that an issue of exclusive competence is discussed in the IMO. As a solution, it has been decided that, if there are diverging views on issues falling within the Community's exclusive competence, it will be up to the Council acting by QMV to adopt the common position on the basis of a suggestion from the Commission.[1247] This position is legally binding for all member states, which may be brought to Court if they do not follow what has been agreed. While, in a first stage, this practice only applied to matters under the EC's exclusive competence, the Commission has taken new steps towards extending it to matters of shared competence.

In addition, the Commission is firmly determined to eliminate the existing deadlock which impedes the Community from being represented in the IMO. It is worth stressing that it is the Commission, not the Community, which has observer status in the organization. In February 2005, for instance, the MEPC 54 refused to accept a submission to the BLG sub-committee presented on behalf of the Community, because the Community itself is not recognized in the IMO. As a response, on 16 February 2005, on the basis of a decision by the COREPER, a submission was presented to the IMO on behalf of the 25 member states and the Commission using the formula "it is therefore the view of the above mentioned submitting Contracting parties - *which are all members of the European Community, to which these States have transferred the competence regarding this particular subject matter - that*…" (emphasis added)(the so-called BLG formula).[1248]

The Council, on the basis of a working document submitted by the Commission in April 2005, is currently in the process of establishing a procedural framework for the preparation and presentation of positions to be taken by the member states and the Commission in the IMO.[1249] This framework, which intends to serve as a practical guide for improving the influence of the member states and the Community in the IMO, clarifies and reinforces existing coordination mechanisms and increases the role of the EC in the IMO decision-making process. The main innovation is the introduction of a clear distinction between "Community positions" on matters under the EC's exclusive competence, which are adopted by the Council (also at the level of

[1246] The opportunity to go to COREPER for issues of exclusive competence has always existed. However, in the past this has not frequently happened because of the limited scope of EC maritime safety legislation. Issues of exclusive competence came up only with regard to accession to a new Treaty or a new Protocol such as, for instance, with the negotiation of the 1993 Torremolinos Protocol.

[1247] This practice was followed for the first time in the preparation for the MEPC 52, in October 2004. Denmark and the UK had problems with some types of oil listed in Annex I of MARPOL. At the EU coordination meeting the Council endorsed the common position on the interpretations and amendments of the MARPOL 73/78 to be discussed in MEPC 52. See the Report of the Transport Council, 7 October 2004, p.14.

[1248] See BLG 9/12 (16.02.2005) on the clarification of the definition of "fuel oil" under the revised Annex I of MARPOL 73/78. The BLG formula has also been used in MSC 80/5/4 (maritime security) and MEPC 53/2/30 (ballast waters).

[1249] These procedures have been intensively discussed in the Shipping Working Party in its 2005 April, June, July and September sessions and in the COREPER, 19.10.2005. This framework finds its legal basis in Article 10 EC setting out a duty of cooperation, but it is meant to be an informal guide and a practical tool.

the Shipping Working Party) by QMV on the basis of a proposal from the Commission; "Common positions of the Community and the member states" on matters under shared competence, which are adopted unanimously by the Council on the basis of a proposal from the Commission or the member states; and "Coordinated positions of the member states" on issues under the member states' exclusive competence, which are adopted by unanimity within the Council. If the Council is unable to adopt a "Community position", the member states have to abstain from expressing any position in the IMO on the subject unless this is not necessary to defend the Community *aquis*. Conversely, if the Council does not succeed in adopting a "Common position", the member states maintain their freedom to express their positions in the IMO as long as this does not affect the Community *aquis*. During the discussions in the Council (the Shipping Working Party and the COREPER), all member states stressed the need for flexible positions which allow some margin of manoeuvre in order to avoid excessive rigidity.

Both Community and Common positions will be submitted by [the Presidency] the 25 member states and the Commission, in the first case using the BLG formula. Community and Common positions will be introduced by the Presidency on behalf of the European Community and with the support of the 25 member states. If so agreed during the coordination process, they may be presented by one of the member states or by the Commission taking into account its technical expertise.[1250] Coordinated positions may be submitted by the 25 member states and the Commission if the member states so decide and this should be supported by all member states and the Commission in good faith in order to achieve the given objective.

This procedural framework has not yet been formally adopted by the Council. The most controversial element relates to the formal submission of the Community positions. Reportedly, there is still concern with regard to the use of the BLG formula for the submission of Community positions. Some member states (especially shipping nations) do not accept the explicit reference to the transfer of competence contained in that formula and have prevented its adoption in the latest submissions to IMO.[1251] In the view of the Commission the easier solution would be to require observer status for the Community in the IMO. In this way, it would be possible to present submissions on behalf of the Community to the IMO and the BLG formula would thereby become redundant. This observer status, however, does not prejudice the main objective of ensuring the Community's full membership in the IMO.

For a long time member states, especially those which used to be strong negotiators in the IMO (e.g., the UK and Denmark), firmly opposed having Brussels (especially the Commission) involved in this forum. In the wake of the *Erika* and *Prestige* accidents, however, it became evident that the EC's coordinated action could be very effective especially with regard to highly political issues. Given the extending scope of EC maritime safety legislation, moreover, EC coordination is the necessary and the natural effect of increasing the Community's competence. On the other hand, some member states (especially the shipping nations) are not entirely happy with the recent developments in coordination and accuse the Commission of trying to extend its competence and being too rigid in its positions, leaving the member states with little room for negotiation. Reportedly, they believe that less antagonism and more

[1250] Member states and the Commission may introduce additional submissions or speak in support of the Community or the common positions, if so agreed.

[1251] Reportedly, due to the opposition of Cyprus, supported by Germany, Greece, Malta and Poland, the BLG formula has not been used in the submissions to the MSC 81 and MEPC 54, in 2006.

cooperation between the Commission and the member states would lead to better results.

Inevitably, this EC coordination reduces the member states' margins for negotiation, which, unlike 5 years ago, are no longer free to pursue their own targets, but are blocked by EC positions. If an issue emerges during the meeting on matters under shared competence, member states need to get together on the spot and try to achieve a coordinated position or, if it is an issue within the EC's exclusive competence, they have to refer it to the COREPER.[1252] Although the member states have always tried to keep their "house keeping" outside the IMO meetings (e.g., before/after the meeting or during coffee-breaks), EC coordination inevitably brings along some degree of "rigidity" and makes the IMO decision-making process more tedious and bureaucratic. This causes certain hostility in the IMO towards the presence of the Community in the negotiation process. Most of the officials attending IMO meetings are technicians with no legal background and do not thoroughly understand the EC integration mechanisms. In the view of the Commission, therefore, it is important to clarify to everybody that the Community's involvement is necessary since the member states can no longer act independently concerning a large range of issues on the table in the IMO.[1253]

6.9.2.1 The Community's Accession to the IMO Convention

In the wake of the *Prestige* accident, the IMO Secretary-General recommended that, for the time being, the Community should pursue its objectives vigorously and supportively through the organization, rather than through regional measures.[1254] The capacity of the Community to promote its targets in the IMO, however, is limited by its lack of membership in the organization. In the view of the Commission, this status does not reflect the central role currently being played by the Community in the international maritime scene and its increased competence in matters regulated by the IMO. Full IMO membership is necessary for the Community in order to exercise its external competence and defend its interests at the international level. In April 2002, therefore, the Commission requested a mandate from the Council for negotiating the EC's accession to IMO.[1255] The objective is to allow the Community to become a full member on an equal footing with other IMO Parties with the right to speak and vote on behalf of (and not in addition to) the member states within the principal Committees (i.e., MSC, MEPC and LEG) and to assume those rights and duties stemming from IMO instruments in all matters under its exclusive competence.[1256] Meanwhile, the Commission proposed the adoption of transitional measures to improve EC coordination and ensure stronger Community representation in the organization.[1257]

[1252] Reportedly, this occurred during the discussions on ballast waters in MEPC 52 with regard to an agreement reached in the Working Group on chemicals in ballast waters. Since this agreement "could" be in conflict with EC legislation, the Dutch Presidency had to explain to the Group that EC member states had to seek directions from Brussels.

[1253] Reportedly, a few years ago the Community prepared a policy paper for the IMO Technical Co-operation Committee (TCC) explaining how EC cooperation works and it proposed to submit a similar document to the IMO Assembly.

[1254] IMO SG, E. Mitropoulos, before the EP-MARE, 22.01.2004, supra n. 247.

[1255] SEC (2002) 381, 9.04.2002.

[1256] The EC should have a number of votes equivalent to the number of member states represented in the given IMO body and bound by the Community instruments from which external competence arises, SEC (2002) 381, Para. 6(b). Member states would maintain their individual right to speak and vote on those matters on which there is no EC legislation and which remain subject to their exclusive competence (ibid. Para. 3.2.2).

[1257] SEC (2002) 381, Para. 4.

Following the *Prestige* accident, the Commission and the EP urged the Council to grant the negotiating mandate.[1258] In November 2005, the Commission renewed the request in its communication on the Erika III package. However, more than four years after the 2002 submission, the issue of the Community's membership in the IMO is still waiting for consideration by the Council and does not seem to be supported by the member states.[1259]

Member states, especially shipping nations, question whether such membership is either desirable or practicable and, although they have already lost their power to act in matters under the EC's exclusive competence, they are still reluctant to give up their individual representation in IMO.[1260] Furthermore, they seem afraid that the EC's membership in IMO might open the door to accession by other IOs (e.g., WHO, ICAO, ILO) and they want to prevent this "avalanche effect".

The EC's accession, moreover, would require an amendment to the 1948 IMO Convention allowing regional economic integration organizations to become members. Since amendments enter into force twelve months after acceptance by two-thirds of the IMO members present in the Assembly (i.e., 109 out of 164 IMO members), the EC's accession may be a difficult and rather long-term process.[1261] In addition, non-EC IMO members do not seem to have strong incentives to amend the IMO Convention in order to allow the Community (and other similar international organizations) to become a member.

The EC's accession to the IMO, however, would be beneficial to the Community, the member states (reinforcing their negotiation position), and to the shipping world as a whole. The EC's participation in the IMO's decision-making might, in principle, discourage future EC regional initiatives and strengthen consistency between EC and IMO standards. But would those reasons be sufficient to convince the other IMO members to go through the complex amendment process?

Despite the undeniable merits, the EC's accession to the IMO does not seem to be a realistic option, at least in the short or medium term. In the opinion of this author, however, accession is not a matter of urgency. Recent developments in IMO have shown that the existing EC coordination may be quite effective and that the interests of the Community may well be defended by the joint action of the member states. Besides, the Community already exercises a significant influence on IMO decision-making even without being a member of the organization since the large majority of the submissions to IMO are presented by EC member states. The Commission, moreover, is already entitled to present joint submissions together with the EC member

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[1258] E.g., COM (2003) 105, Para. 2.2.3; EP April 2004 Resolution, Para. 34, and the Motion for an EP resolution on the external relations of the EU in the field of transport, 2002/2085 (INI), 14.11.2002, at B and M.

[1259] The EC's membership of the IMO has been included on the agenda of the Transport Council (21.04.2005) under the item "any other business". The issue has only briefly been discussed and was only supported by France, see: ECSA (2004-2005), p. 16.

[1260] For an overview of the main concerns, see, e.g., the Position of the U.K Parliament (House of Commons, Thirty Eighth Report (Para. 9), at: www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmeuleg/152-xxxiii/15201.htm) which is the strongest opponent. Reportedly, France is favourable, while the Netherlands is neutral. Reportedly, some Mediterranean States, like Italy, fear that if the EC became an IMO Member, it would not take Mediterranean interests sufficiently into account, but would continue giving preference to the Baltic Sea and the North Sea.

[1261] For the amendment procedure, see 1948 IMO Convention, Articles 66-68. On average the ratification process for IMO conventions takes from 8 to 10 years (SEC (2002) 381), see footnote 9. In addition, since the last IMO Assembly met in December 2005, an amendment to the IMO Convention could not be discussed before December 2007.

states or other IMO Parties.[1262] In addition, the experience with the 2002 Athens Protocol indicates that, if necessary, the Commission, with a mandate from the Council, may already act on behalf of member states in the main IMO Committees (e.g., LEG), even without amending the IMO Convention.[1263] The only added value of the Community being a party to the IMO would be that the Commission could be represented in the IMO Council and decide on the agenda for the organization and which instruments to finance.[1264] Finally, the ultimate main goal for the Community seems to be to become a party to single IMO conventions (e.g., MARPOL or SOLAS), not to the 1948 IMO Convention itself.[1265]

Instead of finding a way for the Community to become a member of the IMO, it seems far more realistic, for the time being, to strengthen mechanisms to ensure that all member states speak with "a single voice" and find more pragmatic solutions to allow the Community to exercise its competence and express its view in the IMO without being a full member of the organization (e.g., by seeking observer status). These are the latest developments in the EC's coordination in this direction, although full EC membership in the IMO still remains the ultimate goal.

6.9.3 The Community's Participation in the UN Discussions under the Agenda Item "Oceans and the Law of the Sea"

The Commission (DG TREN) is not particularly active in the discussions related to maritime safety and ship-source pollution in the UN, in contrast to its participation in the IMO. The main reason for this is that, as discussed in Chapter 5.2.7.4, the Community's participation in the UN agenda item "oceans and the law of the sea" is regulated within the framework of the third pillar (CFSP). Therefore, the main role is played by the Presidency and everything is done by EU Statements drafted within the COMAR. The foreign policy format is also applying when maritime safety issues concerning EC competence are on the table. So far, this has prevented DG TREN, like other DGs, from playing a strong role in this process.

DG TREN participates in the drafting of the EU Statements for the ICP and in the negotiation of the UNGA annual resolution, whenever they cover matters within its interest. Within the Commission, DG FISH and Maritime Affairs (previously DG RELEX) is currently responsible for coordination and it circulates draft positions to the DGs concerned asking for comments. DG TREN submits its contributions to DG FISH indicating the EC priorities and targets in the field of maritime safety and other shipping-related issues. Especially in the past, however, the draft positions were circulated at very short notice and DG TREN, like other DGs, was often consulted at the very last minute as occurred with the negotiation of the UNGA 58 Resolution in 2003, giving little time for any reaction.

DG TREN does not normally attend the ICP or UNGA meetings in New York, but allows DG FISH (previously DG RELEX) to participate on behalf of the

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[1262] E.g., joint submissions in the field of flag State implementation (MSC 73/8/3 (3.10.2000); MSC 72/7/2 (1.03.2000), both submitted by Australia, Canada, France, Poland, Portugal, Singapore, the U.K. and the European Commission; and MSC70/9/3 (25.11.1998), submitted by France, Italy, the Netherlands, Spain and the Commission.

[1263] See, supra n. 433.

[1264] Currently, 14 out of the 40 members of the Council elected by the 24th Assembly for the 2006-2007 biennium are EC or EEA member states. The EC, therefore, may already exercise some indirect influence on the IMO Council.

[1265] See, *inter alia*, SEC (2002) 381, Attachment 2. The eventual accession of the Community to the 2002 Athens Protocol (not yet into force) may prove that it does not need to be an IMO member in order to accede to IMO conventions.

Community even when shipping-related matters are on the agenda. This is mainly due to resource constraints and the need to prioritize actions. Besides, both the ICP and the UNGA take place at a very short distance from the IMO meetings (e.g., MEPC and the Assembly) where there is a stronger need for DG TREN to be present. However, its involvement largely depends on the issues on the agenda. For instance, DG TREN was particularly active in the 4th ICP, in June 2003, which focused on maritime safety, but this has, so far, remained an isolated case. Coordination started rather late within the COMAR (in May 2003) where the draft EU Statements were discussed in very broad terms, and proceeded in New York (two days before the ICP), where these Statements were reviewed and reinforced.[1266] Representatives from DG TREN contributed actively in the drafting of the EU positions on matters of maritime safety and on the last two days of the ICP they attended the meetings in support of DG RELEX, which, at that time, was still responsible for the EC coordination.

Coordination on the spot proved to be difficult, also because for the first time the EU participated in the new 25 format, including Malta and Cyprus, which have been quite active in the debate. Coordination was particularly problematic concerning two specific items: the unilateral restrictions on the transit of single hulls through EEZs adopted by some EC member states in the wake of the *Prestige* accident and the issue of a genuine link. The EU Statements kept a neutral position, which was also supported by the ICP plenary. The EU reaffirmed the primacy of the multilateral framework without expressly condemning unilateral measures and called for stricter flag State control.[1267] All EU Statements were presented by the Greek Presidency in the plenary sessions. Although the discussion touched upon issues such as single-hulls, port state control and AIS, which are clearly subject to the EC's competence, the Presidency has never allowed the Commission to take the floor. In the plenary, some EC member states (i.e., France, Italy, Portugal and Spain) made independent defensive statements despite the fact that they had been strongly recommended no to do so by both the Presidency and the Commission.

Whereas the IMO remains the proper framework to deal with maritime safety, the UN process (especially the ICP) is an important additional forum to promote EC priorities. The full participation of DG TREN in this process would be a good opportunity to influence the development of global maritime safety policies and the law of the sea in a manner which is consistent with the EC's targets and legislation. Institutional problems, the lack of intra-Commission coordination and resource constraints have so far impeded DG TREN from taking full advantage of this opportunity.

6.9.4 The Community's Participation in HELCOM

So far, the Commission has not shown as much interest in shipping matters discussed in HELCOM. Before 2003, representatives from DG TREN never participated in the meetings of the (at the time) HELCOM SEA.[1268] The only exception was HELCOM SEA 2, in 2001, which dealt with PRFs. Since the Community had recently adopted a directive on this matter there was a need to ensure coherence between the HELCOM

[1266] All information is based on the Commission's Mission Report on the Fourth Meeting of the ICP, held in New York, 2-6 June 2003, not published.

[1267] The EU Statement N. 2 deals specifically with the safety of navigation. All EU Statements presented at the ICP are available at: http://europa-eu-un.org/articles/en/article_1301_en.htm.

[1268] HELCOM SEA meetings have sometimes been attended by DG ENV. See: Reports of HELCOM SEA and HELCOM MARITIME available at: **www.helcom.fi/dps/docs/folders/Sea-based%20Pollution%20Group%20(HELCOM%20SEA)/AIS%20EWG%206,%202003.html**

and EC rules. However, in order to have DG TREN involved the meeting had to take place in Brussels. Since 2003, in the wake of the *Prestige* accident and the 2004 enlargement, things have partially changed and, currently, representatives of DG TREN or EMSA normally attend the meetings of HELCOM MARITIME and its EWGs. Nevertheless, the Commission does not play a very proactive role. So far, its contribution to the work of HELCOM has mainly focused on ensuring that any steps taken to improve the situation in the Baltic Sea are in line with EC maritime safety legislation.[1269]

The Commission's approach in HELCOM has been influenced by a number of factors, which have for a large part been discussed in Chapter 5.4.2. First of all, there is a general tendency to leave the implementation of the Helsinki Convention to the member states, which have a long tradition of individual participation in this forum. Before the *Erika* legislation, moreover, there were no major overlaps between EC and HELCOM rules and the Community had not acquired any (implicit) exclusive competence in maritime safety-related matters covered by HELCOM.[1270] The Commission, therefore, had no strong interests to defend in this forum. With the development of the EC maritime safety legislation, the Community has extended the area of competence that might be affected by measures adopted in HELCOM and it partially changed its approach. Representatives of DG TREN, for instance, took an active role in HELCOM Extra 2001 where issues covered by EC legislation (e.g., the phasing out of single-hulls standard or AIS), where on the agenda.[1271] In general, however, the Commission does not seem to have strong interests in strengthening the work of HELCOM MARITIME. The Helsinki Convention has indeed been adopted to preserve the marine environment in the Baltic and to deal with marine environmental problems, but not with shipping issues. The prevalent feeling seems to be that maritime safety issues would be better regulated in the IMO, not HELCOM, and their implementation and enforcement would be better harmonized at the EC level. The adoption of more stringent protective measures in HELCOM may hinder EC-wide harmonization.

Other reasons for the limited involvement of DG TREN in HELCOM are more bureaucratic and procedural in nature. The Helsinki Convention, like other regional agreements, is under the responsibility of DG ENV, which is still the main contact reference for HELCOM MARITIME (and HELCOM in general). There is a single person responsible for HELCOM who receives the documents for all meetings, including HELCOM MARITIME, and then transmits them to DG TREN. Usually documents are sent at the very last moment and there is no time for their careful examination. The representative of the Commission attending the meeting, therefore, may find it more effective to leave the discussion to those member states that normally participate with larger delegations.

[1269] See Reports of the HELCOM MARITIME meetings.

[1270] The only overlapping rules concerned minimum requirements for ships bound to or leaving Baltic State ports and carrying dangerous or polluting goods. In 1998, when HELCOM Rec. 19/15 was adopted, the EC already had legislation in place on the same issue (i.e., Directive 79/116/EEC). However, the HELCOM Rec. mirrors the EC legislation. At the time when HELCOM started adopting measures related to double-hull standards (1991), routing measures (1994), PRF (1998), or a harmonized system of fines in the case of MARPOL violations (1998) there was no EC legislation in place on these issues.

[1271] As a result, the Copenhagen Declaration (Attachment I) ensures that HELCOM measures (e.g., AIS) will be developed with due regard to forthcoming EC legislation. In addition, it has been decided to support EC actions in the field of maritime safety by, inter alia, developing an agreement on technical cooperation between HELCOM and EMSA.

In HELCOM MARITIME, like in HELCOM, there is no EC coordination as in IMO, but simply mutual information. As discussed in Chapter 5.4.2, this has been, in the first place, a specific political choice given the strong resistance against the EC's "single voice" policy and any form of bloc-building in HELCOM. After the 2004 enlargement, moreover, the HELCOM now serves as a bridge between the EC and the Russian Federation and as an important forum for the Community to promote the uniform application of maritime safety and anti-pollution standards throughout the Baltic Sea. The Community is therefore determined to keep HELCOM as a forum for cooperation, not confrontation, with the Russian Federation and for promoting the wider application of EC maritime safety rules.[1272] In the past few years, DG TREN (and EMSA) has increased its participation in HELCOM MARITIME, but this has not resulted in stronger EC coordination in this forum.

As already observed, EC coordination in HELCOM does not seem to be necessary either. The final decisions in HELCOM are taken by unanimity and the Commission, just as any other Party, has a veto on matters under its exclusive competence. Reportedly, there have never been significant conflicts of competence between the Commission and the EC Baltic States with regard to maritime safety matters discussed in HELCOM. In addition, most of the work of the HELCOM in this field has been influenced by[1273] and is linked to EC maritime safety legislation.[1274] After 1 May 2004, all Baltic contracting parties, except the Russian Federation, are now bound by EC rules, which in some cases (e.g., double-hull standards) contain maximum standards. Especially after the enlargement, therefore, ensuring consistency and coordination between the two regimes has become of paramount importance for HELCOM.[1275] During 2005, HELCOM further strengthened its cooperation with EMSA.

The Commission and HELCOM are determined to avoid any duplication of work and to optimize their efforts and resources.[1276] For the time being, HELCOM MARITIME has decided to concentrate exclusively on activities which bring an added value, keeping in mind the specific needs of the Baltic, acting in strict coordination with the EC.[1277] This is in particular the case when there is a need to involve the Russian Federation.

[1272] In the past few years the Commission has intensified dialogue with the Russian Federation to promote the wider implementation of EC's maritime safety standards. E.g. Joint Statement, 12th EU-Russia Summit, Rome, 6.11.2003, at (10), available at: europa.eu.int/comm/energy_transport/russia/2003_11_06_joint_statement_en.pdf.

[1273] Initially, the influence of EC law in HELCOM was marginal, since only two out of the nine contacting parties of the 1974 Helsinki Convention were also EC member states (Germany and Denmark) and the EC's maritime safety policy had not yet been established . After Finland and Sweden joined the EC in 1995, the influence of EC law on HELCOM started to increase. But it was after the *Erika* accident that EC maritime safety legislation acquired great importnce in HELCOM.

[1274] E.g., HELCOM Rec. 22E/5 urging Parties to carry out PSC under either the Paris MOU or the EC Directive.

[1275] The 2003 Bremen Ministerial Declaration called for a new focus for HELCOM's work in view of the enlargement. See also the interview with Prof. Dr. Inese Vaidere, Chair of HELCOM, 30.04.2004, available at: www.helcom.fi/helcom/news/382.html. See also the Preamble to the Copenhagen Declaration; and the Joint IMO/EU/HELCOM Workshop, held in March 2003.

[1276] In 2003, during the drafting of the EC regulation on single-hull tankers, the Commission announced its intention to submit a new proposal to strengthen safety requirements for ships navigating in ice-covered waters in the Baltic Sea and considered the opportunity of an EC driven submission in IMO for the adoption of analogous measures. This idea was however abandoned in the light of the recent developments in HELCOM (i.e., HELCOM Rec. 25/7, 2.03.2004, setting new Guidelines for the Safety of Winter Navigation in the Baltic Sea Area).

[1277] See the HELCOM MARITIME's working programme (2004-2006), supra n. 201.

6.9.5 The Community's Participation in BARCON

Like in HELCOM, DG TREN's participation in the shipping discussions within the framework of BARCON has been generally limited. The reasons are pretty much the same as those discussed in the previous subsection: the long tradition of individual participation by EC member states in BARCON and their reluctance to accept the excessive involvement of the Commission in this forum; the reluctance of DG TREN to discuss maritime safety and operational pollution within the framework of regional "environmental" conventions; the lack of overlapping rules triggering the EC's exclusive competence and the absence of strong EC interests to be defended in this forum; and the primary responsibility of DG ENV with regard to the BARCON and consequent procedural and bureaucratic problems.

The drafting of the new Emergency Protocol in 2001 has so far been an exception since, for the first time, issues covered by existing or forthcoming EC legislation (i.e., PRFs, places of refuge and monitoring) were involved. DG TREN therefore decided to take an active part in the negotiations to ensure coherence between the BARCON and EC rules.[1278] The participation of DG TREN in this case was necessary in order to defend the EC's interests. Within the BARCON framework decisions are taken by QMV and, unlike in HELCOM, the Community has no power of veto and the member states' autonomous actions may seriously affect the EC's exclusive competence.[1279] Initially, DG TREN felt that DG ENV was competent and did not organize any EC coordination in Brussels in preparation for the meetings. Some EC coordination took place on the spot, although this was done in a rather informal way (during the meeting, in the coffee breaks, during lunches).[1280] Reportedly, on this occasion the EC member states wanted to have the Commission involved in the negotiations because it was unclear to them what exactly they were allowed to do under EC legislation. The impression was that, unlike in IMO, the presence of the Commission was generally welcomed and considered helpful by all the Parties.

The final text of the 2002 Protocol included different elements of and was largely inspired by EC maritime safety legislation. However, in order to avoid the situation where the Protocol could hinder the further development of EC rules on these subjects, Article 20 makes it clear that the Parties remain free to adopt more stringent standards acting in conformity with international law.

As already mentioned, maritime safety was at the centre of the discussions during the 13th BARCON MOP in November 2003. Although issues such as places of refuge, VTS and others matters covered by EC legislation were on the table, representatives from DG TREN did not directly participate in the negotiation of the Ministerial Declaration adopted at the meeting because they felt that DG ENV was competent. As discussed in Chapter 5.5.2, EC coordination for the MOP 13 was very weak. The Commission proposed that the Presidency should convene a meeting in

[1278] See the Commission's Proposal for a Council Decision on the conclusion of the new Pollution Prevention and Emergency Protocol, COM (2003) 588. By the decision on 24-25.01.2000 (doc. 14243/88 ENV 463 MAR 115) the Council authorized the Commission to participate on behalf of the EC in the negotiations and set out negotiating directives.

[1279] However, as discussed in Chapter 5.5.2, decisions in BARCON require 16 votes out of the 21 Parties. Before 2004, the EC member states had only 4 votes within this framework and had no decisive influence on the decision-making process.

[1280] 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).

Brussels to inform the member states about the issues on the agenda of the MOP 13. In the view of the Italian Presidency, however, there was no need for any EC coordination since BARCON is a sub-regional agreement and not all member states are Parties. Eventually, a minor point was added to the agenda of a working party on external relations which, however, was not attended by the same officials who participated at the MOP 13. On the spot, DG ENV, with some resistance from the Presidency, tried to coordinate certain issues, but this coordination was minimal and consisted of brief meetings before the plenary to discuss the main elements. DG ENV, under the direction of DG TREN, insisted on coordinating positions especially on single-hull and HGO issues. This was a great opportunity to promote the wider application of EC maritime safety rules in the entire Mediterranean Sea and to obtain the support of all BARCON Parties in relation to the EC-driven submission in IMO concerning the amendments to MARPOL Annex I. Reportedly, however, there was some resistance by EC member states to coordinating certain positions in BARCON and the results were not particularly positive. As mentioned in Chapter 5, there is a sort of "inertia" on the part of Mediterranean EC member states in acting intergovernamentally in this framework and this is reflected in the actual level of EC coordination.

Representatives from DG TREN did not attend the 14th MOP, in November 2005, where the BARCON Strategy for the Prevention of (and Response) to Marine Pollution from Ships was on the agenda, but once again it relied on DG ENV. The weak involvement of DG TREN in the BARCON's MOPs is the consequence of the need to prioritize action. The EUROMED Transport Forum is considered to be the most appropriate political framework for discussing maritime safety issues and promoting the uniformity of rules at the regional level.[1281] These meetings are chaired by the Commission (i.e., DG TREN, DG Enlargement and the Aid Cooperation Office (AIDCO)) and, unlike BARCON, they are attended by Transport Ministers. Under the leadership of DG TREN, the Forum has developed the SAFEMED project, launched in November 2005 at the IMO, which is directed at increasing maritime safety and the environmental protection of Mediterranean waters and promoting consistency among the existing IMO, EC and BARCON rules (e.g., flag State implementation and the monitoring of classification societies; VTMs; PRFs and places of refuge).[1282] There is no Community coordination in EUROMED, which is a political forum where member states participate in a completely intergovernamental manner.

6.9.6 Community Participation in the North Sea Ministerial Conference and Bonn Agreement.

Although maritime safety issues are frequently on the agenda at the NSMC and CNOSSO, so far DG TREN has never participated to the negotiations of the NSMC Declarations or in the meetings of the CNOSSO. These political meetings are normally attended by representatives of DG ENV (plus DG FISH in CNOSSO) and by environmental Ministers of the North Sea coastal States. Since all of them are EC/EEA member states and they are bound by EC maritime safety legislation, DG TREN has no strong interests which should be defended in these forums.

[1281] This forum has been established within the framework of EUROMED, launched in 1995 between the EU and 10 Southern Mediterranean States (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, the Palestinian Authority, Syria, Tunisia and Turkey) and includes a working group on Maritime Transport. So far, seven meetings have taken place, the last one in Brussels in October 2005.

[1282] The SAFEMED is implemented by REMPEC. More details on SAFEMED are available at: www.smaprms.net/DOC/Project_summary_SAFEMED.doc.

Similar considerations apply to the Bonn Agreement whose contracting Parties are all EC member states plus the Community. The Agreement deals primarily with emergency response rather than ship-source pollution and is under the responsibility of DG ENV, which normally attends the meetings. DG TREN has so far never been strongly involved in this forum. Starting from 2003, however, EMSA now attends the COPs and the main WGs when issues related to EC maritime safety legislation are at stake, but there is no EC coordination at all.

6.10 The Duty to Give Effect to Existing GAIRAS and to Enforce Them in the Community

Finally, as a party to the LOSC, the Community is under an obligation to give effect to and enforce the "generally accepted" or "applicable" rules and standards adopted by the competent international organizations (GAIRAS). The Community uses the terms "applicable" and "accepted" as synonyms without attaching specific legal significance to the difference between the two expressions.[1283] Most EC legislation simply refers to "international instruments" or "international conventions", which include the main IMO conventions (e.g. MARPOL 73/78 and SOLAS) and their protocols, non-binding codes and resolutions.[1284] So far, the Community has "given effect" to IMO standards in two different ways: a) by recommending EC member states to ratify, implement and comply with IMO Conventions;[1285] and b) by incorporating most IMO binding and non-binding standards in EC legislation. Most EC maritime safety legislation contains a reference to IMO instruments, which are considered to be applicable in their up-to-date version, including subsequent amendments that after a "conformity checking procedure" result in being compatible with EC rules.[1286] This mechanism allows EC maritime safety legislation to be kept constantly up to date with international developments avoiding the delayed application of the most recent and most stringent international safety standards within the Community. Alternatively, a few pieces of EC legislation reproduce, in full or in part, the IMO instruments.[1287] In this case, subsequent amendments do not apply automatically, but EC legislation has been amended as well.

Once IMO standards have been incorporated into EC legislation, they become an integral part of the EC legal system and the EC institutions may use the enforcement mechanisms available under the EC Treaty to ensure their full implementation by the member states. With regard to vessels flying non-EC flags, however, it is mainly for the member states to exercise the enforcement jurisdiction according to their national systems, acting consistently with the LOSC. That means

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[1283] For instance, in COM (2003) 92 the Commission defines MARPOL 1973/78 first as "globally accepted" (Para. 3) and immediately afterwards as "widely applicable" (Para. 4.3). EC Regulation 2099/2002, infra n. 1286, (Article 4) defines "applicable international instruments" as "those which have entered into force, including the most recent amendments thereto, with the exception of the amendments excluded from the scope of the Community maritime legislation […]".

[1284] E.g., EC Regulation 2099/2002, infra n. 485, defines "International Instruments" as "the conventions, protocols, resolutions, codes, compendia of rules, circulars, standards and provisions" adopted by an international conference, IMO, ILO or the parties to a MOU referred to in the provisions of the Community maritime legislation in force" (Article 2(1)).

[1285] See supra n. 259. The Commission's proposal for a Directive on Flag State Responsibility, moreover, places States under a positive legal obligation to ratify IMO Conventions.

[1286] Regulation 2099/2002/EC, 5.11.2002 establishing a Committee on Safe Seas and Prevention of Pollution from Ships (COSS). The COSS centralizes the tasks previously exercised by different Committees and assists the Commission in the implementation of maritime safety legislation.

[1287] E.g., Regulation 2978/94/EC on the implementation of IMO Resolution A.747 (18) concerning the application of tonnage measurement of ballast spaces in segregated ballast oil tankers.

that EC legislation incorporating IMO mandatory standards may be enforced against all ships, including non-EC ships, wherever they are. Conversely, outside the territorial sea of the EC member states, EC legislation incorporating non-binding IMO discharge or navigational standards (e.g., routeing or reporting recommendatory standards) cannot be enforced against non-EC ships in transit. In no case may EC legislation incorporating non-binding CDEMs be enforced against non-EC ships in transit. [1288]

How far the Community may go to ensure full compliance by member States with IMO conventions to which it is not a Party and which have not been incorporated in EC law is still unclear. All 25 member states are contracting parties to the main IMO conventions (e.g., MARPOL 73/78 (Annex I) and SOLAS) and are obliged to comply with the relevant standards. But if they do not do so, is the Commission under an obligation to take enforcement action against member states to ensure full compliance with their obligation under the IMO conventions? And may the ECJ test the consistency of a member state's actions with these instruments? This brings us back to the controversial issue of whether IMO instruments may form an integral part of EC law and bind the Community regardless of its individual participation on the basis of the rules of reference contained in the LOSC. As discussed in Chapter 1.3.1, this is still a grey area, especially when it comes to very detailed and technical rules contained in Annexes and Regulations. From an international law point of view, it is difficult to maintain that the Community may be bound to such technical rules without its consent and has to enforce them against its member states. Nevertheless, it seems to be largely accepted that all Parties, including the Community, which have voluntarily adhered to the LOSC, have indirectly consented to be bound by GAIRAS.[1289] The Commission, however, does not seem to consider the LOSC as a backdoor for applying IMO conventions in EC law.

From an EC law perspective, the situation seems to be slightly different. Although the Court has never clearly pronounced itself on the application of IMO conventions in EC law, in the *Peralta* Case it incidentally took a stance on MARPOL 73/78. According to the Court, an international instrument to which the Community is not a Party (in that specific case MARPOL 73/78) forms an integral part of EC law only in so far as the EC Treaty has transferred to the Community the powers previously exercised by the member states in the field covered by the agreement.[1290] The Court, however, seems to refer exclusively to policy areas, such as the commercial or fisheries policy, which fall under the EC's exclusive competence under the Treaty. This is not the case with MARPOL 73/78 as all IMO instruments cover areas, such as environmental protection and the safety of navigation, which are subject to shared competence. In the opinion of Advocate General Lenz, however, this is true so long and in so far as the Community has not adopted legislation on the same subject .[1291] Given that, in 1994, when the judgment was delivered, there was no EC legislation on matters covered by MARPOL 73/78, the Court concluded that the agreement was not

[1288] A. Nollkaemper (1998), p. 13. See also CPSS, Chapter 3, Paras 78-9; VTMIS Directive, Article 11(3) and the Opinion of the Council's Legal Service on the compatibility of the amended proposal for a VTMIS Directive with international law, 17.07.1992 (Para. 4).

[1289] For a full discussion see: Chapter 1.3.1of this study.

[1290] See Case C-397/92, *Peralta*, Para. 16, "[…] it does not appear that the Community has assumend, under the EEC Treaty, the powers previously excercised by the Member States in the field to which the Convention applies". The Court has drawn analogous conclusions in Joined Cases 21-24/72, International Fruit Company, Para. 18, referring to the GATT Agreement, and in Joined Cases 267-269/81, Amministrazione delle Finanze dello Stato v. SPI and Sami, Para. 17.

[1291] See the Opinion of Advocate General Lenz in the Peralta Case, in: [1994] ECR I-3453, paras 29 and 30. See also E. Hey and A. Nollkaemper (1995), p. 295.

part of Community law. Considering the consistent body of EC law covering issues regulated under IMO instruments, there seem to be ample possibilities for the Commission and the ECJ to enforce these IMO standards, including standards that have not been incorporated into EC legislation, vis-à-vis the member states. The Commission, however, does not seem to share this view and still attaches great importance to the EC's accession to the single IMO conventions in order to be able to use EC enforcement mechanisms against non-complying member states.

The considerations made so far, however, are mainly theoretical since most IMO standards have been incorporated into EC law and, in practice, the Community already plays an important role in the enforcement of IMO regulatory instruments within the EC. As discussed in this chapter, the bulk of the EC's maritime safety legislation is directed at strengthening port and flag State control and ensuring that all vessels entering EC ports or flying the flag of a member state comply with MARPOL 73/78, SOLAS and the main IMO standards. The recently proposed *Erika III* package, especially the proposed directive on Flag States Responsibilities, represents a further step in this direction. As emerges from the increasing number of infringement proceedings started by the Commission against non-complying member states, the Commission is firmly determined to make full use of its enforcement powers under the Treaty in order to ensure the effective implementation of the EC's maritime safety legislation and, indirectly, IMO standards. In addition, while enforcement has been traditionally left to the member states and the Commission has focused on ensuring full implementation, the latest developments (e.g., Ship-Source Pollution Directive; and the suggestion to create an EU coastguard along the lines of the US coastguard) point towards the increasing involvement of the Community in the enforcement of maritime safety measures. One author has suggested that the EC is on its way to becoming a real enforcement organ of the IMO in Europe.[1292] Without going so far, it is clearly becoming a key player in the regional enforcement of IMO standards.

6.11 The Commission's Suggestion to Amend the LOSC

The *Erika* and *Prestige* accidents triggered a review of the legal options currently available to coastal States under the LOSC to control "hazardous" and/or sub-standard ships in transit through waters under their jurisdiction.[1293] According to the Commission the jurisdictional regime contained in the LOSC proved to be ineffective, based on a balance of interests over three decades and not in line with the current requirements of maritime safety and marine environmental protection.[1294] The exclusion from coastal waters of ships "which clearly represent environmental hazards and fail to comply with the most basic safety standards should […] be a duty for coastal States".[1295] The limited control over foreign ships in transit under the LOSC

[1292] G. Vitzthum (2002), pp. 179-82.

[1293] The "Prestige"-Council Conclusions (Para. 11), urge member states to adopt measures, in compliance with the law of the sea, to control and possibly to limit, in a non-discriminatory manner, the traffic of dangerous vessels within 200 n.m. from their coastlines. See also, Copenhagen European Council (Para. 33) and the December 2002 Environmental Council (para.15). See also, COM (2002) 681, p. 13; EP April 2004 Resolution (Para. 42); EP Sterckx Resolution (paras 24-5). For a full discussion, see: V. Frank (2005), pp. 15-18.

[1294] COM (2002) 681, p. 12, and the letter from the Vice President of the Commission, Loyola de Palacio, to the UNSG, Kofi Annan, 20/12/2002, quoted in the 2003 UNSG Report, Para. 58.

[1295] COM (2002) 681, p. 13. The EP Sterckx Resolution (Para. 25) requires member states to refuse access to their coastal waters, including the EEZ, to vessels posing a clear threat to the marine environment and failing to meet basic safety rules. However, in its April 2004 Resolution (Para. 41), the EP rejected the categorical banning of high-risk vessels from the EEZ, because it is legally contentious and impedes rapid and effective assistance in a case of distress.

appears to conflict with the general duties of all States to protect and preserve the marine environment, to prevent maritime accidents and to take all necessary measures to minimize, to the fullest possible extent, pollution from vessels. In the aftermath of the *Prestige* accident, therefore, the Commission, supported by the EP, called for an adjustment of the provisions of the LOSC relating to the freedom of navigation and the right of innocent passage in order to enhance coastal State protection against the risk posed by dangerous vessels transiting along their coastlines. For this purpose they urged the Community to take the initiative to revise the relevant provisions of the LOSC using the amendment procedures in the Convention.[1296]

Amendments may be proposed after the expiry of ten years from the entry into force of the Convention, being 16 November 2004. Starting from that date, all Parties, including the EC, may propose specific amendments to the UN Secretary-General by requesting the convening of an amendment conference (Article 312). The conference is convened only if, within 12 months, "no less than half" of the Parties reply favourably. There are currently 149 parties to the Convention, which means that at least 74 Parties would have to support the reopening of the LOSC. Alternatively, according to the simplified procedure under Article 313, a Party may propose an amendment that enters into force without convening a conference if, within 12 months from the date of the circulation of the communication, no Party has objected.[1297] In both cases, the entry into force of the amendments requires ratification by two-thirds of the Parties (at present 94 Parties) (Article 316).

In order to reopen the Convention, either via Article 312 or Article 313, the Commission would need a negotiating mandate from the Council, which has to decide by QMV.[1298] Soon after the *Prestige* accident the Commission, supported by the EP, considered the possibility of requesting this mandate, but it has never submitted any formal demand in this respect.[1299] It is very unlikely that the Commission will do so in the near future since it lacks the necessary political support, with a large majority of the member states having clearly expressed their opposition to the idea of reopening the LOSC.[1300] Even if the Commission obtained a negotiating mandate from the Council, it would be impossible to reach the majority required under the amendment procedure of the LOSC. The possibility of reviewing the Convention is not supported at the international level.[1301] Some states, such as Denmark, Greece, Norway, Russia and the US (even though it is not a Party to the LOSC), with strong maritime interests, firmly oppose any initiative that would compromise the freedom of navigation and the right of innocent passage guaranteed by the Convention. Other states seem to be more concerned with the risks involved in an amendment process. Indeed, once such a

[1296] E.g., COM (2003) 105 (Para. 2.2.3.3); EP Sterckx Resolution (paras. 41 and 63) and EP Sterckx Report (Para. 2.5). See also 2003 UNSG Report (Para. 58).

[1297] LOSC Article 313 does not expressly require waiting for ten years from the entry into force of the Convention before proposing an amendment. For a full discussion of the LOSC's formal amendment procedures see: D. Freestone and A.G. Oude Elferink in A.G. Oude Elferink (ed.) (2005), pp. 173-83.

[1298] Article 300(1), (2) and (4) EC.

[1299] E.g., COM (2003) 105 (Para. 2.2.3.3) and EP Sterckx Resolution (paras. 41 and 63).

[1300] Reportedly, at the Joint Meeting of the Council's Working Group on Transport and the COMAR, 2.04.2003, and the COMAR meeting in preparation for the 4th ICP, 22.05.2003, Finland, France, Germany, Greece, Italy, Portugal, Sweden, the Netherlands and the UK clearly opposed the LOSC amendment; while Spain has been the only member state to support the idea. Reportedly, some EC member states (e.g., France and Greece) also opposed the idea during the SPLOS-13, 9-13/6/2003.

[1301] This clearly emerged during the discussions on the safety of navigation within the 4th IPC, in June 2003. For a full discussion, see: D. Freestone and A.G. Oude Elferink in A.G. Oude Elferink (ed.) (2004), pp. 169-221.

process starts, there is no sure way to control its agenda or its outcomes.[1302] Thus, reopening the negotiations might lead to a reopening of the overall package, not only maritime safety and anti-pollution provisions. Moreover, under Article 316, amendments would enter into force only for those states that have ratified them, thereby jeopardizing the uniformity which the LOSC tries to achieve. Previous suggestions of using the amendment procedure to revise the LOSC have never progressed in a tangible way indicating that the international community is not prepared to accept the risks involved in the amendment process.[1303] Likewise, there seems to be a general consensus at the EC level that rather than starting a formal amendment process, EC coastal States should take full advantage of the possibilities already available under the LOSC and IMO conventions to prevent maritime accidents.[1304] At the end of the day, despite the concerns raised by the *Prestige* disaster, the package deal achieved in the LOSC is considered to be fair enough taking into account all the interests involved, especially the heavy dependence of the global economy and national security on the freedom of navigation.

6.12 Final Observations

Much has changed since the CPSS was established in 1993 and most of the major changes have occurred in the past three years. The *Erika* and *Prestige* accidents, the rapid EC response, and the 2004 enlargement are some of the factors which have eliminated many of the obstacles that for a long time prevented the Community from playing a proactive role in the field on maritime safety and ship-source pollution.

In the past decade, however, the Community has been accused of slowly moving from a policy focused on the implementation of international standards towards a policy of prescribing its own maritime safety rules.[1305] Despite the allegations of regionalism, the Community has never abandoned its traditional global approach or questioned the IMO's leading role in international shipping matters.[1306] On the contrary, it fully recognizes the added value of IMO regulatory action with respect to maritime safety, which is generally preferable to regional action as long as it guarantees sufficiently high levels of protection.[1307] EC safety rules are intended to rectify some weaknesses and gaps in the IMO regime by ensuring that IMO standards are implemented more stringently (e.g., by making mandatory IMO non-binding instruments) or in advance (e.g., by accelerating the phasing out of single-hull tankers) within the Community and are extended to vessels which, by virtue of specific

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[1302] On the risk of reopening the 1982 LOSC see: B. H. Oxman, Topic VI: The Tools for Change: The Amendment Procedure, 57th UNGA Session on the Commemoration of the 20th Anniversary of the Opening for Signature of the 1982 United Nations Convention on the Law of the Sea, 9.12.2002.

[1303] For instance, in October 2001, within CCAMLR-XXI/23, the Australian Delegation floated the idea of amending Article 73(2) LOSC. This suggestion, however, found no support among other CCAMLR members and it soon became clear that it could not be pursued at the global level.

[1304] E.g., Statement by Ambassador Vassilakis on behalf of the EU at the 2003 ICP, at www.greenceun.org/statement?eupr3045.htm.

[1305] E.g., E. Hey and A. Nollkaemper (1995), p. 282. *Contra*: J. De Dieu in H. Ringbom (ed.) (1997), p. 151 and A. Nollkaemper (1998), p. 7. See also U. Jenisch (2004), pp. 82-83.

[1306] *E.g.,* EU Presidency Statement on Oceans and the Law of the Sea at the 20th Anniversary of the LOSC, UNGA 57th Session, 10/12/2002, at europa-eu-un.org/article.asp?id=1854; Joint Statement released in the wake of the *Prestige* accident by the IMO-SG, Mr. O'Neil, and the President of the EC Maritime Transport Ministers, Mr. Anomeritis (11/01/2003) and the Joint Statement of the Vice-President of the Commission, Ms. de Palacio, and the IMO-SG, Mr. Mitropoulos, before the EP-MARE, in January 2004. See also: Copenhagen European Council (Para. 33), and December 2002 Environmental Council (Paras 13-5).

[1307] See: COM (2005)585 (Erika III Communication), p. 7.

exceptions, are not bound by the IMO standards (e.g., as vessels engaged in domestic or regional trade, younger or smaller tankers).[1308] The EC's regulatory action in the field of maritime safety, therefore, was never intended as a substitute for, but always as a complement to IMO action at the regional level.

The spur of unilateral and regional initiatives which followed the *Prestige* accident has highlighted once more the importance of having maritime safety and environmental standards set out at the global level, acting within the jurisdictional framework of the LOSC and the IMO regulatory regime. But what happens if the IMO does not take action? It should be stressed that the Community not only has a right, but also a duty under the LOSC to protect EC waters from the threat posed by international shipping. As discussed in section 6.2.3.1, the LOSC leaves some room for regional organizations or single States to take action without waiting for the IMO. Despite a great deal of criticism, regional or unilateral initiatives have played an important role in promoting stricter international standards.[1309] In the past decade, indeed, the threat of unilateralism or regionalism has urged the IMO to react rapidly to preserve its authority as the only international regulator and has driven the main "coastal-oriented" developments within the organization. As Lord Donaldson in his famous Inquiry pointed out: "a balance is sometimes needed between consensus and speed, and there may sometimes be good reasons for a single country or group of countries to move faster than the remainder of IMO".[1310] As long as they are consistent with the LOSC jurisdictional framework, therefore, regional and national initiatives cannot always be condemned.

The Community has always insisted on the need to improve the protection of European waters acting within the jurisdictional framework set out in the LOSC and without hindering the freedom of navigation.[1311] Most EC maritime safety measures have been adopted by the Community acting in its capacity as a flag State (i.e., by raising safety standards for ships flying the EC flag and harmonizing rules for classification societies) and port State (i.e., by setting out port access conditions for all ships regardless of their flags and harmonizing PSC to ensure full compliance with IMO rules). The Community action in its capacity as a coastal State has been limited to reinforcing the monitoring of dangerous maritime traffic through the territorial sea of the EC member states, but without interfering with the rights of navigation of foreign ships under the LOSC. In no case do EC maritime safety standards higher than IMO rules apply to foreign ships in transit through the EEZ of the EC member states. When, following the *Prestige* accident, the LOSC framework appeared not to be adequate for ensuring effective protection for coastal States, the Commission suggested a revision of the relevant provisions, indicating the Community's determination to play the game according to the rules.

Despite the progress of the international maritime safety regime during the past thirty years, the root of the problem: the lack of flag State implementation still remains unsolved. It is globally recognized that for the time being there is no need for new rules, but for clarifying and effectively enforcing existing regulations. The EC maritime safety legislation (e.g., PSC, classification societies directives) and the new

[1308] The vessels used in the North Sea, for instance, are more modest in size, ranging from 5, 000 to 50,000 tonnes and would be excluded from the scope of application of MARPOL.
[1309] See, inter alia, D. Bodansky (2000), pp. 339-347 and H. Ringbom (1999), p. 24.
[1310] Lord Donaldson Report, Para. 2 (11) and 5 (7).
[1311] See, e.g., EU Statement to the 2004 UNGA plenary inviting coastal States bordering straits used for international navigation to respect the right of passage in straits and requesting port States to do their utmost not to hinder access to ports.

Erika III legislative proposals (e.g., the proposed directive on compliance with flag State requirements) may certainly contribute to these results. The Community legal framework, moreover, offers unique tools for controlling and ensuring the full implementation and enforcement of IMO standards in European waters. In the past few years, the Commission, assisted by EMSA, has taken enforcement very seriously and is firmly determined to make full use of these tools. In addition, the newly established EMSA plays a fundamental role in assisting member states (and the Commission) in the correct implementation of EC and, indirectly, IMO standards.

On the other side of the coin, there are clear risks in regional (or unilateral) regulatory actions. As a result of the EC legislation, indeed, the oldest and most dangerous ships might move to regions with lower safety standards and less stringent PSC regimes, such as the Middle East or Asia, increasing the traffic and the potential for accidents in these areas as occurred in Europe after the adoption by the US of OPA 90. However, it seems quite unrealistic for international shipping to avoid EC ports and the risk, therefore, is minimal. Nevertheless, to ensure uniformity and to avoid safe havens for substandard ships it is certainly more effective to have the highest possible standards and enforcement mechanisms set out at the global level. The Community fully recognizes that and, in the wake of the *Prestige* accident, has considerably strengthened its external maritime safety policy and is firmly determined to play a leading role in the multilateral development of stringent international rules, in particular within the IMO. After the accession of Cyprus, Malta and Poland, moreover, the interests of flag States and the shipping industry have become stronger within the Community and in the future it will probably be more difficult to agree on higher safety standards at the EC level. It is likely that after the intense regulatory action of the past few years, in the future the Community will further intensify its external policy trying to achieve its objectives at the international level. For this purpose, the Commission is firmly determined to attain the Community's membership of the IMO.

The Community's involvement in maritime safety issues both at the internal and international levels has been traditionally challenged by member states and viewed with suspicion by third countries that did not really understand what the EC was and how it worked. In the past few years, however, the situation has considerably changed. The member states have largely overcome their traditional opposition to the EC's involvement in shipping-related matters. A decade ago, for instance, talking about EC criminal sanctions for pollution offences or an EC coastguard would have been considered as pure science fiction. In the wake of the *Erika* and *Prestige* disasters, member states have realized that Community harmonization and EC coordinated action in the IMO may be more effective than national solutions, especially when highly political issues are on the table. So far, however, they have supported the EC's involvement as long as it is beneficial to their commercial interests (e.g., the accelerated phasing out of single-hull tankers and MARPOL amendments) and does not interfere too much with their sovereignty (e.g., the proposal for negotiating the EC's accession to the 1948 IMO Convention). This approach is reflected in the level of EC coordination in the IMO which, so far, has been good as long as strong national interests have not been involved. As a response, the Commission has recently taken important steps towards strengthening the EC's coordination mechanisms and ensuring that member states speak with "one voice". The Council, on the basis of a proposal by the Commission, is in the process of adopting a framework procedure for EC coordination, which will allow the Community to play a stronger role in the IMO even without being a member and without going through the amendment of the 1948 IMO Convention, which, in the short term, does not seem to be a feasible option.

Compared to ten years ago, the international community has become more familiar with the presence of the EC in the IMO. Third States still become irritated by EC coordination, which brings considerable rigidity to the IMO decision-making process. However, even if there is still a lmited understanding of the EC's mechanisms, they now seem to accept that the EC member states are no longer free to negotiate in the IMO, but they need to ask for directions and to coordinate their positions. This is an inevitable consequence of the Community's extended competence in matters covered by the IMO.

Apart from for PSC regimes, regional regulations on shipping-related issues have traditionally remained an exception. Only a few regional seas conventions (i.e., the Helsinki Convention and the BARCON) contain maritime safety and anti-pollution provisions, but these are normally directed at harmonizing the implementation and enforcement of IMO rules and standards. So far, the Community has appeared to be a little reluctant in discussing maritime safety issues within the framework of regional "environmental" conventions, which are normally attended by Ministers and/or senior officials from the Environmental Ministries and DG ENV. The Commission (DG TREN) does not seem to be keen to strengthen the work of regional bodies in the field of maritime safety, but feels that the relevant standards should be set out by the IMO. If regional rules are needed, it should be for the EC to take the initiative. The weak participation of the Community in the regional maritime safety debate, however, seems to be a missed opportunity for promoting the wider application of EC maritime safety standards and importing into the EC framework instruments and policies which have proved to be successful at the regional level. EC coordination in regional forums has been practically non-existent. The "one voice" policy that the Commission is pursuing in IMO is not workable in the regional conventions, which traditionally have been forums for open discussion and cooperation among contracting parties acting on the same level.

During the past few years, the Community has shown a strong commitment to maritime safety and the prevention of ship-source pollution as well as the ability to influence global developments. In spite of all the criticism, as a matter of fact the Community, acting at the EC level and coordinating the positions of its member states in IMO, has been the catalyst for the most coastal-oriented developments in IMO and has contributed to a great extent to making the maritime transport of oil safer, cleaner and more environmentally friendly.