Chapter 7
Ocean Dumping

7.1 Introduction

Ocean dumping, unlike vessel-source pollution, only made its first appearance on the international agenda in the 1970s. For a long time, this practice has been considered to be a cheaper, easier and relatively safe alternative to land-based disposal and has been conducted without any control. Currently, ocean dumping (and incineration) is strictly regulated and only a few harmless materials may still be legally disposed of in the sea. The legal framework is not as articulated as the one governing ship-source pollution. The global regime is based on the LOSC, which sets out the jurisdictional framework; Chapter 17 of Agenda 21, which contains general principles; and the IMO-sponsored 1972 London Convention (LC) and its 1996 Protocol, which entered into force in March 2006, which lay down minimum rules for the prevention of marine pollution by the dumping of waste and other matter. Unlike in the field of vessel-source pollution, both the LOSC and the LC strongly encourage the development of regional measures to control ocean dumping. Regional rules, indeed, appear to be more suitable compared to global ones to ensure adequate protection, especially in enclosed and semi-enclosed seas. Ocean dumping has been regulated within the framework of the 1974 Helsinki Convention, as amended, the OSPAR Convention, which replaced the 1972 Oslo Dumping Convention, and the BARCON together with its 1976 Dumping Protocol (BDP), as amended. These regional regimes are very articulate and are generally more stringent than international standards contained in the LC and, in some respects, the 1996 Protocol.

With the sole exception of the Helsinki Convention, which totally bans ocean dumping and incineration in the Baltic Area (except for dredge spoils), the regimes under the 1996 Protocol to the LC and the regional seas conventions show strong similarities. Originally, however, there were considerable differences, for instance, in relation to the types of hazardous substances controlled (e.g., radioactive waste) and the regime for the final disposal of disused offshore installations. In the early 1970s, most EC member states acceded to the LC and regional seas conventions. The existence of conflicting obligations under different legal instruments created competitive advantages for some member states jeopardizing the establishment of the European single market, which was still in the course of completion. In order to eliminate the discrepancies and harmonize member states' legislation, the European Commission came up with two proposals, in 1976 and in 1985, for the adoption of an EC Directive on ocean dumping. Both the proposals did not succeed, however, due to the firm opposition of the member states and the different positions of the Commission and the EP, especially in relation to radioactive waste. This Chapter will look at the history of these proposals discussing the reasons for their rejection in the Council. However, even though the Community has never succeeded in adopting specific legislation on ocean dumping, this practice has been regulated within the framework of waste management legislation. The Chapter looks at the main EC directives which are of relevance for the control of ocean dumping and incineration and identifies the factors that have influenced the Community's approach.

In the 1990s, the ocean dumping regime went through a profound revision process that brought it into line with the modern approaches to waste management and the protection of the marine environment as recommended by Agenda 21. This process removed most of the original discrepancies between the existing international conventions. The international regime on ocean dumping provides a satisfactory level

of protection for the European seas and the Community decided that it was better to direct its efforts towards trying to accede to the relevant conventions rather than to adopt its own rules. The attention will subsequently move on to the Community's participation, next to the member states, in the policy and decision-making process related to ocean dumping within the relevant global and regional bodies. The Chapter concludes with some final observations about the added value of the Community's involvement in the field and the manner in which it might contribute to filling the main gaps in the international regime for the control of ocean dumping.

7.2 The Global Legal Framework for the Control of Ocean Dumping and Incineration

7.2.1 Ocean Dumping and Incineration: Extent of the Phenomenon

Ocean dumping refers to an "intentional" disposal into the sea of wastes that are generated normally (but not exclusively) on land. Waste is loaded on to special ships and discharged into the sea, either in it its original form or after onboard incineration. Ocean incineration consists of burning on board special ships wastes which are too difficult and costly to dispose of on land and too toxic and persistent to dump directly into the sea. In Europe, as in the majority of the industrialized world, these practices have been commonly and generally accepted based on the incorrect assumption of the ocean's infinite ability to assimilate wastes. All European seas, from the North-East Atlantic to the Baltic and the Mediterranean Sea, have been seriously affected by ocean dumping. Before 1972, there were only a few general rules at the international level and they related exclusively to the dumping of nuclear wastes.[1312] For centuries, therefore, oceans have been used as the dumpsites for any kind of garbage, including industrial, chemical and radioactive materials. Since the late 1940s, the nuclear industry (especially in the US, the former USSR, France, the UK, Germany and Sweden) considered open oceans as "a convenient place to dispose of its inconvenient wastes."[1313] Until recently, moreover, dumping has been the most common way to get rid of vessels, aircraft, old oil and gas platforms and disused offshore installations.[1314] This diffuse practice started to lose much of its popularity in the 1970s as soon as it became clear that wastes (especially nuclear, industrial and chemical) are very persistent in the marine environment and, through bioaccumulation into the food chain, pose a serious threat to human health, fisheries and other legitimate uses of the sea. The 1972 Stockholm Conference urged governments to take action both at the global and regional level to control this practice.[1315] As a response, in the next two decades, dumping and incineration have become among the most discussed and regulated issues on the international agenda.[1316]

[1312] The UN High Seas Convention (Article 25(1)), for instance, simply required States to adopt measures to prevent marine pollution from the dumping of radioactive waste "taking into account" any standards and regulations that "may be formulated" by the competent international organization. See also: recommendation from UNCLOS I to the IAEA to undertake studies on the dumping of radioactive waste (A/CONF.13/L.56 (1958)) and the 1957 IAEA guidelines and recommendations on the safe disposal of radioactive wastes into the sea (IAEA, Radioactive Waste Disposal into the Sea, in IAEA Safety Series no. 5, Vienna, 1961).

[1313] R. Parmentier (1999), p. 2.

[1314] At present, there are about 6, 500 offshore platforms around the world and most of them are approaching the time for their decommissioning.

[1315] I.e., Stockholm Conference Report (A/Conf.48/14/Rev.1 (1973)), Annex III, p. 73 and Recommendations 86 and 92 (*ibid*, pp. 22-23). The Stockholm Conference was expected to adopt a global convention on ocean dumping, but the text was not yet ready.

[1316] E.g., 2001 UNSG Report (A/56/58), p. 62.

With some minor variations, all the relevant conventions regulating ocean dumping adopt the same definition of dumping as the LOSC, which refers to: (i) any "deliberate" discharge at sea of waste and other matter from vessels and aircraft or other man-made structures at sea, and (ii) any "deliberate" disposal at sea of vessels, aircraft, platforms or other man-made structures at sea.[1317] Dumping, therefore, is always intentional. Accidental discharges or operational discharges regulated under MARPOL 73/78 are excluded from the definition of dumping.[1318] All discharges that do not have a "mere disposal" purpose are also excluded from the definition making it clear that dumping is always the exclusive purpose of the voyage.[1319] The LOSC does not define "waste and other matters", while the LC and the regional seas conventions adopt a very broad definition.[1320]

Incineration is not defined in the LOSC (nor in the 1972 LC and earlier regional seas conventions), which did not perceive this practice as a threat. Incineration has subsequently been included within the scope of all conventions governing ocean dumping and is normally defined as the "deliberate combustion of wastes or other matters in the maritime area for the purpose of their thermal destruction" excluding, therefore, incidental incineration in conformity with international law and operational combustion from vessels, aircraft or offshore installations for purposes other than mere incineration.[1321]

Currently, ocean dumping and incineration are strictly controlled and only account for 10 per cent of all marine pollution.[1322] The disposal at sea of industrial and radioactive wastes has been completely banned and only a few harmless materials may still be dumped into European waters (i.e. dredge material, inert, geological materials (e.g., mine tailings) and fish waste). The absolute majority of dumping operations currently taking place concern dredge materials (e.g., sand and silt), which are relatively clean and do not pose a major threat to the marine environment.[1323]

7.2.2 The LOSC Jurisdictional Framework for Controlling Ocean Dumping

The LOSC framework governing ocean dumping is not as articulated as the one on vessel-source pollution. The Convention does not contain technical rules and standards, but establishes the jurisdictional framework for the prescription and enforcement of measures to control and regulate ocean dumping. Article 210(1) places States under a legal duty ("shall") to adopt laws and regulations and any other measure

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[1317] LOSC, Article 1(5)(a). See, also: LC, Article III(1)(a)(1) and (ii). The LOSC does not define "ships and aircraft", while the definition under the LC is very broad and refers to any "waterborne or airborne craft of any type whatsoever", including air-cushioned craft and floating craft, whether self-propelled or not (Article III (2)). See also BDP, Article 3(1).

[1318] E.g., LC, Article III(1)(b)(1).

[1319] LOSC, Article 1(5)(b)(ii); LC, Article III(1)(b)(2); BDP, Article 3(4)(b); 1992 Helsinki Convention, Article 2(3)(b)(ii); and OSPAR, Article 1(f)(ii).

[1320] LC, Article III(4) and BDP, Article 3(2) include "material and substances of any kind, form or description"; OSPAR, Article 1(o) defines waste as everything but (i) human remains; (ii) offshore installation; (iii) offshore pipelines: (iv) unprocessed fish and fish offal discharged from fishing vessels. Waste is not defined in the 1992 Helsinki Convention.

[1321] E.g., OSPAR, Article 1(h); 1992 Helsinki Convention, Article 2(5); and BDP, Article 5.

[1322] See GESAMP Report No. 39, The State of the Marine Environment (1990), p. 88; and GESAMP, Sea of Troubles, Report no. 70, (2001), p.26.

[1323] Initially, about 70% of all dumping permits notified to the LC concerned dredged material. This percentage rose to 80 - 85% following the cessation of incineration at sea and the ban on the dumping of industrial waste, see: www.londonconvention.org/London_Convention.htm#Industrial%20waste. Dredge materials, however, may be contaminated by the output of municipalities and industries (e.g., heavy metals, agricultural materials, organic compounds) which may accumulate in marine organisms and may still pose a threat to human health and fisheries.

to "prevent, reduce and control" dumping. These measures have to ensure that no dumping will be carried out without a permit from the competent national authority (Article 210(3)). In particular, dumping within the territorial sea, EEZ or onto the continental shelf requires the "express prior approval" of the coastal State (Article 210(5)). Apparently, tacit approval is not enough.[1324] Coastal States, moreover, have the right to permit, regulate and control the disposal "after due consideration of the matter with other states which, by reason of their geographical situation may be adversely affected thereby" (*ibid.*). This provision does not oblige states to enter into formal consultation, but it is declaratory of the customary duty to consult in good faith.[1325]

National laws and regulations cannot be "less effective […] than global rules and standards" (Article 210(6)). These global rules and standards are generally considered to be those laid down in the LC, which seems to reflect customary law.[1326] In regulating ocean dumping, therefore, all Parties have to conform, as a minimum, to the provisions of the LC regardless of their individual participation in that Convention. States, moreover, "shall endeavour" to establish global and "regional" rules, standards and recommended practices and revise them from time to time acting within the framework of the "competent international organizations" (Article 210(4)). Unlike in the field of vessel-source pollution, competent organizations do not only refer to the IMO, but also to the IAEA and regional bodies, such as the OSPARCOM, HELCOM and the BARCON. The LOSC, indeed, seems to recognize that regional rules may be more suitable compared to global regulations to effectively control ocean dumping. The regulation of ocean dumping, unlike vessel-source pollution, does not interfere with the freedom of navigation and does not require strong uniformity.

Article 216 of the LOSC gives jurisdiction to enforce national anti-dumping measures and "applicable international rules and standards" to (i) flag States; (ii) coastal States with regard to dumping activities in their territorial sea, EEZ or onto their continental shelves; and (iii) States in whose territories (or offshore terminals) the waste is loaded. Generally *applicable* rules, unlike the "general rules" mentioned in Article 210, seem to refer to instruments expressly ratified by the Parties concerned and customary international law, such as the LC and, since March 2006, also the 1996 Protocol. All global and regional agreements regulating ocean dumping rely on the jurisdictional rules set out in the LOSC.[1327]

The LOSC includes the deliberate disposal of platforms or other man-made structures at sea within the definition of dumping (Article 1.1(5)(a)(ii)). Article 60(3) of the LOSC requires coastal States to remove offshore installations in the EEZ and continental shelf to ensure the safety of navigation, fishing, and the protection of the marine environment and "taking into account any generally accepted international standards established by the competent international organization", but also envisages the option of partial removal.[1328] In 1989, the IMO adopted a set of guidelines to

[1324] E.g., S. Rosenne and A. Yankov (eds.) (1991), p. 166. Also the LC requires the prior approval of the coastal state, but this does not need to be "express."
[1325] E.g., S. Rosenne and A. Yankov (eds.) (1991), p. 166.
[1326] IMO doc. LC 17/14, Para. 2.5. See also 1995 UNSG Report (A/50/713), Para. 107.
[1327] E.g., LC, Article 12(1)(a)(b)(c); BDC, Article 11; and the 1992 Helsinki Convention, Article 9(3).
[1328] LOSC, Article 60(3). Article 60 applies mutatis mutandis to the continental shelf (Article 80). In this way, the LOSC departs from the traditional regime under the 1958 UN Geneva Convention on the Continental Shelf (CCS), which required the entire removal of abandoned or disused offshore installations (Article 5(5)). For a detailed analysis of the regime on the removal and disposal of offshore installations see: E.D. Brown (1992), p. 128.

implement Article 60(3).[1329] Total removal is considered the norm, but in special circumstances (e.g., installations meeting certain depth or weight criteria) coastal States may authorize partial removal on the basis of a case-by-case evaluation of the different factors involved (e.g., any potential effect on the safety of navigation, the marine environment and its living resources).[1330] The status of the 1989 IMO guidelines is still controversial.[1331] If, on the one hand, Article 60(3) of the LOSC does not make such guidelines mandatory, then, on the other hand, in view of the consistent practice of states (including the US) and their endorsement in most international and regional agreements, they seem to reflect customary international law.[1332]

7.2.3 The 1972 London (Dumping) Convention

The London Dumping Convention was concluded on 29 December 1972 in the aftermath of the Stockholm Conference.[1333] It represents the first global convention regulating ocean dumping, but its regime was profoundly influenced by the 1972 Oslo Convention for the prevention of pollution by dumping in the North East Atlantic, which was adopted in February 1972.[1334] In 1992, the Parties decided to refer to the Convention as London Convention 1972 (LC).[1335]

The LC requires contracting parties "to take all practicable steps" to harmonize their policies in order to prevent pollution by the dumping of wastes and other hazardous matters that may affect human health, harm marine living resources and ecosystems, damage amenities or interfere with any legitimate use of the sea (Articles I and II). Incidental or operational disposal regulated under MARPOL 73/78 are not covered (Article III (1)).[1336] The definition of dumping mirrors the one under the LOSC. However, unlike the LOSC and the regional seas conventions, the LC expressly excludes from the definition of dumping the disposal of waste or other matter "directly arising from or related to the exploration, the exploitation and associated offshore processing of seabed mineral resources."[1337] This exception (which

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[1329] "Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone," IMO Res. A.672 (16), 19.10.1989. It is commonly agreed that the IMO Guidelines represent the generally accepted international standards referred to in Article 60(3) of the LOSC (e.g., UN Doc. A/52/487, Para. 282). For a detailed discussion of the IMO Guidelines see, e.g., J. Woodliffe (1999), pp. 105-6 and E.D. Brown (1992), pp. 129-30.

[1330] All factors are listed in IMO Res. A.672 (16), paras 2.1 and 2.2. In addition, after January 1998, the placement of offshore installations on the continental shelf or in the EEZ is prohibited unless their design, construction and structure allow their total removal upon abandonment.

[1331] For a general discussion on the topic see: L. de la Fayette (1998), pp. 524-26; E.D. Brown (1992), pp. 128-30 and Z. Gao (1997), p. 62.

[1332] E.g., J. Woodliffe (1999), p. 106.

[1333] Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter, 29.12.1972, in force on 30.08.1975. On 14.10.2004 the Convention had 80 Parties, including 18 EC member states. Other EC Members: i.e. Austria, the Czeck Republic, Slovakia, Hungary (all land-locked States) and Estonia, Lithuania and Latvia are not parties.

[1334] E.g., S. Rosenne and A. Yankov (eds.) (1991), p. 158. For a detailed discussion of the Oslo Convention see: L. de la Fayette (1998), pp. 515-536.

[1335] The decision (IMO Doc. LC 15/16, Para. 4.25) was taken on the basis of a proposal from Greenpeace International (IMO Doc. LC 15/5) since the old name suggested the idea of a sort of "dumping club". See also E.J. Molenaar (1997), p. 397.

[1336] The exact scope of this exception has been challenged in the IMO. In 2004, LC 26 asked the MEPC to clarify the boundaries between "normal operations of vessels" under MARPOL 73/78 and "dumping" under the LC and its Protocol. The main concerns relate to the broad definition of "cargo associated wastes" which may be discharged under MARPOL Annex V (garbage). The Parties reviewed the MEPC's response at their 27th meeting in December 2005, but the issue has not yet been resolved (e.g., LC 27/16, 16.12.2005, Para.7.10).

[1337] LC, Article III (1)(c). Article 2 (b)(ii) of MARPOL 73/78 contains the same exception.

was reconfirmed in the 1996 Protocol[1338]) has been strongly criticized for being purely political and for providing the offshore oil and gas industry with preferential treatment since it makes it possible to dump from fixed platforms the same kind of waste that cannot be disposed of from a ship.[1339] However, the offshore operations excluded from the LC seem to fall within the scope of "operational discharges" from fixed or floating platforms regulated under MARPOL 73/78.[1340]

Another controversial issue is whether or not sub-seabed disposal falls within the definition of dumping under the LC. The controversy initially started in the 1980s in relation to the sub-seabed disposal of radioactive (especially high-level radioactive) materials. The nuclear industry had to accept the ban "on the seabed", but claimed that the LC does not cover disposal "under the seabed".[1341] In 1990, the parties to the LC adopted a peculiar resolution banning sub-seabed disposal from the sea, but allowing it from land, through a tunnel.[1342]

Incineration was not originally within the scope of the Convention, but was included in 1978 through an amendment to the Annexes.[1343]

The Convention applies to "all marine waters other than internal waters of states" (Article III (3)).[1344] Article XIII makes it clear that nothing in the LC shall prejudice the codification and development of the law of the sea by UNCLOS III. It is generally accepted that the regime of the LC therefore applies to the EEZ.[1345]

Just as most of the earlier environmental treaties, the LC follows a double-listing approach. The dumping of substances listed in Annex I (the Black List), including high-level nuclear waste, is completely prohibited,[1346] while the disposal of substances listed in Annex II (the Grey List), including low-level nuclear waste, is conditional on a special permit being issued by the competent national authority.[1347]

[1338] 1996 Protocol to the LC, infra n. 1363 (Article 1.3). During the Special meeting of the Parties, held in November 1996 to sign the Protocol, a large number of countries made it clear that they would not ratify it without this exception.

[1339] This was a typical political decision because in the 1970s the exploitation of mineral resources (e.g., polymetallic nodules) was considered as an important industrial sector for the future.

[1340] Article 2(4) of MARPOL 73/78 includes fixed or floating platforms in the definition of "ships".

[1341] In the early 1980s, the UK, France, Japan, the U.S, Germany, Switzerland, Belgium and the Netherlands developed a sub-seabed disposal option for high-level radioactive wastes under the auspices of the Sub-Seabed Disposal Working Group of the Nuclear Energy Agency of the OECD. See, e.g., R. Parmentier (1999), p. 4.

[1342] Resolution LC 14(7), Para. 207.

[1343] It was decided to include incineration rules in the LC by amending Annex I and II since the revision of the Convention would have taken too long. The so-called LDC Incineration Amendments were adopted on 12.10.1978 and entered into force in 1979 (1979 UKTS 71). These amendments, however, did not prohibit incineration, not even for substances listed in Annex I, but laid down the criteria for the approval of incineration vessels and required parties to consider the practical availability of land-based alternatives before issuing incineration permits.

[1344] The 1972 LC, like all the early environmental treaties, was mainly concerned with dumping by foreign vessels and contracting Parties opposed the establishment of international rules in areas under their absolute sovereignty. See: B. Kwiatkowska (1995), p. 55.

[1345] Parties agreed to meet after UNCLOS III to define the nature and extent of rights and duties of coastal States (Article XIII). Such a meeting, however, has never been convened. At the 11th Meeting of the LC (1988), Norway, among other countries, called for an amendment of the LC in order to expressly recognize the rights and responsibilities of states to regulate dumping within the EEZ. However, the majority of the parties agreed that since there was no inconsistency between the LC and the LOSC, there was no need to amend the LC. See A. Fretheim (1990), p. 249.

[1346] LC, Article IV(1)(a). Annex I includes, *inter alia*, organosilicon compounds, mercury and cadmium and their compounds, synthetic materials and persistent plastics, crude oil and hydrocarbons.

[1347] LC, Article IV(1)(b). Annex II includes, *inter alia*, pesticides and their by-products, arsenic, lead, copper and zinc.

Wastes and other matters that are not listed in the Annexes require a prior general permit.[1348] In issuing special and general permits, the national authorities have to take into account the criteria laid down in Annex III (e.g., the characteristics and composition of the materials, dumping sites, the possible effect of the dumping and the practical availability of land-based disposal alternatives). The LC intends to ensure that no dumping takes place without a prior assessment of all the possible adverse effects. Parties have to keep a record of the dumping activities permitted, monitor the conditions of the sea and report all relevant information to the IMO.[1349] So far, only a small percentage of the contracting Parties have met their reporting requirement under the convention.[1350]

The LC, as the LOSC, requires Parties to take legislative action to implement the Convention for vessels or aircraft (a) registered in their territory or flying their flag, (b) loading waste in their territory or territorial sea, and (c) engaging in dumping in waters under their jurisdiction (including the continental shelf and the EEZ).[1351] The enforcement of the LC is the task of the coastal States in waters under their jurisdiction, while in the high seas such responsibility lies primarily with flag States.[1352] Although the provisions on enforcement are poorly drafted and there is no indication as to what the Parties may do to enforce the Convention, they seem to be entitled to take all measures that are necessary to verify that no illegal dumping operations are carried out and that the conditions set out in the permits are met. Parties, moreover, agreed to cooperate in the development of procedures for the effective application of the LC especially on the high seas, including procedures for the reporting of vessels and aircraft engaged in dumping in contravention of the Convention.[1353] The Convention lists a number of exceptions to these general rules (e.g., for vessels entitled to sovereign immunity and in emergency situations).[1354]

Like the LOSC, the LC strongly encourages regional cooperation and the adoption of agreements for the control of dumping activities taking into account regional features (Article VIII).

Finally, the Convention sets out an institutional framework governing its future operation. Secretariat duties are carried out by the IMO. Consultative Meetings between the Parties have to be held every two years (but in practice they take place annually) to discuss possible amendments to the Convention and its Annexes, to examine national reports on implementation and to develop guidelines for the operation of the Convention (Article XIV).[1355]

7.2.4 The Revision Process and the 1996 Protocol

In the early 1990s, the LC was subject to a revision process that extended its scope and brought the Convention into line with the modern approach to waste management and emerging principles of international environmental law, especially the precautionary

[1348] LC, Article IV(1)(c).
[1349] *Ibid*, Article VI(1).
[1350] E.g., IMO Doc. LC 27/16, Para. 3 (2005) and LC 22/3/2 (2000).
[1351] LC, Article VII. See: D. Suman, (1991), p. 567 and R. Churchill and A. Lowe (1999), p. 364.
[1352] At their 11th meeting (1988), the Parties recognized the possibility to enforce the LC in the EEZ and continental shelves (IMO Doc. LDC 11/14, Para. 5.4).
[1353] LC, Article VII(3). So far, however, no action has ever been taken pursuant to Article VII(3).
[1354] E.g., *force majeure* or when the dumping is necessary to protect the safety of human life and vessels (LC, Articles VII(4) and V).
[1355] The Consultative Meetings of the Parties (hereinafter LC) are preceded by the meetings of the Scientific Group that take place annually to discuss scientific and technical aspects of dumping. The records of the meetings are available at: www.londonconvention.org/main.htm

principle.[1356] This evolution was strongly encouraged by Agenda 21.[1357] In 1993, three major amendments were adopted. Firstly, the dumping of industrial waste was completely phased out.[1358] Secondly, following the recommendation of Agenda 21,[1359] the sea disposal of all classes of radioactive waste was totally banned,[1360] putting an end to the long controversy over the dumping of low-level radioactive material.[1361] Thirdly, the incineration of industrial waste and sewage sludge was completely phased out.[1362]

The revision process which the LC underwent came to an end in 1996 with the adoption of a new Protocol.[1363] The 1996 Protocol is far more restrictive than the LC and, in practice, is a completely new Convention. Given that OSPAR contracting parties have always been particularly active in the LC, the Protocol presents strong analogies with the OSPAR dumping provisions. The main objective is not only to prevent and control, but also to eliminate, "where practicable", pollution by dumping and the incineration of wastes and other matters.[1364] Incineration at sea is completely prohibited. The 1996 Protocol (Article 3) requires ("shall") Parties to apply the precautionary approach and moves from the traditional black and grey lists towards a so-called "reverse listing" structure whereby all dumping is prohibited unless explicitly permitted.[1365] Only matters listed in Annex I may be considered for sea disposal with a prior permit from the national authority. They include: dredged materials; sewage sludge; fish processing wastes; vessels and disused offshore installations; inert, inorganic geological material; organic material of natural origin; and harmless bulky items.[1366] These materials, however, are not eligible for dumping when "they contain

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[1356] For an overview see: E.J. Molenaar (1997), pp. 396-403; L. de la Fayette (1999), pp. 526-7.

[1357] Agenda 21 (Para. 30 (b)(1)) called for a revision of the existing international regime on ocean dumping.

[1358] Resolution LC 49(16) concerning Phasing Out Sea Disposal of Industrial Waste by the end of 1995. Australia made a reservation (IMO Doc. LC 17/14, para. 2.2). However, the exact identification of "industrial waste" is still controversial. In particular no consensus has been reached on the conditions under which materials exempted from the definition of "industrial wastes", as listed in Annex I, paras. 11(a) to (f), would be eligible for disposal at sea. See: LC 25/16 (2003), pp. 23-4; LC 24/17 (2002); and LC 22/14 (2000); all available at: www.londonconvention.org/Documents.htm.

[1359] See: Agenda 21, Para. 22.5.c.

[1360] Resolution LC 51(16) concerning Disposal at sea of Radioactive wastes and other Radioactive Matter. The 1993 ban entered into force on 20.02.1994 for all contracting Parties except the Russian Federation which made a reservation (see: IMO doc. LC 17/14, Para. 2.2). Reportedly, it did not have sufficient facilities to store and process low-level radioactive waste and therefore dumped it in the Barents and Kara Seas. Only in May 2005 did the Russian Federation officially accept the 1993 ban.

[1361] Under the 1972 LC, the dumping of low-level radioactive materials listed in Annex II was still allowed on the basis of a special permit. In 1983, due to strong political pressure, a non-binding moratorium on the dumping of low-level radioactive waste was adopted pending the completion of scientific and technical studies by an independent panel of experts (Resolution LDC 14(17)). The moratorium was extended in 1985 (i.e., Resolution LDC 21(9)).

[1362] Resolution LC 50(16) concerning Incineration at Sea. The incineration of noxious liquids was phased out by the end of 1994 (1988 Resolution LDC 35 (11)).

[1363] Article 23, 1996 Protocol to the London Convention on Dumping of Waste and Other Matter (1996 Protocol). The Protocol was adopted at the Special Meeting of the Parties, held on 7.11.1996, and entered into force in March 2006, see infra n. 67.

[1364] 1996 Protocol, Article 2. According to E.J. Molenaar (1997), p 399 this formula leaves a great deal of discretion to the states Parties and is quite ambiguous since it is not clear whether states should suspend dumping activities or clean up the existing pollution.

[1365] 1996 Protocol, Articles 4 and 5. The OSPAR, 1992 Helsinki Convention and the 1995 BDP follow the same approach.

[1366] I.e, bulky items primarily comprising iron, steel, concrete and similarly harmless materials for which the concern is physical impact, limited to those circumstances where such wastes are generated at

levels of radioactivity greater than *de minimis* concentrations as defined by the IAEA and adopted by contracting parties."[1367] The permits have to be issued on a case-by-case basis according to Annex 2, which determines the criteria by which to assess the potential impact of dumping activities on the marine environment. Dumping is permitted only if, after the assessment, it emerges as the best environmental option, but preference should always be given to alternatives such as reuse, recycling and land disposal.[1368] To assist national authorities in the issuing of permits, the contracting parties adopted different sets of guidelines for the assessment of wastes eligible for dumping.[1369]

In practice, however, the "reverse listing" approach does not substantially change the previous regime since the substances listed in Annex I to the 1996 Protocol are the same as those that could be dumped under Annex II to the amended LC. Particularly contested, especially by EC contracting Parties, is the retention of the possibility to dump vessels and disused installations.[1370] This practice, as will be discussed later, has been put in the spotlight in the aftermath of the Brent Spar controversy in 1995, but the interests of the offshore oil and gas industry always prevented the adoption of a strong regulation within the framework of the LC.[1371]

What substantially differentiates the 1996 Protocol from the LC is, first of all, the extension of its geographical scope. The Parties to the Protocol may decide to apply its provisions to internal waters, which are expressly excluded from the scope of the LC.[1372] In addition, the Protocol includes within the definition of dumping: any storage of wastes or other matters "into the seabed and the subsoil thereof" (Article 1(3)), thereby putting an end to the long controversy over whether or not sub-seabed disposal falls within the LC regime . However, it is still not clear whether sub-seabed disposal through a tunnel is still possible.[1373]

Another innovating element of the 1996 Protocol is the introduction of a new total ban on the export of waste for dumping or incineration purposes to non-Parties (Article 6). This provision creates a bridge between the LC and the Basel Convention on the Control of Transboundary Movement of Waste and their Disposal (Basel

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locations, such as small islands with isolated communities, having no practicable access to disposal options other than dumping. See Annex I, point 7.

[1367] 1996 Protocol, Annex 1, Para.3. In 2001, the IAEA adopted Guidelines on the assessment of the level of radioactivity contained in the materials considered for dumping under the LC.

[1368] Annex 2, opening paragraph and the 1996 Protocol, Articles 2, 3 and 4.2 .

[1369] The LC 22, in 2000, adopted a set of Guidelines for the assessment of wastes that may be dumped under the 1996 Protocol which also apply to waste under Annex II of the LC. See also the 1997 Guidelines for the assessment of wastes or other matters that may be considered for dumping (LC 19/10, Annex 2), currently under review. In 2005, moreover, LC 25 approved policy guidance for the "placement of matter" (e.g. the construction of artificial reefs), which is exempt from the definition of "dumping" under the LC.

[1370] Conversely, the dumping of platforms and other man-made structures at sea is conditional upon removal to the maximum extent of material capable of creating floating debris or otherwise contributing to marine pollution and does not have to pose a serious obstacle to fishing or navigation (Annex I, para. 2). The Protocol therefore implements the 1989 IMO Guidelines.

[1371] The LC 18, in 1997, rejected a Danish proposal for a moratorium on the dumping of disused vessels and offshore installation. But with Resolution LC.56(SM) the Parties urged future research to be conducted by a scientific group on land-based alternatives, assessments and a procedure for preventing pollution arising from the sea disposal of vessels. For a detailed analysis see: L. de la Fayette (1999), pp. 524-527; J. Woodliffe (1999), pp. 106-109; and J. Side (1997), pp. 45-52

[1372] 1996 Protocol, Articles 1(7) and 7. In addition, contracting Parties may decide to apply the 1996 Protocol also to vessels and aircraft entitled to sovereign immunity (Articles 8 and 10(4) and (5)).

[1373] Currently, it is under discussion whether CO2 sequestration in sub-seabed geological structures are compatible with the LC (and the 1996 Protocol), see: LC 27/16, 16.12.2005, paras 6.1-33.

Convention).[1374] The Basel Convention indeed aims to reduce movements of hazardous waste to a minimum and makes sure that its rules on processing and disposal, including ocean dumping, are not circumvented by exports.[1375] The 1996 Protocol therefore reinforces the Basel regime.

Finally, the 1996 Protocol places far more emphasis on compliance than the LC and requires the Meeting of the Parties to establish procedures and mechanisms which are necessary to assess and promote compliance (Article 11); to provide technical assistance (Article 13); and to establish a dispute-settlement procedure (Article 16).[1376] The Protocol mirrors the LOSC and the LC with regard to application and enforcement.[1377]

The 1996 Protocol entered into force on 24 March 2006, 10 years after its adoption, superseding the LC as between the Parties to the Protocol which are also Parties to the LC.[1378] For the time being, therefore, both instruments will be in force in parallel. This might create some confusion, especially for States parties to the LOSC which did not ratify any of the two instruments (including the Community and some EC member states),[1379] as to whether the "global rules" and the "generally applicable international rules" referred to respectively in Article 210 and Article 216 of the LOSC are those laid down in the Protocol or in the LC.[1380] For a long time, the 1996 Protocol has not attracted a large number of ratifications and it is still controversial whether, like the LC, it may be considered to reflect customary international law.[1381]

7.3 Regional Conventions and the Control of Ocean Dumping and Incineration

7.3.1 The 1972 Oslo Convention and the 1992 OSPAR Conventions

Among all European Seas the North-East Atlantic, in particular the North Sea, has been the most affected by dumping and incineration and for a long time has been used as a dumpsite by the Western European nuclear industry.[1382] Offshore gas and mineral extraction is one of the main activities in the area and here there is the highest concentration of oil platforms and other man-made structures at sea. Not surprisingly, dumping has been one of the first sources of marine pollution ever regulated in the North-East Atlantic. The 1972 Oslo Convention for the Prevention of Marine Pollution by Dumping from Ship and Aircraft (Oslo Convention) was the first international

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[1374] Basel, 22 March 1989, in force 5 May 1992. The EC is a party to the Basel Convention.

[1375] Almost all wastes labelled as hazardous under Annex I of the Basel Convention are listed in Annex I of the LC among matters whose dumping is prohibited.

[1376] In addition, it strengthens monitoring and reporting obligations (Annex 2, Para. 16). The work towards the development of compliance procedures started in 2003.

[1377] 1996 Protocol, Article 10. Article 10(2) requires Parties to adopt "appropriate measures in accordance with international law to prevent and if necessary punish acts contrary to the provisions of this Protocol".

[1378] The requisite 26 ratifications necessary for its entry into force had been met on 22.02.2006, when Mexico deposited its instrument of ratification. See: IMO News, No. 1 (2006). Only 10 EC member states have ratified the Protocol (i.e., Belgium; Denmark; France; Germany; Ireland; Luxembourg; Slovenia; Spain; Sweden and the UK), while others (e.g., Finland, Greece, Italy and the Netherlands) are in the process of ratifying. The two acceding countries (Bulgaria and Romania) have not ratified either.

[1379] I.e. Austria, the Czech Republic, and Slovakia (all land-locked States) and Estonia, Lithuania and Latvia.

[1380] E.g., 2001 UNSG Report (A/56/58), Para. 338.

[1381] See, e.g., E.A. Kirk (1997), p. 959.

[1382] Between 1949 and 1982, approximately 140,000 tons of low-level radioactive waste was disposed of in ten different dumpsites in this area. In addition, most of the existing incineration vessels operated in the North Sea, see: D. Suman (1991), pp. 560-1 and R. Parmentier (1999), p. 2.

agreement regulating ocean dumping.[1383] As already mentioned, the Oslo Convention strongly influenced the 1972 LC, which was adopted shortly afterwards. The two instruments, therefore, had a similar structure, but differed with respect to the substances controlled (e.g., high and low-level radioactive wastes were not originally controlled in the Oslo Convention). The Oslo Convention set out a permit system and required parties to submit to the Oslo Commission all records of the dumping permits issued. The Commission therefore had an overview as to who dumped what, where and how much, but could not do much to impede Parties from continuing to dump their waste into the North-East Atlantic. At the beginning of the 1990s, in parallel with the global developments, the Oslo Convention went through a revision process that was largely influenced by the NSMCs.[1384] Incineration, which was not originally covered, had been completely phased out by the end of 1990,[1385] the dumping of sewage sludge had been totally banned by the end of 1998[1386] and by that same date the ban had been extended to industrial waste.[1387] In the wake of the *Brent Spar* controversy, moreover, the Oslo Commission adopted a moratorium on the disposal of disused offshore installations at sea.[1388] The controversy started in 1995, when the oil multinational Shell decided to dump, with the authorization of the UK government, a disused oil ring, the *Brent Spar,* into the North Sea. At the 4th NSMC, in 1995, the environmental Ministers of the North Sea coastal States manifested strong concerns about this practice, being aware of the fact that an increasing number of offshore installations in the North Sea were approaching the time of their decommissioning.[1389] They agreed that decommissioned offshore installations should be either reused or disposed of on land and invited the Oslo Commission to take steps in this direction. Three weeks later, the Oslo Commission adopted the moratorium, but Norway and the UK made a reservation.[1390] Given that both countries license the large majority of all offshore installations in the North Sea, the effectiveness of this moratorium has been strongly questioned.[1391] Only in January 1998, due to strong international pressure, did Shell announce a plan to recycle the *Brent Spar*, but the controversy over the dumping of offshore installations was far from over.[1392]

In 1998, the dumping regime in the North-East Atlantic was reinforced with the entry into force of the 1992 OSPAR Convention that replaced the 1972 Oslo Convention. Dumping and incineration are regulated in Annex II. As already

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[1383] Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, adopted in Oslo on 15.02.1972, entered into force on 7.04.1974. For a detailed analysis of the Oslo Convention see: The OSLO and Paris Commissions, "The First Decade", International Co-operation in Protecting the Marine Environment (1984).

[1384] In particular, the 2nd NSMC (1987) and 3rd NSMC (1990). See, e.g., E. Hey (2002), pp. 325-51 and E. Hey, T. IJlstra, A. Nollkaemper (1993), p. 2. On the role of the NSMCs see, in general, Chapter 1.4.1.

[1385] OSCOM Decision 90/2, 23 June 1990. Incineration was regulated in a special Protocol adopted in 1983 and entered into force in 1989 (1989 UKTS 59). That Protocol,, however, did not phase out incineration, but considered it as an interim measure pending the development of land-based alternatives.

[1386] OSCOM Decision 91/1, 23 June 1990.

[1387] OSCOM Decision 89/1, 14 June 1994.

[1388] OSCOM Decision 95/1, 4 August 1995. For a full discussion see: L. de la Fayette (1999), pp. 523-32; and J. Woodliffe (1999), pp. 11-114.

[1389] 4th NSMC Declaration (1995), Para. 54.

[1390] OSCOM Decision 95/1 on the Disposal of Offshore Installations.

[1391] See, e.g., R. Parmentier (1999), p. 11.

[1392] Shell decided to reuse the installation as a quay extension near Stavanger in Norway (e.g., Shell Press Release, 29.01.1998). Reuse operations were completed in July 1999. Since the entry into force of the decision on 4.08.1995, 18 platforms have been brought ashore. Greenpeace International played a major role in the controversy.

mentioned, the dumping provisions of the OSPAR Convention shaped the 1996 Protocol, although they are generally more stringent. Unlike the Oslo Convention, the OSPAR Convention expressly applies to internal waters[1393] and to the EEZ.[1394] But there are no provisions on seabed disposal. Like the 1996 Protocol, the OSPAR Convention endorses the precautionary principle and moves from the traditional "black and gray list approach" towards "a reverse listing system".[1395] Incineration is completely prohibited, while dumping is still permitted on the basis of a prior permit by the national authorities, but only for: dredge materials, inert materials of natural origin, sewage sludge (until 31 December 1998), fish processing waste and vessels and aircraft (until 31 December 2004).[1396] Dumping permits, however, cannot be issued whenever vessels and aircraft contain substances that result or are likely to result in harm or interference with other legitimate uses of the sea.[1397] The disposal of all radioactive waste is completely prohibited, but France and the UK made a reservation.[1398] The disposal at sea of disused offshore installations and pipelines is regulated in Annex III and may only be permitted on a case-by-case basis according to decisions, recommendations and other agreements adopted under the OSPAR Convention.[1399] Both Annexes II and III mirror the LC and the LOSC with regard to implementation and enforcement and require Parties to report to the Commission all records of authorized dumping operations.[1400]

At its first Ministerial Meeting, held in Sintra (Portugal) in July 1998, the OSPAR Commission adopted a number of legally binding decisions that further strengthened the dumping regime. First of all, Decision 98/2[1401] removed the exception granted to France and the UK with regard to the dumping of radioactive waste, bringing the OSPAR regime in line with the 1993 amendments to the LC, which had been accepted by both states.

Secondly, after complex negotiations between Norway and the UK, on one the side, and the other OSPAR contracting parties, on other side, Decision 98/3 was adopted, putting an end to the long controversy over the dumping of offshore installations in the North Sea.[1402] The dumping, and leaving wholly or partially in place of disused offshore installations within the maritime area has been completely prohibited subject to three exceptions.[1403] Generally speaking, these exceptions apply

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[1393] OSPAR, Annex II, Article 10(1)(c).

[1394] Article 10(1)(c) refers to the "part of the sea beyond and adjacent to the territorial sea under the jurisdiction of the coastal State to the extent recognized by international law".

[1395] Accordingly, Annex II, Article 1(o) defines waste by referring to everything except human remains, offshore installations and pipelines, unprocessed fish and offal discharged from vessels.

[1396] Annex II, Article 2 (incineration) and Article 3 (dumping). The list of materials that may be dumped into the OSPAR Area largely corresponds to that under the 1996 Protocol.

[1397] Annex II, Article 4(2).

[1398] Annex II, Article 3(3)(a), has been largely influenced by the 2nd NSMC Declaration (1987), Para. 32. According to Annex II, Article 3(3)(b) the UK and France are exempt from the prohibition.

[1399] Annex III, Article 5. The regime under Annex III mirrors Annex II. Deliberate disposal from offshore installations are included in the definition of dumping (Article 1(f)(2)) and are expressly prohibited (Annex III, Article 3).

[1400] Annex II, Articles 4(3) and 10 and Annex III, Articles 5(4) and 9.

[1401] The OSPAR Decision 98/2 came into force on 9 of February 1999.

[1402] OSPAR Decision 98/3 implementing the 1989 IMO Guidelines on the Removal of Offshore Installations in the OSPAR area. For a full discussion see: L. de la Fayette (1999), pp. 528-30 and J. Woodliffe (1999), pp. 101-23.

[1403] I.e. (a) the leaving in place of all or part of the footing of a steel installation listed in Annex 1 and placed in the Maritime Area before 9.02.1999; (b) the dumping of or leaving wholly or partially in place a concrete installation listed in Annex 1 or constituting a concrete anchor base (currently, there are 27 such installations in place in the area, see: www.ogp.org.uk/pubs/338.pdf) and (c) the dumping of or

whenever the entire or partial removal would be too difficult or even impossible (e.g., the footing of steel installations or concrete anchor bases). Parties which want to make use of these exceptions have to prepare an environmental assessment (according to Annex 2) and consult with other Parties (on the basis of a procedure set out in Annex 3).[1404] Initially, the OSPARCOM envisaged the possibility to reduce the scope of the exceptions in the light of new technical developments in the decommissioning of offshore installations at its regular meeting in 2003.[1405] The relevant work has been carried out within the Offshore Industry Committee (OIC), which concluded that decommissioning activity had not developed as quickly as expected in 1998 and there was no rationale for amending the decision.[1406]

After 1 January 2005, when the disposal of vessels and aircraft officially came to an end, ocean dumping in the North-East Atlantic is limited to inert material of natural origin; bulky wastes (e.g., steel wire and concrete); fish waste; dredge material;[1407] and disused offshore installations. Currently, the absolute majority of the dumping permits concern dredge materials, which are relatively harmless.[1408] Ocean dumping, therefore, is no longer a major threat in the North-East Atlantic and is no longer priority action for OSPAR.[1409] It is likely that for the time being OSPAR activities in this field will be limited to monitoring, reviewing and assessing the obligations of the Parties.[1410] Currently, dumping issues are mainly discussed within the OSPAR Working Group on Environmental Impact of Human Activities (EIHA),[1411] but occasionally they are also on the agenda of other OSPAR committees, such as the Biodiversity Committee (CBD) and the OIC.[1412]

7.3.2. The 1974 Helsinki Convention, as Amended

The Baltic Sea was used to dispose of most of the military waste from World War II and like the North-East Atlantic has been strongly affected by ocean dumping.[1413] Its

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leaving wholly or partially in place any other disused offshore installation, when exceptional and unforeseen circumstances resulting from structural damage or deterioration or from some other cause presenting equivalent difficulties may be demonstrated (OSPAR Decision 98/3, Para. 3).

[1404] Annex 4 lays down conditions for issuing decommissioning permits and for implementation reports to be submitted to the OSPAR Commission.

[1405] OSPARCOM Decision 98/3, Para. 7. Parties, moreover, will strive to avoid using such derogations for footings of still installations (Sintra Ministerial Statement, Para. 22).

[1406] See: Summary Record of the OIC's Meeting, 10-14 March 2003, Annex 4 and Summary Record of OSPAR 2003, para. 7.3, both available at: www.ospar.org/eng/html/welcome.html.

[1407] In Sintra the Commission adopted two series of Guidelines to Assist Parties in the Management of Dredge Material and in the Dumping of Fish Waste from Land-based Industrial Fish Processing Operations (see: Summary Records OSPAR 98/14/1-E, Annex 43).

[1408] See: OSPARCOM (2004): Overview of Past Dumping at Sea of Chemical Weapons and Munitions in the OSPAR Maritime Area, and the 2004 Report on dumping of wastes at sea adopted at BDC 05/4/2, both available at: www.ospar.org/eng/html/welcome.html, currently under review.

[1409] OSPARCOM's Action Plan for the period 1998-2003, as revised in 2003, and the 5th NSMC Declaration (2002) do not include ocean dumping and incineration among priority actions.

[1410] See, e.g., OSPARCOM recommendation 2003/2 on an OSPAR Framework for Reporting Encounters with Marine Dumped Conventional and Chemical Munitions (available at: www.ospar.org/v_ospar/strategy.asp?v0=1&lang=1).

[1411] Initially, dumping issues were discussed within the WG on Sea-based activities (SEBA), in the WG on Radioactive Substances (RS) and the WG on Impact on the Marine Environment (IME).

[1412] Currently, for instance, discussions are going on within the Group of Jurists/Linguists (JL), CBD and OIC as to whether CO2 disposal in the seabed may be considered as dumping or discharge (e.g., Summary records of OSPAR 2005).

[1413] About 40,000 tonnes of chemical munitions were dumped south-east of Gotland, east of Bornholm and south of the Little Belt, i.e: State of the Baltic Marine Environment (1998-2002), p. 35, available at:

waters, however, are much shallower than the North-East Atlantic and the rather restricted circulation makes wastes particularly difficult to remove.[1414] The dumping regime under the 1974 Helsinki Convention, therefore, was far stricter compared to the 1972 Oslo Convention or the LC. Dumping was completely banned except for dredge material, which required a special permit.[1415] Similarly, the dumping provisions of the 1992 Helsinki Convention are similar to the OSPAR Convention (e.g., the precautionary principle and the reverse listing approach), but in some respects they are more stringent. Dumping is completely prohibited with the only exception being dredge materials according to the provisions of Annex V and on the basis of a special permit from the competent national authorities.[1416] The prohibition extends to dredge materials containing significant quantities of noxious liquids listed in Annex I. In 1992, the HELCOM adopted recommendation 13/1 and related guidelines for the disposal of dredge material inviting Parties, *inter alia,* to evaluate different disposal options, select sea disposal sites and assess potential environmental effects before issuing a permit.[1417] Also incineration, which was not originally covered under the 1974 Convention, is now completely prohibited (Article 10(1)).[1418]

Given that offshore activities in the Baltic are rather limited, the Helsinki Convention, unlike OSPAR, does not contain specific provisions on the dumping of disused offshore installations. However, the Convention includes the deliberate disposal of any man-made structure at sea in the definition of dumping. Presumably, on the basis of the general ban on dumping, the Helsinki contracting Parties are under an obligation to totally remove disused offshore installations. The Baltic Sea has a maximum depth of 210 meters and there are not many steel installations or concrete anchor bases in the area. This makes the entire removal relatively simple compared to the North-East Atlantic and seems to be in line with the 1989 IMO guidelines and Article 60(3) of the LOSC.

The Helsinki dumping regime applies to internal waters and the EEZ.[1419] Moreover, unlike OSPAR, the Helsinki Convention includes disposal into the seabed within the definition of dumping (Article 2(4)). However, it makes it clear that seabed disposal with access from land by tunnel, pipeline or other means is land-based pollution (Article 2(2)) and, therefore, is not regulated by the dumping regime.

Parties have to report to the HELCOM on all dumping activities permitted in their waters, indicating the location of dumping sites, the quantities and quality of the material disposed and they have to monitor the area (Article 11(5)). In addition, they have to cooperate in the investigation of suspected illegal operations in violation of the

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www.helcom.fi/stc/files/Publications/Proceedings/bsep87.pdf. See also the Final Report of the *Ad Hoc* Working Group on Dumped Chemical Munitions (HELCOM CHEMU) to HELCOM 15 (March 1995).

[1414] For a full discussion see: D. Suman (1991), p. 571 and M. Fitzmaurice (1992), pp. 29-43.

[1415] 1974 Helsinki Convention, Article 9(1).

[1416] 1992 Helsinki Convention, Article 11(1) and (2). Dumping is permitted in emergency situations (Article 11(4)). See : HELCOM Rec. 19/18 on emergency dumping (24.03.1998).

[1417] Available at: www.helcom.fi/stc/files/Guidelines/guide_rec13_1.pdf. The HELCOM Guidelines are currently under revision so that they can be aligned with the Guidelines adopted within the framework of the LC and OSPAR and to ensure consistency with the EC EIA Directive (HELCOM DREDGED SPOILS 1/2005).

[1418] Currently, HELCOM only covers land-based incineration (e.g., HELCOM Rec. 27/1, 8.03.2006, on the limitation of emissions into the atmosphere and discharges into water from incineration of waste.

[1419] 1992 Helsinki Convention, Articles 1, 3(1) and 5.

Helsinki Convention.[1420] Finally, the jurisdictional framework for the control of dumping under the Helsinki Convention mirrors that of the LOSC.[1421]

Ocean dumping has practically ceased in the Baltic Sea and is no longer a priority issue in HELCOM. Occasionally, however, dumping issues are still discussed within HELCOM Monitoring and Assessment Group (HELCOM MONA).[1422]

7.3.3 The 1976 BARCON and its Dumping Protocol, as amended

The Mediterranean Sea, like all semi-enclosed seas, is particularly vulnerable to ocean dumping (and incineration) which has been one of the most regulated sources of marine pollution within the BARCON system. Just as the Baltic, also the Mediterranean Sea, especially the Southern Adriatic, has been strongly affected by dumping and has been used to dispose of chemical weapons from World War II and, more recently, from the Balkans War.[1423] The 1976 BARCON requires Parties to take all appropriate measures to prevent and abate pollution caused by dumping from ships and aircraft (Article 5). This general provision was further specified in the Protocol for the prevention of pollution of the Mediterranean Sea by dumping from ships and aircraft (BDP) adopted together with the Convention.[1424] The 1976 BDP follows the 1972 Oslo Convention and the 1974 Helsinki Convention with regard to the definition of dumping;[1425] the absence of provisions on incineration; the listing structure and the permit system;[1426] reporting obligations;[1427] exceptions;[1428] the lack of application to internal waters;[1429] and the jurisdictional framework.[1430] But unlike other international agreements, the 1976 BDP lists both high and low-level radioactive waste in Annex I (the black list) and prohibits their disposal.

In 1995, within the context of the modernization of the BARCON system, both the 1976 Convention and the 1976 BDP have been amended along the lines of all the international dumping conventions.[1431] The dumping provisions of the revised Convention have been strengthened so as to require parties to "prevent, abate and to the fullest possible extent eliminate pollution" caused by dumping from ships and

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[1420] Ibid., Article 11(5) and (6). See also HELCOM Rec. 19/16 (24.03.1998) for cooperation in investigating violations or suspected violations of, *inter alia*, dumping and incineration regulations.

[1421] 1992 Helsinki Convention, Articles 10(2) and 11(3).

[1422] Most of the work on dumping is currently limited to the revision of the HELCOM Guidelines for the Disposal of Dredge Spoils (e.g., Minutes of HELCOM MONAS 8/2005, 21-5.11.2005).

[1423] Report on Dumping Activities in the Mediterranean Sea for the Period 1995-2001 (i.e. UNEP (DEC)MED WG.266/2, 19.01.2005, at: http://195.97.36.231/acrobatfiles/03WG231_20_eng.pdf.

[1424] Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, adopted on 16.02.1976 (1976 BDP).

[1425] 1976 BDP, Article 3(3).

[1426] *Ibid*, Articles 4, 5, 6 and 7.

[1427] Parties have to report to UNEP all dumping permits issued (1976 BDP, Article 11.2).

[1428] 1976 BDP, Articles 8, 9 and 11(1).

[1429] 1976 BARCON, Article 1(2), in defining the geographical coverage of the Convention, excludes internal waters, unless parties otherwise decide in any Protocol to the Convention. However, the 1976 BDP made no reference to internal waters.

[1430] 1976 BDP, Article 11(1).

[1431] Amendments to the Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, Barcelona 9-10 June 1995. For an overview of the revised 1995 BDP see, e.g. R. Churchill and A. Lowe (1999), p. 368. As discussed in Chapter 1.4.4, the revised BARCON, like the OSPAR and 1992 Helsinki Conventions, embraces the modern principles and approaches to waste management (e.g., the precautionary principle (Article 4(3)(a)), the polluter pays principle (Article 4(3)(b)), the use BAT and BET (Article 4(2)) and the duty to carry out an EIA (Articles 3(c) and 4(3)(d)). In addition, it introduced new provisions on marine pollution arising from the transboundary movement of hazardous wastes and their disposal, which shall be reduced to a minimum and if possible eliminated (Article 11).

aircraft (Article 5). The objective of the revised BDP (not yet into force) has been extended to eliminate "to the fullest possible extent" pollution by dumping from ships and aircraft and incineration at sea.[1432] Also the definition of dumping has been extended to include "any deliberate disposal or storage and burial of wastes or other matters on the seabed or in the marine subsoil from ships and aircraft."[1433] The revised BDP follows the same reverse listing approach as the other international conventions and its regime is similar to the 1996 Protocol of the LC and the OSPAR Convention, but the phasing out timetable is somewhat more stringent.[1434] Incineration has been completely prohibited,[1435] while dumping is generally banned except for: a) dredge material; b) fish waste or organic materials resulting from the processing of fish or other marine organisms; c) vessels, until 31 December 2000; d) platforms and other man-made structures at sea; and e) inert uncontaminated geological materials the chemical constituents of which are unlikely to be released into the marine environment.[1436] The dumping of these materials requires a prior special permit from the competent national authorities after a careful consideration of the factors listed in the Annex.[1437] Special Guidelines have been adopted to assist Parties in carrying out the dumping operations according to the Protocol.[1438] Parties have to keep records of the dumping permits, indicating the nature, quantities and locations where wastes have been dumped, and to submit them to the Secretariat.[1439] Moreover, they shall inform any other Party concerned about any suspected dumping in violation of the Protocol.[1440]

The regime for the decommissioning of offshore installations under the Dumping Protocol is less stringent compared to the OSPAR and the Helsinki Conventions. Offshore activities, indeed, are rather limited in the Mediterranean Sea. The Protocol does not provide for the removal (total or partial) of disused offshore installations, but simply requires Parties to remove to the maximum extent all material capable of creating floating debris or otherwise contributing to the pollution of the marine environment.[1441] In 2003, however, a set of Guidelines has been adopted for the

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[1432] 1995 BDP, Article 1. As of 30 April 2006, the Protocol counts 14 Parties, including the Community and all the EC's Mediterranean member states, except Greece. Two extra ratifications are needed for its entry into force.

[1433] 1995 BDP, Article 3(c).

[1434] These materials are the same as the ones listed in the 1996 Protocol and the OSPAR Convention. The differences in the phasing-out schedule concern sewage sludge and disused vessels, but since the 1995 BBP has not yet entered into force the three regimes are now consistent.

[1435] 1995 BDP, Article 7.

[1436] *Ibid*, Articles 4(1) and (2).

[1437] *Ibid*, Articles 5, 6 and 7.

[1438] I.e., Guidelines for the management of dredge materials (UNEP(OCA)/MED IG.12/4, 1999) and for the management of fish waste or organic materials resulting from the processing of fish and other marine organisms (UNEP(DEC)/MED IG.13/5, 2001). In 2005, the 14th MOP adopted two sets of Guidelines, one on the placement at sea of matter for purposes other than mere disposal (construction of artificial reefs) (UNEP (DEC) MED IG.16/8) and another on inert, uncontaminated geological materials (UNEP(DEC)/MED IG. 16/9).

[1439] 1995 BDP, Article 14.2. Dumping permits must be reported to the Coordination Unit of the Mediterranean Action Plan (MEDU) and the Meeting of the Parties shall study these records. For more on the reporting obligations under the BDP, see: EEA, Technical Report n. 45, "Guidelines of the EC reporting obligations under the Barcelona Convention and its Protocols in force" (2001), available at: http://reports.eea.eu.int/Technical_report_No_45/en/tech45.pdf.

[1440] 1995 BDP, Article 12.

[1441] *Ibid*, Article 4(2)(d). This provision is without prejudice to the provisions of the BARCON Protocol concerning the Pollution Resulting from Exploration and Exploitation of the Continental Shelf, the Seabed and its Subsoil (to which the Community is not a party).

dumping of platforms and other man-made structures at sea and these guidelines introduce a very detailed regime analogous to that of OSPAR Decision 98/3 and brings the Mediterranean system into line with the 1989 IMO Guidelines.[1442]

Like in other regional forums, dumping issues are not at the top of the agenda in the framework of BARCON, but are occasionally discussed within the MOPs, the Meetings of the MED POL National Coordinators[1443] and the Meetings of National Focal Points (NFP).

Pending the entry into force of the 1996 BDP, the dumping regime in the Mediterranean framework is far less stringent compared to the OSPAR or Helsinki Convention. Its effectiveness, moreover, is affected by serious implementation and enforcement problems. So far, only a few Mediterranean States have fully complied with their reporting obligations under the 1976 BDP and there seems to be a strong lack of control over dumping activities in the region.[1444] As a result, cases of illicit, unregulated and unreported dumping still occur.[1445]

7.4 Weaknesses of the International Regime

In the last three decades, the international regime has made giant steps towards the progressive phasing out of dumping and incineration. Despite its undeniable merits, the existing regime still has some weaknesses. Global rules (the LC and 1996 Protocol) are the result of a high degree of compromise between the conflicting interests involved and normally result in the lowest common denominator. Global provisions are often vague and leave a high degree of discretion to coastal States. The main concerns relate to the possibility to use existing loopholes under the LC and its 1996 Protocol to continue to dispose of harmful wastes into the sea, for instance through a tunnel or pipelines.[1446] In addition, the LC (and the 1996 Protocol) lacks strong enforcement mechanisms and control procedures to ensure full compliance by contracting Parties, which so far have fallen short of meeting their reporting obligations.[1447] Marine pollution from dumping activities, moreover, cannot be tackled in isolation, but requires efficient waste management policies and the effective regulation of land-based pollution.[1448] The LC does not adopt an integrated approach, and does not promote land-based alternatives. The 1996 Protocol represents an improvement in terms of compliance mechanisms and a more integrated approach to waste management. However, so far, the Protocol has not attracted many Parties.

The regional seas conventions fill most of the weaknesses of the global regime. Regional rules normally reflect a lower level of compromise, contain more stringent and clear obligations for the contracting Parties, and take a more holistic approach that integrates dumping and land-based pollution. In the past two decades, regional regimes

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[1442] The 2003 Guidelines, however, will enter into force at the same time as the new BDP (UNEP(DEC)/MED WG.231/21, 2003, paras 2 and 3).

[1443] The Programme for the Assessment and Control of Pollution in the Mediterranean Region (MED POL) is responsible, inter alia, for the implementation of the BDP.

[1444] UNEP Report on Dumping Activities in the Mediterranean Sea (1995-2001), supra n. 1423.

[1445] There seems to be an extended unreported disposal of obsolete weapons, which is not mandatory under the LC and is mainly carried out by national military authorities; chemical and conventional weapons (especially during the Kosovo conflict) have been dumped in the Adriatic; while some illicit dumping of radioactive wastes (especially from Eastern Europe) have taken place in Italian national waters, i.e., UNEP Report on Dumping (1995-2001), supra n. 1423, pp.15-19.

[1446] As GESAMP pointed out, the overall system "may result in substantial increases in waste disposal through pipelines directly into the coastal seas or into rivers that flow to the sea, bringing additional pressure on the coastal zone" (GESAMP Report No.63, Nairobi, 14-18 April 1997).

[1447] See, for instance, LC 27/16, para. 4.3 and 4.13.

[1448] E.g., 2001 UNSG Report (A/56/58), Para. 62.

governing ocean dumping and incineration have achieved a level of stringency with few equivalents in other environmental areas. However, the regional bodies lack strong enforcement mechanisms to ensure the full compliance and to encourage Parties to meet their monitoring obligations. As a result, in some regions, illegal dumping still takes place.[1449]

7.5 The Community Framework for the Control of Ocean Dumping and Incineration

7.5.1 The Community's Competence Concerning Ocean Dumping and Incineration

The Community, just as any other Party to the LOSC, has not only a right, but also a legal duty to adopt laws and regulations to prevent, reduce, and control dumping, which cannot be less effective than the LC (Article 210 LOSC). For a long time, the Commission, supported by the EP, has tried to directly adopt measures to implement Article 210, but the Community's regulatory action in the field of ocean dumping has been highly controversial.

The Community's competence in this field may be based on Article 175 EC. This provision has been used for the adoption of all EC legislation on waste disposal on land and, in principle, may serve as a legal basis for regulating waste disposal at sea.[1450] Article 95 (ex Article 100) EC and Article 37 EURATOM, moreover, may provide additional legal bases for controlling, respectively, the impact of dumping operations on the market and the sea disposal of radioactive waste. The Declarations of the Community upon signature and formal confirmation of the LOSC do not expressly refer to the Community's competence concerning ocean dumping. However, in listing the EC legislation in the field of the protection of the marine environment, both Declarations include a number of EC directives on waste disposal that also apply to the sea and the 1976 BDP,[1451] implicitly recognizing the capacity of the Community to take action on dumping issues. The Community's regulatory action on dumping and incineration, therefore, is consistent with the principle of attribution of powers.[1452] This, however, is not enough.

The Community's competence in environmental matters is shared with the member states and its regulatory action needs to be justified on the basis of the subsidiarity and proportionality principles. As will be discussed later in this Chapter, the member states always firmly opposed the Commission's attempts to regulate ocean dumping and used the subsidiarity and proportionality principles to keep the Community away from dumping issues. What was questioned in the first place was not the existence of a Community competence in ocean dumping matters, but the need for additional legislation in an area that was extensively and effectively regulated in other global and regional frameworks.[1453] Moreover, each regional sea requires a different

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[1449] E.g., UNEP Report on Dumping Activities in the Mediterranean Sea (1995-2001), supra n. 1423

[1450] See on the point: L. Kramer (2000), pp. 59-61.

[1451] The list of "*Community texts Applicable in the Sector of the Protection and Preservation of the Marine environment and relating Directly to subjects Covered by the Convention*" annexed to both Declarations includes waste disposal legislation: e.g., Council Directive 78/176/EEC on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the TiO2 industry as amended; Council Directive 75/442/EEC on waste; Council Directive 91/689/EEC on hazardous waste; and Council Directive 94/67/EEC on the incineration of hazardous waste. In addition, they list the EIA Directive 85/337/EEC and the 1976 BDP.

[1452] On the principle of attribution, see: Chapter 2.3.1.

[1453] E.g., UK House of Commons Debate (91 Parl. Deb. H.C (6th ser.) 1986, pp. 245-46.

level of protection, according to its oceanographic and ecological characteristics. Shallow seas with a slow circulation and exchange of waters like the Baltic or parts of the Mediterranean are more affected by ocean dumping compared to deep seas like the North Sea whose water circulation makes it relatively easier to remove waste. The effectiveness of uniform EC dumping standards equally applicable to the North Sea, Baltic Sea and Mediterranean Sea, therefore, was firmly contested. Moreover, the effective protection of a regional sea requires close cooperation between neighbouring coastal states. EC standards were not considered to be very effective especially in the Mediterranean Sea where the EC member states were (and still are) a minority of the coastal States. For all these reasons, regional conventions appeared more appropriate than uniform EC standards to protect European seas from pollution by dumping. For a long time, therefore, the Community's legislative action was seen as an unnecessary extra layer and a duplication of efforts which were not justifiable according to the subsidiarity and proportionality principles.[1454]

7.5.2 The 1976 Proposal for a Directive on Ocean Dumping

In the early 1970s, when the first international agreements on ocean dumping were adopted, the EC environmental policy was at its very beginning and the very existence of a Community competence in environmental matters was still controversial. All the (at that time) member states, except for Luxembourg, acceded to the 1972 LC and the regional seas conventions.[1455] The Community was able to accede to the 1976 BARCON and its BDP, but could not ratify the 1972 Oslo and 1974 Helsinki Conventions. Originally there were considerable differences among the substances controlled under the black/grey lists of the regional seas conventions.[1456] Some member states, therefore, could continue to dump their waste at sea, while others had to dispose of the same substances through more costly alternatives on land. This situation created a competitive advantage for some member states, jeopardizing the establishment of the single market, which at that time was still in the course of completion.[1457] In 1976, therefore, the Commission submitted a proposal to the Council for the adoption of a Directive on ocean dumping, on the basis of Article 100 EEC, with a view to harmonizing the implementation of the existing international rules on dumping within the Community.[1458] To this end, the proposal envisaged the establishment of a uniform system for issuing dumping permits by national authorities. The Commission's proposal presents strong analogies with the 1972 LC and the

[1454] E.g., D. Suman (1991), p. 605 and T. IJlstra (1988), pp. 181, 197, and 205.

[1455] I.e., Belgium, Denmark, France, Germany, Ireland, the Netherlands and the UK (1972 Oslo Convention); Germany and Denmark (1974 Helsinki Convention) and France and Italy (1976 BARCON and 1976 BDP).

[1456] Major differences concerned, e.g., crude oil and hydrocarbons; high and low-level radioactive waste; material produced for biological or chemical warfare; organosilicon compounds; acid and alkalis; possible carcinogens; and substances which may form organohalogen compounds.

[1457] The Mediterranean paint industry, for instance, was allowed under the 1976 BARCON to dump its titanium dioxide wastes at sea, while the German industry could not do so under the Oslo regime, but had to dispose its waste in a more expensive landfill. These differences could seriously distort competition in the European paint industry. Similarly, the Italian industry, which was prohibited from dumping low-level radioactive waste in the Mediterranean Sea under the 1976 BDP, could do so in the North Sea, because it was not a party to the Oslo Convention and, under the 1972 LC, the disposal of low-level radioactive waste was still permitted.

[1458] Proposal for a Council Directive Concerning the Dumping of Waste at Sea (1976 Proposal) (OJ C/40) 3 (1976)), based on Article 100 EEC on approximation of laws that affect the establishment or functioning of the common market.

regional seas conventions with regard to the definition of dumping;[1459] the black and grey listing structure; exceptions;[1460] jurisdictional application;[1461] and the lack of provisions on incineration. The black list (Annex I), however, was more extensive compared to most existing agreements and, like the 1976 BDP (not yet in force at that time), included both high and low-level radioactive waste.[1462] The EP generally welcomed the Commission's proposal and considered it as an important first step, but still far from a satisfactory solution.[1463] In the view of the EP, the language was too broad and there was no clear obligation to cease or phase out ocean dumping. In addition, according to the EP, the proposed directive should have implemented the existing international conventions at EC level and there should have been stronger consistency between the respective Annexes. In addition, the EP urged the Community to accede to all the relevant international conventions.

Despite the general support of the EP, the Council rejected the proposal. In the same year, the Council also refused to allow the Commission to begin the negotiations on the EEC's accession to the 1972 Oslo Convention. The need for Community involvement in the field of ocean dumping and its competence in this matter was still highly contested by the member states.

The EP has always firmly supported the need to regulate and harmonize ocean dumping at the EC level, especially with regard to radioactive waste, and it passed several resolutions calling upon the Commission to prepare a new proposal.[1464] In 1984, the EP once again urged the Community and its member states to accede as soon as possible to the 1972 LC, the 1972 Oslo Convention and the 1974 Helsinki Convention.[1465] Alternatively, the EP invited the Council to harmonize the matter by transposing the relevant international obligations into EC law. Central to any new proposal should be the prevention of dumping radioactive waste that should be totally harmonized in the form of a regulation.

7.5.3 The 1985 Proposal for a Directive on Ocean Dumping and Incineration, as Amended

In 1985, in response to the request of the EP and the 1st NSMC Declaration,[1466] the Commission submitted a new proposal to the Council for a directive on ocean dumping.[1467] Like the previous proposal, the 1985 proposal was primarily aimed at avoiding the distortion of competition by harmonizing the member states' laws and

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[1459] 1976 Proposal, Article 2.

[1460] I.e., vessels entitled to sovereign immunity, force majeure and in the absence of land-based alternatives (1976 Proposal, Articles 6 and 11).

[1461] I.e., the directive should apply to vessels registered in a member state; or loading within the territory of a member state; or carrying on dumping activities within the jurisdiction of a member state (1976 Proposal, Article 3(1)).

[1462] 1976 Proposal, Articles 4, 5 and 6 and Annex I (B).

[1463] EP Opinion to the Council for a Directive Concerning the Dumping of Waste at Sea (OJ C293 (1976), p. 60). See also the Opinion of the ESC on the Proposal for a Council Directive Concerning the Dumping of waste at Sea (OJ C 197 (1976), pp. 54-5).

[1464] E.g., EP Resolution on the Storage of Nuclear Waste in the Atlantic by the Netherlands, Belgium and the UK (OJ C 267, 1982), Para. 46, urging, *inter alia*, the Commission to prepare a proposal for an EC directive banning the dumping of radioactive waste; EP Resolution on the Combating of Pollution of the North Sea (OJ C 46, 1984) requesting, *inter alia*, a proposal for a directive banning incineration.

[1465] EP Resolution for the Dumping of Chemical and Radioactive Wastes at Sea (OJ C 104, 1984), paras. 72-75.

[1466] The 1st NSMC Declaration (1984) called for the complete prohibition of dumping and incineration of harmful wastes in the North Sea.

[1467] 1985 Proposed Directive, COM (85) 373, 13.08.1985 (O.J C 245, 1985, p.2).

setting out a common system of permits. Additionally, it also intended to improve the quality of the marine environment and protect the sea against pollution. Accordingly, the proposal was based on Articles 100 and 235 EEC.

The 1985 proposal is more stringent compared to the 1976 proposal and, to some extent, existing international conventions. The material scope of the draft directive has been extended to include within the definition of dumping any deliberate discharge from fixed or floating platforms and other man-made structures at sea and their equipment; any disposal on or in the seabed, interim storage of wastes; and ocean incineration.[1468] Due to pressure from the nuclear industry (especially in the UK), however, the Commission excluded the dumping or seabed burial of radioactive substances from the scope of the directive.[1469] The 1985 proposal still adopts a black/grey listing structure, but unlike the 1976 proposal, it does not include high and low-level radioactive wastes in any of its Annexes.[1470] Ocean incineration is only allowed for substances listed in Annex IV on the basis of a special permit and only in the absence of practical land-based alternatives.[1471] The proposal, moreover, sets out a system for the gradual phasing out of dumping and incineration of substances listed in Annex II and requires member states to promote land-based disposal alternatives and recycling.[1472] Member states, however, are free to adopt more stringent measures, including the total ban of dumping and incineration in particularly vulnerable areas.[1473] The 1985 proposal reconfirms the same exceptions as in the previous proposal.[1474]

The 1985 proposal only applies to dumping operations conducted by EC or third State vessels in waters within the jurisdiction of the member states, implicitly including the EEZ.[1475] Conversely, it does not cover dumping activities carried out by vessels flying the flag of EC member states in waters outside their jurisdiction, including the high seas or waters under the jurisdiction of third States. This is probably the weakest point of the proposal.

In general, the EP supported the 1985 proposal,[1476] but expressed strong concerns with regard to some provisions and in 1987 put forward a set of amendments.[1477] First of all, the EP stressed the importance to include all radioactive wastes in Annex I.[1478] Secondly, it reconfirmed the need to ensure consistency with the existing international conventions, by incorporating their black and grey lists into the Annexes of the proposed directive.[1479] Thirdly, the proposal would apply to dumping operations, wherever they occur, when carried out by ships loading in the ports of an

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[1468] 1985 Proposal, Article 2.
[1469] See: Explanatory Memorandum Accompanying the 1985 Proposed Directive, COM (85) 373 final.
[1470] 1985 Proposal, Article 4(1), (2) and (3). Annex I includes all substances listed in the black list of other conventions (except radioactive wastes), but also includes organotin compounds and drilling muds that were not covered by any other convention.
[1471] 1985 Proposal, Article 5. Permits have to be issued according to criteria set out in Annex IV.
[1472] *Ibid*, Articles 9 and 10.
[1473] *Ibid* , Article 19.
[1474] *Ibid*, Articles 3(2), 13(1), 14(1) and 14(4).
[1475] *Ibid*, Article 3.
[1476] EP Opinion (infra n. 1477) and ESC Opinion (CES (86) 964). For a detailed analysis of both opinions see: D. Suman (1991), pp. 587-95.
[1477] See: Report of the Committee on the Environment, Public Health and Consumer Protection on the Proposal from the Commission of the European Communities to the Council for a Directive on Dumping of Wastes at Sea, (Environmental Committee's First Report), 1986-87 ((P.E. A 2-98) 3 (1986)). See also the Opinion of the EP's Committee on Legal Affairs and Citizen's Rights, 1986-87 (P.E. A 2-98) 39 (1986) and the Environmental Committee's Second Report, 1986-87 ((P.E. A 2-19) 4-5 (1987)).
[1478] Environmental Committee's First Report, Para. 26.
[1479] *Ibid*, paras 34-36.

EC member state or flying the flag of an EC member state. Fourthly, dumping, like incineration, should only be allowed in the absence of available land-based alternatives.[1480]

In January 1988, the Commission submitted a revised proposal to the Council.[1481] The new proposal was based on Article 130S (environmental policy), recently introduced by the Single European Act. The Commission, however, did not endorse any of the EP's main amendments. First of all, it refused to list radioactive wastes in Annex I but announced that it would soon request a mandate from the Council to negotiate the Community's accession to the LC whereby the dumping of high-level radioactive waste would be automatically banned.[1482] The Commission's inflexible position on this point was largely influenced by the political debate on the ocean dumping of radioactive wastes which took place in the 1980s.[1483] Although in 1988, the UK was the sole EC member state still supporting this practice, the Commission could not ignore the British position. Since Article 130S EEC still required unanimity in the Council, the inclusion of radioactive waste in Annex I would have blocked the adoption of the directive.

The Commission, moreover, refused to extend the scope of the proposed Directive to vessels flying the flag of member states in waters outside their jurisdiction. This was perceived as an attempt to regulate ocean dumping in waters under the exclusive control of third States and on the high seas in violation of international law.[1484] However, as the EP's Environmental Committee pointed out, there would be no conflict with international law and no country would ever demand that foreign ships must start dumping in their territorial seas.[1485]

Finally, the Commission did not accept the introduction of a cross reference to the Annexes of the international conventions into the proposed directive but, as a compromise, included a comparative table on substances regulated under the LDC, Oslo and 1976 BDP in a new Annex IX.

In January 1988, the amended proposal was sent to the Council, but the discussions never progressed and three years later, in 1993, the Commission decided to withdraw it.[1486]

7.5.4 Communication from the Commission on the Removal and Disposal of Disused Offshore Installations

In the aftermath of the *Brent Spar* controversy, the Community manifested strong concerns about the lack of a coherent legal framework for the decommissioning of offshore installations.[1487] The Commission considered this as a matter of Community

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[1480] *Ibid* , Para. 32.

[1481] Amended Proposal for a Council Directive on Dumping at Sea (COM(1988) 8 in: OJ C72, 1988).

[1482] 1988 Proposal, Para. 10. In the 4th EAP for the period 1987-1992 the Commission reiterated the intention to negotiate the Community's accession to the LC.

[1483] The UK was the strongest supporter of ocean dumping of nuclear waste, followed by France, Germany, Belgium and the Netherlands, while Ireland, Italy, Portugal and Spain always opposed such a practice. For more on this point see: D. Suman, (1991), pp. 595-97.

[1484] 1988 Amended Proposal, p. 9. See also the Opinion of the EP's Legal Committee in its opinion supra n. 1477, Para. 43.

[1485] The EP's Environmental Committee Second Report, Para. 24.

[1486] The Council's discussion on proposals from the Commission are mostly confidential and it is not possible to know what exactly occurred to the 1988 Proposal.

[1487] See, e.g., Memo submitted by the Commission to the House of Lords Select Committee on Science and Technology: Decommissioning of Oil and Gas Installations. Session 1995-96 Third Report, p. 178. For a detailed analysis see: J. Woodliffe (1999), pp. 115-118.

competence under Article 130 R given its potential impact on the marine environment and on fisheries in the North Sea.

In 1995 the Community signed the 4th NSMC Declaration, which urged the Oslo Commission to introduce a moratorium on the ocean dumping of offshore installations. One year later, the Commission published a study on the possible methods of decommissioning and disposing of disused offshore platforms.[1488] According to this study, the state of technology allowed the removal of all installations, except for a few extremely heavy concrete structures. In February 1998, the Commission published a communication evidencing the possible impact of the lack of a coherent legal framework on decommissioning activities on EC legislation in the fields of water quality; waste disposal; protection of marine species and habitats; safety of navigation; and fisheries.[1489] Different decommissioning obligations under the regional agreements, moreover, would provide some member states (e.g., the Mediterranean member states) with competitive advantages compared to others (e.g., the North Sea member states, which had to bear the extra costs of removal). In the view of the Commission, therefore, the Community's regulatory action was necessary to ensure uniformity and protect competition.[1490] As a consequence, it announced its intention to propose a Directive, which would substantially reproduce the OSPAR regime on the decommissioning of offshore installations. The advantage of such a directive would have been to bind all member states, including non-contracting parties to OSPAR (i.e., Austria, Greece and Italy). However, it could be perceived as an attempt to exclude other OSPAR contracting Parties, especially Norway, and could have been prejudicial to the Community's position in the OSPAR Convention, which had been recently ratified.[1491] The Commission probably felt that a proposal for a directive on the disposal of offshore installations would have been rejected in the Council as had occurred with the previous proposals on ocean dumping. Once again, acting within the framework of the OSPAR Convention, this appeared to be the best option. The Commission, therefore, requested the Council to authorize participation in the negotiation of OSPAR Decision 98/3 on the disposal of offshore installations.[1492]

7.5.5 Reasons Behind the Failure of the Proposed Directives

The Commission's attempts to regulate ocean dumping failed because of the strong opposition of the member states. Using the subsidiarity and proportionality principles, they resisted the Community's regulatory action in this field probably more than in any other environmental area. At the time when the Commission presented its proposals, decisions in the Council were taken by unanimity. Environmental protection, moreover, was not yet a primary objective of the EEC, which was still conceived as a purely economic organization by most of its member states (e.g., the UK).[1493] Several EC member states, the UK at the forefront, were heavily dependant on ocean dumping and were highly reluctant to give up their sovereign rights in favour of the Community. As one commentator pointed out: "the sovereignty issue, although often unspoken,

[1488] Technical Review of the Possible Methods of Decommissioning and Disposing of Offshore Oil and Gas Installations, November 1996.
[1489] Communication from the Commission on the Removal and Disposal of Disused Offshore Oil and Gas Installations COM (98) 49, 18.02.1998 (not published in the OJ).
[1490] COM (98) 49, Paras 5.8. and 6.1.
[1491] See, e.g., Written Question E-2084/95 (Méndez de Vigo) [1996], O.J. C 9/15; and L. Kramer (2000) p. 200-201.
[1492] See, infra n. 1540.
[1493] The traditional British "Euro scepticism" was particularly strong under the Thatcher administration in the 1980s.

underlies the ocean dumping debate".[1494] In addition, the precautionary principle had not yet been established and there was no scientific evidence as to the negative effects of the dumping and incineration of many substances listed in the Annexes.

In addition, the Commission's proposals (especially the 1985 proposal) contained some technical gaps. The timetable for the phasing out of dumping and incineration was too short and was difficult to adhere to for many member states.[1495] Developing land-based disposal alternatives would have been too costly and, in some cases, materially impossible due to the limited land-based capacity to dispose of waste. Furthermore, the Commission included in the black list certain substances (e.g., organotin compounds and drilling muds) which were not controlled under existing international instruments, creating a competitive disadvantage for the EC industry compared to the rest of the world. The prohibition on dumping drilling muds, for instance, would have also applied to disposal from offshore installations.[1496] The EC offshore industry, therefore, would have to find more expensive landfill solutions and bear extra costs.[1497] In order to avoid serious conflicts with the member states, therefore, the Commission considered it more appropriate to ensure the Community's accession to the 1972 LC, the 1972 Oslo Convention and the 1974 Helsinki Convention.

7.5.6 EC Legislation covering Ocean Dumping and Incineration

After 1988, the Commission did not present further proposals for a Directive specifically addressing ocean dumping and incineration and it never succeeded in establishing an "ocean dumping policy" as it did for other sources of marine pollution (e.g., CPSS). Nevertheless, both practices have been indirectly regulated within the framework of the Community's waste management policy and legislation.[1498] This legislation, however, was not specifically designed to implement Article 210 of the LOSC and to address ocean dumping, but was primarily directed at managing and disposing of waste on land.

Improving the final disposal of waste has been one of the main pillars of the EC's waste management policy since the very beginning.[1499] The 1989 Community Strategy for Waste Management, as revised in 1996, seems to support dumping and incineration operations as long as they are conducted according to high-level environmental standards.[1500] However, the 1991 Waste Framework Directive (1991 WFD), adopted on the basis of Article 130 (now 175) EEC, to implement the strategy,

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[1494] D. Suman (1991), p. 616.

[1495] E.g., a 10% annual reduction between the 1990-1995. For the UK, that was responsible for half of the industrial waste dumped in the North Sea, it would have been almost impossible to meet this requirement.

[1496] According to the ESC in its Opinion (1986:6) the inclusion of drilling mud in Annex I might adversely affect oil prospecting in the North Sea and, to a considerable extent, the EC's energy supply.

[1497] D. Suman (1991), p. 604.

[1498] There are no relevant provisions on dumping in the water quality legislation. It is interesting to note that Article 1(2)(e) of Directive 76/464 on pollution caused by discharges into the aquatic environment expressly excludes dumping from ships and the disposal of dredge materials from the definition of "discharges". The exclusion may be explained because in 1976, when the directive was adopted, the Commission presented the first proposal for a directive on dumping and wanted to avoid overlaps.

[1499] E.g., First (1973), Second (1977) and Third (1983) EAPs. See also S.P. Johnson and G. Corcelle (1989), pp. 158-86. This objective was confirmed in the Sixth (2002) EAP, Para. 6.2.

[1500] The Community Strategy on Waste Management (SEC (89) 934 final) lists among its priorities "waste disposal by dumping and incineration, to be ensured by harmonization of standards on the basis of a high level of environmental protection". This priority was confirmed in the new 1996 Strategy (COM (96) 399 final).

requires member states to take all necessary measures to prohibit the abandonment, *dumping* or any uncontrolled disposal of waste (Article 4).[1501] The Directive does not define dumping, but includes the "*release into seas/oceans including sea-bed insertion and incineration at sea*" among the disposal operations listed in Annex IIA, which require previous authorization by the competent authority according to the criteria set out in Article 9.[1502] The 1991 WFD applies to a broad range of wastes,[1503] including dredge materials,[1504] fishing residues,[1505] residues from raw material extraction and processing (including inert, geological materials),[1506] which represent the absolute majority of wastes that may still be dumped at sea. However, any type of waste may, in principle, fall within the scope of the directive, including decommissioned offshore installations.[1507] Only a few categories of waste are excluded from the scope of the Directive, such as radioactive waste, waste resulting from prospecting, extraction, treatment and storage of mineral resources and decommissioned explosives.[1508] This is not surprising considering the strong interests of the offshore industry in Europe and the ongoing debate on the dumping of radioactive waste. It is worth mentioning that Article 37 of the EURATOM Treaty requires member states to provide the Commission with all relevant data before authorizing a plan for the disposal of radioactive waste. In the absence of further specification, "disposal" seems to include ocean dumping. After consultation with experts, the Commission gives its opinion including, *inter alia*, on the possible radioactive contamination of waters. However, the Commission's opinion is not binding.[1509]

Ocean dumping and incineration, moreover, fall within the scope of several EC directives concerning specific categories of waste, such as titanium dioxide (TiO2), polychlorinated biphenyls (PCB) and polychlorinated terphenyls (PCT). TiO2, a whitener used mostly in the paint industry, was dumped into the sea without any control until 1978, when the Community took a first step to regulate its disposal.[1510]

[1501] Directive 91/156/EEC, amending Directive 75/442, which did not cover disposal at sea or incineration. On 21.12.2005, the Commission presented a proposal for a revised Waste Framework Directive (COM (2005) 667, 21.012.2005), which reconfirms the prohibition of the abandonment, *dumping* or uncontrolled disposal of waste (Article 6), but does not substantially change the dumping regime under Directive 91/156. For a full discussion of the main changes see: D. Pocklington (2006), pp. 75-87.

[1502] Directive 91/156/EEC, Annex II A (D7 and D11). According to Article 9(2) "permits may be granted for a specific period, they may be renewable, they may be subject to conditions and obligations, or, notably if the intended method of disposal is unacceptable from the point of view of environmental protection, they may be refused".

[1503] Directive 91/156/EEC, Article 2.1. The categories of wastes covered by the directive are listed in Annex I.

[1504] Dredge materials expressly fall within the categories of waste under Article 1(a) of Directive 91/156/EEC. In 2001, the Commission adopted a List of wastes that includes, *inter alia*, dredge materials, whether or not they contain dangerous substances (Commission Decision 2001/118/EC). On the EC directives that may impact on the dumping of dredge material see: OSPAR, BDC 05/6/11-E(L), available on the OSPAR web site.

[1505] Directive 91/156/EEC, Annex I (Q 10).

[1506] *Ibid*, Annex I (Q 11).

[1507] *Ibid*, Annex I includes "any materials, substances or products which are not contained in the above categories" (Q16). Over the years the Court has adopted a very broad interpretation of waste. In joined cases 206/207/88, *Vessoso and Zanetti*, the Court said that the concept of waste does not presume that the holder disposing of the substance intends to exclude all economic reutilization of the substance by others, explicitly including in the definition also materials that still have some commercial value.

[1508] The same exceptions are reconfirmed in Directive 91/689/EEC on hazardous wastes (Article 1.3).

[1509] E.g., Case 187/87, *Cattenom* Case on the interpretation of Article 37 EURATOM.

[1510] Controlling pollution caused by the TiO2 industry has been a priority action since the First EAP (1973), in the wake of the diplomatic incident between Italy and France caused by discharges of TiO2

The cost of this disposal had a significant impact on the price of the final product distorting competition and justifying the Community's regulatory action. EEC Directive 78/176 on the prevention and reduction of waste from the TiO2 industry, which was based on Articles 100 and 235 EEC, expressly covers ocean dumping.[1511] The discharge, *dumping,* storage, tipping and injection of TiO2 residues require a prior authorization issued according to the criteria set out in Article 5 by the competent authority of the member state in which the waste has been generated and from whose territory it is dumped (Article 4). Member states have to keep reports and transmit to the Commission information concerning all authorized dumping activities.[1512] Directive 82/883, moreover, sets out procedures for the surveillance and monitoring of the disposal of TiO2 into the environment, including "dumping into estuaries, coastal waters and open sea".[1513] In 1992, after different attempts were blocked in the Council (especially by the UK), the Community succeeded in adopting, on the basis of Article 130s (now 175) EEC, a new Directive 92/112 on the reduction and eventual elimination of pollution caused by wastes from the TiO2 industry.[1514] The dumping of all solid waste, strong acid waste, treatment waste, week acid waste or neutralized waste was completely prohibited as from 15 June 1993 (Article 3).[1515] The Directive adopts a definition of dumping which mirrors that of the LOSC and includes "any deliberate disposal into inland surface waters, internal coastal waters, territorial waters or high seas of substances and materials by or from ships and aircraft".[1516] The lack of any express reference to the EEZ is due to the fact that, at that time, only a few member states had established an EEZ and the competence of the Community to regulate activities in this maritime zone was still strongly contested. However, the application of the Directive to the high seas seems implicitly to include areas of EEZ. On the other side of the coin, the definition of dumping does not include discharges from platforms or other man-made installations. Once again, this exclusion was a necessary political compromise to overcome the opposition of the North Sea offshore industry (especially the UK).[1517] The three TiO2 directives contain minimum standards and explicitly allow member states to adopt more stringent regulations to control dumping activities under their jurisdiction.[1518] This may be done by agreeing on more stringent national regulations or accepting higher standards at the international level. TiO2 as such is not specifically regulated under the LC and other regional seas conventions. However, it is a type of "industrial waste" or "acid waste" whose disposal

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from the Montedison factory at Scarlino into Mediterranean waters. On the legislative history of the directive see: S.P. Johnson and G. Corcelle (1989), pp. 93-7 and L. Kramer (2000), pp. 110-11.

[1511] Directive 78/176/EEC on waste from the TiO2 industry. Dumping at sea falls within the definition of "disposal" under Article 1(2)(c).

[1512] *Ibid*, Articles 13 and 14. In addition, the Directive contains monitoring requirements (Article 7). If the conditions laid down in the permit have not been fulfilled, the member state must immediately cease the discharge or the dumping in question.

[1513] Directive 82/883/EEC, based on Articles 100 and 235 EEC, specifying the monitoring duties under Directive 78/176/EEC.

[1514] Directive 92/112/EEC implementing Directive 78/176/EEC (Article 9). On the legislative history and content on this directive see: L. Kramer (2000), pp. 110-11 and J.H. Jans (2000), pp. 357-58.

[1515] All these types of waste are defined in Article 2(1)(a) and (b) of Directive 92/112.

[1516] Directive 92/112/EEC, Article 2(1)(c).

[1517] This opposition, as mentioned, contributed to the failure of the Commission's 1985 proposal which included offshore installations in the definition of dumping.

[1518] E.g., Directive 78/176/EEC (Article 12).

was progressively phased out by all international conventions, except the BARCON pending the entry into force of the 1995 BDP.[1519]

Like the TiO2 directives, EC Directive 76/403 on the disposal of PCBs and PCT prohibited the uncontrolled dumping of PCB and objects and equipment containing this substance.[1520] Also in this case, the disparity between national regulations on PCB created unequal conditions of competition among member states threatening the establishment of the single market and required Community harmonization. Originally, the 1976 Directive allowed the dumping of PCB on the basis of a special permit issued by the competent authority (Articles 2 and 6) and required member states to periodically report to the Commission on the disposal of PCB permitted in their territory (Article 10). In 1996, the Directive was replaced with a new EC Directive 96/59, which does not contain any provision on the dumping of PCBs, which, at that time, had been completely phased out under the LC and all the regional conventions to which the Community was a party. The Directive, however, requires member states to take all necessary measures to prohibit the incineration of PCBs on ships.[1521]

In 2000, the Community adopted Directive 2000/76 setting out the criteria for the safe operation of incineration plants.[1522] An incineration plant is defined as "any stationary or mobile technical unit dedicated to the thermal treatment of wastes […]" (Article 3(4)) and could in principle include incineration vessels. The Directive intends to prevent or limit, as far as practicable, negative effects on the environment, including pollution by emission into *surface and ground water*, resulting from the incineration of waste (Article 1). Although EC law generally does not distinguish between the sea and other aquatic environment, the express reference to "surface and ground waters" suggests that the directive only applies to land-based incineration.[1523] As already mentioned, incineration at sea is already regulated under the 1991 WFD and in 2000 the ocean incineration of wastes had already been phased out at the international level, except in the Mediterranean Sea, pending the entry into force of the 1995 BDP.

Outside the waste management legislation, we should mention Decision 2850/2000 setting up a Community framework for cooperation in the field of accidental or deliberate marine pollution. This Decision contains provisions on the dumping of materials such as munitions and requires member states "in accordance with the internal division of competences to exchange information on dumped munitions with the view to facilitating risk identification and preparedness measures".[1524]

The EC regime generally mirrors the existing international rules on the prohibition of dumping and incineration of solid waste, strong acid waste, treatment waste from the TiO2 industry, and the dumping of dredge material, fish waste, inert

[1519] The 1976 BDP still allows the dumping of "synthetic organic chemical" (as TiO2) on the basis of a permit. TiO2 falls within the scope of HELCOM Recommendation 23/11 on discharges of wastewaters from the chemical industry. See also the OSCOM Code of Practice for the Dumping of Acid Wastes from the TiO_2 Industry at Sea and the 1977 Methods of Monitoring Sea Areas where Titanium Dioxide Wastes are dumped, 1980 and 1986.

[1520] Directive 76/403/EEC is based on Articles 100 and 235 EEC.

[1521] Directive 96/59/EC, Article 7. The Directive, which is based on Article 130s (now 175) EC, does not include dumping in the definition of "disposal" under Article 2(f).

[1522] Directive 2000/76/EC on the incineration of waste. Of some relevance may also be Council Directive 96/61/EC concerning Integrated Pollution Prevention and Control, which covers some combustion and waste incineration plants on offshore installations.

[1523] A.C.H. Kiss and D. Shelton (1997), p. 338.

[1524] Decision 2850/2000/EC, Article 1.2(b).

geological material, which may still be dumped on the basis of a special permit issued by the competent authority. Although there are no specific rules on the dumping of offshore installations, they may, in principle, be brought within the scope of the 1991 WFD. Even though this was not probably its main purpose, the EC waste management legislation indirectly implements Article 210 of the LOSC and ensures a level of protection equivalent to that of the LC. All relevant Directives, moreover, contain minimum standards and always allow the member states to adopt more stringent regulations acting at the national or international level.

7.5.7 Reasons Behind the Member States' Approval of Community Regulatory Action on Ocean Dumping within the Framework of the EC Waste Management Legislation

When discussing dumping issues with representatives from the member states, international bodies and, sometimes, even from the EC institutions, the prevailing feeling is that there are no Community rules on ocean dumping and incineration. The analysis carried out in the previous section shows that this impression is not correct. So, why did the member states that so firmly opposed the adoption of a specific Directive in this area actually allow the Community to regulate ocean dumping and incineration within the framework of waste management legislation? First of all, the earlier Directives (e.g., 1978 TiO2 and 1976 PCB) were necessary to protect competition and the member states had a direct interest in Community harmonization. In addition, all the Directives discussed in the previous section (e.g., 1991 WFD) do not affect the interests of the offshore industry which at the time were very strong. It is interesting to note that the Commission's proposal for the 1991 WFD was submitted to the Council only a few months after the withdrawn 1988 proposal for a directive on ocean dumping.[1525] In drafting the 1991 WFD, therefore, the Commission was very careful not to repeat the same mistakes. The member states, especially those with strong offshore interests, eventually accepted that the Community could take measures on dumping and incineration within the broader context of a waste *framework* directive, which is much less prescriptive than the previous proposals and does not touch upon the interests of the offshore industry. The Community sets out criteria for the issuing of permits and confers on the Commission some monitoring functions, but leaves member states with ample control concerning national dumping/incineration activities. All Directives considered above contain minimum standards.

In addition, at the beginning of the 1990s, when most of the Directives discussed above had been adopted, the panorama and the political climate had considerably changed compared to three decades previously when the Commission presented its first proposal for a directive on ocean dumping. The Treaty of Maastricht consolidated the EC's competences in environmental matters and extended the QMV to the adoption of environmental legislation. Agenda 21 called for more effective waste disposal policies and the adoption of a precautionary approach in handling hazardous activities. The risks associated with ocean dumping and incineration became evident and steps had been taken at the international level toward the phasing out of these practices. These factors changed to a large extent the positions of member states, especially the UK,[1526] with regard to ocean dumping and incineration and their traditional opposition to the Community's involvement in these matters.

[1525] As discussed in Chapter 7.5.3, the 1998 proposal touched upon the core interests of the offshore industry.

[1526] In 1990, the Thatcher administration and its anti-EC policies came to an end.

Finally, it should be reiterated that EC waste management legislation was not specifically designed to address ocean dumping and the Commission has never paid serious attention to its full application at sea.

7.6 The Community's Action at the International Level in the Field of Ocean Dumping and Incineration

7.6.1 Division of External Competence in Ocean Dumping Matters

In the field of waste management and disposal, including ocean dumping and incineration, the Community and the member states have shared competence. All relevant EC waste legislation contains minimum standards and allows member states to adopt more stringent regulations for the control of ocean dumping activities acting at the national level or within the framework of existing international conventions. This is the case for both directives based on Article 175 (ex Article 130s) EC (e.g., 1991 WFD and 1996 TiO2 Directive) and those based on Article 100 (now Article 95) on the approximation of laws affecting the single market (e.g., 1978 TiO2 Directive and 1976 PBC Directive), which explicitly provide the possibility to adopt higher standards. As discussed in Chapter 4.2.2.1, the Court has made it clear that the mere fact that a directive lays down minimum standards does not mean that the subject-matter has not been "exhaustively" harmonized, but it is necessary to look at the specific "scope" of the directive.[1527] As already mentioned, the EC's waste legislation has not been designed to "exhaustively" harmonize ocean dumping and incineration. In addition, although these matters have been "largely harmonized" at the Community level, the adoption by member states of higher standards at the international level does not seem to affect the uniform application of the EC's minimum directives and does not jeopardize the full achievement of their objective.

As discussed in Chapter 4.2.2.2, in order to determine the nature of the EC's external competence it is also necessary to assess whether the international agreement contains minimum or maximum standards. According to Article 210 of the LOSC, global and regional ocean dumping standards represent minimum standards both for flag and coastal States. By agreeing on higher standards at the international level, the member states do not preclude the further development of EC rules and do not affect the Community's competence.

It seems that EC waste management legislation does not trigger any exclusive external competence of the Community in ocean dumping and incineration issues discussed within the LC, the 1996 Protocol, or regional seas conventions and the member states are not pre-empted from taking decisions within these frameworks. As a general rule, however, the Community and the member states have to cooperate closely, on the basis of Article 10EC, in the negotiation, adoption and implementation of international standards.

7.6.2 The Community's Participation in the Global Decision-Making on Ocean Dumping and Incineration

Ocean dumping and incineration issues are not a priority action within the UN and are no longer on the agenda of the UNGA under the item "oceans and the law of the sea". In the late 1980s/early 1990s, the Community did not take an active part in the UN discussions on the phasing out of ocean dumping mainly because of the strong

[1527] E.g., C-1/96 Compassion in World Farming [1998] ECR I, 1251.

opposition of the member states and the controversy surrounding the existence of the Community's competence in these matters.

The Community is not a party to the LC and its 1996 Protocol, which reserve accession exclusively to States. In the late 1980s, the Commission manifested the intention to request a mandate from the Council to negotiate the accession of the Community to the LC.[1528] This accession was considered to be the best method for introducing a ban on the ocean dumping and incineration of all radioactive wastes, thereby overcoming the opposition of some member states (especially the UK). However, the Commission had never submitted a formal request to the Council and in the light of the successive developments (e.g., the complete ban on radioactive waste disposal at sea and the entry into force of the 1996 Protocol) the Community's accession to the LC was no longer considered necessary. Besides, the large majority of the EC member states are parties to the LC and those who have not ratified (i.e. Austria, the Czech Republic, Slovakia (all land-locked States) and Estonia, Lithuania and Latvia) are bound by the regional seas conventions, which are far more stringent compared to the LC. Moreover, since they are parties to the LOSC they seem to be bound by the LC on the basis of the rule of reference contained in Article 210 of the LOSC.

When the 1996 Protocol was negotiated, the EC's accession was not even discussed since the participation of the EC in the dumping regimes was still highly controversial. At present, the Community's accession would require an amendment of the 1996 Protocol, which has only recently entered into force. It is very unlikely that the current contracting Parties would go through the complex ratification process to allow the Community to become a party. Furthermore, acceding to the 1996 Protocol does not seem to be a priority for the Community in contrast to, for instance, acceding to MARPOL 73/78 or SOLAS. The Community is a party to all regional seas conventions, whose dumping and incineration rules are similar, but somewhat even more stringent, than the 1996 Protocol. The fact that only a few EC member states (i.e. Belgium, Denmark, France, Germany, Ireland, Luxembourg, Slovenia, Spain, Sweden and the UK) have ratified the 1996 Protocol does not therefore seriously affect uniformity. On the other hand, the Community's accession would contribute to filling the compliance and reporting gaps in the existing London regime.

The Commission has a standing invitation to attend meetings of the Parties of the LC on the basis of its observer status at the IMO.[1529] Nevertheless, the Commission has never been particularly involved in the LC. Before 1993, the Commission attended the LC meetings because the ocean dumping of radioactive wastes was regularly on the agenda and the Community had a clear competence concerning radioactive materials on the basis of the EURATOM Treaty. However, since 1993, when the dumping of nuclear waste was completely phased out, representatives of the Commission no longer attend the meetings of the Parties. Unlike in other IMO matters, the Commission has never attempted to play a stronger role within the framework of the LC and there is no EC coordination in preparation for the LC meetings. Sporadically there is some informal EC coordination on the spot, in London, under the chairmanship of the Presidency.[1530] This, however, depends on the issue on the agenda and the priorities of the State holding the Presidency and it only takes place when

[1528] See, supra n. 1482.
[1529] The Commission participates in the meetings of the Parties on the basis of the 1974 Cooperation Agreement discussed in Chapter 6.9.3. The LC has its own rules for granting observership status to NGOs, but follows the general practice of IMO with regard to international governmental organizations.
[1530] Conversation with Mr. R. Coenen, Head of Legal Office , London Convention, 15.03.2005.

formal decisions, such as amendments, must be taken. This occurred during the negotiations on the 1996 Protocol, when the EC member states took similar positions to promote the OSPAR model. Otherwise, the EC member states do not normally coordinate their positions, but rather defend their interests as parties to the OSPAR, the Helsinki Convention or BARCON.[1531] The Commission does not seem to be particularly interested in increasing EC coordination in the LC as it is in other IMO meetings, since it does not have strong interests to defend in this forum.

7.6.3 The Community's Participation in the 1972 Oslo Convention and OSPAR

The Community was a party to the 1974 Paris Convention, but despite the attempts of the Commission, has never succeeded in acceding to the 1972 Oslo Convention.[1532] The Community's accession has been blocked by a number of factors, including the controversy over the Community's competence concerning ocean dumping, the lack of a proper legal basis in the EEC Treaty for the Community's regulatory action in environmental matters, and the principles of subsidiarity and proportionality.[1533] In 1972, moreover, the ECJ's case law on external powers was at its very early stage. According to the *ERTA Case* the Community could not accede to an international convention covering subjects which were not covered by EC legislation.[1534] Since there were no EC measures on ocean dumping, the Commission first drafted the three proposals for a directive on this matter, trying to open the door to the Community's accession to the 1972 Oslo Convention. Since none of these proposals were adopted, the Commission tried to demonstrate the "necessity" of the Community's accession to the Convention on the basis of the *Kramer/Opinion 1/76 Doctrine*.[1535] However, also this attempt failed due to resistance on the part of the member states.[1536] In addition, the negative experience with the Community's participation in the 1974 Paris Convention created strong concerns about the added value of the Community's accession to the 1972 Oslo Convention. This accession, moreover, required an amendment to Article 22 of the Oslo Convention, in order to allow regional economic organizations to become parties and the Oslo contracting Parties had little incentive to go through the complicated amendment process.

Even though it was not a party to the Oslo Convention, the Community could exercise some influence on the work of the Oslo Commission (OSCOM). The EC Commission had observer status in the Convention and as a member of PARCOM could participate in the joint meetings of the OSCOM and PARCOM Commissions (OSPARCOM). In addition, the Commission and OSPARCOM's officials used to meet to coordinate their policies and avoid duplications.[1537] Representatives of the EC Commission (DG ENV, at that time DG XI), moreover, actively participated in the NSMCs, which had a strong influence on the Oslo dumping regime.

[1531] See: Records of the Meetings of the Parties to the London Convention, supra n. 1355.

[1532] E.g., Fourth EAP (1987-1992), Para. 7.16. For a full discussion see: Oslo and Paris Commissions (1984), Chapter 15; E. Hey, T. IJlstra, A. Nollkaemper (1993), p. 37; J. Side (1986), pp. 290-94; L. Kramer (1988), p. 336; and D. Suman (1991), pp. 560-618 and J.L. Prat in D. Freestone and T. IJlstra (eds.) (1990), pp. 100-10.

[1533] E.g., A. Nollkaemper (1987), pp. 73-75. See also the discussion in Chapter 5.3.1 of this study.

[1534] The ECJ's *Case 22/70 ERTA* . For a full discussion see: Chapter 4.4.2 of this study.

[1535] *Kramer Case*, 3/4 and 6/76 (1976) and *Opinion 1/76* which justified the EC's external action even in the absence of EC measures when it was necessary to achieve the EC's objectives.

[1536] However, the Council, in principle, agreed to the Community's accession, but its decision was never implemented (Bull. Of the E.C. 1978, No.12, 02.01.80). See also: A. Nollkaemper (1987), p. 69.

[1537] E.g., M. Fitzmaurice (1992), p. 222.

When, in 1990, the parties to the Paris and the Oslo Conventions decided to merge the two conventions and to address all sources of pollution in a single instrument, the full participation of the Community appeared to be necessary given its extensive competence on land-based pollution. The Community, therefore, acceded to the OSPAR Convention with the right to speak and vote on matters under its exclusive competence.[1538] Since the Community has no exclusive competence in ocean dumping and incineration, its participation in the relevant discussion within the OSPARCOM has been traditionally very limited. The Commission never had strong ocean dumping interests to defend in OSPAR and the member states' autonomous actions in this body is not likely to affect the EC's minimum rules. Member states, moreover, have a long tradition of individual participation in the Convention. Therefore, the Commission normally prefers to allow the member states to discuss ocean dumping matters freely and to concentrate its efforts on issues which have Community priority, like hazardous substances or land-based pollution.[1539] Representatives from DG ENV do not always attend the meetings where ocean dumping and incineration issues are still discussed (e.g. EIHA) and on the few occasions in which they are present, they do not normally take the floor. To the knowledge of this author only on two occasions has the Commission attempted to play a more proactive role in OSPARCOM, which was in Sintra during the negotiation of OSPAR Decision 98/3 on the disposal of disused offshore installations and in regard of OSPAR Decision 92/2 on the dumping of radioactive waste at sea. The Commission required a mandate for the Council to conclude both decisions on behalf of the EC, but due to resistance from the member states, the Council did not grant the mandate.[1540]

7.6.4 The Community's Participation in the Helsinki Convention

The role of the Commission in the decision and policy making related to ocean dumping in HELCOM has been even more limited than in OSPAR. As discussed in Chapter 5.4.1, the Community was able to accede to the 1992 Helsinki Convention only in 1994, after a long controversy over the necessity of its participation. Since 1990, the Commission has been invited to attend the HELCOM meeting as an observer. This observer status, however, did not allow the Commission to take an active part in the negotiating process that led to the complete ban on dumping and incineration except for the dumping of dredge material. In the 1992 Helsinki Convention, like in OSPAR, the Commission, acting on behalf of the EC, participates in the meetings of HELCOM and its committees as an equal party with the right to vote on matters under the EC's exclusive competence.[1541] Although the Commission takes part in the discussions on dredge spoils in HELCOM, it does not take a very proactive role and normally leaves the member states free to speak and to take decisions in ocean dumping matters (e.g., HELCOM 19/18 on emergency dumping;

[1538] OSPAR, Article 25(d). For a full discussion see: Chapter 5.3.1 of this study.
[1539] The OSPAR Commission at its 2001 meeting, held in Valencia, referred to the EC legislation in the field of dumping and expressly mentioned the directives on sewage sludge, EIA and urban waste-water treatment (Summary Record OSPAR 2001, OSPAR 01/18/1, Para. 7.5). However, the sewage sludge Directive 86/278 intends to ensure the safe use of sewage sludge in agriculture, but does not contain provisions on final disposal; while Directive 91/271 covers the discharge of urban waste from industrial sectors and does not covers dumping.
[1540] See: Proposal for a Council Decision concerning the approval, on behalf of the Community, of OSPAR Decision 98/3 on the disposal of disused offshore installations and the Proposal for a Council Decision concerning the approval, on behalf of the Community, of OSPAR Decision 98/2 on radioactive waste (COM (1999) 190, in: OJ C 158/03, 4.06.1999).
[1541] 1992 Helsinki Convention, Article 23(2). For a full discussion see: Chapter 5.4.1 of this study.

HELCOM 13/1 and related guidelines on the disposal of dredge materials).[1542] The reasons for this are the same as those discussed in the previous section: the lack of EC's exclusive competence in ocean dumping matters, the lack of strong EC interests to defend and the need to prioritize action and concentrate its resources and efforts on land-based pollution and hazardous discharges as well as the long tradition of the individual participation of EC member states in the Convention. As already mentioned, moreover, especially after the 2004 enlargement, there is a particularly strong resistance in HELCOM against bloc-forming. However, even though the Commission does not take an active part to the discussions, the policy making related to the dumping of dredge material in HELCOM is inevitably influenced by EC legislation and policies on waste management and water quality.

7.6.5 The Community's Participation in the BARCON and BDP

In 1977, despite initial resistance by most of the non-EC contracting parties, the Community acceded to the BARCON and its 1976 BDP.[1543] The signature of the Convention and the Protocol preceded, by a few months, the 1976 Commission proposal on a directive on ocean dumping and its rejection in the Council. The existence of Community competence in the field of ocean dumping was still very controversial. As discussed in Chapter 5.5.1, the Community's accession to the 1976 BARCON was necessary since the Convention covered matters falling within the scope of EC water quality legislation.[1544] The accession to the Convention, however, was conditional on the ratification of any other Protocol not yet in force (Article 27(2)) and at that time BDP was the only one available.

Like the OSPAR and Helsinki Conventions, the Community participates in BARCON and the 1976 BDP as an equal party with the right to vote on matters under its exclusive competence. Since the Community does not have exclusive competence in ocean dumping matters, its participation within the framework of the BDP has always been rather limited.[1545] As in the other regional seas conventions, the Commission does not have strong dumping interests to defend in this forum and prefers to concentrate its actions on other Protocols which are of major interest to the Community. The sovereignty issue, moreover, has always been particularly strong within the BARCON framework and the Mediterranean EC member states are still reluctant to accept the excessive involvement of the Commission in this framework. The Community, therefore, decided to concentrate its actions on Protocols (e.g., the Land-based Pollution Protocol) in which it has an extended competence and to rely on the member states for the implementation of the BDP.

In 1999, the Council accepted the 1995 amendments to the Convention and the BDP.[1546] The Commission (DG ENV) took part on behalf of the Community in the

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[1542] The Commission does not seem to be particularly active in the discussions on the revision of the HELCOM Guidelines for the Disposal of Dredge Spoils. Representatives from DG ENV and the Joint Research Centre (JRC) were present at MONAS 2004 to discuss the revision of the Guidelines, but did not produce any substantial input on that matter (Minutes of HELCOM MONAS 7/2004). The Commission was not present at the Expert Workshop that took place in January 2005 for the revision of HELCOM Guidelines.

[1543] See: Council Decision 77/585/EEC. For a full discussion see: Chapter 5.5.1 of this Study. 1978.

[1544] As discussed in Chapter 5.5.1, the Council authorized the Commission to negotiate the EEC's accession to the 1976 BARCON and its BDP with a view to determining standards for bathing waters and shellfish waters which were covered by EC legislation (see: Council Decision 77/585/EEC).

[1545] See the Reports of the activities related to the Dumping Protocol available at: www.unepmap.org/home.asp.

[1546] On the participation of the Community in the BARCON revision process see: Chapter 5.5.2.

two expert working groups set up to negotiate the revision of both the Convention and the BDP.[1547] However, the role of the Commission in the drafting of the amendments to the BDP was marginal. This is also apparent from the discrepancies among the revised BDP and the dumping provisions of the OSPAR and Helsinki Convention with regard to the timetable for the phasing out of certain substances and the decommissioning of offshore installations. Apparently the Commission did not negotiate strongly enough to ensure full uniformity between the regional regimes, which was the rationale behind the 1976 and 1985 proposals for a directive on ocean dumping.

7.7 Final Observations

Under the LOSC (Article 210) the Community is under a legal duty to adopt legislative measures which are no less effective than the international rules to prevent, reduce and control dumping. In spite of several attempts by the Commission, the Community has never been able to adopt a directive specifically addressing ocean dumping and incineration and directly implementing its obligation under the LOSC. The Community's regulatory action in the field of ocean dumping has indeed always been opposed by the member states. What was contested, however, was not the Community's competence in these matters, but rather the necessity of having additional legislation at the EC level in a field that was already extensively and effectively regulated at the global and regional levels. Instead of adding new law and duplicating the work of and the efforts undertaken by the member states under other international bodies, the Community preferred to become a party to the relevant regional conventions.

After three decades, the global and regional regimes have succeeded in halting industrialized nations from using oceans and seas as dumpsites and uncontrolled dumping and incineration have officially ceased. Currently, therefore, the control of ocean dumping is no longer a priority on the global and regional agendas. Illegal dumping, however, still takes place in different parts of the world, including the European seas. The main challenge for the future is therefore to strengthen the implementation and enforcement of existing standards.

Currently, the only matter that may be dumped into European seas (except in the Baltic where nothing but harmless dredge spoils may be dumped) are: dredge material; fish waste; inert, geological materials; and decommissioned offshore installations. Although the EC has never adopted legislation specifically addressing ocean dumping and incineration, the marine disposal of these materials falls within the scope of the EC waste management legislation. In particular, the 1991 WFD specifically prohibits the uncontrolled dumping of dredge materials; fish waste; and inert, geological materials. In principle, also decommissioned offshore installations may be captured within the scope of that Directive and fall within the broad definition of waste as adopted by the Court. Even though the EC waste management legislation was not specifically designed to regulate disposal at sea, it indirectly contributes to meeting the Community's obligations under Article 210 of the LOSC.

The 1996 Protocol of the LC, which recently entered into force, and the regional seas conventions offer a higher level of protection compared to EC minimum rules, but they lack strong mechanisms to ensure full compliance. As a matter of fact, dumping operations continue to take place illegally in waters under the jurisdiction of the contracting Parties. The Community has the necessary instruments to fill most the

[1547] Two meetings of legal and technical government-designated experts were held in Barcelona on 14-18.11.1994 (UNEP(OCA)/MED WG.82/4) and on 7-11.02.1995 (UNEP(OCA)/MED WG.91/7).

existing implementation gaps. As a result of the Community's accession, the dumping regimes under the OSPAR, the 1992 Helsinki Convention and the 1976 BDP form an integral part of EC law binding the EC institutions and member states.[1548] The question is whether the Commission may use the strong enforcement instruments which exist under EC law to ensure that EC member states comply with their ocean dumping obligations under the regional seas conventions. As discussed in Chapter 4.4, the Court has recently recognized the possibility for the Commission to start an infringement action before the ECJ against a member state for a violation of the provisions of a regional convention (in this specific case the BARCON Protocol on Land-based pollution) which cover matters under shared competence and concern a field covered "in large measure by Community legislation".[1549] It seems that ocean dumping and incineration are covered "in large measure" by the EC waste management legislation and the Commission, in principle, could play an important role in ensuring the full compliance of the EC member states with the regional dumping regimes, thereby improving their effectiveness. In practice, however, serious resource constraints make it difficult for the Commission to effectively exercise its monitoring functions. In addition, the Commission has to prioritize its actions and, lately, ocean dumping does not seem to be a top priority on the EC agenda.

Recently, ocean dumping has received some attention at the EC level. The 6th EAP lists the dumping at sea of harbour sludge and sediments as one of the main threats that the Community will address in the coming years.[1550] Also the Commission, in its 2002 Communication on the marine strategy pointed attention towards the dumping of waste as one of the main threats to the European seas.[1551] In the future, therefore, the Commission may decide to take stronger enforcement action to ensure the full implementation of the EC's waste management legislation at sea and the regional conventions. The Commission may also decide to take some regulatory action within the framework of the WFD (e.g., by including the dumping of harbour sludge and sediments within those disposal activities which require previous authorization), but it is very unlikely that it will ever propose a directive on ocean dumping. The reasons which led, in the 1970s and 1980s, to the EC's attempts to regulate this practice are no longer valid. There is no longer a need to harmonize member states' laws to protect competition. The revision process that all the regional conventions have undergone has eliminated most of the original differences ensuring a large degree of uniformity for the system. Even though some slight discrepancies still exist with regard to the substances controlled and the dumping of offshore installations, these are justified by the different characteristics of each regional sea. Despite their weaknesses, regional seas conventions still seem the most appropriate framework to introduce dumping standards tailored to the need of regional seas and Community regulatory action could not be justified under the subidiarity and proportionality principles. However, the proposed Marine Strategy Directive, which is currently at the exam of the EC legislators, may be a more appropriate framework to specify and reinforce the ocean dumping obligations of member states under the regional seas conventions.

So far, the Community has not been very active in the ocean dumping discussions within the regional bodies. The reasons for this are similar to those discussed in the previous chapter with regard to vessel-source pollution, in the first place the absence of exclusive competence in ocean dumping matters and the lack of

[1548] Article 300(7) EC.
[1549] See: Case C-239/03, *Commission v. French Republic*, [2004], paras. 29-31.
[1550] See the Sixth EAP, p. 36.
[1551] See COM (2002)539 (Para 1.1).

strong EC ocean dumping interests to defend in the regional forums. The Commission, therefore, preferred to leave the member states free to discuss ocean dumping issues and to play a more incisive role in matters which have EC priority, such as land-based pollution. It is highly improbable that this situation will change in the future, but the Commission could play a central role in ensuring the full implementation and enforcement of the regional dumping regimes by the member states.