Chapter 8
Marine Habitat Protection through the Establishment and Management of Marine Protected Areas (MPAs)

8.1 Introduction

In the past two decades the concept of Marine Protected Areas (MPAs) has received increasing attention in all political and legal forums dealing with ocean affairs. MPAs are considered to be key tools to conserve critical habitats, to foster the recovery of overexploited and endangered species, including depleted fish stocks, and to promote the sustainable use of marine living resources, and have become a central element of all marine biodiversity conservation strategies at the global, regional and national level. The present Chapter focuses in particular on areas designed to protect marine biodiversity and the habitats of endangered species, while sites directly established for the conservation of species , including commercial stocks or marine mammals, will be covered only incidentally.

The international regime on MPAs is based, in the first place, on the LOSC, which sets out global obligations and the jurisdictional framework for all uses and activities at sea. The Convention, therefore, represents a fundamental starting point for examining the extent to which coastal States are entitled to designate and manage MPAs. Agenda 21 and the WSSD Plan of Implementation establish global principles and targets, which are implemented in a variety of global and regional instruments. Most MEAs designed to protect biodiversity (i.e., the Convention on Biological Diversity (CBD)), habitats (e.g., the 1972 RAMSAR Convention on Wetlands), or threatened species (e.g., the 1979 Bonn Convention on Migratory Species of Wild Animals) and all regional seas conventions applying to the European seas (i.e., the OSPAR Convention, the 1992 Helsinki Convention and the BARCON) have developed mechanisms for the designation and management of MPAs as a means to achieve their objectives. Many of these agreements combine an obligation to create and manage a network of protected areas with the duty to conserve species. The provisions on species' conservation, however, remain outside the scope of this Chapter.

A central element of the MPA concept is the management of human activities and extractive uses taking place in the area. As discussed in Chapter 6, the LOSC places considerable restrictions on the capacity of coastal States to control the shipping activities of third States in waters under their jurisdiction. This chapter, therefore, looks closely at the regime for special areas under Articles 211(6) and 234 of the LOSC and the IMO regulatory regime for shipping, namely: Special Areas under MARPOL and Particularly Sensitive Sea Areas (PSSAs). These represent important complementary instruments to ensure full legal protection for vulnerable sites against the threat posed by maritime transport.

At the Johannesburg WSSD, in 2002, the international community committed themselves to establish a coherent network of MPAs by 2012. This target has been endorsed in a multiplicity of political instruments at the global (e.g., UNGA resolutions) and regional level (e.g., Joint OSPAR/Helsinki Bremen Declaration, 2002 5th NSMC Declaration) and has triggered new developments within the main decision-making bodies competent for ocean issues. The EC has signed the WSSD Plan and all relevant declarations and is a party, alongside its member states, to most of the global and regional agreements which have been implemented by means of two Directives (i.e.: the Wild Birds and Habitats Directives). The Habitats (and Birds) Directive provide the framework for the designation and management of sites of Community

importance within a coherent network of protected areas called Natura 2000. The present Chapter looks closely at the way in which the existing EC legislation may contribute to meeting the WSSD target and the steps taken by the Community in this direction.

In the past few years, the establishment and management of MPAs in the high seas (HSMPAs) has been put at the top of the agenda within and outside the UN. There is currently a legal gap with regard to the protection of marine biodiversity beyond the limits of national jurisdiction. The Community is actively involved in the discussion. Reasons of space do not allow a full discussion, but the main developments will be briefly discussed.

The following analysis provides an overview of the legal regime for the designation and management of MPAs within and outside national jurisdiction under the LOSC, global and regional agreements as well as the main political processes, evidencing the main gaps and weakness. The focus is on the manner in which the Community implements these commitments and how it may contribute to filling the gaps. Particular attention is given to existing EC legislation, with a brief reference to the relevant instruments under the Common Fisheries Policy (CFP) and the possible contributions of the proposed Marine Strategy Directive. The Chapter looks closely at the Community's participation alonside its member states in the international policy and decision-making related to MPAs.

8.1.1 Marine Protected Areas (MPAs)

The generally accepted definition of an MPA refers to "any area of intertidal or subtidal terrain, together with its overlying water and associated flora and fauna, historical and cultural features, which has been reserved by law or other effective means to protect part or all of the enclosed environment".[1552] The concept of MPAs is not clearly defined in a legal context. It refers to different types of geographically-defined marine and coastal areas established to reduce the pressure posed by certain human activities on the marine environment by means of appropriate and necessary measures.[1553] MPAs may have diverse names and serve a variety of purposes.[1554] They may be established to conserve marine biodiversity by protecting particular habitats, to increase fishing productivity by ensuring safe havens for species under threat or for research purposes. MPAs may be designed in isolation or within a coherent network, especially in the case of enclosed or semi-enclosed seas; when the threat originates in

[1552] I.e., General Assembly of the IUCN, Resolution 17.38, February 1988, in: G. Kelleher and R. Kenchington (1992), p. 6. The IUCN definition of MPA has been challenged see: www.iucn.org/themes/wcpa/wpc2003/pdfs/Proceedings/emergingissues.pdf. See also the definition adopted in 2002 by the CBD SBSBTTA Ad Hoc Technical Expert Group on Marine and Coastal Protected Areas (UNEP/CBD/SBSTTA/8/9/Add.1, 27.11.2002).

[1553] For a full discussion on the concept of MPAs see: H. Thiel and J.A. Koslow (eds.) (2001).

[1554] In 1997, the IUCN developed a list of categories of protected areas according to the different level of protection and the various objectives they want to pursue (IUCN World Commission on Protected Areas, (1998), Gland, at XViii), i.e.: *Category Ia*, Strict Natural Reserve: protected areas managed mainly for science; *Category Ib*, Wilderness Area: protected areas managed mainly for wilderness protection; *Category II*, National Parks: protected areas managed mainly for ecosystem protection and recreation; *Category III*, Natural Monument: protected areas managed mainly for conservation of specific natural features; *Category IV*, Habitat/Species Management Area: protected area managed mainly for conservation through management intervention; *Category V*, Protected Landscape/Seascape: protected area managed mainly for landscape/seascape conservation and recreation; and *Category VI*, Managed Resources Protected Area: protected areas managed mainly for the sustainable use of natural ecosystems.

part beyond national jurisdiction; or when transboundary natural ecosystems or migratory species are involved.[1555]

Central elements of the MPAs regime are the protective measures to control human activities within the site. Initially these measures focused on the prohibition of fishing,[1556] but they have been progressively extended to all offshore activities and extractive uses which may potentially affect the site, including navigation, mining operations, sand and gravel extraction, seabed exploitation, dumping and land-based discharges.[1557] Depending on the objective they want to fulfil, MPAs may assume different forms ranging from fully protected reserves where all human activities are generally banned, to areas where several activities are prohibited, to large marine ecosystems where only sustainable uses of natural resources may be allowed.

There are currently around 4,000 MPAs worldwide covering less than half of one percent of the global ocean surface.[1558] The largest number of MPAs is concentrated in European waters, but most of them are very small and not effectively managed. The majority of existing MPAs have been established in close proximity to the coasts to protect wetlands, lagoons or estuaries and only a few areas are truly offshore. This is in part because of the lack of proper administrative and legal frameworks, political will and the difficulty of managing and monitoring offshore activities, partly due to the fact that knowledge about offshore habitats and ecosystems has been traditionally rather limited compared to the coastal or terrestrial ones.[1559] In the past decade, however, scientific and technical developments have made gigantic steps and focused the attention of the international community on vulnerable marine ecosystems, deep-water species, communities and habitats including those located beyond national jurisdiction (e.g., seamounts, hydrothermal vents, cold-water coral reefs or submarine canyons).[1560] Technological developments have extended human activities deeper and further offshore. Over-fishing; by-catches; bottom trawling; habitats degradation; shipping; deep seabed mining; and bio-prospecting place increasing pressure on the biodiversity of high seas and deep seas. Currently, several sectoral instruments at the global and regional levels provide for the designation of specific types of MPAs in areas beyond national jurisdiction (e.g., fishing closures, whaling sanctuaries or PSSAs).[1561] They may provide a possible framework for the establishment and management of HSMPAs, but a global legal instrument to protect the high seas' biodiversity in an integrated manner, including the establishment of

[1555] The establishment of a network of MPAs is a priority action for all global and regional forums as well in the EC. See, e.g., 5th IUCN World Parks Congress, Durban (South Africa), 2003, Rec.V.22 on Building a Global System of Marine and Coastal Protected Area Networks, at: www.iucn.org/themes/wcpa/wpc2003/pdfs/Proceedings/recommendations.pdf. See also, 4th IUCN World Parks Congress (Caracas, Venezuela, 1992), Rec. 11.

[1556] The first international convention establishing specially protected areas of marine space, i.e., whaling sanctuaries, was the 1946 International Convention for the Regulation of Whaling .

[1557] See: F. Spadi (2000), pp. 285-302.

[1558] See: UNEP/World Conservation Monitoring Center (WCMC), 2005, at: http://sea.unep-wcmc.org/wdbpa/toptwenty.cfm.

[1559] E.g., G.C. Ray in E.O. Wilson (ed.), pp. 36-50. See also the Sixth EAP, p. 35.

[1560] See, e.g.: S. Gubbay (2003), pp. 47-79 and H. Thiel in A. Kirchner (ed.) (2003), pp. 169-92.

[1561] The 1946 International Whaling Convention; 1995 UNFSA; 1993 FAO Compliance Agreement and several RFMOs envisage the possibility of establishing high seas areas. These instruments, however, remain outside the scope of this Chapter.

MPAs, is still lacking. The international community is currently exploring the possibility and necessity of developing such an instrument.[1562]

8.2 The Jurisdictional Framework under the LOSC

8.2.1 Establishment of MPAs under the LOSC

The LOSC contains limited express references to marine areas and never uses the term "marine protected areas" or any similar expression. During the UNCLOS III, the concept of special areas met with considerable hostility given the strong interference with legitimate uses of the sea, in the first place fisheries and navigation.[1563] It is still controversial whether the Convention provides a clear and sufficient legal basis for the establishment of all types of protected areas, especially in the EEZ and areas beyond national jurisdiction.[1564] The only detailed LOSC provisions on special areas relate to the control of vessel-source pollution in clearly defined areas of the EEZ (Article 211(6)) and in ice-covered areas (Article 234).

However, the LOSC provisions on the protection of the marine environment may provide an indirect legal basis for the designation of all types of MPAs directed at preserving marine biodiversity.[1565] The Convention indeed lays down a positive legal duty to protect and preserve the marine environment (Article 192), including *rare or fragile ecosystems* as well as the *habitat* of depleted, threatened or endangered species or other forms of *marine life* (emphasis added) (Article 195(4)). This general obligation does not contain any particular geographical or material restrictions, but seems to cover all kinds of vulnerable marine ecosystems, habitats and species regardless of their location, including areas beyond national jurisdiction.[1566] Although the LOSC does not clarify the meaning of "marine life", it seems to refer to all species of flora and fauna that are not commercially exploitable (e.g., some species of marine mammals and corals).[1567] Presumably, the rare or fragile ecosystems, habitats and other forms of marine life mentioned in Article 195(4) are those which have been identified pursuant to other global, regional or EC instruments which are consistent with the Convention.[1568] Articles 237 and 311(2) of the LOSC, indeed, create a link between the Convention and the obligations assumed by States under compatible MEAs, such as, for instance, the CBD.

[1562] For a full discussion on high seas' MPAs see: L.A. Kimball (2005); T. Scovazzi (2004); K.M. Gjerde and C. Breide (eds.) (2003); H. Thiel in A. Kirchner (ed.) (2003), pp. 169-92; K.M. Gjerde (2001), pp. 515-28 and H. Thiel and J.A. Koslow (eds.) (2001).

[1563] See, for instance, the legislative history of Article 234 on ice-covered areas, which has been reluctantly included in the LOSC because of the insistence of Canada which was worried about the Artic marine environment. See S. Rosenne and A. Yankov (eds) (1991), pp. 392-98.

[1564] According to R. Platzöder in: H. Thiel and J. A. Koslow (2001), p. 138, the LOSC does not provide a legal basis for the establishment of MPAs either in zones under the coastal state's sovereignty or jurisdiction, nor in the high seas or in the Area. According to R. Lagoni in A. Kirchner (ed.) (2003), pp.157-67, the LOSC does not provide a legal basis for MPAs in the EEZ. Among the States, Norway is one of the stronger opponents to high seas' MPAs. Norway argues that they would be inconsistent with Articles 89 and 137(1) of the LOSC (e.g., Report of the Working Group on the Future of NEAFC, 26.04.2005, Annex 1, p. 7).

[1565] Inter alia, T. Scovazzi (2005); and C. de Fontaubert (2001), p. 79.

[1566] According to D. Owen (2001), pp. 49-51, Article 195(4) focuses exclusively on habitats and ecosystems, and cannot be used to protect species directly.

[1567] The definition of pollution under LOSC, Article 1(4) refers to harm to "living resources" and "marine life" suggesting that a difference exists between the two concepts. It is generally accepted that the LOSC refers to "marine living resources" to indicate commercially exploitable stocks. See on this point: D. Owen, p. 50.

[1568] E.g., L.A. Kimball (2001), p. 35.

In addition, Article 194 requires States, acting individually or jointly, as appropriate, to take "all measures necessary" to prevent, reduce and control marine pollution from any source "using the best practicable means at their disposal".[1569] These measures and means may certainly include MPAs which are considered among the most effective tools for ocean preservation and management.

The Convention places States under a positive legal duty to take measures based on the best available scientific evidence for the conservation and sound management of marine living resources (including highly migratory stocks and marine mammals) in the EEZ and, acting directly or through appropriate subregional or regional organizations, in areas beyond national jurisdiction.[1570] It is still controversial whether the LOSC provisions on the conservation of marine living resources may provide an indirect legal basis for the creation of all types of MPAs.[1571] Although the Convention does not contain a definition of "marine living resources", it seems to refer exclusively to commercial stocks and other exploitable species which are of immediate value for mankind.[1572] However, the Convention specifically integrates marine environmental protection with the conservation of marine living resources by requiring that conservation and management measures must take into account environmental factors, the interdependence of stocks and the effects on associated or dependent species, including marine mammals and seabirds.[1573] Therefore, even though the conservation provisions of the LOSC are directed at maintaining the availability of commercial stocks for fishing purposes and do not seek to protect marine ecosystems, presumably they might provide an indirect legal basis for establishing MPAs as effective tools for fisheries conservation and management.

The LOSC, moreover, requires coastal States to exercise their exclusive rights to exploit natural resources in all waters under their sovereignty and jurisdiction in accordance with their duty to protect and preserve the marine environment (Article 193). However, even though the LOSC may provide an indirect legal basis for the establishment of MPAs in waters within and beyond national jurisdiction, it does not set out a positive legal duty for States to do so.

8.2.2 Management of MPAs under the LOSC

The LOSC restricts to some extent the capacity of coastal States to take management measures within MPAs and unilaterally to control human activities of other States within the sites. First of all, in taking environmental measures pursuant to Part XII, Article 194(4) requires States to refrain from "unjustifiable interference" with legitimate rights and activities carried out by third States in accordance with the Convention. Secondly, as discussed in Chapter 1.2.2.1, coastal States have limited

[1569] The LOSC does not explain the meaning of "necessary", but seems to imply that the decision does not rest exclusively with the coastal State(s) concerned. See: S. Rosenne and A. Yankov (eds.) (1991), p. 64.

[1570] These include, *inter alia*, measures designed to maintain and restore depleted stocks in the EEZ (Article 61); regulating seasons and areas of fishing (Article 62(4)(c)); conserving stocks occurring within the EEZ of two or more coastal States (Article 63); highly migratory species (Article 64); marine mammals (Article 65), andromous stocks (Article 66) and catadromus species (Article 67); and conservation of marine living resources in the high seas (Articles 117-119), including marine mammals (Article 120). Provisions on the conservation and management of straddling and highly migratory fish stocks are also regulated under the 1995 UNFSA.

[1571] For a full discussion see: N. Wolff (2002), pp. 65-6.

[1572] E.g., D. Owen (2001), pp. 49-51. Also the definition of biological resources under the CBD, BARCON, Helsinki Convention and OSPAR is based on the concept of use or value for humanity.

[1573] E.g., LOSC, Articles 61(3) and 119(1) suggest that the relevant decisions have to include the impact on non-target marine and coastal species other than commercial stocks.

capacity to unilaterally control the environmental impact of international shipping and their powers decrease proceeding towards the high seas.

Generally speaking, coastal States may control and eventually prohibit all kinds of activities within MPAs located in their internal waters which are under their exclusive sovereignty. This sovereignty extends to the territorial sea where coastal States are free to designate MPAs and to adopt and enforce all protective measures they so wish as long as they do not result in discriminatory limitations on the right of innocent passage and do not impose ship construction standards (CDEMs) which are higher than international standards on foreign ships in transit.[1574]

Over the continental shelf, coastal States have exclusive sovereign rights for the purpose of exploring and exploiting natural resources (Article 77(1)), which include mineral and other non-living resources of the seabed and subsoil together with "living organisms belonging to sedentary species" (e.g., corals and sponges).[1575] These sovereign rights of exploitation seem to implicitly embrace the right to manage and conserve the natural resources of the continental shelf.[1576] The Convention, moreover, makes it clear that coastal States may prohibit the exploration and exploitation of their continental shelves by third States (Article 77(2)). Presumably, they may also regulate and set out conditions for the exploration and exploitation of the shelf, including activities such as mining, oil and gas operations, sand and gravel extraction, and fishing for sedentary species. It follows that in exercising their sovereign rights on the continental shelf coastal States may establish MPAs and prohibit all activities potentially damaging sedentary species, including destructive fishing practices (e.g. bottom trawling). [1577] In doing so, however, they "must not infringe or result in any unjustifiable interference" with navigation and other freedoms granted by the LOSC (Article 78(2)).[1578] This requires a process of weighing all conflicting interests involved on a case-by-case basis.[1579]

Within the EEZ coastal States have jurisdiction with regard to, *inter alia*, the protection and preservation of the marine environment (Article 56(1)(b)(iii)). In addition, they have explicit sovereign rights not only to explore and exploit, but also "to conserve and manage natural resources" (Article 56(1)(a)). These include both living and non-living resources of the water superadjiacent to the seabed and of the seabed and its subsoil. The EEZ regime, therefore, partially overlaps with the regime of the continental shelf.[1580] In the exercise of their sovereign rights coastal States may

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[1574] See: Chapter 6.2.2.1. According to some authors Article 21(1) would entitle coastal States to ban navigation within MPAs located in the territorial sea. See: F. Spadi (2000), p. 289 and T. Scovazzi (1995), pp. 837-55.

[1575] Sedentary species are defined as "organisms which at the harvestable stage either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or subsoil" (LOSC, Article 77(4)). See also: R.R. Churchill and A.V. Lowe (1999), p. 153.

[1576] See, e.g., E.J. Molenaar (2005), p. 558. *Contra:* R. Long and A. Grehan (2002), p. 243; and D. Owen (2001), pp. 49-51.

[1577] See, e.g., Report of the Ad Hoc Open Ended Informal Working Group to study issues related to the conservation and sustainable use of marine biodiversity beyond national jurisdiction (A/61/65), Para 22. There are already several precedents, see: infra n. 1580. See for a full discussion E.J. Molenaar (2005), pp. 557-62.

[1578] States fishing in the high seas, however, have to take into account the rights and interests of the coastal States vis-à-vis, *inter alia*, their sedentary species (LOSC, Article 116(b)) and the effect of fishing practices on sedentary species (*ibid*, Article 119(a)).

[1579] See: North Atlantic Coast Fisheries Arbitration (UK v. US), Permanent Court of Arbitration, 1910, J.B. Scott, The Hague Court Reports, Vol. 1, p. 171.

[1580] Some States relied on the EEZ regime to designated deep-sea areas in their EEZ and prohibit certain human activities therein. Australia, for instance, has prohibited fishing, drilling for oil and gas and the exploitation of oil and gas within the Tasmanian Seamounts Marine Reserve; Norway banned all fishing

prohibit fishing activities and ban destructive fishing practices in areas of their EEZ. They may also allow other States to fish in their EEZ (or equivalent Exclusive Fishing Zones (EFZs)), but they may impose conditions and terms and adopt conservation measures (e.g., area closure or the prohibition of destructive fishing practices) that foreign ships must observe (Article 62.4).[1581] Generally speaking, therefore, coastal States may designate MPAs in the EEZ and unilaterally regulate all extractive uses (including fishing and mining) and human activities (e.g. dumping; offshore and land-based pollution; marine scientific research) which may harm the marine environment and its natural resources as long as they do not interfere with the traditional freedoms of navigation, overflight and the laying of submarine cables by other States. However, the delineation of the course of submarine pipelines is subject to the consent of the coastal State, which may always decide to deviate its traject outside the MPA (Article 79(2)). As extensively discussed in Chapter 6.2.2.3, coastal States have limited capacity to control the passage of foreign ships through the EEZ and cannot require them to observe national standards which are more stringent than international ones during the transit through MPAs located in this area. As will be examined later in this chapter, only under specific conditions does the LOSC allow coastal States to promote the adoption of more stringent measures in clearly defined areas of their EEZ.

Finally, coastal States cannot unilaterally regulate and control the activities of third States in waters beyond national jurisdiction. On the high seas all states enjoy the traditional freedoms.[1582] These freedoms, however, cannot affect the rights of other States and must be exercised under the conditions laid down in the LOSC and other rules of international law (LOSC, Article 87). These conditions include the duty to protect and preserve the marine environment; to conserve natural resources; and cooperate with other States for these purposes.[1583] All environmental and conservation measures in such areas need to be established through multilateral cooperation among States directly or within the competent international organizations (e.g., CBD, IMO).

8.3 The Global Political Debate on MPAs

8.3.1 Chapter 17 of Agenda 21

At the beginning of the 1990s, the progressive loss of marine biodiversity and the depletion of fish stocks evidenced the limits of the traditional approach to ocean management. Chapter 17.1 of Agenda 21 expressly recognizes that international law, as codified in the LOSC, provides the basis for the protection and sustainable use of the marine environment, but it strongly requires the international community to take a new approach at the national, sub-regional, regional and global level. This new approach needs to be "integrated in content", "precautionary and anticipatory in ambit"

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activities within the Marine Reserve northwest of Trondheim to protect cold water coral reefs; Portugal and the US designated deep-sea areas respectively in the south-west of the Azores and the Hawaiian Islands, while the UK is considering taking similar steps in the Darwin Mounds. Also Iceland has prohibited bottom trawling in an extended part of its EEZ to protect vulnerable marine habitats (see also the 2005 revised Act on Fishing in Iceland's Exclusive Fishing Zone).

[1581] For a full discussion on the fisheries regime in the EEZ see: R.R Churchill and A.V. Lowe (1999), pp. 289-94.

[1582] As discussed in Chapter 1.2.2.1 the exploration and exploitation of mineral resources of the seabed is subjected to a separate regime, which is regulated in Part XI of the LOSC and is under the competence of the ISBA. This regime is not covered here. On the regime for the conservation and management of high seas fisheries see: N. Wolff (2002), p.p. 59-61 and R.R. Churchill and A.V. Lowe (1999), pp. 296-305.

[1583] See: T.R. Young, "Developing a Legal Strategy for High Seas Marine Protected Areas", Legal Background Paper", prepared for the Malaga Workshop (2003).

and based on the ecosystem approach.[1584] Integrated ocean management requires, in the first place, strong integration between fisheries management and biodiversity conservation.[1585] The concept of MPAs embodies the new approaches to ocean management.[1586] Chapter 17 of Agenda 21 therefore strongly supports the establishment and management of MPAs and encourages states to identify marine ecosystems with a high level of biodiversity and productivity and other critical areas and to limit human activities and extractive uses at these sites.[1587] To this end, States should designate protected areas with particular priority to be accorded to coral reefs, estuaries, wetlands (including mangroves), and sea grass. Agenda 21, moreover, recommends coastal States to undertake, with the support of international organizations, measures to maintain biological diversity and productivity of marine species and habitats under national jurisdiction, including the designation of protected areas.[1588] In addition, States are encouraged to "preserve rare or fragile ecosystems, as well as habitats and other ecologically sensitive areas" both under their jurisdiction and in the high seas in order to conserve and sustainably use marine living resources.[1589] Finally, Agenda 21 recommends all States to ensure respect for areas designed by coastal States within their EEZ consistently with international law, in order to protect and preserve rare and fragile ecosystems.[1590]

8.3.2 The WSSD Plan of Implementation and its Follow-Up in the UN

Ten years after the adoption of Agenda 21, it became evident that the general recommendations of Chapter 17 had not been able to arrest the loss of marine biodiversity and States have made little progress towards the establishment and management of offshore MPAs. The WSSD Plan of Implementation, adopted in Johannesburg in 2002, sets out new clear-cut and time-bound targets urging the international community to increase efforts to preserve marine life. In particular it requires States to halt the decline of biodiversity by 2010 and "to establish MPAs consistent with international law and based on scientific information, including representative networks by 2012 and time/areas closures for the protection of nursery grounds and periods".[1591] Despite its non-legally binding nature, the WSSD Plan had the major merit of giving a new political impetus to the MPAs debate and triggered new developments at the global and regional level.[1592]

At the global level, WSSD targets have been endorsed in all subsequent UNGA annual resolutions which call upon States to continue their efforts towards the establishment of representative networks of MPAs by 2012 acting consistently with

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[1584] See Agenda 21, Chapter 17, paras 17.1; 17.5; 17.6; 17.21; and 17.22.

[1585] This new approach is endorsed, inter alia, by the CBD (e.g., Decision II/10); OSPAR, Article 2(1)(a); Helsinki Convention, Article 3(1); and the 1996 SPA Protocol of the BARCON, Article 3(1) (a) and (b) and in the Sixth EAP, Para. 35.

[1586] See T. Scovazzi (1999), p. 21; K.M. Gjerde and D. Freestone (1994), p. 435.

[1587] Agenda 21, Chapter 17.85.

[1588] Ibid, Chapter 17, Paras 17.7 and 17.6(c).

[1589] Ibid, Paras 17.74(f) and 17.46(f). These recommendations eventually led to the conclusion of the 1995 UNFSA.

[1590] Agenda 21, Chapter 17.30 (a)(v).

[1591] WSSD Plan, paras 42 and 31(c). Other relevant targets are: to apply the ecosystem approach by 2010 (*ibid*, paras 29(d) and 31(c)); to maintain or restore stocks where possible not later than 2015 (*ibid,* para. 30(a)); and to eliminate destructive fishing practices (*ibid,* paras 32(a) and (c)).

[1592] For a critical analysis of the outcome of the WSSD in relation to ocean issues see: M. Gianni, Greenpeace International (2002), at: www.udel.edu/CMS/csmp/globaloceans/pdf/Gianni.pdf.

international law and on the basis of the best scientific information available.[1593] It is worth mentioning that in the past few years the UNGA has dedicated increasing attention to marine biodiversity issues in areas beyond national jurisdiction. For that purpose, in 2004 an *Ad Hoc* Open-ended Informal Working Group was established to study issues relating to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction, including the possibility to establish MPAs in this area.[1594] Also the UN ICP, in all its sessions, has strongly encouraged the use of MPAs as an effective management tool for the conservation and integrated management of biodiversity in areas within and beyond national jurisdiction,[1595] as well as for fisheries purposes.[1596] Similarly, the UN Secretary-General gave a great deal of attention to MPAs in his annual reports.[1597]

In addition, the WSSD commitment towards establishing a representative network of MPAs has been endorsed in a variety of ocean forums outside the UN,[1598] and has been translated into clear targets within the framework of the CBD, regional agreements and the EC.

8.4 The Global Regulatory Regime

8.4.1 The Convention on Biological Diversity (CBD)

The Convention on Biological Diversity (CBD), adopted at UNCED in 1992,[1599] sets out the legal framework for the conservation and the sustainable use of biodiversity, including marine biodiversity.[1600] The CBD complements and reinforces the general obligations of the preservation of marine life and the conservation of marine living resources under the LOSC.[1601] In particular, contracting Parties are under a legal duty

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[1593] I.e, 2005 UNGA Resolution 60/30 (paras 74-5); 2004 UNGA Resolution 59/24 (Para. 72); 2003 UNGA Resolution 58/240 (Para. 54) and 2002 UNGA Resolution 57/141 (Para. 53). Resolutions adopted before 2002 do not contain any reference to MPAs.

[1594] E.g., 2004 UNGA Resolution 59/24 (Para. 73). The Group met for the first time in February 2006 (see: Report of the meeting in: A/61/65). See also UNGA Resolution 59/25 (Para. 66) calling upon States either by themselves or through RFMOs to take action urgently, and to consider on a case-by-case basis and on a scientific basis, the interim prohibition of destructive fishing practices, including bottom trawling, which have adverse impacts on vulnerable marine ecosystems located beyond national jurisdiction.

[1595] E.g., 5th ICP (A/59/122), paras 84; 88 and 89; 4th ICP (A/58/95), paras 22 and 104; 3rd ICP (A/57/80), para. 25; 2nd ICP (A/56/121), para. 84; and 1st ICP (A/55/274), paras 28 and 73.

[1596] 6th ICP, Para 11(e) encouraging, *inter alia*, cooperation with the CBD, available at: www.un.org/Depts/los/reference_files/new_developments_and_recent_adds.htm.

[1597] E.g. 2006 UNSG Report (A/61/63), paras 254-57; 2005 UNSG Report (A/60/63), paras 152, 164 and 185; and A/60/63/Add.1; 2004 UNSG Report (A/59/62), paras. 223-28 and Add. (paras 278, 291); 2003 UNSG Report (A/58/65), paras. 224-27; and 2002 UNSG Report (A/57/57), paras. 472-85.

[1598] WWF, IUCN and the IUCN's World Commission on Protected Areas (WCPA) are in the process of developing an Action Plan for the establishment of HSMPAs. The first IUCN, WCPA and WWF High Seas MPAs Workshop took place in Malaga, Spain in 2003. See also the 5th meeting of the World Park Congress (WPC), held in Durban (South Africa, 2003), WPC Rec. V.4 (Para. 1(h)); WPC Recs. V.22 and 23, available at: www.iucn.org/wpc2003/pdfs/Proceedings/recommendations.pdf.

[1599] UNEP, Convention on Biological Diversity, signed in Rio de Janeiro 5 June 1992 and entered into force on 29.12.1993, text available at: www.biodiv.org/convention/articles.asp. At the present the CBD has 188 contracting Parties, including the EC and its 25 member states. For a general analysis of the CBD see, e.g., P. Sands (2003), p. 515-23; A. Boyle in: M. Bowman and C. Redgwell (1996), pp. 33-49 and D. Freestone in ibid, pp. 91-107.

[1600] Biodiversity is defined in Article 2 as the "variability amongst living organisms from all sources including…*marine and other aquatic ecosystems* and the ecological complexes of which they are a part" (emphasis added). For a critical analysis of the applicability of this definition to marine biodiversity see: D. Freestone in M. Bowman and C. Redgwell (eds) (1996), pp. 92-3.

[1601] See 1999 UNSG Report (A/54/429), Para. 493.

to take *in situ* conservation measures,[1602] including "*as far as possible and as appropriate"* the establishment of a system of protected areas or areas where special measures are needed and the development of guidelines for the selection, establishment and management of those areas (CBD, Article 8(a) and (b)).[1603] Annex I provides an indicative list of habitats and ecosystems, which could be used to assist Parties in the development of criteria for the selection of MPAs.[1604] The CBD is the only global Treaty, together with the Ramsar Convention, setting out a positive legal duty to create protected areas. However, the "*as far as possible and as appropriate*" clause makes the implementation of this duty highly discretionary.[1605]

The CBD explicitly endorses the ecosystem approach and, implicitly, the precautionary principle[1606] and contains general duties which have relevance for the management of MPAs, such as the duty to integrate biodiversity considerations into other policies (Articles 6 and 10) and to carry out an EIA of all projects likely to have significant adverse effects on biodiversity (Article 14).[1607] The "*as far as possible and as appropriate*" clause also applies to most of these obligations, however.

Contracting Parties must apply the provisions of the CBD to components of biological diversity in waters under their jurisdiction (Article 4(a)) as well as to processes and activities carried out under their jurisdiction and controls that take place both within or beyond national jurisdiction and wherever their effects occur (Article 4(b)). In other words, Parties have to take measures to conserve and sustainably use marine biodiversity in waters under national jurisdiction and to prevent the impact of national activities, such as shipping, dumping or fishing, on marine biodiversity outside their jurisdiction, including the high seas (and the seabed). However, they cannot take unilateral measures directed at the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, but they shall, "*as far as possible and as appropriate*", cooperate directly or through competent international organizations (Article 5). Presumably, such measures may include the designation and management of MPAs. The CBD, therefore, seems to provide the legal basis for the multilateral establishment of MPAs in waters beyond national jurisdiction.[1608] Contracting Parties, however, have to "implement the Convention with respect to the marine environment consistently with the rights and obligations of States under the Law of the Sea", implicitly referring to the LOSC (including the freedom of navigation

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[1602] CBD, Article 8 (f). In situ conservation is defined in Article 2 as "the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings".

[1603] Protected areas are defined as "geographically defined areas designed or regulated and managed to achieve specific conservation objectives" (CBD, Article 2).

1604 Annex I urges, inter alia, special attention to be paid to critical habitats for marine living resources as an important selection criterion. See, e.g., M. Vierros, S. Johnston and D. Ogalla in H. Thiel and J.A. Koslow (eds.) (2001), p. 172.

[1605] See A. Boyle (1994), p. 118.

[1606] The CBD does not expressly refer to the precautionary principle. However, the Preamble makes it clear that measures should not be avoided or postponed where there is a *lack of full scientific certainty*.

[1607] See also the duty to identify and monitor critical components of biodiversity and potentially dangerous activities (Article 7) and provisions on reporting (Article 26); consultation on activities likely to have a significant adverse effect on the biodiversity of other states or areas beyond national jurisdiction (Article 14 (1)(c) to (e)); financial resources (Article 20); and financial mechanism (Article 21). The Global Environmental Facility (GEF) is the financial mechanism established by the CBD (Article 39).

[1608] See, e.g., M. Vierros, S. Johnston and D. Ogalla in H. Thiel and J.A. Koslow (eds.) (2001), pp. 169-73, K.M. Gjerde (2001), pp. 515-28; and C. de Fontaubert (2001), p. 81. *Contra:* Norwegian submission to ICP 2003, "Protection and conservation of vulnerable marine ecosystems in areas beyond national jurisdiction (A/AC.259/10).

regime).[1609] In addition, the CBD does not affect rights and obligations stemming from other international agreements, "except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity".[1610]

The governing body of the CBD is the Conference of the Parties (COP) which meets every two years and is responsible for monitoring the implementation and steering the further development of the Convention.[1611] The COP may adopt decisions, amendments, new Protocols and Annexes. COP decisions, unlike formal amendments, annexes and protocols, are non-legally binding, but have strong political force. In its work the COP is assisted by the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA), which gives advice in the form of recommendations on scientific, technical and technological aspects related to the implementation of the Convention.[1612] In addition, the COP may establish additional subsidiary bodies or working groups with time-limited and defined mandates.[1613]

The CBD has been criticized for being poorly drafted in relation to marine biodiversity.[1614] Strengthening the Convention's regime on the conservation and sustainable use of marine and coastal biodiversity has been something of a priority since the beginning.[1615] In the past decade, MPA issues have been placed at the top of the agendas of all COPs and SBSTTAs.[1616] The so-called Jakarta Mandate on Marine and Coastal Biological Diversity adopted at the COP-2 (1995),[1617] and the multi-year working programme adopted at the COP-4 (1998) to assist the implementation of the Jakarta Mandate,[1618] evidence the importance of marine and coastal protected areas (MCPAs) to achieve the objectives of the CBD and to encourage the establishment of MCPAs as part of an ecosystem-based precautionary and integrated approach to the conservation and sustainable use of marine biodiversity.[1619] The programme sets out the key operational objectives and priority activities within five thematic areas, including MCPAs, and calls for the development of criteria for the establishment and management of such areas.[1620]

[1609] CBD, Article 22(2). See: D. Freestone in M. Bowman and C. Redgwell (eds.) (1996), p. 91 and R. Wolfrum and N. Matz in J.A. Frowein and R. Wolfrum (eds.) (2000), p. 445.

[1610] CBD, Article 22(1). This might be the case for some fishing agreements.

[1611] The COP and its functions are regulated in Article 23. To date, there have been eight COPs, and the last one was held in Curibita (Brazil), on 20-31 March 2006. All COP decisions are available at: www.biodiv.org/convention/cops.asp#.

[1612] The SBSTTA and its functions are regulated in Article 25. Normally, the COP endorses the SBSTTA recommendations in whole or in part in its decisions.

[1613] See, e.g., the Ad Hoc Technical Expert Group on Marine and Coastal Protected Areas established in 2000 to assist the SBSTTA (Decision IV/5). The Group met twice (in 2001 and 2002) and presented its key findings to SBSTTA-8 in 2003, which endorsed them in Rec. VIII/3.

[1614] Apparently, the weakness of the CBD obligations in relation to the marine environment was one of the reasons why the US signed, but has not yet ratified the CBD. See: T. Scully in: E.L. Miles and T. Treves (ed.) (1993), p. 148.

[1615] E.g., COP-1 (1994), Decision I/9, Para. 5.3.

[1616] See, in particular, SBSTTA Rec. VIII/3 on "Marine and coastal biodiversity: review, further elaboration and refinement of the programme of work" (2003). See also, Rec. X/4 (2005); Rec. IX/4 (2003); Rec. VI/2 (2001); Rec. V/6 (2000); Rec. III/2 (1997); Rec. II/10 (1996) and Rec. I/8 (1995). All SBSTTA Recommendations are available at:www.biodiv.org/convention/sbstta.asp.

[1617] CBD Decision II/10. The Jakarta Mandate, however, does not make explicit reference to MPAs, but calls for the integrated management of marine and coastal ecosystems following an ecosystem and precautionary approach (paras 2 and 3 and Annex II, Para 3(a)).

[1618] CBD Decision IV/5, for the period 1998-2004.

[1619] *Ibid,* Programme element 3, especially Para. B. 1 and 2.

[1620] CBD Decision IV/5, operational objective 3(2). The critical habitat for marine living resources is identified as an important selection criterion.

MCPAs have been a priority issue at COP-7, held in Kuala Lumpur in February 2004, which fully endorsed the WSSD targets.[1621] Taking note of the limited progress in the designation and effective management of MCPAs,[1622] the COP-7 urged Parties to increase efforts towards the establishment of marine protected areas in waters under their jurisdiction, including representative networks by 2012 and time/area closures for the protection of nursery grounds and periods (Decision VII/5).[1623] In addition, it called for strengthening international cooperation to improve the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, also through the establishment of MPAs.[1624] Protected areas, both within and beyond national jurisdiction, have to be consistent with international law and based on scientific information. The COP-7 recognizes the LOSC as the proper legal framework for regulating activities in areas beyond national jurisdiction and supports any work by the UNGA in identifying the appropriate mechanisms for the establishment and effective management of MPAs in the high seas.[1625] The working programme on marine and coastal protected areas has been extended to 2010, further elaborated,[1626] and translated into clear and time-bound targets.[1627] Additionally, Decision VII/28 established an A*d Hoc* Open–ended Group on Protected Areas with the task of, *inter alia*, supporting and reviewing the implementation of the working programme on MCPAs and exploring options for cooperation in the establishment of MPAs in areas beyond national jurisdiction.[1628] How to proceed and which forum should take the lead in addressing MPAs in areas beyond the limits of national jurisdiction have been the most controversial issues during the first meeting of the Working Group, held in June 2005 in Montecatini (Italy).[1629] The EC has been trying to gather support for an implementing agreement to the LOSC, but it met with strong opposition from states

1621 CBD Decision VII/5 (UNEP/CBD/COP/7/21).

1622 *Ibid*., paras 9-15. See also the Report of the Ad Hoc Technical Expert Group on Marine and Coastal Protected Areas (UNEP/CBD/SBSTTA/8/INF/7) and (UNEP/CBD/SBSTTA/9/5).

1623 CBD Decision VII/5, paras 16-19. In addition, paras. 20-28 offer guidance for the development of a national framework of MCPAs and identify two main categories a) MCPAs where threats are managed for the purpose of biodiversity conservation and/or sustainable use and where extractive uses may be allowed; and (b) Representative MCPAs where extractive uses are excluded, and other significant human pressures are removed or minimized, to enable the integrity, structure and functioning of ecosystems to be maintained or recovered.

1624 *Ibid,* paras. 29-31.

1625 *Ibid*, VII/5, Para. 31 (and paras 57-62) which also urges the CBD Secretariat to collaborate with the UN Secretary-General and other competent international and regional bodies in drafting a report on how better to address the risk for vulnerable ecosystems beyond national jurisdiction as requested by UNGA Resolution 58/42 (Para. 52).

1626 CBD Decision VII/5, Programme element 3, pp. 146-49, elaborates the operational objectives (e.g., to establish and strengthen national and regional systems of MCPAs integrated into a global network and as a contribution to globally agreed goals (objective 3.1); to enhance the conservation and sustainable use of biological diversity in marine areas beyond the limits of national jurisdiction (objective 3.2.); and to achieve effective management of existing MCPAs (objective 3.3)) and identifies the suggested activities, and the ways and means to achieve these objectives.

1627 See the 2004 Programme of Work on Protected Areas (UNEP/CBD/COP/7/21 (Annex I)), pp. 349-65. For example, Goal 4.1 requires the development and adoption of standards, criteria, and best practices for planning, selecting, establishing, managing and governance of national and regional systems of MPAs by 2008.

1628 CBD Decision VII/28 (UNEP/CBD/COP/7/21).

1629 See: Report of the First Meeting of the Ad Hoc Open-ended Working Group on Protected Areas (UNEP/CBD/WG-PA/1/6, Annex I), available at: www.biodiv.org/doc/meeting.aspx?mtg=PAWG-01.

like Norway and Iceland.[1630] According to others, high seas MPAs should be addressed within the framework of the CBD, albeit not as a leading agency. The designation of PSSAs in high seas has been another option on the table.[1631] The COP-8, held in Curibita (Brazil) in March 2006, did not progress much on this issue, which is therefore still far from being settled.[1632]

Since its adoption, moreover, the CBD has advocated better cooperation and coordination with existing global and regional legal instruments, including regional fisheries management organizations and international bodies whose mandate includes MPAs with the view of promoting synergies and avoiding unnecessary duplications.[1633]

8.4.2 Other MEAs Providing a Possible Legal Basis for the Designation and Management of MPAS

The 1971 Convention on Wetlands of International Importance, Especially for Waterfowl (Ramsar Convention) aims at the conservation and wise use of wetlands, *inter alia*, by establishing a system of protected areas.[1634] Like the CBD, also the Ramsar Convention sets out a positive legal obligation to designate and manage special areas. In particular, contracting Parties are required to designate at least one site within their territory for inclusion in the *List of Wetlands of International Importance*[1635] on the basis of specific selection criteria.[1636] The selected sites may include areas of marine water no more than six meters deep at low-tide and may extend to adjacent islands and coastal zones.[1637] Marine and coastal wetlands include mangroves, sea grass beds, coral reefs, intertidal zones and estuaries and are considered as a critical component in marine conservation and an important support system for marine life. The Convention devotes particular attention to wetlands which are transboundary or which represent important habitats for migratory species and requires Parties to cooperate in their conservation, especially with regard to shared water dependent species, migratory species other than water birds, including marine turtles and fish stocks.[1638]

[1630] See the Statement by Norway : "[…] To negotiate amendments to existing international law would be time consuming and difficult, and it would take valuable resources and focus away from implementing specific measures with practical results" (Report of the First Meeting, Para. 160).

[1631] See: Options for Cooperation for the Establishment of Marine Protected Areas in Marine Areas Beyond the Limits of National Jurisdiction (Doc. UNEP/CBD/WG-PAS/1//2) and L.A. Kimball (2005), pp. 40-48. PSSAs, however, only relate to shipping and in order to provide a comprehensive level of protection, they should be integrated with additional international and/or national instruments.

[1632] The COP-8 adopted Decision VII/21 on the conservation and sustainable use of deep seabed genetic resources beyond the limits of national jurisdiction, which identifies the establishment of MPAs as one of the possible options to protect deep sea's genetic resources beyond national jurisdiction (Para. 5). The issue is also being examined by the Ad Hoc Group established by UNGA Resolution 59/24, supra n. 1593.

[1633] E.g., CBD Decision IV/5; Decision VII/5 and 2004 Programme of Work on Protected Areas (Para. 3). Also the WSSD highlighted the need to integrate the objectives of the CBD into global, regional and national policies.

[1634] Signed in Ramsar, Iran, 2.02.1971, into force on 21.12.1975, text available at: www.ramsar.org/index_very_key_docs.htm. The Convention, as amended, has 145 contracting Parties, including the EC and its 25 member states. For an overview of the Convention: P. Sand (2003), 543-45 and Lee A. Kimball (2001), pp. 35-6.

[1635] Ramsar Convention, Article 2. The List is administrated and updated by IUCN (ibid, Article 8).

[1636] Criteria for selection have been adopted by Ramsar Convention, COP-4 (1982), as amended by COP-6 and 7, and are available at: www.ramsar.org/key_criteria.htm.

[1637] See the definition of wetlands in Ramsar Convention, Article 1(1).

[1638] Ramsar Convention, Article 5 and Ramsar COP-7, Res. VII.19.

Inclusion in the list brings a number of positive management obligations for states parties including the establishment of natural reserves;[1639] the formulation and implementation of wetland conservation plans and policies; an EIA of all human activity conducted in the site; as well as monitoring and reporting.[1640] Inclusion in the list is without prejudice to the sovereignty of the state concerning its wetlands, but provides the site with an international legal status. States, indeed, are placed under an "international responsibility for the conservation, management and wise use of migratory stocks of waterfowl" and must "compensate for any loss of wetland resources, such as the establishment of additional natural reserves".[1641] Ramsar sites are located in close proximity to shores and are not likely to interfere with the traditional freedoms of the high seas, including shipping and fisheries. Their management, therefore, does not create particular concerns from a law of the sea viewpoint and virtually all human activity may be controlled in the area.

The Conference of the Parties (COP) is held every three years to review the implementation and further development of the Convention. In the exercise of its functions the COP adopts resolutions and recommendations on the conservation, management and wise use of wetlands. Despite their non-legally binding nature, the COP resolutions (and recommendations) have a great deal of political force.[1642]

Originally, the Ramsar Convention, like the CBD, was primarily intended to protect terrestrial wetlands, but in the past decade, its scope has been progressively extended to marine and coastal waters. Currently, more than one third of all the designated sites have a marine component.[1643] In 1996, the COP-6 included wetlands important as fish habitats within the selection criteria and called for the designation of new sites to protect under-represented wetlands (e.g., coral reefs, mangroves and sea grass beds).[1644] The COP-7 (1999) adopted a new comprehensive Framework and Guidelines to assist Parties in the establishment of a global network of sites representing all types of wetlands, including marine wetlands.[1645] COP-8 (2002) and COP-9 (2005) provided further indications as to how to apply these guidelines to under-represented wetlands (e.g., coral reefs) and coastal and marine biodiversity.[1646] Since its adoption, the Ramsar COPs attached great importance to increasing cooperation with the CBD and all relevant international, regional and sub-regional bodies (including EC) which are competent for the conservation of biodiversity and COP-9 expressly called for the full integration of the Ramsar sites into the CBD programme of work on MCPs.[1647]

[1639] Ramsar Convention, Article 4(1). P.van Heijnsbergen ("International Legal Protection of Wild Fauna and Flora", 1997, p. 183) notes the term "nature reserve", apparently meaning a wide range of protected areas.

[1640] Obligations within the listed sites are laid down in the Ramsar Convention, Articles 3 and 4.

[1641] See, respectively, Articles 2(5)(6) and 4(2). As will be discussed later, also the EC Habitats Directive provides for an analogous compensatory mechanism.

[1642] All the functions of the COP are listed in Article 6. In its work the COP is assisted by a Scientific and Technical Review Panel (STRP). In 1990, a special *Wetland Conservation Fund* was established in order to provide financial and technical assistance to the Parties, especially developing countries.

[1643] The Directory of Wetlands is available at: www.wetlands.org/RDB/Directory.html.

[1644] See the Strategic Plan for the period 1997-2002 (Action 6.2.3) and Ramsar COP-6 Resolution VI 2, available at: www.ramsar.org/key_res_vi.2.htm.

[1645] Ramsar COP-7, Resolution VII-11 (see: www.ramsar.org/key_guide_list2002_e.htm).

[1646] Ramsar COP-8, Resolutions VIII-11 and VIII-33 and Ramsar COP-9, Resolution IX-1, Annex A. COP-9, moreover, devoted particular attention to the management of sustainable fisheries in wetlands (e.g., Resolution IX-4).

[1647] COP-9, Resolution IX.22.

In addition, it is worth making a brief reference to the 1979 Bonn Convention on the Conservation of the Migratory Species of Wild Animals (CMS) which sets out the framework for the conservation and effective management of migratory species and their habitats.[1648] The Convention makes a distinction between migratory species in danger of extinction, which are listed in Appendix I, and migratory species with an "*unfavourable conservation status*" which need or would significantly benefit from international cooperation and are listed in Appendix II.[1649] Over the years, an increasing number of marine species, especially cetaceans and sea turtles and migratory seabirds, have been listed in both Appendixes.[1650]

Unlike the CBD and Ramsar Convention, the CMS does not contain a positive legal duty to designate and manage MPAs but calls on "range States" to take immediate action to protect Appendix I species by, *inter alia*, conserving and, where feasible and appropriate, restoring their habitats.[1651] Since the definition of "range state"[1652] includes "states, flag vessels of which are engaged outside national jurisdictional limits in taking migratory species", these provisions also apply to the high seas. In addition, the Convention requires range States to conclude international agreements in order to achieve and maintain a favourable conservation status for Annex II (and other migratory) species.[1653] Each Agreement adopted pursuant to the Convention should provide for the maintenance of a network of suitable habitats appropriately disposed in relation to migration routes (Article V.5 (f)). As will be discussed later, one of the CMS agreements (i.e., the ACCOBAMS) contains a positive legal obligation to establish and manage a network of specially protected areas.[1654] The CMS serves as an umbrella mechanism for the review of all the agreements concluded within its framework. The Conference of the Parties (COP) is the main decision-making organ and is responsible for monitoring and reviewing the implementation of the Convention. It may adopt resolutions and make recommendations to states Parties for the improvement of the conservation status of the migratory species and of the effectiveness of the convention.[1655] The COP-8 (November 2005) adopted a number of resolutions and recommendations concerning marine species and devoted attention to the need to reduce the impact of fishing activities on marine species. Just like the CBD and Ramsar, also the CMS recognizes that its aims and objectives complement and

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[1648] Article II.1 of the CMS, adopted on 23.06.1979, into force 1.11.1983, text available at: www.cms.int/documents/convtxt/cms_convtxt.htm. As of 1.02.2005 the CMS has 89 Parties, including the EC and its 25 member states.

[1649] Article IV.1. Some species can be listed in both the Appendixes.

[1650] Various species of cetaceans and sea turtles are included in Appendix I, while a variety of small cetaceans, including dolphins, are included in Appendix II. At the COP-8, in November 2005, six new marine species were included in the Appendixes. The CMS Appendixes are available at: www.cms.int/documents/appendix/cms_app1_2.htm#appendix_I.

[1651] All measures that Parties have to take to conserve Annex I species are listed in CMS, Article III.

[1652] CMS, Article I.1(h).

[1653] CMS, Article IV(3) and (4). These agreements are open to all range States regardless of their participation in the CMS (Article V.2). In addition, Parties may adopt less formal agreements in the form of Memoranda of Understanding (MOUs). So far three Article IV(4) agreements have been concluded: the 1996 ACCOBAMS, infra n. 1718, the 1992 Agreement on the Conservation of Small Cetaceans in the Baltic and North Sea (ASCOBANS) and the 1990 Agreement on the Conservation of Seals in the Wadden Sea (36 ILM. 777).

[1654] Conversely, the ASCOBANS and the Wadden Sea Agreement do not contain specific obligations to establish MPAs.

[1655] CMS, Article VII. The COP meets every three years and is assisted by a Scientific Council (Article VIII) and a Standing Committee. All CMS resolutions and recommendations are available at: www.cms.int/bodies/cop_mainpage.htm

reinforce those of other international conventions and calls for strong cooperation and synergies in areas of mutual interest.[1656]

8.5 The Regional Regime for the Designation and Management of MPAs

8.5.1 OSPAR's Annex V and the OSPAR Network of Marine Protected Areas

The OSPAR Convention deals with the protection and conservation of the ecosystems and biological diversity in Annex V. This Annex was adopted at the first meeting of the OSPARCOM (Sintra, 1998)[1657] to implement the CBD in the OSPAR marine area.[1658] Its adoption was a direct response to the call for action contained in the Third (1990) and Fourth (1995) NSMC Declarations, which urged the OSPARCOM to take further steps to ensure the conservation, restoration and protection of the biodiversity and ecosystems in the North Sea.[1659] The Annex, like the CBD, covers the preservation of both habitats and species.[1660] Its provisions apply to waters under the jurisdiction of contracting Parties as well as the high seas (Article 1(a)). Annex V has been adopted together with an Appendix 3 setting out the criteria for the identification of human activities that may have adverse effects on the marine environment; a Biodiversity Strategy and an Action Plan, both revised in 2003.[1661] The Annex, like the OSPAR Convention, follows a two-step approach. It first requires the OSPARCOM to develop means and programmes and to draft specific measures that, in a second stage, have to be implemented by the contracting Parties.[1662]

Annex V does not contain detailed obligations for contracting Parties, but leaves them with ample discretion concerning whether and how to act. Recalling Article 5 of the CBD, it requires Parties to take "*all necessary measures* to protect and conserve the ecosystems and the biological diversity of the maritime area, and to restore, *where practicable*, marine areas which have been adversely affected" (Article 2(a)). Parties, moreover, shall cooperate in adopting programmes and measures for controlling human activities identified according to the criteria laid down in Appendix 3 (Article 2(b)). This cooperation takes place primarily within the Biodiversity Committee (BDC), established in 2000 to assist the OSPARCOM in the implementation of Annex V and the Biodiversity Strategy.

The duties of the OSPARCOM are more detailed, but also leave ample discretion for the Commission as to when and how to exercise its regulatory

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[1656] See, e.g., UNEP/CMS Res.7.11, 2.09.2002, calling on all international organizations and the EC to cooperate with the CMS in efforts to prevent accidental oil pollution and to minimize its negative impact on migratory species.

[1657] Annex V entered into force on 30.08.2000. As of February 2005, it has 15 CPs: Denmark, Finland, France, Germany, Luxembourg, Iceland, Ireland, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the UK and the EC. Ratification by Belgium is still expected. The Text of Annex V is available at: www.ospar.org/eng/html/welcome.html.

[1658] Summary Record of the Sintra Ministerial Meeting (OSPAR 98/14/1-E, Annex 3). All OSPAR contracting Parties are also Parties to the CBD and, by means of Annex V, they implement their duty under the CBD to develop strategies for the conservation and sustainable use of biological diversity (Article 2). Article 1, Annex V refers to the CBD for the definition of "biological diversity", "ecosystems" and "habitat". See also Annex V, Preamble (Paras 5 and 6).

[1659] As discussed in Chapter 1.4.2, Article 7 of OSPAR envisages the possibility to adopt additional Annexes in the future to address new issues as long as they are not "already subject of effective measures agreed by other international organizations or prescribed by other international conventions".

[1660] See also the definition of marine pollution under OSPAR, Article 1(4), which refers to the harm to living resources and marine ecosystems. The work on species preservation remains outside the scope of this Chapter.

[1661] All documents are available at: www.ospar.org/eng/html/welcome.html.

[1662] See: Chapter 1.4.2 of this study, at n. 137.

powers.[1663] The main idea is to avoid duplication with the work of other international organizations. Hence, the OSPARCOM is subject to two sets of obligations. First of all, it has to collect and assess information on initiatives concerning marine species and habitats under other global and regional bodies and determine whether further action is needed at the OSPAR level. Only when further action is needed does it have to draw up programmes and measures for controlling human activities which meet the criteria set out in Appendix 3 and develop "means, consistent with international law, for instituting protective, conservation, restorative *or precautionary measures related to specific areas or sites* or related to particular species or habitats (emphasis added)". In its work the OSPARCOM shall "aim towards the application of an *integrated ecosystem approach* (emphasis added)".

Although the OSPARCOM has no competence to regulate fishing (including "the management of marine mammals"[1664]) and shipping**,** it may still consider the impact of these activities on the marine ecosystem and biodiversity within its assessments on the quality status of the marine environment in the region (under Annex IV). Fisheries issues must be brought to the attention of the competent fisheries management organizations, but the OSPARCOM may cooperate with them if supplementary action is needed (Annex V, Article 4(1)).[1665] In the North-Sea, the competent organizations are the Norwegian Fisheries Authority and the EC, which by means of the CFP has exclusive competence over conservation and management of fisheries resources in waters of the EC member states.[1666] As already discussed in Chapter 6.5.4, shipping-related issues shall be referred to the IMO to achieve an appropriate response (Annex V, Article 4(2)). However, this does not necessarily preclude the possibility for OSPARCOM to take some measures to limit the impact of shipping in sensitive areas, as long as they are consistent with the LOSC.

There is no legal requirement under the OSPAR Convention and Annex V to establish MPAs or manage and assess the environmental impact of human activities therein.[1667] Nevertheless, the OSPARCOM has always considered the establishment of a coherent network of well managed MPAs as a main tool to implement Annex V and it adopted it as a separate agenda item of the BDC.[1668] The work conducted so far has been mostly preparatory in nature.

At the Fifth NSMC, in 2002, the North Sea Environmental Ministers endorsed the WSSD targets and agreed that by 2010 relevant areas of the North Sea will be

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[1663] Duties of the OSPARCOM are defined in Annex V, Articles 3 and 4.

[1664] 1998 OSPAR Agreement on the meaning of certain concepts in Annex V, Para. 15.2. Reportedly, marine mammals have been excluded in order to meet the requests of Norway, Iceland and Denmark.

[1665] The competent organizations are identified in the 1998 Agreement, supra n. 1664, and include the EC; the North East Atlantic Fisheries Commission; the North Atlantic Salmon Commission; and the Norwegian and Icelandic fisheries authorities.

[1666] The EC Council Resolution (3.11.1976) provided that, starting from 1977, member states should extend their fishing zones up to 200 miles from their North Sea and Atlantic coasts. In this area the EC has exclusive jurisdiction over fisheries conservation and management and member states cannot take unilateral decisions on these matters.

[1667] Annex V, Article 3(1)(b)(i) simply requires the OSPARCOM to collect and review information on human activities identified pursuant to Appendix 3 and their effects on ecosystems and biological diversity. Parties have to undertake and publish at regular intervals joint assessments of the quality status of the marine environment, including an evaluation of the effectiveness of the measures taken and planned (OSPAR, Article 6).

[1668] The 1998 Sintra Ministerial Statement encouraged the OSPARCOM to promote initiatives in this direction and the "establishment of specific areas or sites which need to be protected and plans to manage these areas or sites" have been included in the OSPAR Action Plan for 1998-2003. Also the OSPAR Strategy called for the adoption of guidance for the selection and establishment of a system of MPAs and the management of human activities in these sites.

designated as MPAs within a network of well-managed sites for the protection of representative, threatened and declining species, habitats and ecosystems. In addition, they urged the OSPAR and the EC to assess the necessity of complementary measures to the existing ones and to improve cooperation between the two regimes.[1669] As a response, the OSPARCOM, at its 2003 Meeting in Bremen, recommended contracting Parties to establish an ecologically coherent network of well managed MPAs by 2010 and adopted two sets of guidelines on the selection of MPAs and their management.[1670] The definition of MPAs[1671] and the objectives of the OSPAR MPA network[1672] are quite broad and areas may be established within national jurisdiction (including the EEZ) and in the high seas.[1673] However, both the 2003 Recommendation and the Guidelines leave it completely to contracting Parties to identify the sites (according to ecological criteria), to select the sites (according to practical criteria) and to determine their legal status and the human activities to be controlled or prohibited therein.[1674] In addition, unlike in the CBD and the Ramsar Convention, there is no clear obligation to conduct an EIA within the sites.[1675] Natura 2000 sites under the EC Habitats and Bird Directives may be proposed for inclusion in the OSPAR MPA Network, but that would not imply management obligations other than those already prescribed by the EC Directives. Despite its great political weight, the 2003 Recommendation on MPAs is not legally binding and its effectiveness mainly depends on the political will of individual governments.

Contracting Parties are still at the stage of selecting sites to be included in the OSPAR MPA network. The selection process is progressing very slowly, but should be completed by 2006.[1676] So far, only six OSPAR Parties (France; Germany; Norway; Portugal (the Azores); Sweden; and the UK) have selected sites as OSPAR MPAs, but most of these areas are either already existing or are proposed Natura 2000 sites and they are all located in the territorial sea.[1677] However, a number of Parties (e.g.,

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1669 Bergen Ministerial Declaration, Paras 6 and 7, available at http://odin.dep.no/md/nsc/.

[1670] Recommendation 2003/03, in: Summary Records OSPAR 2003 (OSPAR 03/17/1-E, Annex 9).

[1671] I.e., "an area for which protective, conservation, restorative or precautionary measures, consistent with international law have been instituted for the purpose of protecting and conserving species, habitats, ecosystems or ecological processes of the marine environment" (2003 Rec., Para. 1.1).

[1672] I.e., (a) protect, conserve and restore species, habitats and ecological processes which have been adversely affected by human activities; (b) prevent degradation of and damage to species, habitats and ecological processes according to the precautionary principle; (c) protect and conserve areas which best represent the range of species, habitats and processes in the OSPAR Area.

[1673] The "OSPAR Network of Marine Protected Areas" is defined as "areas which have been reported by a Contracting Party […] together with any other area in the maritime area outside the jurisdiction of the Contracting Parties which has been included as a component of the network by the OSPAR Commission" (2003 Rec., Para. 1).

[1674] On the basis of the criteria set out in Appendix 3, the OSPARCOM identified a non-exhaustive list of human activities that should be controlled within the sites: e.g., sand and gravel extraction; dredging for navigational purposes, other than within harbours; the placement of structures for the exploitation of oil and gas; the construction of artificial islands, artificial reefs, installations and structures (including offshore wind-farms); the placement of cables and pipelines; the deliberate or unintentional introduction of alien or genetically-modified species; and land reclamation (2003 Biodiversity Strategy, Para. 2.2).

[1675] See supra n. 1667.

[1676] Parties were expected to report to the OSPARCOM on measures adopted to implement the 2003 recommendation by 31 December 2005, but only 5 out of the 12 OSPAR coastal contracting Parties have done so. Reportedly, Parties are currently focusing on the implementation of the EC Habitats and Birds Directives.

[1677] See, e.g., Summary Records of the BDC 2006, 13-7.03.2006 (paras 3.33-48) and the Intersessional correspondence group on marine protected areas (ICG-MPA 2006), 24-26.01.2006 (BDC 06-3.info.1). In addition, the ICG-MPA 2005, 4-8.04. 2005 (i.e., Summary Records ICG-MPAs, Agenda item 3,

Germany, Ireland, Portugal, the Netherlands, Norway and Sweden) are in the process of identifying potential MPAs in their EEZ.[1678] So far, no MPAs have been nominated beyond national jurisdiction.[1679]

The BDC plays a role in the coordination and guidance of the national initiatives and since 2003 has been assisted by a Working Group on Marine Protected Areas and Species and Habitats (MASH). Most of the work of the OSPARCOM/BDC/MASH is directed at identifying areas where additional action is needed and promoting consistency between the OSPAR MPAs Network and other international instruments (notably, the EC Natura 2000 Network). In this way, OSPAR represents an effective framework to coordinate the work of different bodies and instruments. Most of the preparatory work foreseen by the Biodiversity Strategy has been completed; it is now up to both the OSPARCOM and the contracting Parties to implement it fully. The lack of resources and political will may represent a major problem.

8.5.2 The Helsinki Convention

The MPAs regime under the 1992 Helsinki Convention presents many similarities with that under the OSPAR Convention. Starting from the early 1990s the HELCOM devoted increasing attention to the development of a comprehensive programme on nature conservation, including the establishment of a representative system of MPAs.[1680] Like OSPAR, the 1992 Helsinki Convention does not contain specific requirements to designate and manage MPAs, but the work conducted so far is merely of a recommendatory nature and is still in a preliminary phase.

Unlike the OSPAR Convention, the Helsinki Convention does not contain a separate Annex or Protocol on Biodiversity Preservation. However, a new Article 15 has been included in the 1992 Convention requiring contracting Parties to take all appropriate measures to conserve natural habitats and biological diversity and to protect ecological processes.[1681] In 1993, HELCOM set up a permanent Working Group on Nature Protection and Biodiversity (EC Nature, now HELCOM HABITAT) with the special task of coordinating the implementation of Article 15.[1682] In 1994, HELCOM adopted Recommendation 15/5 calling on Baltic States to take "all appropriate measures" to establish a System of Coastal and Marine Baltic Sea Protected Areas (BSPAs).[1683] BSPA is not purely a conservation tool, its objective is "to protect representative ecosystems of the Baltic as well as to guarantee sustainable use of natural resources […]." The recommendation lists 62 marine and coastal areas that should represent the

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paras 3.2-3.17) reported that most OSPAR Parties are reluctant to nominate sites for the OSPAR Network that are not yet protected under national law or Natura 2000 (*ibid*, Para. 3.2).

[1678] At the BDC 2006, Germany reported the selection of two MPAs in its EEZ which will be shortly included in the OSPAR Network.

[1679] At the 2005 ICG-MPA, the WWF presented a Draft High Seas MPA Proposal for the Rainbow Hydrothermal Vent Field (ICG-MPA 5/3/1), which was welcomed by a number of participants. However, at the 2006 ICG-MPA, Portugal indicated that the area is under its national jurisdiction according to Article 76 of the LOSC (BDC 2006, Para. 3.35 (d)).

[1680] E.g., Baltic Sea Declaration (Ronneby, 1990), Para. 14; and HELCOM 14, Para. 5.38.

[1681] Moreover, Article 2(1) of the 1992 Convention adopts a definition of pollution that, like the OSPAR Convention, includes harm to living resources and marine ecosystems.

[1682] HELCOM HABITAT replaced EC NATURE in 2000 (see: HELCOM HABITAT 1/2000, 13/2, Annex 2). Reports of the meetings of the HELCOM HABITAT are available at: http://sea.helcom.fi/dps/docs/folders/Nature%20Protection%20and%20Biodiversity%20Group%20(HABITAT).html.

[1683] HELCOM Recommendation 15/5, 10 March 1994, Para. 1.1.

first step in establishing such a system.[1684] This system should be gradually developed with special attention being given to marine areas outside territorial waters.[1685] HELCOM should adopt appropriate guidelines for the selection of new sites incorporating the IMO's criteria for the designation of PSSAs.[1686] In addition, States are recommended to adopt management plans for each BSPA taking into account guidelines appropriately developed by HELCOM.[1687] Any decision that could affect the size, the management quality or protection status of the BSPA should be previously notified to HELCOM and contracting Parties should report on the state of the BSPAs at regular intervals.[1688]

In 1995, HELCOM adopted two sets of Guidelines for the designation of new BSPAs and their management. Both Recommendation 15/5 and the Guidelines leave it completely to the contracting Parties to identify the sites (according to the IUCN categories of protected areas), their designation (according to ecological criteria),[1689] to determine their legal status (for instance, national legal protection; Natura 2000 sites; PSSA status) and as regards the human activities to be controlled or banned within the BSPA.[1690] When selecting new BSPAs the interest of fisheries and aquaculture should be taken into account (Designation Guidelines, Para. 2). Some areas, therefore, may be opened to small-scale, non-destructive fisheries. It is worth reiterating that unlike the OSPARCOM, the HELCOM may take measures related to fisheries (and shipping).[1691] However, all Parties, except the Russian Federation, are bound by the CFP of the EC and they cannot take decisions on fisheries issues at this forum.

In 2005, HELCOM HABITAT decided that the designation of Natura 2000 sites by the EC member states is accepted as an adequate implementation measure with regard to Recommendation 15/5, making it clear that contracting Parties are not under an obligation to take any further actions with respect to these sites other than those which arise from EC legislation.[1692]

The implementation of Recommendation 15/5 has proceeded very slowly. In the follow-up to the 2002 WSSD, however, there has been some progress in the establishment of the BSPA network in order to meet the 2012 target. At present, of the 98 sites indicated for designation, only 32 have been officially designated as BSPAs, and they are for the large part Natura 2000 sites and most of them are located in the

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[1684] *Ibid*, Para. (a). In 1998, HELCOM proposed 23 additional sites.

[1685] *Ibid*, Para. (b).

[1686] *Ibid,* Para. (b).

[1687] Ibid, Para. (d). In some areas, a zoning system is encouraged and monitoring programmes should be incorporated into the management plans (e).

[1688] HELCOM has 6 months to express its opinion (ibid, Para. (c)). This appears to be a simplified form of EIA although the recommendation is silent on the legal effects of the HELCOM opinion.

[1689] The area can be designated as a BSPA if it meets the specific criteria mentioned in Para. 2 of the Designation Guidelines and its proposed status corresponds with the IUCN Categories of protected areas.

[1690] The Management Guidelines (Para. 6) identify harmful human activities that should be regulated in the management plans: a) restriction of activities in extent; b) restriction of activities in space (including zoning); c) restriction of activities in time (e.g., during breeding seasons or spawning periods); d) maintenance of sustainable and traditional uses when appropriate; e) alteration of procedures (e.g., the reintroduction of traditional sea use practices); f) substitution of materials or substances; g) a total ban on activities or the demolition of constructions; and h) restoration, reintroduction.

[1691] In the past few years, the HELCOM has paid increasing attention to promoting sustainable fisheries practice and intensified cooperation with the International Baltic Fishery Commission (IBSFC), the new Baltic Regional Advisory Council under the EC Common Fisheries Policy and the EC Commission (DG FISH).

1692 See decision of the 18th meeting of the Heads of Delegations (HELCOM HOD), 12-3.12.2005. The same conclusions apply to the designation of Emerald Network sites by the Russian Federation.

territorial sea, some in close proximity to the shores.[1693] In addition, not all sites have been protected under national legislation and only a few of them have a management plan or monitoring programmes in place. The effectiveness of the regime depends on the will of the Baltic States and the HELCOM does not have strong instruments at its disposal to bring about full compliance with its recommendation. In 2004, HELCOM HABITAT announced its intention to adopt a new Annex on the "Sustainable use of marine natural resources, nature conservation and biodiversity".[1694] This Annex may transform the political commitments under Recommendation 15/5 into legally binding obligations. However, there are no records of any subsequent developments.

Like OSPARCOM, HELCOM plays a central role in coordinating the work and promoting consistency and uniformity among the different MPA regimes applying to the Baltic Sea. In 2004, HELCOM HABITAT adopted a HELCOM Project for the implementation of the Joint HELCOM/OSPAR Working Programme on MPAs, which will be discussed below. This Project intends to ensure, *inter alia*, the full implementation of HELCOM Recommendation 15/5 and the consistent implementation of the BSPA system, the Natura 2000 network and the Emerald Network in the Russian Federation.

8.5.3 Joint HELCOM/OSPAR Network of MPAs

In 2003, at the First joint meeting of the OSPARCOM and HELCOM (Joint HELCOM/OSPAR Meeting) held in Bremen, Ministers of the contracting Parties of the two Conventions endorsed their commitments under HELCOM Recommendation 15/5 and the 2003 OSPAR Recommendation. In particular, they agreed to identify the first set of sites by 2006 and to complete by 2010 a joint network of well managed marine protected areas that, together with the NATURA 2000 network, is ecologically coherent.[1695] Moreover, they adopted a joint working programme to ensure that the Declaration is implemented consistently across the Helsinki and OSPAR marine areas as well as the envisaged future cooperation with the BARCON (and the Artic Council) on these issues.[1696] The relevant work is coordinated respectively by MASH in OSPAR and HELCOM HABITAT in the Helsinki system.

The joint HELCOM/OSPAR network will be developed and implemented in close collaboration with the EC and will be consistent with the EC Natura 2000 network and the European Marine Strategy. This represents an important framework to strengthen cooperation and ensure consistency between these regimes. Despite their political weight, however, these initiatives are non-legally binding and, considering the slow progress discussed in previous paragraphs, a real commitment seems to be still lacking.

[1693] Report on "initial analysis on the status of ecological coherence of the BSPA Network", prepared by the Secretariat on 3.05.2006 for HELCOM HABITAT 8, which will take place on 15-19.05.2006. BSPAs have been designed by Finland (20 sites), Germany (2 sites), Latvia (3 sites), Lithuania (3 sites), Poland (1 site) and Sweden (3 sites).

[1694] See HELCOM HABITAT 6/2004, Annex 7, p. 28. The draft Annex should be submitted to HELCOM HABITAT 7/2005 and HELCOM 27/2006.

[1695] See: Joint HELCOM/OSPAR Bremen Declaration, Para. 17, available at: www.helcom.fi/stc/files/MinisterialDeclarations/HelcomOsparMinDecl2003.pdf

[1696] I*bid*, Para. 18.

8.5.4 The 1995 Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean (SPA Protocol)

The Special Areas regime under the BARCON is particularly detailed compared to the OSPAR and Helsinki systems.[1697] Article 10 of the BARCON, which can be seen as an implementation of Article 194(5) of the LOSC, requires Parties to take "all appropriate measures" to protect and preserve biological diversity, rare and fragile ecosystems as well as species of wild flora and fauna which are rare, depleted, threatened or endangered and their habitats.[1698] This broad obligation has been further specified in the 1982 special Protocol Concerning Mediterranean Specially Protected Areas. In 1995, this Protocol was replaced by a new Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean (1995 SPA Protocol).[1699] The new Protocol has been adopted to implement the CBD in the Mediterranean Sea and it incorporates many elements of that Convention. The Regional Activities Centre (RAC/SPA) assists contracting Parties in the implementation of the SPA Protocol, while the annual meetings of the National Focal Points supervise the implementation.[1700]

Unlike the previous Protocol, which only applied to the territorial sea, the 1995 SPA Protocol extends to all Mediterranean waters irrespective of their legal status, including internal waters, territorial seas, high seas, the seabed and its subsoil (Article 2(1)). The application of the SPA Protocol to the high seas appeared necessary, in the first place, to protect highly migratory species, such as marine mammals,[1701] but its provisions are without prejudice to the traditional freedoms and rights of navigation belonging to third States under customary international law and the law of the sea (Article 2(2)).[1702] At the same time, the Protocol recognizes that the exercise of traditional rights and freedoms by third States in the Mediterranean Sea may compromise the effectiveness of its regime. Contracting Parties, therefore, "shall invite" third States and international organizations to cooperate in the implementation of the Protocol (Article 28.1) and undertake to adopt appropriate measures, consistent with international law, to ensure that no one engages in any activity which is contrary to the principles or purposes of the Protocol (Article 28.2).

Article 3 of the SPA Protocol places Contracting Parties under a number of general obligations including the duty to protect, preserve and manage, in a sustainable and environmentally sound way, areas of particular natural or cultural value, "*notably by the establishment of specially protected areas*".[1703] These obligations have to be

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[1697] For a detailed discussion of the BARCON regime, see: C. Chevalier (2004); T. Scovazzi in H. Thiel and J.A. Koslow (eds.) (2001), pp. 185-93; T. Scovazzi (1999), pp. 82-99 and T. Scovazzi (1996), p. 95.

[1698] Unlike the LOSC, Article 10 expressly refers to species. See D. Owen (2001), p. 63.

[1699] The 1995 SPA Protocol, adopted on 10.06.1995, into force on 12.12.1999, is not an amendment to the 1982 Protocol, but an entirely new treaty. The Text is available at: www.oceanlaw.net/texts/unepmap2.htm. In 2004, the Strategic Action Plan for Biodiversity in the Mediterranean Region (SAP-BIO) was adopted to facilitate the implementation of the SPA Protocol.

[1700] See: "The SPA Protocol and the activities carried out by the RAC/SPA" available at: www.faocopemed.org/reports/mpas/rac_spa.pdf.

[1701] See Doc. UNEP (OCA)/MED/WG. 73/6, 18 September 1993.

[1702] 1995 SPA Protocol, Article 2(2) reads: "Nothing in this Protocol nor any act adopted on the basis of this Protocol shall prejudice the rights, the present and future claims or legal views of any state relating to the law of the sea, in particular, the nature and the extent of marine areas, the delimitation of marine areas between states with opposite or adjacent coasts, freedom of navigation on the high seas, the right of innocent passage in territorial seas, as well as the nature and extent of the jurisdiction of coastal states, the flag state and the port state".

[1703] In addition, Article 3 contains a duty to protect, preserve and manage threatened or endangered species of flora and fauna. This duty is further specified in Part III of the 1995 Protocol dedicated to the

implemented without prejudice to the sovereignty or jurisdiction of other Parties or third States, and any measure taken to enforce these measures must be in conformity with international law (Article 3(6)).

The Protocol, however, does not lay down any positive legal duty to establish protected areas. It is up to each contracting Party to take the initiative in choosing between two kinds of areas, namely: "Specially Protected Areas" (SPAs) and "SPAs of Mediterranean Interest" (SPAMIs) with the purpose being to achieve one of the conservation objectives laid down in Article 4.[1704] SPAs may be established "unilaterally" by coastal States in areas under their sovereignty or jurisdiction and they present strong similarities to OSPAR MPAs and BSPAs. Within the SPAs the proposing State(s) shall take all the necessary protective measures (Article 6)[1705] as well as planning, management, supervision and monitoring measures (Article 7) acting in conformity with international law.

With regard to the second category of areas the SPA Protocol is particularly innovatory. SPAMIs may be established "multilaterally" by contracting Parties in order to promote cooperation in the management and conservation of the natural heritage of the region.[1706] A SPAMI may be established in the territorial waters of one or more Parties or in the high seas (Article 9.1) and should be the core of a network aiming at the effective conservation of the Mediterranean heritage.[1707] Parties are under a legal duty to draw up a special list of sites that fulfil at least one of the ecological criteria set out in the Protocol and are representative of the Mediterranean region and its biodiversity (the so-called SPAMI List).[1708]

The proposal for inclusion in the SPAMI List may be submitted by the concerned Party or by more Parties, when the SPAMI lies wholly or in part in the high seas, but the final decision to incorporate the site into the list is taken by the Meeting of the Parties to the SPA Protocol (SPA MOP).[1709] When the SPAMI is situated in the high seas this decision has to be taken by consensus. The SPA MOPs may revise the SPAMI List and, in certain cases, may entirely or partially de-list a site.[1710] SPAMIs should represent models for protection and good management practices. Hence, Parties "shall" ensure that all areas included in the SPAMI List are provided with an adequate legal status, protective measures, management and monitoring plans and means for

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protection and conservation of species, which was completely absent in the 1982 Protocol. Part III, however, does not contain specific provisions on special areas and remains outside the scope of this chapter. In addition, Article 3 contains general duties similar to those under the CBD.

[1704] These objectives mirror the ones under the CBD. Article 4 expressly refers to SPAs, but it is generally agreed that it also applies to SPAMIs.

[1705] The protective measures which may be adopted within the SPA are very broad and include, inter alia: (b) the prohibition of dumping wastes and other dangerous substances; (c) the regulation of the passage of ships, stopping and anchoring; (e) the regulation of activities involving the exploitation of the soil, subsoil, and seabed; (g) the regulation of fishing, hunting, taking of animals, plants, part of plants, which originate in the SPA; (h) the regulation of any activity likely to harm or disturb the species or the state of conservation of the ecosystems or the natural and cultural characteristics of the SPA; (i) "*any other measures aimed at safeguarding ecological and biological processes and the landscape*" (emphasis added).

[1706] The SPAMI regime is specifically regulated in Section II (Articles 8-10) and Annex I of the SPA Protocol. Annex I was adopted in Monaco on 24.11.1996 together with an Annex II (list of endangered and threatened species) and an Annex III (list of species whose exploitation needs to be regulated).

[1707] See Annex I, Para. A (d) laying down the guiding principles for the establishment of the SPAMI list.

[1708] Detailed criteria are listed in Article 8(2) and Appendix I of the 1995 SPA Protocol and mirror the criteria under the CBD.

[1709] The procedure for the establishment and listing of SPAMIs is set out in the 1995 SPA Protocol, Article 9.

[1710] *Ibid*, Articles 9(6) and 10.

their implementation, which must be clearly indicated in each proposal.[1711] Contracting Parties undertake to comply with all measures adopted in the SPAMI and not to authorise nor commence any activities that might be contrary to the objectives of the area.[1712] Finally, Parties are expressly required to carry out EIAs before planning any projects or activities that may "significantly" affect protected areas (both SPAs and SPAMIs), species and their habitats (Article 17).

It is worth mentioning that the General Fisheries Commission for the Mediterranean (GFCM), in which the EC is a Member,[1713] is responsible for the conservation and management of fisheries in the region. All conservation measures adopted within the SPAs/SPAMIs must therefore be consistent with GFCM recommendations.

The Mediterranean Network of SPAMIs was launched at the 12th MOP of the BARCON, in November 2001. Originally, the SPAMI List contained 12 sites, including the International Sanctuary for the Mediterranean Marine Mammals (Cetacean Sanctuary) between France, Italy and Monaco that is a very large area (about 90,000 km2) extending to the high seas.[1714] However, the SPAMI listing process is progressing very slowly and, since 2001, only six new sites have been included in the List.[1715] In addition, the 18 sites inscribed so far do not even fulfil the basic requirement for being part of the List. Only a few of them have been fully protected and have a management plan in place. Except for the Cetacean Sanctuary, existing areas have small moderate sizes, are not well distributed and are not representative of the wide Mediterranean region and its biodiversity.[1716] The 14th MOP of the BARCON, in November 2005, invited the contracting Parties to consider the establishment of new MPAs, in particular in the high seas, on the basis of existing scientific knowledge and in accordance with the commitments undertaken at the COP-7 of the CBD.[1717] In addition, it called for further work to facilitate the development, before 2012, of a representative network of MPAs.

This limited progress is the result of different factors. From a legal point of view, the regime under the 1995 SPA Protocol is rather weak and its effectiveness largely depends on the political will of the Mediterranean States. It is entirely up to the single Party to take the initiative to designate SPAs/SPAMIs and to decide on how to protect the site. There is no strong mechanism under the BARCON to ensure full compliance with this regime and the lack of implementation and enforcement, together with resource constraints, is a major problem in the Mediterranean Sea. Despite these

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[1711] *Ibid*, Article 9 (3) and (5) and Annex I, para. C (1). Annex I, Para. D, identifies some of the protection, planning, management and monitoring measures which parties must take in the area. Protection measures include, *inter alia*, the strenghtening of the regulation of: (a) dumping; (b) introduction or reintroduction of any species into the area; (c) any activity or act likely to harm or disturb the species, or that might endanger the conservation status of the ecosystems or species or might impair the natural, cultural or aesthetic characteristics of the area.

[1712] *Ibid* , Article 8(3) (a) and (b).

[1713] See Council Decision 98/416/EC.

[1714] The Sanctuary was established by the 1999 Agreement between France, Italy and Monaco (into force on 21 February 2002). For a full discussion on the Sanctuary see: T. Scovazzi (2001).

[1715] E.g., G. Notarbartolo di Sciara (2003). At the 14th MOP, in November 2005, three additional sites have been proposed for inclusion in the SPAMI list. See: UNEP (DEPI)/MED IG.16/13, Annex III (Recommendation II.B.2, Para. 1).

[1716] Existing SPAMIs are mainly located in Spain, France and in Tunisia. Also existing SPAs are mainly concentrated in the North and Western Mediterranean Sea.

[1717] 14th MOP, Recommendation II.B.2, supra n. 1715, Para. 3. The MOP also invited the Parties to assess and identify SPAMIs which are exposed to risks by shipping activities and could be proposed for designation as PSSAs by IMO (ibid. Para. 4).

limits, the 5th UN ICP (2004) indicated the 1995 PSA Protocol as a possible model for a global mechanism for the designation and management of MPAs in the high seas.

8.5.5 Other Regional MEAs Providing a Possible Legal Basis for the Establishment and Management of MPAs

To complete the picture of the complex regime governing the establishment and management of MPAs in the European seas it is important to briefly mention two additional regional agreements. First of all, the Agreement on Conservation of Cetaceans of the Black Sea, Mediterranean and Contiguous Atlantic Area (ACCOBAMS), concluded in November 1996 under the umbrella of the 1979 CMS, reinforces the regime under the 1995 SPA Protocol of the BARCON.[1718] Although the EC is not a Party to the ACCOBAMS, some Mediterranean member states and candidate countries have ratified it, and briefly outlining its main characteristics is therefore worthwhile.[1719] The primary objective of the Agreement is "to achieve and maintain a favourable conservation status for cetaceans" by, *inter alia*, establishing a network of specially protected areas (Article II.1).[1720] The SPA Protocol is indicated as the most appropriate framework for establishing such areas.[1721] The ACCOBAMS, like the SPA Protocol, applies to all maritime waters of the Mediterranean (and the Black Sea) independently from their juridical status, including high seas and internal waters (Article I.1(a)) and is without prejudice to the freedom of navigation and other rights and duties of States under the law of the sea (Article I.1(b)). As far as fisheries activities are concerned, parties may apply protective measures in waters within their sovereignty and/or jurisdiction, and outside these waters in respect of vessels flying their flag (Article II.3). Fisheries-related measures under ACCOBAMS, however, must be consistent with GFCM recommendations.

The work on protected areas under ACCOBAMS is still at the very beginning. At their Second meeting, held in November 2004, the contracting Parties charged the Scientific Committee with, *inter alia*, drafting criteria for the selection of the sites; identifying putative sites containing habitats important for cetaceans, including areas located in the high seas; and drafting guidelines for their management. Like in the SPA Protocol, Parties have to take the initiative and submit their proposal for the designation of ACCOBAMS sites to the Meeting of the Parties. In the meantime, Mediterranean parties are urged to make wide use of the SPAMI concept to protect areas which are important for cetacean conservation especially in the high seas.

Secondly, it is worth mentioning the Bern Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention), which was adopted in

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[1718] ACCOBAMS has been concluded on the basis of Article IV (4) of the CMS (see Article I (4) ACCOBAMS) and it entered into force on 1.06.2001. The Text is available at: www.oceanlaw.net/texts/accobams.htm.

[1719] Currently ACCOBAMS has 7 Parties: Bulgaria, Croatia, Malta, Monaco, Morocco, Romania and Spain. The EC is a party to the CMS, but has not acceded to ACCOBAMS. France, Greece, Italy, Portugal and Spain signed the ACCOBAMS on 24.11.1996, but, to date, only Spain and Malta have ratified the agreement. Probably, given the strong synergy between ACCOBAMS and the 1996 SPA Protocol of BARCON, the EC and the member states do not consider accession to ACCOBAMS to be a priority.

[1720] In particular, Parties "shall endeavour" to establish and manage specially protected areas for cetaceans corresponding to their critical habitat and feeding grounds (Annex II, Article 3).

[1721] Similarly, the SPA Protocol lists all cetacean species protected under ACCOBAMS. In 2001 RAC/SPA and the ACCOBAMS Secretariat concluded a cooperation agreement to ensure consistency between the two regimes.

1979 under the auspices of the Council of Europe.[1722] The aim of the Convention is to conserve species of wild flora and fauna listed in Appendices I and II and their habitats, with particular attention being paid to migratory species listed in Appendix III.[1723] For this purpose the Convention requires Parties to take "appropriate and necessary legislative and administrative measures"[1724], but leaves them free to determine the specific means to achieve the Convention's objective.[1725] The Standing Committee is responsible for monitoring the application of the Convention and may adopt recommendations and resolutions regarding the implementation and further development of the Convention.[1726] Originally, the Bern Convention focused on terrestrial and freshwater habitats and species and gave little attention to the marine environment. At its 19th meeting (1999), the Standing Committee urged the Bern Convention to provide leadership in marine nature conservation in the European region by concentrating on marine habitats, biotypes and species, particularly those important to fish, invertebrates and seaweeds, and including offshore and deep-sea areas.[1727] As a response, a growing number of marine species of flora and fauna have been listed in the Appendixes of the Convention.[1728]

The Bern Convention does not contain any specific provision on the establishment and management of protected areas. However, it provided the legal basis for the development of programmes that, despite their recommendatory nature, have significant political force. In June 1989, the Standing Committee launched the idea of establishing a pan-European network of protected areas.[1729] For this purpose it recommended the Parties to the Bern Convention to take steps towards the designation of Areas of Special Conservation Interest (ASCIs) and to ensure that the necessary and appropriate conservation measures are taken for each area.[1730] However, the relevant work has been delayed in order to ensure coherence with the regime under the EC Habitats Directive, adopted in 1992. In 1996, when the work on the creation of the Natura 2000 was already at an advanced stage, the Standing Committee launched the Emerald Network of ASCIs as the common operative tool for the protection of habitats under the Bern Convention.[1731] Ten years later, however, the establishment of the

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[1722] Bern, 19.09.1979, into force on 1.06.1982. The Text is available at: http://conventions.coe.int/Treaty/en/Treaties/Word/104.doc.

[1723] Bern Convention, Article 1.

[1724] All obligations are laid down in ibid, Articles 2, 3, 4, 5 and 6.

[1725] *Ibid*, Article 12.

[1726] *Ibid* , Articles 13, 14 and 15. The Standing Committee consists of representatives of each contracting Party. In addition, the Convention has set up a Group of Experts and a Secretariat.

[1727] See 19th Standing Committee, Strasbourg 29.11/3.12.1999, Draft Report on "Conservation of marine habitats and species in Europe" (Doc. T-PVS (99) 56, Para. 4). The Reports of the meetings of the Standing Committee are available at: www.coe.int/T/E/Cultural_Co-operation/Environment/Nature_and_biological_diversity/Nature_protection/meetings_reports.asp#.

[1728] Certain species of sea grass, such as the *Poseidonia oceanica* and the *Zostera marina*, and many species of seaweeds, are now listed in Appendix I (strictly protected flora species); marine seals, whales, dolphins, reptiles, many fish which migrate through estuaries, most marine birds, sponges, corals and different varieties of molluscs are listed in Appendix II (strictly protected fauna species) and in Annex III (protected fauna species).

[1729] Resolution No.1, 1989; and Recommendations No. 14, 15, 16 and 25 (1989), all available at: www.coe.int/T/E/Cultural_Co-operation/Environment/Nature_and_biological_diversity/Nature_protection/Recommendations.asp#.

[1730] See Recommendation No.16 (1989) on Areas of Special Conservation Interest (ASCIs).

[1731] See Resolution No. 3 (1996) setting up the Emerald Network which would include the ASCIs under Recommendation No. 16 and Resolution No. 5 (1998) on rules for the Emerald Network.

Network is still in a preliminary phase.[1732] This is mainly due to the fact that the Emerald Network is based on a non-legally binding resolution, which merely has recommendatory force.[1733] Given that most Parties to the Bern Convention are also EC member states, they have given priority to the implementation of their legal obligations under the Habitats Directive. However, since Natura 2000 under the Habitats Directive and the Emerald Network have the same objectives and are based on the same principles and criteria, the full implementation of Natura 2000 by EC member Parties may provide the Emerald Network with a legal status.[1734]

Given the strong synergy between the two networks, the Emerald Network may be considered as an extension of Natura 2000 to non-EC countries, including the Russian Federation.[1735] Such a synergy may greatly contribute to the development of a uniform system of protected areas in the wider European region.

8.6 Protection of Areas Particularly Vulnerable to International Shipping

Before concluding the discussion on the international regime on the establishment and management of MPAs, it is important to address a *sui generis* category of protected areas, namely: Special Areas under the IMO's regulatory regime for shipping. Generally speaking, the LOSC provides coastal States with ample possibilities to manage activities (e.g., dumping) and extractive uses (including mining and fisheries) within waters under their sovereignty or jurisdiction as long as they do not interfere with the freedom of navigation and do not unilaterally restrict international shipping.[1736]

Since the early 1970s, it became evident that some marine areas due to their ecological, oceanographic and socio-economic characteristics are particularly exposed to the threat posed by maritime transport and require special protection. Of particular concern are areas located beyond the territorial sea (i.e., the EEZ and high seas) and in international straits where the capacity of coastal States to adopt mandatory measures which are more stringent than international standards is significantly restricted. Global safety and anti-pollution standards might be insufficient to reduce the risk in these regions. This situation may limit to a great extent the effectiveness of existing MPA regimes in regional seas, such as the Mediterranean, Baltic and North-East Atlantic, which are among the most trafficked seas worldwide.

International law offers three main multilateral mechanisms for increasing control over international shipping in particularly vulnerable areas, namely: special areas in the EEZ under Articles 211(6) and 234 of the LOSC; Special Areas under MARPOL 73/78 and PSSAs under the IMO Guidelines.[1737] All these mechanisms, but Article 234, have one element in common: they always need the IMO's approval. It is

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[1732] On the progress in setting up the Emerald Network see: www.coe.int/T/e/Cultural_Co-operation/Environment/Nature_and_biological_diversity/Ecological_networks/The_Emerald_Network/02General_information.asp#P173_24745.

[1733] The Standing Committee examined the possibility to integrate the Emerald Network into the text of the Convention to reinforce its legal status, but, to date, it has not taken a decision in this direction.

[1734] See Resolution No. 5 (1998) which stipulates that "for contracting parties which are Member States of the European Union Emerald Network sites are those of the Natura 2000".

[1735] The Russian Federation is a party to the Bern Convention. Given the fact that the conservation of migratory species requires cooperation with non-European countries, Article 20 invites African States to accede to the Convention.

[1736] E.g., A. Merialdi in: T. Scovazzi (1999), p. 43. See also the submission by Australia in MEPC 30/19/4, 19.09.1990.

[1737] Routeing measures (e.g., ATAs, TTSs and sea lanes) and traffic surveillance (e.g., SRSs and VTSs) are other effective means to reduce the impact of shipping on sensitive areas. For a detailed discussion on these measures, see J. Roberts (2005), pp. 139-59 and H. Ringbom (1996), pp. 50-72.

important to stress that these Special Areas are not designed to provide comprehensive protection for sensitive sites, but their scope is exclusively restricted to controlling certain aspects of shipping. Therefore, they cannot be classified as real MPAs, but they are important tools to complement the action taken under existing MPA regimes and to ensure an effective and integrated control of all hazardous activities in the area, including shipping.

8.6.1 Special Areas under Articles 211(6) and 234 of the LOSC

The possibility to establish a more stringent regime for the control of shipping in exceptionally vulnerable areas was a highly controversial issue during the UNCLOS III negotiations and met with firm opposition from maritime states.[1738] What was contested, however, was not the concept of protected areas *per se* or the necessity for a special regime, but the capacity of coastal states to take unilateral action.[1739] As a compromise solution, the establishment of special areas in the EEZ and the adoption of mandatory measures therein have been placed under the control of the IMO.

According to Article 211(6) of the LOSC, when coastal States prove that existing international standards do not meet the special requirements of a "clearly defined area" of their EEZ which due to oceanographic, ecological and socio-economic factors and the particular character of the maritime traffic requires special protection, they may submit a proposal to IMO for the adoption of special mandatory measures. It is up to the IMO to verify whether the area meets all the conditions for the creation of the area and for the adoption of special measures.[1740] These conditions are cumulative. Article 211(6) simply requires that it must be an area of the EEZ clearly defined by geographical coordinates, but it does not impose size restrictions.[1741]

Two kinds of measures may be adopted within the special area. The first category includes "laws and regulations for the prevention, reduction and control of pollution from vessels implementing such rules and standards or navigational practices as are made applicable, through the organization, for special areas" (Article 211(6)(a)).[1742] These measures do not seem to be restricted to Special Areas under MARPOL 1973/78,[1743] but may include all measures that may be adopted by the IMO for the protection of vulnerable areas from the impact of shipping (e.g., mandatory ATBAs, precautionary areas under Regulation V/8 SOLAS, SRSs and VTSs).[1744] The second category includes: "additional laws and regulations" previously approved by IMO (Article 211 (6)(c)). These additional measures may relate to discharge standards and/or navigational practices and may be more stringent than international standards, but they shall not require foreign vessels to observe CDEMs other than the generally accepted international standards. These "additional" law and regulations may be defined by coastal States also outside the existing IMO regulatory regime and, presumably, may include measures which are not yet available in any existing IMO

[1738] See, e.g., Caracas Session (1974), Canada [and others]: draft articles on a zonal approach to the preservation of the marine environment (A/CONF.62/C.3/L.6, 3.7.1974, in Official Records, III, 249).
[1739] See e.g., Belgium [and others] draft article on prevention, reduction and control of marine pollution (A/CONF.62/C3/L.24 of 21.031975, in: Official Records, IV, 210-12).
[1740] The detailed procedure for approval by the IMO is laid down in LOSC, Article 211(6)(a).
[1741] E.g., comments by DOALOS on the consistency of the WE PSSA with Article 211(6), infra n. 1780.
[1742] For a more detailed analysis: E.J Molenaar (1998), pp. 404-6 and H. Ringbom (1996), pp. 30-2.
[1743] According to some authors these measures are limited to MARPOL Special Areas. E.g., A.E. Boyle (1985), p. 36; K. Hakapää (1981), p. 254; A. Merialdi (1999), p. 33.
[1744] K.M. Gjerde and D. Ong (1993), p. 11; B. Kwiatkowska (1989), p. 174; E. Molenaar (1998), p. 405; H. Ringbom (1996), p. 32; F. Spadi (2000), p. 295 and G. Timagenis (1980), pp. 612-3. See also "Follow-up Action to UNCED", Note by the IMO Secretariat (1993), MEPC 34/INF.6, p. 9.

instrument.[1745] According to the LOSC Commentary, indeed, Article 211(6) "does not *impose any limitation upon the organization's [IMO] freedom of action in the matter, or on that of the States members of the organization in their participation in the organization*"(emphasis added).[1746] It is possible to conclude that measures pursuant to Article 211(6) may be determined on a case-by-case basis choosing within the general categories of rules, standards and navigational practices designed to prevent vessel-source pollution. These measures always require the IMO's approval, which ensures the consensus of the international community as a whole.

Once approved, the special mandatory measures may be enforced against all vessels entering the area regardless of their flag and port of destination. However, Article 220(8) makes it clear that the status of special areas under Article 211(6) does not alter the enforcement jurisdiction of coastal States in the EEZ. So far, no coastal state has applied for Special Areas under Article 211(6) and the IMO has not taken any action in this direction.[1747]

Only in ice-covered areas located within the EEZ does the LOSC allow coastal States to unilaterally increase safety and anti-pollution requirements, including CDEMs, without going through the IMO (Article 234).[1748] It must be an area in which particularly severe climatic conditions exist, where the presence of ice for most of the year creates obstructions or exceptional hazards to navigation and where the pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance.[1749] In these special areas, coastal States may adopt their own national laws and regulations and enforce them against all ships in transit as long as they are non-discriminatory, have due regard to navigation and are based on the best available scientific evidence.

8.6.2 Special Areas under MARPOL 73/78

MARPOL 73/78 recognizes that some areas of the sea, especially enclosed or semi-enclosed seas, due to their oceanographic and ecological conditions and vessel traffic characteristics are particularly vulnerable to vessel-source pollution and need a higher level of protection.[1750] The Convention therefore provides for the establishment of Special Areas where more stringent discharge standards will apply for substances regulated in Annexes I (oil and oily mixtures), II (noxious liquid substances) and V (garbage).[1751]

[1745] Indeed, there is no reference to "implementing IMO rules and standards" as in Para. (a); see: E. Molenaar (1998), p. 407. H. Ringbom (1996), p. 33, provides some examples of Para. (c) measures, such as rules for the Black Sea on the limitation of grey waters or compulsory pilotage which are not regulated in any IMO instrument.

[1746] S. Rosenne and A.Yankov (1991), p. 205.

[1747] This is probably due to the complexity of and the lack of clarity concerning the procedure under Article 211(6).

[1748] Article 234 is the only real exception to the EEZ regime. According to E.J Moleenar (1998), p. 419 and H. Ringbom (1996), p. 25 this regime may also apply to ice-covered areas in the territorial sea.

[1749] There is no definition of ice-covered areas in the LOSC and there is no clarification as to what is meant by "most of the year". Given that local ice conditions may vary to a great extent from year to year, what has to be considered is the general characteristics of the climate and its relation both to ecology and navigation in the region (S. Rosenne and A. Yankov (eds.) (1991), p. 397).

[1750] The debate over special areas was one of the most contentious during the MARPOL Conference in 1978 and the concept met with strong opposition from flag States, the shipping industry and oil companies (e.g., Statement by the Oil Companies International Marine Forum in IMCO Doc. MP/CONF/8/2, p. 5). For a full discussion on MARPOL's Special Areas: E.J. Molenaar (1998), pp. 431-35 and H. Ringbom (1996), pp. 46-50.

[1751] A Special Area under MARPOL is defined as "a sea area where for recognized technical reasons in relation to its oceanographical and ecological condition and the particular character of its traffic, the

The conditions for the identification of Special Areas under MARPOL are similar to those for Special Areas under Article 211(6) of the LOSC.[1752] The proposal for designation may be submitted by one or more coastal States to the MEPC which verifies whether the area meets all the criteria. The designation of Special Areas occurs through a formal amendment of the Annexes of MARPOL.[1753] This ensures the full participation of all States potentially affected by the multilateral establishment of the Area.

Special Areas under MARPOL differ from the Special Areas under Article 211(6) of the LOSC in two main aspects. On the one hand, their material scope is narrower and limited to controlling discharges of specific substances.[1754] On the other hand, their geographical scope is broader and not restricted to the EEZ, but may encompass an entire enclosed or semi-enclosed sea, including waters beyond the limits of national jurisdiction.[1755]

All European seas, including the Baltic Sea area, the Mediterranean Sea area and the North-West European Waters (and the Black Sea) are Special Areas under Annex I. Thereby, all discharges of oil or oily mixtures (including oil sludge and discharges from the machinery spaces of ships)[1756] exceeding 15 ppm are prohibited and stricter requirements for port reception facilities apply in these areas.[1757] Moreover, ships operating in Special Areas under Annex I have to be fitted with special equipment, such as oil separation equipment or filters, and must retain on board or deliver to port reception facilities all oil residues that cannot be discharged into the sea.[1758] The Baltic Sea is also a Special Area under Annex II of MARPOL where more stringent controls on tank washing and residue discharge procedures with regard to noxious liquid substances apply.[1759] Additionally, the Baltic Sea, the Mediterranean Sea and the North Sea are Special Areas under Annex V, where the discharge of "garbage" including all kinds of victual, domestic and operational waste generated during the normal operation of the ship, is strictly regulated and the disposal of any kind of plastic is totally prohibited.[1760] Finally, the Baltic Sea area and the North Sea have been designated as SOx Emission Control Areas (SECA) under Annex VI with more stringent controls on sulphur emissions from ships.[1761]

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adoption of special mandatory methods for the prevention of sea pollution is required" (i.e., Annex I, Reg. 1(19); Annex II, Reg. 1(7) and Annex V, Reg. 1(3)). There are no stricter discharge provisions for Annex III (packaged harmful substances) and Annex IV (sewage). Areas may also be designated as SOx Emission Control Areas (SECA) under Annex VI. On SECA see: E.J. Molenaar (1998), pp.432-33.

[1752] These criteria are specified in detail in the IMO Guidelines for the Designation of Special Areas under MARPOL in Res.A 927(22), November 2001, Annex I (amending Res. A.720 (17); November 1991), paras 2.3 to 2.6.

[1753] Res. A 927(22), Annex I, Para. 3.4. The amendment procedure is set out in Article 16 of MARPOL.

[1754] E.g., S. Rosenne and A.Yankov (eds.) (1991), p. 181; A. Merialdi in T. Scovazzi (1999), p. 34 and B. Kwiatkowska (1989), p. 174.

[1755] Res. A 927(22), Annex I, Para. 2.2. See S. Rosenne and A.Yankov (eds.) (1991), p. 181.

[1756] However, there is an exception for discharges of processed bilge water from machinery spaces unless they meet specific conditions. See: MARPOL, Annex I, Regulation 10(3)(b)).

[1757] Moreover, all discharges at sea shall not contain chemicals or other substances in quantities or concentrations that are hazardous to the marine environment. See, for details, MARPOL, Annex I, Regulations 9 and 10.

[1758] MARPOL, Annex I, Regulations 16-19.

[1759] See, MARPOL, Annex II, Regulation 5.

[1760] See MARPOL, Annex V, Regulations 3 and 5.

[1761] Annex VI and the Baltic SECA entered into force on 19.05.2005, while the North Sea SECA will enter into force on 21.11.2006.

8.6.3 Particularly Sensitive Sea Areas (PSSAs) and the adoption of Associated Protective Measures (APMs)[1762]

The concept of PSSAs is not a legal one and it emerged in the IMO's practice in the late 1970s.[1763] Unlike MARPOL Special Areas, PSSAs are not regulated in a Convention, but in a 1991 IMO Assembly resolution setting out the Guidelines for Designation of Special Areas under MARPOL 73/78 and the Identification of Particularly Sensitive Sea Areas.[1764] These Guidelines were updated and simplified in 2001.[1765] Given the lack of any legal basis, the PSSA regime and its effects have always been quite controversial.[1766] Until recently, Governments have not taken full advantage of this instrument.[1767] However, in the aftermath of the *Prestige* accident in 2002, the trend has changed. Six new areas have been designated as PSSAs[1768] including the Western European Atlantic (MEPC 52),[1769] the Baltic Sea (MEPC 53)[1770] and the Canary Islands (MEPC 53)[1771] and new PSSA proposals may be submitted in

[1762] This section builds on V. Frank (2005), pp. 28-38.

[1763] The concept was formulated for the first time in Resolution 9 during the 1978 International Conference on Tanker Safety and Pollution Prevention. For a legal analysis of PSSAs see, *e.g.,* L. de La Fayette (2001), pp. 185-94; K.M. Gjerde in H. Thiel and J.A. Koslow (2001), pp. 123-31; K.M. Gjerde and D. Freestone (1994), p. 431-68; E.J. Molenaar (1998), pp. 438-43 and H. Ringbom (1996), pp. 72-83.

[1764] Resolution, A.720 (17), 6. 11. 1991. On the drafting history of the PSSA Guidelines see: G. Peet (1994), pp. 469-506.

[1765] Resolution, A.927 (22), 29.11.2001, amending Resolution A.720 (17), on the Designation of Special Areas under MARPOL 73/78 and Guidelines for the Identification *and Designation* of Particularly Sensitive Sea Areas (emphasis added). In March 2003, MEPC adopted a guidance document for the submission of PSSA proposals to IMO (MEPC/Circ.398, 27.03.2003). For a critical analysis of the 2001 Guidelines see: L. de La Fayette (2001), pp. 143-44 and K.M. Gjerde (2001), pp. 123-31.

[1766] See: First, Second and Third Meeting of Legal Experts on PSSAs in: MEPC 33/INF.27 (1992); MEPC 35/INF.17 (1993) and MEPC 36/21/4 (1994) all available in IJMCL (1995), Special Edition on PSSAs, pp. 437-68. According to H. Ringbom (1996), p. 73, the concept of PSSA does not necessarily provide any completely new methods for tackling pollution from ships beyond those already available under the LOSC, IMO instruments and existing international law. See also MEPC 51/8/4, submitted by BIMCO, ICS, INTERCARGO, INTERTANKO, OICF, and IPTA (Para. 4), questioning the legal basis of PSSAs.

[1767] Before the *Prestige*, there were five PSSAs in place: the Great Barrier Reef, Australia (1990); Sabana-Camaguey Archipelago, Cuba (1997), Malpelo Islands, Colombia (2002); Florida Keys, US (2002); and the Wadden Sea, Denmark, Germany and the Netherlands (2002).

[1768] See: Paracas National Reserve PSSA (MEPC 49); Galapagos Archipelago PSSA (MEPC 53) and the extension of the Great Barrier Reef PSSA to include the Torres Strait (MEPC 53).

[1769] MEPC 49/8/1, 11.04.2003, submitted by six EC member states (i.e., Belgium, France, Ireland, Portugal, Spain and the UK) to MEPC 49. See V. Frank (2005), p. 31.

[1770] MEPC 51/8/1, 19.12.2003, submitted by 9 EC Baltic States (Denmark, Estonia, Germany, Finland, Latvia, Lithuania, Poland and Sweden) to MEPC 51. See on that V. Frank (2005), p. 32 and Chapter 6.5.2 of this Study. The Baltic PSSA was designated "in principle" at MEPC 51 (March 2004). In July 2005, NAV 51 approved the proposed APMs (NAV 51/3/6) and MEPC 53 (July 2005) formally designated the Baltic Sea as a PSSA. Until the very last minute, the Russian Federation opposed the designation. Eventually the US delegation came up with a compromise text which makes it clear that the Baltic PSSA does not include marine areas within the sovereignty of the Russian Federation, or subject to its sovereign rights and jurisdiction under Article 56 LOSC and does not prejudice the sovereign rights and jurisdiction of the Russia Federation under international law in the area (MEPC 53J/10). In December 2005, the IMO Assembly adopted the APMs in the Baltic PSSA, which will become operational on 1.07.2006. The Russian Federation informed the Assembly that it would support and implement the new measures as routing measures, not as APMs, since it did not associate itself with the decision to designate the Baltic Sea as a PSSA (see 2006 UNSG Report, Para. 216).

[1771] MEPC 51/8, 24.10.2003, submitted by Spain. NAV 51 approved new APMs in the area: i.e., a new TSS, recommendatory ATBAs and a mandatory SRS for certain kinds of tankers (MEPC 53/8/5). At MEPC 53 the area was formally designated as PSSA.

the future, *inter alia*, in the Mediterranean Sea.[1772] The increase in PSSA submissions prompted a strong reaction by maritime States and the shipping industry, worried about the negative repercussions of these initiatives on the traditional freedom of navigation.[1773] In January 2004, the Russian Federation, Liberia and Panama, supported by the shipping industry, called for a revision of the existing PSSA Guidelines which were considered to be too broad and vague in their wording and open to different and excessively liberal interpretations.[1774] At MEPC 53, in July 2005, the PSSA guidelines were reviewed with the objective of clarifying and, where appropriate, strengthening certain aspects and procedures for the identification and designation of PSSAs and the adoption of associate protective measures (APMs) therein.[1775] The revised Guidelines were formally adopted by the 24th IMO Assembly in November 2005.[1776]

Under the revised Guidelines PSSAs are defined as "areas which need special protection through action by IMO because of their significance for recognized ecological or socio-economic or scientific attributes where such attributes may be *vulnerable to damage by international shipping activities*" (emphasis added).[1777] Unlike MARPOL's Special Areas, therefore, the concept of PSSA is not restricted to pollution, but extends to any potential impact from international shipping on the marine environment including, for instance, noise, the introduction of alien species through ballast waters or dumping.[1778]

A PSSA may be designated in areas "within and beyond the limits of the territorial sea".[1779] The IMO guidelines implicitly recognize the possibility to designate PSSAs in the high seas and do not impose any particular restriction on the size of an area.[1780] To be eligible as a PSSA an area has to fulfil three conditions. Firstly, it must meet at least one of the ecological, socio-economic and scientific criteria extensively

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[1772] See the 14th MOP of the BARCON (Recommendation II.B.2), supra n. 1717. Reportedly, Italy and France are working on a submission for a PSSA in the Bonifacio Strait; while Italy, Croatia and Slovenia are exploring the possibility of a PSSA in the Adriatic Sea; and this is also true of Spain in the Balearic Islands, and Norway in the Barents Sea.

[1773] On the flag states' and the shipping industry's reactions see: V. Frank (2005), pp. 34-7.

[1774] MEPC 51/8/3, submitted by the Russian Federation, Liberia and Panama and MEPC 51/8/4, submitted by BIMCO, ICS, INTERCARGO, INTERTANKO, OICF, and IPTA.

[1775] In March 2004, MEPC 51 approved the possibility of reviewing the guidelines on the basis of specific proposals. Three proposals have been submitted respectively by the US (MEPC 52/8), the Russian Federation (MEPC 52/8/1) and the shipping industry (MEPC 52/8/3). MEPC 52 in October 2004 set up a Correspondence Group to revise the guidelines using the US proposal as a basic text. The Group reported to MEPC 53 in July 2005 (MEPC 53/8/X). At MEPC 53 a Technical Group was instructed to prepare a draft final text of the revised Guidelines (MEPC 53/WP.15), which has been approved in plenary session.

[1776] Resolution A.982 (24) amending Resolution, A.927 (22).

[1777] Revised PSSA Guidelines, Annex I (Para 1.2).

[1778] According to the Revised PSSA Guidelines (Para. 7.5.2.4), for instance, APMs adopted in the area may relate to ship routeing measures, reporting requirements, discharge restrictions, operational criteria and prohibited activities.

[1779] Revised PSSA Guidelines (Para. 4.3). All PSSAs established before the *Prestige* accident are located in the territorial sea, with the only exception being the Great Barrier Reef, which partially extends to the EEZ.

[1780] According to the PSSA Guidelines (Para. 4.5) a PSSA may be identified within a Special Area under MARPOL 73/78 "and *vice versa*". Since Special Areas may include entire regional seas (e.g., the Baltic or the Mediterranean), it follows that also a PSSA may have a rather extended dimension. During the 2005 revision process, the Russian Federation (MEPC 52/8/1, p. 13) proposed to delete the words "and *vice versa*" from the text of Para. 4.5. See also the comments by DOALOS on the consistency of the WE PSSA with Article 211(6) of the LOSC (LEG 87/WP.3, reproduced in LEG 87/17, Annex 7); L. de La Fayette (2001), p. 185 and K.M. Gjerde (2001), p. 127.

articulated in the IMO guidelines.[1781] These criteria are less stringent than the ones for MARPOL and LOSC Special Areas and are not cumulative. Secondly, the area must be at risk from international shipping.[1782] Thirdly, the associate protective measures (APMs) proposed in the area must have a clear legal basis and be within the competence of the IMO.[1783] It is for the MEPC to determine whether the area meets these conditions. Governments with common interests in the area are invited to submit a coordinated proposal.[1784]According to the revised guidelines at least one APM has to be appended to a PSSA proposal at the time of the submission.[1785] Each APM has to be adopted or approved by the competent committee or subcommittee (e.g., MSC or NAV) before the MEPC may formally designate the area as a PSSA.[1786] The designation takes place by means of an MEPC resolution which, in a second stage, has to be endorsed by the IMO Assembly. It is worth reminding that all 164 IMO Members may participate in the adoption of MEPC/Assembly resolutions which are normally adopted by consensus.

APMs may include measures already adopted by IMO to protect the area[1787] or entirely new measures and it is always possible to introduce additional APMs in the future in order to address identified vulnerabilities.[1788] APMs may include MARPOL Special Areas or special discharge restrictions for vessels operating in the PSSA; ships' routing (e.g., ATBAs) or reporting measures or "the development and adoption of other measures aimed at protecting specific sea areas against environmental damage from ships, provided that they have an identified legal basis".[1789]

There are three possible legal bases for APMs. Firstly, "any measure already available in an existing instrument" (Para. 7.5.2.3*(i)*). The term "*instrument*" does not seem to refer exclusively to IMO conventions, but also to recommendatory instruments such as non-legally binding IMO codes and IMO resolutions.[1790] Secondly, measures which do not yet exist, but "could become available through amendment of an IMO instrument or adoption of a new IMO instrument. The legal basis for any such measure would only be available after the IMO instrument was amended or adopted, as

[1781] Revised PSSA Guidelines (Para. 4). The ecological criteria were amended in 2001 in order to incorporate the CBD criteria.
[1782] Revised PSSA Guidelines (Para. 5) and MEPC/Circ.398 (paras. 3(3) and 3 (4)).
[1783] Revised PSSA Guidelines (paras 1.5 and 7.5.2) and MEPC/Circ.398 (Para. 1.2). The legal basis for APMs was one of the overarching issues during the 2005 revision process.
[1784] During the 2005 revision process some flag States (e.g., the Russian Federation) insisted on the need to obtain the consensus of all neighbouring coastal States before submitting a PSSA proposal. The majority of the correspondence group, however, did not support this requirement.
[1785] Revised PSSA Guidelines, Para. 7.1. This has been one of the main changes brought about by the 2005 Guidelines, which removed the possibility under the previous regime to submit PSSA proposals without any APM attached and propose APMs at a later stage (i.e., two years after the designation of the PSSA "in principle"). The two-stage approach has been maintained in cases where States need technical assistance in preparing PSSA proposals with an APM attached. In this case, they are encouraged to request assistance from the IMO (Para. 3.3). The concept of "designation in principle" now refers exclusively to the situation in which the MEPC has already reviewed the PSSA proposal and is awaiting approval or adoption of the APM by the appropriate body (Para. 8.3.2).
[1786] E.g., Para. 8.3.2.
[1787] Revised PSSA Guidelines (Para. 7.2). This has been the case of the Wadden Sea PSSA where no new APMs have been proposed in addition to the existing ones.
[1788] Revised PSSA Guidelines (paras. 7.1 and 7.3). The latter possibility has been firmly opposed by some Flag states, especially the Russian Federation.
[1789] Revised PSSA Guidelines (paras. 6.1.1; 6.1.2 and 6.1.3).
[1790] See, for instance, MEPC Resolution 45(30) recommending compliance with the Australian system of compulsory pilotage in the Great Barrier Reef PSSA.

appropriate" (Para. 7.5.2.3*(ii)*).[1791] Presumably, this category may also include CDEMs higher than international standards for ships operating "exclusively" in the PSSA even though within existing PSSAs there are no examples of APMs directly regulating CDEMs.[1792] Thirdly, "any measure proposed for adoption in the territorial sea or in the EEZ pursuant to Article 211(6) of the UNCLOS where existing measures or generally applicable measures (as set forth in subparagraph (ii) above) would not adequately address the particularized need of the proposed area" (Para. 7.5.2.3*(iii)*). It is worth reminding that the LOSC (e.g., Articles 21(1), 22, 23, 25(2), 211(2), (4) and (6)) allows for the adoption of compulsory measures that may be more stringent than international standards except for CDEMs on foreign ships in transit. It is also interesting to note that most existing PSSAs lie entirely within 12 nm and in this area coastal States do not need the IMO's approval to adopt stricter discharge or navigational standards as long as they do not impede the right of innocent passage. So, why would States go through the complex and time-consuming PSSA process instead of taking unilateral action? The reason seems to be that through the PSSA designation coastal States obtain the international endorsement of measures that are particularly controversial, like some compulsory routeing (e.g.., ATBAs) and reporting measures which have strong implications for the traditional freedom of navigation. In addition, measures adopted by the IMO are more likely to be observed than national measures.

As the recent PSSA debate indicates, there is still some confusion concerning the relationship between PSSAs and special areas under Article 211(6) LOSC.[1793] Article 211(6) provides the legal basis for the adoption of APMs in the EEZ; it does not contain the criteria for the designation of a PSSA.[1794] The latter are far more flexible and are set out in the IMO Guidelines. It is clear, however, that APMs based on Article 211(6) need to meet all the more stringent requirements set forth in the Article.[1795]

APMs need to be specifically tailored to meet the need of the area and to prevent, reduce or eliminate the identified vulnerability from international shipping.[1796] It is up to the IMO to decide on a case-by-case basis which APMs are the most suitable to address such a vulnerability and this choice is not necessarily restricted to existing IMO instruments.[1797] The establishment of a PSSA could indeed justify the adoption of

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[1791] An example of these kinds of APMs is the "no anchoring zone" proposed by the US around the Florida Keys PSSA and adopted through an amendment of SOLAS. The 2001 PSSA guidelines referred to measures which do not yet exist, but "should be available as a generally applicable measure".

[1792] In 2003, six European States proposed a ban on single-hull tankers as APM in the WE PSSA. In the light of the forthcoming amendments to MARPOL, this measure, however, has been withdrawn before the MEPC could pronounce itself on its legality. In addition, there are several examples of APMs that indirectly touch upon CDEMs, such as compulsory ATBAs for certain classes of ships. See also the Comments of IUCN on the 2001 revised PSSA Guidelines (in: MEPC 43/6/3, Annex 2, p. 3).

[1793] See, e.g., the concerns expressed by Liberia, the Russian Federation, BIMCO, ICS, INTERCARGO, INTERTANKO and IPTA with regard to the WE PSSA (in: LEG 87/16/1), as discussed in LEG 87, in October 2003 (see: LEG 87/17). See: V. Frank (2005), pp. 34-5.

[1794] On the relationship between PSSA and Special Areas under Article 211(6) LOSC see: L. de La Fayette (2001), pp. 190-2, and E.J. Molenaar (1998), pp. 436-7 and 441-2. See also the Comments by DOALOS on the consistency of the WE PSSA with Article 211(6), supra n. 1780.

[1795] So far LOSC, Article 211(6) has been explicitly adopted as the legal basis for the compulsory pilotage proposed within the Torres Strait PSSAs (MEPC 49/8, Para. 5.14) and for the compulsory notification requirement within the Galapagos PSSA (MEPC 51/8/2). Both measures, however, have been adopted as "recommendatory".

[1796] Revised PSSA Guidelines (Para. 7.5.2.4).

[1797] According to the Third International Meeting of Legal Experts on PSSA (in: MEPC 36/21/4, paras 10-17) the identification of a PSSA can serve to "provide the basis for the approval of exceptional measures which, although justified by internationally recognized exceptional circumstances, cannot find

measures that have not received general acceptance and which are not regulated in any IMO Convention. In principle, there is no limit to the kind of measures that the IMO may approve or adopt in the PSSA as long as they have a clear legal basis in the LOSC or other IMO instruments and enter within the competence of the organization.[1798] It is important to stress that PSSA status does not increase the coastal State's jurisdiction in the area, but confers on the proposing State the mere role of the initiator of the multilateral development of protective measures within the IMO. Any proposed measure will have to be assessed by the competent IMO committees taking into account all the interests involved, including those of flag States, and its adoption will always require the consent of the international community as a whole through the approval by the MEPC and the Assembly. The PSSA designation process therefore allows the level of protection in particularly vulnerable areas to be increased without altering the jurisdictional balance set out in the LOSC.

Once approved, APMs have to be implemented in accordance with international law as reflected in the LOSC and coastal States may enforce them consistently with the Convention vis-à-vis all ships transiting the area.[1799]

Only APMs are legally binding, while the PSSA designation has no legal effect. However, the added value of the designation cannot be underestimated.[1800] Among other things, it confers a special status on an area that can be marked on nautical charts, informing vessels of the importance of taking extra care when approaching the area. That is extremely important since over 50% of all maritime accidents are caused by human error. The PSSA status, moreover, may influence and eventually change the behaviour of users of the area and increase awareness regarding the sensitivity of the region. This may stimulate action at the international, regional or national levels towards a more comprehensive protection of the area from sources other than shipping.[1801] Designation as a PSSA, therefore, is in itself an important preventive instrument in line with the precautionary approach endorsed by IMO.[1802]

8.7 Weaknesses of the Existing International Regime

There are currently (too) many international and regional instruments governing the designation and management of MPAs. Despite their analogies, global and regional instruments differ to a considerable extent with regard to their legal or political nature, their scope of application (high seas or waters under national sovereignty or jurisdiction) and selection, designation and management criteria. This patchwork regime creates confusion and brings overlapping obligations for coastal States making it quite difficult to correctly implement their international commitments. Although, in the past few years, new efforts have been taken to promote consistency and strengthen

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a precise legal basis in existing international instruments." During the 2005 revision process, many delegations shared the view that APMs should not be limited to measures that now exist in IMO instruments. See the Report of the Correspondence Group (MEPC 53/8/X, Para. 14).

[1798] On the broad "environmental" mandate of the IMO under the 1948 IMO Convention (Articles 1(a) and 15 (j)) see: Chapter 6.4.1 of this study.

[1799] Revised PSSA Guidelines (paras. 9.2 and 7.9).

[1800] On the non-legal effects of the PSSA designation see: IMO doc. MEPC 34/INF.6.

[1801] The CBD, for instance, is considering PSSAs in its work on the establishment of HSMPAs, supra n. 1631. See also the 14th BARCON MOP, supra n. 1717

[1802] See, *inter alia*, Resolution MEPC.67 (37) setting out Guidelines on the Application of the Precautionary Approach that requires the MEPC to apply the precautionary approach in its activities. Additionally, the PSSA status raises the standards of care that may be expected in the assessment by courts in claims for damage to PSSAs.

cooperation among the different instruments and competent bodies, overregulation and confusion still remain.

Most of the international instruments, moreover, do not contain straightforward obligations and the duty to establish and manage MPAs is not always formulated in legally binding terms. Their implementation therefore strongly depends on the political will of each State. Institutional fragmentation at the national level often represents an additional obstacle to proper implementation. Normally, biodiversity policies come under the responsibility of the Ministry for the environment, but marine biodiversity and MPA issues may be dealt with by different sectoral departments.[1803] In some cases, the Ministries for agriculture, fisheries and water resources may be in charge of MPA policies. Normally it is for central governments to implement international regimes, but when local issues are at stake, it may be up to regional authorities to take action. The effective management of MPAs, moreover, requires a strong coordination among different administrative levels and among departments dealing with environmental protection, water management, fisheries, pollution control, public health, tourism and maritime transport. The current level of coordination seems to be generally rather low.[1804]

In addition, there are no strong compliance and enforcement mechanisms in place at the international level to ensure that state Parties meet their international commitments and monitoring and reporting are still ineffective. Finally, there are considerable funding problems and the existing multilateral financing mechanisms (e.g., GEF) are still inadequate.

8.8 The European Community's Regime

8.8.1 The Community's Objective to Establish a Coherent network of MPAs

The establishment of a coherent network of protected areas that would ensure the protection of habitats and native European species has been a primary objective of the EC's environmental policy since its establishment.[1805] In the course of the 1970s and 1980s, it became evident that the deterioration and progressive loss of habitats was threatening European wildlife. In the First (1972) and Second (1977) EAPs the Commission, supported by the EP, highlighted the need to take an integrated approach towards the conservation of endangered species and the protection of their habitats.[1806] However, before the introduction of Article 130 (now 174) in the EC Treaty in 1987, the existence of Community competence in matters of nature conservation was challenged by most of the member states because of the lack of relevance to the market integration objective.[1807] Member states therefore preferred the Community to accede to existing international conventions, such as the Bern Convention, rather than adopting its own rules.[1808] In 1979, however, due to strong public pressure, the Council adopted the Birds Directive with the objective being to guarantee uniform and

[1803] In Italy, for instance, MPAs and biodiversity issues are mainly dealt with by the Ministry of the environment, within two different departments: a sea protection department and nature conservation department; however the Ministry of agricultural and forestry policy may also be involved via its fishing and agriculture department. In certain cases, moreover, the protection of local coastal areas falls within the ambit of the regional authorities.

[1804] E.g., the 5th IUCN World Parks Congress, Durban (South Africa), 2003, Rec. V.22.

[1805] For an overview of the EC's Nature Conservation and Biodiversity Policy see: J.H. Jans (2000), pp. 410-24; L. Kramer (2000), pp. 131-49; and EC Commission (DG ENV) at: http://europa.eu.int/comm/environment/nature_biodiversity/index_en.htm.

[1806] The Second EAP also called for the proper implementation of the Bern Convention in the EC.

[1807] S.P. Johnson and G. Corcelle (1989), p. 237; L. Kramer (2000), p. 131 and J.H. Jans (2000), p. 410.

[1808] The EC acceded to the Bern Convention in 1982 on the basis of Article 235 EEC. See infra n. 1942.

effective protection for wild birds, especially migratory species, and their habitats.[1809] For this purpose member states are required to classify Special Protection Areas (SPAs)[1810] and take appropriate steps to avoid any significant pollution or deterioration of habitats or any disturbance affecting the birds.[1811] In order to protect habitats hosting species other than birds and to properly implement the Bern Convention within the Community, both the Third (1983) and the Fourth (1987) EAPs called for the adoption of a Directive on habitats conservation. As a response, the Commission presented a proposal for a Directive with the main objective of establishing, by the year 2000, a comprehensive network of protected areas aimed at ensuring the maintenance of threatened species and habitats.[1812] Initially, the proposal did not meet with the enthusiasm of all the member states which were afraid that such a Directive could threaten their exclusive competence in the field of land-use planning. It was only in 1991, in the preparation for the 1992 UNCED, that the text of the Habitats Directive was agreed upon.[1813] The Community was indeed willing to play a leading role at the Rio Conference and the adoption of the Habitats Directive would have enhanced its position in the negotiation of the CBD. A central element of the Habitats Directive is the establishment of a coherent network of protected areas called Natura 2000. However, as will be discussed later, the Natura 2000 network was mainly designed to protect nature on land and it dedicated little attention to marine biodiversity. Similarly, the EC Biodiversity Strategy and the Biodiversity Action Plan (BAP) adopted in 1998 to facilitate the implementation of the CBD did not include the preservation of marine habitats and species among their priority actions.[1814]

Both the Fifth (1992) and the Sixth (2001) EAPs consider the full implementation of the Natura 2000 network as a key tool for protecting biodiversity within the Community. In particular, the Sixth EAP notes that as a consequence of the loss and degradation of habitats, fish stocks are under the threat of complete collapse and some marine life other than commercial fish have been decimated in almost all regional seas.[1815] To reverse this trend the EAP identifies a set of priority actions including, inter alia, the extension of Natura 2000 to the marine environment and the development of an integrated European Marine Strategy.[1816] In its 2003

[1809] Council Directive 79/409/EEC on the conservation of wild birds was adopted on the basis of the Commission proposal of 20.10.1976. Since the Habitats Directive has replaced most of the provisions of the Birds Directive, the two regimes will be examined together in the next section. For more details on the Birds Directive see J.H. Jans (2000), p. 411; L. Kramer (2000), p. 134; and S.P. Johnson and G. Corcelle (1989), p. 238.

[1810] SPAs shall represent the most suitable territories, in number and size, for the conservation of particularly threatened species listed in Annex I (Article 4(1)) or regularly occurring migratory species (Article 4(2)). In addition to conservation measures, the Directive requires member states to take measures restricting hunting and the trade in species (Articles 5 and 6).

[1811] Birds Directive, Article 4(4). According to the ECJ, member states can only derogate from that obligation in exceptional cases when an interest superior to the directive's conservation objective is at stake (e.g., the danger of flooding or the protection of coastlines), but never for economic reasons (C-57/89, Leybucht Case).

[1812] Commission Proposal in: O.J. C247, 21.09.1988.

[1813] P.W. Birnie in: M. Bowman and C. Redgwell (ed) (1996), pp. 214-5.

[1814] See: COM (98) 42, in O.J. C 341, 9.11.1998. The Commission is currently reviewing the Biodiversity Strategy and the BAP in the light of the global and regional targets, including the establishment of a coherent network of MPAs by 2012. The output should be a 2010 Delivery Plan which identifies priority objectives toward meeting these targets.

[1815] The Sixth EAP, p. 30, reports the alarming data published in 1999 by the EEA in "Environment in the European Union at the Turn of the Century", available at: http://reports.eea.eu.int/92-9157-202-0/en/.

[1816] The Sixth EAP also calls for the revision of the CFP. See, in general, Chapter 3.5.1 of this study.

Communication, the Commission identifies halting the biodiversity decline by 2010 and restoring degraded marine ecosystems as one of the overall goals of the future Marine Strategy and indicates the full implementation of the Habitats Directive in the marine environment as a means to achieve these targets.[1817] These objectives have been endorsed by the Council in its conclusions.[1818]

At the international level, the Community is fully committed to the target of establishing a network of MPAs by 2012 (and halting biodiversity loss by 2010) as endorsed in Johannesburg, within the framework of the CBD and in other global (ICP and UNGA) and regional forums (OSPAR, HELCOM, Joint HELCOM/OSPAR, BARCON). In 2003, the EP urged the Community to take immediate steps towards the creation of such a network meeting its global and regional commitments.[1819] Also the Environmental Council has expressly supported the establishment, by 2012, of a system of representative networks of MPAs both in coastal waters and the high seas, consistently with international law.[1820] Similarly, the European Council has called for an effective follow-up to the Johannesburg objectives on the protection of the marine environment, but without making express reference to the 2012 target on the MPA network.[1821] Surprisingly, also the Commission in its 2003 and 2005 Communications on the Marine Strategy, unlike in the Preamble to the proposed Marine Strategy Directive, does not explicitly refer to the 2012 target. Nevertheless, as will be discussed later in this Chapter, the Community, driven by the Commission, has taken the lead in the international efforts towards the full achievement of this target.

8.8.2 The Community's Legal Framework for the Establishment and Management of MPAs

The Community's competence concerning MPAs and marine biodiversity conservation issues has clear legal bases in the EC Treaty.[1822] With regard to the protection and preservation of natural habitats such competence is based on Article 175 EC and is shared with the member states. However, with regard to the conservation and management of fisheries resources, the EC's competence is exclusive and is based on Article 37 EC on the CFP.[1823] According to Article 102 of the 1972 Act of Accession of the United Kingdom, Ireland and Denmark, the EC's exclusive competence in the

[1817] COM (2002) 539, 20.10.2002, Objectives 1 and 2 and Action 2.

[1818] See, in particular, the Conclusions of the ENV Council (March 2003), Para. 7 (d). See also: ENV Council (March 2005, Para. 13); ENV Council (December 2004, p. 22); ENV Council (June 2004, pp. 19-23); ENV Council (December 2003, p. 16-8); ENV Council (March 2003, pp. 8-10); ENV Council (December 2002, pp. 20-4); ENV Council (June 2002, p. 11); ENV Council (December 2001, p. 18).

[1819] E.g, EP Report on the Commission Communication: "Towards a strategy to protect and conserve the marine environment" (PE 328.753, 7.05.2003, Para. 20). According to the EP, the full implementation of Natura 2000 in the marine environment should not be the only tool to protect marine biodiversity.

[1820] E.g., ENV Council (December 2003, paras 14 and 25) and ENV Council (December 2004, p. 22).

[1821] See, in particular, Presidency Conclusions (Brussels, March 2003), Para. 60. See also: Presidency Conclusions (Brussels, March 2005, p. 7); Presidency Conclusions (Brussels, June 2004, Para. 43); Presidency Conclusions (Brussels, March 2003, Para. 54). The target of halting biodiversity loss by 2010 is identified as the main component of the EU's Strategy on Sustainable Development discussed in Chapter 3.4.5 of this study.

[1822] For a detailed discussion on the EC's competence in matters of nature conservation see, e.g., N. Wolff (2002), pp. 26-32; J.H. Jans (2000) p. 410; P.W. Birnie in: M. Bowman and C. Redgwell (eds.) (1996).

[1823] Council Regulation EEC 3760/92 setting out the legal framework for the conservation and protection of fisheries resources, as replaced by Regulation 2731/2002.

field of fisheries also includes the conservation of the biodiversity of the sea.[1824] The identification of the proper legal basis for Community action may therefore be problematic especially with regard to the conservation of marine biodiversity other than commercial species and the adoption of fisheries-related measures that serve environmental objectives, such as the establishment of protected sites to conserve certain species or the ban on destructive fisheries practices in a particularly sensitive area. The choice of the correct legal basis for these kinds of measures is particularly critical since since Article 175 and Article 37 provide for different decision-making procedures, which cannot be combined.[1825] The ECJ in its case law has made it clear that measures primarily related to fisheries, such as the prohibition of drift-netting, bottom trawling or other destructive techniques, which serve both resource conservation and marine environmental protection objectives still have to be based on Article 37.[1826] Presumably, the same reasoning may also apply the other way around and measures directed at conserving non-commercial stocks (e.g. coral reefs and other forms of aquatic wildlife) which only indirectly touch upon fisheries, may still be based on Article 175.[1827] In addition, the Community's Declarations upon signature and formal confirmation of the LOSC make it clear that the EC has exclusive competence in the field of "*conservation and management of sea fishing resources*", which seem to refer to commercial stocks.[1828] The Community, therefore, does not seem to have exclusive competence concerning the conservation of marine biodiversity other than commercial species.

Measures based on Article 175 (shared competence), unlike fisheries-related measures under Article 37, need to be justified on the basis of the subsidiarity and proportionality principles. Since the beginning, the Community's regulatory action for the preservation of marine habitats (and species), including the creation of a coherent European ecological network, appeared to be more effective than isolated national initiatives and consistent with the subsidiarity and proportionality principles.[1829]

Marine biodiversity legislation based on Article 175 is adopted by QMV according to the co-decision procedure between the Council and the EP on the basis of a proposal from the Commission (Article 251 EC).

Within the Commission, issues related to marine biodiversity, including MPAs, are primarily subject to the responsibility of DG ENV, Nature and Biodiversity Unit (B2). However, the same issues are partially dealt with by the Protection of Water and Marine Environment Unit (D2), which is in charge of the European Marine Strategy and the Marine Strategy Directive. In addition, the International Affairs Unit (E2) is

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[1824] In Case 804/79, Commission v. UK (Para. 17), the ECJ makes it clear that this provision confers on the Community an "implied" exclusive external competence in these matters since effective and equitable conservation measures could only be taken at the supranational level.

[1825] See discussion in Chapter 2.3.1.2 of this study, especially at n. 92.

[1826] In case C-405/92 (Driftnets *Case*) the Court held that Article 37 (former Article 43), and not Article 175 (former 130s), was the correct legal basis for Regulation 345/92 banning the use of drift-nets in order to protect aquatic wildlife. Other examples of "conservation measures" based on Article 37 are: Council Regulation 973/2001 on technical measures for conservation of migratory stocks; Council Regulation 602/2004 banning bottom trawling in the Darwin Mounds and the similar ban proposed by the Commission to protect coral reefs around the Azores, Madeira and Canary Islands (COM (2004) 58). See also A. Berg (1999), p. 74.

[1827] For instance, Annex I of the EC Treaty includes marine mammals within the living resources that fall under the CFP. Nevertheless, as will be discussed later, some species of cetaceans are listed in the Annexes of the Habitats Directive, meaning that the Community may still take action on the basis of Article 175 to conserve marine species.

[1828] Both Declarations are reproduced in Annexes I and II of this study.

[1829] See the Preamble to the Habitats Directive.

responsible for the Community's external policy on biodiversity-related matters. Given the intersectoral nature of MPA issues, moreover, some aspects related to the establishment or management of marine areas may fall under the responsibility of other DGs (e.g., DG FISH, TREN, Development, Enterprise) which have to be fully involved in the drafting process. As already discussed in Chapter 2.2.4, the Commission has to act as a single body and each proposal needs to be prepared in close coordination between all interested DGs and units.

Within the Council the adoption of legislation related to marine biodiversity is under the responsibility of the Environmental Council. The relevant discussions take place primarily within the Council's Working Party on the Environment and the COREPER. As will be discussed later, marine biodiversity-related matters are frequently on the agenda of the Biodiversity Group of the WPIEI, which coordinates the EC's positions in international environmental negotiations and of the COMAR in which the EC coordinates its positions for the UNGA and ICP, and of the Fisheries Council, with regard to conservation measures.

Within the EP, the Commission's proposals on biodiversity issues are mainly discussed by the Committee for Environment, Public Health and Food Safety, but biodiversity issues may be incidentally brought to the table of other EP Committees, such as the Fisheries Committee or the Transport Committee.

On the other hand, fisheries-related measures based on Article 37 are adopted by the Fisheries Council acting on QMV in simple consultation with the EP on the basis of a proposal from the Commission (DG FISH).[1830] The EP, therefore, does not have a decisive role in the decision-making related to fisheries and has limited opportunity to influence more environmental friendly decisions in the Council.[1831]

8.8.3 The Community's Regulatory Action Towards the Establishment and Management of MPAs

8.8.3.1 The Natura 2000 Network

The 1992 Habitats Directive together with the 1979 Birds Directive set out the legal framework for the designation and management of marine protected areas with the Community.[1832] Although the Habitats Directive was intended to implement the Bern Convention, it was drafted during the run-up to UNCED and incorporates many of the elements of the CBD.[1833] Its most ambitious objective is to establish and manage a coherent ecological network of special areas of conservation (SACs) called "Natura 2000" to maintain or restore native European habitats and species with a "favourable conservation status".[1834] Such a network also includes the areas classified as Special Protection Areas (SPAs) under the Birds Directive.

Annex I lists natural habitats of "Community interest" that require protection,[1835] including eight open seas, coastal and tidal habitat types (e.g.,

[1830] Article 37(2) of the EC Treaty.

[1831] However, it is worth mentioning that the EP, especially the Fisheries Committee, is heavely lobbied by the fishing industry. Its stronger involvement in the decision-making process, therefore, would not necessarily result in more environmentally friendly regulations in the field of fisheries.

[1832] Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora. Like the Birds Directive and the Bern Convention, the Habitats Directive contains two sets of measures on "Conservation of natural habitats and habitats of species" and on "Protection of Species". The latter remain outside the scope of this Chapter.

[1833] See: A. Boyle (1994), p. 114.

[1834] Habitats Directive, Article 3(1). Favourable conservation status is broadly defined in Article 1(e).

[1835] "Natural habitats of Community interest" are defined in Article 1(c) and include priority habitats (i.e., habitats "in danger of disappearance in their natural range"); habitats that have a "small natural

sandbanks, reefs and *posidonia beds*). Annex II lists species of wild animals and plants of Community interest whose habitat requires protection, including a few marine species (e.g., Bottlenose dolphins, Grey seals, *carretta carretta, monacus monacus)*. Additionally, some species of marine mammals are also listed in Annex IV (species whose deliberate killing is prohibited) and Annex V (species whose deliberate killing is regulated).[1836] All the marine habitats and species listed in the Annexes are also included in the Annexes of the international and regional conventions discussed in this Chapter.

The Habitats Directive lists the criteria for the selection of SACs (Annex III) and sets out a three-step procedure for their designation (Article 4). Firstly, member states "shall" propose a list of habitats and species of Community interest occurring in their territories that meet the criteria of Annex III.[1837] Such a list had to be transmitted to the Commission by 1995. Secondly, on the basis of the national lists the Commission "shall" establish a List of sites of Community importance (SCIs).[1838] Thirdly, once the site is on the SCI List, the member state had to designate it as a SAC by June 2004 at the latest and take the necessary measures to achieve their favourable conservation status.[1839]

In its consistent case law, the ECJ has made it clear that member states have a positive legal duty to classify a site that meets the criteria set out in the Birds and Habitats Directives and cannot escape from this duty by adopting other conservation measures.[1840] In practice, however, member states have considerable margins of discretion in selecting SACs under the Habitats Directive. Indeed, if the Commission considers that a national list fails to include a site hosting priority habitats or species, it may initiate bilateral consultation with the interested state. If, after the consultation, the dispute remains unresolved, the Council may decide by unanimity to place the site on the list (Article 5(1)). Hence, the consent of the member state concerned is always necessary to place the site on the SCI List.[1841]

Article 6 identifies three kinds of measures that member states shall adopt to manage and conserve Natura 2000 sites.[1842] These are: special conservation measures, including, when necessary, management plans (Article 6(1)); all necessary steps to avoid the deterioration of habitats or disturbance to species (Article 6(2)); and EIAs of all plans or projects not directly linked to the management of the site (including projects and plans carried on outside the SAC, but having effect therein (Article

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range"; or that are "outstanding examples of typical characteristics of one or more of the seven bio-geographic regions: Alpine, Atlantic, Boreal, Continental, Macaronesian, Mediterranean and Pannonian.

[1836] Member states must guarantee strict protection for species listed in Annex IV prohibiting, *inter alia*, the deterioration or destruction of breeding sites and resting places.

[1837] Habitats Directive, Article 4(1).

[1838] *Ibid*, Article 4(2).

[1839] *Ibid*, Article 4(4).

[1840] As for the Habitats Directive see: e.g., Case C-67/99, *Commission v. Ireland*; Case C-71/99, *Commission v. Germany;* and Case C-220/99, *Commission v. France*. As for the Birds Directive, see: C-334/89, *Commission v. Italy (1991)*, (Para 10); C-3/96, *Commission v Netherlands* (1998), (Paras 55 and 63); C-355/90, *Commission v. Spain* (1993); C-44/95 *R. v Secretary for Environment ex Parte Royal Society for the Protection of Birds* (1996), C-166/97 and C-96/98, *Commission v. France (*1999).

[1841] See: J.H. Jans (JEL, 2000), p. 388.

[1842] Article 6(2), (3) and (4) replace the obligations arising under Article 4(4) of the Birds Directive (see: Habitats Directive, Article 7). For a detailed discussion, see: EC Commission, "Managing Natura 2000 sites. The Provisions of Article 6 of the Habitats Directive 92/43/EEC", 2000, at: http://europa.eu.int/comm/environment/nature/art6_en.pdf.

6(3)).[1843] Member states and the Commission, however, may authorise plans or projects serving "imperative reasons of overriding public interest, including those of a social and economic nature" (Article 6(4)).[1844] The exception, however, only applies if there are no available alternative sites and member states must always compensate for the loss of habitat ensuring the overall coherence of the Natura 2000 network.[1845] The ECJ has given a rather stringent interpretion of the management and conservation duties.[1846] In particular, the Court has made clear that the mere inclusion of the site on the SCI List triggers the obligation for member states to adopt protection measures under Article 6(2) and (3) even before formal designation as a SAC.[1847] In addition, even before the inclusion of the site in the SCI List, member states have to act in conformity with the conservation objectives of the Directive and should abstain from all activities that may deteriorate a site which is eligible for identification as a SAC and is included in the national list.[1848]

Finally, the Habitats Directive sets out monitoring and reporting obligations for member states and the Commission.[1849] The LIFE nature provides financial support for nature conservation projects that contribute to meeting the objectives of the Habitats Directive and is the main financial mechanism to implement Natura 2000.[1850] So far, however, implementation has progressed very slowly and the listing process is still not complete.[1851]

8.8.3.2 Implementing Natura 2000 in the Marine Environment

The possibility to apply the provisions of the Habitats and Birds Directives in the marine environment, especially in areas beyond the territorial sea, has for a long time been controversial.[1852] Article 2 of the Habitats Directive and Article 1 of the Birds Directive, indeed, do not specify their geographical scope but generally refer to the "territory of member states where the Treaty applies". As already mentioned in Chapter 2.5, the EC Treaty applies to the member states, without making specific reference to their territory (Article 299 of the EC Treaty), but it seems to implicitly

[1843] In its ruling on the Waddenzee Cockle Fishery, 7.09.2004, the ECJ clarified that "plan or project" also includes activities whose licence is being renewed.

[1844] The Habitats Directive, unlike the Birds Directive, does not automatically rule out economic and recreational plans and projects within the sites. These "imperative reasons of overriding public interest" are not defined in the Directive and the ECJ has never clearly pronounced on the point. However, when the site in question hosts priority natural habitats or species, the plan or project can be authorized only on the basis of health or safety considerations, or when it brings beneficial consequences for the environment.

[1845] These compensatory measures are similar to those under the Ramsar Convention. See EC Commission (2000), p. 38.

[1846] See, e.g., Case C-103, *Commission V. Hellenic Republic* (2002) on the failure of Greece to establish and implement an effective system of strict protection for the sea turtle as requested under the Habitats Directive.

[1847] Habitats Directive, Article 4(5). See, e.g., Case C 117/03, *Società Italiana Dragaggi SpA v. Ministero delle Infrastrutture e dei Trasporti, Regione Autonoma del Friuli Venezia Giulia*, Para. 31.

[1848] *Ibid*, Case C 117/03, Para. 31. This is the case, in particular, for sites hosting priority natural habitat types or priority species. The ECJ, however, does not identify the legal basis for this obligation. Arguably, such a legal basis is Article 10 EC setting out the duty to cooperate.

[1849] Habitats Directive, Articles 9, 11 and 17.

[1850] Council Regulation 1973/92/EEC establishing LIFE, as amended by EC Regulation 1655/2000, (LIFE III).

[1851] E.g., Report from the Commission on the implementation of the Habitats Directive (COM(2003)845, 5.01.2004)**.** SCI Lists have been compiled only for the Macaronesian region (2001), the Alpine region (2003) and the Atlantic and Continental regions (2004). No List has as yet been adopted for the Mediterranean region .

[1852] For a full discussion on that topic see J.H. Jans (2000), p. 72; D. Owen (2000), pp. 46-8.

include all terrestrial and marine areas under their sovereignty and jurisdiction.[1853] In addition, the Court on several occasions (e.g., *Kramer Case* and *Drift Nets Case)* has made it clear that the Community may adopt conservation measures beyond the territorial sea as far as its member states are allowed to do so under international law.[1854] Following this approach the EC Commission maintains that as far as the member states have declared an EEZ and are entitled under international law to enforce their regulations therein, the Habitats Directive also applies to the area since EC law is an integral part of national legislation.[1855] The Court, however, has never clearly pronounced on this point and, so far, the offshore application of the Directive has only been confirmed by one national court (i.e. the High Court of England and Wales in *The Queen v The Secretary of State for Trade and Industry ex Parte Greenpeace Case* in 1999).[1856] Nevertheless, in the light of the recent practice of the member states in the implementation of the Habitats Directive, it seems to be largely accepted that Natura 2000 sites may be designated in the territorial sea, continental shelf and, when declared by the member state, the EEZ or analogous fishing zones.

The Habitats Directive in its present form, however, does not provide an effective legal framework for the designation and effective management of MPAs especially beyond the territorial sea.[1857] The Directive, like the Birds Directive, was primarily intended to protect terrestrial biodiversity and does not adequately address marine habitats and species (especially highly migratory species) which are still largely unrepresented in its Annexes. Only three of the marine habitats listed in Annex I (i.e., reefs, submerged sandbanks and submarine structures made by leaking gas) and a few species listed in Annex II (e.g., harbour porpoises, bottlenose dolphins and monk, common and grey seals) are found beyond the 12 n.m. limit.[1858] In addition, the scientific criteria under Annex III are ill-suited for the selection of marine sites and the lack of sufficient data and scientific information makes it particularly difficult to apply these criteria to marine habitats and species. The Directive, moreover, focuses on small sites and is inappropriate to protect migratory species. Indeed, for aquatic species ranging over wide areas, SCAs may only be proposed in a "clearly identifiable area" which presents the physical or biological factors essential to their life and reproduction (Article 4(1)). This may prove to be very difficult considering that most the marine species listed in the Annex are dispersed over wide areas sometimes as large as the entire North Sea.[1859] Member states have encountered major difficulties in implementing the Natura 2000 network for the marine environment (e.g., the lack of

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[1853] See the discussion in Chapter 2.5 of this study.

[1854] E.g., Joined Cases 3,4 and 6/76 (Kramer) and *Case C-405/92 (Driftnets Case).*

[1855] See, *inter alia*, Communication from the Commission, "Fisheries Management and Nature Conservation in the Marine Environment", COM (1999) 363, p. 10.

[1856] See *R v. Secretary of State for Trade and Industry ex Parte Green Peace Case*, 5.11.1999, Environmental Law Reports 2000, at (221). On the judgment see: D. Owen (2000), pp. 46-8 and J.H. Jans (2000), pp. 385-7. The judgment refers to the application of the Habitats Directive to the UK Continental Shelf and to the superjacent waters up to a limit of 200 miles from the baseline. This is explained by the fact that the UK has not yet declared an EEZ. The British Court, moreover, notes that the original proposal from the Commission clearly referred to the European territory of the member states, including maritime areas under their sovereignty or jurisdiction.

[1857] See, inter alia, the 19th meeting of the Standing Committee of the Bern Convention, Draft Report on "Conservation of Marine Habitats and Species in Europe", (T-PVS (99) 561), 3.10.1999, at 14.

[1858] For a comprehensive analysis see: Report by WWF, "Implementation of the EU Habitats Directive Offshore: Natura 2000 sites for reefs and submerged sandbanks", June 2001, available at: www.ngo.grida.no/wwfneap/Projects/Reports/Reefs_Sandbanks_Vol1.pdf.

[1859] Conversely, the Birds Directive does not contain a similar requirement, but calls on member states to classify "the most suitable territories in number and size" (Article 4(1)).

clarification as to the geographical application of the Directive; the lack of data and scientific information; difficulties in defining and selecting appropriate marine sites; deficiencies in national legislative and administrative frameworks) and of the over 18,000 sites designated so far, only around 800 have marine components and very few of them are truly offshore.[1860] Nevertheless, in the past few years the member states have taken new steps towards the application of the Directive to the marine environment and some of them (e.g., Denmark, Germany and Portugal) have designated or selected Natura 2000 sites in their EEZ.

The Commission is firmly committed to ensuring the full implementation of the Habitats Directive in waters under the sovereignty "and jurisdiction" of the member states and the adjustment of its Annexes is considered as one of the main tools to achieve this objective.[1861] Recently, the Habitats Committee, which assists the Commission in the implementation of the Habitats Directive, established an expert group on marine issues under the Habitats and Birds Directives with the mandate, among other things, to set out criteria for the designation of marine sites under the Natura 2000 Network and to investigate possible management measures within these sites. In addition, most member states (at least those which are Parties to OSPAR and/or HELCOM) agree on the need to adjust the Annexes of the Habitats Directive in order to include additional marine habitats, species and ecological processes. MASH (OSPAR) and HELCOM HABITAT are currently working on common suggestions in this direction. Apparently, the Commission takes inputs by these bodies seriously into consideration since they have the marine expertise, data and studies that the Commission is short of. Also the Council expressly called for the full implementation of the Habitats Directive at sea, indicating the willingness of the member states to take action in this direction.[1862] The Commission is currently working on the compilation of the SCI List for the Boreal and Mediterranean bio-regions and the territories of the new member states. However, considering the delays of the past it will probably take some time before the listing process will be completed. In the short term, therefore, the Commission is determined to make use of the enforcement and financial (LIFE) mechanisms available under EC law to bring about full compliance with the Directive.[1863] It seems that the Commission will start revising the Annexes only after the SCI Lists are completed and the Natura 2000 network is implemented. Adjusting the Annexes, therefore, may be a time-consuming process and it does not seem to be enough to eliminate all the shortcomings of the Habitats Directive. A few member states (e.g., Germany and the UK) seem to support a more radical revision to make it more suitable to protect the marine environment, but so far they are still a large minority.

The future Marine Strategy Directive could provide a good opportunity to reinforce the obligation of the member states to establish and properly manage Natura

[1860] See: Report from the Commission (2003), supra n. 1851. R. Long and A. Grehan (2002), p.250, also refer to the difficulty in delimitating sites in offshore areas.

[1861] E.g., the Commission's Communication on the Marine Strategy (COM (2005) 504, Para. 6.2.1); Communication (COM (2002) 539, Action 2); the Sixth EAP, p. 30 and the Communication on "Fisheries Management and Nature Conservation in the Marine Environment" (COM (1999) 363), p. 11.

[1862] See, in particular, Conclusions of the ENV Council (March 2003), Para. 7 (d).

[1863] In October 2004 the Commission issued a Reasoned Opinion against Greece for its failure to comply with Case C-103, *Commission V. Hellenic Republic* (2002) and to establish and implement an effective system of strict protection for the sea turtle as requested under the Habitats Directive. This is the final step, giving Greece a two-month deadline before the Commission can ask the ECJ to impose penalties on Greece similar to the ones imposed earlier in the Chania waste case C-387/97 and the Spanish bathing water case C-287/01.

2000 sites in waters under their sovregnity and jurisdiction as a measure to achieve good environmental status in each marine region. However, the proposal, in its present form, does not explicitly identify the full implementation of Natura 2000 as a means to achieve this objective.[1864] The Preamble simply notes that the future directive should support the position taken by the Community in the context of the CBD and should contribute to the achievement of the objective of the COP 7 of establishing and maintaining ecologically representative national and regional systems of marine protected areas by 2012 and that the obligations of the member states to designate Natura 2000 sites in the marine environment will make an important contribution to this process.[1865]

8.8.3.3 The Management of Natura 2000 Marine Sites

As far as the duty of classification is concerned, the EC legislation does not raise any issue of consistency with international law. The Habitats (and Birds) Directive indeed implements and further specifies the general duties under Article 194(5) of the LOSC and Article 8 of the CBD and contributes to achieving the objectives of OSPAR Annex V, the Helsinki Convention and the 1995 SPA Protocol.

Conversely, the management of Natura 2000 marine sites might give rise to some legal issues under both EC law and the law of the sea. The Habitats Directive places the member states under a duty to manage the sites and to take all necessary measures to maintain habitats and species with a favourable conservation status. Member states may regulate all human activities and extractive uses that may possibly affect habitats and species within the sites in question, but they have to act in accordance with EC law. That means that within marine sites member states cannot unilaterally regulate matters under the EC's exclusive competence, such as, inter alia, the management and conservation of fisheries (with a few exceptions) and aspects of shipping which are covered by EC legislation. However, they are still able to regulate a wide range of activities that remain within their competence, such as sand and gravel extraction, oil and gas exploitation, energy production from wind and some aspects of shipping that are not totally harmonized at the EC level. In doing so, however, they have to act consistently with the LOSC.[1866] That means that beyond the territorial sea they cannot unilaterally regulate shipping activities as they need to act through the IMO.

8.8.3.4 Natura 2000 and the EC's Common Fishery Policy (CFP)

The CFP sets out the legal framework for the management and conservation of fisheries resources in waters under the jurisdiction of the member states, including EEZs and fishing zones.[1867] In this matter the member states have transferred their powers to the Community, which is exclusively competent both at the internal and

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[1864] As discussed in Chapter 3.5.2, the MSD (Article 12(2)) simply requires member states, in respect of each Marine Region, to develope programmes of measures in order to achieve good environmental status, "taking into account" measures required under relevant EC legislation and international agreements.

[1865] MSD, Preamble (Para 10).

[1866] However, the Habitats (and Birds) Directive, unlike the 1995 SPA Protocol, Annex V of the OSPAR and the Helsinki Convention, does not contain any explicit reference to the law of the sea.

[1867] The CFP is currently regulated in "basic" Regulation 2371/2002, which entered into to force in January 2003 amending Regulation 3760/92, and which sets out the framework for, inter alia, the conservation and management of resources (Article 1). The overall objective, however, is to maintain fish stocks in an exploitable state (Article 2(1)). For a general overview on the CFP and its relationship with environmental policy, see: N. Wollf (2002), pp. 144-94; and R.R. Churchill in A.H.A. Soons (ed.) (1990), pp 344-62.

international level. Therefore, they can no longer act unilaterally, but they may only take measures expressly provided for under the CFP and only in so far as they do not breach EC rules.[1868] However, it is still controversial whether member states may unilaterally adopt measures which are necessary to ensure that fishing activities within Natura 2000 sites are conducted consistently with the requirements of the Habitats Directive. It is largely agreed that there is still some room left for unilateral action outside the CFP with regard to measures related to environmental aspects of fishing that are not primarily directed at fisheries conservation and/or management.[1869] According to the Commission (DG FISH), however, these measures still fall within the CFP and whenever the protection of a Natura 2000 site requires the regulation of fishing, it is for the Community to take action. The ECJ, however, has never clarified whether DG FISH has exclusive competence to control fishing in Natura 2000 sites.

So far, the CFP has paid little attention to the environmental effects of fisheries. The Commission (DG ENV) has stressed the importance of integrating marine biodiversity concerns into fisheries management and urged a reform of the CFP to reduce the impact on non-target species, marine and coastal ecosystems.[1870] In the follow-up to the Sixth EAP, DG FISH appeared willing to better integrate environmental considerations into the fisheries decisions.[1871] It has recognized the existence of a direct link between Natura 2000 and the CFP and made it clear that disturbance by fishing "should not have an effect contrary to the aims of conservation of the habitats pursued by the Habitats directive".[1872] The revised CFP, however, does not contain any reference to the regulation of fisheries in Natura 2000 sites in keeping with the purpose of the Birds and Habitats Directives. Nevertheless, there are different types of measures available under the new CFP Regulation 2371/2002 that may serve this purpose. These include: "fisheries closures" (or boxes) which may be used to close, seasonally or permanently, certain areas to fishing activities (Article 4 (g)(*ii*)); special measures to limit the impact of fishing on marine ecosystems or non-target species such as the ban on bottom trawling to protect cold-water coral reefs in the Darwin Mounds[1873] and in waters around the Azores, Madeira and the Canary Islands[1874] (Article 4 (g)(iv)); emergency measures (Article 7);[1875] and multi-annual

[1868] E.g., Article 102 of the 1972 Accession Treaty.

[1869] E.g., conclusion of the International Experts Workshop on "Marine Protected Areas and Fisheries", Isle of Vilm, July 2004, available at: www.horta.uac.pt/intradop/noticias1/Proceedings/MPA_and_fisheries-workshop_proceedings_2004.pdf, p.62.

[1870] See, for instance, Sixth EAP, p. 36 and the EC's Biodiversity Strategy, Paras 17-20.

[1871] See the Communication of the Commission on "Fisheries Management and Nature Conservation in the Marine Environment": COM (1999) 363, 14.07.1999, and the Green Paper on the Future of the Common Fisheries Policy, COM (2001) 135.

[1872] E.g., Communication on the reform of the CFP (COM (2002) 181, p. 9, and the Community Action Plan to integrate environmental protection requirements into the CFP (COM (2002) 186, pp. 4-5).

[1873] The Darwin Mounds are located in the UK EEZ and is among the largest cold-water coral reefs in Europe. The area is a candidate for designation as a Natura 2000 site. In 2003 the Commission proposed a permanent ban on bottom trawling in the area (COM (2003) 519), explicitly referring to the Habitats Directive and OSPAR Annex V (Preamble). The proposal has been adopted by Council Regulation 602/2004.

[1874] On 3.02.2004 the Commission submitted a similar proposal to the Council making reference to the Habitats Directive and OSPAR's Annex V (COM (2004) 58). The ban has been adopted by the Council on 22.09.2005.

[1875] Emergency measures are temporary and may be taken by the Commission on its own initiative or at request of a member state. In June 2003, for instance, upon a request by the UK, DG FISH, after consulting DG ENV, adopted a 6-month ban on bottom trawling in the area (Commission Regulation 1475/2003 (OJ L211)). The regulation makes explicit reference to the Habitats Directive.

recovery or management plans (Articles 5 and 6).[1876] All these measures, however, have to be proposed by the Commission (DG FISH) and agreed upon by the Council, but both institutions have no legal obligation to do so. Traditionally, DG FISH and most member states in the Council (e.g., Spain, Portugal, France, Ireland and lately also Poland) have not been very keen to incorporate environmental considerations into fisheries management decisions.[1877] The new CFP Regulation 2371/2002 requires the Community to apply the precautionary approach in taking measures designed to protect and conserve living aquatic resources; to provide for their sustainable exploitation; to minimize the impact of fishing activities on marine ecosystems; and to aim at the progressive implementation of an ecosystem-based approach to fisheries management (Article 2.1). These broad obligations, however, still leave the Council with ample discretion as to "how" to integrate environmental concerns into the CFP.

Under the new CFP, moreover, the member states have retained some limited capacity to act unilaterally. They may introduce non-discriminatory measures to minimize the effect of fishing on the conservation of marine ecosystems within the territorial sea as long as the Community has not taken similar action (Article 9); temporary emergency measures to conserve resources in waters under their sovereignty and jurisdiction (up to 200 nm) as long as the threat is "serious" and "unforeseen" (Article 8); and measures solely applicable to fishing vessels flying their flag (Article 10).

In principle, therefore, the CFP offers several opportunities to adopt measures to protect Natura 2000 sites from the impact of fishing activities. In practice, the availability and effectiveness of these measures will depend on the willingness of the Commission and member states to act. However, it might be argued that whenever fisheries activities affect the favourable conservation status of marine habitats and species within a Natura 2000 site, member states are required under Article 6(2) of the Habitats Directive to take all necessary measures available under the CFP to protect the site. The current work on the development of an integrated EC ocean policy, moreover, may improve the situation imposing more stringent obligations for the Community to regulate the environmental impact of fishing, especially within Natura 2000 sites. However, as emerged during the drafting of the MSD, both DG FISH and the member states are not willing to discuss fisheries issues outside the CFP.[1878]

8.8.4 The Community's Action at the International Level

8.8.4.1 The Division of External Competences between the Community and the Member States in Marine Biodiversity and MPA Matters

The Community's competence concerning the preservation of marine habitats and species other than commercial stocks, including the establishment of MPAs is shared with the member states. This is also confirmed in the Community Declaration upon the formal confirmation of the LOSC, which lists the Habitats Directive among the

[1876] These plans intend to keep stocks within safe limits, which may include targets relating to other living resources and the maintenance or improvement of the conservation status of the marine ecosystem (Articles 5(2) and 6(2)).

[1877] So far, DG FISH has appeared unwilling to introduce proposals which might affect the interests of the fishing industry and fishing member states. In the Darwin Mounds case, for instance, there is little fishing in the area (see: COM (2003)519, p. 2). In the EC, fishing interests are particularly strong and measures which are too restrictive would hardly reach the necessary number of votes in the Council. Among the member states Germany, Sweden and, to a lesser extent, the UK and the Netherlands are the most likely to accept the introduction of environmental measures restricting fishing.

[1878] The proposed MSD indeed makes it clear that measures regulating fisheries management can only be taken in the context of the CFP and are not addressed in the Directive (Preamble, Para. 28).

Community acts on matters under shared competence regulated under the LOSC.[1879] As already discussed the Community's Declaration recognizes the evolutionary nature of the Community's external competence on the basis of the ERTA doctrine developed by the Court.[1880] However, the Birds and Habitats Directives do not seem to trigger any exclusive external competence on the part of the Community according to the pre-emptive criteria discussed in Chapter 4.2. First of all, both Directives are based on Article 175, they set out minimum standards and do not intend to totally harmonize the subject-matter. The adoption by member states of stricter protective measures at the international level is not likely to affect the objective of the two Directives and does not affect the uniform and consistent application of EC rules and the proper functioning of the system which they establish. Secondly, the CBD, other relevant MEAs and the regional seas conventions contain minimum standards and do not preclude contracting Parties, including the Community, from increasing the level of protection in waters under their sovereignty or jurisdiction. By agreeing on higher standards at the international level, the member states do not affect the EC minimum rules and do not preclude the further development of stricter EC measures. Therefore, the member states' concurrent action within the framework of the international and regional conventions cannot be pre-empted. However, they are under a general duty under Article 10 EC to cooperate with the Commission. Moreover, when fisheries-related matters are under consideration, they cannot take decisions, but have to refer those matters to the Community, which is exclusively competent to act.

Unlike in other environmental areas, such as vessel-source pollution or ocean dumping, the member states and the Community have always been strongly united and coordinated in the global debate on marine biodiversity and MPAs. These issues, except for aspects related to fisheries management, do not generally give rise to problems of competence. The interests of the member states in these matters are not as strong as in other fields, such as shipping or fisheries, and they had no problem in accepting the Community's participation in the international negotiations.

8.8.4.2 The Community's Participation in the UN Discussions on the Establishment of a Coherent Network of MPAs

The EU actively participated in the WSSD and its preparatory work (especially in PrepCom IV) with a rather ambitious agenda.[1881] The coordination started quite early in Brussels within the framework of the General Affairs and External Relations Council (Development Council), where the EU Statements were agreed upon. Given the variety of issues on the agenda of the Summit, officials from different ministries (*inter alia*, foreign affairs and the environment) of the 15 member states participated in the coordination. Likewise different DGs (*inter alia*, DG RELEX, DG Development and DG FISH) were involved in the drafting of the EU Statements under the coordination of DG ENV. Initially, the Commission was of the opinion that the ocean and seas, and marine biodiversity should not be on the agenda, and that the Summit should focus exclusively on those natural resources issues that are of particular importance to economic development (including fish stocks) and are not effectively

[1879] The Community's Declarations upon signature and formal confirmation, however, do not list the Birds Directive, probably because it was not considered to be a matter regulated under the LOSC.
[1880] The ERTA doctrine and the pre-emptive effect of EC law are discussed in Chapter 4.2.2.
[1881] At the WSSD, like in UNGA in general, it was the EU (meaning the EC and the 15 member states) as a political entity which took action. See: Development Council Conclusions, 30.05.2002, available at: http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/gena/70867.pdf. See also ENB 22/51, available at: http://www.iisd.ca/download/pdf/enb2251e.pdf, and http://europa.eu.int/comm/environment/wssd/documents/agenda_en.pdf.

dealt with by other intergovernmental processes.[1882] Eventually, halting and reversing by 2015 the current loss of natural resources and biodiversity, including marine biodiversity, and establishing coastal and marine protected areas were included among the EU priorities for the Summit, although not as key targets.[1883]

Day-by-day coordination continued on the spot in Johannesburg outside the meeting sessions under the chairmanship of the Presidency and with the assistance of the Commission. The EU participated in the Summit with an extended delegation composed of the former, present and next Presidencies; and representatives from the Secretariat of the Council and the Commission (*inter alia*, DG ENV, DG RELEX, DG DG DEV, and DG FISH) (the *Troika* format). Members of the EP (MEPs) were invited to participate as observers in the EU delegation, but without taking part directly in the negotiations. Although MEPs were regularly consulted and briefed by the Commission, they questioned the limited involvement of the EP in the discussions.[1884]

In Johannesburg, as in all political forums (especially within the UN framework), it was for the (Danish) Presidency to represent and speak on behalf of the EU. The Commission generally had an assisting role except concerning few matters under the EC's exclusive competence. The EC institutions and the 15 member states appeared to be particularly united during the negotiations.[1885] They succeeded in advancing the EU's priorities and promoting ambitious and time-framed targets towards reversing the trend of biodiversity loss, including the establishment of a MPA network by 2012,[1886] restoring stocks by 2015 and combating illegal and unregulated fisheries.[1887]

The Community has attached great importance to the full achievement of the WSSD biodiversity targets and in the follow-up to the Summit, it has constructively participated in the relevant debate within the UN.[1888] Since the 4th ICP (June 2003), the Community has been particularly active in the global discussions on the protection of marine biodiversity within and beyond the limits of national jurisdiction, including the establishment and management of HSMPAs.[1889] The EU co-ordination for the 4th ICP started quite late (on 22 May 2003) within the framework of the COMAR. Under the coordination of DG RELEX, DG ENV, after consulting DG FISH and other DGs concerned, drafted the EU Statement on "protection of vulnerable marine ecosystems" which was one of the main topics of the meeting. This draft was agreed upon within

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[1882] Communication from the Commission, "Ten years after Rio: Preparing for the World Summit on Sustainable Development in 2002", COM (2001) 53, p. 16.

[1883] Development Council Conclusions (Para. 4.5). However, there is no clear time frame and no reference to a coherent network of MPAs. Restoring stocks to a sustainable level by 2015 was another EU priority. The EU Presidency Statements and Speeches in Johannesburg are available at: http://europa-eu-un.org/articles/articleslist_s11_en.htm

[1884] On the role of the EP in WSSD, see the Speech by Commissioner Nielson on post-WSSD at: http://europa-eu-un.org/articles/en/article_1630_en.htm.

[1885] General Secretariat of the Council, Information for the Press, 4.09.2002. See also ENB 22/51.

[1886] However, the 2012 target does not seem to be a key EU priority within the WSSD framework and had not been included within the Community strategy in preparation for the 2005 UN Summit (COM (2005) 259, 15.06.2005). Neither the EU Presidency nor the Commission referred to the 2012 target in their comments on the outcome of the WSSD, see, for instance, EU Presidency Statement (16.9.2002) and Commissioner Wallstrom's Speech on the results of WSSD (11.09.2002).

[1887] E.g., Speech by Commissioner Fisher on the WSSD agreement to prevent overfishing (29.08.2002).

[1888] E.g., EU Presidency Statement to the 5th ICP (8.06.2004); EU Position Paper to the UNGA Second Committee (Economic and Financial Affairs, Environment), 16.10.2003, item 94(c); EU Presidency Statement to the UNGA Second Committee (Special Session on the Law of the Sea), 9.04.2002; and EU Presidency Statement to the UNGA Sixth Committee (Legal Affairs), 11.04.2002.

[1889] See: EU Presidency Statement to the 4th ICP (4.06.2003). Reportedly, negotiations were difficult due to the strong opposition of Norway which questioned the very need for establishing HSMPAs.

the COMAR and subsequently revised in New York, including a reference to the forthcoming European Marine Strategy, but without making any reference to the target of establishing a coherent network of MPAs. Day-by-day coordination of marine biodiversity issues continued on the spot under the chairmanship of the Hellenic Presidency with the assistance of the Commission (DG RELEX and DG ENV). Although fisheries-related matters (such as bottom trawling) were on the agenda, representatives from DG FISH could not attend the meetings mostly due to a lack of human resources. However, they were actively involved in the drafting of the EU Statement.

At UNGA 58, in October 2003, the EU Presidency highlighted the importance of MPAs as an instrument to protect marine biodiversity. In addition, it pointed to PSSAs and other regional instruments (e.g. OSPAR MPAs and SPAMIs) as examples to be used, in accordance with the LOSC, for the establishment of HSMPAs in other parts of the world.[1890]

HSMPAs have been one of the main issues on the agenda of the 5th ICP (June 2004), which focused on "new sustainable uses of the oceans".[1891] This time the EU coordination within the framework of the COMAR started earlier, in February 2004, and was rather effective. The Irish Presidency circulated a draft statement which was discussed in the COMAR and then transmitted to the WPIEI and to the External Fisheries Group of the Council to finalize the EU Statement. In the COMAR, DG ENV put forward the idea of developing a LOSC Implementing Agreement on the conservation of marine biodiversity in the high seas along the lines of the Fish Stock Agreement. This idea met with the general support of the member states and the Irish Presidency. At the meeting in New York the Presidency announced that "in principle" the EU would support the development of an instrument within the framework of the LOSC to protect and manage marine biodiversity beyond the limits of national jurisdiction, including the establishment and regulation of MPAs where there is a scientific case for establishing these areas.[1892] The common position was consistently upheld by all member states, but met with firm opposition from the G77 countries.[1893] On the other hand, the Community did not appear very united with regard to other critical issues, such as the moratorium on bottom trawling in the high seas proposed by NGOs. Due to the strong opposition of Spain, the Irish Presidency could not support the proposal but favoured the use of the same language agreed upon at the COP-7 of the CBD.[1894] Representatives from DG FISH did not participate at the meetings, but were actively involved in the drafting process.

High seas biodiversity issues were brought back on the agenda of the 6th ICP (June 2005), which focused, *inter alia*, on "fisheries and their contributions to sustainable development".[1895] The EU coordination took place mainly within the

[1890] See also UNGA 58, Official records, A/58/PV.63 (24.1.2003), pp. 12-14.

[1891] For a Report of the 5th ICP negotiations see: ENB 25/12 (14.06.2006), available at: http://www.iisd.ca/download/pdf/enb2512e.pdf.

[1892] EU Presidency Statement to the 5th ICP (4.06.2004). Outside the plenary, in the discussion panel on new sustainable uses, Italy suggested drafting a legal instrument on HSMPAs. The idea was supported by France and Greece, which stressed the need to balance the protection of biodiversity and freedom of the high seas. Portugal pointed to the work on HSMPAs within the framework of OSPAR (ENB, 25/12).

[1893] The G77 countries opposed any regime which does not clearly set up a mechanism for sharing benefits from the exploitation of genetic resources of the seabed (ENB, 25/12).

[1894] Spain questioned the exclusive focus of the moratorium on the high seas since the majority of fishing activities are concentrated in the EEZ. However, in the plenary, it supported temporary fishing bans in specific areas of the high seas. Outside the plenary, Italy supported the moratorium.

[1895] For a Report of the 6th ICP negotiations, see: ENB 25/18 (13.06.2005), available at: http://www.iisd.ca/download/pdf/enb2518e.pdf.

COMAR, but the Dutch Presidency took supplementary steps to get all interested groups of the Council (the External Fisheries Group and WPIEI) involved in the drafting of the EU Statement. Starting from January 2005, DG FISH is responsible for coordinating the work of the Commission within the COMAR. Reportedly, DG FISH supported the idea put forward by DG ENV to promote the development of a new international instrument (whether a LOSC Implementation Agreement or a new Protocol to the CBD) which also addresses the designation and management of HSMPAs. Reportedly, EU coordination on this matter did not give rise to particular problems and there was a strong uniformity of views among the member states. At the meeting in New York, the Dutch Presidency reiterated the EU's support for an Implementation Agreement within the framework of the LOSC.[1896] Once again, EU coordination was particularly difficult with regard to the control of destructive fishing practices and due to the resistance of some member states (e.g., Spain) the EU opposed a temporary moratorium on bottom trawling.[1897] However, the EU was united in supporting the establishment of criteria on the objectives and management of MPAs for fisheries and urged close coordination and cooperation with relevant international organizations including the CBD. On these matters it was for the Commission (DG FISH) to speak on behalf of the Community. This is quite exceptional within the UNGA framework where the EC merely has observer status and normally the Commission plays a secondary role in the negotiations.[1898] However, since issues under the EC's exclusive competence (sustainable fisheries) were on the agenda, the Presidency and the chairman of the ICP agreed that DG FISH could intervene on behalf of the Community. This, however, was a pragmatic and informal solution. Since nobody objected, DG FISH sat next to the Presidency and took the floor whenever EC issues were on the table. Reportedly, during the negotiation of the 2005 UNGA Resolution, the Commission tried to formalize this formula, but did not succeed. Still, this may represent an important precedent to strengthen the future role of the Commission in the ICP.

8.8.4.3 The Community's Participation in the Work on MPAs within the CBD and other MEAs

The Community participated in the Preparatory Commission for the negotiation of the CBD as a full member.[1899] Since the beginning, the Commission, acting on behalf of the Community on the basis of a mandate of the Council, has stressed the importance of *in situ* conservation and has advanced the creation of a coherent network of protected areas along the lines of the Natura 2000 network.[1900] Like the LOSC, also the CBD required the Community to make a Declaration at the time of accession indicating those matters within the Community's competence (Article 34(4)). The Declaration includes a cross-reference, *inter alia,* to the Habitats and Birds

[1896] EU Presidency Statement to the 6th ICP (9/06/2005). The Netherlands spoke on behalf of Luxembourg, which had the Presidency, but lacked the necessary expertise to deal with biodiversity issues. Italy, moreover, reiterated its call for a new international instrument on HSMPAs.
[1897] The EC recommended that the Ad Hoc Open Ended Working Group set out by UNGA Resolution 59/24 should examine options for the management of high seas fisheries (ENB, 25/18).
[1898] The ICP works according to the rules and procedures of subsidiary bodies of UNGA.
[1899] On the EC's participation in the CBD negotiations see: P.W. Birnie in: M. Bowman and C. Redgwell (eds) (1996), p. 215. Reports of negotiations are available in ENB, Vol. 09, at: www.iisd.ca/vol09/.
[1900] See: Council Doc. 7486/91 ENV, 18 July 1991.

Directives.[1901] The Commission and the member states were not entirely satisfied with the outcome of the negotiations on protected areas and at the time of the signature of the CBD committed themselves to start, as soon as possible, further work to strengthen the relevant provisions of the Convention. As a consequence, in the past two decades, the Community has driven the CBD work on the protection of marine biodiversity including the creation of a coherent network of marine and coastal protected areas within and beyond the limits of national jurisdiction.

The Community coordination within the CBD is a consolidated and formalized practice and the EC normally speaks with a single voice.[1902] The coordination starts with the preparation of so-called position papers, which are generally drafted by the Commission in collaboration with the current and next Presidency or by the Precidency itself depending on the subject matter and their respective competence. Before going to the Council the position paper drafted by the Commission must go through the Commission Inter-Service Consultation.[1903] In particular, DG ENV submits a position to the Inter-service Group on Biodiversity, which is formed by 25 representatives from different DGs concerned with biodiversity issues. The position paper, therefore, always reflects the position of the Commission as a whole. Once finalized, the position papers are circulated to the member states and then discussed within the Biodiversity Group of the Council's Working Party on International Environmental Issues (WPIEI) where the Commission and all member states work closely together to refine the common positions. Discussions within the WPIEI may last for several months and particularly controversial issues may eventually go to the COREPER. In preparation for the COPs of the CBD a common practice is to have common positions adopted by (Environmental) Council conclusions fixing the political objectives which the EU wants to achieve in the negotiations.[1904] It should be noted that this practice has no legal basis in the EC Treaty, but has developed over time. Council conclusions are normally unanimous. However, since biodiversity and environmental issues in general are subject to shared competence, QMV, not unanimity, would apply should a formal vote be requested by a member state.[1905]

[1901] The EC Declaration makes it clear that the Community has competence in relation to different matters covered by the Convention and has adopted several legal instruments, both as part of its environmental policy and within the framework of other sectoral policies. These include Council Decision 82/72/EEC on the conclusion of the Bern Convention; Council Decision 82/461/EEC on the conclusion of the CMS; Council Regulation 3626/82/EEC on the implementation of CITES within the Community; the Habitats and Birds Directives and the EIA Directive; Council Regulation 2078/92/EEC on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside (OJ L 215, 30.07.1992); Council Decision 89/625/EEC on a European Programme on Science and Technology for Environment Protection (STEP) (OJ L 359, 8.12.1989); Council Regulation 3760/92/EEC establishing a Community system for fisheries and aquaculture (OJ L 389, 31.12.1992); Council Directive 90/219/EEC on the contained use of genetically modified micro-organisms (OJ L 117, 8.05.1990); Council Directive 90/220/EEC on the deliberate release into the environment of genetically modified organisms (OJ L 117, 8.05.1990); and Council Regulation 1973/92/EEC establishing LIFE.

[1902] It is worth mentioning that within the CBD it is common practice to refer to the EU. Information about the coordination procedure is based on interviews with representatives of DG ENV (Unit E2) who normally attend the CBD meetings (Mr. C. Berrozpe, Mr. N. Notaro and Mr. S. Leiner). The author remains exclusively responsible for the opinions expressed in this section.

[1903] On the Inter-service Consultation see: European Commission, "Putting MEA/WTO governance into practice: the EC experience in the negotiation and implementation of MEAs, 27.06.2005, pp. 3-5, available at: http://trade-info.cec.eu.int/doclib/docs/2005/august/tradoc_124258.pdf.

[1904] E.g., the ENV Council Conclusions on the CBD COP- VII (December 2003, p. 16-8).

[1905] Reportedly, the issue was brought to the attention of Council during the discussions on the Commission mandate to negotiate the EC's accession to the Cartagena Protocol and the Arhus

In preparation for CBD meetings, moreover, there is always an intensive e-mail exchange between the Commission and the member states and between the different DGs involved. Reportedly, there is strong coordination between DG ENV and DG FISH on marine biodiversity issues discussed within the CBD. The EC coordination continues on the spot under the chairmanship of the Presidency and in close collaboration with the Commission. The relevant meetings take place outside the CBD sessions or whenever new issues come up and there is a need to coordinate positions. Once adopted, common positions are legally binding for the member states. Occasionally, they still express their views directly, but they normally align with the EC positions, especially in plenary.

Common positions are more often presented by the Presidency, but the Commission may speak on behalf of the Community when issues falling within the EC's exclusive or predominant competence are on the agenda (e.g., agriculture, fisheries or trade-related matters). However, this practice has not been consistently followed within the CBD.[1906] Sometimes there are informal agreements between the Commission and the Presidency on who will present the common positions, whether in plenary or in smaller negotiation groups. There is close cooperation between the EC institutions in this forum and normally the Commission is the strongest ally of the Presidency. The EP is kept informed by the Commission, but its role in the CBD remains marginal. Normally, the Commission attends all major CBD meetings in its institutional role of the representative of the Community unless there is a lack of human or financial resources. In this case the Presidency participates alone with the member states that are able to attend.

This formal EC coordination takes place in preparation for COPs or other meetings which have strong political weight (e.g., open-ended Groups or WG on protected areas). Generally, there is no formal coordination for *ad hoc* technical experts groups discussing only technical issues and where experts intervene on their personal capacity and do not formally represent Parties. The coordination procedure is more complicated with regard to the adoption of amendments or new Protocols. In this case the Commission requests a formal negotiating mandate from the Council and usually holds external consultations to make sure that all interested stakeholders are involved in the development of the common positions.[1907]

The Community spoke with a single voice in all relevant COPs discussing coastal and marine biodiversity and MPA issues, such as COP-2 (1995) and COP-4 (1998).[1908] EC coordination was particularly intense in preparation for the COP 7 (2004). During the negotiations on Decision VII/5 concerning marine and coastal biodiversity the Community stressed the urgent need for international cooperation to protect marine biodiversity beyond the limits of national jurisdiction, including the

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Convention. Some member states proposed that there should be Council "conclusions" instead of a formal "mandate" (see Chapter 4.3.2.2 of this study, in particular at n.575).

[1906] While member states still speak individually in matters under their exclusive competence (e.g., national experiences in the various fields)

[1907] Prior to the COP-2, for instance, the Council provided the Commission with a mandate for the negotiation of the Biosafety Protocol. This mandate was revised several times during the negotiations.

[1908] At the COP-2 the Spanish Presidency made a statement on behalf on the EU in addition to Italy, the Netherlands and Sweden (Report of COP-2, UNEP/CBD/COP/2/19, Para. 92). At the COP-4 the UK Presidency made a statement on behalf on the EU in addition to Finland, Italy, Portugal, Spain and Sweden (Report of COP-2; UNEP/CBD/COP/4/27, paras 85-92). All available at: www.biodiv.org/convention/cops.asp#.

establishment of MPAs acting consistently with the LOSC.[1909] As within the ICPs, coordination has been more difficult with regard to the control of destructive fishing practices in the high seas.[1910] Due to the resistance of Spain and Greece, the Community could not agree upon the NGOs' proposal for a moratorium on bottom trawling in the high seas but supported the possibility of considering an interim prohibition in these areas, on a case-by-case basis, whenever there is attested damage to marine biodiversity.

The Community was particularly active and played a major role at the first meeting of the open-ended working group on protected areas (WGPA-I), held in Montecatini in June 2005. There was no formal coordination in preparing for the meeting, but the EC decided to follow the same position taken at the 6th ICP. DG ENV was present, while representatives from DG FISH did not attend the meetings, but were directly involved in the preparatory work. The Dutch Presidency, on behalf of the EU, Bulgaria and Romania, proposed the development of an implementing agreement under the LOSC addressing, *inter alia*, the conservation of marine species and ecosystems beyond national jurisdiction, the establishment of a global MPA network and the prohibition of destructive fishing practices.[1911] The Community, moreover, called for the establishment, by 2008, of some MPAs in the high seas acting within the framework of regional seas conventions (such as OSPAR or the BARCON SPA Protocol) or RFMOs. This proposal, however, was bracketed due to a lack of consensus. Eventually, at the COP-8 (March 2006), the Community succeeded to include in Decision VIII/21 an indirect reference to a LOSC Implementing Agreement for the protection of marine biodiversity, including the establishment of MPAs in areas beyond national jurisdiction, as a possible follow-up to the February 2006 meeting of the UN Ad Hoc Working Group on Marine Biodiversity.

The same coordination mechanism for the CBD may also apply in the preparation for the meetings of the other MEAs discussing MPAs and marine biodiversity issues, such as Ramsar or the CMS. However, this happens very rarely. Traditionally, indeed, the Commission preferred to concentrate its efforts and scarce human resources on the CBD, leaving to the Presidency the task of co-ordinating as necessary the member states within those MEAs. In the aftermath of the WSSD Summit, however, the situation has partially changed and the Community has reinforced its participation in these forums, which are increasingly involved in the achievement of the WSSD biodiversity targets. However, Community coordination has so far been much looser within these frameworks.

The Community is not a party to the Ramsar Convention, which reserves membership exclusively to States, but it merely has observer status. Since 1980 representatives from the Commission (DG ENV) and occasionally from the Secretariat of the Council and the EP attend the meetings.[1912] All 25 member states are contracting Parties and normally participate individually in the discussion. At the COP-8 (in 2002), the Irish Presidency spoke on behalf of the EU on several fisheries-related matters and

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[1909] At the COP-7, the Irish Presidency made several statements on marine biodiversity and MPAs on behalf on the EU, the acceding countries and Bulgaria and Romania as candidate countries. Member states made individual statements aligning themselves with the EU positions. See Report of COP-2, UNEP/CBD/COP/7/21 (Paras 168-88).

[1910] Decision VII/5, Paras 61-62.

[1911] The EU wanted to see a reference to such an implementing agreement in the final document of the WGPA. However, due to the strong resistance of some states (i.e., Norway, Iceland and Japan), the text remains in brackets, see: ENB 9/326 (PAWG-1) at: www.iisd.ca/biodiv/wgpa/.

[1912] See Official Records of the Ramsar COPs, at: www.ramsar.org/index_key_docs.htm#conf. Starting from 1980 the Commission always attended the meetings except in COP 2 (1984) and COP 3 (1987).

other issues within the EC's exclusive competence which were on the agenda.[1913] However, there was no formal coordination in preparation for this meeting. Also at the COP-9 (in 2005), there were some common statements and informal coordination, but exclusively in relation to fresh water.

Although the Community is a party to the CMS alongside all the member states and may participate as a full member,[1914] it has never been particularly active within this framework. Member states have been traditionally freeer to act in the CMS compared to the CBD and the EC does not always speak with one voice. Since COP 6, in 1999, however, matters of EC interest, including fisheries-related issues, are increasingly on the CMS agenda and the Community has increased its participation and coordination in this forum (e.g., COP 7 (2002) and COP 8 (2005)).[1915]

8.8.4.4 The Community's Participation in the IMO's Work on PSSAs

The Community coordination in preparation for IMO meetings has been exhaustively discussed in Chapter 6.9.2 and will not be repeated here.[1916] In the past few years this coordination mechanism has been formalized and strengthened to a great extent along the lines of the CBD. At present when issues under the EC's exclusive competence are on the agenda of IMO (e.g., double-hull standards) the common positions are adopted by the Council by QMV and are legally binding for the member states. This is a major difference compared to the EC coordination for the CBD where common positions are endorsed in the Council's (unanimous) conclusions. So far, when matters subject to shared competence have been on the IMO table, such as PSSA issues, the Commission and the member states have had to do their best to achieve coordinated positions, which, however, are not legally binding. The (Transport) Council is in the process of strengthening the coordination mechanism and it is expected that the future common positions on matters subject to shared competence (e.g., PSSA issues) will be taken within the Council by unanimity, as occurs in the framework of the CBD. These positions will be legally binding and it will be impossible for member states to deviate from them. In practice, however, there has always been a strong uniformity of views among member states on PSSA issues.

In the wake of the *Prestige* disaster the Community and the member states highlighted the PSSA regime as an effective instrument to enhance the protection of vulnerable sea areas against the threats posed by international shipping while remaining within the framework of the LOSC and safeguarding the freedom of navigation granted by the Convention.[1917] Soon after the disaster, the EU Council, supported by the Commission and the EP, urged the member states to identify common sensitive areas particularly vulnerable to international shipping and to formulate coordinated proposals for their designation as PSSAs by IMO.[1918] In addition, the EC

[1913] Reports of the Ramsar COPs are available at: www.iisd.ca/vol17/.

[1914] See Council Decision (O.J. L210, 19.07.1982),

[1915] At the COP 8 (2005), for instance, the EU (next to Denmark, on behalf of the Faroe Islands, and Portugal on behalf of the Azores), made a reservation to the listing of the Basking shark in Appendix I. The Presidency, on behalf of the EC, said it had to make a reservation until EC legislation was in place to ensure compliance with the Convention time frame. The Report of CMS COPs are available in: ENB Vol 18, at: www.iisd.ca/vol18/ .

[1916] The following section builds on V. Frank (2005), pp. 30-8.

[1917] E.g., the Statement of the EU Presidency, Mr. Nesi, on behalf of the EU at the 58th UN General Assembly, 63rd plenary meeting, 24 November 2003, New York (A/58/PV.63, at 13), available at: europa-eu-un.org/articleslist.asp?section=11.

[1918] "Prestige"- Council Conclusions (Para. 10) and the December 2002 ENV Council (Para. 12); EP Sterckx Report (Para. 25) and the Sterckx Resolution (paras. 16 and 42).

institutions urged the full implementation of the Natura 2000 network in areas particularly vulnerable to shipping, including the EEZ, and called for a reinforced link between PSSAs under the IMO and Natura 2000 sites.[1919]

Following the Council recommendations, in April 2003, six EC member states submitted a proposal to the MEPC 49 for the designation of a PSSA in the Western European Atlantic (WE PSSA) which includes certain parts of their EEZs (and equivalent zones) and the English Channel.[1920] Similarly, in December 2003, the EC Baltic States submitted a proposal to be considered during MEPC 51 (in March 2004) for the designation of the Baltic Sea area, except for Russian waters, as a PSSA in the same vein as the WE PSSA.[1921] Given the firm opposition of the Russian Federation, the Baltic States decided to proceed outside the framework of HELCOM and this has impeded the formal involvement of the Community in the process.[1922] Although the WE and Baltic PSSA proposals cannot strictly be considered as Community initiatives, they are characterized by the strong coordinated action of member states and have been firmly supported by the EC institutions.[1923] Both proposals, moreover, include Natura 2000 sites thereby making an important link between the two regimes. The Commission, therefore, has played an important coordinating role and its work has been crucial in ensuring the support of the other member states in the IMO. PSSA issues have been regularly on the agenda of the EC coordination meetings since MEPC 49. Reportedly, except for the initial opposition of Greece against the WE PSSA, there have been no major conflicts among the member states on PSSA matters and they have been generally united in supporting the commonly agreed positions in London.[1924] The Community appeared particularly united at the MEPC 53 (July 2005), where the revision of the PSSA guidelines and the formal designation of the Baltic PSSA and the Canary Islands PSSA were on the agenda. The Community has supported the possibility of clarifying and strengthening, if appropriate, the guidelines as long as the revision did not affect existing or proposed PSSAs. There has been EC coordination in Brussels and on the spot in London on this matter, but no EU Statements. At the meeting member states spoke individually but they all expressed the same view. Representatives from DG TREN were present at the plenary, but they did not take part in the Technical Group established to revise the guidelines. Very few member states attended the Group, mainly due to a lack of human resources.[1925] However, they were rather active at the plenary. In addition, all the 25 member states have been particularly

[1919] COM (2002) 539 on the Marine Strategy, p. 21; December 2002 ENV Council (Para. 12) and EP Sterckx Report (paras. 88 and 89).

[1920] IMO doc. MEPC 49/8/1, 11.04.2003, submitted by Belgium, France, Ireland, Portugal, Spain and the UK. For a full discussion see: V. Frank (2005), pp. 30-32.

[1921] IMO doc. MEPC 51/8/1, submitted by Denmark, Estonia, Germany, Finland, Latvia, Lithuania, Poland and Sweden, 19.12.2003.

[1922] It is worth reminding that the EC is not a member of the IMO. However, since the eight proponents were EU and acceding countries, the Commission has been able to exercise a coordinating role.

[1923] See, e.g., COM (2003) 105, at (2.2.3.3); March 2003 Transport Council; March 2003 ENV Council, at (17); December 2002 ENV Council, at (31), and EU Statement No. 2 for the 4th ICP. The Irish Presidency has renewed its support for the WE PSSA and has envisaged the idea of new PSSAs to be identified in the Mediterranean and the Baltic, see the Speech by Minister D. Ahern before the EP-MARE, 18.02.2004, at: www.europarl.eu.int/comparl/tempcom/mare/default_en.htm.

[1924] Reportedly, during the EC coordination meeting in preparation for the MEPC 49, some member states, such as the Netherlands and Germany, did not fully agree with the WE PSSA, but they still supported the proposal in the IMO. Conversely, Greece expressed its reservation against the WE PSSA and made a unilateral statement at the MEPC 49.

[1925] Only Denmark, France, Finland, Greece, Ireland, Italy, Spain, Sweden and the UK attended the Group. Several Working Groups were running in parallel with the plenary and especially for small delegations it was impossible to participate in all the discussions.

united in supporting the designation of the Baltic Sea as a PSSA which until the very last minute was contested by the Russian Federation. Reportedly, some member states are in the process of preparing proposals for new PSSAs in the Mediterranean.[1926] It is likely, therefore, that PSSA issues will remain on the table of the EC coordination for the next MEPC meetings and the Community will continue to be actively involved in the PSSA work within IMO.

8.8.4.5 The Community's Participation in the Regional Work on MPAs

Unlike at the global level, the Community is not actively involved in the work on MPAs carried out within the regional seas conventions. The Commission (DG ENV) participates in the relevant discussions but generally plays a marginal role. As in the field of maritime transport and ocean dumping, the Commission does not seem to be particularly interested in strengthening the regional regimes on MPAs; its priority remains the full implementation of Natura 2000 under the Habitats Directive. Most of the Community's action in the regional forums, therefore, is directed toward promoting consistency between the regional and EC rules and safeguarding the EC's exclusive competence. In particular, the Commission makes sure that EC member states do not discuss fisheries issues and do not undertake commitments with non-EC countries without a specific mandate. Representatives from DG FISH do not normally participate in the relevant meetings, but they are regularly consulted by DG ENV whenever fisheries issues are on the agendas of the regional bodies.

Due to resource constraints, the Commission cannot attend all the relevant meetings, but generally gives priority to the bodies where decisions are taken. Besides, the EC delegation, unlike those of the EC member states, is normally formed by a single representative from DG ENV who has to deal with all items under discussion. Although the regional secretariats normally circulate the relevant documents a couple of months before the meetings, it is very difficult for the Commission delegate to be fully prepared concerning all the items on the agenda and he/she often allows member states to play the leading role.

Member states, for their part, have been traditionally keen to preserve their individual participation in the regional bodies and have always opposed an excessive involvement of the Community. The need for regional differentiation is particularly strong in relation to marine biodiversity and regional measures specifically tailored to the characteristics of the area are considered to be more effective in protecting regional habitats, species and ecosystems than EC-wide harmonized standards. The most environmentally minded member states, moreover, are afraid that the Community's participation in the regional decision-making could result in lower protective standards and importing into the regional sea in question certain problems that do not exist there and which are proper of another sea.[1927]

As already extensively discussed in the previous chapters, there is no EC coordination whatsoever in the preparation or during to the regional meetings discussing MPAs and biodiversity issues. Regional conventions intend to set out a framework for intergovernmental cooperation among contracting Parties on the same level and have traditionally opposed any kind of bloc-forming and co-ordination.

[1926] Reportedly, Italy and France are preparing a PSSA proposal for the Bonifacio Strait; Italy, Croatia and Slovenia are discussing the possibility of a new PSSA in the North East Adriatic; while Spain is considering a PSSA in the Balearic Islands.

[1927] Reportedly, this happened within the framework of ACCOBAMS where the Commission pushed for the introduction of a whaling exception because of the insistence of Denmark. The latter has strong whaling interests in the Faroe Islands but there is no whaling in the Mediterranean Sea.

The Community is a party to Annex V of the OSPAR Convention together with all the EC OSPAR contracting Parties.[1928] A representative from DG ENV normally attends the meetings of the BDC (and OSPARCOM) on behalf of the EC as a full member, but does not participate in the meetings of MASH or other sub-committees.[1929] For the reasons discussed before, the member states generally play the main role in this forum. In order to avoid a duplication of work and efforts there is a well established cooperation between the DG ENV and the OSPARCOM.[1930] Although fisheries issues remain outside the scope of the OSPAR Convention, they are occasionally discussed within the BDC.[1931] Representatives from DG FISH never attend the OSPAR meetings, but DG ENV always consults them on the position to be taken and defends the EC's fisheries interests in OSPAR. Generally, the role of OSPAR in fisheries issues is to identify the problem and possible solution and then to ask the EC Commission (and other competent regional organizations) to take legislative action. Traditionally, the level of cooperation between OSPARCOM and DG FISH has been rather weak, but in the past few years it has improved to a great extent.[1932]

The Commission is not particularly involved in the HELCOM work on BSPAs either. Due to a lack of human resources, DG ENV only occasionally attends the meetings of HELCOM HABITAT, but it normally participates in the meetings of HELCOM where biodiversity-related decisions are taken.[1933] However, it is normally for the member states to exercise their voting right on MPA issues, as in the case of Recommendation 15/5 setting out the BSPA network. The role of the Commission in HELCOM, like in OSPARCOM, is mainly directed at controlling whether member states do not infringe the EC's competence by adopting fishing management measures. Like in OSPAR, there is a strong level of coordination between the HELCOM and DG ENV on MPAS and biodiversity issues.[1934] After the 2004 EU enlargement, the Habitats and Birds Directives are legally binding for all Baltic States except the Russian Federation, which, however, adopted a similar regime.[1935] Therefore, there is no need for the Commission to participate in HELCOM in order to defend Community interests.

On the other hand, the Community actively participated next to the member states in the MPA discussions within the main regional political forums, especially within the framework of the NSMCs. Representatives from DG ENV, and lately also

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[1928] See Council Decision 2000/341/EC concerning the approval, on behalf of the Community, of the New Annex V of the OSPAR Convention and Appendix 3 and the Proposal from the Commission (COM (1999) 190, in: O.J. C 158/1, 4.06.1999). Belgium ratified Annex V on 25.08.2005 and Portugal on 25.03.2006.

[1929] See OSPAR Summary Records, available at: www.ospar.org/eng/html/welcome.html.

[1930] See, e.g., Summary Records of the OSPARCOM meeting held in Valencia, June 2001, Agenda item 10 "Cooperation with the European Community" (OSPAR 01/18/1-E) and Annex 17 "Considerations on Strategic Cooperation between OSPAR and the European Community".

[1931] See, for instance, the inclusion of some commercial stocks (e.g., cod and salmon) in the OSPAR lists of threatened species and habitats. Reportedly, DG ENV referred the issue to DG FISH asking if it was appropriate to have cod on the OSPAR List. Since the listing has no legal consequences, DG FISH agreed.

[1932] In the case of the Darwin Mounds, for instance, DG FISH followed a recommendation from OSPAR and used it as a ground for closing the area to fishing. According to E. Hey (2002), pp. 346-48, the revision of the CFP has been a missed opportunity for formalizing and improving this cooperation.

[1933] So far, DG ENV has only participated in HABITAT 3 (2002), HABITAT 4 (2003) and HABITAT 7 (2005).

[1934] See, e.g., HELCOM HOD 12/2003, Document 2.1/4, 30.04.2003 on the Future role of HELCOM.

[1935] The Emerald network, which applies in Russian waters, like the BSPAs network builds upon and presents strong similarities with Natura 2000.

from DG FISH, have been fully involved in the drafting of the 5th NSMC Declaration, which endorsed the WSSD target on the MPA network.[1936] Similarly, DG ENV took part in the drafting of the 2003 Joint OSPAR-HELCOM Ministerial Declaration that reinforced the MPA targets in the North-East Atlantic and Baltic areas.[1937] In both cases, however, the role of the Commission was mainly directed at promoting EC targets and there was no EC coordination in the preparation or during these meetings.

The EC is a party to the 1995 SPA Protocol of the BARCON, together with all seven Mediterranean member states.[1938] The Commission (DG ENV), acting on behalf of the Community, took part in the drafting process on the basis of a formal mandate from the Council. Since the Protocol covered areas of Community competence under the Habitats and Birds Directives and concerned species whose exploitation is regulated under the CFP the Commission's participation in the negotiation was necessary in order to ensure consistency between the EC and the BARCON regimes.[1939] However, the implementation of the SPA Protocol has been mainly left to the member states and, so far, the Commission has not been particularly active in the MPA discussions in this framework. DG ENV normally attends the Meetings of the National Focal Points for SPAs and the BARCON MOPs. Like in other regional forums, the role of the Commission is to control that the EC member states do not address fisheries and that they do act consistently with EC law.[1940] The situation may change in the near future. In the past few years, the Commission has been becoming more involved in marine biodiversity and MPA discussions within the BARCON framework and DG ENV is intending to strengthen EC coordination in this forum. Traditionally, the level of cooperation between the BARCON and DG ENV has been rather weak. This has to some extent improved with the accession in 2004 of Cyprus, Malta and Slovenia and will strengthen further with the next enlargement with the accession of Croatia and Turkey. The 14th MOP (2005) and the 13th MOP (2003) stressed the need to achieve synergy on strategic matters of common interest and to promote consistency between the SPA Protocol, Natura 2000 and the EMS in order to avoid duplication of efforts.[1941]

Finally, the role of the Community within the framework of the Bern Convention has been traditionally more active than within the regional seas agreements discussed before.[1942] This is probably because of the existence of a clear competence for the Community in matters covered by the Bern Convention, which has

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[1936] In Bergen, moreover, the EC member states confirmed their intention to fully implement the Natura 2000 network without delay and to "study the practicability" of its application beyond the territorial sea. The Summary Records of the CONSSO meetings are available at: http://odin.dep.no/md/nsc/p10003262/bn.html.

[1937] Summary Records of the Helsinki and OSPAR Commissions (JHOD 1-02), available at: http://sea.helcom.fi/dps/docs/documents/Response%20Group/HELCOM%20RESPONSE%202,%202003/2_2.pdf. The environmental impact of fisheries was also discussed at the meeting, but representatives from DG FISH were not present.

[1938] See Council Decision 1999/800/EC. The EEC was a party to the 1982 Protocol as well (i.e., Council Decision 84/132/EEC).

[1939] However, it has been up to the member states to negotiate and adopt the Annexes as the Commission had no mandate for this.

[1940] In 2002, the EC adopted an Action Plan for the conservation and sustainable exploitation of fisheries resources in the Mediterranean Sea under the CFP (COM (2002) 535).

[1941] E.g., the 14th MOP (UNEP(DEPI)/MED IG. 16/13 (Annex III, Para. I.A.5.2) and the 13th MOP calling on the EC to take full account of the characteristics of the Mediterranean Sea in the drafting of the EMS (UNEP (DEC)/MED IG.15, Annex V, paras. 8-10).

[1942] The Community signed the Bern Convention in 1979 and ratified it in 1982 with Council Decision 82/72/EEC. All 25 member states are parties to the Bern Convention, which sets out an alternative voting system analogous to the one under the LOSC (Article 13 (2)).

been directly implemented by means of the Habitats Directive. Representatives from DG ENV normally attend the meetings of the Standing Committee, occasionally accompanied by representatives from DG FISH, the Commission's Legal Service and the Council Secretariat. The Commission votes and speaks on behalf of the Community in matters under the EC's exclusive competence, which, however, are not normally discussed in this forum, while the Presidency is responsible for matters of shared competence. After the 2004 enlargement, the Community has the majority of votes in the Bern Convention and may lead the decision-making process. Most of its efforts have been directed towards ensuring consistency between the Emerald Network and Natura 2000 and between the Annexes of the Bern Convention and Habitats Directive. There is strong coordination between the Community and the Bern Institutions in order to avoid any duplication of work and efforts.

8.9 Final Observations

In the past two decades, the establishment and management of a coherent network of MPAs has become one of the main priorities of the global and regional bodies dealing with the protection of marine biodiversity. At the WSSD the international community committed themselves to establish, by 2012, representative networks of MPAs consistent with international law. The establishment of MPAs finds a legal basis in different MEAs, including the CBD and the regional seas conventions and seems to be supported by the LOSC which requires States to protect and preserve rare and fragile ecosystems as well as the habitats of depleted, threatened and endangered species or other forms of marine life (Article 194(5)). In the aftermath of the WSSD Summit, the MPAs target has been endorsed in all political ocean forums and new steps have been taken within the CBD, OSPAR, Helsinki Convention and BARCON toward the full achievement of this goal. Most of these commitments, however, are not formulated in legally binding terms and their implementation largely depends on the political will of the contracting Parties. In addition, there are no strong enforcement mechanisms and effective funding instruments at the global and regional level to ensure compliance. Moreover, there are currently (too) many international and regional instruments governing the designation and management of MPAs and there has been overregulation in this area. Within European waters, for example, a variety of MPAs may be established (e.g., Natura 2000 sites; MCPAs under the CBD; Ramsar sites; OSPAR MPAs; BSPAs; SPA/SPAMIs; ACCOBAMS sites; and ASCIs within the framework of the Bern Convention). Despite their analogies, global and regional instruments differ to a considerable extent with regard to their legal or political nature, their scope of application (high seas and/or water under national sovereignty or jurisdiction) and selection, designation and management criteria. This patchwork regime may create confusion and bring overlapping obligations for coastal States making it quite difficult to correctly implement their international commitments. Current efforts, therefore, are directed toward ensuring consistency among existing regimes and creating a coherent network of MPAs which is consistent with the law of the sea.

In principle, the Community, through its institutions, legally binding instruments, and enforcement and funding mechanisms would offer a particularly effective framework to fill most of these gaps and transform the broad political commitments into legally binding obligations and clear enforceable targets.

The Community, as a party to the LOSC, CBD, Annex V of OSPAR, the Helsinki Convention, and the SPA Protocol, is under a legal duty to protect marine biodiversity. In addition, it has fully endorsed the WSSD target and regional

commitments to establish a coherent network of MPAs by 2012. The Habitats and Birds Directives indirectly implement the Community's obligations under the LOSC and other instruments and may contribute to achieving their objectives. In their present form, however, they do not provide an adequate framework for the Community to fully comply with its international obligations and to meet the MPA targets completely. In the aftermath of the WSSD, however, the Commission, with the assistance of OSPAR and HELCOM, has taken new steps to make the Habitats Directive more suitable for protecting the marine environment and marine wildlife. Nevertheless, the relevant work is proceeding quite slowly. Likewise, the recent Commission's proposal for a Marine Strategy Directive, in its present form, represents a missed opportunity for the Community to fully meet its international duty to protect marine biodiversity and achieve the WSSD biodiversity-related targets.

The Habitats and Birds Directives are based on Article 175 EC and contain minimum standards. The member states are free to raise the level of protection, for instance, by agreeing on higher standards within the framework of the CBD and other global or regional conventions. Their individual action in these forums is indeed not likely to jeopardize the achievement of the objectives of the EC Directives. The EC legislation, therefore, does not trigger any Community exclusive competence to act at the international level, but, according to the general rule, member states and the EC institutions, on the basis of Article 10 EC, have to cooperate within the relevant bodies.

In the past few years, the Community, next to the member states, has been particularly active in the global discussions on MPAs within the UN, CBD, and IMO. Speaking with a single voice, they have taken the lead in the current efforts toward the establishment of a coherent network of MPAs both within and beyond national jurisdiction. On the other hand, the Community plays a marginal role in the MPA work within the regional bodies and there is no EC coordination in these frameworks. In these forums it is normally for the member states to play the leading role, while the Commission simply controls that they do not violate EC law (e.g., by discussing fisheries management issues), and promotes consistency with the EC rules. The Commission does not seem to be particularly interested in strengthening the regional MPA networks, but seems to give strong priority to the full implementation of the Natura 2000 network.

The work on MPAs under the regional conventions is still at a preparatory stage and is largely political in nature. The large majority of the contracting Parties of the Helsinki Convention and OSPAR's Annex V as well as some Parties to the SPA Protocol are also EC member states and they are under a legal obligation to designate and manage Natura 2000 sites under the Habitats Directive. Given the strong synergy between the EC and the regional regimes, the implementation of the Natura 2000 network in the regional seas may provide the OSPAR MPAs, BSPAs and SPA/SPAMIs networks with full legal protection. For some contracting Parties, moreover, the lack of resources represents a major obstacle to full compliance with their regional commitments. However, they may take advantage of the financial instruments which are available under EC law to assist them in the implementation of Natura 2000.