9. Conclusions

9. 1 Concise Summary of the Research Objectives

The European Community and its member states have shared competences in marine environmental matters. That means that, within their respective spheres of power, they may both act. As a consequence, they have jointly acceded to the LOSC and the main marine environmental agreements and they jointly participate in the work of the bodies established by these conventions. The purpose of the present study was to establish how the existence of shared competence between the Community and its member states and the difficulty in clearly dividing the respective spheres of powers impact on the implementation of their international obligations for the protection and preservation of the marine environment. Particular attention has been paid to the global and regional conventions and bodies in which they jointly participate. Secondly, the research intended to establish whether the Community's regulatory actions and approaches are in conformity with the existing international rules for the protection and preservation of the marine environment (hereinafter: the international ocean regime), especially looking at the jurisdictional framework established by the LOSC. The material scope of the research has been limited to the prevention of oil pollution from ships, the regulation of ocean dumping and the protection of marine habitats through the establishment of MPAs. These three topics have been discussed in separate case-study Chapters.

9. 2 Implementing the International Regime for the Protection and Preservation of the Marine Environment

As discussed in Chapter 1, the LOSC places all States under the positive legal duty to protect and preserve the marine environment. The Convention sets out the framework for the multilateral development of rules, primarily through competent international organizations, and their uniform implementation and enforcement. Chapter 17 of Agenda 21 establishes the objectives, principles and approaches (e.g., the precautionary principle and an ecosystem-based approach), which have to guide States in implementing their obligations under the LOSC. The WSSD Plan of Implementation adopted in Johannesburg in 2002, set out new clear-cut and time-bound targets with important implications for the preservation of the marine environment and marine life. Both the LOSC and Agenda 21 place particular emphasis on regional cooperation, especially with regard to enclosed and semi-enclosed seas, like the Baltic Sea, parts of the North East Atlantic, including the North Sea, and the Mediterranean Sea, which, due to their poor circulation and the shallowness of their waters, are highly vulnerable to marine degradation.

In the European seas, the environmental provisions of the LOSC have been primarily implemented by means of three comprehensive agreements (i.e., the OSPAR Convention; the 1992 Helsinki Convention; and the BARCON). In addition, in the past three decades the LOSC has provided the legal basis for the adoption of an extensive corpus of global, regional and sub-regional instruments of a different legal nature and covering a wide range of pressures for the marine environment and its components. These instruments set out the framework for further cooperation between the contracting Parties. This cooperation takes place primarily within the decision-making bodies established by these conventions, preparatory committees and working groups.

The implementation of the environmental provisions of the LOSC requires contracting Parties, including the Community and its member states, to take action at three different levels:

(a) at the global level, within the competent international organizations (e.g., IMO and UNEP); the decision-making bodies established by the relevant conventions (e.g., COP/MOPs); and the main political forums (e.g., UNGA and ICP);

(b) at the regional level, within the regional seas conventions (e.g., the 1992 Helsinki Convention; OSPAR; and BARCON and related Protocols) and the main regional political forums (e.g., NSMCs, Ministerial Conferences of the Baltic Environmental Ministers); and

(c) at the national level.

The implementation of the international ocean regime in the European seas must be considered in the light of the unique legal and political structure of the European Community and the special relation with its member states. As discussed in Chapter 2, with the evolution of the European integration process, the EC member states have explicitly or implicitly, completely or partially transferred their competence to the Community in several areas covered by the LOSC and related global and regional instruments. In implementing their obligations, therefore, they cannot act in isolation; but they must proceed in accordance with EC law. In the same way, the Community's competence is not unlimited and must be exercised consistently with the fundamental principles of EC law.

In implementing their Treaty obligations contracting Parties, including the Community and the member states, have to act in conformity with the jurisdictional framework set out by the LOSC, which establishes the rights and duties of States in the different maritime zones. As discussed in Chapter 1.2.2.1, the Convention places some limits on the capacity of coastal States to control unilaterally the potentially dangerous activities of foreign vessels within waters under their national jurisdiction, especially in relation to shipping. Furthermore, both the LOSC and Chapter 17 recognize that marine environmental problems are closely interrelated and cannot be tackled in isolation. The implementation of the global ocean regime therefore requires an integrated and comprehensive approach, which takes into consideration all forms of pressures on the marine environment and its components.

9.3 How Does the Community Implement the Marine Environmental Provisions of the LOSC and the Related International Agreements?

9.3.1 Multilateral Approach to Ocean Preservation

As discussed in Chapter 2.3 and 2.4, the EC principles governing the "existence" and the "exercise" of the Community's competence are so broadly formulated as to leave the EC institutions with ample discretion to decide "whether", "in which manner" and "how far" to act. Generally speaking, in matters under shared competence, such as the environment, the Community may only act on the basis of powers explicitly conferred by the EC Treaty (attribution), as long as its action appears to be more "effective" than member states' individual actions (subsidiarity) and in so far as it does not go beyond what is "necessary" to achieve the common objective (proportionality). These principles are based on general concepts such as "effectiveness" or "necessity" and are linked to the Community's objectives as broadly defined in the EC Treaty (Chapter 2.3.1.1). In the absence of more clearly defined legal criteria, therefore, the determination of whether and how the Community may act is often a matter of political choices. As a consequence, most of the Community's action in the field of the marine environment has been primarily driven by political and economic, rather than legal considerations.

In spite of the existence of a proper legal basis in the EC Treaty (Chapter 2.3.1.2), so far the Community has never established a comprehensive policy or specific legislation on oceans and seas as it has done in other environmental areas (e.g., waste or water quality), but it has always taken a multilateral approach (Chapter 3.2.4). Oceans and marine resources play a vital role in the life and economy of most EC member states, which have traditionally opposed the direct involvement of the Community in marine environmental issues that could affect their core national interests.[1943] Member states, especially maritime nations, wanted to preserve their autonomous role and their visibility at the international level and were afraid that the adoption of EC rules could trigger an exclusive competence on the part of the Community in the main ocean bodies, as occurred in the field of fisheries. From an economic point of view, moreover, the adoption of EC standards which are more stringent than international standars risked placing the EC industry in a competitive disadvantage with respect to the rest of the world. Furthermore, the very existence of the

[1943] On the other hand, member states accepted the Community's involvement in the field of fisheries because different national regulations could have had a serious impact on the establishment of the single market.

Community's environmental competence beyond the territorial sea of the member states has always been strongly contested (Chapter 2.5). Before the Treaty of Maastricht, the Community's regulatory actions in marine-related matters were hindered by the unanimity rule in the Council. The extension of qualified majority voting (QMV) to the adoption of all environmental legislation and the enhancement of the EP's role in the environmental decision-making have, in part, removed the obstacle. However, relying on the "effectiveness" of the existing international rules and standards, member states have used the principles of subsidiarity and proportionality to limit the Community's involvement in marine-related matters to a minimum.

To avoid a serious confrontation with the member states and because of the need to prioritize its action, the Commission has decided to concentrate its efforts and limited resources on the protection of nature on land and to rely on existing international instruments for the protection and preservation of the marine environment. Therefore, as discussed in Chapter 5, the Community, acting alongside its member states, has become a party to the LOSC and it has signed Agenda 21 and acceded to all the relevant MEAs (e.g., CBD) and regional conventions implementing the LOSC and Agenda 21 in the European seas. In addition, it directly participates in the decision-making within the bodies established by these conventions and, when it is not a party (e.g., IMO's regulatory instruments), it acts through the coordinated positions of its member states (Chapter 6.9.3). Moreover, the Community and the member states actively participate in the development of ocean policies within the main political forums, within and outside the UN. On the other hand, the Community's regulatory action in the field of the marine environment has so far been limited, indirect and rather fragmented.

9.3.2 Sector-by-Sector Approach

Given the cross-sectoral nature of marine issues, important aspects related to the protection of the marine environment have been directly or indirectly regulated within the framework of different EC policies and legislation (e.g., water quality, transport or fishing). Still, as discussed in Chapter 3.4.4, this sectoral legislation is primarily directed at ensuring the proper functioning of the internal market (e.g., water quality legislation), protecting human health (e.g., waste legislation and EURATOM legislation) or enhancing safety (e.g., maritime transport legislation) rather than halting marine degradation. The conflict of interests among member states and the internal tensions among EC institutions (especially the Council and the Commission) and within the Commission itself, make it particularly difficult to harmonize views and adopt comprehensive and uniform rules. The sector-by-sector approach, moreover, is the direct consequence of the strong institutional fragmentation existing within the EC and the member states and of the lack of an overall structure specifically and comprehensively responsible for dealing with marine environmental issues (Chapter 3.2.1). The level of interinstitutional coordination has been traditionally rather weak, increasing the risk of a duplication of work and a waste of resources.

As discussed in Chapter 2.4.3, after the Treaty of Amsterdam codified the principle of integration (Article 6 EC), the EC institutions are legally required to integrate (marine) environmental considerations within the definition and implementation of all Community policies and activities. The EC Treaty, however, leaves ample discretion to the EC institutions in deciding what has to be integrated and in what manner. As a result, environmental considerations are not yet taken fully into account in the adoption of sectoral legislation, as in the field of fisheries management (Chapter 8.8.3.4).

9.3.3 Towards a Comprehensive Ocean Policy?

As a result of the Community's multilateral and sector-by-sector approach to ocean preservation, EC waters are currently governed by a patchwork of global, regional, EC and national rules, standards and practices. This "patchwork regime" has made it difficult to reconcile competing uses of the seas and does not respond to the need to take a comprehensive and integrated approach as strongly recommended by the LOSC and Agenda 21. As discussed in Chapter 3.5, in the past few

years, in response to the increasing pressure on the European seas, the Community has partially changed its traditional approach and has taken new steps towards the adoption of a coherent and integrated oceans policy. Since January 2005, DG Fisheries has also become responsible for Maritime Affairs, laying down the basis for stronger institutional integration. In October 2005, moreover, the Commission presented a proposal for a European "Marine" Strategy together with a Marine Strategy Directive (MSD) and is currently in the process of developing a comprehensive "Maritime" Policy. Once again, this partial change of approach has been mainly influenced by political and economic considerations. On the one side, member states seem to have realized the benefits of harmonized EC rules compared to diverging national standards and have largely overcome their traditional opposition vis-à-vis the Community's involvement in marine environmental matters. On the other side, they seem to be willing to accept the Community's regulatory action in this field as long as it is not too prescriptive and too prejudicial to their sovereign interests. This approach clearly emerged during the drafting of the Marine Strategy and is evident in the weak provisions of the proposed MSD.[1944] In addition, the key challenge of the future "Maritime" Policy is primarily economic rather than environmental.[1945] The European economy is heavily dependent on the oceans and their resources and in order to preserve its competitiveness it needs to take a more integrated approach along the lines of other States such as Australia, Canada and US.

Despite these recent initiatives, the Community has not abandoned its traditional multilateral approach to ocean preservation and still attaches great importance on international cooperation. This clearly emerges from the Community's increasing involvement in the international discussions on marine issues and ocean affairs (e.g., in the UN, IMO and CBD). The Community recognizes the importance of the work being done at the international level, especially within the framework of the regional seas conventions. However, in order to avoid inconsistencies and duplications, it promotes effective coordination among all the bodies involved in marine protection and coherence among different instruments and policies at the global, regional and EC level. A central element of the Marine Strategy, the MSD and the future Maritime Policy is to enhance the implementation of existing EC and international legislation in a coherent, coordinated and integrated manner.

9.3.4 The Community's Participation in the LOSC, Marine-related MEAs and Regional Seas Conventions

As discussed in Chapter 5.2.7.4, the role played by the Community in the LOSC implementation process is quite marginal. Unlike the COP/MOPs of other multilateral agreements, the Meeting of the States Parties of the LOSC (SPLOS), in which the Community participates as a full member, only has administrative and budgetary functions. In practice, the supervision of the implementation of the Convention takes place within the framework of the UN under the agenda item "oceans and the law of the sea" (ICP and UNGA). Since the Community is not a member of the UN, its role in this process is very limited. At the EC level, moreover, given the tendency to consider law of the sea issues as matters of foreign policy, the participation of the Community and the member states in the UN ocean debate is regulated within the framework of the 2nd pillar of the EU Treaty (CFSP). As a consequence, the main role is played by the Presidency and everything is done by EU Statements adopted within the Council (COMAR) and drafted in coordination with the Commission's DG RELEX. The foreign policy format also applies when matters under the first (EC) pillar are on the table, including issues under the EC's exclusive competence (e.g., fisheries). This makes it impossible for the Commission to play its institutional role of the external representative of the EC (Article 300(1) EC). This approach, moreover, does not seem to be completely consistent with the EU Treaty (e.g., Article 47) and the latest Court case law (e.g., the judgement of 13 September 2005), which exclude the possibility of using EU mechanisms and

[1944] The overall idea was to have a framework directive that is ambitious in its scope, but not too prescriptive in its tools. The limits of the MSD in its present form are discussed in Chapter 3.5.2.
[1945] For a full discussion on the Maritime Policy and its objectives see Chapter 3.5.3.

instruments for regulating EC matters. This potential anomaly is partly the product of what may be defined as a sort of "power of the precedents" (or the "inertia" factor), which strongly influences the functioning of the Community. Just like in all administrative processes, what is most relevant is the precedent. Once the Commission and the member states start to act in a certain manner and a precedent is established, it will be very difficult to change it. In reality, the EU format seems to be justified by the political nature of the discussions and the lack of EU membership in the UN.

The recent transfer of responsibility from DG RELEX to DG FISH might strengthen the role of the Commission in the UNGA-ICP process; perhaps, it might move it back to the EC pillar, and restore the institutional balance within the EU. This does not necessarily imply that a stronger role for the Commission would increase the weight of the EC in the LOSC discussions. Over the past decade, indeed, under the lead of the Presidency, the EU has become one of the most influential players in the development of ocean policies within and outside the UN. EU Statements presented by the Presidency have substantial political weight and a growing number of countries, including candidate and acceding countries alongside Iceland and Norway, have increasingly associated themselves with EU positions. From a substantive point of view, however, the EU Statements are not always as concrete and specific as the common positions taken by the Commission, especially on matters under the EC's exclusive competence. The Commission, indeed, tends to clearly define the priorities and results that the EC wants to achieve out of the negotiations and normally brings more technical input to the discussions.

The role played by the Community in other marine-related agreements largely depends on its priorities and interests. The Community (and the Commission), for instance, participates as a full member and plays a leading role in the CBD, where issues are discussed which may affect its trade-related and fisheries interests. In the past few years, moreover, the Community has also been increasingly active in the IMO, even though it is not a member of this organization. Conversely, the Community involvement in other international instruments (e.g., the CMS and LC) has so far been minimal since the Community has no strong interests to defend in these forums.

Likewise, the Community is not very proactive in the discussions related to shipping, ocean dumping and marine biodiversity within the regional seas conventions. The Community, represented by the Commission, participates in the work of the bodies established by these conventions (OSPARCOM, HELCOM and BARCON-MOPs) as a full member with the right to vote on matters under the EC's exclusive competence. However, except for some maritime safety (and land-based pollution) standards which have been totally harmonized at the EC level, regional seas conventions do not normally discuss matters under the EC's exclusive competence and the Community does not have strong interests to defend in these frameworks. Member states, moreover, have a long tradition of individual participation in these conventions and wish to preserve their autonomous representation in these frameworks. The power of precedent (or the "inertia factor"), moreover, is particularly strong in the regional seas conventions. For political reasons, therefore, the Commission prefers to allow the member states to have a free rein in speakingand voting in the regional bodies. Besides, the Commission does not seem to be particularly keen to strengthen regional standards. EC legislation is primarily directed at harmonizing rules and approaches within the Community and the adoption of higher regional standards is likely to affect this harmonization. Especially in the field of maritime safety, the Commission seems to be of the idea that the relevant standards should be set out at the global level (by IMO) and if regional rules are needed, then it should be for the EC to take the initiative (Chapter 6.9, sections 4, 5 and 6). Likewise, in the field of marine habitat preservation, the Commission seems to believe that priority should be given to the full implementation of the Natura 2000 network, rather than regional MPA regimes (Chapter 8.8.4.5). For all these reasons, the Community normally plays a defensive role in the regional seas conventions and its action is limited to ensuring that member states do not violate the EC's exclusive competence as well as promoting consistency between the EC and regional rules. The weak participation of the Community within the framework of the regional seas conventions, however, seems to be a missed opportunity for promoting the application of EC standards for the

wider European region (e.g., the Russian Federation in the Baltic Sea) and importing instruments and policies which proved to be successful at the regional level within the EC.

In addition, the EC's role in the regional discussions is influenced by a series of practical factors. Within the Commission, DG ENV is the main body responsible for all regional seas conventions. As discussed in Chapter 1.4, the agenda of the regional bodies (especially OSPARCOM and HELCOM) is very demanding and the Commission, due to a serious shortage of personnel, cannot attend all meetings, but has to prioritize its action. Normally, representatives from DG ENV (and exceptionally from DG TREN and DG FISH) participate in meetings at the decision (or high political) level and only occasionally at the working level.[1946] Moreover, the EC's delegation, unlike the ones of the EC member states, is usually very small, commonly composed of a single representative. It might be very difficult for a single representative to be fully informed about all items under discussion and he/she might prefer to allow the member states to take the lead. All the considerations so far mentioned also apply with regard to global discussions within the UN, CBD and IMO. In general, the Commission always follows a pragmatic approach in marine environmental negotiations.

9.4. In What Manner Does the Existence of a Division of Competences between the Community and the Member States Influence the Implementation of the Marine Environmental Provisions of the LOSC and Related Agreements?

The Community participates in the LOSC and related marine environmental agreements alongside its member states. As a general rule, member states and the Community exercise the rights, including the voting rights, and perform the duties stemming from the conventions in matters within their respective spheres of competence. Within marine environmental conventions, however, it is not always possible to clearly allocate the respective spheres of power. Uncertainties or disputes concerning the division of competences between the Community and its member states may affect the correct implementation of their respective obligations, it may result in a lack of action, duplications or inconsistencies and bring conflicting obligations for the member states. In the past decade, however, the situation has considerably improved and today the existence of a division of competence does not seem to seriously affect the implementation of the international ocean regime.

Especially in the past, the joint accession and participation of the Community and the member states in marine environmental agreements confronted third States with problems of an unprecedented nature as regards the question of who had to exercise the rights and perform the duties stemming from the convention. As discussed in Chapter 4.3.1, most of the agreements allowing the Community to become a party contain some relevant indications (so-called "participation clauses").[1947] These clauses intend to safeguard the good operation of the agreement and to provide a guarantee to third States against any privileged position of the Community and/or its member states. They generally acknowledge the existence of a division of competence and set forth an alternative system whereby the Community or the member states exercise the rights and perform the duties concerning matters under their respective spheres of power. However, they do not provide any clear indication as to how competences are to be divided. The LOSC and the CBD, moreover, require the Community and its member states to release a declaration at the time of the signature and accession indicating the allocation of the respective spheres of competence. The EC institutions, including the ECJ, as well as the member states in the Council have always been reluctant to proceed toward a clear delimitation of competence (Chapter 5.2.2.3). A rigid demarcation would affect the flexibility of the external action and prevent the further development of the Community's competences. Normally, therefore, these declarations make explicit reference

[1946] For a full discussion on the Community's participation in the regional bodies see: Chapter 6.9 paras. 4, 5 and 6 (oil pollution from shipping); Chapter 7.5, paras. 2, 3 and 4 (ocean dumping); and Chapter 8.8.4.4 (establishment and management of MPAs).

[1947] For a full description of the EC participation clauses see: Chapter 5.2.2 (LOSC); 5.3.2 (OSPAR); 5.4.2 (Helsinki Convention); 5.5.2 (BARCON); and Chapter 8.8.4.2 (CBD).

to the evolutionary nature of the EC's competences and are so broadly formulated that they are not very useful. Currently, however, third States are becoming more and more used to the presence of the Community on the international scene. Although they are not yet entirely familiar with the EC mechanisms and processes, they know that no matter what struggle the Community and the member states are facing internally with regard to the division of competence, externally their mutual relations are governed by international law.

Also at the EC level, the division of competence between the Community and the member states in marine environmental matters does not seem to be as disputed as it used to be in the past. The member states seem to have largely overcome their traditional resistance to the Community's involvement in the international ocean debate, as long as it does not touch upon core national interests. They have also started to see the benefits of the "one voice" policy pursued by the Community at the international level, especially when highly political issues are on the table. On the other hand, the division of competence concerning marine environmental matters is still a critical issue, because of the absence of clear legal rules in the EC Treaty, the ambiguity of the ECJ's case law and its difficult application to ocean matters.

The Community and its member states have shared competences to act at the international level for the protection of the marine environment. As discussed in Chapter 4.2.4, the notion of "shared competence" is still quite vague and, unlike in areas within the EC's exclusive competence, it is not entirely clear how things should work in practice. According to the Court, in these matters member states are free to decide whether to enter into multilateral relations with third States by acting alone or through the Community, but it is still highly controversial in which circumstances and to what extent they may take autonomous action. The Court has never defined shared competence and has always been quite reluctant to fully clarify its legal consequences. Supported by the other EC institutions and the member states, the Court has traditionally opposed the establishment of rules which are too rigid in areas under shared competences where member states' individual actions are less likely to affect the vital interests of the Community. In these areas they have wanted to keep the division of powers as dynamic and flexible as possible.

Given the cross-sectoral nature of ocean issues, however, marine environmental agreements may cover areas, such as fisheries and trade, which fall within the exclusive competence of the Community. In these areas it is quite clear how things should work. As discussed in Chapter 4.2.1, by means of the EC Treaty or Acts of accession, member states have definitely transferred their legislative powers to the Community which is solely responsible for negotiating, concluding and implementing conventions. Only in clearly defined circumstances may the member states be expressly authorized to act on behalf of the Community. Sometimes, especially within the framework of the regional seas conventions, member states try to discuss fisheries-related issues, but they know that they are not entitled to take decisions on these matters.

The same legal consequences of "exclusivity" under primary law seem to apply also to "pre-emption" under secondary law. As discussed in Chapter 4.2.2, according to the Court every time the Community adopts common rules on the basis of its internal powers, the member states are "pre-empted" from assuming, outside the EC framework, any international obligations which would "affect" these rules or "alter their scope" (the *ERTA Doctrine*). On these subjects the Community acquires implicit exclusive competence to negotiate and adopt international standards. However, the pre-emption criteria developed by the Court (e.g., "total" harmonization and maximum standards at the international level) do not seem to be entirely applicable to marine environmental negotiations and are open to discretionary interpretations (e.g., "exhaustive" harmonization or "largely" covered by EC legislation).[1948] These criteria may apply to maritime safety Directives based on Article 80(2)

[1948] Pre-emption occurs when international negotiations cover matters that have been "totally" harmonized. It does not occur whenever EC legislation sets out minimum standards, unless it intends to "exhaustively" harmonize the subject-matter. Recently the Court has introduced two new pre-emption criteria: the international agreement has to cover an area which has been "largely harmonized" at the EC level "and" must affect the uniform and consistent application of EC rules and the proper functioning of the system which they establish (see: Chapter 4.2.2.1).

EC which clearly aim at "total harmonization". Conversely, environmental Directives based on Article 175 EC (e.g. the Habitats and Birds Directives; the proposed MSD; waste management legislation) contain minimum standards which do not intend to "exhaustively" harmonize the matter. On the basis of Article 176 EC member states are always free to agree on more stringent protective measures, acting at the national or the international level. Likewise, most marine environmental agreements (e.g., the CBD, the LC and all regional seas conventions) contain minimum standards and always allow contracting Parties, including the EC, to adopt higher standards.[1949] The individual actions of the member states within the framework of these agreements would not preclude the application and further development of stricter EC rules and cannot be pre-empted. Conversely, the LOSC and IMO regulatory instruments may contain minimum or maximum standards depending on whether they apply to flag, port or coastal States and on the maritime zone and the activities or standards concerned. This makes it very difficult to draw a clear allocation of external powers between the Community and the member states on the basis of the "minimum or maximum standards" criterion.

The pre-emption criteria discussed so far, moreover, have been formulated by the Court in relation to commercial and association agreements, which prevalently cover policy areas, such as trade and fisheries, under the EC's exclusive competence and where it is possible to clearly separate the parts of the agreement under the respective spheres of competence of the Community and the member states. This is not the case with regard to marine environmental agreements, which cover matters under shared competence and where the member states never completely lose their powers.

In general, therefore, EC marine-related legislation does not seem to trigger an implicit exclusive competence on the part of the Community within marine environmental conventions. However, even in fields where pre-emption may occur, such as maritime safety and vessel-source pollution, the Community, for practical or political reasons, does not strictly apply the ECJ's criteria, but wishes to retain a maximum level of flexibility. At the end of the day, in marine environmental matters neither the Community nor the member states are fully competent and the allocation of their respective spheres of power requires pragmatic and case-by-case solutions.

9.5. How Does Community Coordination Work?

To overcome the difficulty in proceeding towards a clear allocation of powers between the member states and the Community in areas of shared competence, the Court has diverted attention to the duty of cooperation under Article 10 EC and its application in the negotiation, conclusion and implementation of mixed agreements and in joint participation in the activities of IOs.[1950] The Court has intentionally avoided providing a strict formulation of the duty of cooperation and establishing uniform rules and rigid procedures on how the EC institutions and the member states should behave at the international level. Especially in matters subject to shared competence, the Community and the member states wish to take a pragmatic approach. Political and practical considerations, conflicts of interest between the EC and the member states and internal tensions among EC institutions influence to a large extent the manner in which the Community and the member states participate in mixed agreements calling for flexible solutions tailored to the circumstances of each case.

As discussed in Chapter 4.3.2, in the absence of specific rules under EC law, coordination mechanisms and procedures have been developed in the day-by-day practice of the Community's external relations. It is worth stressing that these are mainly practical rules and are largely driven by political and practical considerations. In some cases, the Commission, due to a lack of personnel, expertise or simply to avoid confrontation with member states, might find it more convenient to allow them to conduct the negotiations on specific subjects. Conversely, in areas where there is a

[1949] Pre-emption only occurs when an international agreement sets out maximum standards, which would make it impossible for EC member states to comply with the more stringent EC requirements (see: Chapter 4.2.2.2).

[1950] For a full discussion on the duty of cooperation and "mixed agreements" see respectively: Chapter 4.2.4.1 and 4.2.4.2.

stronger uniformity of interests (e.g., the preservation of marine biodiversity), member states might find it more effective to allow the Community to take the lead. The forms of mixed participation may therefore change from forum to forum and sometimes even during the same negotiations or within the same meeting. Although the Commission always tries to put some order into this chaotic reality, both EC institutions and the member states want to maintain this flexibility to the maximum extent.

On the other side, the absence of clear and uniform rules and the ambiguity of the ECJ's case law create uncertainty among member states with regard to whether and how far they have to coordinate their positions. This, in turn, increases the risk of member states taking unilateral action in areas that should be regarded as falling within the EC's implicit exclusive competence (pre-emption). The risk is particularly high in forums like the UN or the IMO, where the Community is not a member and may only defend its interests through the coordinated action of its member states. In addition, the lack of uniform rules may create some confusion for third States with regard to "who is speaking for whom". Uncertainties, ambiguities and a lack of coordination may limit the role of the EU in marine environmental negotiations and affect the entire decision-making process. As a response, in the past few years, the cooperation mechanisms have been strengthened and currently the Community speaks with a single voice on most marine environmental issues.

Coordination mechanisms are well consolidated for the CBD meetings and other high-level marine biodiversity discussions (Chapter 8.4.4.1 and 8.4.4.2); in preparation for UNGA and ICP discussions on the law of the sea (Chapter 5.2.7.2); and, in the past few years, they have been enhanced and formalized to a great extent also in preparation for the IMO (especially MEPC) meetings (Chapter 6.9.3 and 8.4.4.3). Conversely, there is normally no coordination for the IMO discussions on ocean dumping since the Community has never adopted specific legislation on the matter (Chapter 7.5).

Normally, there is no formal Community coordination within the regional seas conventions, with very limited exceptions in the OSPAR and BARCON. The "one voice" policy that the Community is pursuing in other global forums is not welcome in regional bodies, which are venues for open discussions and cooperation among Parties at the same level and always oppose any form of bloc-forming. Community coordination in these regional frameworks, moreover, does not seem to be necessary either. Here, the Community acts within its own rights in all matters which come under its exclusive (explicit or implicit) competence (e.g., some maritime safety standards). Especially after the 2004 enlargement, moreover, the EC member states represent the large majority of the contracting Parties in the Helsinki Convention and OSPAR, and with the future accession of Croatia (and potentially also Albania, Bosnia and Herzegovina, Serbia and Montenegro and Turkey) the Community will also increase its representation in BARCON. EC member states are bound by EC legislation and know that they have to act consistently with EC law otherwise the Commission may bring them to Court.

Even though forms of mixed participation vary to a great extent according to the agreement and the issue on the table, it is possible to identify some common patterns in the manner in which the Community and the member states coordinate their action in marine environmental negotiations. In preparation or during negotiations, representatives of the member states and the Commission coordinate their positions within so-called "Community co-ordination" meetings.[1951] When matters under the EC's (explicit or implicit) exclusive competence are on the agenda, the Commission and the member states are under the duty to reach common positions.[1952] Once adopted, common positions become binding on member states which cannot deviate from them by taking different positions at the international level. If they do so, the Commission may bring them to Court for a violation of their obligations under Article 10 EC. In matters under shared competence, on the other hand, the Commission and the member states must coordinate their actions and try their best to

[1951] For a full discussion on EC coordination and the adoption of common positions see: Chapter 4.3.2.3.

[1952] Common positions on matters under exclusive (explicit or implicit) competence are normally adopted by the Council acting on QMV.

reach common positions. However, they are not legally required to do so. Common positions in matters under shared competence are normally adopted by unanimity. This may prove to be very difficult especially concerning matters (e.g., maritime safety) where the conflict of interests is particularly strong. The unanimity rule, moreover, is not completely understandable with regard to marine environmental matters, which normally require QVM for the adoption of EC legislation, showing that member states are still reluctant to lose their individual representation at the international level. If, in spite of their efforts, it is not possible to reach common positions, member states may express their own views. However, they are strongly discouraged from doing so because the presentation of different positions may seriously undermine the Community's negotiation role.

The Community and the member states continue to coordinate their positions on the spot during early-morning and late-evening sessions or coffee/lunch breaks. In this way they try to avoid excessively delaying the international decision-making process.

The external representation of the common positions is a matter of traditional tension between the Commission and the Council. As discussed in Chapter 4.3.2.5, as a general rule, it is up to the Commission, on the basis of a mandate from the Council, to negotiate on behalf of the Community and present common positions when issues concerning the EC's (explicit or implicit) exclusive competence are on the table (Article 300(1) EC). Concerning matters under shared competence, as is normally the case in the CBD, it is for the Presidency to represent the Community. This general rule, however, does not consistently apply in marine environmental negotiations. There might be internal agreements between the Commission and the Presidency on whom presents common positions. Normally within the main ocean bodies, such as the IMO, UNGA and ICP, the Presidency speaks on behalf of the EU also when matters under the EC's exclusive competence are on the table. It might be argued that the Presidency, as a political organ of the EU, should not be entitled to speak on these matters. However, the role of the Presidency within the framework of the UNGA and the IMO is justified by the observer status of the Community in both organizations. Likewise, the role of the Presidency in the ocean debate within the UN is justified by the political nature of the discussions and is a direct consequence of the fact that this process is carried out within the framework of the EU Treaty (CFSP). Despite this traditional tension, there is normally close cooperation between the Commission and the Presidency during marine environmental negotiations.

The EP is kept informed and may be consulted by the Commission, but its role in the (marine environmental) negotiations is rather marginal. The limited involvement of the EP creates a sort of democratic deficit in the negotiation process, but is justified by the need for flexibility and speedy decisions.

So far, Community coordination has proved to be successful as long as it does not interfere too much with the sovereignty of the member states and there is a strong uniformity of interests (e.g., in the CBD). But when core national interests are on the table, as is frequently the case in the IMO, some member states tend to proceed unilaterally, sometimes deviating from previously agreed positions. The Commission, however, seems firmly determined to make full use of its enforcement powers to correct any violations and ensure the uniform representation of the Community at the international level.

9.6. Are the Approaches and Measures Adopted by the Community to Implement its International Ocean Obligations in Conformity with the LOSC?

The Community has attached great importance to the need to act consistently with the jurisdictional framework set out by the LOSC. The three case studies conducted in Chapters 6, 7 and 8 reveal that, in general, the Community's regulatory action toward the implementation of its international ocean obligations in the fields of oil pollution from shipping, ocean dumping and habitats preservation through the establishment of MPAs seems perfectly in line with this framework.

As far as oil pollution for shipping is concerned, the LOSC limits to a great extent the capacity of coastal States to take unilateral action, but calls for the multilateral development of rules

within the IMO and their uniform implementation and enforcement (Chapter 6.2). The Community has always recognized that all regulatory actions to prevent the risk of oil pollution and further improve maritime safety must be taken within the IMO. As a consequence, it has implemented its obligations under the LOSC, first of all, by coordinating the action of its member states in the IMO. Secondly, the Community has adopted legislation within the framework of its Common Policy on Safe Seas (CPSS), which is primarily directed at ensuring the uniform and full application of IMO standards within the EC (Chapter 6.7.1 and 6.8). In the aftermath of the *Erika* and *Prestige* accidents and the 2004 enlargement, the Community has become increasingly proactive in the field of oil pollution from shipping (e.g., the Erika I and II legislation and the new Erika III proposals). EC regulatory action has been mostly directed at strengthening the application of IMO rules in the European seas (e.g., PRF), anticipating their implementation (e.g., the phasing out of single-hulled tankers) or making IMO non-legally binding rules mandatory (e.g., VTS and VRD). EC maritime safety legislation was not intended as a substitute for, but as a complement to the IMO's regulatory action. Despite the allegation of "unilateralism", the Community has never questioned the IMO's leading role in shipping-related matters and never wanted to replace that organization. However, in the absence of an adequate IMO response, the Community felt that it not only has a right, but also a duty under the LOSC to take regulatory action to protect European waters. Therefore, acting in its capacity of port State, it has set out conditions for the transportation of the most polluting type of oil (HGOs) in the European ports, which are more stringent than existing IMO rules (e.g., an immediate ban on the transportation of HGO in single-hulled tankers). Despite the strong criticism, the EC's reaction seems to be fully consistent with the exercise of port state legislative jurisdiction under the LOSC (Chapter 6.8.1). As discussed in Chapter 6.2.3.1, the LOSC leaves some room for regional organizations or single States to take action without waiting for the IMO. Despite the great deal of criticism, over the years regional or unilateral initiatives have urged the IMO to react rapidly and have driven the main "coastal-oriented" developments within the organization. As long as they are consistent with the LOSC's jurisdictional framework, therefore, regional and national initiatives cannot always be condemned. As Lord Donaldson in his famous Inquiry pointed out: "a balance is sometimes needed between consensus and speed, and there may sometimes be good reasons for a single country or group of countries to move faster than the remainder of IMO".[1953]

In addition, the Community has always insisted on the need to act within the jurisdictional framework set out in the LOSC and without hindering the freedom of navigation. As a result, most of the EC maritime safety legislation has been adopted by the Community acting in its capacity of flag and port State, while the Community's action in its capacity as a coastal State has been limited to reinforcing the monitoring of dangerous maritime traffic in EC waters. EC legislation in the field of oil pollution from shipping does not interfere with the rights of navigation of foreign vessels under the LOSC and in no case do EC oil pollution standards higher than IMO rules apply to foreign vessels in transit.

Unlike in the field of shipping, the LOSC leaves substantial power to coastal States to control dumping activities in waters under their sovereignty and jurisdiction (Chapter 7.2.1). In these waters coastal States have to comply with existing international standards (i.e., LC) which, however, always represent minimum standards. As long as they are not discriminatory, therefore, national ocean dumping standards do not create problems of conformity with the LOSC's jurisdictional framework. In addition, the LOSC encourages the development of regional rules, which seem to be more effective compared to global ones to control ocean dumping. The regulation of this practice, moreover, does not interfere with the rights of passage. Due to the firm opposition of the member states, the Community has never been able to establish an "ocean dumping policy" and has never succeeded in adopting ad hoc legislation on that matter (Chapter 7.4, paras. 1, 2 and 3). What was contested was the necessity of having additional EC rules in a field that was already extensively and effectively regulated at the global and regional level. The Community, therefore,

[1953] Lord Donaldson Report, Para. 2 (11).

has implemented its global obligations in the field of ocean dumping mainly by acceding to existing regional conventions. The regional approach is in line with the LOSC, LC and Chapter 17 of Agenda 21.

According to existing global and regional rules, outside the Baltic where nothing but harmless dredge spoils may be dumped, the only matters that may be disposed of in the European seas are: dredge material; fish waste; inert, geological materials; and decommissioned offshore installations. As discussed in Chapter 7.4.5, ocean dumping (and incineration) of these materials (probably including offshore installations) are incidentally caught within the scope of the EC waste management legislation even if they were not specifically designed to apply to the marine environment. The relevant EC rules are minimum standards and mirror, to a large extent, existing international rules.

The Community as a party to the LOSC, CBD and regional seas conventions (i.e., Annex V of OSPAR, the Helsinki Convention, and the SPA Protocol) is under a positive legal duty to protect and preserve rare and fragile ecosystems as well as the habitats of depleted, threatened and endangered species or other forms of marine life. As discussed in Chapters 8.3, 8.4 and 8.5, these conventions may provide the legal basis for the establishment of a coherent network of MPAs, but they do not contain any positive duty in this direction. Conversely, the relevant provisions are broadly formulated and the current work on the establishment of an MPA network is still in a preparatory stage and is mainly political in nature. Nevertheless, the Community has fully endorsed these political commitments and the target to establish a coherent network of MPAs by 2012 (e.g., WSSD, CBD COP-7, the HELCOM/OSPAR Ministerial Declaration). The Community has implemented its international obligations to protect marine biodiversity within the framework of the Habitats (and Birds) Directive, whose main component is the establishment and management of a coherent network of MPAs of Community importance (Natura 2000 network). As discussed in Chapter 8.8.3.1, this Directive, in principle, may be a useful instrument to translate political commitments into clear and enforceable targets. However, the Habitats Directive was not expressly designed to apply to the sea and is mainly directed at protecting nature on land. Marine species and habitats are still largely unrepresented and most of the existing Natura 2000 sites are located on land or in close proximity to the coasts. As discussed in Chapter 8.8.3.2, in its present form, the Habitats Directive does not provide an adequate framework for the Community to fully comply with its international obligations to protect marine biodiversity and to meet the international targets on MPAs. In the wake of the WSSD, the Commission has appeared firmly determined to correct these weaknesses and is currently in the process of making the Directive more suitable for protecting the marine environment (e.g., by amending its Annexes). However, the work in this direction is progressing very slowly. Likewise, the recent Commission's proposal for a MSD represents a missed opportunity for reinforcing the member states' obligation to implement the Natura 2000 network to the marine environment. In its present form, moreover, the proposal does not ensure the Community's full compliance with its international duty to protect marine biodiversity and achieve the WSSD biodiversity-related targets.

Although the Court has never clearly pronounced itself on the point, currently EC member states seem to accept that the Habitats Directive also applies in the EEZ. From a jurisdictional point of view, the designation of Natura 2000 sites in the EEZ may create some problems as regards the management of human activities within the sites. Generally speaking, according to the LOSC, outside their internal waters (i.e., in the territorial sea and EEZ) coastal States, including the Community and the member states, are free to regulate all extractive uses, including fishing and mining, and other potentially dangerous human activities as long as they do not interfere with shipping. The Habitats Directive places the EC member states under a duty to protect and manage the Natura 2000 sites, but makes no reference to the specific activities that have to be managed therein. In principle, therefore, there is no conflict with the jurisdictional regime set out by the LOSC.

From an EC law point of view, the management of Natura 2000 sites may create some problems with regard to the control of fishing, which is under the exclusive competence of the EC. Member states are not entitled to regulate unilaterally the environmental impact of fishing within Natura 2000 sites, but all relevant measures have to be adopted within the framework of the CFP. As discussed in Chapter 8.8.3.3, although there are several instruments available under the CFP which may be used to protect marine biodiversity, the revised CFP has not properly integrated environmental concerns into fisheries management as requested by the LOSC and Agenda 21. Once again, the Commission (DG ENV) intends to correct this failure and, recently, DG FISH has appeared to be more open to adopting fisheries restrictions to protect marine ecosystems (e.g., the Darwin Mounds and the Azores Archipelago). The future Maritime Policy, moreover, may provide a good opportunity to better integrate fisheries and environmental considerations and further specify the duty of the Commission to regulate the environmental impact of fishing, especially within Natura 2000 sites.

9.7 Final Observations on the Contribution of the Community Towards the Effective Implementation of the International Ocean Regime

The Community legal framework may contribute to a great extent to the effective implementation of the international ocean regime in European waters. As discussed in Chapter 1.5, global and regional seas conventions suffer from strong implementation and enforcement deficits. The global rules agreed, normally by consensus, by a large number of states generally reflect a high level of compromise, which often results in the lowest common denominator; weak, broad and unclear obligations; and increasing resort to recommendatory instruments. Likewise, a large part of the work carried out within the regional seas conventions, especially as regards MPAs, is mainly political in nature. In addition, the lack of adequate monitoring and funding mechanisms at the global and regional levels has influenced the existing implementation deficit to a great extent. The Community with its strong legal framework has the potential to transform broad political commitments into clear and enforceable targets. Community rules adopted by QMV by 25 member states are easier to agree on and normally result in higher standards of protection compared to global ones. However, due to the conflict of interests among member states and EC institutions, the level of compromise of Community legislation is often rather high. This compromise results in a lack of clarity, the frequent use of derogation clauses, soft law and policy instruments especially when highly political issues or important national interests are on the table. The Commission's proposed MSD is an example of the high level of compromise.

The adoption of EC standards which are higher than international ones would certainly benefit the local environment and make EC waters definitely safer and cleaner. Of course, there is nothing wrong with this. However, by increasing protective standards in EC waters there is a higher risk of diverting dangerous activities (e.g., shipping) or unsustainable practices (e.g., destructive fishing methods) to regions with lower environmental standards, shifting the problem from one area to another. To ensure an effective and uniform level of marine environmental protection, especially in the field of vessel-source pollution, the highest possible standards and enforcement mechanisms should be set out at the international level.

As discussed in Chapter 2.2.3, international agreements concluded by the Community according to the procedure laid down in the Treaty, as well as decisions of their bodies, form an integral part of Community law. Once ratified, the provisions of agreements which are under the EC's competence (both exclusive or shared) acquire the same characteristics as EC legislation (e.g., supremacy over conflicting national rules and, in some cases, direct effect). In addition, by means of their incorporation within the EC legal order the international instruments may avail themselves of the strong compliance mechanisms of EC law discussed in Chapter 2.2.6 (e.g., monitoring, enforcement, funding instruments and infringement proceedings under Article 226 EC). These mechanisms have the potential to fill most of the existing compliance gaps, especially with regard to regional seas conventions where EC member states are the majority of the contracting Parties

(except in BARCON). Nevertheless, the Commission (DG ENV), due to its workload and a shortage of personnel, has to prioritize its action. So far, its record in monitoring the application of (marine) environmental conventions has been rather poor and mostly limited to hazardous substances which have been totally harmonized at the EC level, leaving the member states free to decide whether and to what extent to apply the other provisions.[1954] The proper implementation and enforcement of international agreements concluded by the Community, therefore, ultimately depends on the willingness of the member states.

The proliferation of global, regional, and sub-regional instruments and the resulting patchwork of rules make the implementation of the international ocean regime increasingly complex and result in duplications, overlaps and a waste of resources. One of the main challenges for the future, therefore, is to enhance coordination and cooperation among all international instruments and bodies involved in marine environmental issues. As already mentioned this is also one of the primary objectives of the EC Marine Strategy. In the drafting of the Strategy, the Community has considerably enhanced cooperation with the regional bodies, especially OSPARCOM and HELCOM, and it is firmly committed to promoting full consistency between EC and regional rules.

The EC's regulatory action toward the implementation of its international ocean obligations may influence significantly the progressive development of the international law in the field of the marine environment in terms of state practice. EC marine-related legislation is binding on the 25 member states, plus the acceding (Bulgaria and Romania) and candidate countries (Croatia and Turkey), and most of the maritime safety rules also apply to the EEA countries (Norway and Iceland).[1955] All these countries (except Turkey) are parties to the LOSC and most marine environmental agreements. By complying with EC rules, they will contribute to the formation of state practice. The Community's influence is particularly evident in the field of vessel-source pollution where the fleets of EC member states, plus acceding, candidate and EEA countries represent over 30% of the world tonnage and a large part of the international shipping traffic is directed towards EC ports and is thereby bound by EC rules.

The 2004 enlargement has significantly increased the ability of the Community to influence the international decision and policy-making in the field of marine environmental protection, especially within the regional seas conventions. From an environmental perspective, the increased numerical weight of the Community in the international decision-making process may have both positive and negative effects. As experience indicates, the high environmental orientations of the Community may encourage the development of greener ocean policies and legislation at the global level. In the past few years, by advancing its own targets, the Community has driven the main coastal-oriented developments in the UN, CBD and IMO and has promoted the global application of the objectives, principles and approaches recommended by Agenda 21 (e.g., the ecosystem-based approach and the precautionary principle). On the other hand, the Community tends to prevent the adoption of regional environmental standards stricter than those of the EC. However, although the 2004 enlargement created significant opportunities for strengthening the participation of the EC within the regional seas conventions, the tendency of the member states to act intergovernamentally in these forums is still predominant. In addition, if the enlargement has increased the numerical weight of the Community in the international decision-making process, on the other hand, it has made EC coordination even more difficult, especially in shipping-related matters.

With the consolidation of the Community coordination mechanisms, the existence of a division of competence between the Community and the member states in marine environmental matters does not seem to affect the international decision-making process as much as it did in the past. Community coordination, however, has both positive and negative implications. By speaking with a single voice and presenting itself as united vis-à-vis the rest of the world, the Community and

[1954] To the knowledge of this author, so far the Commission has only once taken action against a member state for not complying with the provisions of a regional sea convention: the Land-based pollution Protocol of the BARCON.
[1955] The Former Yugoslav Republic of Macedonia is also a candidate country, but is not a coastal State.

the member states play a stronger role in international negotiations as is proved by the successes obtained by the EU in the past few years. Good coordination at the EC level, moreover, may facilitate and speed up the decision-making process to the advantage of all. For third States it is certainly easier to negotiate with a single entity, rather than with 25 uncoordinated member states. On the other side, EC coordination brings some rigidity to the negation process and may be a source of major delays and great frustration for third States. Even though the Community and the member states try their best to maintain their "housekeeping" outside the negotiations, Community coordination may be particularly irritating for third States which have to wait until the EU has put its house in order. Today, however, the international community has become more familiar with the presence of the EC on the international scene and although there is still comparatively little understanding of the EC's mechanisms and a strong resistance against bloc-forming, other States know that the EC member states can no longer act in isolation, but need to coordinate positions. Maybe they do not like this, but they seem to accept it as an inevitable corollary of the Community's participation in the international decision-making and a point of no return.

In conclusion, the Community may contribute to the effective implementation of the international ocean regime in two ways. From a legal point of view, the EC offers a strong legal framework to correct the weakness of and ensure full compliance with international rules. From a political point of view, the enlarged EU has become one of the most influential players on the international scene and by moving its targets and priorities up the international agenda it may lead to the development of cleaner, safer and more environmentally sound ocean policies and legislation.