Chapter 2
The Legal Framework for the European Community (EC) Action to Protect the Marine Environment

2.1 Introduction

The implementation of the international ocean regime in the European seas must be examined in the context of the unique legal and political structure of the European Community (EC) and the special relation with its member states. The present chapter provides some general remarks on the main elements which makes the EC system a "new legal order of international law", including its legal subjects, sources, institutional framework, instruments, decision-making processes and compliance mechanisms. The focus of the discussion is on European environmental law and the capacity of the Community to take action at the internal and international levels concerning matters related to the protection and preservation of the marine environment. Particular attention is given to the rules and principles justifying "*when*", "*whether", "to what extent"* and *"in what manner"* the Community may act. With the evolution of the European integration process, the member states have transferred, completely or partially, explicitly or implicitly, some of their powers to the Community, thereby limiting their capacity to take autonomous action at the national and international levels. The Community capacity to act, generally defined as "competence", is not unlimited, but derives from the attribution of powers under the EC Treaty (the principle of attribution). Such a (shared) competence, moreover, has to be exercised according to the fundamental principles of EC law (i.e., subsidiarity and proportionality) and guiding principles of European environmental law (e.g., integration; regional differentiation; precautionary principle). These principles are essential in order to understand the Community's approach to ocean preservation and the manner in which it implements its commitments under the international ocean regime, which will be discussed in detail in Chapter 3. Different from the "existence" of a Community competence is the "nature" of its powers, which may be exclusive or shared with the member states. Defining the nature of the EC competence is a fundamental step in determining the division of powers between the EC and its member states, which will be covered separately in Chapter 4. Chaper 2 concludes with some final considerations of the possible added value of the Community legal system for the proper implementation of the international ocean regime in the European seas. The discussion does not pretend to be exhaustive, but provides an important starting point for conducting the analysis in the following chapters.

2.2 Mechanisms of European Integration
2.2.1 Different Legal Subjects

At the time of its creation in 1957, the then European Economic Community (EEC) was conceived as a purely economic organization whose primary objective was the establishment of a common market without internal borders or trade barriers between the member states. In addition, the member states created the European Atomic Energy Community (EURATOM), which is a legal entity different from the EEC with a separate legal personality, but acting through the same institutions.[174]

With the development of the European integration process and the further amendments of the original Treaty, the EEC evolved into a wider entity, which

[174] Both the EEC Treaty and the EURATOM Treaty were signed in Rome on 25 March 1957 and entered into force on 1 January 1958.

includes, *inter alia*, environmental protection within its primary objectives.[175] In 1992, the Maastricht Treaty formalized this development and transformed the original EEC into the European Community (EC), normally referred as the "Community".

The 1992 Maastricht Treaty, moreover, extended the cooperation between the EC member states beyond economic integration and related matters by establishing a European monetary and political union, i.e., the European Union (EU).[176] The EU was conceived as an overarching political entity formed by the Community and its member states cooperating intergovernmentally in matters of common foreign and security policy (CFSP) and with cooperation in justice and home affairs (JHA). There was no intention to create an international legal person separate from the existing Community(ies), equipped with its own treaty-making powers and able to undertake international obligations.[177] The EU does not have its own institutional structure, it may only act through its components: i.e., the Community and the member states.

The EU legal system, therefore, is a complex legal order based on three pillars: the EC and EURATOM (first pillar) plus two intergovernmental pillars: the CFSP (second pillar) and the PJJC (ex JHA) (third pillar).[178] The EU's action under the two intergovernmental pillars is governed by different mechanisms, decision-making and instruments compared to the EC action under the first pillar. The member states are the main actors here and the EC institutions play a secondary role. This study focuses mainly on the law of the first pillar (i.e., EC or Community law); while the second and the third pillars (i.e., non-EC law) are covered only marginally.

Bearing in mind the fundamental difference between the EC and the EU, it has become common practice in the field of external relations to refer to the EU to indicate the member states and the Community also when matters under the first pillar are on the table.[179] This is mainly in order to simplify relations with third countries. For similar reasons, the Treaty establishing a Constitution for Europe, which has not yet entered into force, unified the EU and the EC into a single entity (Article IV-438 (1)) with a single legal personality (Article I-7) and abolished the three-pillar structure but internally the original distinction still remained.[180]

At present, the EU/EC has 25 member states (Austria; Belgium; Cyprus; the Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Malta; The Netherlands; Poland; Portugal; Slovakia; Slovenia; Spain; Sweden and the United Kingdom); two acceding countries (Bulgaria and Romania) are expected to join in 2007 and there are three

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[175] See, in general: P. Craig and G. de Búrca (2003), pp. 1-52; F.G. Jacobs (2004), pp. 303-16; J. Monar and W. Wessels (2001); A. Moravcsik (1999); and D. Urwin (1995).

[176] See, in general, P. Craig and G. de Búrca (2003), pp. 24-9. The consolidated text of the Treaty on the European Union (EU Treaty) is available at: http://europa.eu.int/eur-lex/lex/en/treaties/index.htm.

[177] The EC Treaty, Article 281, makes explicit reference only to the legal personality of the EC. Conversely, there is no reference to the legal personality of the EU in the EU Treaty. See J. Klabbers in: M. Koskenniemi (1998), pp. 231-53 and I. Macleod et al. (1996), p. 25.

[178] With the Treaty of Amsterdam part of the third pillar (asylum and immigration policies) has been transferred to the first pillar (EC). Currently, the third pillar deals only with policy and judicial cooperation in criminal matters.

[179] See, e.g, http://europa.eu.int/comm/external_relations/env/index.htm.

[180] Treaty establishing the Constitution for Europe, signed in Rome on 29.10.2004, not yet into force. Text available at: http://europa.eu.int/constitution/en/lstoc1_en.htm. On the main changes brought about by the Constitution see: A. Dashwood (2004), pp. 355-81.

candidate countries (Croatia, the Former Yugoslav Republic of Macedonia and Turkey).[181]

2.2.2 The European Community as a "New Order of International Law"

The European Community system is part of public international law, but it has its own peculiarities, which make it a "new legal order of international law".[182] Born out of an international agreement between contracting parties, the EC legal order has progressively evolved into something which is rather innovative, dynamic and effective compared to other international regimes.[183]

The Community legal order is subordinate to international law,[184] but has supremacy over national law.[185] According to the principle of supremacy member states have to abstain from taking any measure, including national legislation or the conclusion of international agreements, which is inconsistent with Community law and must always give preference to Community law over conflicting national law.[186] Under particular conditions, moreover, Community legislation may have "direct effect" and extend to non-state actors including individuals, granting them rights which may be enforced before national courts.[187] As will be discussed in the following paragraphs, the strong institutional framework and the progressive extension of qualified majority voting (QMV) in the Council provide the Community's system with a strong autonomy from the national systems of the member states.

2.2.3 Sources of Community (Environmental) Law

The Community legal order is based on five main sources. Firstly, the constitutive Treaties (i.e., the 1957 Treaty of Rome establishing the EEC; the 1957 Treaty of Rome establishing the EURATOM and the 1992 Maastricht Treaty establishing the EU, in so far as this has amended the EEC Treaty), their Annexes and Protocols and all subsequent amendments (i.e., the 1987 Single European Act, the 1996 Amsterdam Treaty, and the 2001 Treaty of Nice) set out the Community's constitutional framework and represent the primary source of Community law.[188] If, in the future,

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[181] In addition, there are three potential candidate countries: Albania; Bosnia and Herzegovina; and Serbia and Montenegro. For more information about enlargement see: http://europa.eu.int/comm/enlargement/enlargement.htm.

[182] E.g., Case C-26/62, *Van Gend en Loos*. For a general discussion see: A. Dashwood (2004), pp. 376-80 and C.W.A. Timmermans (1999), pp. 181-94.

[183] See D. Bethlehem in: M. Koskennemi (ed.) (1998), p. 184.

[184] On the relation between EC law and customary international law see: e.g., Case C-4/73 *Nold*, Para. 507; Case C-61/94, *Commission v. Germany*, Para. 52; and Case T-115/94, *Opel Australia*, Para. 90. On the relation between EC law and international agreements concluded by the Community, see infra section 2.2.3 .

[185] E.g., Case C-6/64, *Costa v Enel*. The supremacy is now expressly codified in Article I-10 (1) of the EU Constitution. See in general, P. Craig and C. de Búrca (2003), pp. 275-315 and D. Bethlehem in M. Koskennemi (ed.) (1998), pp. 169-96.

[186] Any conflicting national provisions, whether prior or subsequent, are automatically inapplicable and national courts cannot take such provisions into consideration (e.g., Case C-106/77 *Simmenthal*,and, recently, Joined cases C-10-22/97 IN.CO.GE '90 Srl).

[187] For a detailed discussion on the direct effect see: S. Prechal (2005), pp. 216-70 and P. Craig and C. de Búrca (2003), pp. 178-229.

[188] The consolidated version of the European Community Treaty (EC Treaty), after the entry into force of the Treaty of Nice on 1 February 2003, is available at: http://europa.eu.int/eur-lex/lex/en/treaties/index.htm.

the European Constitution will enter into force, it will replace the EC and EU Treaties (but not the EURATOM Treaty).[189]

The case law of the European Court of Justice represents another important source of EC law.[190] In performing its duties, indeed, the Court does not only implement existing law, but in most cases provides new interpretations, which contribute to a large extent to its further development.

International agreements concluded by the Community according to the procedure laid down in the EC Treaty, as well as binding decisions adopted by the bodies established by these agreements, constitute another primary source of EC law and are binding on the Community's institutions as well as on member states (Article 300(7) EC).[191] According to the Court these agreements become an integral part of EC law.[192] They prevail over EC secondary legislation[193] and, in some cases, they may have supremacy over the Treaty.[194] The supremacy of the EC Treaty, however, is without prejudice to the validity and enforceability of the international agreements under international law.[195]

The legislative acts of the Community institutions adopted in conformity with the Treaties represent a secondary source of EC law.[196] Article 249 EC lists five different types of Community legislation (i.e., regulations, directives, decisions, recommendations and opinions).

Regulations have general application, are binding in their entirety and are directly applicable to all member states without the need to be transposed into national law. Regulations are mostly used to implement international agreements and whenever there is a need for a more uniform regime.[197] In the absence of an explicit derogation clause, regulations do not allow member states to adopt different (either

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[189] Article IV 437 (1). The EU constitution should enter into force on 1 November 2006 provided that all instruments of ratification have been deposited. So far, only 14 out of the 25 member states (i.e., Austria; Cyprus; Estonia; Germany; Greece; Hungary; Italy; Lithuania; Luxembourg; Malta; Slovakia; Slovenia; Spain; and Sweden) have ratified either by national parliaments or by referendums. After the negative outcome of the referendums in the Netherlands and France it is very unlikely that the Constitution in its present form will ever enter into force.

[190] See, e.g., Opinion 1/91(paras 21 and 46) and Case C-294/83 *"Les Verts"* (para. 23).

[191] In Case C-30/88, Greece v. Commission (Para. 13), the Court made it clear that binding decisions taken by the bodies created by an international convention also become an integral part of EC law in the same way and with the same consequences as the agreement itself. See, in general: E. Hey and A. Nollkaemper (1995), p. 296; I. Mcleod et al (1996), p. 138; B. Martenczuk in: V. Kronenberg (Ed.) (2001), pp. 155-63; A. Peters (1997), pp. 12-13; and C.W.A. Timmermans (1999), p. 189. See also infra Chapter 4.4.

[192] *Inter alia*, Opinion 2/94, Para. 24; Case C-181/73 *Haegeman*, Para. 3; Case C-12/86, *Demirel*, Para. 7. See, in general: I. Macleod et al. (1996), pp. 133-37.

[193] See, *inter alia*, Case C-377/98, *The Netherlands v. European Parliament and Council*, Para. 53; and Case C-61/94, *Commission v. Germany*, Para. 52.

[194] This, however, is still a controversial point. In Case T-306/01 (Yuzuf Case) the Tribunal of First Instance recognized the supremacy of a Security Council resolution over EC legislation. See Tomuschat (2006), pp. 537-51.

[195] Opinion 1/00, paras. 20-21.

[196] For a detailed analysis of the instruments of EC law see: P. Craig and G. de Búrca (2003), pp. 111-17; and L. Kramer (2000), pp. 38-46. The EU Constitution changes the terminology of the legal instruments, but their content remains substantially the same.

[197] Regulations are mostly used for the harmonization of trade-related environmental measures (e.g., CITES Regulation 338/97 on the import and export of endangered species of wild animals and plants; Council Regulation 259/93 on the import and export of hazardous wastes; Council Regulation 348/81 on the import of whales and other cetacean products).

more or less stringent) standards either through national legislation or by acceding to an international agreement.[198]

Directives are the most used instruments in EC environmental law.[199] They require member states to achieve a specific result within a given period of time, but they leave them free to choose the most appropriate means. They guarantee large flexibility, but, unlike regulations, they need to be transposed and incorporated into national law. Environmental directives based on Article 175 EC normally provide for "minimum harmonization". They lay down minimum standards and fix a minimum level of protection through the Community, but member states are normally free to adopt more stringent measures than those contained in the directive.[200] However, when a more uniform regime is needed directives may also provide for a higher degree ("total" or "exhaustive") of harmonization.[201]

Finally, decisions are only binding upon the member state(s) (or individuals) to which they are addressed, while recommendations and opinions are not legally binding, but have a great deal of political force.

However, the list contained in Article 249 discussed above is not exhaustive.[202] In addition to the "official" instruments, there are a number of other instruments, such as additional soft law instruments (e.g., communications, resolutions, codes, white and green papers, guidelines, reports, among others) and *sui generis* acts. Among these it is worth mentioning the so-called decisions *sui generis*, which unlike decisions under Article 249 EC are addressed to EC institutions or have general application. Decisions *sui generis* are normally used by the Council and the EP to adopt the Environmental Action Programmes (EAPs) proposed by the Commission. These programmes define the policy objectives, strategies, and the guiding principles of the Community environmental action and are legally binding for EC Institutions which are under the positive duty to implement them (Article 175(3) EC).[203]

Finally, the general principles of law (e.g. non-discrimination) represent an important unwritten source of Community law.[204]

All sources discussed so far form the so-called "*acquis communautaire"* which is binding in its entirety on both the member states and on the Community's institutions.[205] The "*acquis communautaire"* also applies to acceding and candidate countries, which in order to join the Community have to incorporate the entire body of EC law into their legal systems (but they are de facto only bound starting from the

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[198] E.g., Case C-148/78, *Ratti*.

[199] For a detailed discussion on the directives see: S. Prechal (2005).

[200] Minimum harmonization directives are usually adopted concerning matters where national differences are not likely to affect the common market, such as environmental quality standards or the protection of flora and fauna.

[201] This is often the case for directives based on Article 95 EC regulating product standards and trade-related environmental measures (e.g., Directive 84/631 on the transboundary shipment of hazardous waste). However, it is not the legal basis which determines whether the directive provides for "total" or "minimum" harmonization, but the content of the directive. For a full discussion see: P.J. Slot (1996), pp. 378-97. This issue is discussed in further detail in Chapter 4.2.2.1.

[202] H. Somsen in T. Jewell and J. Steele (eds)(1998), pp. 189-90.

[203] According to Article 175(3) EC, EAPs have to be adopted by the Council on the basis of a co-decision with the EP. Since 1973, six EAPs have been adopted. The Sixth EAP: "Environment 2010: Our Future, Our Choice" setting out the framework of the Community environmental policy for 2001-2010 (COM (2001) 31, 24.1.2001), was adopted by Decision 1600/2002 of the EP and the Council, 22.07.2002, based on Article 175(3) EC.

[204] However, see on this point P. Craig and G. de Búrca (2003), pp. 337-38.

[205] For a detailed discussion on the *aquis communitaire*, see C. Delcurt (2001), pp. 829-70.

date of their accession).[206] Some EC legislation, including environmental rules, may also apply to members of the European Economic Area (EEA), i.e., Liechtenstein, Iceland and Norway.[207]

In addition to the legal sources, it is important to mention political instruments (e.g., conclusions of the European Council or recommendations of the EP), which define the Community's general orientation in different policy areas. Despite their non-binding status, these instruments have a great deal of political force and provide the input for new legal developments.[208]

Finally, it is worth mentioning that the EU's action under the 2nd and 3rd Pillars is based on different instruments. Some of them (e.g., common positions under the 2nd Pillar and framework decisions under the 3rd Pillar) have binding force. [209]

2.2.4 The Community's Institutions

To carry out its tasks, the Community is equipped with a strong institutional structure, which differentiates it from other international organizations (EC Treaty, Article 7).[210] The EC institutions, like state organs, are not legal entities separated from the Community and they have no legal personality under international law. They have to assist the Community in the achievement of its objectives on the basis of their duty of sincere cooperation (EC Treaty, Article 5).[211]

The European Commission (hereinafter the Commission) has three main functions (Article 211 EC).[212] First of all, it has the right of initiative and is the key player at the stage of policy and legislation formulation in all matters under the first pillar.[213] It drafts proposals for new policy and legislation, which form the basis for negotiations among member states in the Council. Secondly, it is the executive organ of the Community. As the "guardian of the Treaties" it supervises compliance with EC law and may bring actions against member states acting in violation of EC legislation (Article 226 EC). Thirdly, as will be discussed in Chapter 4, the Commission represents the Community at the international level on matters under EC (exclusive) competence and maintains all appropriate relations with the UN's organs, its specialized agencies, and other international organizations.[214] In performing its functions the Commission has to act in the exclusive interest of the Community and be independent from any governments or any other body (Article 213 EC). The

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[206] This is one of the "Copenhagen criteria" adopted in June 1993 by the Copenhagen European Council.
[207] Preamble (point 4) to the Agreement on the creation of the EEA, signed in Porto, 2.05.1992 (entered into force on 1.01.1994) among the three abovementioned countries and the EC member states. Parties are required to strengthen cooperation in several areas, including the environment (Article 78) and to adopt "parallel legislation, where appropriate, of identical or similar content" (Article 80).
[208] On the EC policy instruments in general, see: K. Wellens and G. Borchardt (1989), pp. 267-321.
[209] Instruments of the CFSP, for instance, are listed in Article 12 EU and include: principles and guidelines; common strategy; joint actions; common positions; and systematic cooperation between the member states.
[210] There are five institutions. This section does not discuss the Court of Auditors.
[211] E.g., Case C-65/93, *Parliament v. Council*, Para. 22.
[212] For a detailed discussion on the composition, functioning and powers of the Commission see: P. Craig and C. de Búrca (2003), pp. 54-64; L. Kramer (2000), pp. 26-32; H. Somsen in T. Jewell and J. Steele (eds) (1998), pp. 172-5 and A.M. Sbragia in: H. Wallace and W. Wallace (eds.) (2000), pp. 298-300.
[213] The Commission shares the right of initiative with the member states in matters under the second pillar (CFSP) and in some matters relating to the third pillar.
[214] Articles 300(1) and 302 EC. Next to the UN, the EC Treaty expressly refers only to the Council of Europe (Article 303 EC) and the Organization for Economic Cooperation and Development (OECD) (Article 304 EC).

Commission, therefore, is a truly supranational organ and the main political force towards EC integration.

The Commission is divided into twenty-four Directorates Generals (DGs) with different and sometimes opposing policy objectives (e.g., DG Environment; DG Trade; DG Competition) and fifteen services (e.g., the Legal Service).[215] Each DG consists of separate directorates and units. Despite the internal fragmentation, the Commission as a whole is responsible for its acts and has to work as a single body. Each proposal therefore needs to be developed and adopted in close coordination with all interested DGs, directorates and units.[216]

The Council is the main legislative body of the Community.[217] It is made up of ministers of member states and its composition changes according to the issue at stake. The Council meets in nine different configurations (e.g., Environment; Agriculture and Fisheries; General Affairs and External Relations) bringing together the ministers responsible for the areas concerned. The Presidency of the Council, which changes every six months, sets out the agenda and chairs these meetings. Each configuration meets on average two times under each Presidency.

The Council, unlike the Commission, is the forum where the different national interests are represented. Its work is prepared by the Permanent Representatives Committee (COREPER), which is composed of the permanent representatives of the member states in the rank of ambassadors (Article 207 EC). The COREPER examines draft legislation before it is submitted to the Council for adoption and plays a central role in the EC decision-making process.[218] The COREPER is assisted by a large number of committees, working parties, or working groups made up of national delegates and experts. They examine the legislative proposals of the Commission before they are discussed in the COREPER, which normally focuses only on points where consensus has not been reached. Together with the COREPER, these bodies represent the forums where negotiations among member states and, to a minor extent, between the member states and the Commission, take place. Representatives from the Commission may indeed also attend these meetings, but they play a secondary role.

As will be discussed in detail in Chapter 4, the Council is mainly responsible for concluding international agreements. In addition, the Presidency is charged with the external political representation of the EU in matters under the second pillar (CFSP) and, although it is not an organ of the Community,[219] it also plays a central role in matters under the first pillar (EC).[220]

The European Parliament (EP) has become the main legislator together with the Council. It has primarily legislative and budgetary tasks, but it also supervises the

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[215] For a list of all the Commission's DGs and services see: http://europa.eu.int/comm/dgs_en.htm.

[216] See: Rules of Procedures of the Commission, Article 21 on interdepartmental cooperation and coordination (C (2000) 3614) (OJ. L 308/26, 8.12.2000). See also L. Kramer (1997), p. 282 and A. M. Sbragia in: H. Wallace and W. Wallace (eds.) (2000), p. 299.

[217] Article 202 EC. For a detailed discussion on the structure, composition, functioning and powers of the Council see: P. Craig and C. de Búrca (2003), pp. 65-71 and L. Kramer (2000), pp. 34-5. See also: http://ue.eu.int/cms3_fo/showPage.asp?id=427&lang=en&mode=g.

[218] See Rules and Procedures of the Council, Council Decision 2004/338/EC/Euratom, 22.03.2004 (OJ 2004 L106/22), Article 19 (10). The COREPER prepares so-called *common positions* which are then adopted by the Council.

[219] The Presidency is not listed among the EC institutions (Article 7 EC) and has no functions under the EC pillar (except for the operation of the European Central Bank), but only under the second pillar (Article 18 EU).

[220] See in detail Chapter 4.3.2.5.

work of the Commission and the Council.[221] The EP's work is prepared by twenty permanent committees responsible for different areas (e.g., the Environment, Public Health and Food Safety Committee; Transport and Tourism Committee; Legal Affairs Committee) and composed of Members of the EP (MEPs).[222] The Commission's proposals are discussed within the competent committee under the chairmanship of a 'rapporteur' who reports to the plenary where decisions are taken. The EP, like (in part) the Council, is made up of politicians, who, however, sit according to political grouping, not by nationality. This is the only democratically elected EC institution and represents the voice of the European citizens in the EC decision-making process. Like the Commission, the EP also has strong supranational aspirations. It is considered to be the greenest of the Community institutions and has traditionally placed environmental issues at the top of its agenda. The EP, unlike the Council, normally tends to raise the environmental standards proposed by the Commission.[223] Its increasing role in the legislative process, which has been strengthened over the years, has had a strong influence on the progressive development of European environmental law.

The European Court of Justice (ECJ or "the Court"), together with the Court of First Instance (CFI), is the judicial organ of the Community.[224] Its main role is to ensure that EC law is uniformly interpreted and applied throughout the EU. In particular, the Court exercises judicial control over the acts of the EC institutions and reviews member states' compliance with EC law.[225] The ECJ has exclusive jurisdiction over all disputes between member states concerning violations of the EC Treaty (Article 292 EC).[226] In addition, the Court gives rulings on the interpretation or validity of Community legislation (Article 234 EC) and provides opinions on the consistency of international agreements with the EC Treaty (Article 300(6) EC). The Court is not competent in matters under the second pillar (CFSP) and has only limited powers (preliminary rulings) with regard to matters under the third pillar (PJJC).[227] Like the Commission and the EP, the Court is a supranational institution with strong

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[221] For a detailed discussion on the composition, functioning and powers of the EP see: P. Craig and C. de Búrca (2003), pp. 75-86 and A. M. Sbragia in: H. Wallace and W. Wallace (eds.) (2000), pp. 301-1. The EP considers proposals drawn up by the Commission alongside the Economic and Social Committee (ECS), which is made up of representatives of various categories of economic and social activities (Article 257 EC) and the Committee of the Regions, which is composed of local and regional authorities (Article 263 EC). The EP's Rules and Procedures are available at: www2.europarl.eu.int/omk/sipade2?PROG=RULES-EP&L=EN&REF=TOC#X6

[222] EP permanent and temporary committees and meeting documents are available at: www.europarl.eu.int/activities/expert/committees.do?language=EN.

[223] This is mainly due to the lobbying efforts of the environmental NGOs. The EP, however, is also heavily lobbied by the industry, including the shipping and the fischeries industries. On the EP role in the EC environmental law and policy see: L. Kramer (2000), pp. 32-4; H. Somsen in T. Jewell and J. Steele (eds) (1998), pp. 175-77 and A.M. Sbragia in: H. Wallace and W. Wallace (eds) (2000), pp. 301-02.

[224] For a detailed discussion on the composition, functioning and division of powers between the ECJ and CFI see: P. Craig and C. de Búrca (2003), pp. 86-102; A.M. Sbragia in: H. Wallace and W. Wallace (eds.) (2000), pp. 303. The CFI normally decides on cases brought by individuals (Article 230(4) EC) and on competition matters.

[225] The EC Treaty sets forth several proceedings before the ECJ: the infringement proceeding brought by the Commission against member states for lack of compliance with EC law (Article 226 EC); actions for annulment of EC acts adopted in violation of the Treaty (Article 230 EC); complains concerning the failure of the Community to act (Article 232 EC); and actions for damages arising from the actions (or non-actions) of EC institutions (Articles 235 and 288(2) EC).

[226] See also Chapter 4.4 of this Study.

[227] In 3rd pillar matters, the member states have the right to choose whether or not to accept the ECJ's jurisdiction (EU Treaty, Article 35.2). The ECJ's competence in these matters is rather restricted (Article 35 (6) and (7) EU).

integration aspirations. It has played a central role in advancing European integration and expanding the Community's competence. The Court's case law has paid particular attention to the environment and has had a decisive influence on the establishment and development of EC environmental law through a process of balancing conflicting environmental and economic interests.[228] The Court is independent from national governments and in performing its functions it tries to mediate between the EC institutions and the member states. Its judgments, therefore, are often influenced by political considerations.[229]

Finally, the European Council is not a Community institution, but the main political organ of the EU.[230] It is composed of the Heads of State or Government plus the President of the Commission. It meets twice yearly under the chairmanship of the member state holding the Presidency in order to define the general political guidelines of the EU, but it has no legislative power (Article 4, EU Treaty). Despite their non-legal status, the European Council's conclusions have a great deal of political force and have influenced, to a great extent, the evolution of EC environmental law.[231]

2.2.5 The Community's Decision-Making Process

The EC Treaty lays down different decision-making procedures, which provide for a different degree of participation on the part of the EC institutions and normally require a final decision by the Council according to three voting requirements (i.e., unanimity, simple majority and QMV). The amendments to the EC Treaty have progressively strengthened the role of the EP within the legislative process and have extended the QMV in the Council.[232] These changes have resulted in the substantial "greening" of the EC legislative process.

As already mentioned, the participation of the EP strongly influences the environmental content of EC legislation. Its involvement is minimal in the "consultation procedure",[233] is a bit stronger in the "cooperation procedure",[234] and it is decisive in the "co-decision procedure" and the "assent procedure" where the EP is a co-legislator together with the Council and enjoys a real veto power.[235] The co-decision has currently become the standard procedure for most Community legislation. This procedure is quite complex.[236] In essence, it gives the EP the right to propose

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[228] The Court's main contribution to the EC environmental policy has been the progressive extension of the environmental grounds of justification which, under certain circumstances, justify trade restrictions (infra Chapter 4.2.3) and the expansion of the external competence of the Community (infra Chapter 4.2.2).

[229] See: P. Craig and C. de Búrca (2003), p. 89; G. Garret (1995), p. 171 and L. Kramer (2000), p. 35.

[230] For a detailed discussion of the composition, functioning and powers of the European Council see: P. Craig and C. de Búrca (2003), pp. 71-5. The Treaty on the EU Constitution includes the European Council among the institutions of the Union alongside the Commission, the Council, the EP and the ECJ (Article I-19 (1)).

[231] Presidency conclusions are available at: http://ue.eu.int/cms3_fo/showPage.asp?id=432&lang=en&mode=g.

[232] For a detailed discussion see: P. Craig and G. de Búrca (2003), pp. 139-77; A. Dashwood (2004), pp. 373-76; A. Dashwood (1998), p. 25; P. Craig and C. Harlow (eds.) (1998); P. Craig, (1997), p. 105.

[233] Consultation is still maintained in very few policy areas, such as fisheries (Article 37 (2) and Article 175(2)), see P. Craig and G. de Búrca (2003), p. 141.

[234] The cooperation procedure is maintained only for economic and monetary union measures, see P. Craig and G. de Búrca (2003), pp. 141-4.

[235] See in detail, P. Craig and G. de Búrca (2003), pp. 144-8. Only in exceptional cases may the Commission and/or the Commission and the Council act alone without any involvement by the EP, see, ibid. p. 140.

[236] See: Co-decision Guide available at: http://ue.eu.int/uedocs/cms_data/docs/2004/4/29/Codecision%20guide.pdf.

amendments to the Commission's proposal before it is approved by the Council. If the Commission accepts the EP amendments the Council must either reject them unanimously or adopt them by QMV (Article 251 EC). It may consist of three phases: a first reading in the EP and the Council (with no time-limits); which may be followed by a second reading (with a quite extended time-limit) and eventually a third reading (with a more stringent time-limit). The co-decision procedure may therefore be rather time-consuming and it may take years before a proposal is adopted, especially when it involves highly political or sensitive issues.

The extension of QMV in the Council has removed the capacity of member states to block a proposal and has limited their capacity to exercising the full political control guaranteed in the past under the unanimity rule.[237] In addition, it speeds up the adoption of Community measures, makes higher environmental standards easier to agree upon, and lessens the extent of the compromise.

At present, the standard procedure for the adoption of Community environmental legislation is co-decision with the EP and QMV in the Council. However, "by way of derogation", the "unanimity" rule and the consultation procedure have been maintained for a number of measures, including, inter alia, measures "significantly affecting" the energy policy of member states.[238] As will be discussed in detail in Chapter 4.3.2.7, QMV in the Council is also the rule for the conclusion of international conventions while the standard procedure is consultation with the EP (Article 300(2) and (3) EC).

2.2.6 The Community's Compliance Mechanisms

The EC Treaty leaves the implementation and enforcement of EC law, including environmental legislation, under the control of the member states.[239] Each member state is under a legal duty to take all appropriate measures to ensure the fulfilment of obligations arising from the Treaty or from action taken by the EC institutions (Article 10 EC) and to implement and finance the common environmental policy (Article 175(4) EC). The implementation duties require, in the first place, the transposition of Community legislation into the national legal systems and its full application. In performing these duties member states act according to their national system and there are no uniform rules on transposition at the EC level.[240] The Community legal order, however, provides for strong monitoring, enforcement and financing instruments to facilitate or ensure full compliance with EC law.

The Commission, first of all, "shall ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied" (Article 211 EC). In carrying out the monitoring function, the Commission is assisted by a number of agencies, including the European Environmental Agency (EEA).[241]

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[237] Currently QMV in the Council is reached when 232 votes out of 321 are cast and the decision receives a favourable vote from the majority of the member states. Conversely, unanimity is still the rule in the EU pillars, while QMV is exceptionally applied in limited areas.

[238] Some marine environmental measures (e.g., standards related to the maritime transport of oil) could, in principle, fall within the scope of these broad exceptions listed in Article 175(2) EC. So far, however, this has never occurred.

[239] On the implementation and enforcement of EC law see, in general, J.H. Jans (2000), pp. 135-159; A. Berg (1999), pp. 63-6; A.M. Sbragia in: H. Wallace and W. Wallace (eds) (2000), pp. 304-08; and H. Somsen in T. Jewell and J. Steele (eds) (1998), pp. 200-03.

[240] However, there are some guiding principles on transposition in ECJ's case law, see: S. Prechal (2005), Chapter 5.

[241] The EEA was established in 1990 (Council Regulation 1210/90) to provide the EC institutions and the general public with targeted, relevant and reliable information. Since 1994, the EEA has been

When the Commission considers that a member state has failed to fulfil an obligation under the Treaty, it may start an infringement proceeding acting on its own initiative (Article 226 EC) or at the request of a member state (Article 227 EC). The Commission may bring member states to Court also in the case of inadequate enforcement.[242] If member states do not comply with the ECJ's judgments, which are final and irrevocable, the Court may also impose pecuniary sanctions (Article 228(2) EC).[243] Pecuniary sanctions may have an important deterrent effect and encourage member states to comply with EC rules. The infringement procedure may, however, be rather time-consuming and does not offer prompt solutions to prevent environmental harm.

Over the years, individuals have played an increasingly important role in the enforcement of the EC law. Indeed, they may initiate actions before national courts against member states for the violation of EC legislation having direct effect. National Courts may, in turn, bring the case to the ECJ. When issues are too political, the Commission stimulates individuals to start actions.

In addition, the EC system provides for several financing mechanisms to assist member states in complying with EC environmental legislation. These include, first of all, "LIFE" (i.e., LIFE Nature and LIFE Environment) which is directed at the development and effective implementation of the Community's environmental policy; but also Cohesion Funds which intend to assist less developed member states to cover the substantial costs of the higher EC environmental standards; and, to some extent, Structural Funds, which promote harmonious, balanced and sustainable development within the Community.[244]

Although the level of compliance has increased over the past few years, the Community environmental system still faces strong implementation and enforcement gaps, which have so far prevented the common environmental policy from being fully effective.[245] The proper implementation and enforcement of EC legislation ultimately depends on the member states. Those who voted against legislation adopted by QMV or did not participate in the decision-making may have political or economic interests not to apply the legislation. The workload and the shortage of personnel of DG ENV, moreover, often impede an effective exercise of the monitoring function.[246] The lack of motivation to comply, together with the ambiguity in policy objectives; excessive derogation clauses; the increasing use of soft-law instruments; the participation of too

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assisted by European Topic Centre on Marine and Coastal Environment (ETC/MCE) which carries out the work on marine and coastal issues.

[242] E.g., Case C-56/90 *Blackpool Case*; Case C-198/97, Commission v. Germany, [1999]; Case C-374/98 *Commission* v *France*.

[243] Recently, in Case C-304/02 Commission v. France [2005], the Court ordered France to pay a penalty payment of huge proportion for a violation of EC provisions on fisheries. See also: Case C-278/01, Commission v. Spain [2004] and C- 387/97, Commission v. Greece.

[244] LIFE was established in 1992 (Council Regulation 1973/92/EEC), replacing two existing mechanisms (i.e., the 1991 Regulation on the Community Action for the Protection of the Environment in the Mediterranean Basin (MEDSPA) (EEC Regulation 563/91) and the 1991 Regulation on the Community Action for the Protection the Coastal Areas and waters of the Irish Sea, North Sea, Baltic Sea and North-East Atlantic (NORSPA) (EEC Regulation 3908/91)). For a general overview of the financial mechanisms for the environment, see L. Kramer (1997), Chapter 7 and S.P. Johnson and G. Corcelle (1989), pp. 343-50.

[245] See, e.g., the Sixth Anual Survey on the Implementation and Enforcement of Community Environmental Law, SEC(2005)1055, 20.08.2005; available at :http://europa.eu.int/comm/environment/law/as04.htm.

[246] See: H. Somsen in T. Jewell and J. Steele (eds) (1998), pp. 200-03; L Granvik (1998), p. 270 and L. Kramer (1997), p. 283.

many actors and overlapping authorities in the implementation process; insufficient technical, personal and financial resources; and a lack of information are some of the main shortcomings resulting in the serious implementation deficit.

2.3 The "Existence" of the Community's Competence

2.3.1 The Attribution Principle

The Community, unlike states, does not have "sovereignty" or "jurisdiction" but only powers which are attributed to it, explicitly or implicitly, by its member states. These powers are generally referred to as "competence".[247] The EC legal order is based, in the first place, on the fundamental principle of the "attribution" of competence. According to this principle the Community is entitled to act only "within the limit of the powers conferred upon it by the Treaty and of the objectives assigned to it therein" (Article 5(1) EC).[248] The legality of the Community legislation may be challenged for non-compliance with this principle and both EC institutions and member states may start an action before the ECJ for annulment of EC acts adopted in violation of the Treaty (Article 230 EC).

To determine whether the Community has competence concerning a specific subject-matter or area (e.g., marine environmental protection) it is, therefore, necessary to look at the objectives of the Treaty and the existence of a proper legal basis for the Community action.

2.3.1.1 The Community's Objectives

The Treaty of Maastricht included the promotion of a "high level of protection and improvement of the quality of the environment" among the fundamental objectives of the Community laid down in Article 2 EC on an equal position with respect to other objectives.[249] There is no definition of "environment" in the Treaty. Community legislation, however, refers to an "all-embracing" concept which comprises human beings; natural habitats; fauna, flora, and all biological forms; water, air, climate, soil and landscape and the interaction among these factors.[250] Oceans and seas together with their components therefore fall within the scope of Article 2.[251] The content of the environmental objective is further specified in Article 174(1) EC which sets out four specific objectives of the Community's Environmental Policy. Firstly, the Community's action shall aim to "preserve, protect and *improve* the quality of the

[247] For a general discussion see: N. Wolff (2002), p. 21; I. Macleod et al (1996), pp. 38-9 and J.A. Usher (1985), pp. 121-42.

[248] The EU Constitution places strong emphasis on this principle, referred to as the "principle of conferral" (i.e., Articles I-1 (1), I-9 (1)(2) and I-18 (3) of the Draft Constitution). For a detailed discussion of the principle see: A. Dashwood (2004), pp. 357-62; J.H. Jans (2000), p. 10; A. Von Bogdany and J. Bast (2002), pp. 232-4 and in general, A. Dashwood (1996), pp. 113-28.

[249] On the origin and evolution of the EC environmental policy see: J.H. Jans (2000), pp. 3-10; S.P Johnson and G. Corcelle (1995), pp. 1-11; A.M. Sbragia in H. Wallace and W. Wallace (eds) (2000), pp. 296-8; H. Somsen, in: T. Jewell and J. Steele (1998), pp. 161-70; L. Kramer (2000), pp. 1-4, and S. Bär et al. (2001), pp. 212-20.

[250] E.g., Council Directive 97/11 on EIA (Article 3) and Council Directive 79/117/EEC on the placing on the market and use of plant protection products containing certain active substances (Article 2(10)) and the Habitats Directive (Preamble).

[251] E.g., European Council Declaration on the environmental imperative, 15 June 1990 (in: Bulletin EC 1990, No. 6, pp. 16-20), Para. 1.36. For more on the point see L. Kramer (2000), p. 2. The Commission's proposal for a marine framework directive (COM (2005) 505, 24.10.2005), defines the "environmental status" as "the overall state of the environment in marine waters, taking into account the structure, functioning and processes of the constituent marine ecosystems together with natural physiographic, geographic and climatic factors, as well as physical and chemical conditions including those resulting from human activities in the area concerned" (Article 1).

environment" (*empahsis added*). This objective seems to be broad enough to justify, under the attribution principle, any kind of measure necessary to control all possible threats to and "improve" the quality of the marine environment in line with Chapter 17 of Agenda 21. Secondly, the Community action shall be directed at "protecting human health". This objective may justify the adoption of a broad range of marine environmental measures related to water quality, transboundary movement of hazardous or radioactive substances, or the accumulation of dangerous substances in the food chain of fish stocks.[252] The third objective of the environmental policy is "the prudent and rational utilization of natural resources".[253] The term "natural resources" is not defined in the Treaty, but it seems to comprise marine natural resources including marine habitats, ecosystems and marine species of flora and fauna.[254] The term "utilization" might suggest that "natural resources" also include commercially exploitable resources. However, as will be discussed in further detail in Chapter 8, measures related to the conservation and utilization of fisheries are outside the scope of the environmental policy and have to be adopted within the framework of the Common Fisheries Policy. Similarly, the Community is not entitled to take measures which may affect the exploitation of energy resources from the seabed.[255] With these two exceptions in mind, the Community seems to be entitled to take any legislative action to ensure the prudent and rational utilization of marine natural resources. Fourthly, the common environmental policy shall promote measures at the international level to deal with regional or worldwide environmental problems. This objective may justify Community participation in the multilateral development of ocean law and policies at the global and regional levels.

Finally, the promotion of a "harmonious, balanced and sustainable development of economic activities" is another fundamental objective of the Community under Article 2 EC.[256] The sustainable development goal may justify a broad range of Community measures directed at the sustainable use of the marine environment and its resources.

2.3.1.2 Legal Bases for the Community's "Internal" Competence

Since the introduction of the Environmental title into the Treaty in 1987, there is no doubt about the existence of a Community competence in environmental matters, including the protection of the marine environment. What is problematic, however, is the determination of the correct legal basis for the Community action. Due to their cross-sectoral nature, marine environmental measures may indeed be based on a number of different legal bases in the Treaty.

[252] As will be discussed in further detail in Chapter 3.4.4, most of the EC "water quality" legislation and EURATOM legislation are aimed at the protection of "human health".

[253] According to L. Kramer (2000), p. 58, resource utilization is "prudent and rational" if it avoids the destruction or complete removal of the resources.

[254] Most EC policy documents following Principle 2 of the Stockholm Declaration refer to all "natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems". In addition, Communication from the Commission: Ten Years After Rio: Preparing for the World Summit on "Sustainable Development" (COM (2001) 53, p. 16) expressly refers to "natural resources issues such as oceans and seas".

[255] For instance, Directive 94/22 on the conditions for granting and using authorizations for the protection, exploration and production of hydrocarbons" makes it clear that member states maintain sovereign rights over their hydrocarbon resources (Preamble). According to the Declaration annexed to the 1987 SEA, the "Community's activities in the sphere of the environment *may* not interfere with national policies regarding the *exploitation* of energy resources". See also J.H. Jans (2000), p. 28.

[256] The sustainable development goal is further specified in a number of policy documents. See infra, Chapter 3.4.5

First of all, measures necessary to achieve the environmental objectives laid down in Article 174(1), including marine environmental rules and standards, may be based on Article 175 EC.[257] This provision may provide the proper legal basis for the control of all potential threats to the marine environment. That is confirmed in the broad definition of "pollution" contained in EC legislation based on Article 175 which refers to "the discharge by man, directly or indirectly, of substances and energy into the aquatic environment, the results of which are such as to cause hazards to human health, harm to living resources and to aquatic ecosystems, damage to amenities or interfere with other legitimate uses of waters".[258]

Marine-related legislation, moreover, may be based on other Articles of the EC Treaty, such as Article 37 (i.e., conservation of marine species; impact of fisheries and agricultural practices on the marine environment);[259] Article 80(2) on the Common Transport Policy (i.e., maritime safety and vessel-source pollution); Article 95 (e.g., harmonization of pollution standards within the EC);[260] Article 133 on the common commercial policy (i.e., trade-related marine environmental measures affecting import and export to or from the Community); Article 163 (i.e., marine research); and Article 173 (i.e., marine technological development). In addition, the EURATOM Treaty may provide the proper legal basis for measures related to the shipment of nuclear material and safety standards (Article 31 and 32) or the disposal of radioactive waste (including ocean dumping) (Article 37).

The identification of the proper legal basis is not merely a theoretical issue. It is necessary, first of all, for the validity of the measure, which can be challenged and annulled in the case of an incorrect basis. Secondly, it is fundamental for the decision-making procedure to follow and for the level of the involvement of the Community institutions, especially the EP, in the legislative process.[261] Thirdly, the choice of the correct legal basis determines the "nature", whether exclusive or shared, of the Community competence and affects the extent to which member states are entitled to adopt more stringent measures. For instance, measures based on Articles 175 or 95 EC always allow member states to maintain or introduce higher environmental standards,[262] while measures based on Articles 80(2), 37 or 133 EC do not provide for such a possibility.

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[257] Before the introduction of a proper legal basis in the EC Treaty with the 1987 SEA, environmental directives were based on the combination of Article 100 (now Article 95) on the harmonization of national laws which are likely to affect the single market, and Article 235 (now Article 308) on implicit powers (e.g., Council Directive 76/464/EEC on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, as amended). Both Articles required unanimity in the Council and provided no involvement of the EP.

[258] E.g., Directive 76/464/EEC (Article 1(e)). The Water Framework Directive 2000/60/EC defines pollution as the direct or indirect introduction, as a result of human activities, of substances or "heat" into air, water, or land which, *inter alia*, results in damage or impair or interfere with legitimate uses of the environment" (Article 2 (33)).

[259] E.g., Council Regulation 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy and Council Regulation 973/2001 on technical measures for conservation of migratory stocks. For examples of "conservation measures" which may be based on Article 37, see A. Berg (1999), p. 74.

[260] E.g., TiO2 Directive 92/112. The proper functioning of the internal market, however, must be the primary objective of these measures. On this point see: L. Kramer (2000), p. 68 and J.H. Jans, (2000), p. 82.

[261] For that reason the EP started several actions before the ECJ for the annulment of EC legislation adopted on an incorrect legal basis. See J.H. Jans (2000), p. 58 and H. Somsen in T. Jewell and J. Steele (eds) (1998), pp. 184-87.

[262] See respectively, Article 176 EC and Article 95(4) and (5) EC.

According to the Court, in choosing the proper legal basis for the Community action, it is necessary to look at the "primary objective" and the "centre of gravity" of the measure.[263] In practice, even though an environmental measure imposes rules on products or fisheries management, it still has to be based on Article 175 EC if the primary objective is the protection of the environment and the effects on other policies is only incidental.[264] However, when a measure pursues different objectives which are equally essential, it may be adopted on several legal bases, as long as their decision-making procedures are not inconsistent (as would be the case in a co-decision vis-à-vis consultation and unanimity in the Council) and may be combined.[265]

2.3.2 The Community's External Competence

2.3.2.1 The Community's International Legal Personality

To be able to operate on the international plane the Community, in the first place, must possess international legal personality.[266] The Community seems to satisfy all the criteria which an organization has to meet in order to enjoy legal personality under international law as established by the International Court of Justice (ICJ).[267] In particular, it is a "supra-national organization founded on a constitutional Treaty" and "equipped with an institutional structure and powers in order to reach certain objectives". In addition, the active role played by the Community at the international level indicates the "widespread recognition" of its international legal personality. The EC Treaty itself implicitly recognizes the international legal personality of the Community (e.g., Articles 281; 174(4); 133; 300(1) and 310 EC).[268]

The attribution of international personality entitles the Community, in first place, to conclude agreements and to participate in the activities of other international organizations. As will be discussed in Chapter 4, however, the Community accession or participation must be expressly allowed in the agreement or in the statute of the organization in question.

This international legal personality, moreover, implies the recognition of the international rights and duties of the Community, which may be brought before international tribunals, except those whose jurisdiction is limited to states, such as, for instance, the ICJ.[269]

According to the ICJ the rights and duties of an organization depend on the objectives and functions attributed or implied in the constituent document and

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[263] E.g., Case C-42/97, Euopean Parliament v. Council, paras. 39-40. According to the Court such a choice must be based on objective factors capable of judicial review (e.g., Case C-269/97, Commission v. Council, Para. 43 and C-36/98, Spain v. Council, Para. 58). For the recent case law, see: H. Somsen (2003), pp. 1415-18.

[264] See, e.g., *WTO Opinion 1/94*, Para. 57 and Case C-281/01, Commission v. Council, Para. 86. As a consequence, the Council based many trade-related regulations on Article 175 EC (e.g., CITES Regulation 338/97 and Regulation 259/93 on the transfrontier shipment of waste). For a discussion on the correct legal basis for the adoption of fisheries-related measures to protect the aquatic wildlife see: Chapter 8.8.2 of this study.

[265] Joined cases C-164-165/97, European Parliament v Council, Para. 14. See C-300/89, Commission v Council, paras. 17-21. According to J.H. Jans (2000), pp. 54-5, the more demanding procedures applies plus any additional requirement of the less demanding procedure.

[266] On the EC's legal personality see, in general, I. Macleod at al. (1996), pp. 29-36 and R. Frid, (1995), pp. 9-54.

[267] The ICJ set out the relevant criteria in its advisory opinion in *Reparations for Injuries Suffered in Service of United Nations [*1949].

[268] According to Article 281 EC "the Community shall have legal personality". That provision has been criticized as "the most laconic of the whole Treaty", but it is generally considered as including "international legal personality". See R. Frid (1995), p. 22.

[269] See, for instance, Article 34 of the ICJ Statute.

developed in practice.[270] The broad scope of the EC objectives and functions as attributed in the EC Treaty seem to provide the Community with a potentially unlimited legal capacity to act at the international level.

Finally, the attribution of international legal personality confers on the Community a right to establish diplomatic relations with third countries or international organizations (the so-called "right of legation"), and the right of its Institutions to enjoy privileges and immunities in third States.

2.3.2.2 The Community's External Competence under EC law

The fact that the Community enjoys legal personality under international law is not sufficient, under EC law, to justify the Community's external action, which has to find a proper legal basis in the Treaty. The EC Treaty indeed extends the attribution principle to the Community's external policies and allows the EC institutions to begin international negotiations only "*where this Treaty provides for* the conclusion of agreements between the Community and one or more States or international organizations" (Article 300(1) EC) (emphasis added).[271]

In addition to Article 300(1), there are several legal bases in the EC Treaty for a Community action at the international level. The EC Treaty provides the Community with an explicit external competence in environmental matters ("the Community and Member States shall cooperate with third countries and with the competent international organizations […]") (Article 174(4)), in commercial matters (Article 133 EC)[272] and for the conclusion of association agreements (Article 310 EC). In addition, the EURATOM Treaty (Article 101) explicitly allows the Community to establish contractual relations with third countries and international organizations in matters related to radioactive materials.[273] The same considerations in 2.3.1.2 on the choice of the proper legal basis also apply in this context.

Moreover, under the EU Treaty (second pillar): "the Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy" in order to, *inter alia*, promote international cooperation (Article 11, Title V). As will be discussed in Chapter 5, this provision provides the legal basis for the EU's participation in the international development of ocean policies within the UN and other political forums.[274]

The existence of an "explicit" legal basis in the Treaty is not a *conditio sine qua non* for the Community's international action.[275] In the leading *ERTA Case* the ECJ made it clear that the Community's external competences are coextensive with

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[270] See *Reparations for Injuries Suffered in Service of United Nations, supra n. 267,* paras. 179-80.

[271] See also ECJ Opinion 2/94, Para. 24. Article 300(5), moreover, implies that the negotiation of an agreement which is outside the competence of the Community requires an amendment to the Treaty in order to provide the EC institutions with the necessary powers.

[272] Article 133 (together with Article 300), for example, has been adopted as a legal basis for the Council Decision 94/562/EC authorizing the signature by the EC of the agreement implementing Part XI of the 1982 LOS Convention .

[273] On the basis of Article 101, the EURATOM acceded, *inter alia*, to the International Convention on the Physical Protection of Nuclear materials (Commission Regulation 3956/92) and concluded cooperation agreements on matters of common interest with the International Atomic Energy Agency (IAEA) in 1975 (O.J. L329/28) and with the International Labour Organization (ILO) in 1963 (OJ 18/473).

[274] E.g., G. Loibl (2000), pp. 226-7. The issue is discussed in detail in Chapter 5.2.7.4.

[275] The EEC Treaty, prior to Maastricht, did not contain any reference to an external environmental competence. However, even before 1992, the Community was already active at the international level and was a party to several conventions (e.g., the 1974 Paris Convention; the 1976 BARCON and the 1989 Basel Convention on the control of the transboundary movement of hazardous waste).

those which are internal (the so-called principle of "*in foro interno, in foro externo")*.[276] According to the Court the Community is entitled to conclude international conventions or to establish contractual links with third countries not only by virtue of an express conferment by the Treaty, but such a competence can be "implied by other provisions of the Treaty conferring internal powers."[277] When the Community has used its powers to adopt internal legislation it acquires competence to act externally concerning the same subject-matter. As will be discussed in Chapter 6, vessel-source pollution, for instance, is an area where the Community has acquired an implicit external competence on the basis of internal legislation.

In the *Kramer Case* and in *Opinion 1/76* the Court took a further step and recognized that the Community's external powers may derive from the provisions of the Treaty conferring internal competence even in the absence of internal legislation whenever the external action appears "necessary for the obtainment of one of the Community objectives" (the so-called *Kramer/Opinion 1/76 Doctrine)*.[278] Considering the central position acquired by the environmental objective within the EC legal framework, the *ERTA* and the *Kramer/Opinion 1/76 Doctrine* confer on the Community a potentially unlimited external competence in environmental matters.[279]

2.3.3. The Nature of the Community's Competence: "Exclusive" or "Shared"?

Different from the "existence" of a Community competence, both internal and external, is the "nature", whether "exclusive" or "shared", of such a competence. The nature of the EC's powers determines the extent to which the member states retain their autonomy to act outside the EC framework. Defining the nature of the Community's competence, therefore, is central to determining the division of powers between the Community and the member states. The issue will be discussed in detail in Chapter 4.2.1 and 4.2.2. However, some preliminary considerations are needed.

By means of the Treaties or the Acts of Accession the member states have explicitly consented to transfer their competence to the Community in entire policy areas, which come under the "exclusive" competence of the Community. There are a few policy areas subject to "exclusive" competence including the common fisheries policy,[280] the common commercial policy,[281] and the promotion of uniform health and safety standards against the dangers of radioactivity under the EURATOM Treaty.[282] In these areas, moreover, the Community has exclusive external competence on the

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[276] Case C-22/70 (*ERTA*),, Para. 19. See in detail: J. Temple Lang (1986), p. 197.

[277] Case 22/70 (*ERTA*), Para.16. On the Community's implicit external competence see, *inter alia*, J. Jans, (2000), p. 80; A. Dashwood in M. Koskenniemi (ed.) (1998), pp. 113-123; I. Macleod et al. (1996), pp. 46-53; R. Frid (1995), p. 74; A. Maunu (1995), pp. 115-27; A.T.S. Leenen (1992), p. 101; and A. Nollkaemper, (1987), pp.63-6.

[278] Joined Cases 3, 4, 6/76 (*Kramer*) and Opinion 1/76, (Para. 17). See, for further details, Chapter 4.2.2.3.

[279] So far, however, the Community has made limited use of its implied external competence and has only taken action on the basis of the *Kramer -Opinion 1/76 Doctrine* in two cases: i.e., the signature of the 1974 Paris Convention on land-based pollution and the commitment made within the UN Framework Convention on Climate Change. In both cases there were no internal rules justifying the EC's external action. However, the Commission has relied on the *Kramer -Opinion 1/76 Doctrine* on other occasions, such as the proposed accession to the 1972 Oslo Convention.

[280] See: Article 37 EC and Article 102 of the Act of Accession of the United Kingdom, Ireland and Denmark, commencing on 1 January 1979. See also Joined Cases 3, 4, 6/76 (*Kramer*), paras 16-20.

[281] Article 133 EC, however, does not expressly refer to an "exclusive" competence, which, however, may be implied in paras. 1 and 3.

[282] EURATOM, Article 101 draws a parallel between internal and external competence. See also Opinion 1/78, paras 13-18.

basis of the principle of in foro interno, in foro externo announced by the Court in the *ERTA* case.[283]

The extent of the Community competence, however, is not static. The Court, in its case law, draws a fundamental distinction between "exclusivity" under primary law and "pre-emption" under secondary law.[284] In the case of "pre-emption" the transfer of powers results implicitly from the exercise by the Community of its internal competence, either through the adoption of secondary legislation or through the conclusion of international agreements, and only covers specific subject-matters. The criteria which trigger pre-emption and its legal effects will be discussed in detail in Chapter 4.2.2.

In policy areas originally conceived as being at the core of national sovereignty, the transfer of powers from the member states to the Community has been only partial. These areas come under "shared" (or "joint") competences of the Community and the member states and neither of them is exclusively competent, but, in principle, they may both act.[285] The EC Treaty, however, never refers to "shared competence" or any similar term and does not explain what shared competence means in practice.[286]

Generally speaking, it is possible to identify three situations where competence is shared. Firstly, it may stem from the Treaty. In environmental matters, for instance, the shared nature of the Community's competence implicitly emerges from Article 176 EC, which allows member states always to adopt more stringent environmental standards than those laid down at the Community level.[287] The shared nature of the external environmental competence appears more clearly from Article 174(4) according to which "*within their respective spheres of competences* Community and Member States shall cooperate with third countries and with the competent international organizations […] *without prejudice to Member State's competence* to negotiate in international bodies and to conclude international agreements" (emphasis added). Secondly, competence is shared in matters which are regulated by minimum standards at the EC level leaving member states free to adopt higher standards. Thirdly, competence is shared on issues which fall in part within the exclusive powers of the Community and in part within the exclusive powers of member states or whenever it is impossible to separate issues under the respective sphere of competence. As will be discussed in further detail in Chapter 4, this situation normally occurs with regard to the negotiation of marine environmental agreements.

However, in the absence of clear rules in the Treaty and due to the ambiguity of the ECJ case law on the matter, the exact meaning and legal effects of shared competences are still quite controversial. This is one of the most critical aspects in the field of the Community's external relations and will be discussed in detail in Chapter 4.2.4.

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[283] Case 22/70 (*ERTA*), Para. 19.
[284] Case 22/70 (*ERTA*), Para. 22. The issue is discussed in detail in Chapter 4.2.2.
[285] With Opinion 2/91 and Opinion 1/94 the Court started to refer to "joint competence". Before it used the term "mixed competence". Some authors also refer to "concurrent powers".
[286] As will be discussed in Chapter 4.6, the EU Constitution clearly defines matters under shared and exclusive competence.
[287] L. Kramer (2000), p. 75. However, it is important to bear in mind that in other fields, like human rights, things work somewhat differently.

2.4 The "Exercise" of the Community's Competence

2.4.1 The Principle of Subsidiarity

The "existence" of a Community competence is not, *per se*, enough to legitimize its action. Such action must be justified on the basis of the principle of susbidiarity, which determines "when" the Community may exercise its powers.[288] This principle intends to strike a balance between "efficiency" of action and the freedom of member states and has been introduced in order to protect the member states against an excessive transfer of authority to the Community. Originally formulated as a specific principle of the environmental policy (former Article 130r(4) EC), it has developed into a fundamental principle guiding the Community action as a whole. As in the case of the attribution principle, the legality of Community legislation may be challenged for non-compliance with the subsidiarity principle, which is enforceable before the ECJ by both the EC institutions and the member states under Article 230 EC.[289]

The subsidiarity principle is currently formulated in Article 5(2) EC which reads: "in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community." The principle, moreover, is reflected in Article 176 EC and Article 174(4) EC with regard to the external environmental policy.

It is clear from the definition in Article 5(2) that the subsidiarity principle does not apply to areas under the exclusive competence of the Community or the member states (under the Treaty), but only applies to areas of shared competences.[290] Before taking any legislative action, moreover, the Community (i.e., the Commission) has to demonstrate that the objectives in question (a) cannot be "sufficiently" achieved at the international or national level, and (b) it can be "better" achieved at the Community level.[291] Member states may challenge the validity of EC legislation before the ECJ for non-compliance with these criteria, but the Court has always been quite reluctant to annul EC legislation on this basis.[292] Indeed, the criteria in Article 5 are so broadly formulated and based on such relative notions (i.e., "sufficiently" and "better") as to leave the EC institutions with a high level of discretion in deciding when to act. The Protocol annexed to the Treaty of Amsterdam provides some guidance on how to apply subsidiarity (and proportionality), but once again it does not establish clear legal criteria. Community action, for instance, is justified whenever transnational environmental problems are at stake, either global or regional, which have cross-border effects.[293] Marine environmental degradation and marine biodiversity loss, as typical transboundary issues, seem *prima facie* to justify Community intervention. According to the Commission, however, not all transboundary problems justify

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[288] For a detailed analysis of the subsidiarity principle see: P. Craig and G. de Búrca (2003), pp. 124-129; J.H. Jans (2000), pp. 11-7; L. Kramer (2000), pp. 11-4; A. Dashwood (2004), pp. 366-9; G. de Búrca (2000) and H. Somsen in T. Jewell and J. Steele (eds) (1998), pp. 187-89.

[289] However, Court does not conduct a substantive review, but simply looks at whether the Community has taken subsidiarity into account. It does not assess what level of protection is the most effective.

[290] See: Protocol on the application of the Principle of Subsidiarity and Proportionality annexed to the Treaty of Amsterdam, [1997] O.J C340/105, Para 3 (Subsidiarity and Proportionality Protocol). See also: P. Craig and G. de Búrca (2003), pp. 124-127) and G. de Búrca (2000), pp. 18-24.

[291] Subsidiarity and Proportionality Protocol, Para. 4.

[292] See, for instance, Case C-233/94 Germany v. European Parliament and Council, paras 26-8. See on that point J.H. Jans (2000), p. 14; and P. Craig and G. de Búrca (2003), p. 129. The EU Constitution provides national parliaments with the power to control the compliance of EC legislation with the subsidiarity criteria "before" its adoption.

[293] Subsidiarity and Proportionality Protocol, supra n. 117, Para. 5.

Community action, but to meet the subsidiarity criteria it is necessary to look at: (a) the Community dimension of the problem; (b) the most effective solution, considering the means available to the Community and to the member states (the *comparative effectiveness* test); and (c) the added value of the Community action compared to isolated action by member states (the *added value test)*.[294] Although the Community action for the protection of the marine environment may be justifiable under (c), it will hardly meet the (a) requirement. Marine degradation, indeed, does not know of maritime boundaries nor does it exclusively involve EC member states and appears to be more of a "regional", rather than a Community problem. Whether or not the Community action meets the (b) requirement, moreover, must be determined on case-by-case basis depending on the issue and taking into account different legal, geographical, environmental, economic and political factors. These factors and the manner in which the subsidiarity principle applies to different marine issues will be considered in the case-study chapters.

2.4.2 The Principle of Proportionality

Even though the Community's action passes the subsidiary test, it must also be justified on the basis of the principle of proportionality, which determines "to what extent" and "in what form" the Community may act. The principle is formulated in Article 5(3) EC which requires that "any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty". First of all, it is clear that the proportionality test, unlike subsidiarity, applies to "any" Community action, including in areas under its exclusive competence.[295] However, Article 5(3) does not establish clear legal criteria on how to apply proportionality. According to the Court, in order to establish whether Community law complies with the principle of proportionality, it must be ascertained "whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it".[296] The Protocol of the Amsterdam Treaty provides some additional guidance and requires that Community action shall be "as simple as possible" and leave "as much scope for national decision as possible".[297] As a consequence, directives should always be preferred above regulations and the use of non-binding instruments, such as recommendations or voluntary codes of conduct, should be encouraged.[298] In this fashion, the Protocol suggests that EC legislation should set the general framework leaving member states free to take specific actions. This approach is reflected in Article 176 EC, which allows member states to maintain or introduce more stringent environmental standards than those contained in EC legislation.[299]

As far as the external competence is concerned, in order to justify Community action on the basis of the proportionality principle it is important to look at the international regime. When existing international instruments seem to be adequate and effective enough to achieve the objectives pursued, Community action does not seem to be necessary.

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[294] Communication from the Commission on the Subsidiarity Principle, SEC (92) 1900. See also H. Somsen in T. Jewell and J. Steele (1998), p. 188.
[295] E.g., G. de Búrca (2000), p. 24.
[296] Case C-84/94, UK v Council, Para. 57.
[297] Subsidiarity and Proportionality Protocol, supra n. 290, paras 6 and 7.
[298] Ibid. See on this G. de Búrca (2000), pp. 32-33.
[299] See the Opinion of Advocate General Cosmas in the C-318/98, *Fornasar Case*, Para. 35.

As in the case of the subsidiarity principle, the member states and the EC institutions may challenge the validity of the Community legislation for non-compliance with the proportionality principle on the basis of Article 230 EC.

2.4.3 Guiding Principles of the Community (Environmental) Policy

Different from the fundamental principles discussed in the previous paragraphs are the guiding principles which define "in which manner" and "how" the Community should act. The Community action has to be guided, in the first place, by the integration principle. Originally formulated as a principle of EC environmental policy, in the Amsterdam Treaty "integration" has been included among the general principles of EC law.[300] The evolution of the integration principle into a general principle of EC law suggests that there is no hierarchy in the EC Treaty among the economic and the environmental objectives which need to be satisfied without one prevailing over the other. Article 6 EC requires the Community institutions to integrate environmental protection requirements into the definition and implementation of all common policies and activities in view of promoting sustainable development. That means that, as a minimum, they have to take environmental considerations fully into consideration before taking any action within the different common policies, including, for instance, transport, fisheries, agriculture, energy and industry.[301] However, the content of the principle is rather vague and it is not entirely clear which "environmental protection requirements" have to be integrated in practice.[302] The EAPs and other policy documents provide some guidance. The Sixth EAP, for instance, calls for an integrated strategy which deals with the pollution and degradation of marine habitats and coastlines and also calls for the full integration of environmental considerations into the 2002 revision of the Common Fisheries Policy as well as into all aspects of the Community's external relations, including trade and development cooperation.[303] Nevertheless, the EC institutions still have a a great deal of discretion in balancing the environment with other interests and do not always fully integrate environmental considerations into other policy sectors. So far, moreover, the ECJ has seemed reluctant to challenge the validity of Community legislation for not taking environmental considerations into sufficient account.[304]

Article 174(2) EC, moreover, sets out a number of principles which should guide the Community action in the field of the environment. These principles are further specified in the EAPs and other policy documents and determine "the manner" in which the Community should exercise its environmental competence.[305] The Community environmental policy shall aim, first of all, at a "high level of protection". This principle, which repeats the fundamental objective under Article 2 EC, intends to ensure that environmental legislation, which usually lays down minimum standards, provides for a sufficiently strong level of protection throughout the Community. The

[300] On the integration principle see N.M. Dhondt (2003); R. Garabello in T. Scovazzi (ed.) (2001), pp. 79118; D. Grimeaud (2000), pp. 207-18; and M. Wasmeier (2001), pp. 159-177. Communication from the Commission, "Partnership for Integration - A strategy for Integrating Environment into European Union Policies" (COM (98) 333).

[301] As Advocate General Leger pointed out in its Opinion on Case C-371/98 sustainable development requires the Community, as a minimum, to apply the integration principle.

[302] See on this point J.H. Jans (2000), p. 18.

[303] The 6th EAP, paras 7.2 and 35. The EAP also includes the "integration of environmental concerns into other policies" among the strategic approaches to achieve the EC's environmental objectives (Para. 2.2). See, for more details, Chapter 3.5.1.

[304] See, e.g., Case C-341/1995, *Bettati Case,* and Case C-293/97 *Standley Case*.

[305] For a detailed analysis of these principles: L. Kramer (2000), pp. 9-20 and J.H. Jans (2000), p. 31-3.

Court seems to admit the possibility, in some cases, to annul environmental legislation for non-compliance with the high level of protection principle.[306] Secondly, the EC institutions are required to take into account the "diversity of situations" and the "different environmental conditions" in the various regions of the Community.[307] The principle of "*regional differentiation"* is in line with the regional approach of the LOSC and, as will be discussed in further detail in the Chapter 3.2.3, it has played a central role, together with the subsidiarity principle, in shaping Community action in marine environmental matters. Article 174(2) EC, moreover, endorses the main principles of Chapter 17 of Agenda 21 and requires that the Community environmental policy "shall be based on the precautionary principle, and on the principle that preventive action should be taken, that environmental damage should as a priority be rectified at source[308] and that the polluter should pay".[309] By embodying these principles in the Treaty, the EC legal order clarifies their content and confers on them a more concrete dimension. The Community commitment to the precautionarity principle is particularly strong.[310] Although the principle is explicitly mentioned only in the environmental title, it seems to apply to other policy areas.[311] On several occasions, the Court, supporting the position taken by the Commission, has justified the Community action on the basis of the precautionary principle and has made it clear that "where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of these risks become fully apparent".[312] The idea that to "prevent is better than to cure", moreover, has been central to the Community's environmental policy since the earliest stages and has inspired legislation in the field of environmental impact assessment (EIA), use of BAT and BET, prior information and consultation.[313] Surprisingly, however, the general definition of "aquatic pollution" adopted by the Community does not reflect the preventive principle, but refers to the introduction of substances and energy "which result" in damage to the environment.[314]

Despite their inclusion in the EC Treaty, the nature of these principles is not entirely clear and they seem to work as general guidelines for the EC institutions, rather than legally binding rules.[315] According to the Court these principles could only be used in exceptional cases to challenge the validity of EC legislation when the

[306] See, Opinion of Advocate General Cosmas in the C-318/98, *Fornasar Case*, Para. 32.

[307] See also Article 174 (3) EC. That regional approach is reflected in most environmental legislation in the field of water quality (e.g., Directive 76/160 on the quality standards for bathing waters or Directive 79/923 on the quality required of shellfish waters). For more details see L. Kramer (2000), pp. 133-40.

[308] This principle has influenced most EC legislation in the fields of water quality, transbounadry shipment and disposal of wastes.

[309] This principle has been central to EC environmental policy since the beginning because of its possible impact on the internal market and finds application in all Community legislation regarding environmental liability, environmental charges and imposition of environmental standards.

[310] The Maastricht Treaty, unlike most global and regional instruments, formulates precaution as a "principle" rather than an "approach". On the role of the precautionary principle within the EC legal order and on the role played by the EC in promoting the global acceptance of this principle, see A. Trouwborst (2002), pp. 142-8 and J.H. Jans (2000), pp. 33-4 and L. Kramer (2000), pp. 16-7.

[311] In Case C-405/92 *(Driftnets Case) (*Para. 3), for instance, the Court recognized the application of the principle to the common fisheries policy.

[312] E.g., Case C-180/96 *R. v Ministry of Agriculture, Fisheries and Food and Others*, Para. 63; Case C-405/92, *Driftnets Case,* Para 3; C-418/97 *ARCO Chemie Netherlads and others*, paras 39-40. For an overview of the ECJ case law on the precautionary principle, see: A. Trouwborst (2002), pp. 175-8.

[313] E.g., EIA Council Directive 85/337, as amended, and IPPC Directive 96/61.

[314] E.g., Water Framework Directive 2000/60/EC (Article 2(33)) and Directive 76/464/EEC (Article 1(e)).

[315] L. Kramer (2000), p. 10.

Council has committed a "manifest error of appraisal regarding the condition for the application of Article 130r [now Article 174]".[316]

2.5 The "Geographical" Scope of the Community's Environmental Competence

Defining the geographical scope of the Community's environmental competence is central to the present study.[317] In particular, it is fundamental to determine whether the Community is competent to regulate the environmental impact of human activities taking place in maritime areas within and beyond the sovereignty or jurisdiction of its member states.

First of all, for sake of clarity, it should be said that the Community, unlike states, has no competence with regard to the establishment of maritime zones or maritime boundary delimitation, which remain under the exclusive sovereignty of the member states.[318]

The EC Treaty does not make any reference to the geographical scope of the application of EC law. According to Article 299, the EC Treaty applies to the member states, subject to some exceptions and adjustments, without making any reference to their territory.[319] According to the Community's Declaration upon the ratification of the LOSC, on the other hand, the Convention applies to "the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in the Treaty, in particular Article 227 (now Article 299) thereof".[320] The Declaration makes it clear that the EC's competence in the field of fisheries applies to waters under national jurisdiction and to the high seas, but is silent about the geographical scope of the Community's environmental competence.

The applicability of the EC Treaty, including Article 175, to the territorial sea of its member states does not raise particular problems.[321] Conversely, the extension of the EC's environmental competence beyond the territorial waters of the member states (i.e., continental shelves and EEZ) has for a long time been the object of discussion and has been traditionally opposed by those member states having strong interests in oil and gas exploitation, maritime transport and fisheries.[322]

The ECJ has recognized that any extension of member states' sovereignty or jurisdiction in accordance with international law implies a corresponding extension of the application of EC law and policies.[323] The Court, moreover, has made it clear that Community competence in the internal waters, territorial sea and EEZ of the member states must be exercised in conformity with the LOSC.[324] The Court's conclusions on

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[316] Case C-341/1995,Gianni Bettati, Para 35. According to L. Kramer (2000), p.8, this is a case of systematically diregarding the principles.

[317] On the geographical scope of the EC law in general see, *inter alia*, J. Wolff (2000), pp. 30-43; C. Bury and J. Sack in: E. Franckx and P. Gauthier (eds.) (2003), p. 66; I. Macleod at al. (1996), pp. 69-72; D. Freestone (1992), pp. 103-05; P. Birnie, (1992), pp. 193-216 and J. C. Woodlife (1975), p. 7-26.

[318] J. Wolff (2000), pp. 30; E. Franckx (1992), pp. 239-40; D. Freestone (1992), p. 97 and D. Vignes in: T. Treves (ed.), (1997), pp. 7-26, at 8.

[319] These are listed in Article 299 EC, paras 2-6 and in the Acts of Accession.

[320] The Text of the Community's Declaration is reproduced in Annex II to this study.

[321] Under Vienna Convention of the Law of the Treaty (Article 29), in the absence of further specifications, a Treaty is binding upon each party with respect to the "entire territory". According to the International Law Commission "the territory" includes any "appurtenant territorial waters and airspace". See ILC Report [1966], p. 45.

[322] E.g., *inter alia*, D. Freestone (1992), p. 104; J.E. Harders (1990), pp. 263-79 and J.C. Woodlife (1975), pp. 7-26.

[323] E.g., Case C-61/77, Commission v. Ireland. See also: Case C-286/90, *Poulsen*, paras 9 and 24; C-405/92, *Driftnets Case*, Para. 5; Case C-285/89 Commission v. Spain.

[324] Case C-286/90, *Poulsen*, paras. 25-8.

the EEZ seem to be also applicable, by analogy, to the continental shelf.[325] The Court, moreover, has on several occasions recognized the Community's competence to regulate activities on the high seas, in so far as the member states have authority under international law.[326] All the relevant case law, however, expressly refers to fisheries and vessel-source pollution and, so far, the Court has never expressly pronounced on the application of the EC environmental legislation beyond the territorial sea of the member states. Nevertheless, as will be discussed in further detail in Chapter 8.8.3.2, the extended seaward application of environmental legislation is largely accepted.[327]

Existing EC environmental legislation, unlike maritime safety and fisheries legislation,[328] makes no reference to the geographical application beyond the territorial sea of the member states. Some environmental directives expressly apply to coastal waters,[329] others extend to the territorial sea,[330] while still others generally refer to the sea.[331] The Commission, however, has consistently adhered to the extended application of EC environmental legislation beyond the territorial waters, including the EEZ established by member states in accordance with international law.[332] As will be discussed in further detail in Chapter 3, the recent proposal for a Marine Strategy Directive expressly applies to "all European waters on the seaward side of the baseline from which the extent of the territorial waters is measured extending to the outmost reach of the area covered by the sovereignty or jurisdiction of the Member States including the bed of all those waters and its subsoil, hereinafter "European marine waters"".[333]

2.6 Conclusions

The European Community has its own peculiarities compared to other international organizations which make it a "new legal order of international law". This body of law is in a position of supremacy compared to the member states' national systems. The strong institutional framework, the progressive extension of the QMV in the Council and the extensive jurisdiction of the ECJ confer on the Community legal order a strong

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[325] The Community has adopted legislation which applies to resources of the continental shelf. Council Regulation 802/68, for instance, includes in the definition of "goods" subject to the common market rules "products taken from the sea-bed or beneath the sea-bed outside the territorial waters, if that country has, for the purpose of exploitation, exclusive rights to such soil or subsoil" (Article 4.2.h), except petroleum products (Article 3).

[326] E.g., Case C-286/90, *Poulsen*, Para. 24; Joined Cases 3-4-6/76, *Kramer*; C-405/92, *Driftnets Case*, paras 12 and 15; and Joined Cases 89-104-114-116-117-125-129/85, Woodpulp. All cases, except the *Poulsen* Case, relate to fisheries.

[327] E.g., *The Queen v The Secretary of State for Trade and Industry ex Parte Greenpeace Case*, 5.11.1999, in: Environmental Law Reports 2000, p. 221. On this judgment see: D. Owen (2000), pp. 46-8; J.H. Jans (2000), pp. 385-7.

[328] E.g., Directive 2005/35/EC on ship-source pollution, Article 3(1), infra Chapter 6. 8.7. EC fisheries law applies to activities taking place in Community waters (i.e., waters under the sovereignty or jurisdiction of the member states) or by Community fishing vessels or nationals of Member States wherever they are (i.e., Council Regulation 2371/2002 on the Common Fisheries Policy, Article 1(1)).

[329] E.g., the Water Framework Directive 2000/60/EC defines coastal waters as "surface waters on the landward side of a line, every point of which is at a distance of one nautical mile on the seaward side from the nearest point of the baseline from which the breadth of the territorial waters is measured […]". See also: Council Directive 79/923/EEC on the quality required of shellfish waters.

[330] E.g., Council Directive the 76/464/EEC on the quality standards for bathing waters.

[331] E.g., TiO2 Council Directive 78/176/EEC.

[332] See, e.g., Communication from the Commission, Towards a Strategy to Protect and Conserve the marine environment, COM(2002)539 (Para. 10) and COM/2003/92 final, at 4.3. In COM (1999) 363, moreover, the Commission states that, as far as member states have competence, the Habitats Directive applies to the EEZ. See for further details Chapter 8.8.3.2.

[333] COM (2005) 505, 24.10.2005, Article 1. See Chapter 3.5.1 of this study.

autonomy from the national systems of the member states. By establishing a Community of unlimited duration, with its own institutions, legal personality and with its own capacity to act on the international plane, and, by creating an autonomous and evolving body of law, which is binding on them, their courts and their citizens, the member states have explicitly or implicitly consented to limit, completely or partially, their legislative sovereignty in many policy areas,[334] including the (marine) environment.

Community competence, however, is not unlimited, but is based, first of all, on the principle of attribution, according to which the Community is entitled to take actions necessary to achieve the objectives of the Treaty and within the limits of the powers conferred therein. As discussed in Chapter 2.2.1.1, the objectives of the Community in the field of the environment, however, are so broadly formulated as to justify virtually any action of the Community considered to be necessary to protect and preserve the marine environment and its resources. The Community's competence in environmental matters, including ocean issues, finds a solid legal basis in various provisions of the EC Treaty. In addition, the Treaty confers on the Community the power to conclude international conventions and to establish contractual relations with third countries in a number of policy areas, including the environment. Moreover, according to the Court in the ERTA Case the Community's external competence may be implied by other provisions of the Treaty conferring internal powers. The "existence" of Community internal and external competence in (marine) environmental matters, therefore, cannot be contested. What may be contested is the choice of the legal basis for such an action, which influences the level of participation of the EC institutions in the decision-making process. Currently, environmental legislation is adopted by means of co-decision with the EP and by QMV in the Council. Normally, the EP, unlike the Council, tends to raise the standards proposed by the Commission and its participation in the decision-making, therefore, strongly influences the environmental content of EC legislation.

Different from the "existence" of a Community competence is the "nature" of such competence, whether "exclusive" or "shared", which defines the residual autonomy of the member states to act. The extent of the Community's competence, however, is not static, but evolves according to the developments in the European integration process. The Court, indeed, draws a difference between the exclusive competence under the EC Treaty and the transfer of powers resulting implicitly from the adoption of EC legislation ("pre-emption").

"Whether" and "to what extent" the Community is entitled to "exercise" its competence requires a case-by-case analysis on the basis of the subsidiarity and proportionality principles. According to the former, in areas outside its exclusive competence, Community action is only justified when it appears to be more effective to achieve the proposed objectives compared to a member state's action. According to the latter, the Community action cannot go beyond what is necessary to achieve the objectives of the Treaty. Both principles, however, are based on relative concepts such as "effectiveness" or "necessity" and are linked to the Community's objectives as broadly defined in the EC Treaty. In the absence of clear legal criteria on how to apply subsidiarity and proportionality, the determination of whether and how the Community may act is often a matter of political choice.

Finally, the Community's action in environmental matters has to be guided by a number of principles, including those recommended by Agenda 21 (e.g., the

[334] Case 6/64, *Costa v. ENEL*, paras. 593-4.

integration, precautionary, prevention and polluter pays principles), which define "in what manner" the Community should act.

The validity of the Community's action may be challenged both by the member states and the EC institutions for non-compliance with the attribution, subsidiarity and proportionality principles, and in some cases the guiding principles of EC environmental law.

As far as the "geographical scope" of the Community's environmental competence is concerned, in the absence of specific provisions in the EC Treaty, the Court has made it clear that the Community has the authority to regulate activities in the territorial sea, EEZ as well as in the high seas as long as member states have competence under international law and as far as it acts in accordance with the LOSC.

As discussed in this Chapter, the Community's legal order is equipped with a series of enforcement tools (such as the possibility for the Commission to initiate infringement proceedings against member states not complying with EC rules; the capacity, under certain circumstances, of individuals to take action before national courts for a violation of rights stemming from EC legislation; and the possibility for the Court to order monetary penalties) which make it particularly effective compared to other international regimes, especially in the field of (marine) pollution.

Finally, it is worth stressing that political considerations and institutional dynamics play a fundamental role in shaping the work of the Community. In general, the Commission, supported by the EP and ECJ, tends to extend European integration further, while the member states in the Council normally try to resist these attempts and defend their national interests. The constant struggle between supranational and national aspirations creates the scenario for Community action in ocean issues.