

## Chapter 3

### The Protection of the Marine Environment under European Community Law

#### 3.1 Introduction

The previous chapter discussed the rules governing “whether” and “how” the Community may act to protect the marine environment and the instruments and mechanisms available under EC law. The present chapter looks closely at the way the Community actually applies these rules and the approach it has taken with regard to marine issues. For the purpose of the discussion, “European oceans and seas” exclusively refer to the Baltic Sea, the North-East Atlantic and the Mediterranean Sea. Given the fact that, at the moment, none of the Black Sea coastal States is a EC member, the Black Sea is not covered.<sup>335</sup>

The protection and preservation of the marine environment and its essential functions have been a central element in the Community’s environmental policy since its inception. Nevertheless, despite the existence of adequate legal bases in the EC Treaty, marine environmental protection has traditionally played a subordinate role within European environmental law. So far, the Community has never developed a comprehensive policy on oceans as it did for other environmental areas and its action “at sea”, unlike “on land”, has been limited, fragmented and indirect. Given the cross-sectoral nature of marine issues, important aspects related to the protection of the marine environment have been directly or indirectly regulated within the framework of different policies (e.g., water quality, transport or fishing). For a long time, rather than establishing its own rules and standards the Community has relied on the international ocean regime either by urging its member states to adopt and implement existing international conventions or, when possible and appropriate, by acceding itself. The present chapter briefly discusses the main factors which have influenced this “multilateral” approach to ocean preservation. As a result, the legal regime for the preservation of the marine environment within the European Community may take the shape of a pyramid figure formed by three main building blocks: the global ocean regime (i.e., customary principles, the LOSC and Chapter 17 of Agenda 21), which stands at the top; the international implementing regime (e.g., MEAs and regional seas conventions) which stands in the middle; and sectoral EC legislation forming the base. The Chapter briefly describes this legal framework with strong attention being given to the action taken by the Community towards the implementation of its international commitments.

The “patchwork” regime applying to the European seas leads to inconsistencies, overlaps and duplications and does not respond to the need to adopt an integrated approach to ocean issues as recommended at the international level. In the past few years, therefore, the Community has gradually changed its traditional approach and has taken important steps towards the adoption of a comprehensive policy on oceans and seas. The focus of the future European Maritime Policy, however, is still on multilateral cooperation and the implementation of global, regional and EC rules in a coherent, coordinated and integrated manner.

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<sup>335</sup> The Community is not a party to the Black Sea Convention, which reserves membership to only states. However, since 2001 it has observer status in the Convention and in view of the next enlargement concerning Bulgaria and Romania (and Turkey), it has increased its participation in this forum. The Black Sea, moreover, is fully integrated in the new European Marine Strategy (e.g., COM (2002) 539, Para. 10 and p. 48).

### 3.1.1 Degradation of Europe's Marine Environment

The latest official data on the status of Europe's oceans and seas reveal a rather critical situation.<sup>336</sup> In spite of the important results achieved in the past three decades in terms of controlling the traditional sources of pollution, the European marine environment is still subject to serious pressure. As discussed in Chapter 1.4.1, the European seas, due to their ecological, geographical and socio-economic characteristics are particularly exposed to the threats posed by human activities, including merchant shipping and the introduction of non-native species from the ballast waters of ships;<sup>337</sup> over-fishing and the use of destructive fishing practices (e.g. bottom trawling);<sup>338</sup> ocean dumping;<sup>339</sup> oil and gas extraction;<sup>340</sup> land-based activities, especially agricultural practice and waste water treatment;<sup>341</sup> as well as contamination from litter and noise pollution.<sup>342</sup> As will be further discussed in Chapter 8, these activities have a strong impact on marine biodiversity and ecosystems, including sensitive habitats (e.g., marl beds, posedonia meadows and deep-sea coral reefs), and non-targeted species including cetaceans, seals, marine birds and turtles.

### 3.2 The Marginal Role of Marine Environmental Protection within European Community Law

The Community has recognized the essential role of oceans and seas and the need to enhance efforts to protect and preserve the marine environment since the early stages of its common environmental policy.<sup>343</sup> In the First Environmental Action Programme (1973) the Commission identified marine pollution as one of the most dangerous and affecting environmental problems in the whole Community and, due to the diversity of sources, the most difficult to control.<sup>344</sup> At the same time, the Council, supported by

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<sup>336</sup> See, for instance, EEA, "European Environment, State and Outlook 2005", pp. 132-67, at: [http://reports.eea.eu.int/state\\_of\\_environment\\_report\\_2005\\_1/en/SOER2005\\_all.pdf](http://reports.eea.eu.int/state_of_environment_report_2005_1/en/SOER2005_all.pdf); the Commission Communication, "Thematic Strategy on the Protection and Conservation of the Marine Environment" and Impact Assessment; and the Commission Communication, "Towards a strategy to protect and conserve the marine environment" (COM(2002)539).

<sup>337</sup> Commission (2005), Impact Assessment, *infra* n. 428, p. 10 and Chapter 6.1.1 of this study.

<sup>338</sup> Over-fishing is posing a serious threat to the very availability of commercial stocks (e.g., cod; hake and tuna) and has a strong impact on non-target species. See Commission (2005), Impact Assessment, *infra* n. 428, pp. 7-8; and COM (2002) 539, pp. 29-32.

<sup>339</sup> Ocean dumping, however, no longer represent a major threat to the European seas. See, in general, Chapter 7.2.1 of this study.

<sup>340</sup> As discussed in 1.4.2, there is oil and gas extraction from the continental shelves of the Netherlands, Germany, Denmark, and the U.K. Despite a substantial reduction of discharges from offshore platforms, there is still a high risk of marine pollution associated with the expansion of drilling operations in deeper waters and ice-covered waters. E.g., Commission (2005), Impact Assessment, *infra* n. 428, p. 13 and COM (2002) 539, p. 34.

<sup>341</sup> Eutrophication is a main problem in all European seas together with contamination by hazardous substances, urbanization, uncontrolled development of coastal areas, concentration of human activities along the coasts and tourism (e.g., Commission (2005), Impact Assessment, *infra* n. 428, pp. 10-13 and COM (2002) 539, p. 35.

<sup>342</sup> E.g., Commission (2005), Impact Assessment, *infra* n. 428, pp. 12-13.

<sup>343</sup> For a general discussion on the protection of the marine environment within the common environmental policy see: L. Kramer (1997), pp. 259-97; S.P. Johnson and G. Corcelle (1989), pp. 115-22; A.C.H. Kiss and D. Shelton (1997), pp. 338-51; D. Anderson in M. Kusuma-Atmadja, T.A. Mensah and B. Oxman (eds) (1997), pp. 700-13; P.W. Birnie (1992), pp. 193-216; and K.R. Simmonds (1989), pp. 74-107.

<sup>344</sup> See the First Environmental Action Programme, 22.11.1973, Chapter 6, p. 25. The First EAP is the only one which devotes specific attention to oceans and seas within a section on "marine pollution". It identified the major sources of marine pollution which needed to be controlled, namely: sea transport and navigation; deliberate ocean dumping; the exploitation of marine and submarine resources,

the EP,<sup>345</sup> stressed the importance for the Community to take measures to combat marine pollution.<sup>346</sup> Also the European Council, since 1978, has devoted increasing attention to the protection of oceans and seas, urging the Community and member states to take concrete action to preserve the marine environment.<sup>347</sup>

Despite the strong political commitment, the protection of the marine environment has traditionally played a secondary role within EC law.<sup>348</sup> So far, the Community has never established a common policy or comprehensive legislation on oceans and seas as it did for other environmental sectors. Ocean preservation, instead, has been treated within the framework of different environmental policies, first of all, the common water policy, which, however, focuses mainly on fresh waters.<sup>349</sup> The most direct and concrete action has been taken within areas outside the environmental policy, such as transport and fisheries, and, to a certain extent, the internal market and agriculture. Most of these measures, however, are not designed specifically for the protection of the marine environment, which is always in a subordinate position compared to other objectives.

In performing its monitoring functions, moreover, the Commission has traditionally dedicated minor attention to protection of the oceans and seas. The marine environment, indeed, does not normally receive specific consideration within the annual reports on the state of the environment,<sup>350</sup> nor within the annual surveys on the implementation and enforcement of Community environmental law,<sup>351</sup> but it is always treated within the general context of the “aquatic environment” and in a secondary plane compared to fresh waters and coastal areas. Also the EC environmental financing mechanisms (i.e., LIFE Nature and LIFE Environment) give strong priority to the protection of nature on land, while marine environmental protection projects are

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especially from the seabed, and land-based discharges. See, in general, L. Kramer (1997), pp. 261-78; K.R. Simmonds (1989), pp. 75-79.

<sup>345</sup> E.g., Resolution, 3.03.1983 (OJ C 69/66); Resolution 25.10. 1984 (OJ C 314/91); Written Question 1385/84 [Beyer de Ryke] (OJ C 129/9) and Written Question 401/886 [Muntingh] (OJ C 299/63). On the position of the EP see: P.W. Birnie (1992), p. 205 and S.P. Johnson and G. Corcelle (1989), pp. 340-41.

<sup>346</sup> Declaration of the Council of 22 November 1973 on the First EAP (OJ C 112, 20.12.1973, p. 1).

<sup>347</sup> See, *inter alia*, the 1978 Copenhagen European Summit; the 1988 Rhodes European Summit and the 1998 Lisbon Declaration adopted for the International Year of the Ocean (Expo 98).

<sup>348</sup> L. Kramer (1997), p. 206.

<sup>349</sup> Originally, the Common Water Policy (COM (1996) 59, 21.02.1996, as amended) did not include any specific action on marine waters. The new Water Framework Directive 2000/60/EC extends to “coastal waters” up to 1 n.m from the baseline (Article 2(7)).

<sup>350</sup> However, the 2005 EEA Report, supra n. 336, contains a special section on “marine and coastal environment”.

<sup>351</sup> E.g., 6th Annual Survey on the Implementation and Enforcement of Community Environmental Law, SEC (2005) 1055, 17.08.2005, at: [http://europa.eu.int/comm/environment/law/pdf/6th\\_en.pdf](http://europa.eu.int/comm/environment/law/pdf/6th_en.pdf). This, however, may be explained by the absence of specific EC law on marine environmental protection.

largely underrepresented.<sup>352</sup> Likewise, the Court in its case law has dedicated little attention to the protection of the marine environment.<sup>353</sup>

The limited attention of EC environmental law to oceans and seas has been influenced, at least in part, by a general lack of reliable data and a strong gap in knowledge with regard to the marine environment compared to the terrestrial environment.<sup>354</sup> In addition, several factors of a legal, political and institutional nature have for a long time prevented the establishment of a comprehensive marine environmental policy and the necessary legislation and this has resulted in the incorrect impression that oceans and seas are not the “Community’s business”. These factors will be briefly discussed in the following paragraphs.

### 3.2.1 Institutional Fragmentation

The absence of a common marine policy and legislation is at the same time the cause and the effect of a strong institutional fragmentation within the Community with regard to marine issues. Within the Commission, DG ENV is the main body responsible for marine environmental issues, but important aspects related to oceans and seas are also dealt with by other DGs including, inter alia, DG Energy and Transport (TREN), DG Fisheries (FISH), DG External Relations (RELEX), with diverse and sometimes opposing interests. Within DG ENV itself, marine matters are discussed by several units and, mainly due to resource constraints, a separate unit dealing exclusively with oceans and seas has never been established.<sup>355</sup> According to the Commission’s procedural rules on interdepartmental coordination each Unit has to act in conjunction with all interested Units bearing in mind that the Commission as a whole will be responsible for the final measure.<sup>356</sup> Reportedly, however, the level of coordination among the different DGs and units involved has traditionally been rather weak.

The fragmentation existing within the Commission is also reflected in the work of the Council. Marine environmental issues are discussed within different Working Groups or Working Parties under different Council configurations. The Council’s Working Party on the Law of the Sea (COMAR), for instance, acting within the

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<sup>352</sup> The list of all LIFE-sponsored projects is available at: <http://europa.eu.int/comm/environment/life/project/Projects/index.cfm>. So far, projects related to the protection of the marine environment have been a minority and they mostly relate to integrated coastal management and coastal areas (e.g., LIFE98 NAT/P/005275 on Integrated management of coastal and marine zones in the Azores). See also: List of LIFE Environment Projects 2005, p. 72, at: [http://europa.eu.int/comm/environment/life/infoproducts/lifeenvcompilation\\_05\\_lowres.pdf](http://europa.eu.int/comm/environment/life/infoproducts/lifeenvcompilation_05_lowres.pdf) and List of LIFE Nature Projects for the conservation of habitats and species, available at: <http://europa.eu.int/comm/environment/life/life/nature.htm>.

<sup>353</sup> Most of the Court’s relevant case law relates to the conservation of fisheries (e.g., Joined Cases 3, 4 and 6/76, *Kramer*; Case C-405/92, *Drif nets Case*), while only a few judgments have dealt indirectly with marine environmental protection (e.g., C-379/92, *Peralta Case* and Case C-286/90, *Poulsen*).

<sup>354</sup> Commission (2005), Impact Assessment, infra n. 428, p.15.

<sup>355</sup> See L. Kramer (1997), p. 209. Within DG ENV, for instance, Unit B1 has for a long time been responsible for the protection of “Water, Marine and Soil Quality”. Currently, Unit D2 is the main Unit responsible for “Protection of water and marine environment”, but important marine environmental-related issues are also dealt with within other units, such as, for instance, Unit B2 (Nature and Biodiversity); Unit E1 (international relations); Unit A4 (interinstitutional relations); Unit B1 (agriculture and soil); Unit B3 (impact from forestry practices); Unit C1 (air pollution from ships); Unit C 3 (industrial effluents); Unit C4 (chemical control); and Directorate G (aspects related to integrated coastal zone management and sustainable use of conservation of marine living resources).

<sup>356</sup> See: Rules of Procedures of the Commission, Article 21 on interdepartmental cooperation and coordination (C(2000) 3614)(OJ. L 308/26, 8.12.2000).

framework of the Council's General Affairs and External Relations, is the main body responsible for assisting the COREPER in examining the consistency of EC legislative proposals with the LOSC and the law of the sea.<sup>357</sup> Marine-related legislation, however, may also be discussed within the framework of the Environmental Council (e.g., Working Group on Environment and Working Party on International Environmental Issues (WPIEI)); within the Transport Council (e.g., Transport Working Group); or within the Fisheries Council (e.g., External Fisheries Group), among others.

Similarly, within the European Parliament (EP) oceans and seas are dealt with by different committees, mainly the Committee on Environment, Public Health and Food Safety;<sup>358</sup> but also the Agriculture and Fisheries Committee; the Transport and Tourism Committee; and the External Relations Committee, among others.

The institutional fragmentation existing at the EC level is also present at the national level. Within the member states, decision-making responsibilities on marine environmental matters are normally spread among different ministries (e.g., Environment, Transport, Fisheries, Foreign Affairs) and departments.

This strong institutional fragmentation has contributed to a great extent to the Community's sector-by-sector approach to marine issues. The institutionalisation of the integration principle by the Treaty of Amsterdam (Article 6 of the EC Treaty) has created the political momentum for a change and established the legal basis for a more comprehensive approach to marine environmental protection. The principle, however, still leaves a high level of discretion for the EC institutions to decide what has to be integrated and in what manner. So far, therefore, environmental concerns have not been fully and properly integrated into sectoral policies and legislation.<sup>359</sup>

### 3.2.2 Conflict of Interests

Oceans and marine resources play a vital role in the life and economy of most of the EC member states. Traditionally, therefore, they have opposed any direct involvement of the Community in marine environmental issues, which strongly affect their national interests and impinge on their sovereignty.<sup>360</sup> Conversely, in the field of fisheries member states had to accept that they would transfer their competence to the Community because of the strong impact of fisheries regulations on the establishment of a single market, which was the primary objective of the (at the time) EEC.

The conflict of interests is particularly strong also among member states. Generally speaking, it is possible to divide member states into three main groups, namely: those with strong maritime interests (e.g., Cyprus, Malta, Greece, Denmark and, to some extent, the UK, the Netherlands, Belgium and Poland); those with strong fisheries interests (e.g., Spain, Portugal, Ireland, Italy and, to some extent, France, Estonia, Latvia, Lithuania); and the more environmentally-oriented countries (e.g., Germany, Sweden and Finland and, to some extent, the Netherlands).<sup>361</sup> The same diversity of interests existing between member states is present among different EC

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<sup>357</sup> The mandate of the COMAR is contained in Annex III of Council Decision 98/329, concerning the conclusion of the LOSC by the Community. For a full discussion see: Chapter 5.2.7.3.

<sup>358</sup> On the history, composition and powers of the Environmental Committee see: [www.europarl.eu.int/comparl/envi/default\\_en.htm](http://www.europarl.eu.int/comparl/envi/default_en.htm).

<sup>359</sup> E.g., Commission (2005), Impact Assessment, infra n. 94, p. 15.

<sup>360</sup> For a full discussion see: P. Daillier (1979), pp. 436-43.

<sup>361</sup> Future enlargements will increase maritime interests within the EC since Bulgaria, Romania, Turkey and Croatia are all maritime nations. In addition, there is the group of landlocked states (i.e., Austria, the Czech Republic, Hungary, Luxembourg and Slovakia) with no strong marine-related interests. These countries may take different positions according to the circumstances.

institutions and within the Commission itself. The conflict of interests has made it particularly complex for the member states to agree on uniform measures, especially before the Treaty of Maastricht when marine-related legislation normally required unanimity in the Council and simple consultation with the EP. Similarly, for the Commission it has been rather difficult to propose marine-related legislation and most of its attempts have been blocked in the Council. The limited role of the EP in the environmental decision-making process has further hindered the adoption of marine environmental measures. The progressive extension of QMV in the Council and the co-decision with the EP has partially changed the situation. As will be discussed later in this chapter, however, economic considerations and market integration objectives have traditionally prevailed over the necessity to arrest marine degradation within the Community and has played a decisive role in limiting the Community's autonomous action in this field.

### **3.2.3 The Principles of Subsidiarity and Proportionality**

For a long time, the member states have used the principles of subsidiarity and proportionality to limit the Community's regulatory action in marine environmental matters to a minimum, mostly in relation to land-based pollution.<sup>362</sup> EC law (Article 5 EC) and all EAPs require that action should be taken at the level (global, regional, or national) which is best suited to the type of pollution and the geographical area concerned. European waters are all enclosed or semi-enclosed seas within the meaning of Article 122 of the LOSC and require close cooperation among all coastal States in the region, including non-EC countries, such as the Russian Federation in the Baltic, or the North African states and Syria in the Mediterranean. As discussed in Chapter 2, marine degradation appears more as a "regional", rather than a Community problem and may be tackled most effectively at the regional or global levels, rather than at the EC level. In addition, the principle of regional differentiation, as endorsed in Article 174(2) and (3) EC and strongly supported by the ECJ, requires different strategies for different regional seas according to their peculiarities and their capacity to absorb pollution. Standards and measures, which are effective in the Baltic Sea, could be totally useless in the Mediterranean Sea and vice versa. The geographic, oceanographic, climatic, economic and political diversity of the European seas makes it extremely difficult to adopt a coherent and uniform legal framework at the EC level, except in a very general form. Therefore, regional regimes appear more effective than EC uniform standards equally applicable to all the European seas. For a long time, moreover, existing global and regional mechanisms appeared adequate enough to control the traditional sources of marine degradation and to achieve the high level of environmental protection required by the EC Treaty (Article 2) in the European seas. Additional EC rules, therefore, were not considered to be "necessary" and were not justified under the subsidiarity and proportionality principles. To avoid confrontation with the member states, the Commission has preferred to direct its efforts at other environmental matters.

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<sup>362</sup> EC measures on land-based pollution appeared necessary and to be the most effective on the basis of the subsidiarity and proportionality principles because of the lack of adequate global and regional rules and the potential impact of different national standards on the internal market. Most of the relevant legislation is indeed based on Article 100 (and 235) on the harmonization of national laws affecting the single market. See, for instance, *infra* n. 397.

### 3.2.4 The Community's Multilateral Approach to Ocean Preservation

All factors discussed in the previous paragraphs have influenced the Community's multilateral approach to ocean preservation.<sup>363</sup> Since the beginning of the environmental policy, the Community has traditionally considered international cooperation as the most effective means to address ocean issues. With the exception of land-based pollution, the first EAP placed strong emphasis on the development of international instruments and limited the role of the Community in the adoption of measures for their effective implementation.<sup>364</sup> The following EAPs enhanced the multilateral approach and called for the Community's autonomous participation, next to that of the member states, in existing global and regional instruments.<sup>365</sup> In addition, the Commission, supported by the EP, is strongly committed to multilateralism and has traditionally considered international cooperation as a precondition for meeting global challenges.<sup>366</sup>

The member states in the Council have strongly supported the Community's multilateral approach. In order to defend their interests and priorities, for a long time they preferred to regulate marine environmental issues at the international level. Member states, moreover, have stronger control over the international decision-making process, which is normally based on consent, compared to that of the EC, where environmental measures are generally adopted by QMV. In addition, international standards are generally less stringent and more flexible compared to those of the EC.<sup>367</sup> At the political level the European Council in its declarations has also expressed a clear preference for international cooperation as the most effective tool to protect the marine environment.<sup>368</sup>

Economic considerations, next to the subsidiarity and proportionality principles, have played the main role in influencing the Community's multilateral approach to ocean issues. International cooperation is generally considered as more appropriate compared to unilateral measures, which are less environmentally friendly and have a major impact on trade.<sup>369</sup> In addition, the adoption of EC autonomous standards that are more stringent than international ones could place the EC's industry in a competitive disadvantage with respect to the rest of the world. On the other hand, an autonomous international action by the member states could lead to disparities at

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<sup>363</sup> This study, following the EC terminology, refers to "multilateral approach" as opposite to unilateral regulatory action. See, for instance, Commission's Communication (COM(2003)526), "The European Union and the United Nations. The choice of multilateralism".

<sup>364</sup> The First EAP "authorized" the Commission to submit proposals for controlling sea transport and navigation, deliberate ocean dumping, and the exploitation of marine and submarine resources and expressly "required" it to fix emission limits and environmental quality objectives to reduce land-based pollution.

<sup>365</sup> Within the subsequent EAPs the marine environment is not covered separately, as it was within the First EAP, but is generally treated within the broader context of "Water". This suggests that marine environmental protection is not a priority area for Community action, but is better regulated at the international level. On the relevant provisions of the various EAPs see: L. Kramer (1997), pp. 264-78 and S.P. Johnson and G. Corcelle (1989), pp. 109-21.

<sup>366</sup> See: Communication from the Commission, The European Union and the United Nations: The Choice of Multilateralism, COM (2003)526, paras. 3 and 5.

<sup>367</sup> E.g., L. Kramer (1997), p. 293.

<sup>368</sup> The 1978 Copenhagen Declaration, for instance, calls on the EC Institutions to take measures for the effective implementation of the existing international rules and for the prevention of accidents through the member states' coordinated action (See EEC Bulletin 4- 1978- point 1.4.3). Similarly, the Expo 98 Declaration calls on member states which have not done so to sign and ratify the LOSC and other relevant global and regional conventions sponsored by the IMO and UNEP (Para. 11).

<sup>369</sup> See, *inter alia*, United States-Import Prohibition of Certain Shrimp and Shrimp Products Case, Report AB-1998-4, WTO Appellate Body, WT/DS58/AB/R, 12.10.1999, Para. 68.

the EC level affecting the proper functioning of the internal market.<sup>370</sup> In order to protect the competitiveness of European industry and the proper functioning of the internal market, therefore, the Community has strongly preferred coordinated action with its member states at the international level.

Instead of adopting its own standards, therefore, the Community has decided to pursue its marine environmental objectives by acting at the international level, in the first place by becoming a party to the LOSC and most marine environmental agreements open to the participation of regional economic integration organizations. The accession to and the participation of the Community, next to its member states, in the LOSC and international agreements applying to the European seas will be discussed in detail in Chapter 5. The following paragraphs will briefly describe the legal framework which is applicable to the European seas as a result of the multilateral approach adopted by the Community.

### **3.3 The Community and the Global Framework Regime for the Protection of the Marine Environment**

The European Court has expressly recognized that the Community is subject to, and must exercise its powers in accordance with, “international law of the sea”.<sup>371</sup> The Community, therefore, just as any other international legal person, is, firstly, under the positive legal duty to protect the marine environment according to the customary principles discussed in Chapter 1. With the exception of the duty to take preventive action, the EC Treaty does not expressly refer to customary principles, but only to the emerging principles embodied in Agenda 21.<sup>372</sup> The customary principles, however, have been endorsed in EC secondary legislation and the main policy documents. In particular, the Community has a general duty to prevent damage to the marine environment within the jurisdiction of the member states (the preventive principle) and to ensure that activities carried out therein do not affect waters outside their jurisdiction or the high seas (*sic utere tuo ut alienum non laedas*).<sup>373</sup> To this end, the Community has to ensure that member states use “due diligence” in carrying out potentially dangerous activities, by performing an environmental impact assessment and by using the best available means at their disposal.<sup>374</sup> In addition, in the case of transboundary pollution and/or emergency situations the EC institutions and the member states are under an obligation to cooperate by means of information exchange, consultation and notification (the principle of good neighbourliness and international cooperation).<sup>375</sup> All these duties, however, must be exercised having “due regard” to the traditional freedoms of the high seas (the “reasonable use” principle).<sup>376</sup>

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<sup>370</sup> See A. Nollkaemper (1987), p. 57.

<sup>371</sup> E.g., Case C-286/90, *Poulsen*, Para. 9. In C-405/92, *Driftnets Case* (Para. 12) the ECJ made it clear that the EC’s competence follows that of its member states and the Community may take action in quality of flag, coastal and port State on matters under its competence as long as its member states are entitled to do so under international law. For a general discussion on the relation between the EC and the law of the sea see: P. Daillier (1979), pp. 416-36.

<sup>372</sup> This omission could be explained by the fact that the EC legislator did not think it necessary to reconfirm principles which are commonly accepted. Conversely, Article 174(2) expressly refers to the emerging principles discussed in Chapter 2.4.3 whose status, in some cases, was still rather controversial under international law (e.g., the precautionary principle).

<sup>373</sup> The *sic utere tuo ut alienum non laedas* has been expressly recalled in the First EAP.

<sup>374</sup> The duty to use *due diligence* is reflected in different pieces of EC legislation requiring member states to apply EIA, BAT and BET, such as, *inter alia*, EIA Directive 85/337, as amended. See, *inter alia*, A. Nollkaemper (1993), p. 41.

<sup>375</sup> The principle of good neighbourliness finds its application in most of the maritime safety legislation, (e.g., Council Decision on a Community cooperative framework in the domain of accidental marine



Secondly, as a party to the LOSC, the Community has the responsibility to protect and preserve the marine environment according to the relevant provisions of Part XII and the jurisdictional rules examined in Chapter 1. In particular, the Community is under three sets of obligations: a) to cooperate at both the global and regional level, directly or through competent international organizations, in the multilateral development of international rules and standards; b) to implement and enforce international rules at the EC level; and c) to take all necessary measures to protect and preserve the marine environment. As discussed in Chapters 2.2.3 and 4.4, the marine environmental provisions of the LOSC and other marine environmental conventions which fall under the competence of the Community form an integral part of EC law and have the same legal effects as Community legislation.<sup>377</sup>

Thirdly, as a signatory of Agenda 21, the Community has assumed a “political” commitment to prevent, reduce and control the “degradation” of the marine environment and to achieve the sustainable development of oceans and seas in accordance with the provisions of Chapter 17. In particular, the Community is under five sets of commitments: a) to adopt an integrated and precautionary approach to ocean management and to apply the emerging principles discussed in Chapter 1; b) to participate in the multilateral development of international rules and standards and to cooperate and coordinate its action with the competent international organizations both at the global or regional level; c) to promote ratification and the proper implementation of the LOSC and existing international instruments on ocean preservation; d) to assist developing countries through the transfer of financial and technical resources; and e) to promote global ocean governance by ensuring access to relevant information and public participation in planning and decision-making at appropriate levels. Despite their non-legally binding nature, the Community has attached great importance to its commitments under Agenda 21 and has endorsed most of its principles in the EC Treaty. At the WSSD in Johannesburg, the Community enhanced its commitments under Chapter 17 and agreed to take specific and targeted action with strong marine environmental implications.<sup>378</sup>

### **3.4 The Community and the International Implementation Regime**

#### **3.4.1 MEAs and Regional Seas Conventions**

The LOSC and Chapter 17 of Agenda 21 require States to cooperate, directly or through competent international organizations, in the multilateral development of international rules for the protection and preservation of the marine environment. In addition, they place strong emphasis on regional cooperation, especially in relation to enclosed and semi-enclosed seas. As discussed in Chapter 1.3.2 this cooperation takes place primarily within framework of a number of MEAs and regional seas

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pollution (2000-2006)), and in a large part of the water quality legislation (e.g., Article 10 of the Shellfish Directive 79/923/EEC and Article 4(4) of the Water Quality Directive 76/160/EEC). On the application of the principle of cooperation in the EC Transport and Environmental policies see: A. Nollkaemper (1993), pp. 161-63.

<sup>376</sup> E.g., Case C-286/90, *Poulsen* (1992); and Case C-432/92, *R. v. Ministry of Agriculture, Fisheries and Food, ex Parte Anastasiou*.

<sup>377</sup> Case C-104/81, *Hauptzollamt Mainz v. Kupferberg* [1982]. On the applicability of mixed agreements vis-à-vis member states which are not parties see L. Granvik in M. Koskeniemi (1998), pp. 266-8 and M.J Dolmans (1985), p. 64.

<sup>378</sup> E.g., a) to maintain and restore fish stocks to levels that can produce the maximum sustainable yield no later than 2015; b) to reverse the current trend in natural resource degradation as soon as possible by adopting and implementing strategies to protect ecosystems and to achieve an integrated management of land, water and living resources; and c) to achieve a significant reduction in the current rate of loss of biological diversity by 2010. See, *infra* Chapter 8.3.2.

conventions. As discussed in Chapter 2.3.1.1, moreover, the promotion of measures at the international level to deal with transboundary environmental problems is one of the key objectives of the common environmental policy and the EC Treaty explicitly provides for Community participation, next to its member states, in multilateral environmental agreements (Article 174).

The Community, therefore, has decided to implement its obligations under the global ocean regime by participating in multilateral negotiations and acceding, in the first place, to regional seas conventions which apply to the European Seas and allow regional economic integration organizations to become a party (e.g., the 1976 BARCON and its Protocols, as amended; OSPAR, and the 1992 Helsinki Convention) and other relevant MEAs (e.g., CBD, Ramsar Convention, Basel Convention).<sup>379</sup>

To meet its responsibility under the MEAs and regional seas conventions, therefore, the Community is under two sets of obligations: a) to cooperate with other parties within the decision-making bodies established by the conventions (e.g., COP/MOPs; OSPARCOM; HELCOM); and b) to implement the provisions of these agreements as well as the binding decisions adopted by the relevant bodies.<sup>380</sup>

### **3.4.2 The Community and the Multilateral Policy-Making in Ocean Affairs and Marine Issues**

The Community implements its obligations under the LOSC and Chapter 17 of Agenda 21 also by participating in the multilateral development of ocean policies within the main political forums, especially within the framework of the UN system. The EC, moreover, is at the forefront of the global debate on sustainable development within the UNGA and the UN Commission on Sustainable Development (CDS).

In addition, the Community takes an active part in the discussions within the main political forums involved in the implementation of the global ocean regime at the regional level. First of all, it plays a central role within the NSMCs.<sup>381</sup> All Community's EAPs have devoted particular attention to the problems affecting the North Sea.<sup>382</sup> There is a strong mutual influence between the EC environmental policy and the NSMC Policies. Given that the majority of the North Sea coastal states are also EC members, the Community, acting as a full member in the NSMC, has always encouraged the development of the policies in this forum in a manner which is consistent with its own environmental policy. At the same time, it has taken concrete steps to give effect to the declarations adopted by the NSMC.<sup>383</sup>

The Community, moreover, is at the forefront in promoting (marine) environmental cooperation in the Baltic Sea area and plays a central role within the

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<sup>379</sup> An exhaustive list of MEAs, including regional seas conventions to which the Community is a party or a signatory with all details on signature, conclusion and publication in the Official Journal, is available at: [http://europa.eu.int/comm/environment/international\\_issues/agreements\\_en.htm](http://europa.eu.int/comm/environment/international_issues/agreements_en.htm).

<sup>380</sup> As discussed in Chapters 2.2.3, 2.6 and 4.4 not only the provisions of the agreement, but also the binding decisions of their bodies (e.g., COP/MOPs; OSPARCOM; HELCOM) governing matters under the EC's exclusive competence become an integral part of EC law. See N. Lavranos (2002), pp. 48-50; R. Churchill and Ulfstein (2000), pp. 643-7; and P. Sands (1991), pp. 2511-23.

<sup>381</sup> On the NSMCs see Chapter 1.4.1 of this study. On the role of the EC within the NSMCs see: P. Ehlers in: D. Freestone and T. IJlstra (eds.) (1990), pp. 3-14; Y. van der Mensbrugge in: *ibid*, pp. 15-21; and J.L. Prat in: *ibid*, pp. 101-10.

<sup>382</sup> E.g., the Fourth EAP urges the EC to take measures to improve the aquatic environment of the North Sea.

<sup>383</sup> The Council Resolution of 28 June 1988 on the protection of the North Sea and other Community waters (OJ C 209), for instance, is part of the programme for the implementation of the Declaration adopted by the 2<sup>nd</sup> NSMC.

CBSS and within the meetings of the Baltic Sea's environmental ministers.<sup>384</sup> The Community, indeed, actively participates in the Joint Comprehensive Environmental Action Programme (JCP) established in 1992 to foster cooperation among coastal states in order to restore the sound ecological balance of the Baltic Sea, as well as within the Baltic Sea Agenda 21, launched in 1996 to promote the sustainable development of the region.<sup>385</sup> In addition, starting from 1998, the EC has strengthened its political involvement in the Northern regions launching a new Northern Dimension initiative to foster cooperation among the EC, Baltic Sea coastal states and Russia in different areas, including marine environmental protection and sustainable development, and to ensure synergies and coherence among the respective policies.<sup>386</sup>

Similarly, the Community has launched and plays a leading role within the Euro-Med, which promotes multilateral cooperation and political dialogue towards the achievement of sustainable development, integrated coastal zone management and the protection and preservation of the marine environment in the Mediterranean region.<sup>387</sup>

### **3.4.3 The Community and the “Generally Accepted” and “Applicable” International Rules and Standards adopted by the “Competent International Organizations”**

Both the LOSC and Chapter 17 of Agenda 21 require the Community to give effect to (and enforce) the “generally accepted” or “applicable” rules and standards adopted by the competent international organizations (GAIRAS). These are considered, in the first place, to be those agreed within the International Maritime Organization (IMO), the International Labour Organization (ILO), the Food and Agricultural Organization (FAO), and UNEP, including non-binding codes and recommendations.<sup>388</sup> As discussed in Chapter 1.3.1, even though the Community is not a member of most of these organizations (e.g., IMO and ILO), it seems to be nevertheless bound by the GAIRAS on the basis of the rules of reference contained in the LOSC.

So far, the Community has “given effect” to existing GAIRAS in two different ways, by acceding to the conventions containing the standards, whenever possible (e.g., FAO Agreement)<sup>389</sup> or by incorporating, in whole or in part, the standards into EC legislation. Since most of the GAIRAS which are relevant to the present study relate to the control of vessel-source pollution (i.e., IMO standards), this issue will be discussed in detail in Chapter 6.10.

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<sup>384</sup> On the CBSS and the Baltic ministerial meeting see Chapter 1.4.1 of this study. The European Commission, in addition, participates in the meetings of the Barents Euro Arctic Council (BEAC).

<sup>385</sup> On the JCP see: [www.helcom.fi/projects/jcp/en\\_GB/pitf/](http://www.helcom.fi/projects/jcp/en_GB/pitf/); on Baltic 21 see: [www.baltic21.org/](http://www.baltic21.org/).

<sup>386</sup> For an overview of the Northern Dimension for Policies of the Union, see: [http://europa.eu.int/comm/external\\_relations/north\\_dim/](http://europa.eu.int/comm/external_relations/north_dim/).

<sup>387</sup> The Declaration adopted at the Barcelona Conference, held in November 1995, established a new partnership between the EU and 12 Southern and Eastern Mediterranean Countries. Sustainable development and (marine) environmental protection have been fully integrated in the objectives of the Euro-Med Process (e.g., Declaration of the Euro-Mediterranean Conference on the Environment, Helsinki 28.11.1997 (Para. 2) and the Athens Ministerial Declaration, 10/07/2002). For further information see: [http://europa.eu.int/comm/external\\_relations/euromed/](http://europa.eu.int/comm/external_relations/euromed/).

<sup>388</sup> For instance, EC Regulation 2099/2002 establishing a Committee on Safe Seas (COSS) defines “International Instruments” as “the conventions, protocols, resolutions, codes, compendia of rules, circulars, standards and provisions adopted by an international conference, International Maritime Organization (IMO), International Labour Organization (ILO) or the parties to a memorandum of understanding referred to in the provisions of the Community maritime legislation in force” (Article 2(1)).

<sup>389</sup> E.g., Council Decision 96/428 on the acceptance by the Community of the FAO Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas, pp. 24-5.

### 3.4.4 Community Measures to Protect and Preserve the Marine Environment

As a party to the LOSC, the Community is under a duty to adopt all the necessary measures to protect and preserve the marine environment. As already discussed, so far the Community has implemented such a duty in a rather fragmented and indirect manner.

Most of the Community's marine-related measures focus on the regulation of land-based pollution and have been adopted within the framework of the water quality legislation. The relevant directives intend to control discharges of hazardous substances into the aquatic environment<sup>390</sup> and determine the maximum concentration of pollution permissible in a given aquatic recipient, such as bathing waters or shellfish waters.<sup>391</sup> The water quality legislation also intends to contribute to the Community implementation of its obligations under the regional seas conventions.<sup>392</sup> These measures, however, are not purely environmental, but they relate primarily to the protection of human health. In addition, "water quality" directives make no distinction between fresh and sea waters, but they generally refer to the "aquatic environment" as a whole giving strong preference to fresh waters. Some of them expressly refer to coastal waters,<sup>393</sup> or to the territorial sea,<sup>394</sup> or, generally, to the sea,<sup>395</sup> but, even in these cases most of the action required has to be taken on land. Other land-based sources of marine pollution, such as urban wastes, moreover, are controlled within the framework of the common chemical policy and are aimed at phasing out the production and/or use of certain chemicals, pesticides and discharges from industries.<sup>396</sup> Additionally, the discharge of nitrates, sewage sludge, and titanium dioxide has been regulated within the framework of the common market policy and legislation, but the primary objective is to prevent the distortion of competition, not to protect the marine environment.<sup>397</sup>

In addition, the Community has implemented its international obligations in the field of the transboundary shipment of wastes and, indirectly, ocean dumping and incineration, within the context of the common waste policy. Waste legislation applies, but is not specifically directed at controlling discharges at sea.<sup>398</sup> Moreover, the shipments of radioactive substances between members states has been regulated under the EURATOM Treaty (Articles 31 and 32), but the main objective is to protect the

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<sup>390</sup> The main instrument is Council Directive 76/464/EC on pollution caused by certain dangerous substances discharged into the aquatic environment, which sets out the framework for the phasing out and control of polluting substances. In addition, a number of so-called "daughter" directives fix emission limits for some of the most dangerous pollutants, such as, inter alia, mercury (Mercury Discharge Directive 82/176/EEC) and cadmium (Cadmium Discharge Directive 83/513/EEC).

<sup>391</sup> E.g., Directive 76/160/EEC on the quality of bathing water (Article 1(2)).

<sup>392</sup> The Water Framework Directive 2000/60/EC, for instance, intends to contribute to the implementation by the Community and the member states of their obligations under the OSPAR, the Helsinki Convention and BARCON (Para. 21 and Article 1).

<sup>393</sup> E.g., Directive 79/923/EEC on shellfish waters (Article 1); Directive 91/271/EEC on Urban Waste Water Treatment, as amended (Article 2(13)); and the Water Framework Directive (Article 2(7)).

<sup>394</sup> See EEC Directive 76/464 EC (Article 1(1)) and all daughter directives. Also the Water Framework Directive, applies to territorial and marine waters, Article 1(e).

<sup>395</sup> See TiO<sub>2</sub> Directive 78/176/EEC.

<sup>396</sup> See Directive 91/271/EEC on Urban Waste Water Treatment, as amended.

<sup>397</sup> The TiO<sub>2</sub> Directive 78/176/EEC, for example, has been adopted on the basis of Article 95 EC (ex Article 100) to prevent the distortion of competition in the TiO<sub>2</sub> Industry.

<sup>398</sup> These measures will be covered in further detail in chapter 7 on "ocean dumping".

health of workers and the general public against the dangers of radioactivity, rather than the marine environment.<sup>399</sup>

As will be discussed in Chapter 8, the Community has implemented its international obligations on the preservation of marine habitats and species within the framework of its nature conservation policy by means of the Wild Birds and the Habitats Directives. So far, however, both directives have focused on the protection of nature on land and give marginal attention to marine biodiversity. Additionally, the Community has implemented some of its international commitments on the conservation of marine living resources within the framework of the Common Fisheries Policy. The relevant legal instruments, however, focus primarily on the utilization of fisheries resources rather than the preservation of marine ecosystems.<sup>400</sup>

As will be discussed in detail in Chapter 6, the Community has taken important steps towards the implementation of its global commitments on vessel-source pollution acting within the framework of the Common Transport Policy. Most of the relevant measures, however, intend to ensure maritime safety and liability and compensation in the case of maritime accidents, rather than the protection of the marine environment per se.

As will be discussed later in this Chapter, existing EC marine-related measures have proven to be inadequate for the Community to meet its international commitments under the LOSC, MEAs and regional seas conventions.<sup>401</sup> EC measures, moreover, suffer from a strong implementation deficit.<sup>402</sup> Lately, the Commission has appeared determined to enhance monitoring and enforcement and to bring about full compliance by member states not only with EC rules, but also with international and regional standards.<sup>403</sup>

### **3.4.5 The Community's Action to implement Chapter 17 of Agenda 21**

The Community is aware of its responsibility in global environmental problems as one of the major consumers of renewable and non-renewable resources, including marine living and non-living resources.<sup>404</sup> In the follow-up to UNCED, therefore, it has taken the lead in promoting targets, principles and approaches recommended in Agenda 21 at both the European and international levels and has taken concrete steps towards their implementation. Initially, however, marine environmental protection was not a priority action for the Community at the WSSD. According to the Commission the WSSD should indeed concentrate on those natural resource issues that are of particular importance to economic development such as energy, freshwater and soil degradation, while other issues, including oceans and seas "may be important to address, but should in principle not be a priority for the summit Agenda".<sup>405</sup> Even so, the Community has

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<sup>399</sup> See Council Regulation 1493/93 and Council Directive 92/3/Euratom, on the supervision and control of shipments of radioactive waste between member states and into and out of the Community.

<sup>400</sup> The CFP includes technical measures to support sustainable fisheries, such as satellite observation, the improvement of technical equipment to decrease catches of juvenile fish and the ban on drift-net fishing which give effect to international fisheries management standards. See, in general, Chapter 8.8.3.4.

<sup>401</sup> E.g., Commission (2005), Impact Assessment, *infra* n. 428.

<sup>402</sup> E.g., 6<sup>th</sup> Annual Survey on Implementation and Enforcement of EC Environmental Law, *supra* n. 351.

<sup>403</sup> E.g., Case C 239/03, *Commission v. French Republic*, 7.10.2004, on the failure of France to fulfil its obligations under the BARCON and its Land Based Pollution Protocol and the failure to adopt appropriate measures to prevent, abate and combat heavy pollution.

<sup>404</sup> E.g., Sixth EAP (COM (2001) 53), Para. 7.2; EU External Strategy on Sustainable Development (COM (2001) 53); and Commission's communication on multilateralism (COM (2003)526).

<sup>405</sup> COM (2001) 53, Para. 16.

played a central role in promoting targets and timetables related to ocean preservation and is currently acting as a frontrunner in the follow-up to the Summit.<sup>406</sup>

In view of the WSSD the Community has adopted an “internal”<sup>407</sup> and a “global”<sup>408</sup> strategy on sustainable development. Both strategies recognize the importance of the oceans as a source of life. However, the protection of the marine environment is not considered as an objective in itself, but as a means to achieve “sustainable use of natural resources” or “sustainable management of natural and environmental resources”.<sup>409</sup> The focus is placed on the control of fisheries and the revision of the Common Fisheries Policy as a key tool to maintain biodiversity and preserving ecosystems.<sup>410</sup> The contribution of these strategies towards the implementation of Chapter 17 of Agenda 21, therefore, seems to be rather limited.<sup>411</sup>

Furthermore, the Community has indirectly implemented its commitments under Chapter 17 within the framework of its Sixth EAP<sup>412</sup> and other sectoral strategies in the field of biodiversity, sustainable fisheries, integrated coastal zone management (ICZM), and marine scientific research.<sup>413</sup> Likewise, the newly proposed Marine Strategy, the proposed Maritime Strategy Directive and the current work toward a future Maritime Policy, which will be discussed in the following sections, aim at achieving the sustainable development of European oceans and seas.

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<sup>406</sup> See in Chapter 8.8.4.2 of this study, and e.g., EU Statement on Ocean and the Law of the Sea, made at the 20<sup>th</sup> anniversary of the LOSC (10.12.2002), by Ambassador Kofod on behalf of the EU.

<sup>407</sup> To implement Agenda 21, the Community relied on the Fifth EAP “Toward Sustainability” adopted in preparation of the 1992 UNCED. In 1997, at the 19<sup>th</sup> UNGA Special Session, all signatories of the Rio Declaration, including the EU, committed themselves to drawing up strategies for sustainable development in view of the 2002 WSSD. The Union’s Sustainable Development Strategy has been adopted by the Göteborg European Council, 15-16 June 2001, on the basis of a Commission proposal (Communication from the Commission: A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development” (COM (2001) 264).

<sup>408</sup> The global strategy intends to achieve a “global deal” on sustainable development at the WSSD. See the Communication from the Commission: Ten Years After Rio: Preparing for the World Summit on “Sustainable Development” in 2002, COM (2001) 53.

<sup>409</sup> See: Para. 31 of the internal Strategy and Para. 12 of the global Strategy. See also Para. 2.4 of the revised EU Strategy on Sustainable Development for 2005-210, which will be adopted by the Council in June 2006 (available at: [http://europa.eu.int/comm/sustainable/sds2005-2010/docs/communication\\_en.pdf](http://europa.eu.int/comm/sustainable/sds2005-2010/docs/communication_en.pdf)).

<sup>410</sup> The global Strategy, for instance, emphasizes the importance of the ocean as a source of life and the increasing pressures from human activities, especially from fisheries, which is depleting stocks and damaging marine ecosystems (Para. 12). In order to reverse this trend, the Strategy calls for the development, by 2015, of Community measures on distant water fisheries, which may contribute to sustainable fisheries outside EC waters (Para. 13).

<sup>411</sup> For a critical analysis of the strategies see: V. Jenkins (2002), pp. 261-4.

<sup>412</sup> The Sixth EAP is an integral part of the EU strategy on sustainable development. According to V. Jenkins (2002), the Sixth EAP appears to be a better model for sustainable development than the Sustainable Development Strategy itself since it does not exclusively focus on integration, but also on transparency, environmental information and public participation in the environmental decision-making.

<sup>413</sup> For instance, the 6<sup>th</sup> EC Research Framework Programme (FP6) (2002-2006) emphasizes the need to improve the understanding of the marine environment and ecosystems so as to minimize the impact of human activities and to contribute towards the sustainable management of marine natural resources. See also the proposal for a FP7 (2007-2013). Similarly, “Integrated Coastal Zone Management: A Strategy for Europe”(COM (2000) 547) intends to meet EU commitments under Chapter 17 of Agenda 21, but is mainly directed towards the sustainable development of coastal “land” areas. On the 1998 Biodiversity Strategy and 2001 Biodiversity Action see: Chapter 8 of this study.

The Community is also firmly committed towards the promotion of capacity-building in marine-related matters as a means to put all States in the position to be able to meet their international marine environmental obligations.<sup>414</sup>

### **3.5 The Way Forward**

#### **3.5.1 The European Marine Strategy**

The Sixth EAP, setting out the framework for the Community's environmental action for 2001-2010, places considerable emphasis on ocean preservation compared to the previous programmes. The protection of the marine environment is considered as a main policy approach to protect "nature and biodiversity". In order to reduce the tremendous pressure posed by human activities on the marine environment and its biodiversity the EAP calls, first of all, for the revision of the Common Fisheries Policy.<sup>415</sup> The Commission, however, recognizes that the effective protection of the marine environment and its biodiversity needs to go beyond the sustainable exploitation of renewable marine resources and requires the effective integration of the environment and biodiversity into all Community policies as well as all aspects of the Community's external relations. The Programme, therefore, calls for the development of a thematic strategy which addresses pollution and degradation of the marine environment from different human activities in an integrated manner. The focus remains on the full implementation of existing international, regional and EC legislation rather than on the adoption of new legal instruments.<sup>416</sup> The Sixth EAP, moreover, reaffirms the willingness of the Community to promote multilateral co-operation in global environmental matters and calls for better co-ordination with the member states in all relevant international bodies.<sup>417</sup>

In 2002, in the follow-up to the Sixth EAP, the Commission published a Communication which was intended to be the first step "Towards a strategy to protect and conserve the marine environment".<sup>418</sup> This ambitious and comprehensive strategy shall contribute to the protection and sustainable development of oceans and their biodiversity throughout the world, focusing not only on European waters, but also on adjacent seas, such as the Barents Sea and the Arctic Ocean, and other international seas.<sup>419</sup> The Communication reviews the current sources of pressures affecting Europe's seas, existing global, regional and EC policies, legislation, monitoring, assessment and reporting mechanisms and identifies the main inconsistencies and overlaps.<sup>420</sup> On the basis of this review, the Commission has established a detailed and ambitious action plan setting out the objectives of the future Marine Strategy and the

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<sup>414</sup> See, e.g., Statement by Ambassador J. A. De Yturriaga Barberán, on behalf of the EU, at the UNGA special session on the law of the sea, 9.04.2002. The Community and the member states account for 55% of the international official development assistance (COM (2003)526, at 3).

<sup>415</sup> Sixth EAP, Para. 4 (4).

<sup>416</sup> Ibid, paras 4 (4); 5(4) and 7(2)).

<sup>417</sup> Ibid, Para. 7 (2).

<sup>418</sup> See the Communication from the Commission "Towards a strategy to protect and conserve the marine environment", COM (2002) 539. According to the Sixth EAP this strategy is an integral part of the EU Sustainable Development Strategy. Its overall objective is indeed to promote the sustainable use of the seas and the conservation of marine ecosystems, including seabeds, estuarine and coastal areas, paying special attention to sites having a high biodiversity value (p. 17).

<sup>419</sup> COM (2002) 539, Para. 10.

<sup>420</sup> Ibid, Chapters 2, 3, 4 and 5, pp. 5-16. In particular, the Commission recognizes strong overlaps and inconsistencies with regard to the control of hazardous substances (p. 36), in the field of biodiversity (pp. 34-5) and eutrophication (p. 38), while there are no wasteful overlaps in the field of chronic pollution (p. 39), radionuclides (p. 41), health and the environment (p. 42) and maritime transport (p. 45).



actions needed to meet them.<sup>421</sup> Most of these objectives simply repeat the Sixth EAP (and the Sustainable Development Strategy),<sup>422</sup> others go much further by setting out clear and ambitious deadlines for the phasing out of several sources of marine pollution.<sup>423</sup> To meet these targets, the Commission calls for the full implementation of existing EC rules and standards, but does not envisage the adoption of new comprehensive legislation on marine preservation. Although some action has to be taken at the EC level, the Commission places considerable attention on multilateral cooperation and on the effective and coherent implementation of international rules and standards. A central element of the future strategy indeed should be effective coordination and cooperation among all bodies dealing with marine protection within the framework of the LOSC and Chapter 17 of Agenda 21, different regional and global conventions and bodies.<sup>424</sup> To this end, the Commission emphasizes the need to develop the future Marine Strategy in close collaboration with regional conventions.

To draw up the Strategy the Commission set up a consultation process which was open to the participation of all relevant stakeholders (e.g., member states and candidate countries; key non-EU neighbouring countries; international commissions and conventions; industry; and NGOs).<sup>425</sup>

In March 2003, the Environmental Council endorsed the approach and the objectives of the Marine Strategy as outlined by the Commission in its Communication, while the EP, supported by NGOs, considered such a Strategy not to be ambitious enough.<sup>426</sup> On 24 October 2005, after two years of intensive stakeholder consultations, the Commission presented the European Marine Strategy (EMS).<sup>427</sup> The EMS is composed of a Communication, a proposal for a Marine Strategy Directive (MSD) and an Impact Assessment.<sup>428</sup>

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<sup>421</sup> Ibid, Chapters 7 and 8, pp. 17-28 and Annex 5.

<sup>422</sup> E.g., halting the biodiversity decline by 2010 (Objective 1); restoring degraded marine ecosystems (Objective 2) and to reform the Common Fisheries Policy (Objective 3).

<sup>423</sup> E.g., the progressive reduction of discharges of polluting and radioactive substances by 2020 (Objectives 4 and 6); the elimination of eutrophication by 2010 (Objective 5); compliance with existing oil discharge limits from platforms and offshore installations by 2010 at the latest and the elimination of all discharges by 2020 (Objective 7); and the elimination of maritime litter from illegal disposal at sea by 2010 (Objective 8).

<sup>424</sup> See Objective 12, p. 20 and Action 21, p. 25. Action 22 (p. 26), moreover, reaffirms the need to increase EC influence on ocean issues by means of better coordinated EC positions in international bodies and by seeking membership in some vital organizations, such as IMO.

<sup>425</sup> In addition, four EC working groups have been established to examine the specific issues in further detail, i.e., Strategic Goals and Objectives (SGO), Ecosystem Approach to Managing Human Activities (EAM), European Marine Monitoring and Assessment (EMMA) and Hazardous Substances (HS). The completion of the Marine Strategy has been included in the Commission's Legislative Work Programme for 2005.

<sup>426</sup> See: Environmental Council Conclusions, 4 March 2003 and the Report of the EP, Rapporteur Laura Gonzalez Alvarez, 7.05.2003 (A5-0158/2003). See also European Environment and Sustainable Development Advisory Councils (EEAC), Working Group Marine (WGM), "Analysis of gaps in the process to draw up the EMS", May 2004, available at: [http://www.eeac-net.org/workgroups/pdf/WG%20Marine\\_GapAnalysis%20EU%20Marine%20Strategy\\_May04.pdf](http://www.eeac-net.org/workgroups/pdf/WG%20Marine_GapAnalysis%20EU%20Marine%20Strategy_May04.pdf) and NGOs' Position Statement, November 2004 European Marine Strategy: Towards a Robust Legal Instrument to Protect the Marine Environment, available at: [http://www.greenpeace.dk/files/2900-2999/file\\_2969.pdf](http://www.greenpeace.dk/files/2900-2999/file_2969.pdf).

<sup>427</sup> The results of the stakeholder consultation process are available at: [http://europa.eu.int/comm/environment/water/consult\\_marine.htm](http://europa.eu.int/comm/environment/water/consult_marine.htm). See also 2005 Impact Assessment, infra n. 94, Para. 10, pp. 52-54.

<sup>428</sup> See: Communication from the Commission to the Council and the European Parliament, "Thematic Strategy on Protection and Conservation of the Marine Environment", COM (2005) 504, 24.10.2005; Proposal for a Directive establishing a Framework for Community Action in the field of Marine



The 2005 Communication briefly identifies the principal threats to Europe's marine environment and the main gaps in the existing legal framework.<sup>429</sup> In the first place, the Commission reconfirms the lack of a comprehensive and integrated Community policy on oceans and seas. Measures to control and reduce the different source pressures impacting on the marine environment do exist, but they have been developed in a sector-by-sector approach and have resulted in a patchwork of policies, legislation, programmes and action plans at the national, regional, EC and international level. There is still little coordination and some duplication between the existing instruments, strategies, and monitoring/assessment mechanisms as well as strong information gaps.<sup>430</sup> Regional seas conventions provide the technical expertise and work as a bridge with non-EC countries and are therefore considered invaluable instruments for delivering the EC Strategy. However, they lack appropriate enforcement mechanisms.

The Commission recognizes that despite some progress, especially in the field of land-based pollution, the state of the marine environment has been deteriorating significantly over the past decades and the existing patchwork regime has been unable to ensure a high level of protection for the European marine environment as requested by Article 2 EC. The Marine Strategy (and the MSD) are expected to fill the gap in the Community's environmental policy by putting an end to the sector-by-sector approach and providing a legally enforceable framework for the EC member states.

The Communication sets out the overall objective of the Marine Strategy as well as the key elements, principles and approaches to achieve it.<sup>431</sup> However, it is not as detailed as the 2003 Communication and does not contain specific deadlines for meeting its targets. Strong emphasis is placed on enhancing cooperation with existing regional seas conventions and on the ecosystem-based approach, while there is no reference to the precautionary principle.<sup>432</sup>

The Strategy builds on the progress made through existing institutions, policies and conventions and wants to create a framework for cooperation and coordination. In addition, it promotes strong synergies with other EC policies, especially the CFP and maritime safety policy.<sup>433</sup>

The Marine Strategy has a strong international dimension. Although it is primarily focused on protecting European seas, it also seeks to reduce the impact of the Community's activities in marine areas outside the jurisdiction of the EC member states, including the high seas.<sup>434</sup> The Strategy, moreover, intends to contribute to

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Environmental Policy (Marine Strategy Directive), COM (2005) 505 and Commission Staff Working Document on "Impact Assessment" (SEC (2005) 1290), all available at: <http://europa.eu.int/comm/environment/water/marine.htm>.

<sup>429</sup> See, in general, COM (2005) 504, paras 2, 3 and 4 and Impact Assessment, para. 3.3, pp. 14-16.

<sup>430</sup> However, the work carried out under the regional seas conventions in the preparation of the EMS has significantly contributed to enhancing coordination (COM (2005) 504, p.5).

<sup>431</sup> The overall objective is "to protect and restore Europe's oceans and seas and ensure that human activities are carried out in a sustainable manner so that current and future generations enjoy and benefit from biologically diverse and dynamic oceans and seas that are safe, clean, healthy and productive" (COM (2005) 504, Para 5.1 and Impact Assessment, Para. 5.1).

<sup>432</sup> One of the key elements in building the Strategy is a dual EU/regional approach whereby the Community sets out the framework for cooperation among member states and third countries, while the planning and execution of measures are left to the regional conventions, taking into account the diversity of marine regions, see: COM (2005) 504, Para. 5.2.

<sup>433</sup> COM (2005) 504,, paras 6.1 and 6.2.

<sup>434</sup> Ibid, Para. 1, p. 2.

fostering the Community implementation of its commitments under international agreements and regional seas conventions.<sup>435</sup>

Despite the strong accent on integration, the Marine Strategy does not envisage the creation of an institutional mechanism or overarching structure to ensure the coherence of policies and the effective participation of all relevant DGs in the marine-related decision-making process. Moreover, the role of the marine regional conventions and bodies and their contribution to the success of the Marine Strategy are not clearly defined and there is no specific indication as to how to coordinate different levels of monitoring and reporting in order to make the best use of resources. On the other hand, the EMS's importance as a guidance and coordination document cannot be underestimated.

### **3.5.2 The Proposal for a Marine Strategy Directive (MSD)**

The proposal for a MSD represents the main component of the Marine Strategy. The adoption of a legally binding instrument was one of the most controversial issues during the preparation of the Strategy. Most member states are still struggling with the implementation of existing EC legislation (e.g., the Habitats Directive and the Water Framework Directive) and while they recognize the need for a Marine Strategy, they were not ready to accept new binding commitments. In addition, member states, especially OSPAR and HELCOM contracting parties, expressed strong concerns about the future role of regional conventions, which in their view offer the most appropriate framework for dealing with marine environmental issues.<sup>436</sup> Although they recognized the added value of an EC legislative instrument in terms of monitoring and assessment, they considered regional measures to be more effective compared to EC-wide standards to respond to the particular conditions of regional seas.<sup>437</sup> Reportedly, moreover, they were particularly afraid that an EC legal instrument could trigger the exclusive competence of the Commission in the regional bodies.

Among the various options on the table (e.g., *inter alia*, tightening up existing legislation; a voluntary approach based on non-binding recommendations; decisions addressed to individual member states), the adoption of a flexible legal instrument, in the form of a framework directive, appeared to be the most appropriate and effective solution.<sup>438</sup> Given the transboundary nature of marine ecosystems and issues, the objective of the proposal cannot be sufficiently achieved by the member states alone, but requires cooperation and common principles. According to the Commission, international cooperation, especially within the framework of the regional conventions, has so far delivered mixed results mainly because of a lack of adequate enforcement and control mechanisms. The Community, therefore, offers the most effective framework for addressing common challenges according to the subsidiarity principle.<sup>439</sup> However, to be consistent with the proportionality principle and the principle of regional differentiation, the proposal leaves ample scope for national decisions and regional cooperation. The overall idea is to adopt a framework directive

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<sup>435</sup> *Ibid.*, Para. 6.2.3. Member states are encouraged to ratify and implement international conventions. According to the Commission, moreover, the Strategy will facilitate enhanced cooperation with regional seas conventions and with third countries (*ibid.*, Para. 6.3).

<sup>436</sup> E.g., Summary Record of the First Joint Meeting of the Heads of Delegation to HELCOM and OSPAR (Joint HELCOM/OSPAR HOD 1/2002), 17.01.2003, Para. 2.4.

<sup>437</sup> Reportedly, OSPAR Parties, mainly due to financial constraints, experience serious difficulties in carrying out monitoring/assessment. Under the EC Directive they would be obliged to find the necessary resources to meet their monitoring/assessment obligations.

<sup>438</sup> See: Impact Assessment, Para. 6.2, pp. 28-32.

<sup>439</sup> COM (2005) 505, Explanatory Memorandum, pp. 6-7.

which is ambitious in its scope, but not too prescriptive in its tools.<sup>440</sup> The proposed Directive, moreover, will contribute to meeting the obligations of the Community and the member states under the LOSC and other international marine agreements.<sup>441</sup>

The MSD proposal, which is based on Article 175 EC, sets out the framework for achieving good environmental status (GES) in European marine waters by 2021 (Article 1).<sup>442</sup> European marine waters include all waters under the sovereignty or jurisdiction of the member states, including the seabed and its sub-soil (Article 2). GES is not defined in the proposal, but it is up to the member states to determine GES in their marine waters according to a set of criteria which will be developed by the Commission in a second stage. The proposal recognizes that the diverse conditions, problems and needs of the marine regions require different and specific solutions and have to be taken into account in the planning and execution of measures.<sup>443</sup> Therefore, ecosystem-based marine regions are identified as the implementation units to be defined on the basis of their hydrological, oceanographic and bio-geographic characteristics (Article 3). For each marine region, member states are required to develop “Marine Strategies” (MS) for the integrated management of all human activities (Article 4). Member states are encouraged to cooperate among themselves and with third countries sharing the same Marine Region and, when appropriate, to act within the framework of existing regional seas conventions (Article 5).<sup>444</sup> Each MS has to contain a detailed assessment of the current state of the marine waters and of the environmental impact of human activities (Article 7); a definition of GES (Article 8); clear environmental targets, which should be consistent with existing national, EC or international targets (Article 9); and monitoring programmes (Article 10), according to a specific time frame set out in the proposal. Within each MS, member states have to establish a programme of cost-effective measures designed to achieve GES, “taking into account” measures required under existing EU legislation and international instruments (Article 12).<sup>445</sup> It is up to the Commission to assess whether the programmes of measures constitute an appropriate means for achieving GES and eventually to reject them in total or in part (Article 15). Finally, the proposal contains provisions on derogations, updating, reports and public information.

The proposal, in its current version, appears very broad and difficult to enforce.<sup>446</sup> Unlike in an earlier draft, which has never been published by the Commission, member states are not required to achieve a GES or improve the state of the marine environment, but only to draw up Strategies designed for this purpose.<sup>447</sup> Therefore, it will be very difficult to hold a member state accountable for failing to improve the state of the marine environment. In addition, it is unclear how and according to which criteria the Commission determines whether a Marine Strategy is

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<sup>440</sup> COM (2005) 504, Para. 5.4, See also: COM (2005) 505, Explanatory Memorandum, p. 7, and Impact Assessment, Para. 8, pp. 35-50 and Para. 11, pp. 54-56.

<sup>441</sup> COM (2005) 504, Preamble, paras 9-11.

<sup>442</sup> 2021 coincides with the first review of the River Basin Management Plans under the Water Framework Directive and allows for synergies in the implementation of the two directives.

<sup>443</sup> COM (2005) 505, Preamble, Para. 5.

<sup>444</sup> See also COM (2005) 505, Preamble, Para. 7 requiring that “where practical and appropriate, existing institutional structures established in Marine Regions should be used to ensure such coordination”.

<sup>445</sup> The programmes of measures need to be developed by 2016 and become operational by 2018. The Preamble of the proposal, however, makes it clear that measures related to fisheries must be taken within the context of the CFP and those related to the use of radioactive material need to be taken under Articles 30 and 31 of EURATOM (Preamble, Para. 28).

<sup>446</sup> See, e.g., NGOs position on the Marine Strategy Directive available at:

<[http://eu.greenpeace.org/downloads/oceans/MSD\\_coalition\\_spin\\_document\\_EN.pdf](http://eu.greenpeace.org/downloads/oceans/MSD_coalition_spin_document_EN.pdf)>

<sup>447</sup> The earlier draft of the proposal is available at [www.wrrl-info.de/docs/legal\\_proposal.doc](http://www.wrrl-info.de/docs/legal_proposal.doc).

sufficiently adequate. It is for the member states to define GES in their marine regions but, unlike the earlier draft, the current proposal does not contain any indicative criteria of what constitutes a healthy environment. These criteria will be developed by the Commission in accordance with the comitology procedure within two years after the entry into force of the MSD.<sup>448</sup> This may represent a possible deadlock in the decision-making process within the EP, which is not involved in the comitology procedure. Finally, the current proposal, unlike the earlier draft, does not require member states which share the same marine region to draw up common strategies, but simply encourages cooperation. This may lead to the adoption of different strategies within the same region. These shortcomings are the result of the high level of compromise between the Commission and the member states during the drafting process and indicate that there is still considerable resistance against strengthening the Community's involvement in marine environmental matters. It is possible that the EP, thanks to the lobbying efforts of the environmental NGOs, will try to reinforce the content of the Commission's proposal in the first reading and put forward several amendments. However, it is rather improbable that member states in the Council will accept too stringent and rigid commitments. The road toward the adoption of the MSD, therefore, may be still long and arduous.

### **3.5.3 Towards an Integrated European “Maritime” Policy?**

The LOSC, in its Preamble, makes it clear that “all problems of the oceans space are closely inter-related and need to be considered as a whole” and there is growing international recognition that ocean affairs are interlinked and require a comprehensive approach. Nevertheless, the Community has so far looked at oceans and seas in a rather fragmented manner.<sup>449</sup> This fragmented approach might change in the future as a consequence of the recent reorganization within the Commission and the work towards a European Maritime Policy. Since 1 January 2005, DG FISH has become responsible for Fisheries and “Maritime Affairs”. The idea is to put an end to the traditional sector-by-sector approach and to integrate all aspects of marine affairs and services under a single and coherent framework. In the view of the Commission, “maritime affairs” encompass a broad range of sectors, such as fisheries and aquaculture, offshore oil and gas extraction, tourism, renewable energies and maritime transport.<sup>450</sup> However, it is not entirely clear which activities will be transferred under the responsibility of DG FISH.<sup>451</sup>

The need for “an all-embracing Maritime Policy” has become one of the strategic objectives of the Commission for 2005-2009.<sup>452</sup> For that purpose, in January 2005, the new President of the Commission, Mr. Barroso, set up a Maritime Policy

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<sup>448</sup> The comitology procedure is a practical executive mechanism whereby the Council authorizes the Commission to make minor modifications or adjustments to EC legislation. This mechanism was introduced before the co-decision became the common procedure and does not involve the EP. Reportedly, the EP is the main opponent of this procedure.

<sup>449</sup> See the Speech by Mr. J. Borg, “Towards an European Maritime Policy”, Conference of Peripheral Maritime Regions of Europe, Santiago de Compostela, 14.01.2005, p. 3, [http://europa.eu.int/comm/fisheries/whatsnew/new\\_en.htm](http://europa.eu.int/comm/fisheries/whatsnew/new_en.htm).

<sup>450</sup> See, e.g., Mr. J. Borg, supra n. 449. However, the term “maritime” is normally related to shipping and navigation and does not seem to be the most appropriate to describe a comprehensive policy on oceans and seas.

<sup>451</sup> For instance, it is possible that DG FISH will absorb some issues related to the safety of fishing vessels and the training and certification of personnel on board fishing vessels, but it is highly improbable that DG TREN will renounce its competence in maritime safety and security issues.

<sup>452</sup> The Commission's strategic objectives and work programme are available at: [http://europa.eu.int/comm/atwork/programmes/index\\_en.htm](http://europa.eu.int/comm/atwork/programmes/index_en.htm).

Task Force formed by the Commissioners responsible for areas directly related to maritime affairs (i.e., Environment; Transport; Enterprise and Industry; Regional Policy; Research and Energy) and led by the new Fisheries Commissioner with the aim being to produce, by the first half of 2006, a Green Paper on a future European “Maritime” Policy.<sup>453</sup> In March 2005, the Commission published a Communication entitled “Towards a Future Maritime Policy for the Union” which represents a first step towards a coherent and integrated oceans policy in Europe along the lines of other countries (e.g., Australia, Canada, Portugal and the US). The overall vision is that of a “Europe with a dynamic maritime economy in harmony with the marine environment, supported by sound marine scientific research and technology, which allows human beings to continue to reap the rich harvest from the ocean in a sustainable manner”.<sup>454</sup> The future Maritime Policy should strive to achieve a fair balance between the economic, social, environmental, security and safety aspects of maritime activities ensuring both the conservation of resources and the improvement of competitiveness, long-term growth and employment in the maritime sector. The European Marine Strategy discussed in the previous paragraph should constitute the environmental pillar of the future Maritime Policy.<sup>455</sup> In practice, however, the Commission’s communication focuses more on the use rather than the preservation of the marine environment and its resources and on boosting competitiveness of the European maritime industry. Indeed, the future Maritime Policy is strictly linked to the Lisbon Strategy which aims at promoting economic growth in the EU.<sup>456</sup>

According to the Commission there is a clear case for an European integrated Maritime Policy. Oceans and seas play a vital role in the EC’s economy and social life and, especially after the 2004 enlargement, this maritime dimension has increased to a great extent.<sup>457</sup> The scale of the maritime challenges that Europe has to face in terms of resources and the types of action needed can be better tackled at the EC level, rather than by individual member states.<sup>458</sup> The adoption of a European Maritime Policy, therefore, would be in line with the subsidiarity principle.

The current fragmentation of decision-making in maritime affairs has so far made it quite difficult to reconcile competing uses of the oceans and seas and has often resulted in conflicting measures.<sup>459</sup> An integrated Maritime Policy will allow the Community to realize the full potential of its seas in a sustainable manner building

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<sup>453</sup> The Task Force acts in collaboration with a Member State Expert Group on Maritime Affairs composed of experts in a wide range of fields (e.g., marine environmental protection and pollution; marine biodiversity; integrated coastal estuaries and seas management; marine science and technology; law of the sea; maritime safety and security; fisheries and aquaculture; maritime transport and ports; ship and fleet management; shipbuilding and repair; energy; job creation; training; tourism and governance and in consultation with stakeholders.

<sup>454</sup> See Communication to the Commission from the President and Mr. Borg, “Towards a future Maritime Policy for the Union”, 2.03.2005 (hereinafter March 2005 Communication) and the Speech by Mr. J. Borg, supra n. 449. These and other relevant speeches and documents are available at: [http://europe.eu.int/comm/fisheries/whatsnew/new\\_en.htm](http://europe.eu.int/comm/fisheries/whatsnew/new_en.htm).

<sup>455</sup> March 2005 Communication; COM (2005) 504, Para. 6.1 (pp. 6-7); and Impact Assessment, Para. 8.6 (pp. 48-49).

<sup>456</sup> The European Maritime Policy is a product of the Lisbon Strategy and has been strongly promoted by the new Commission’s President Barroso. For an overview of the EU Lisbon Strategy see: [www.euractiv.com/en/agenda2004/lisbon-agenda/article-117510](http://www.euractiv.com/en/agenda2004/lisbon-agenda/article-117510).

<sup>457</sup> Speech addressed to the ITLOS by EU Commissioner Borg on Ocean and the Law of the Sea: Towards New Horizons, 2.09.2005.

<sup>458</sup> See, in detail, March 2005 Communication, supra n. 454, Para. 4.

<sup>459</sup> E.g., Speech by Mr. Borg, Designating a European Vision for the Oceans and Seas, Inauguration of the 10<sup>th</sup> Annual EC Maritime Law Course of the IMO International Maritime Law Institute (IMLI), Malta, 4.04.2005.

upon existing policies and legislation. The Maritime Task Force is currently looking at the links between maritime-related sectoral policies and how they could be combined to reinforce each other.

In addition, the future European Maritime Policy will promote close cooperation between the different EC, national and regional decision-making levels. It will also look at the relationship between the law of the sea and EC policies as well as the options to pursue EC international leadership and promote EC principles and objective in international forums, including ILO and IMO, regional organizations and third countries.<sup>460</sup>

The Green Paper is expected to clarify several key issues, including consistencies and inconsistencies between the different sectoral and regional maritime policies; the relationship between the Marine Strategy and the future Maritime Policy, how comprehensive this Policy should be; whether it should rely on existing frameworks or create an overarching framework including new and existing legislation; and whether an institutional and operational framework should be established to ensure coherent and integrated governance.

Once published, the Green Paper will form the platform for an extensive consultation process with all relevant stakeholders, which may result in a concrete Commission proposal for a Maritime Policy.<sup>461</sup> According to the Commission, the initiative has already triggered an enthusiastic response from several member states and key stakeholders. However, given the multiplicity of actors involved (e.g., the shipping industry, the fisheries and aquaculture industry, the oil and gas industry, the tourism sector, environmental NGOs) and the conflicting interests on the table it is difficult to foresee how the future European Maritime Policy will look like, what will be its legal status and what role the marine environment will play within that Policy.

### **3.5.4 Strengthening the Community's External Policy on Oceans and Seas**

Despite the initiatives discussed in the previous paragraphs, the Community is still firmly committed to international cooperation as the key for the protection of oceans and seas.<sup>462</sup>

As will be discussed in detail in the case-study chapters, in the past few years the Community has strengthened its external environmental policy and has taken a lead next to its member states in the global debate on oceans and seas within the UN; CBD; and IMO. The international regime, as it stands, has proved to be unable to guarantee an effective level of protection for Europe's seas and several issues need to be further addressed. The Community, however, recognizes that the necessary action should be taken primarily within the competent international organizations.<sup>463</sup> It wishes to act as

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<sup>460</sup> March 2005 Communication, supra n. 454, Para. 6.6.

<sup>461</sup> The Green Paper is a document published by the Commission to stimulate discussion and to instigate consultation on a specific issue at the European level. It may result in a White Paper which translates the outcome of these discussions into a concrete proposal for Community action.

<sup>462</sup> See e.g., COM (2003) 526, Para. 3. However, as will be discussed in Chapter 6, the Community has been recently criticized for taking an "unilateral" approach in the field of vessel-source pollution.

<sup>463</sup> EU Presidency Statements before the UN (all available at: [http://europa-eu-un.org/home/index\\_en.htm](http://europa.eu-un.org/home/index_en.htm)) recognize that, despite the important steps taken at the EC level, action shall be taken mainly within, *inter alia*, FAO and Regional Fisheries Management Organizations (RFMOs) with regard to the sustainable management of fisheries (e.g., EU Presidency and EC Statement, 6th ICP, 6.6.2005); within UNEP for integrated coastal zone management (e.g., EU Presidency Statement, 26.10.2000); within IMO for marine safety (e.g., EU Presidency Statement, 4<sup>th</sup> ICP, 2.06.2003); within the Intergovernmental Oceanographic Commission of UNESCO (IOC) for marine research (e.g., EU Presidency Statements of 8-9.05.2001) and within the International Hydrographic Organization (IHO) for capacity building in the production of nautical charts (e.g., EU Statement No.2, 4<sup>th</sup> ICP, 2.06.2003).



a front runner in the development of multilateral instruments, and to stimulate the earliest possible ratification by its member states and, where appropriate, by the Community itself.<sup>464</sup> Additional EC measures, when necessary, shall be complementary to and not a substitute for international rules.

The Community attaches great importance to the need to act within the framework of the LOSC and Chapter 17 of Agenda 21 and to secure universal acceptance of the LOSC.<sup>465</sup> Furthermore, the Community realises the need for the better implementation and enforcement of existing international instruments and wishes to be a model in implementing international obligations.

Finally, it should be stressed that, in terms of world trade and industry, the EC is a global player and heavily depends on global standards. For the Community, therefore, ensuring consistency between the international and EC regimes is fundamental in order to protect European competitiveness.

In the light of all considerations made so far, it is very likely that the Community will continue pursuing its marine environmental objectives and targets acting primarily, but not exclusively, at the international level.<sup>466</sup>

### **3.6 Conclusions**

Traditionally, the marine environment has played a limited role within EC environmental law. Instead of establishing its own rules and standards the Community has preferred to rely on the international ocean regime which is considered as the proper and most effective framework to protect the marine environment. As a consequence, it became a party to the LOSC and signed Chapter 17 of Agenda 21. So far, the Community has implemented its international obligations by acting, in the first place, at the international level. In particular, it has acceded to existing global and regional agreements implementing the LOSC (and Chapter 17) and participates individually or through its member states' coordinated action in the decision-making bodies established therein, as well as in main political forums dealing with ocean affairs. On the other hand, the Community's regulatory action towards the implementation of its international obligations in the field of the marine environment has been traditionally rather marginal.

Up to now, the Community has not established a comprehensive policy and legislation on the protection of the marine environment as it did for other environmental sectors. Conversely, it has looked at oceans and seas in a rather fragmented manner, acting within the framework of different sectoral policies, such as transport, fisheries, agriculture or the internal market. This sector-by-sector approach and the resulting patchwork regime has so far failed to ensure a high level of protection for the European marine environment. In the past few years, in response to the increasing pressure on the European seas, the Community has partially changed its traditional approach and has taken new steps toward an integrated policy on marine environmental issues. In October 2005, the Commission proposed a European Marine Strategy together with a MSD and is currently in the process of developing a comprehensive Maritime Policy. Furthermore, starting from January 2005, DG

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<sup>464</sup> E.g., COM (2003) 526, Para. 3.

<sup>465</sup> E.g., EU Presidency Statement, "Conservation and Sustainable Use of Marine Biodiversity", 6<sup>th</sup> ICP, 9.06.2005; EU Presidency Statement by Prof. G. Nesi, Legal Adviser of the Permanent Mission of Italy to the UN, 58<sup>th</sup> UNGA, 24.11.2003; EU Statement by Ambassador A. Vassilakis, 4<sup>th</sup> ICP, 2.06.2003; and EU Statement by Ambassador M. Kofod, 57<sup>th</sup> UNGA, 10.12.2002.

<sup>466</sup> E.g., EU Statement on oceans and law of the sea, by B. Bradshaw, Parliamentary Under-Secretary, Department for Environment Food and Rural Affairs (UK) on behalf of the EU, 60<sup>th</sup> UNGA, 28.11.2005.

Fisheries has become responsible for Maritime Affairs laying down the basis for stronger institutional integration. Despite these initiatives, however, the Community has not abandoned its traditional multilateral approach to ocean issues and still places strong emphasis on international cooperation. A central element of the Marine Strategy, the MSD and the future Maritime Policy is to enhance the implementation of existing EC and international legislation in a coherent and integrated manner. The Community recognizes the importance of the work being done at the international level, especially within the framework of the regional seas conventions, but notices several inconsistencies and overlaps. In order to avoid duplication of efforts and a waste of resources, therefore, it promotes effective coordination among all bodies involved in marine protection and coherence among different instruments and policies at the global, regional and EC level. The MSD, moreover, encourages member states to use, whenever appropriate, existing regional instruments and bodies.

In the past few years, moreover, the Community has considerably enhanced its role in the main international bodies responsible for marine environmental issues and ocean affairs trying to advance its targets and influence the development of the marine environmental policies and legislation along the lines of those of the EC. The Community attaches great importance to ensuring consistency between the international and EC regimes in order to protect European competitiveness and the correct functioning of the internal market. It is very likely, therefore, that it will continue to pursue its marine environmental objectives acting mainly at the international level.