

Introduction

1. Critical Issues and Central Questions

The European Community (EC), for legal and political reasons, has never established a comprehensive policy on the “ocean and seas” as it has done in other environmental areas. Instead of adopting its own rules and standards, the Community has traditionally relied upon the existing international regime and has acceded, next to its member states, to the 1982 United Nations Convention on the Law of the Sea (LOSC) and most of the global and regional agreements implementing the Convention in the European seas. All these conventions are not self-executing, but require further action to be taken by the contracting parties. The central question that the present research intends to address is the following: *In what manner does the Community implement the marine environmental provisions of the LOSC and related global and regional conventions?*

The implementation of the international oceans regime in the European seas must be considered in the context of the unique legal and political structure of the Community and the special relation with its member states. The present study focuses on two main issues: the existence of a “division of competences” between the Community and the member states; and the “conformity” of Community action with the international ocean regime, in the first place with the jurisdictional rules codified in the LOSC.

The Community and its member states have “shared competences” in the field of the protection of the marine environment, which means that, within their respective spheres of powers, they may both act. As a consequence they have together acceded to the LOSC and all the marine environmental conventions and they jointly participate in the work of the bodies established therein. However, as the Community declared at the time of signature and accession to the LOSC, the extent of its competence and the division of powers with its member states are not static, but may be subject to future changes. With the development of the European integration process, the member states have explicitly or implicitly transferred some of their powers to the Community in many areas covered by the LOSC and related agreements. As a result, in performing their international obligations member states can no longer act in isolation; they rather have to operate within the framework of EC law, which limits to a considerable extent their capacity to take unilateral action.

Firstly, this research intends to establish in what manner the existence of a division of competence between the Community and the member states influences the implementation of the LOSC and related agreements in the European seas, with particular attention to the Baltic Sea, the North-East Atlantic and the Mediterranean Sea. The focus is on the relevant global and regional conventions and bodies in which the Community and its member states participate and which provide an essential mechanism for implementing the LOSC. In particular, this study addresses a number of sub-questions such as: *who is competent and for what? What are the legal effects of the division of competencies vis-à-vis the EC institutions, the EC member states and non-EC contracting parties? How does this division influence the decision-making process within the relevant international organizations? How do the Community and the member states cooperate and coordinate their activities within the main global and regional forums implementing the LOSC?*

The “joint” participation of the Community and the member states in global and regional agreements creates legal problems both under international and EC law and influences to a large extent the manner in which the international regime is implemented in the European seas. Especially in the past, joint participation

confronted non-EC contracting parties with critical issues, such as *who is competent and for what? Who has to exercise the rights and perform the obligations under the conventions? Who is responsible in the case of violations?* Vis-à-vis non-EC contracting parties these questions must be answered on the basis of international law. Some indications may be provided by the international agreement itself. The LOSC and some related agreements, for instance, contain general rules on the EC's participation and require both the Community and its member states to make a declaration at the time of the signature and/or accession specifying the respective spheres of competences. The so-called "participation clauses", however, are too broad and the declarations are too vaguely formulated to provide non-EC countries with clear and definite answers.

In their mutual relations, the division of competences between the Community and the member states is regulated by EC law. This is one of the most critical and disputed aspects of the EC's external policy and it is particularly complicated with regard to ocean issues. It is disputed because for a long time the Community's actions for the protection of the oceans, unlike in other environmental fields, has been firmly opposed by its member states, striving to preserve their autonomous role at the international level. It is critical because of the absence of clear legal rules in the EC Treaty as regards the allocation of the respective spheres of competences and its legal effects. To fill this gap the European Court of Justice (ECJ) has developed a rather ambiguous doctrine, which does not provide for uniform solutions and leaves a number of questions unsolved, such as: *is there any room left for the unilateral action of member states outside the Community's framework? Or is there an obligation for the member states always to act within the Community's framework?* The ECJ doctrine, moreover, has been developed in relation to commercial and association agreements and its application is difficult with regard to marine environmental conventions, which have different characteristics. Uncertainties or disputes about the division of competences between the Community and its member states may affect the correct implementation of their respective obligations, resulting in a lack of action, duplications or inconsistencies and imposing conflicting obligations on the member states.

Instead of establishing rigid and uniform rules, the Court preferred to emphasise the duty of close cooperation between the Community and the member states in the negotiation, conclusion and implementation of the international agreements (so-called "mixed agreements"). However, it has never clarified what the duty of cooperation entails in practice, leaving a number of questions still open (*e.g., are member states always obliged to coordinate their action and to adopt common positions when acting at the international level?*). The situation is further complicated by the absence of a uniform practice. The manner and forms of coordination between the Community and its member states vary depending on the forum, the issue on the agenda and other practical and political circumstances. The absence of uniform procedures has often resulted in a lack of coordination affecting the effectiveness of the Community's external action. This lack of coordination is particularly dangerous within the framework of international organizations to which the Community is not a member (*e.g., the International Maritime Organization (IMO)*) and may only participate through the coordinated action of its member states. The lack of coordination between the Community and its member states, moreover, may negatively affect and delay the decision-making process in the global and regional bodies where they jointly participate.

Secondly, the present study intends to establish whether and to what extent the substantive approaches and measures adopted by the Community to implement its obligations under LOSC are consistent with the international ocean regime. The Community's actions to protect the marine environment must be in conformity with the jurisdictional framework established by the LOSC, which sets out the rights and obligations of flag, coastal and port States in the different maritime zones. The LOSC restricts the capacity of the coastal States, including the Community, to take unilateral action to protect their marine environment and to apply national rules for foreign vessels, but calls for the multilateral development and uniform application of international standards adopted by "the competent international organizations". The Community, in implementing its international obligations under the LOSC, may act in violation of these jurisdictional rules and adopt substantive standards which are different from the international ones. Although in the case of conflict international rules always prevail over Community legislation, these inconsistencies may subject member states to contradictory obligations under international and EC law, creating confusion and affecting the proper implementation of the international ocean regime.

2. Scope and Themes of the Study

The present study focuses on the implementation of the international ocean regime by the European Community and its member states. Implementation is the main challenge for the future. With the entry into force of the LOSC in 1994 and the adoption of most of the regional and global agreements implementing the Convention, the 1990s have been characterized as a decade of developing the international law for the protection and preservation of the marine environment. It is now widely recognized that the coming decade should focus on the full implementation of existing conventions at the regional and national levels. The proper implementation in a Community enlarged to 25 member states may without doubt contribute to this challenge.

For the purpose of this study the term "implementation" means giving effect to international norms by exercising the rights and performing the obligations under the relevant conventions. Attention is placed in particular on (a) the joint participation of the Community and the member states in the work and activities of the decision-making bodies set out by the conventions and the main political forums which are competent for ocean issues; and (b) the adoption by the Community of implementing legislation. The manner in which EC member states implement the international obligations under their exclusive competence remains outside the scope of this study.

The focus of this research is on standard-setting and not on enforcement. Enforcement, which is the capacity to punish violations, remains the primary responsibility of the member states, while the Community has very limited competence in this field. Likewise, the settlement of disputes arising from the violation of international obligations as well as responsibility and compensation in the case of environmental damage will not be covered. However, the study does pay some attention to the ECJ's jurisdiction as regards the application and interpretation of international ocean agreements concluded by the Community and the main compliance mechanisms available under EC law to ensure the full implementation of international ocean rules, including the capacity of the Commission to commence legal proceedings against member states for violations of relevant international standards.

The material scope of the present study is limited to the implementation of the international rules governing vessel-source pollution, ocean dumping and the protection of marine habitats through the establishment and management of marine protected areas (MPAs). These issues have been chosen, first of all, because they

illustrate three different approaches to marine environmental issues by the Community. As will be discussed in the course of this study, the Community has traditionally adopted a “global approach” to the regulation of vessel-source pollution by giving preference to international standards adopted by the IMO. Conversely, in the field of ocean dumping the Community has followed a more “regional approach” and has implemented its international obligations under the LOSC by becoming a party to the existing regional dumping agreements. Finally, in the field of marine habitats protection the Community has adopted an “EC approach” and has implemented its international obligations directly within the framework of its nature conservation legislation (i.e., the Wild Birds Directive and the Habitats Directive). These approaches have been influenced by the different operation of the fundamental principles of EC law, especially subsidiarity and proportionality, in relation to each of the selected issues. Furthermore, the three selected topics show the different attitudes of member states vis-à-vis the involvement of the Community in ocean matters. Member states with strong maritime interests, for instance, have for a long time opposed the adoption of EC measures on vessel-source pollution. They were afraid, first of all, of losing their individual role at the international level, and, secondly, that the establishment of a strict environmental regime in Europe could place the EC shipping industry in a competitive disadvantage compared to the outside world. Similarly, member states have traditionally opposed the adoption of EC rules in the field of ocean dumping which was considered to be adequately regulated at the global and regional level. Community legislation, therefore, appeared to be duplicative and unnecessary. Conversely, member states have never contested the involvement of the Community in the protection of marine habitats with biodiversity, where interference with their national interests was minor compared to other fields.

These three topics, moreover, have been chosen because they relate to activities which are taking place at sea and may strongly interfere with the jurisdictional rules of the LOSC. Land-based pollution, on the other hand, is the most regulated source of marine pollution at the EC level, but relates to activities taking place on land. The impact of EC land-based pollution measures on the law of the sea is minimal, making this topic of little interest for the purpose of the present study. The same holds true for fishing activities. In this field, indeed, the member states have transferred their powers to the Community which is exclusively competent to act at the international level and the issue of the division of competence does not normally arise. Therefore, land-based pollution, the environmental impact of fishing and some aspects of the conservation and management of marine living resources will only be discussed in general terms.

Finally, the choice to deal with the establishment and management of MPAs next to the regulation of marine pollution from shipping and dumping might appear to be a curious one. This, however, is a particularly interesting topic since it involves the regulation of diverse human activities, including fisheries or shipping, where the Community has competences of a different nature. In addition, this is one of the most regulated issues at the global, regional and EC levels and provides a good example of the interrelationship between different layers of regulation.

3. Outline of the Study

The present study is divided into two main parts. The first part contains the general principles and rules regulating the implementation of the international regime for the protection of the marine environment within the European Community.

As a starting point, Chapter 1 gives a general description of the peculiarities and the structure of the international regime for the protection of the marine

environment. The focus of the analysis is on the comprehensive legal framework, with special attention being paid to the LOSC (in particular the jurisdictional rules and Part XII on the protection of the marine environment), and on the implementing regime composed of multilateral environmental agreements (MEAs), “generally accepted” international rules and standards adopted by “the competent international organizations”, and the regional seas conventions. Of relevance for the present study are the 1976 Barcelona Convention for the protection of the Mediterranean Sea, as amended; the 1992 Convention for the protection of the North-East Atlantic (OSPAR) and the 1992 Helsinki Convention for the protection of the Baltic Sea. The Chapter looks closely at the institutional framework established by these conventions as well as the main global and regional political processes, within and outside the UN, involved in ocean issues. These represent the main forums for the implementation of the LOSC and the further development of the law of the sea and ocean policies. Chapter 2 gives a general overview of the peculiarities which make the Community’s regime a “new legal order of international law”, including its sources, institutional framework, instruments, decision-making processes and compliance mechanisms. The focus of the discussion is on the EC rules governing the capacity of the Community to take action at the EC and international levels concerning matters related to the protection and preservation of the marine environment. Particular attention is given to the EC principles establishing “*whether*”, “*when*”, “*to what extent*” and “*in what manner*” the Community may act (i.e., attribution, subsidiarity and proportionality and the guiding principles of EC environmental law); the “material scope” of the Community competence and the different legal bases in the Treaties; and the “geographical scope” of such competence and its extension to the different maritime zones under the sovereignty or jurisdiction of the member states. Chapter 3 looks closely at the way in which the Community actually applies these rules and principles in the field of the marine environment and the approach it has taken towards the implementation of its international ocean obligations. Chapter 4 focuses on the international and EC rules governing the accession and joint participation of the Community and the member states in mixed agreements and in the activities of international organizations (IOs) dealing with ocean issues. Particular attention is devoted to the EC rules on the division of competences as laid down in the EC Treaty and the ECJ’s case law; on the “participation clauses” contained in international agreements as well as on the procedural rules, as developed in day-to-day practice, on how the Community and the member states should cooperate in the negotiation, conclusion and implementation of mixed agreements. Finally, Chapter 5 looks closely at the participation of the Community next to its member states in the negotiation, conclusion and implementation of the LOSC and the main regional seas conventions. Particular attention is placed on the manner in which they coordinate their activities in the bodies established by these conventions.

The second part of the study applies the general principles and rules discussed in the first part to the specific fields of vessel-source pollution, ocean dumping and habitat protection through the establishment of MPAs. Each case-study chapter starts with an analysis of the existing global and regional rules governing the selected topic, with particular attention being paid to the jurisdictional provisions of the LOSC, and the specific approach taken by the Community in the implementation of its international obligations. Particular attention is given to the role played by the fundamental principles of EC law, EC institutions and the member states in shaping the Community’s action in these matters. The focus of the discussion is on the manner in which the general rules on the division of competences are applicable in practice,

with special attention being given to the coordination between the Community and the member states in the main international and regional forums (so-called Community coordination) and the legal consequences, merits and limits of the Community's participation therein. The case-study chapters briefly describe the relevant legislation adopted by the Community in each of the selected fields and discuss the consistency between the EC and the international rules, in the first place with the jurisdictional rules of the LOSC.

The study concludes with some final considerations about the Community action in marine environmental matters and the added value or limits of its participation next to the member states in the implementation of the international ocean regime. The present study does not however assess the Community's action in terms of "effectiveness" which is a very relative and discretionary concept and, in the absence of clear criteria, difficult to evaluate.

4. Reference Framework

To evaluate the manner in which the Community and the member states implement the environmental provisions of the LOSC and related global and regional instruments, it is first of all necessary to look at the relevant rules on the division of competences. The main rules for such an evaluation are:

- international rules on the participation of the Community in the LOSC as contained, first of all, in Annex IX, and the declarations of competences released at the time of signature/accession to the Convention;
- analogous "participation clauses" contained in the global and regional agreements to which the EC is a party and declarations eventually released by the Commission at the time of accession;
- EC rules governing the division of competencies between the Community and the member states. In particular:
 - the legal basis; objectives and principles guiding the Community's action as laid down in the European Treaties; and
 - criteria developed by the ECJ, which, in turn, require a systematic analysis of:
 - EC legislation related to the protection of the marine environment.

In the absence of legal rules and uniform procedures under EC law, an assessment of the manner in which the Community and the member states coordinate their action in the global and regional bodies requires one to look at the practice, in particular:

- coordination meetings between the Community and the member states in order to prepare for the international discussions. The reports of these meetings are normally confidential, but relevant information may be obtained through interviews or, when possible, direct participation in the meetings themselves;
- reports and minutes of the global and regional meetings where the Community is present. These are available on the websites of the global and regional organizations. However, these reports are quite general and do not normally clarify the role and input provided by the Community representatives in the meeting;
- further and more accurate information on the Community coordination may be obtained through interviews with the representatives of the Community or member states who attended the meetings: the chairman of the particular meeting or any other official who may have been present.

To evaluate the conformity of the Community's approach and legislation with the international ocean regime it is necessary to look at:

- the jurisdictional rules codified in the LOSC and the environmental provisions contained mainly, but not exclusively, in Part XII of the Convention;
- the objectives, principles and approaches recommended in Chapter 17 of Agenda 21, the plan of action adopted at the United Nations Conference on Environment and Development (UNCED), which spells out the methods for implementing the environmental provisions of the LOSC;
- the main "generally accepted international rules and standards" adopted by the "competent international organizations";
- MEAs and regional seas conventions applying to the European seas.

The conformity of the Community legislation with the substantive rules and standards laid down in global and regional conventions, however, is only covered in general terms.

5. Contribution of the Study

The present research builds upon several earlier studies dealing, directly or indirectly, with similar issues. Previous works, however, have approached the topic from a different perspective not answering the central questions of this study satisfactorily. Most of the existing studies (e.g., A. Kiss and D. Shelton (1997); L. Kramer (1997); S.P. Johnson and C. Corcelle (1995)) have looked at the Community action in the field of the marine environment from a purely EC law perspective. Others have focused mainly on the participation of the European Community (at that time the European Economic Community) in the negotiations and conclusions of the LOSC (e.g., A. Koers (1979) and K.R. Simmonds (1982)) without looking at implementation. Given that the Community became a party to the LOSC in 1998 and most of the marine-related conventions discussed in this study have only recently entered into force, the issue of implementation is relatively new. Only a few studies have addressed the Community's implementation of marine international and regional conventions in general (e.g., D. Anderson (1995)), while most of them focus on specific regional seas, such as the North Sea (e.g., J.L. Prat (1990); D. Freestone and T. IJlstra (1990)); the Baltic (e.g., M. Fitzmaurice (1992)) or the Mediterranean (e.g., T. Scovazzi (1999)); or on particular sources of marine pollution, such as vessel-source pollution (e.g., A. Nollkaemper (1997); E. Hey and A. Nollkaemper (1995); E.J. Molenaar (1996); H. Ringbom (1997)) and ocean dumping (e.g., D. Suman (1991)) or on fisheries (e.g., A. Koers (1979); R.R. Churchill (1989); A. Berg (1999)). On the other side, there is extensive literature on the division of competences between the Community and the member states in the field of external relations, including environmental matters (e.g., M. Koskenniemi (Ed.) (1998); Macleod et al. (1996); N. Newall (1996 and 1991); J. Temple Lang (1987)); and much has been written on the role of the Community as an international actor (e.g., P. Eeckhout (2004) and E. Canizzaro (ed.) (2002)) and joint participation in mixed agreements (e.g., J. Helinskoski (2001); D. O'Keeffe and H.G. Schermers (eds.) (1983) and M.J.F.M. Dolmans (1985)) or on the activities of international organizations (e.g., R. Fried (1995)). These studies, however, do not pay detailed attention to the rules and procedures on EC coordination as developed in practice and do not specifically address the allocation of powers in marine environmental matters. Finally, most of the previous studies are not up to date and do not take into account the latest developments in international and EC rules in this field. As will be discussed in the course of this study, much has happened in the past few years and, especially after 2000, the Community has to a great extent changed its

traditional approach to marine environmental issues . The present research intends to provide a comprehensive picture of how the Community implements its international commitments under the LOSC in the light of the recent international and EC developments while looking at the three main European regional seas: the Baltic, the Mediterranean and the North Sea. The existing literature does however offer an invaluable contribution to the present research.

The study, moreover, combines traditional legal research, based on legal documents and literature, with an empirical approach. Most of the information reported has been obtained through interviews with the representatives of the EC institutions, the member states, and the secretariats of the international conventions. By joining theory and practice the research should therefore be of interest to both academics and practitioners.

From a practical point of view, this research intends to contribute to a better understanding of some of the issues arising from the “joint participation” of the Community next to the member states in the international ocean regime. By analyzing the joint participation in the main global and regional forums discussing ocean issues, this research sheds some light, first of all, on the manner in which the competences are allocated among the Community and the member states in the three selected topics. The study, moreover, tries to identify common rules and practices concerning how the Community and the member states coordinate their external actions in marine environmental matters. The intention is not to suggest a model of participation or a uniform code of conduct, which would eventually affect flexibility, but to put some order into the chaotic reality of the Community’s involvement in the international ocean debate. These findings might indirectly contribute to improving the efficiency of the decision and policy-making processes where the Community participates next to the member states. By analogy, the results of this research may be applied to and may clarify the issue of the participation of any intergovernmental organization similar to the EC in international agreements between states. From a theoretical point of view, this study looks at whether and in what manner the criteria on the division of competences as developed by the ECJ in relation to commercial agreements apply to marine environmental conventions.

The compatibility of the EC legislation with the law of the sea is particularly important given that the way in which the enlarged Community implements its international ocean obligations may have strong relevance in terms of state practice. In the past few years, especially in the field of vessel-source pollution, the Community has often been accused of “operating unilaterally” and acting inconsistently with the law of the sea. The findings of this research will clarify whether and to what extent these claims are correct, at least with regard to the three selected topics. In addition, by analyzing the marine environmental measures adopted by the Community, the present research identifies the main deficiencies, duplications, overlaps or inconsistencies eventually existing between global, regional and EC rules as well as areas where further coordination is needed. These findings might contribute to a more rational and effective allocation of resources, work and efforts between the EC and the global and regional bodies responsible for the protection of the European marine environment.