Implementation of the LOS Convention at Regional Level: European Community Competence in Regulating Safety and Environmental Aspects of Shipping

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Introduction

At present the European Community is in the process of developing a legislative framework for regulating safety and environmental aspects of shipping activities. The basis for this policy, triggered by the accident with the *Braer* off the coast of the Shetland Islands on 5 January 1993, is contained in the Commission's Communication on A Common Policy on Safe Seas. The Council adopted this document on 8 June 1993.[1] In its Resolution the Council identified, *inter alia*, the following priorities:

- ensuring effective and uniform implementation of international rules by strengthening port state control; making selective resolutions of the International Maritime Organization (IMO) mandatory; and elaborating common standards for classification societies;
- enhancing training and education by developing common standards for minimum training levels of key personnel; and
- improving maritime infrastructures and traffic procedures by imposing mandatory ship reporting in certain areas through IMO and by adopting a reporting system for ships bound for or leaving Community ports.

In order to implement this Resolution the Commission has proposed a large number of directives. Thus far, three directives have been adopted. These set

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1 Council resolution on a common policy on safe seas, OJ 1993, C 271/1.

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minimum requirements for vessels bound for or leaving Community ports,[2] common rules and standards for ship inspection and survey organizations,[3] and a minimum level of training of seafarers.[4] Proposals for other directives concern, *inter alia*, port state control[5] and a European vessel reporting system.[6]

The adoption of the Common Policy on Safe Seas marks a departure from the attitude thus far adopted by the Community with respect to the regulation of safety and environmental aspects of shipping activities. Prior to 1993, the Community's policy on this subject can be characterized as focused on stimulating the implementation of existing international treaties by member states. Elements of this policy are the establishment, in 1986, of a Community information system for combating oil pollution[7] and the call on member states to ratify and apply conventions adopted within the IMO[8] and intensify port state inspections as provided for in the Memorandum of Understanding (MOU) on Port State Control.[9]

The policy now being developed can be characterized as one in which the Community aims to adopt substantive measures with the objective of laying down regional rules and standards for shipping activities. Community policy in the area of the safety and environmental aspects of shipping activities thus seems to be moving from a policy aimed solely at strengthening the implementation of existing international regulations to one also aimed at the development of autonomous Community law on the subject.

2 Directive 93/75/EEC of 13 September 1993 on minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods, OJ 1993, L 247/19.

3 Directive 94/57/EC of 22 November 1994 on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations, OJ 1994, L 319/20.

4 Directive 94/58/EC of 22 November 1994 on the minimum level of training of seafarers, OJ 1994, L 319/28.

5 Proposal for a Council Directive concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member State, of international standards for ship safety, pollution prevention and shipboard living and working conditions, OJ 1994, C 107/14.

6 Proposal for a Council Directive concerning the setting up of an European vessel reporting system in the maritime zones of Community Member State, OJ 1994, C 22/7, as amended in OJ 1994, C 193/7.

7 Council Decision 86/85 setting up a Community system for information for the control and reduction of pollution from oil spills at sea, OJ 1986, L 77/33.

8 Recommendations 78/584 (OJ 1978, L 194/17) and 79/114 (OJ 1979, L 33/33) calling respectively on member states to ratify the International Convention on the Safety of Life at Sea, 1 November 1974 ((1975) XIV ILM 959) [hereinafter the SOLAS Convention] and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 5 July 1978 ((1984) UKTS 50, Cmnd. 9266) [hereinafter the STCW Convention].

9 Resolution of 19 June 1990 on the prevention of accidents causing marine pollution, OJ 1990, C 206/1. This Resolution also calls on member states to ensure stricter compliance with the SOLAS Convention and the International Convention for the Prevention of Pollution by Ships, 2 November 1973, (1973) XII ILM 1319 [hereinafter the MARPOL Convention]. The Memorandum of Understanding on Port State Control, Paris, 26 January 1982, is reproduced in David Freestone and Ton IJlstra (eds.), *The North Sea: Basic Legal Documents on Regional Co-operation* (1991), p. 291.

This development will have a significant impact on the relationship between Community law and international law applying to safety and environmental aspects of shipping activities. As yet, the role of the Community in respect of the regime laid down in the LOS Convention and the relevant IMO Conventions is a limited one. But in its Declaration made pursuant to Article 2 of Annex IX of the LOS Convention, the Community rightly noted that the exercise of competence that the Member States have transferred to the Community is subject to continuous development. With the implementation of the Common Policy on Safe Seas, the Community increasingly will take over competences from Member States.

This article will examine the growing role of Community law on environmental aspects of shipping activities and the consequences thereof for the relationship between Community law and international law as laid down in the LOS Convention and the IMO Conventions. Three points are addressed: the scope of the internal competences of the Community with respect to safety and environmental aspects of shipping activities; the scope of external powers in this area; and the possible effect that the development of Community law may have for the implementation and enforcement of international law. Since the practical effect of the use of Community powers will not so much be seen with regard to the Law of the Sea Convention itself, but with respect to the Conventions concluded in the framework of the IMO, the article will primarily focus on the competences of the Community with regard to these treaties rather than with regard to the LOS Convention itself.

The Internal Competence of the Community

The scope of the internal competence of the Community with respect to safety and environmental aspects of shipping activities is relevant for two reasons.[10] First, it needs to be determined what specific subjects may be covered by Community rules. Are there any issues (like discharge standards, manning standards, or enforcement procedures) that fall outside the competence of the Community? The subsequent analysis shows that, in principle, that are no such limitations and that Community competences cover the entire range of safety and environmental aspects of shipping activities. Secondly, it needs to be determined whether the Community can lay down exhaustive rules or whether member states will be permitted to adopt more stringent standards than those provided for in Community measures.[11] The subsequent analysis indicates that on this issue the law is not fully settled; in particular it is unclear to what extent environmental aspects of shipping policy are to be brought under the environmental policy, rather than under the transport policy of the Community.

In determining the scope of the internal competence of the Community, two

[10] See J. H. Jans, *Europees Milieurecht in Nederland* (1994), pp. 7-8.

[11] This also has effects on the external competences of the Community, as will be explained below.

criteria are relevant.[12] First, the extent to which member states, under international law, have jurisdiction over safety and environmental aspects of shipping activities. Secondly, the extent to which these aspects are covered by the substantive scope of the EC Treaty, as amended by the Treaty on European Union (hereinafter the Treaty).[13]

The jurisdiction of member states under international law

The extent to which international law endows states with jurisdiction over shipping activities primarily is determined by the jurisdictional framework contained in the LOS Convention.[14] The competences of the Community follow those of member states.[15] The Community thus, depending on the substantive scope of the Treaty (see below), may exercise flag state, port state and coastal state jurisdiction as provided in the LOS Convention.[16] We will not discuss the jurisdictional framework provided by the LOS Convention as it has been treated extensively elsewhere.[17]

We, however, do wish to draw attention to two points. First, uncertainties remain as to the precise scope of coastal and port state jurisdiction under the LOS Convention and as to the precise meaning of the phrase "generally accepted international rules and standards" to which the relevant provisions repeatedly refer.[18] These uncertainties also affect the precision with which the scope of the Community's competences can be determined.

Secondly, in the area of shipping activities the generally accepted international standards adopted within the IMO contain the *maximum standards* that a coastal state may apply to foreign ships in its EEZ[19] and in its territorial sea where the design, construction and manning of ships are concerned.[20] This is in contrast to most areas of international environmental law and also other parts of the LOS Convention where the adopted rules and regulations generally contain *minimum*

[12] See P. J. G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities*, 2nd edn., ed. Laurence W. Gormley (1989), p. 54.

[13] 7 February 1992, (1992) XXXI ILM 247.

[14] 10 December 1982, (1982) XXI ILM 1261 [hereinafter: the LOS Convention].

[15] See in general David Freestone, Some Institutional Implications of the Establishment of Exclusive Economic Zones by the EC Member States (1992) 23 *Ocean Dev. Int'l L.* 97-114.

[16] Articles 17-26, 211, 217-220 and 223-233 of the LOS Convention.

[17] See Alan E. Boyle, Marine Pollution under the LOS Convention (1985) 79 *Am. J. Int'l L.* 347-372; R. R. Churchill and A. V. Lowe, *The Law of the Sea* (1988), pp. 255-261; Daniel Bodansky, Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond (1991) 18 *Ecology L. Q.* 719-777; Glen Plant, Legal Environmental Restraints upon Navigation Post-Braer (1992) 10 *Oil & Gas L. Tax'n R.* 245-268.

[18] See Bodansky, n. 17 above, at pp. 764-767 (discussing unresolved issues relating to vessels-source pollution); Budislav Vukas, Generally Accepted International Rules and Standards, in Alfred H. A. Soons (ed.), *Implementation of the LOS Convention through International Institutions* (1990), pp. 405-421 (discussing different interpretations of "generally accepted rules and standards").

[19] Article 211(5) of the LOS Convention.

[20] *Ibid.*, Article 21(2).

standards which a state must apply.[21] We will return to this point later, as it may have consequences for the external competences of the Community.

The competences of the Community under Community law

There is no doubt that the Treaty contains an adequate legal basis for the development of a Community policy on safety and environmental aspects of shipping activities. There appear to be no limitations as to the subjects that may be covered in the Community policy on safe seas. However, there is some room for discussion as to the most appropriate legal basis for such a policy. Articles 84(2), 75 and 130s of the EC Treaty each may provide such a basis. The choice between these Articles is relevant as Article 84(2) leaves wide discretion to the Council whereas Article 75 is more compelling and more specific, and as Article 84(2), in contrast to Article 130s, allows for maximum standards to be adopted by the Community.

The directives that have been adopted thus far on safety and environmental aspects of shipping activities have been based on Article 84(2). There are good reasons for this choice. Article 84(2), part of Title IV on transport, specifically refers to the development of a policy on sea transport. Article 84(2) provides a competence rather than an obligation. The inclusion of the term "may" in Article 84(2)[22] implies, if Article 84(2) is read on its own, that the Council has discretionary powers to adopt measures for sea transport, that is: there would be no *obligation* to adopt such measures. However, if, as discussed below, Article 84(2) is read together with Article 3f, a different conclusion may ensue.

In contrast to Article 84(2), Article 75, also in Title IV, provides an obligation for the Council to adopt common rules for international transport to or from the territory of a member state or passing across the territory of one or more member states, to adopt measures for the improvement of transport safety and to adopt any other appropriate provisions. At first sight, Article 75 does not apply to sea transport. According to Article 84(1) the obligation in Article 75, as well as the rest of Title IV with the exclusion of Article 84(2), apply to transport by rail, road and internal waters and thus not to sea transport.[23] The extent to which Article 75 nonetheless may apply to sea transport remains unclear. In Case 167/73 the Court held that the general provisions of the Treaty also apply to sea transport.[24] This could imply that the obligation to develop a common transport policy as provided for in Article 3f also applies to sea transport, thereby limiting

[21] See e.g. Article 210(6) of the LOS Convention (imposing minimum standards for ocean dumping).

[22] Article 84(2) provides that "The Council may (...) decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport".

[23] See Jürgen Erdmenger, Artikel 84, in Groeben *et al.* (eds.), *1 Kommentar Zum EWG-Vertrag*, 4th edn. (1991), pp. 1266-1267 (noting that during the negotiations sea transport was considered to be of such a specific nature that it should not be brought under the general provisions for transport and that Article 84(2) was intended to create a special regime).

[24] Case 167/73 *Commission* v. *France*, (1974) ECR 359, para. 32. See also Case C-379/92, Peralta, n.y.r., para. 14.

the discretion of the Council on the basis of Article 84(2).[25] However, the Court retained the distinction between the other provisions of Title IV and Article 84(2). This would seem to imply that unless the Council decides otherwise, Article 84(2) is not covered by the rules on the common transport policy contained in Title IV.[26] As noted earlier, up till now the Council has decided to base the relevant directives solely on Article 84(2).

In so far as the aim of a directive on sea transport is the protection and preservation of the environment, Article 130s, part of Title XVI on the environment, also may provide a legal basis. However, it does not constitute an adequate exclusive basis. This is because of the close relationship between the regulation of safety and environmental aspects of shipping activities and the fact that safety aspects cannot be brought under Title XVI. Moreover, in literature it is generally recognized that Articles 74 and 75 can cover *all* aspect of transport, including environmental protection.[27] Thus a sea transport policy developed on the basis of Article 84(2) should also include the environmental aspects thereof. This conclusion is substantiated by Article 130r(2), which provides that environmental protection must be integrated into the definition and implementation of other Community policies. As noted by the Court in Case C-300/89, this implies that a measure that aims to protect the environment does not necessarily need to be based on Article 130s, but also can be based on other treaty provisions.[28]

Even though in view of the close relationship between the regulation of safety and environmental aspects of shipping activities exclusive resort to Article 130s is unwarranted, it may be argued that the relevant directives might be based on several Articles. There are precedents for such an approach, for example with respect to the regulation of environmental aspects of the agricultural policy.[29] In the case of shipping activities directives might thus be adopted on the joint basis of Article 84(2) (possibly combined with Article 75) and Article 130s.[30]

One difference between Article 84(2) and 130s requires emphasis. Directives based on Article 130s as a matter of definition contain minimum standards,

[25] Kapteyn and Verloren van Themaat, n. 12 above, p. 728.

[26] Case 167/73 *Commission* v. *France*, (1974) ECR 359, para. 32.

[27] See R. Barents, Milieu en Interne Markt (1993) *Statistische en Economische Berichten* 15 (noting that the competences of the common transport policy are indivisible and provide an adequate basis for all measures related to the objectives of these policies). In similar terms: Erdmenger, n. 23 above, p. 1268.

[28] Case C-300/89, *Commission* v. *Council* (1991) ECR I-2867.

[29] Regulations 2157/58 and 2158/92 on the protection of forests against air-pollution and fire (OJ 1992, L 217/1 and 217/3). Also see the proposal for a directive on CO_2 charges based on Article 99 and 130s (OJ 1992 C 196/1).

[30] There would be a legal impediment to the adoption of such a double legal basis if the decision-making procedures in the two provisions were different. In Case 300/89, n. 28 above, the Court considered the procedures under Article 100A and 130s incompatible. This incompatibility, however, does not exist between Articles 84(2) and 130s as both require the application of the procedure provided for in Articles 189c.

leaving member states the discretion of adopting more stringent standards.[31] In contrast, Article 84(2) gives the Council the discretion to adopt maximum standards. If that discretion is used, member states no longer are free to adopt more stringent standards. So far the directives adopted on the safety and environmental aspects of shipping activities contain minimum standards, leaving member states the option of adopting more stringent standards and avoiding a conflict between the powers of the Council under Articles 84(2) and 130s.

The above leads to the conclusion that in so far as member states under international law have jurisdiction with respect to safety and environmental aspects of shipping activities, the Community is entitled to exercise those competences. Given the broad competences of the Treaty, the scope of the Community's competences follows those of its member states under international law. On the basis of Article 84(2) the Community may exercise this competence in an exhaustive way that would preclude unilateral standard-setting by member states.

The External Competence of the Community

To date the Community has not exercised external powers in the IMO. It is not a party to the main treaties adopted in the framework of the IMO,[32] although it does have observer status in the IMO. In general, in the past member states have taken a reluctant stance towards an increased role of the Community in co-ordinating the actions of member states in the IMO.[33] Illustrative is the rejection by the Council of a proposal for a directive on the harmonisation of port state control[34] as some member states were concerned that this could trigger an external competence of the Community that would derogate from the competences of member states in the IMO.[35]

The development of a Community policy on the safety and environmental aspects of shipping activities gives rise to the question as to whether and to what extent the Community can break this pattern and invoke and exercise external competences in the IMO that keep pace with the development of its internal legislation. In the Communication on the Common Policy on Safe Seas[36] as well as in other documents[37] the Commission refers to the exercise of external powers

[31] Article 130t. See, however, Jans, n. 10 above, at pp. 113-114 (arguing that Article. 130t does not necessarily imply that the Community could not exhaustively regulate a particular issue on the basis of Article 130s).

[32] Although a great many conventions developed in the framework of IMO may be relevant for the common policy on safe seas, the subsequent analysis will be confined to the SOLAS, STCW and MARPOL Conventions, see nn. 8 and 9 above.

[33] Communication of the Commission on a Common Policy on Safe Seas, n. 1 above, para. 148.

[34] OJ 1980, C 192/8.

[35] Erdmenger, n. 23 above, at pp. 1191-1192.

[36] n. 1 above, paras. 146-151.

[37] Commission of the EC, Community Participation in International Organs and Conferences, SEC(93)36, 1March 1993, p. 18.

as an important means of enhancing safety and environmental protection.[38]

In determining to what extent the Community indeed can invoke such external powers and what will be their effect, three questions need be considered. First, does the Community indeed possess any external competences with regard to safety and environmental aspect of shipping activities? Secondly, if so, with respect to which substantive issues can the Community exercise such powers? Thirdly, are external Community competences of an exclusive or a concurrent nature, that is: does the exercise of external powers by the Community in the IMO exclude a role for member states or do the Community and member states share competences in the IMO?

The basis for the Community's external competence

Given the fact that Article 84(2) of the Treaty does not explicitly attribute an external competence to the Community, any external competence of the Community must be implicitly derived from the Treaty or from any secondary legislation adopted on the basis of the Treaty.[39] Under the case law of the Court, the Community has implied external powers if such powers are necessary for the attainment of Community objectives.[40] The Community has the competence to exercise external powers in a given case, as recalled by the Court in Opinion 2/91, "whenever Community law created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community [has] authority to enter into the international commitments *necessary for the attainment of that objective* even in the absence of an express provision in that connection".[41]

The arguments set forth by the Court in the *Kramer* case, in which it found that the Community had external powers in respect of the fisheries policy, also would seem to apply in the case of the sea transport policy. That is: in order for Community policy to be effective it would have to apply to all ships using

[38] See in general on the exercise of external powers as a means to achieve environmental objectives: A. T. S. Leenen, Participation of the EEC in International Environmental Agreements, *Legal Issues of European Integration* (1984), pp. 93-111; André Nollkaemper, *The European Community and International Environmental Co-operation—Legal Aspects of External Community Powers, Legal Issues of European Integration* (1987), pp. 55-91.

[39] Opinion 2/91, ILO Convention 170, n.y.r., paras. 7-9. See Kapteyn and VerLoren van Themaat, n. 12 above, at p. 772.

[40] Case 22/70, *Commission* v. *Council*, (1971) ECR 263, para. 28; Case 3, 4, & 6/79, Kramer *et al.*, (1976) ECR 1279, paras. 30-33; Opinion 1/76, (1977) ECR 741, p. 755.

[41] Opinion 2/91, n. 39 above, para. 7 (emphasis added); Opinion 1/94, n.y.r., para. 94. Elsewhere in Opinion 2/91 the Court applied a more flexible test for the existence of external powers. The Court n.d that when an internal legislative competence exists in the field covered by a treaty, the treaty falls within the Community's competence, in particular when the subject-matter coincides with directives. (Opinion 2/91, above, para. 19). Here, the Court did not refer to the requirement that the external competence is necessary for the attainment of the objectives of the Community. See C. W. A. Timmermans in a commentary on Opinion 2/91, 9 *Statistische en Economische Berichten* (1994), pp. 615-627, at p. 623. It is not clear, however, whether this conclusion would also apply outside the specific context of Opinion 2/91.

Community waters, including those flying the flag of a third state.[42] Given that a large number of the ships using Community waters fly the flag of a third state, the Community thus indeed would have external powers regarding the development of safety and environmental rules for shipping activities.

The scope of the Community's external competence

These external powers extend in any case to the subject-matter covered by the directives on shipping activities adopted by the Community. For these subjects external policies are necessary to attain the objectives as contained in the directives. However, when the broad objectives of Articles 75 and 130r and their relevance to the safety and environmental aspects of shipping activities - as described above - are taken into account, a much broader external competence of the Community emerges. In that case the external competence of the Community, might well cover all of the subject-matter covered by IMO regulations which relate to safety and environmental aspects of shipping activities, irrespective of whether these are covered by Community directives.

The nature of the Community's external competence

If, as in the case of the common commercial policy,[43] member states had explicitly transferred their competences to the Community, the Community would have exclusive external competence to the exclusion of the member states. This not being the case, the answer to the question as to exclusiveness of the external competences of the Community depends in particular on the following rule. Member states cannot, outside the framework of the Community institutions, assume obligations towards third states that may affect measures or alter the scope of measures adopted by the Community institutions.[44] If obligations would affect Community rules, the external competences of the Community would be of an exclusive nature; if not, they would be concurrent.[45]

Whether obligations that member states have accepted towards third states in the framework of the IMO will affect Community rules or alter their scope in turn depends on two criteria.[46] First, whether the Community rules contain maximum or minimum standards. Secondly, whether the IMO rules contain maximum or minimum standards.

[42] Kramer, n. 40 above, para. 30-33; Opinion 1/94, n. 41 above, para. 86.
[43] Article 113, see Case 41/76, Donckerwolcke, (1976) ECR 1921, para. 32.
[44] Case 22/70, *Commission* v. *Council*, (1971) ECR 263, paras. 17-18; Opinion 2/91, n. 39 above, para. 9; Opinion 1/94, n. 41 above, para. 77.
[45] Concurrent powers are powers that the Community may exercise if the Council so decides, but which are not (yet) exclusive Community powers; see John Temple Lang, "The Ozone Layer Convention: A New Solution to the Question of Community Participation in Mixed International Agreements", (1986) 23 *Common Mkt. L. Rev.*, pp. 157-176, p. 157, n. 3.
[46] Opinion 2/91, n. 39 above, paras. 17 *et seq.*

The standards contained in Community rules

In those cases where Community rules contain minimum standards, member states may adopt more stringent standards either through the unilateral adoption of national rules or through the adoption of national rules based on treaties concluded with third states.[47] Such more stringent rules, unless they are derived from treaties that contain maximum standards (see below), will not affect or alter the scope of Community rules, as the Community in these cases remains free to subsequently adopt more stringent standards. As noted above, the directives that so far have been adopted by the Community within the Common Policy on Safe Seas contain minimum standards, thus leaving member states the freedom to adopt more stringent standards individually or through treaties concluded with third states.

If Community rules were to provide maximum standards a different picture would emerge. In that case the acceptance by member states of obligations towards third states could affect or alter the scope of Community rules, even if such obligations are not in direct conflict with Community rules. In Opinion 2/91, the Court noted that Part III of ILO Convention 170 was concerned with an area largely covered by Community rules containing maximum standards which had been adopted since 1967 with a view to achieving a closer degree of harmonization. The Court concluded that in this case the provisions of the ILO Convention were of such a kind as to affect the Community rules contained in Community directives. Consequently, it found that member states are not in a position to undertake such commitments outside the framework of the Community institutions.[48] Thus if the Council, on the basis of Article 84(2), were to use its discretion to adopt maximum standards, the competence of member states to undertake commitments in the IMO could be limited.

The standards contained in IMO conventions

If a treaty concluded between member states and third states imposes minimum standards, in principle it will not affect or alter the scope of Community rules. The Community in that case remains free to adopt more stringent standards in its own rules. If, on the other hand, such a treaty were to provide maximum standards, it could obstruct the development of Community rules on the subject.

The relevant question thus is whether the generally accepted international rules and standards referred to in the LOS Convention and contained in IMO conventions prescribe maximum or minimum standards. In order to determine the answer to this question a distinction needs to be made between standards that apply to flag states, port states and coastal states.

In the case of flag states, the rules and standards developed through the IMO clearly contain minimum standards. A flag state remains free to impose more stringent standards on ships flying its flag. A flag state is obliged to ensure that

[47] *Ibid.*, para. 18.
[48] *Ibid.*, paras. 25-26.

any laws and regulations which it adopts "shall at least have the same effect as that of generally accepted international rules and standards".[49]

In the case of port states, the LOS Convention imposes minimum standards in so far as the prescriptive jurisdiction of these states is concerned.[50] However, as regards the enforcement jurisdiction of port states the LOS Convention imposes certain maximum standards. Thus, for example, a port state's enforcement jurisdiction with respect to violations committed beyond its territorial sea by a ship flying a foreign flag and which is in one of its ports is limited to violations of applicable international rules and standards[51] as well as by certain safeguards.[52] The latter ensure that the flag state is the primary entity responsible for instituting proceedings against its ships, unless it has a bad record with respect to the institution of proceedings against ships flying its flag, or if the proceedings relate to a case of major damage to the coastal state.[53]

When states act in their capacity as coastal states, the LOS Convention imposes maximum obligations in two cases. First, in its territorial sea a coastal state may prescribe and enforce only standards for the design, construction, manning and equipment of ships which give effect to generally accepted international rules and standards.[54] This means that the relevant standards as contained in the MARPOL, SOLAS and STCW Conventions provide the maximum standards that may be prescribed and enforced. In the EEZ this is *a fortiori* the case. In addition, coastal states are not allowed in their EEZ to prescribe or enforce standards which are more stringent than those contained in the MARPOL Convention. Furthermore, the only exception to this rule, for sensitive areas under Article 211(6) of the LOS Convention, is contingent upon prior approval of the IMO.

The above implies that in those cases where member states in their capacity as port and coastal states participate in the development of standards under the MARPOL, SOLAS and STCW Conventions, they may through their actions affect or alter the scope of Community rules. Once standards have been adopted within the IMO, the Community would no longer be at liberty to adopt more stringent standards.

A complicating factor is that although the above distinction between flag, port and coastal states is useful for purposes of analysis, that distinction is not made in many of the substantive standards adopted within the IMO. The relevant rules often set one standard which is to be applied by a flag state as a minimum standard and by a coastal or port state as a maximum standard. The scope of the competences of the Community and the member states with respect to the development of a particular standard thus cannot be clearly defined on the basis

[49] Article 211(2) of the LOS Convention.
[50] *Ibid.*, Article 211(3).
[51] *Ibid.*, Article 218(1).
[52] *Ibid.*, Article 218(4) juncto Article 223-233.
[53] *Ibid.*, Article 228.
[54] *Ibid.*, Article 21(2).

of the distinction between flag, port and coastal states. The conclusion would seem to be that in all cases were a standard is relevant both for flag states and for port and coastal states member states and the Community in any case have a shared competence. It might be argued, however, that to the extent that the IMO conventions impose maximum standards, the Community competence may become of an exclusive nature.

The fact that the Community has at least shared competences implies that the Community is in principle, on the basis of Community law, competent to become a party to the MARPOL, SOLAS and STCW Conventions. None of these treaties provides for the possibility of the Community becoming a party.[55] However, this situation does not prevent the Community from exercising its external powers. There are several other treaties that do not allow for the Community to become a party, yet the subject-matter of which is covered by Community legislation and where the Community does exercise external powers.[56] In Opinion 2/91 the Court held that, where the Community cannot become a party to a treaty, the external competences of the Community can be exercised through the member states acting jointly in the interest of the Community.[57] Although the Court held in Case 316/91 that in the case of shared competences member states are entitled but not required to use the institutions of the Community,[58] in other cases it has placed greater requirements on the degree of cooperation between member states and the Community. Thus, in Opinion 2/91 the Court held that negotiation and implementation of the agreement required joint action by the Community and the member states.[59] This duty resulted from the requirement of unity in the international representation of the Community.[60] In Opinion 1/94, the Court held that this applies in particular in cases where the subject matter falling under the competences of the Community and the member states are closely interrelated, as in case of the agreements annexed to the World Trade Organization agreement.[61]

In particular in view of the close link between the standards to be applied by flag states, port states and coastal states it must be concluded that in law member states have a duty to co-operate and to consult within the framework of the Community before they become a party to any treaties on safety and environmental aspects of shipping activities and, in practice more relevant,

[55] See e.g. Article 13 of the MARPOL Convention (allowing only states to become a party). See for the different types of participation clauses that are used to allow the Community to become a party to treaties: J. J. Feenstra, A Survey of the Mixed Agreements and their Participation Clauses, in: David O'Keeffe and Henry G. Schermers (eds.), Mixed Agreements (1983), pp. 207-248; Temple Lang, n. 45 above.

[56] e.g. the Convention on international trade in endangered species, XII ILM 1085 (1973). Although an amendment that would allow the Community to become a party was drafted in 1983, this has not yet been ratified by the required two-thirds majority.

[57] Opinion 2/91, n. 39 above, para. 5.

[58] Case C-316/91, European Parliament v. Council, (1994) ECR I-625, paras. 26 and 34.

[59] Opinion 2/91, n. 39 above, para. 38.

[60] *Ibid.*, par. 36.

[61] Opinion 1/94, n. 41 above, para. 109.

before they adopt regulations that implement these treaties. Equally, the Commission would be obliged to foster cooperation between member states. However, it must be noted that the duty resting on member states to co-operate within the IMO is of a very general nature and difficult to enforce in case one or more member states take a non-co-operative stand.[62] Indeed, it might be argued that the present pattern of consultation within the IMO, although far removed from what the Commission in its Communication on the Common Policy on Safe Seas considers desirable,[63] qualifies as sufficient cooperation.

Community Enforcement of International Law

Given the lack of adequate enforcement procedures in international environmental law in general[64] and also within the IMO,[65] the enforcement procedures available in Community law may provide mechanisms for improving the implementation record of member states. Moreover, they could ensure convergent and uniform interpretation and application of international obligations resting upon member states, one of the key objectives of the common policy on safe seas.

One approach, that constitutes a major source of inspiration for the legislative program of the Community in the framework of its policy on safe seas, is to implement IMO rules in Community legislation so as to make the implementation and enforcement procedures of the Treaty applicable. Another approach, that up till now has received much less attention, is the possibility to apply these powers *directly* to the implementation of IMO conventions by member states, without first incorporating IMO rules in Community directives.

At present the Community institutions do not enforce IMO conventions or any other environmental conventions, unless they have been incorporated in Community law. However, there is no doubt that, under certain conditions, the Community would be empowered to apply its powers under Article 177 (to interpret treaties in the context of a preliminary ruling) and 169 (to judge compliance by member states) to conventions.

This is most obviously the case if the Community were to become a party to the MARPOL, SOLAS or STCW Convention. These treaties then would be an

[62] See in general on the enforceability of obligations to co-operate: André Nollkaemper, *The Legal Regime for Transboundary Water Pollution: Between Discretion and Constraint* (1993), pp. 157-164.

[63] Communication of the Commission on a Common Policy on Safe Seas, n. 3 above, para. 148 (noting that member states have not allowed the role of the Community in the IMO to keep pace with the development of the Community's competences).

[64] Alan E. Boyle, "Saving the World? Implementation and Enforcement of International Environmental Law through International Institutions", (1991) 3 *J. Envtl. L.* 229-245; Nollkaemper, n. 62 above, chap. 6.

[65] Gerard Peet, "The MARPOL Convention: Implementation and Effectiveness" (1992) 7 IJECL 277-295; André Nollkaemper, "Agenda 21 and Prevention of Sea-based Marine Pollution: A Spurious Relationship?" (1993) 17 *Marine Policy* 555.

integral part of the legal order of the Community.[66] They would be binding upon the Community and the member states and both would have "to ensure compliance with the obligations arising from such agreements".[67] On the basis of recent jurisprudence of the Court, this would seem to imply that when both the Community and the member states are parties to a treaty, both the Community and the member states are responsible to third states for "the fulfilment of every obligation arising from the commitments undertaken".[68] Moreover, member states are under an obligation towards the Community to comply with the obligations undertaken.[69]

The above implies that in any case the Court is competent to interpret the provisions of treaties that are part of the legal order of the Community in the case of a preliminary ruling under Article 177 of the Treaty.[70] Less certainty exists whether this would also apply to procedure instituted under Article 169. It has been argued in literature that in such cases the Commission indeed would be able to exercise its powers under Article 169.[71] However, Hancher notes that although the Court is prepared to restrict the margin of interpretation remaining the national judge under Article 177, "it seems unwilling to adopt the same severe approach to the interpretation of mixed agreements in direct action, even if this might fulfil the aim of reinforcing performance obligations under such agreements".[72] Given the opinion that in case of mixed agreements member states have an obligation to fulfil these agreements both towards other states parties to the agreement and towards the Community,[73] it is arguable that the Commission would indeed be competent to institute proceedings against a member state *ex* Article 169 for non-compliance with an obligation contained in a mixed agreement. Krämer indeed has argued that, even if only a part of a mixed agreement is the subject matter of internal Community rules, the Community by becoming a party to the treaty has undertaken the commitment

[66] Case 181/73, Haegeman, (1974) ECR 449, para. 5; Case 12/86, Demirel, (1987) ECR 3747, para. 7; Case 30/88, *Greece* v. *Commission*, (1988) ECR 3733, para. 12; Case C-192/89, Sevince, (1990) ECR I 3497, para. 8.

[67] Case 104/81, Kuferberg, (1982) ECR 3641, para. 11.

[68] Case C-316/91, *Parliament* v. *Council*, n. 58 above, para. 29. Also see Giorgio Gaja, The European Community's Rights and Obligations under Mixed Agreements, in *Mixed Agreements*, n. 55 above, at p. 137 (noting that breach of a mixed agreement on the part of the Community and the member states causes joint responsibility).

[69] Case 104/81, Kupferberg, n. 67 above, para. 13; Case 12/86, Demirel, n. 66 above, para. 11.

[70] Case 181/73, Haegeman, n. 66 above, para. 4 and Case 12/86, Demirel, n. 66 above, para. 7 (noting that since the agreement had been concluded pursuant to Article 228 and 238 of the Treaty, it is an act of the institutions of the Community in the sense of Article 177(1)(b) of the Treaty).

[71] Ludwig Krämer, "The Implementation of Environmental Law by the European Communities" (1991) 34 *German Y.B. Int'l L.* 44-46.

[72] Leigh Hancher, "Constitutionalism, the Community Court and International Law" (1994) 25 *Netherlands Y.B. Int'l L.* (forthcoming), text at n. 112. Also see Krämer, n. 71 above (noting that until now, however, the Community has not exercised its powers under Article 169 with respect to international agreements).

[73] See nn. 67-69 above.

for implementing the whole of the treaty in question. Moreover, he argues, Article 5 of the Treaty obliges member states to allow the Community to meet the obligations derived from such a treaty.[74]

The above observations apply to the case where the Community is a party to a treaty. However, this does not appear to be a critical condition for the interpretation and enforcement powers to apply. In the situation where the Community cannot become a party to the international treaty in question, as is the case with the MARPOL, SOLAS and STCW Conventions, under certain conditions, Community institutions appear to be able to interpret and enforce the treaty provisions. The key criterion in this case is whether the Community institutions indeed have assumed powers and, consequently, whether there is a sufficient link between the Community legal order and the treaty in question. In *Peralta*, the Court held that it could judge national laws against a treaty, to which the Community was not a party, if the powers previously exercised by the member states had been assumed by the Community.[75] In case of the safety and environmental aspects of shipping activities, this reasoning would seem to apply to those parts of the international treaties with respect to which the Community has adopted directives. Whether the competences of the Court extend to those aspects not covered by Community directives would seem to depend on whether a direct link between the Community legal order and the provision of an IMO convention can be constructed.

Arguably, in many cases such links indeed can be established. The subject matter covered by the (proposed) Community directives can only artificially be separated from the subject matter of IMO conventions. For instance, although the proposed directive on port state control[76] only covers enforcement and does not contain substantive obligations, there is a direct link between the substantive rules and the enforcement powers of port states. With the evolution of directives, these links can be expected to intensify. If so, the interpretation and enforcement powers under the Treaty indeed could be used with respect to the full scope of IMO conventions. With the development of the competences of the Community, the Court might thus be in a position to consider IMO conventions in its rulings. This would be a step beyond its decision in *Peralta* where the Court held that it could not rule on the compatibility between a provision of a national law and the MARPOL Convention because the Community was not a party to that Convention and because the Community had not (yet) assumed internal competences.[77]

In considering the possibility of the Court interpreting and enforcing IMO

[74] Krämer, n. 71 above, p. 45.

[75] n. 24 above, para. 16; also see Joined Cases 21 and 24/72, International Fruit Company, [1972] ECR 1219, para. 18 (noting that in so far as under the EEC Treaty the Community has assumed the powers previously exercised by member states in the area governed by the GATT, the provisions of that agreement have the effect of binding the Community).

[76] See n. 5 above.

[77] n. 23 above, para. 16.

rules, it is important to note that the relevant IMO conventions are often implemented through resolutions, which under the IMO legal system are not legally binding. The question thus arises whether it would be within the competence of the Court to interpret these resolutions. On the basis of the jurisprudence of the Court it is clear that the Court is competent to interpret *legally binding instruments* adopted by institutions established by treaties to which the Community is a party because they are considered to be an integral part of the Community legal system.[78] The Court has the task "to ensure the uniform application throughout the Community of all provisions forming part of the Community legal system and to ensure that the interpretation thereof does not vary according to the interpretation accorded to them by various member states".[79]

The IMO would appear to qualify as an authority capable of taking decisions which would form part of the Community legal system in terms of Cases 30/88 and C-192/89. It is less clear whether legally non-binding resolutions may be part of the legal order of the Community. In Case C-192/89 the Court found that decisions only form an integral part of the Community legal system after their entry into force.[80] Resolutions adopted by the IMO do not enter into force. However, in Case C-188/91, *Shell*, the Court found that legally non-binding recommendations can have a direct connection with the agreement in question and thus may form an integral part of the Community legal system.[81] Also relevant is Case 182/89, *Commission* v. *France* in which the Court relied on a legally non-binding resolution adopted by an international forum for the interpretation of an obligation under Community law.[82] This case is particularly relevant as it concerned the interpretation of a convention to which the Community is not a party.

As the above analysis shows, many uncertainties remain as to the precise extent to which international regulations may be considered to be part of the Community legal system. However, it would seem that under certain conditions IMO resolutions can be taken into account in the interpretation and enforcement of obligations under Community law, even though initiating enforcement proceeding under Article 169 for the mere non-compliance with an IMO resolution may be one step too far. In all cases, the critical test is the establishment of a sufficiently strong and direct connection between the

[78] Case 30/88, *Greece* v. *Commission*, (1988) ECR 3733, para. 13; Case C-192/89, Sevince, n. 66 above, paras. 9-10.

[79] Case 104/81 Kupferberg, n. 69 above, para. 14; Sevince, n. 68 above, para. 11.

[80] n. 68 above, para. 9.

[81] Case C-188/91, Deutsche Shell AG, n.y.r., see also Hancher, n. 74 above, text at n. 53.

[82] Case C-182/89, *Commission* v. *France*, [1990] ECR 4337. See also Case C-322/88, Grimaldi, [1989] ECR 4421 (holding that although recommendations according to Article 189 of the Treaty have no binding force, they may have legal significance; and that, in particular, national courts were required to take account of relevant recommendations when these would shed light on the correct interpretation of national provisions established to implement them or when they meant to supplement Community law).

resolution and an obligation under Community law. This may be the case in two situations. First, on the basis of *Shell*, if the resolution is related to an obligation in an international treaty and that obligation in turn is an integral part of the legal order of the Community. Secondly, on the basis of Case 182/89, if the resolution is related to an obligation under secondary Community legislation. Given the close links between IMO resolutions and IMO conventions, and given the above observations on the link between IMO conventions and the Community directives, it appears that with the development of Community law on environmental and safety aspects of shipping activities the possibility that IMO resolutions come within the purview of Community supervisory procedures may increase.

Final remarks

The analysis conducted in this article illustrates that uncertainties remain as to the appropriate legal basis of internal and external competence of the Community with respect to the regulation of safety and environmental aspects of shipping activities, as to the scope and the nature of the external competence of the Community, and as to the applicability of the enforcement procedures of Community law to IMO conventions and resolutions. These uncertainties will only be resolved through the further development of the relevant law. On the one hand, this may occur through the development of international law which, for example, as a result of uniform state practice in the exercise of coastal state jurisdiction may give rise to customary international law on the subject. On the other hand, clarity may result from the development of Community law which, for example, through new case law may further elucidate the relationship between international legally non-binding instruments and Community law.

The analysis, however, also clearly illustrates the wide scope of possibilities that the Community has for developing a policy on safe seas. The Community is competent to regulate the safety and environmental aspects of shipping activities, a competence that is shared with the member states. Member states, at present, are in a position to adopt more stringent standards for ships flying their flag and may undertake such obligations through the conclusion of treaties with third states. However, if the Community were to adopt maximum standards this would no longer be the case. Moreover, already at present, because of the maximum standards that international law imposes on port and coastal states, it must be concluded that member states, at least, are under a duty to co-operate within the framework of the IMO because regulations adopted in that forum may affect Community law.

The combined effect of these developments may have substantial effects for the position of the Community with regard to the international law of the sea. Whereas at the time of the signature of the LOS Convention the Community had to admit that, in contrast to for instance fisheries, its competences as regards vessel-source pollution were limited, this conclusion is changing rapidly. The

Community is slowly moving forward on the continuum from no powers at all on the one hand to all-encompassing and exclusive powers on the other. At some point on this spectrum, the situation may arise that the Community, rather than individual member states, may be responsible for the exercise of rights and duties under the LOS Convention. This article has not attempted to indicate where on this continuum the Community is at this stage, nor what will be the consequences, for instance in terms of dispute settlement. However, the above analysis gives ample support to the conclusion that the situation is rapidly changing.

Although from a legal point of view there thus seems to be ample scope for the development of the Common Policy on Safe Seas, we wish to refer to two considerations that impose restraints upon the development of such a policy. First, international law imposes restrictions on the freedom of the Community. Secondly, legal considerations alone do not suffice when it comes to determining the desirable content of such a policy, and policy considerations need to establish priorities.

As regards the first point,[83] the Community, to the extent of its competences, arguably is bound by the international law of the sea as contained in the LOS Convention. This is the case to the extent that the Community has accepted international legal obligations towards third states or has exercised its internal powers with respect to subjects that are covered by treaties. With the possible upcoming formal confirmation of the LOS Convention by the Community, and the consequences of the internal legislative program for the implementation of the LOS Convention, the Community may be considered to be bound by the relevant provisions. However, even if the Community as such is not considered to be directly bound by these provisions, it would be indirectly bound thereby, because its member states are in international law bound by these provisions towards third states. Article 234 would seem to imply that Community law would not affect those obligations entered into by member states with third states, after the entry into force of the Treaty, but while still being empowered to do so by Community law.[84] This argument would apply to most of the existing international law related to the safety and environmental aspects of shipping, including the MARPOL, SOLAS and STCW Conventions, and arguably also to customary international law of the sea.

The above, for example, implies that the Community, by incorporating IMO resolutions on routing systems into Community law, could make the content of the IMO resolutions binding on member states and as a result on ships flying the

[83] See in general on when the Community is bound by international law Kapteyn and VerLoren van Themaat, n. 14 above, pp, 161-162.

[84] *Ibid.*, p. 162 (noting that this situation would appear to be analogous to the one provided for explicitly in Article 234, i.e., that the provisions of the Treaty do not affect rights and obligations arising from agreements concluded before the entry into force of the Treaty between one or more member states and third states).

flag of a member state. However, member states would not be in a position to enforce such regulations beyond their territorial sea on ships flying the flag of a third state[85] because the enforcement of ships' routing systems beyond the territorial sea is the responsibility of the flag state. The same reasoning would apply to the requirement that member states are to ensure that oral communication between crew members is feasible, as contained in the Directive on the Minimum Level of Training for Seafarers.[86] This requirement could not be enforced against ships flying the flag of third states as it is not included in the STCW Convention.

As regards the second point, from a policy perspective, we wish to note that the Community would be well advised to consider where its energies are most likely to have the greatest impact. A case in point is the proposal for a directive on port state inspections.[87] If such a directive were adopted it might result in overlap of activities and thus constitute a duplication of effort with the activities undertaken within the framework of the MOU on Port State Control.[88] If there are deficiencies in the MOU policies on port state inspections, it might be more effective for the Community and the member states to concentrate their efforts on trying to improve the MOU system, instead of creating a parallel Community system. This would also be in accordance with the principle of subsidiarity:[89] for each policy proposal it should be established that the subjects can be more effectively regulated at the Community level, rather than at the national level or in other international institutions.

Furthermore, it is by now a well known fact that many states, including member states of the Community, remain deficient in implementing their international obligations as flag states and in providing the harbour reception facilities as required by the MARPOL Convention.[90] A Community policy should thus at least include standards on these aspects. It is also assumed that if safety and environmental standards for ships are more restrictive in a certain area of the world, substandard ships will move to other areas, especially south of the equator and to the waters and ports of developing countries.[91] These countries often are not in a position to implement international standards, let alone more stringent standards. As a result the safety and environmental problems related to shipping activities are displaced, instead of solved. These

[85] Within the territorial sea a coastal state can prescribe and enforce routing systems as long as these are compatible with the right of innocent passage (Article 22, LOS Convention). However in straits such systems are to conform to the generally accepted international regulations (Article 41(3), LOS Convention)

[86] See n. 6 above, Articles 8(2) and 8(3).

[87] See n. 6 above.

[88] Richard W.J. Schiferli, The Memorandum of Understanding on Port State Control: Its History, Operation and Development, in Alaister Couper and Edgar Gold (eds.), *The Marine Environment and Sustainable Development: Law Policy and Science* (1993), pp. 448-475.

[89] Article 3b of the Treaty.

[90] Peet, n. 67 above.

[91] Schiferli, n. 90 above, p. 442; also see the discussion in the same book on pp. 487-489.

considerations strongly suggest that technical cooperation should be an integral part of a Community policy on the safety and environmental aspects of shipping activities.

The considerations voiced in this paragraph imply that an international, rather than a regional, approach is to be the primary focus of any policy aiming at an adequate regulation of the safety and environmental aspects of shipping activities. This is regardless of whether the Community or the member states are primarily responsible for the development of such a policy. It is therefore imperative that the Community carefully consider its strengths and weaknesses as a regional actor in the international world of shipping.