ANNEX

BACKGROUND PAPER No. 3

ON

EXCLUSIVE ECONOMIC ZONES, UNDERWATER RESOURCES (INCLUDING FISHERIES RESOURCES, CONTINENTAL SHELVES, LAW OF THE SEA)

Disclaimer:

The present document has been elaborated by European Commission services for the purpose of providing background material and information to supplement the Green Paper on Maritime Policy (COM … 2006).

This background document is therefore purely illustrative and is not intended to represent the political views, nor to indicate or announce possible future initiatives of the European Commission.

Inter-service Group on Maritime Affairs
Group 3 – Issues to be considered in the Green Paper

Group on Exclusive Economic Zones, underwater resources (including fisheries resources, continental shelves, law of the sea):

Remit	Remit: Issues related to the use of marine resources, including international legal obligations and maritime governance (UNCLOS, IMO, ILO etc…), and sustainable resource management, spatial planning, technical assistance to developing countries
Lead:	DG FISH
	TREN, FISH, RELEX, JLS, JRC, RTD, ECFIN, TRADE, DEV, ENV, LS.
Participation:	TAXUD, ENTR, MARKT (these last three considered that the issues to be discussed in this subgroup would not fall into the responsibilities of their DG, at least at this stage)
Action:	Further definition of group remit, first contribution to be transmitted by end of July 05.

In order to organize ideas and discharge its tasks, the group agreed to split into two subgroups. The first one focussing on general Law of the Sea issues and maritime space (legal framework but also implementation and enforcement) and the second one related with the conservation, exploitation and exploration of natural resources:
(1) Law of the sea, governance, maritime space
(2) Natural resources

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Definition of Group Remit

The Law of the Sea (UNCLOS and its related instruments) provides the basic legal framework for the allocation of maritime space to States, their rights and obligations regarding such space in its different compartments, and the system for international co-operation towards ocean management and conservation. All issues presented in the future Green Paper will stand against the legal background established in this body of provisions.

However, the elements considered in the following sections are those in which legal aspects are, by themselves, the subject of discussion, in terms of:

- How can the EC contribute to the reinforcement, effectiveness and completion of the LOS framework ("maintenance" and improvement of the rules);

- How the EC institutions and processes need to respond to the constraints derived from the Law of the Sea provisions to ensure, ultimately, effective implementation and enforcement of LOS provisions (governance);

- How should the EC respond to developments in the area of maritime space delimitation, as the allocation of maritime "territory" is a particularly sensitive issue with great bearing on national policies and bilateral/multilateral co-operation.

In sum, these three items relate to the EC's contribution to updating and improving the LOS framework so that it ensures an enabling environment for the development of sound, sustainable policies.

The section relating to natural resources is essentially different in terms of rationale to that of the LOS aspects. It deals with the EC's basic approach to sustainable exploitation, conservation and growth of the economic activities of interest for the Community, from mining, to energetic sources, fishing and shipping. The Group therefore decided to focus on the above 3 elements while noting that issues pertaining to the management of EU waters including those concerning the sustainable use of marine resources would be dealt with by the various working groups from the perspective of their respective remits.

1. THE INTERNATIONAL LEGAL FRAMEWORK

The EC participates actively in the collective effort to establish, complete and update as required a set of internationally agreed rules on the basis of multilateral co-operation. In this first section, we consider the scope of an EC contribution to updating and improving the LOS framework so that it ensures an enabling environment for the development of sound, sustainable policies.

The role of the EC in the international LOS arena

Therefore the first point that deserves examination relates to the EC's ability to assume international leadership and promote EU principles and objectives in international fora and towards partner countries. As a major world power, the EC carries the responsibility to constructively intervene in all processes undertaken by the international community to perfect the LOS framework. It requires the EC to deploy the necessary resources to be represented in all relevant LOS fora, develop to the fullest its negotiation strengths vis-à-vis its international counterparts and maintain its ability to propose avenues for progress based on sound analysis of the problems at stake.

In order to attain this objective, it is necessary to review the EC's participatory status to these fora., taking into account that in some cases exclusive competence lies with the Community, in other cases competence is shared between the Community and its Member States, and in other cases competence lies with Member States only.

(1) Therefore, the Community should determine whether the present state of its participation is adequate. Wherever the Community has external exclusive competence, the Community should have full membership status. The issue of the Community's membership to IMO is a case in point in this regard. Whereas the Community has adopted legislation that implements various IMO measures and regulations, it is not a full member of the IMO nor does it have an observer status. Therefore, despite the fact that Member States have transferred their competence for several issues on the IMO agenda to the Community, the latter cannot adequately exercise its external competence in this forum for lack of formal status**.** Another possible issue is EC participation to the International Oceanographic Commission of UNESCO, particularly regarding co-operation towards the protection of the underwater cultural heritage (UN Convention on the Protection of the Underwater Cultural Heritage).

(2) Further, it is necessary to address in a more systematic manner the situations where both the Community and the Member States are Parties to international agreements, and especially the fact that some Member States are sometimes lagging behind in the fulfilment of their obligations. Of course, it is recalled that, in accordance with Article 300(7), ratification by the EC already has legal effects on areas largely covered by EC competence (cf. Case C-239/03, Commission v. France). In any case, differing Member State participation to various agreements and instruments in cases of issues falling under shared or of national competence might lead to divergences in legal regime among Member States that introduce distortions of competition and discriminatory situations. This is particularly relevant in relation to international agreements that create reciprocal control obligations on vessels and maritime

activities. As a matter of principle, participation by the Community as a party in international agreements should be privileged whenever the object of the agreement falls under the Community exclusive or shared competence.

Where possible, the Community's participatory status in international fora should respond to the requirements of the operation of its internal regulatory system in terms of free competition, internal market in goods and services, and a coherent implementation of Community policies throughout the Community territory.

(3) Finally, in situations of shared competence, the EC and its Member States may have to pool their competences in order to act effectively on the international plane. Such a pooling of competences requires close cooperation between the Community and its Member States, in accordance with the requirements of Article 10 EC Treaty.

An example is that of the UN Fish Stocks Agreement, which establishes a default mechanism for reciprocal vessel boarding and inspection. Currently only the EC and 17 of its Members are parties to the Agreement. This fragmented participation is likely to create confusion and uncertainty as to the uniform application of the agreement throughout the Community.

Also, various Member States have concluded bilateral ship boarding agreements with third parties. Besides the fact that the negotiation of bilateral agreements in a core area governed by UNCLOS may have negative repercussions on the coherence of the international LOS, it may also have certain practical disadvantages (high number of these agreements would be necessary and difficulty in concluding agreements with States whose vessels would be particularly likely to engage in certain activities), and induce delocalization of vessel registration even within the Community. A coordinated approach of all Member States to such initiatives would therefore seem highly desirable.

EC contribution to the maintenance and improvement of the international legal framework

Addressing gaps in the LOS regime

As a preliminary observation, it is worth noting that there is little support in the international community for a re-opening of UNCLOS provisions to negotiation, and the view is strongly held among EC Member States that at this stage, after 10 years since the Convention entered into force, the main challenge is to ensure effective implementation of its provisions before considering any amendments. However, it is true that several areas of pressing concern are not mentioned in the UNCLOS text. Whether there is a case for inserting new provisions in the Convention to cover these areas depends on whether the international instruments that do address them are considered sufficient. Main examples in this regard relate to illegal activities such as drug trafficking and illegal immigration, or matters relating to nuclear non-proliferation (see previous section).

LINK TO GROUP 6 for issues pertaining to safety/security.

Here a number of areas are reviewed in relation to which the basic UNCLOS provisions might require further development through secondary instruments, completion or, with the caveats indicated above, modification.

The protection of biodiversity in waters beyond national jurisdiction. UNCLOS addresses the preservation of the marine environment in terms of minimising the impact of exploitation activities such as shipping, fisheries or mining. Part XII (Protection and preservation of the marine environment) on UNCLOS thus deals essentially with marine pollution, and specific provisions are also contained in Parts V (Exclusive Economic Zone) and VII (High Seas) regarding the conservation of marine living resources in connexion with fishing activities and in part XI (The Area) in connexion with the exploitation of the mineral resources of the common ocean seabed. Regulation of environmental protection therefore materialises in accessory measures to the regulation of the "principal" activities concerned.

Today, perceptions have changed. The protection of the environment is considered as an objective in itself that must be pursued not only to ensure the sustainability of the economic exploitation of marine resources, but also to preserve the natural common heritage for future generations. In practical terms, this approach would require the establishment of a legal framework specific to the conservation task to ensure a holistic (cross-sectoral), integrated approach to marine biodiversity conservation in areas beyond national jurisdiction. An Implementation Agreement of UNCLOS adopted for this purpose would integrate the sectoral principles of the Convention into a decision-making process to adopt agreed environmental objectives for the high seas, essentially on a spatial basis (Marine Protecte Areas – MPAs). (a detailed discussion on the issue of marine protected areas is presented in section 3 "Maritime Space", below). The proposed Agreement would also need to establish the mechanism to identify conservation objectives, set priorities, and formulate management recommendations to the bodies that regulate the different economic activities with a potential impact. This discussion affects areas beyond national jurisdiction because the coastal State conservation obligations are inherent to its jurisdiction over the EEZ and the Continental Shelf.

The current debate on a proposed moratorium of high seas bottom trawling and the parallel discussion on marine protected areas in the framework of the Convention on Biological Diversity illustrate the issues at stake here. The identification of the international body or regulatory agency that should be tasked with adopting conservation measures is fully open. Supporters of a bottom trawling blanket moratorium claim that the UN General Assembly is the right context to establish measures "by default", since not all the regions of the high seas are yet covered by a Regional Fisheries Management Organisation or arrangement with competence to regulate bottom trawling. Opponents underline the responsibility attributed to RFMOs by the LOS-derived fisheries international instruments and plead in favour of addressing this problem in the RFMO context, which includes urgent establishment of organisations for areas not yet covered and possible interim measures by flag States in respect of their fleets operating in these areas, on a precautionary basis.

The CBD on-going work on marine protected areas (MPAs) seeks to implement the World Summit on Sustainable Development objectives to establish a network of MPAs by 2012. The purpose is to establish the basis for the identification of marine

areas that deserve protection and the formulation of management recommendation for such areas in light of the protection objectives at stake. There is, however, no consensus on whether CBD has the authority to establish such MPAs.

LINKS TO GROUP 1 AND 4, contribution from RTD.

The management of high seas discrete fish stocks

Article 118 UNCLOS requires States to co-operate towards the conservation and management of the living resources of the high seas. However, the relevant implementation agreement of UNCLOS in this regard (the 1995 UN Fish Stocks Agreement) only covers straddling and highly migratory stocks. The legal gap in this case relates therefore to extending the detailed co-operative regime in the Agreement to also implement Article 118 UNCLOS in respect of discrete stocks, most of which consist of deep species whose fragility justifies particular care and rigour in their management. There has been already some discussion about this issue at UN Level (notably in the framework of the Informal Consultations of States Parties to the 1995 Agreement and of the UN Open-Ended Informal Consultative Process on Oceans and the Law of the Sea – ICP/UNICPOLOS), where the Community and most other parties agreed on the need to extend the scope of the 1995 Agreement to these stocks. This is one of the issues that will figure prominently in the agenda of the 1995 Agreement Review Conference, scheduled to take place in May 2006. Rather than seeking an amendment to the Agreement to extend its scope, an alternative may be the adoption of a Protocol that would achieve this extension without the need for a re-opening of the Agreement's provisions to negotiation, a scenario that the Community (eg our position in the two UN processes just mentioned) does not support. The adoption of a Protocol seems an effective avenue for progress that the Community should consider supporting.

The definition of the "Genuine link" between a State and its flagged vessels – Dealing with flags of convenience or "open registries".

Companies often register vessels in States where taxation is advantageous or where controls are less strict. In the second case, the practice has obvious detrimental effects over the effectiveness of international rules and regulations. Many countries do not require more than a postal address to set up a company under their national law. As a result, in some countries a vessel may be registered in the absence of any factual link in respect of both the ship and its owner. Various cases involving change of flags while steaming or simultaneous registration in more than one country demonstrate how these practices allow operators to evade controls and conduct their activities outside the regulations that would normally apply to them under a regime of effective flag State jurisdiction. The problem is exacerbated by the fact that national registries, even those not considered "open", seldom require in depth certification of the past history of vessels, showing that there is much room for improvement in terms of inter-registry co-operation.

According to Article 91 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) there must exist a genuine link between a ship and the Flag State whose flag the ship flies. The goal of this provision is to enable Flag States to effectively exercise jurisdiction over ships. There is however no definition of "genuine link" in the UNCLOS Convention, nor in any other international

instrument. An ad hoc agreement containing detailed criteria for this purpose was signed in 1986 (the UN Convention on Conditions for Registration of Ships) but it has never entered into force.

A binding definition of "genuine link" and its enforcement at an international level would be an effective means to fight against Flag States failing to discharge their duties. There would be little interest, on the contrary, in imposing the existence of a factual link between the beneficial ownership of a ship (eg, nationality of shareholders of the shipping company) and the country of registration. The main concern is to ensure that relocation to legitimate, advantageous registries is not hindered by these future criteria.

Therefore, a body of secondary rules to UNCLOS should be developed to define the genuine link. Work is underway in the framework of IMO in this regard: UN General Assembly Resolution 58/240 of 2003 invited IMO to undertake a study in this regard, "including the potential consequences of non-compliance with duties and obligations of flag States in relevant international instruments. Unfortunately, progress on this issue is still quite slow.

In this regard, there might be a case for a separate consideration of this issue between shipping and fisheries. In the latter case, flags of convenience are typically "flags of non-compliance", where fleets change registry to avoid fishing limits and their associated controls. The sensitiveness of the genuine link debate in the context of shipping (certain among the major merchant fleets are largely delocalised) has effectively prevented progress in the fisheries context, despite the acknowledgement of the international community (see the conclusions of the FAO Committee on Fisheries, COIF, 26th Session 2005) that addressing this problem is a key element in the fights against Illegal, Unregulated and Unreported Fishing (IUU).

Port States rights and obligations. Concerning this issue, the problems are essentially of the same nature as those described previously in relation to vessel registries. UNCLOS assumes that the sovereignty of States over their ports entails compliance with relevant co-operative agreements, under which controls at port aim at ensuring the enforcement of international rules and standards. The difference is that there has been much progress in the development of Port State model schemes, particularly on the basis of regional Memorandums of Understanding. Europe is a world leader in promoting this approach. The European Union has built its legislation on IMO Resolutions and the work by the Paris Memorandum of Understanding (Paris MOU) on Port State Control which since 1982 provides the framework for 20 signatory countries[1] to carry out their inspection duties. Directive 95/21/EC (as amended on several occasions) establishes common criteria for control of ships calling at Member States' ports and harmonises procedures on inspections and detentions.

Progress relating to fishing ports is considerably slower. The Committee of Fisheries of the FAO adopted at its 26th Session in 2005 a voluntary Model Port State Scheme which represents a minimum standard to be applied by responsible Port States and RFMOs. The EC should promote the implementation of this instrument, not least in

[1] Today the Paris MOU counts 20 countries: Belgium, Canada, Croatia, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Russian Federation, Slovenia, Spain, Sweden and United Kingdom

its cooperation with developing countries, many of which show poor governance and lack performing monitoring, control and surveillance (MCS) systems and procedures.

Regulation of bioprospection. Prospecting for and collecting valuable genetic resources from micro-organisms occurring in the deep seabed subsoil for use particularly in biomedics, pharmacology and agriculture is an activity of great potential interest not only in scientific but also in economic terms.

> "Estimates put worldwide sales of marine biotechnology-related products at US$ 100 billion for the year 2000. Profits from a compound derived from a sea sponge to treat herpes were estimated to be worth US$ 50 million to US$ 100 million annually, and estimates of the value of anti-cancer agents from marine organisms are up to US$ 1 billion a year."
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> *Source: UNU-IAS Report "Bioprospecting of Genetic Resources in the Deep Seabed – Scientific, Legal and Policy Aspects", 2005*

The LOS gap concerning this topic relates to the fact that most of the genetic resources of industrial interest are extracted from micro organisms occurring in the deep seabed. However, under the LOS, the scope of the legal regime established in part XI UNCLOS and the powers conferred to the International Seabed Authority (ISBA). are limited to the exploitation of mineral resources. On the other hand, Regional Fisheries Management Organisations have been provided mandates to conserve and manage marine living resources, but their methods and knowledge basis are clearly focused on fish stocks and are therefore not adapted to cover the resources at stake here.

A number of countries clearly favour handing this task to ISBA, mainly because as the global administration of the ocean seabed, "the Area", which is designated the common heritage of mankind, ISBA would ensure the sharing of the financial and economic benefits of seabed exploitation by the whole international community, and not only by those States which are technologically advanced enough to profit from this activity. This option would require, however, a difficult legal exercise (which could involve, among other options, agreeing on an extensive interpretation of ISBA's mandate, the adoption of an implementing Agreement to UNCLOS or an amendment of UNCLOS provisions).

It is worth noting in this regard that sharing the benefits arising from the commercial and other utilization of genetic resources in a fair and equitable way is one of the three key objectives of the Convention on Biological Diversity, to which the EC is a key participant. Following a mandate from the WSSD, the negotiation of an international regime on access and benefit-sharing is on going under the CBD. The outlook of this future regime is very uncertain at the moment but it could potentially cover also the deep seabed as the CBD applies in relation to each Party "in the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction." Therefore, bioprospecting activities in the deep seabed carried out under the control of a Party to the CBD are in principle subject to the CBD provisions. However, the latter provisions are essentially based on a provider/user countries relationship which seems ill-suited for the deep seabed.

Moreover, it is doubtful that in the context of the CBD negotiations the necessary expertise on maritime issues and adequate resources will be available.

The Community will need to evaluate its interest in term of possible industrial and environmental strategies for the medium and long term, and take a position as to whether it can support an international regulatory regime based on benefit sharing. While an international legal regime on the use of deep seabed genetic resources (under UNCLOS or the CBD) would be justified by considerations of equity and fairness, the EC should develop its position on this issue in the context of its broader maritime policy and the EC objective of ensuring conservation and sustainable use of biodiversity including by developing marine protected areas, tackling the problem of invasive species and of pollution in general.

LINKS TO GROUP 1 and to the contribution from RTD.

Reinforcement or improvement in the legal regime of international navigation and shipping – The case of international straits.

UNCLOS introduced a new regime for international straits, intended to cover the large number of straits that became "closed" due to the extension of the limit of the territorial sea to 12 nautical miles. This regime restricts in practise the means of intervention of coastal states over the passing ships and their possibility to exercise legislative jurisdiction on the transiting ships, despite the fact that any pollution incident in these zones presents an imminent risk for neighbouring states. The jurisdiction to regulate maritime safety and pollution prevention is thus limited to enacting laws and regulations that have either been established at international level or which were approved by IMO. In addition, even if a transiting ship violates those rules, the means of coastal state to enforce the international rules are very limited.

Such limits imposed on the coastal States do not match the more general obligations of states to protect their marine environment against pollution, as regulated in Articles 192 and 194(5) of UNCLOS.

For such reasons, the Commission in its Communication of 3 December 2002, following the "Prestige" accident, stressed that the existing attribution of rights and duties of States between maritime and coastal interest as laid in UNCLOS is unbalanced. The Commission concluded that the "bias towards freedom of navigation, at the expense of environmental protection, does not reflect the attitudes of today's society, nor those of the Commission" and that a revision would therefore be justified.

The fight against illegal immigration, terrorism and organised crime

DIRECT LINK to GROUP 6 for the development of these issues.

2. MARINE GOVERNANCE

Developments at international level regarding the reinforcement and improvement of the LOS framework have an influence on internal policies, as LOS provisions set the scope of national powers over maritime space. The EC policies must therefore foresee the adoption of measures at Community or national level to exert its rights

under the LOS regime to the benefit of its citizens, as well as to discharge its duty to ensure that the operation of its ports, vessel registries and at sea control mechanisms serves the common purpose of efficient international governance of the oceans.

EC governance issues

An integrated marine policy requires, first and foremost, enhanced internal co-ordination among the different administrative departments responsible for the various areas. This simple postulate is valid for all policies, none of which can function in isolation, but becomes particularly relevant when the main objective is integration and synergy. In the case of the Community, efforts to improve coherence are necessary both within the Community institutions (Council, Commission, Parliament) and between them as well as within and between national administrations, with the added requirement of better transnational co-ordination among departments in Member States with similar responsibilities. Active co-operation with third countries is also an important element to take into account in this context. The role of the Community institutions in promoting these improvements is variable because of the different scenarios that apply to sectoral policies in terms of Community exclusive or shared competence, or lack thereof.

Therefore, in order to organise the implementation of an integrated maritime policy, it will be necessary to review the administrative organisation in place, identify areas where differing Community competence levels stand in the way of an integrated approach to the problems that must be solved, and seek creative ways to overcome such difficulties. There is no intention to affect or distort the competence allocation regime set forth in the EU Treaties, but rather to affirm the need for the Community to reinforce its internal administrative cohesion and transparency.

When intervening at international level, and irrespective of the competence regime that applies, the Community should aim at ensuring a degree of influence commensurate to its international economic and political weight. On issues of EC competence, the representation of the EC should always be assured by the Commission as the single voice of the Community. In any event, the key objective is to ensure that the position itself is solidly built, with sound input from all the institutions, and avoid internal divisions that diminish the chances of a successful EC contribution to domestic and international marine governance.

As a practical matter, the structures within the Council should be adapted to ensure an effective and timely coordination on all maritime matters. The COMAR group, which is currently charged with the coordination of law of the sea matters, meets only infrequently, and follows working methods which are those of the second pillar. This does not adequately reflect that law of the sea matters arise in numerous contexts falling within the first pillar, and that effective coordination therefore requires working according to Community methods.

Regional administrative dimension

Adjustments of key governance mechanisms at regional level: the implementation of the principles outlined in the previous section is particularly relevant at regional level, since maritime policy issues have very often a regional dimension. The governance arrangements foreseen in the Marine Strategy constitute a first step.

Options for further development of a broader governance framework to be elaborated under the Maritime Policy should also take account of the highly diverse legal and political specificities in each of the European regional seas, ranging from the Baltic Sea with seven EU Member States and the Russian Federation to the Mediterranean where Exclusive Economic Zones (EEZs) have not been declared and the EU has to work jointly with a number of third countries.. Aspects pertaining to regional pooling of member States control and / or enforcement means may be an option (especially if an effort is made to manage such means in an integrated way at the service of various marine policies (controls related to the security and safety of navigation, environmental or fisheries measures).

DIRECT LINK TO GROUP 5

Implementation, compliance and enforcement

These are probably the most challenging aspects of an integrated maritime policy for the European Community, as the main responsibility for enforcement lies with the Member States, and the European institutions need to identify the means to maximise co-ordination and monitoring of national compliance and enforcement administrations, as required by EC law.

The Community should first of all carry out a thorough examination of the adequacy of control means currently operational. That study is likely to reveal significant deficiencies and disparities among Member States. Some of them are exploring already ways in which different control authorities may work in synergy. At European level, the objective must surely be to promote better co-ordination among such national administrations, i.e. the reinforcement of networks to share information relevant for control activities. This will require investment on human and technical resources as well as on training, and should focus in particular on coastal surveillance and inspection.

An area where progress should be made is that of the definition of international environmental standards, including *inter alia* specifications for the construction/scrapping of vessels and emission, in particular CO_2. Furthermore, the issue of environmental liability and its adaptation to the development of risks should also be considered a priority which the EU might promote in the framework of IMO.

In the area of fisheries, it is necessary to continue and reinforce our efforts to combat IUU fishing. The Community has made great progress in terms of implementing the International Plan of Action adopted by the FAO in 2001, not only has it adopted a Community Plan of Action (COM(2002) 180 final of 28 may 2002) but the latter has efficiently permeated its activities in international fora, leading to a significant number of successful proposals in RFMOs of measures that have reinforced the array of tools apt at combating IUU adopted by these Organisations. In 2004, for instance, the Community proposed no less than 10 measures in different RFMOs (ICCAT, IATTC/AIDCP, NAFO, CCAMLR) regarding control, compliance and IUU fishing specifically, from recommendations on transhipment, to identification of IUU vessels, to a basic design to assess compliance with conservation measures or to promote compliance by non-Parties.

The international dimension of the efforts made by the EU in promoting co-operation to combat IUU fishing must find its echo at internal level. The will to take decisive action against illegal activities must be reflected in a more efficient use of the control means at the disposal of national control authorities, the urgent instalment and entry into operation of the European Fisheries Control Agency[2], and very importantly, a rigorous implementation of EC regulations requiring Member States to take action in respect of their nationals[3].

With the creation of the European Maritime Safety Agency[4] (EMSA) the Community acquired an additional tool in the framework of its maritime safety and pollution prevention policy. EMSA provides technical and scientific assistance to the Commission in the continuous process of monitoring the implementation of Community legislation and of evaluating the effectiveness of the measures in place. In order to monitor the implementation of the Community acquis, the Agency carries out assessment visits to Member States. Such visits started in 2004 and will be intensified in the years to come. The first area where the Agency verifies the performance of Member States is the application of Port State Control rules. The Agency is also tasked with assisting Member States with regard to the enforcement of Community legislation, organising appropriate training activities and favouring a dissemination of best practices in the Community. With its dual role towards the Commission and Member States, EMSA contributes to the coordination and the monitoring of national compliance in its specific areas of competence.

The need for strengthening the enforcement of maritime safety rules is also behind the idea of increasing the synergies of national authorities entrusted with the application of these rules, such as the national coastguard services. It should be noted that following the adoption of Directive 2005/35/EC[5], the Commission has the obligation to present to the European Parliament and to the Council, before the end of 2006, a feasibility study on the establishment of a European coastguard dedicated to pollution prevention and response.

Finally, the inauguration in 2005 in Warsaw of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States (FRONTEX) established by Council Regulation (EC) No 2007/2004 of 26 October 2004 aims at putting in place at European level an efficient operational cooperation mechanism for national border guards. The FRONTEX Agency will not only be an important cooperation tool for the EU internally, but will also contribute to improving operations cooperation with third countries in the field of border controls. During 2006 the Agency will, among other activities, establish a network of national contact points in Member States for control and surveillance of external maritime borders in the Mediterranean.

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2 Council Regulation (EC) No 768/2005 of 26 April 2005 establishing a Community Fisheries Control Agency and amending Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy

3 Article 23.2 Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy

4 Regulation (EC) N° 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency.

5 Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements

3. MARITIME SPACE

Ten years after entry into force of UNCLOS, the system established in the Convention for the recognition of State entitlements over coastal maritime space is still undergoing completion. Territorial disputes in various areas of the world still oppose the definition of maritime borders. The technical complexity of the charting procedures involved has delayed progress in the respect of the establishment of the limits of the Continental shelf (see below). In general, these technical aspects have a negative influence on the ability of many developing States to formulate their claims.

Against this background, it is quite obvious that the administration or maritime space is the keystone of any maritime policy. Spatial planning is essential for efficient sectoral policies and efficient use of maritime infrastructures, such as ports, offshore platforms and terminals and coastal surveillance means.

There is no case, in legal terms, for a Community assumption of powers over the EEZ. The extent of Community powers is determined by its competences with regard to the various policies, and these obviously differ. But the issues at stake are determinant for the success of various Community measures, and this pleads in favour of a common approach to maritime space. For a start, it might be worth noting that there is no agreed map presenting, as a whole, the waters under the jurisdiction of EU Member States which could supply precise information of the spatial scope of the various EU measures applicable in coastal waters and EEZs.

An illustration of these issues may be found in the current examination of the spatial scope of Member States duties in respect of the implementation of environmental directives such as the "Habitats" and "Birds" Directives (respectively, Directives 92/42/EC and 79/409/EEC

These nature directives provide for the establishment of a network of protected areas on land and water under the title NATURA 2000. The establishment of this network in the marine environment is a key contribution of the EU to meeting the commitment of the 2002 World Summit on Sustainable Development to establishing a globally representative system of marine and coastal protected areas by 2012 as well as similar commitments under the Convention on Biological Diversity (see below).It is now widely recognised that, in addition to their application to coastal waters (up to 12 nautical miles), the nature directives apply to the EEZ as a key element of the protection of the marine ecosystem. This is in line with the legal position that if a Member State is exercising sovereign rights in an exclusive zone of 200 nautical miles, it thereby considers itself competent to enforce national laws in that area. Consequently the Commission considers in this case Directives 79/409/EEC and 92/43/EEC apply, as Community legislation is should apply throughout the territory where Member States exercise jurisdictional rights6. It should be noted that some Member States (such as the United Kingdom) have not formally declared an EEZ but are exercising equivalent sovereign rights over their offshore marine environment. The situation is particularly complex in certain areas such as the Mediterranean and Baltic Seas, especially given that EEZs have not been declared in the Mediterranean. . The waters under the jurisdiction of Member States

6 See Communication from the Commission to the Council and European Parliament 'Fisheries management and nature conservation in the marine environment' COM 1999 (363)

do not extend, beyond 6 or 12 nm of the territorial sea although some Member States have or are in the process of declaring fisheries or environmental protection zones in the Mediterranean. .

Moreover, Member States, who have exclusive jurisdiction for the exploitation of natural resources in the seabed and subsoil of the continental shelf under their jurisdiction, should also exercise their duties for conservation, including the relevant provisions of the EC acquis

The Commission Services are in the process of finalising a guidance document on the application of NATURA 2000 to the offshore marine environment. This will aim to clarify the area of application of the directives as well as providing guidelines on how to identify, assess, select and manage the sites. This will provide the basis for Member States to proceed with the establishment of the marine component of the NATURA 2000 network.

The guide will describe the species and habitat types of European conservation interest to be protected in marine NATURA 2000 sites. All naturally occurring marine bird species fall under the scope of the Birds Directive. The Habitats Directive at present lists a number of habitat types and species that occur in the EEZ and Continental shelf areas of Member States, including coral reefs, which require in particular areas management and protection for potentially damaging activities such as bottom trawling. The Community has already introduced measures to restrict the use of bottom trawls and similar gear to avoid damage to deep water corals in an area surrounding the Darwin Mounds, in offshore marine waters of the United Kingdom[7].

The Mediterranean is a region where standing territorial disputes has prevented the normal establishment of Exclusive Economic Zones till today. At present, the situation as regards declarations of EEZs or Fisheries Protection Zones (FPZs) in the Mediterranean is very inconsistent. The first State to have issued a claim in this respect is Tunisia, through national legislation adopted in June 2005. A number of Coastal States have in the past declared fisheries protection zones (Spain, Malta and, very recently, Libya), environmental protection zones (France), or a combination of both (Croatia).

At the 2003 Mediterranean Fisheries Conference held in Venice, it was agreed that better marine governance required effective jurisdiction of coastal States over their waters, while calling for a co-ordinated approach in the submission of claims. The EU needs to increase our diplomatic efforts to promote such a co-ordinated approach to maritime space in the Mediterranean. The possibility of a cross-sectoral Conference to address these issues (the 2003 Venice Conference dealt exclusively with fisheries) should be considered.

Co-operation at EU level regarding the fixation of the outer limits of the Continental Shelf: also in the context of maritime space, the procedures for the delimitation of the Continental shelf are now operable after three years of intense preparatory work by the UN body responsible for this technically very complex issue, the Commission on the Limits of the Continental Shelf. Only five countries, Russia, Australia, Brazil,

[7] Regulation (EC) No. 606/2004 of 22 March 2004

Ireland and New Zealand have so far submitted dossiers to the CLCS (Portugal has announced its submission in the near future). Again, the fixation of these areas of coastal State jurisdiction over the seabed is a sensitive matter on account of standing territorial disputes and the substantive economic interests involved. In addition, the possibility of coastal States claims over the water column as an extension of their rights over the continental shelf seabed could affect Community interests in areas as sensitive as the Grand Banks and the South West Atlantic. The Community has consistently contested the legality of coastal States jurisdictional claims beyond the limits of the 200 nm EEZ or over the water column above the continental shelf that extends beyond the 200 nm limit ("Creeping jurisdiction").

Research needs due to the access of coastal States to the continental shelf beyond the 200 nm EEZs: The rights of the coastal State over the continental shelf extending beyond the 200 nm EEZs in the context of UNCLOS clearly implies surveying (bathymetric survey, seafloor imagery) ocean areas beyond the current limits of EEZs to meet the UNCLOS' delimitation requirements. The jurisdiction of coastal States over new marine spaces entails new responsibilities and this in turn implies carrying out surveys in order to assess the general status of the continental shelf beyond the 200 nm limit. The research activities would provide to the countries and the communities concerned the information about many aspects of coastal State rights and duties over these spaces in the domain of environmental status, economic potential, risk and hazards, etc. This research requires quite substantial means because it is frequently taking place in deep waters and generally in a hostile environment implying up-to-date research capacities.

Marine Protected Areas

It should be noted first of all that the establishment of Marine Protected Areas in waters under national jurisdiction falls within the sovereign rights of coastal States and Directives 79/409/EEC and 92/43/EEC already provide a strong legal basis for progress on this subject (cf. box in the previous section). There is also a case for intra Community co-ordination of other national measures. As a matter of principle, the benefits of a Community approach without prejudice to Member State competences is clear, as part of the broader goal of a maritime policy of the Union. This issue is dealt with in the Marine Strategy which the Commission will shortly adopt. It is also worth noting the investment made by the Community and its members in advancing the state of knowledge and improving technical approaches to the use of Marine Protected Areas as policy support tools. In the framework of the 6th Research Framework Programme, two projects were launched and are under implementation notably in relation to this area: they are PROTECT "*Marine Protected areas as a tool for ecosystem conservation and fisheries management*"[8] and EMPAFISH "*European Marine Protected Areas as tools for Fisheries management and conservation*"[9]. Research in EEZs: Marine related research in public interest should have access to EEZs of third countries within the general framework laid down in UNCLOS. Clauses within Community bilateral and multilateral agreements could include the mutual consent necessary to carry out fundamental research in the EEZ of third countries and the possibility to improve access to results of this research.

8 http://www.mpa-eu.net

9 http://www.um.es/empafish/index.php

But the Union has, and is playing, an important role in promoting progress also at the international level with regard to the establishment of MPAs in waters both within and beyond national jurisdiction, and these aspects are the subject of focus in this section.

The legal basis for the designation of certain categories of areas, which may require higher standards of environmental protection, is provided by the United Nations Convention on the Law of the Sea (UNCLOS). Article 194(5) places an obligation on parties to take measures necessary to protect and preserve rare or fragile ecosystems. Part IX of UNCLOS identifies enclosed or semi-enclosed areas, such as a gulf, bay, basin, or sea between two or more countries, as places where countries shall endeavour to coordinate management and environmental protection. UNCLOS thus creates an overall structure for the protection and preservation of the marine environment and a general obligation for States to implement and elaborate upon this structure through both global conventions addressing particular forms of pollution and regional agreements tailored to the requirements of discrete sea areas.

What follows is a summary of the state of play in the three major fora where this matter is being currently examined on a global basis. It is worth noting that various RFMOs are also adopting measures of this kind (e.g CCAMLR, NEAFC), and that the FAO has been tasked by its Committee on Fisheries this year to develop technical guidelines for the definition of Marine Protected Areas in terms of their use as fisheries management and environmental protection tools.

The situation in the framework of IMO and its related instruments

The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), in Annexes I, II and V, defines certain sea areas as Special Areas in relation to the type of pollution covered by each Annex.

A Special Area is defined as "a sea area where for recognised technical reasons in relation to its oceanographical and ecological conditions and to the particular character of its traffic, the adoption of special mandatory methods for the prevention of sea pollution by oil, noxious liquid substances, or garbage, as applicable, is required." Under MARPOL 73/78 these Special Areas are provided with a higher level of protection than other areas of the sea.

Some special areas are also defined under the International Convention for the Safety of Life at Sea (SOLAS) such as precautionary areas (where ships must navigate with particular caution), and areas to be avoided (for reasons of exceptional danger or especially sensitive ecological and environmental factors).

Besides, the Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO) began its study of the question of Particularly Sensitive Sea Areas (PSSAs) in response to a resolution of the International Conference on Tanker Safety and Pollution Prevention of 1978. The discussions of this concept from 1986 to 1991 culminated in the adoption of Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Areas by IMO Assembly resolution in 1991.

The Guidelines for designation of Special Areas under MARPOL 73/78 and of identification of Particularly Sensitive Seas Areas were reviewed in 2001 by an IMO Assembly (Resolution A.927 (22). The legal basis of these guidelines is the Article 15(j) of the Convention on the International Maritime Organization (IMO) concerning the functions of the Assembly in relation to regulations and guidelines concerning maritime safety, the prevention and control of marine pollution from ships and other matters concerning the effect of shipping on the marine environment. A new revision of the PSSA guidelines is actually under consideration within the IMO.

According to the formal definition, a PSSA is an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific reasons and because it may be vulnerable to damage by international shipping activities.

As regards PSSAs, UNCLOS Article 211(6)(a) is the relevant specific legal basis in the international law. Indeed, it provides for States to submit to the "competent international organization" (for shipping, this is universally understood to be IMO) for its approval proposals for special mandatory measures within their exclusive economic zones which require extra protection from vessel sourced pollution for recognized technical reasons.

Nevertheless, this article has a broader meaning which allows developing other similar concepts related to the protection of geographically defined areas from ship-source pollution threats.

MARPOL Special Areas

Annex I: Regulations for the prevention of pollution by oil
Regulation 10 identifies the following special areas with strict controls on discharge of oily wastes:

Mediterranean Sea area
Baltic Sea area
Black Sea Area
Red Sea area
"Gulfs" area
Gulf of Aden area
Antarctic area
North West European Waters
Oman Sea area of the Arabian Seas (from 1 January 2007)

Annex II: Regulations for the prevention of pollution by Noxious Liquid substances
Regulation 1 identifies the following special areas with strict controls on tank washing and residue discharge procedures:

Baltic Sea area
Black Sea Area
Antarctic area

Annex V: Regulations for the prevention of pollution by Garbage
Regulation 5 identifies the following special areas, in which there are strict controls

on disposal of garbage:

Mediterranean Sea area
Baltic Sea area
Black Sea Area
Red Sea area
"Gulfs" area
North Sea
Antarctic area (south of latitude 60 degres south)
Wider Caribbean region including the Gulf of Mexico and the Caribbean Sea

Annex VI: Prevention of air pollution by ships
This annex enters into force on 19 May 2005 and establishes the Baltic Sea area as a "SOx Emission Control Areas" (SECA) with more stringent controls on sulphur emissions from ships.

The North Sea was adopted as a SECA in July 2005, under amendments to Annex VI adopted by the MEPC in July 2005, with expected entry into force in November 2006.

The work of the Convention on Biological Diversity

Decision VII/5 of the Conference of the Parties of the CBD acknowledged the urgent need for the establishment of further MPAs with an emphasis on the protection of sensitive environments such as seamounts, hydrothermal vents, cold water corals and other vulnerable ecosystems. CBD Parties (including the EC and all the EU Member States), committed themselves to establish and maintain by 2012 comprehensive, effectively managed, and ecologically representative national and regional systems of MPAs. The CBD Parties also recognised that appropriate mechanisms must still be identified for the future establishment and effective management of marine protected areas beyond national jurisdiction.

On this basis, the CBD adopted a programme of work and established an Ad Hoc Open-ended Working Group on Protected Areas, whose mandate includes exploring options regarding such a possible mechanism, consistent with international law and based on scientific information.

"Beyond the general mandate in the United Nations Convention on the Law of the Sea, currently there is no global agreement encompassing the concept of protecting priority biodiversity areas per se in order to achieve the goal of conserving the biological diversity and productivity of the oceans beyond national jurisdiction, including ecological life support systems. Only limited means to identify and protect these areas before activities pose threats exist; and coordinated approaches through different legal instruments is the only way to take an integrated approach to the different threats to these areas. Marine protected areas beyond national jurisdiction could serve as a coordinating framework for existing specialized regimes, drawing on the model of the PSSAs which provide a framework for the application of associated protective measures available under different IMO instruments. Marine protected areas could ultimately provide the basis for a comprehensive, integrated approach to managing different threats, including from emerging uses."

Source: CBD UNEP/CBD/WG-PA/1/2 – Notes by the Executive Secretary on "Options for cooperation for the establishment of marine protected areas in marine areas beyond the limits of national jurisdiction", prepared for the first meeting of the Ad Hoc Open-ended Working Group on Protected Areas, Montecatini, Italy, 13-17 June 2005.

The CBD commissioned two studies to assist the work of the Ad Hoc Open-ended Working Group. These studies were carried out with funding from the European Commission. They review, respectively, the scientific and the legal aspects of a possible regime for the establishment of MPAs in waters beyond the limits of national jurisdiction. These studies identified general protection priorities in terms of regions and species that should be addressed, called for urgent co-operation on the basis of current international instruments (IMO and RFMOs in particular) and considered options for new legal regimes that would be required to accomplish these objectives.

The CBD Ad Hoc Working Group did not reach consensus on these issues at its first meeting of June 2005. Although there seems to be consensus that the CBD cannot assume the authority to establish and designate marine protected areas in the high seas, the main contentious appears to be how far the CBD can be a key contributor to the work of *inter alia* the United Nations and regional bodies e.g. by focusing on provision of scientific and, as appropriate, technical information and advice relating to marine biological diversity, the application of the ecosystem approach and the precautionary approach, and in delivering the 2010 target. The 8th Conference of the Parties of the CBD held in February 2006 in Curitiba (Brazil) adopted a decision on "Options for the establishment of marine protected areas in marine areas beyond the limits of national jurisdiction that expressly states this possible role and foresees various actions to continue this work, including the organisation of an expert workshop on ecological criteria and biogeographic classification systems. This work will seek the development of methodologies and scientific criteria for identifying MPAs requiring protection and promote collaboration to strengthen the science base by filling knowledge gaps on marine ecosystems, habitats and species.

The 8th Conference of the Parties also adopted a recommendation on "Marine and coastal biological diversity: conservation and sustainable use of deep seabed genetic resources beyond the limits of national jurisdiction. This recommendation, among others, identifies a range of options for the protection of deep seabed genetic resources, including the use of codes of conduct, guidelines and principles, the reduction and management of threats through, inter alia, permits and environmental impact assessment, the establishment of MPAs, and the prohibition of detrimental and destructive practices in vulnerable areas. The CBD emphasised the need for futher work in developing these options, in particular in the UN framework, and also the need to build capacity in developing States in relation to deep seabed biodiversity.

The work in the context of the UN General Assembly

In the context of the annual UN General Assembly on oceans and the law of the sea, there have been a number of discussions in the past years on the issue of the protection of marine biodiversity in areas beyond national jurisdiction. This has been notably the case in the context of the Informal Consultative Process on Oceans and

the Law of the Sea. In its statements in 2004 and 2005, the EU made a statement indicating that it supports in principle the adoption of an implementing agreement of UNCLOS to ensure an integrated, cross-sectoral approach to the protection of marine biodiversity in areas beyond national jurisdiction, including setting up marine protected areas in the high seas. Such an agreement would establish a decision-making mechanism to designate high seas marine protected areas, a designation which regulatory bodies (RFMOs for fisheries, IMO for shipping, ISBA for seabed exploitation activities) would need to take into consideration in their regulatory management regimes.

In 2004, the General Assembly decided to establish an Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (Resolution L/59/24, para. 73-76). This Group met in February 2006 and discussed options ranging from the status quo, the possibility of an Implementation Agreement of UNCLOS as proposed by the EU and the expectations of developing countries **in** relation to the sharing of benefits from the exploitation of marine genetic resources. Some delegations also raised the question of whether these issues should be tackled separately or together. The General Assembly must review the results of this first debate and decide on the continuation of this process. The EU has made in this forum considerable advances on its proposal of an integrated approach to marine environmental conservation and this effort must continue.