

European Law and Policy Review:

Striking a balance between ecosystem considerations and navigation rights under the Marine Strategy Framework Directive, the Law of the Sea Convention and the Draft Directive on Maritime Spatial Planning

Ronán Long*

Introduction

The European Union (EU) is pressing ahead to give effect full effect to the provisions of the Marine Strategy Framework Directive (hereinafter, the “MSF Directive”) with a view to achieving good environmental status of all European marine waters by 2020.¹ At the same time, Europe has a strong dependency on shipping to ensure that it remains an economic powerhouse at a time when it faces intensive competition in global markets from China, India and the United States. Thus it comes as no surprise to see that the scholarship of Alfred Thayer Mahan continues to influence contemporary thinking on the strategic importance of international trade and freedom of navigation for the global community and for the EU most exceptionally. In light of the subject matter of this conference, perhaps it is pertinent to open this paper with a frequently cited quotation from his celebrated work *The Influence of Sea Power Upon History, 1660-1783*, which reads as follows:

“The first and most obvious light in which the sea presents itself from the political and social point of view is that of a great highway; or better, perhaps, of a wide common, over which men may pass in all directions, but on which some well- worn paths show that controlling reasons have led them to choose certain lines of travel rather than others. These lines of travel are called trade

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¹ Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) OJ L 164/19, 25.6.2008. See *inter alia*: R. Long, “The Marine Strategy Framework Directive: A new European approach to the regulation of the marine environment, marine natural resources and marine ecological services” (2011) *Journal of Energy and Natural Resources Law* 29 (1) pp. 1-44 L. Juda “The European Union and the Marine Strategy Framework Directive: Continuing the Development of Ocean Use Management”, (2010) 41 *ODIL* 34-54; and by the same author, *The European Union and Ocean Use Management: The Marine Strategy and the Maritime Policy*, (2007) 38 *ODIL* 259-282; Hans-Joachim Rätz et al., “Complementary roles of European and national institutions under the Common Fisheries Policy and the Marine Strategy Framework Directive”, (2010) 34 *Marine Policy* 1028-1035; N. Westaway “The New European Marine Strategy Framework Directive” (2008) 10 *Env L Rev* 218-224.

routes; and the reasons which have determined them are to be sought in the history of the world.”²

Captain Mahan was very perceptive in the manner in which he identified the influence of seaborne commerce on the wealth of many European countries, which he attributed to shipping interests at sea, as well as to the projection of power by maritime and naval means. In some respects, little has changed with the passage of time, as the commercial greatness of Europe remains very much contingent upon the free flow of maritime trade and the enduring existence of navigational rights and other freedoms, as since codified by the 1982 United Nations Convention on the Law of the Sea (hereinafter “the LOS Convention”).³

The oceans bind humanity together and few will dispute that the problems associated with the use of maritime space continue to challenge the international community to seek innovative solutions to complex regulatory questions.⁴ In this quest, it is evident that the law of the sea is not immutable and that the intensive uses of the ocean and the regional seas around Europe requires further regulatory action, by means of the implementation of the LOS Convention and a broad swathe of related instruments, as well as by giving effect to more specific EU legislation concerning maritime safety and the protection of the marine environment. A brief perusal of current regulatory measures reveals that a wide range of factors including trade, international peace and security, as well as social and environmental considerations, are shaping EU policy in relation to maritime matters including shipping.

In responding to the new challenges encountered in ocean governance, the regulatory rejoinder by the European institutions is increasingly informed by a new generation of normative principles that are based upon scientific knowledge about the marine environment, as well as the processes and phenomena that take place therein.⁵ More thought provoking from a law of the sea perspective is that many of these tools, such as the ecosystem approach, are applied at a pan-European level on the basis ecological regions and not on the basis of the maritime jurisdictional zones established by the Member States in accordance with the LOS Convention.⁶ Indeed, as pointed out by a number of scholars in the specialist literature, the spatial extent of marine ecosystems is seldom coterminous with the maritime boundaries of the Member States and third

² Alfred Thayer Mahan, *The Influence of Sea Power Upon History, 1660-1783* (London: Sampson low, Marston and Company, Ltd., 1890), p.25.

³ The inclusion of Annex IX in the Law of the Sea Convention enabled the predecessor to the EU, European Community (EC), to sign the treaty on 7 December 1984. The EC signed the Agreement on Part XI in 1994 and deposited its instrument of formal confirmation for both the Convention and the Part XI Agreement with the Secretary-General of the United Nations in 1998. The instrument which provides for EC participation is Council Decision 98/414/EC, OJ L 189/14, 3.07.1998.

⁴ This is implicit as is evident from text of the Preamble, United Nations Convention on the Law of the Sea.

⁵ R. Long, “Principles and normative trends in European Union ocean governance” in C. Schofield, S. Lee, M. Kwon (ed.), *The Limits Of Maritime Jurisdiction* (Boston/Leiden, Brill/Nijhoff, Publishers, 2014), pp. 629-726.

⁶ R. Long, “Legal Aspects of Ecosystem-Based Marine Management in Europe” in A. Chircop, M. L. McConnell, S. Coffen-Smout (ed.), *Ocean Yearbook* Vol. 26, (Boston/Leiden, Brill Academic Publishers, 2012) pp.417-484.

countries.⁷ As a result, the manner in which Europe is addressing concerns about the health of marine ecosystems is very much focused on tackling cumulative anthropogenic impacts on the marine environment in a holistic and integrated manner by means of cross-cutting and sophisticated instruments that aim to translate the ecosystem-based approach into coherent policy advice and legislative action. Many of these instruments are transboundary in geographical and material scope.⁸ Over the coming years, the implementation of these instruments will undoubtedly test the regulatory framework and the finely tuned equilibrium of rights and duties codified in the LOS Convention and in related agreements.

A finely tuned equilibrium of rights and duties

One of the enduring characteristics of the Convention is the manner in which it skillfully balances rights and duties in an equitable manner and advances global interests for the benefit of the common good. This balance is very much evident in the key provisions of the Convention, that codify the traditional right of innocent passage through the territorial sea,⁹ that provide for transit passage through straits that are used for international navigation,¹⁰ and for archipelagic sea-lane passage in archipelagic waters,¹¹ as well as the many ambulatory references to the freedom of navigation in the exclusive economic zone and on the high seas that permeate the entire text of the Convention (see Table 1 below).¹²

As is universally accepted, the provisions on navigation rights and other freedoms are the very backbone of the Convention in that they facilitate international trade, communications, security and maritime transport. What is more, experience over the past three decades has revealed that they are fundamental to the effective working of the international legal order and the rule of law as it applies to the ocean. They are also finely poised with the many provisions in the Convention that are aimed at the protection and preservation of the marine environment.¹³ In this respect, it should also not be forgotten that the shipping industry is a major contributor to global greenhouse gas emissions and is a major polluter of the marine environment in its own

⁷ See *inter alia*: S.M. Garcia, M. Hayashi, "Division of the Oceans and Ecosystem: A contrastive spatial evolution of marine fisheries, 43 (6) 2000 *Ocean and Coastal Management*, pp. 445-474; Y. Tanaka, *A Dual Approach to Ocean Governance*, (Farnham, Ashgate, 2010) *passim*.

⁸ See R. Long, "Stepping over Maritime Boundaries to Apply New Normative Tools in EU Law and Policy" in M. Nordquist, J. Norton Moore, R. Beckman, H. Djalal, (ed.), *Maritime Border Diplomacy* (Boston/Leiden, Martinus Nijhoff Publishers, 2012) pp.213-264.

⁹ Arts 17-26, LOS Convention.

¹⁰ Arts 38, 39, 40, 41(7), 42(1), 42(2), 42(4), 44 and 45(1)(a), LOS Convention.

¹¹ Arts 53(2), 53(5), 53(12), and 54, LOS Convention.

¹² In the EEZ, Arts 38(2), 58(1) and 297(1)(a), LOS Convention. On the high seas, Arts 38(2), 87(1)(a) and 297(1)(a), LOS Convention.

¹³ Part XII: Arts 192, 194, 194(3), vessel source pollution, 210, 211, 219-221, and 234, LOS Convention.

right.¹⁴ The term “pollution” is defined expansively by the 1982 LOS Convention to include:

“...the introduction of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.”¹⁵

All forms of marine pollution come within the scope of this definition. Hence, the challenge faced by the EU is how best to abate pollution and achieve good environmental status of the European marine environment under the Marine Strategy Framework Directive in sea areas under the sovereignty and jurisdiction of the EU Member States, and at the same time continue to show “due regard” to the other rights and duties that are codified by the Convention, in particular as regards navigation and overflight.¹⁶ As will be seen below, the standalone nature of EU policies on key sectors such as transport, environment, fisheries, trade, energy, together with the many other commercial activities that impinge upon maritime affairs, exacerbate this task and make it more difficult to bring about fundamental reform to the regulatory regimes applicable to individual maritime sectors.

One of the solutions tabled by the European Commission to address this conundrum comes in the form of a legislative proposal establishing a framework for maritime spatial planning and integrated coastal management (hereinafter the “Draft MSP Directive”).¹⁷ Briefly stated, this instrument requires all coastal Member States of the EU to adopt maritime spatial plans with respect to all offshore activities taking place in sea areas under their sovereignty and jurisdiction, as well as strategies governing development in the coastal zone. As will be seen, an ancillary objective of this instrument is to develop maritime transport by providing “efficient and cost-effective shipping routes across Europe, including port accessibility and transport safety.”¹⁸ At the same time, it strives to ensure the prudent use of natural resources such as fisheries, the protection of the environment, the security of energy supply, as well as to improve coastal

¹⁴ See Second IMO GHG Study 2009(London: IMO, 2010). Available at: http://www.imo.org/blast/blastDataHelper.asp?data_id=27795&filename=GHGStudyFINAL.pdf

¹⁵ Preamble, LOS Convention.

¹⁶ Article 52(2), LOS Convention. In addition Articles 58, 59 and 60 deal with the relationship between the right and duties of other States and the coastal State in the exclusive economic zone. See . Nordquist (et al.) *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht/Boston/Lancaster, Martinus Nijhoff Publishers, 1985) Vol. 11, 491-817, especially at 553-565.

188–200 at 186.

¹⁷ Proposal for a Directive of the European Parliament and of the Council establishing a framework for maritime spatial planning and integrated coastal management. COM(2013) 133 final, SWD(2013) 65 final, Brussels, 12.3.2013. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0133:FIN:EN:PDF>

¹⁸ Article 5(b) of Draft MSP & ICM Directive. COM(2013) 133 final, Brussels, 12.3.2013.

resilience to the effects of climate change.¹⁹

In light of these diffuse and somewhat competing objectives, the focus of this paper is to explore how, and if, the EU upholds international navigation rights and freedoms under the proposed framework set down by the Draft MSP Directive. The importance of this Directive should not be underestimated and we can anticipate considerable controversy over the coming years about the designation of maritime areas for different development activities. Specifically, what will designations of maritime space mean in practice for the shipping industry and their ability to exercise navigation rights and freedoms under the LOS Convention?

This paper does not attempt to provide a definitive answer to this question but reviews a number regulatory factors and other considerations that will have a bearing on the capacity of the EU to strike an appropriate balance between ecosystem considerations under the European MSF Directive, navigation rights and freedoms under the LOS Convention, and spatial management measures under the Draft MSP Directive. This paper thus reveals some of the law and policy constraints and opportunities for the EU to implement an ecosystem-based approach to marine management. In doing so, it is hoped that the EU and the Member States remain true to the letter and spirit of the LOS Convention and maintain free and largely unimpeded navigation in European waters. Before turning to some of the key issues, we can elaborate a little more about the importance of shipping and maritime trade to the future economic prosperity of Europe in order to give greater context to the discussion further on below.²⁰

¹⁹ Article 5(a), (c), (d) and (e) of Draft MSP & ICM Directive.

²⁰ Unusually, this is not mentioned in the European Commission's report on the first phase of implementation of the MSF Directive COM(2014) 97 final, Brussels, 20.02.2014. See discussion *infra*.

Table 1: Navigation rights and freedoms under the LOS Convention

Navigation Rights / Freedoms	Environment considerations /Sea lanes and traffic separation schemes
Innocent passage (Part II (Art 19))	Laws and regulations of coastal State <ul style="list-style-type: none"> • Preservation of the environment of the coastal State (Art 21(1)(f)) • Coastal State may designate or prescribe sea lanes or traffic separation schemes (Art 22)
Transit passage in straits used for international navigation (Part III)	Laws and regulations of straits States <ul style="list-style-type: none"> • Sea lanes and traffic separation schemes (Art 41) • Prevention, reduction and control of pollution by giving effect to the applicable international standards regarding the discharge of oily substances (Art 42 (1)(b)) • Strait States must not deny, hamper, or impair the right of transit passage. (Arts 42(2), 44)
Archipelagic sea lanes passage (Part IV)	Laws and regulations of archipelagic State <ul style="list-style-type: none"> • Designation of sea lanes, prescribe traffic separation schemes, refer proposals to competent international organisations, exercise of rights (Art 53) • Prevention, reduction and control of pollution by giving effect to the applicable international standards regarding the discharge of oily substances (Art 54 and Art 42 (1)(b) <i>mutatis mutandis</i>) • Archipelagic States must not deny, hamper, or impair the right of archipelagic sea lane passage.(Art 54 and Art 42 (2) <i>mutatis mutandis</i>)
Freedom of navigation in the EEZ and on the high seas/EEZ	<p>In the EEZ, Arts 38(2), 58(1) and 297(1)(a), LOS Convention. On the high seas, Arts 38(2), 87(1)(a) and 297(1)(a), LOS Convention.</p> <p>Part XII: Arts 192, 194, 194(3), vessel source pollution, 210, 211, 219-221, 234</p>

Importance of shipping and maritime trade to the Europe Union

The significance and relative importance of the shipping sector in Europe is best appreciated when one considers that the EU is made-up of 23 coastal Member States, which shares 70 000 km of coastline along two oceans (the Atlantic and the Arctic Oceans) and bordered by four regional seas: the Baltic, the North Sea, the Mediterranean, and the Black Sea. These are important areas for the movement of persons, goods

and services. The European Maritime Safety Agency estimates that there are well over 17,000 ships on passage in EU waters on a daily basis and this figure is generally indicative of the intensity of maritime traffic.²¹ Indeed, the European Commission has indicated that 90% of Europe's external trade and close to 40% of its internal trade is seaborne.²² In addition, 400 million passengers embark and disembark in European ports annually.²³ Equally impressive and not well known, 25 % of world tonnage is registered in the Member States, with 40 % of global shipping in gross tonnage under the control of companies or natural persons that are incorporated or located in the European Economic Area.²⁴ Despite the fiscal austerity programme in many EU countries and the slow recovery from global recession, the European Environmental Agency forecasts that the transport of freight by shipping is expected to grow by between 3 % and 4 % per annum over the next decade.²⁵ What is more, it also forecasts that the shipbuilding industry will grow in response to increased demand for more fuel-efficient ships fitted out with new technologies to reduce costs and the environmental footprint of the sector.²⁶

The relative upbeat nature of these forecasts is not all pervasive and many industry representative bodies have voiced their concerns about the challenges faced by the industry in the years ahead. The European Community Shipowners' Association (ECSA), for example, has pointed out that high operational costs, over capacity and poor economic prospects, continue to make global and European markets extremely difficult for the provision of shipping services.²⁷ The industry also asserts that further impediments to growth arise from the ever-increasing regulatory burden imposed on shipping with a view to achieving IMO and European environmental and maritime safety standards.²⁸

Such difficulties are sometimes exacerbated by the increasing scope for conflict between the shipping sector and other uses of the marine environment such as offshore wind energy development. The impact of offshore development such as wind farms in the vicinity of busy shipping lanes has been highlighted by the Baltic and International Maritime Council (BIMCO) in their correspondence with the European

²¹ This figure relates only the vessels that are tracked by EMSA using AIS in accordance with the requirements of Directive 2002/59/EC, as since amended. See, European Maritime Safety Agency, Annual Report 2012, (Lisbon: ENSA, 2013) at 35.

²² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Strategic goals and recommendations for the EU's maritime transport policy until 2018, COM(2009) 8 final, Brussels, 21.1.2009.

²³ *Ibid* at 2.

²⁴ In addition to the 28 EU Member States, Iceland, Liechtenstein and Norway are part of the EEA. These countries have adopted the majority of the EU rules on the internal market apart from those on fisheries and agriculture. Information on the size of the shipping fleet controlled from EEA States is available from the ECSA Annual Report 2011-2012 (Brussels: ECSA, 2013) at p. 9. Available at: http://www.ecsa.eu/files/Annual_report_ECSA_2012.pdf.

²⁵ European Environment agency, Marine messages, Our seas, our future — moving towards a new understanding (Copenhagen: EPA, 2014) at 18.

²⁶ *Ibid*.

²⁷ ECSA Annual Report 2011-2012 (Brussels: ECSA, 2013) at 9-10.

²⁸ *Ibid*.

Commission regarding the proposed regulatory measures on spatial planning set down in the Draft MSP Directive.²⁹ Their concerns are not remarkable as European shipping interests have always defended robustly navigation rights and associated freedoms, as well as easy access to distance markets, which are central to the success of EU trade and competition policies. The ECSA has suggested that environmental measures ought to be adopted at a multilateral level under the auspices of the IMO and not at the level of a regional integration organization, such as the EU.³⁰ That said, the European institutions have adopted a comprehensive regulatory code that addresses sub-standard shipping, reducing the risk of maritime incidents, as well as mitigating the environmental footprint of the shipping sector.³¹ In line with EU primary and secondary law, moreover, the EU has adopted extensive marine environmental measures that are applicable to maritime spaces both within and beyond the jurisdiction of the Member States. Periodically, the European institutions publish comprehensive reports on the effectiveness of these measures and on the status of the marine environment, which more often than not make a pretty disheartening read.

Status of the European marine environment, the ecosystem approach and the MSF Directive

The European marine environment is diverse and subject to many pressures resulting from human interactions with the sea. In particular, the effects of climate change, over-fishing, land-based pollution of the coastal environment, litter, as well as the predominance of new alien and invasive species, continue to expose the ineffectiveness of EU policies and legislation in curbing the degradation of the marine environment. This trend is clearly evident if one takes a look at the European Commission's first assessment and guidance report on the implementation of the MSF Directive, which concludes that the European regional seas are not in a "good environmental status" due to catastrophic depletion of fish stocks in the Atlantic, Mediterranean and Black Seas.³² This is compounded by high levels of eutrophication in the Baltic and Black Seas, widespread evidence of marine litter in the North Sea and Atlantic, as well as the loss or depletion of marine species, habitats and fragile ecosystems, that are all purportedly protected under nature conservation instruments.³³

The reports of the European Environmental Agency are no better and describe the "worrying state" of

²⁹ See BIMCO contribution to the consultation on MSP and ICZM, sent on 19 May 2011, para. 55. BIMCO is the one of the world's leading international shipping associations and represents the interests of shipowners, operators, managers, brokers and agents.

³⁰ ECSA Annual Report 2011-2012 (Brussels: ECSA, 2013 at p. 58.

³¹ Discussed *infra*.

³² European Commission's report on the first phase of implementation of the MSF Directive COM(2014) 97 final, Brussels, 20.02.2014

³³ *Ibid.* at 3-4.

European regional seas with sea surface temperature increasing 10 fold since 1870.³⁴ The EEA further report the disappearance of biodiversity including almost the entire population of European eel.³⁵ They note that the implementation of the MSF Directive and ecosystem-based approach are in their infancy and that much more political and legal effort is required on the part of the Member States to ensure that they discharge their regulatory obligations to protect and preserve the marine environment.³⁶

Consequently, the Draft MSP Directive should not be viewed in isolation as it is intended to supplement the Birds and Habitats Directives, which provide for the establishment of a coherent network of protected areas in the European marine environment.³⁷ Indeed, consolidating this crucial link is also one of the objectives of the MSF Directive, which provides expressly that the programmes of measures adopted by the Member States must include spatial protection measures under the Birds and Habitats Directives, as well as other marine protected areas designated by international or regional bodies.³⁸ In this regard, if shipping activity has a significant impact on the environment, Member States are compelled under the MSF Directive to work with the competent international body (ie. the IMO) in taking appropriate measures to ensure the maintenance and restoration of the integrity, structure and functioning of ecosystems.³⁹ The MSP Directive will also supplement EU instruments on strategic environmental assessment and project based assessment.⁴⁰ Significantly, the EEA have noted the absence of a “correct spatial scale” at which an ecosystem-based approach should be implemented under the MSF Directive.⁴¹ Moreover, they have suggested, “the appropriate scale should be determined by the connections between ecosystem features and human activities.”⁴²

According to this analysis, Member States have to consider pooling their efforts and to grasp the underlying premise that ecosystem-based management entails a number of trade-offs between policy objectives,

³⁴ European Environmental Agency, “Marine messages, Our seas, our future — moving towards a new understanding” (Luxembourg: EEA, 2014).

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L 206/7, 22.7.1992; Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, O.J. L 103/1, 25.04.1979. Subsequently codified by Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds OJ L 20/7, 26.1.2010. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L 206/7, 22.7.1992. Consolidated version published on 1.01.2007. There is a substantial volume of case law in the European Court of Justice on both directives.

³⁸ Article 13(4) of Directive 2008/56/EC.

³⁹ Article 13(4) of Directive 2008/56/EC.

⁴⁰ Council Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197/30, 21.7.2001; codified version of Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26/1, 28.1.2012.

⁴¹ European Environmental Agency, “Marine messages, Our seas, our future — moving towards a new understanding” (Luxembourg: EEA, 2014).at 8.

⁴² *Ibid.*

sectors and spatial boundaries. Instructively, ecosystem-based management is defined by the EEA to mean “an integrated approach to management that considers the entire ecosystem including humans. The goal is to maintain ecosystems in a healthy, clean, productive and resilient condition, so that they can provide humans with the services and benefits upon which we depend.”⁴³ Furthermore, the EEA is of the view that this is the antithesis of the traditional EU regulatory approach, which addresses single concerns such as maritime sectors (fisheries or shipping), activities (renewable energy), or individual species or populations (cetaceans). Plainly, ecosystem-based management is best introduced or facilitated through a system of marine / maritime spatial planning.

What is marine / maritime spatial planning?

There are many definitions of what constitutes maritime/marine spatial planning in the specialist literature.⁴⁴ There is no express reference to spatial planning in the LOS Convention but this has not appear to have deterred many coastal States worldwide including Belgium, the Netherlands, Germany, the United States and Canada,⁴⁵ as well as numerous international bodies including UNESCO and the OECD, from promoting and implementing maritime spatial planning in some shape or form.⁴⁶ In Europe, there have also been several MSP and integrated coastal zone management initiatives taken by the regional seas bodies, as can be seen from the information shown on Table 2 below.⁴⁷ The mandate of the latter bodies is however extremely limited and as a consequence there are legal constraints in establishing appropriate regional measures governing all aspects of spatial planning in the marine environment.

In the United States, Executive Order 13547, *Stewardship of the Ocean, Our Coasts, and the Great Lakes*, sheds considerable light on the subject matter of spatial planning in that it provides:

⁴³ The EEA report cites K. McLeod, H. Leslie, (eds.), *Ecosystem-Based Management for the Oceans* (Washington: Islands Press, 2009).

⁴⁴ On the policy literature, see, *inter alia*: F. Maes, “The international legal framework for Marine Spatial Planning” (2008) 32 *Marine Policy* 797-810; F. Douvere, “The importance of marine spatial planning in advancing ecosystem-based sea use management” (2008) 32(5) *Marine Policy* 762-771; J. Taussik, “The opportunities of spatial planning for integrated coastal zone management” (2007) 31(5) *Marine Policy* 611- 618..

⁴⁵ See *inter alia*: C. Ehler, Myths of Marine Spatial Planning, (2012) 13 *Marine Ecosystems and Management*, 5-7; F. Douvere, C. Ehler, “Marine spatial planning: identifying the critical elements for success” in E. Ciccotelli, C. Benigno, eds. *Spatial Planning: Strategies, Developments and Management* (Hauppauge: Nova Sciences Publishers, 2012) at 233-250; F. Douvere, C.N. Ehler, “New perspectives on sea use management: Initial findings from European experience with marine spatial planning” (2009) 90 *Journal of Environmental Management* 77– 88; F. Douvere *Marine spatial planning: Concepts, current practice and linkages to other management approaches* (Ghent: Ghent University, 2010) 124 pp.

⁴⁶ See D. Rothwell, T. Stephens, *The International Law of the Sea* (Oxford and Portland, Oregon: Hart Publishing, 2010) 465-467.

⁴⁷ Source: Impact Assessment, Accompanying the Proposal for a Directive of the European Parliament and of the Council establishing a framework for maritime spatial planning and integrated coastal management, COM(2013) 133 final, SWD(2013) 65 final, Brussels, 12.3.2013, at 30-31.

“for the development of coastal and marine spatial plans that build upon and improve existing Federal, State, tribal, local, and regional decision making and planning processes. These regional plans will enable a more integrated, comprehensive, ecosystem-based, flexible, and proactive approach to planning and managing sustainable multiple uses across sectors and improve the conservation of the ocean, our coasts, and the Great Lakes.”⁴⁸

Instructively, the Executive Order defines "coastal and marine spatial planning" to mean:

“...a comprehensive, adaptive, integrated, ecosystem-based, and transparent spatial planning process, based on sound science, for analyzing current and anticipated uses of ocean, coastal, and Great Lakes areas. Coastal and marine spatial planning identifies areas most suitable for various types or classes of activities in order to reduce conflicts among uses, reduce environmental impacts, facilitate compatible uses, and preserve critical ecosystem services to meet economic, environmental, security, and social objectives. In practical terms, coastal and marine spatial planning provides a public policy process for society to better determine how the ocean, our coasts, and Great Lakes are sustainably used and protected -- now and for future generations.”⁴⁹

The importance of biological diversity of the oceans is noted in the Executive Order, which also highlights the exercise of “rights and ...duties in accordance with applicable international law, including respect for and preservation of navigational rights and freedoms, which are essential for the global economy and international peace and security”.⁵⁰ The latter statement is unequivocal and again it is interesting to note that the US policy on MSP is inextricably linked with the promotion of environmental sustainability, international trade, as well as with maritime security. Crucially, navigation freedoms are a central aspect of US policy and solidly embedded in the ocean management paradigm foreseen and advanced by means of the Executive Order.

Coastal State practice in the EU supports the view that that MSP is a process leading to the development and implementation of maritime spatial plan(s) by the Member States.⁵¹ Such plans identify and determine the range of maritime activities that ought to take place in a given spatial area. They also take into consideration the outcomes of stakeholder consultation and reflect an integrated ecosystem-based approach to management decisions with a view to achieving the desired economic, ecological and social objectives. Put another way, first and foremost, MSP is a strategic planning tool to control development and other

⁴⁸ Executive Order 13547, *Stewardship of the Ocean, Our Coasts, and the Great Lakes*, 19 July 2010.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Most notably, the practice of Belgium, Germany, Greece, France, Malta, the Netherlands, Portugal and Slovenia, and perhaps to a lesser extent the UK. See COM(2013) 133 final, SWD(2013) 65 final, Brussels, 12.3.2013, at 27-28.

activities that take place in the marine environment.⁵²

Controlling and influencing the land-sea interactions are of fundamental importance if ecosystem-based management is to be implemented successfully by reliance on spatial management measures. That said, MSP can be distinguished from terrestrial planning of the land environment on a number of grounds: first, it has more complex spatial dimensions that encompass the seabed, the water column, the surface of the ocean, and the airspace in the territorial sea and archipelagic waters; second, ocean space is not subject to private ownership but remains in principle a public resource; third, the rights and jurisdictions of States vary considerable in different maritime jurisdictional zones in the form of the obligations and entitlements imposed on the flag State, coastal State and port State.⁵³

To this assessment, we should also add that the principal jurisdictional framework for regulating and controlling human interactions with the ocean is well established at a multilateral level in the form of the LOS Convention and related international and regional agreements. This has many implications for the rolling-out of maritime spatial plans at national levels in the EU. In marked contrast to town and county planning, for instance, EU Member States are required to give “due regard” to the rights and duties of other States in exercising its rights in the EEZ.⁵⁴ Similarly, the transnational nature of international trade and shipping is perhaps one of the best ways to distinguish the activities that are subject to marine spatial planning from the subject matter of its terrestrial equivalent. Another point of distinction is that MSP is very much science driven and the Draft MSP Directive places a clear emphasis on the collection of environmental, economic, and social data for planning purposes, with these requirements extending to the acquisition of oceanographic and geomorphological data.⁵⁵

The marine environment is exceptionally dynamic and is likely to remain so as a result of the extreme weather events associated with the effects of climate change. Furthermore, regulatory practice and policy initiatives in both the US and the EU indicates that MSP is very much informed by the ecosystem-approach to marine resource management with a view to ensuring that the natural environment is not compromised by the anthropogenic impacts of human activities. One should not take this distinction too far as circumstances will often necessitate the adoption of a coordinated approach to MSP and to terrestrial planning with a view to ensuring that the two systems are closely linked. In particular, the land sea-interface is crucial for the successful planning of port infrastructure and other physical developments in the coastal environment and this is going to be achieved at a pan-European level through the adoption of integrated coastal management strategies.

⁵² Impact Assessment, Accompanying the Proposal for a Directive of the European Parliament and of the Council establishing a framework for maritime spatial planning and integrated coastal management, COM(2013) 133 final, SWD(2013) 65 final, Brussels, 12.3.2013.

⁵³ See A. Slater, “What is marine planning?” (2012) 14(1) *Environmental Law Review* 1-6.

⁵⁴ Article 56(2), LOS Convention.

⁵⁵ Article 10 of the Draft MSP Directive.

Table 2: MSP and ICZM activities undertaken under European Regional Seas Conventions.⁵⁶

Regional Seas Convention	MSP and/or ICZM Guidance?	Regional MSP and/or ICZM forum?	Non-Binding MSP and/or ICZM legislation?	Binding MSP and or ICZ M legislation?
OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic	No, but the need for OSPAR measures is under consideration	Yes, the Environmental Impacts of Human Activities Committee	No	No
Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area	Principles, Guidance documents, on-going project (PlanBothnia)	Yes, a joint Working Group with VASAB on MSP, HELCOM-GIS webpage	Yes, Recommendations for both MSP and ICZM	No Yes, for ICZM applicable in national waters
Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution	Yes	Yes, regional co-operation as a part of the protocol implementation	No	Yes, for ICZM applicable in national waters
Convention on the Protection of the Black Sea Against Pollution	Yes	Yes	No	No

Form and legislative history of MSP in the EU

The EU has a sophisticated array of secondary legislation and other measures in the form of regulations, directives and decisions, as well as recommendations, to give effect to European policies pertaining to marine and oceanic matters.⁵⁷ For those that are unfamiliar with the European legal order, it is important to note that directives are unique legal instruments, which are legally binding in relation to the results to be achieved, but leave considerable discretion to the national authorities in the Member States in selecting the

⁵⁶ Source European Commission, COM(2013) 133 final, SWD(2013) 65 final, Brussels, 12.3.2013.

⁵⁷ Article 288, Treaty on the Functioning of the European Union

most appropriate form and methods on how to go about implementation.⁵⁸ This flexibility means, on the one hand, that directives are a particularly suitable instrument to harmonise policy or thematic areas such as those associated with maritime affairs, which are often inherently complex or legally multifaceted. On the other hand, the requirements set down in a directive must be transposed into national law and Member States have not always been fastidious in meeting their European obligations in this regard, particularly when it comes to meeting EU obligations to protect and preserve the marine environment. In view of the diverse practice of the Member States in relation to the licensing and planning of offshore activities, it comes as no surprise that the European institutions selected this means of regulatory intervention (a directive) to set out in rather general terms what needs to be done in relation to MSP and coastal zone management. This broad scheme set down in the Draft MSP Directive will have to be followed by more detailed measures, normally legislation, in the Member States.

The origins of the Draft MSP Directive may be traced back to EU's Integrated Maritime Policy and a number of specialist publications by the European Commission including a so-called *Roadmap for Maritime Spatial Planning: Achieving Common Principles in the EU*.⁵⁹ The latter defined MSP as: "a process that consists of data collection, stakeholder consultation and the participatory development of a plan, the subsequent stages of implementation, enforcement, evaluation and revision."⁶⁰ Importantly the *Roadmap* notes the fundamental importance of the principle of freedom of navigation under the LOS Convention, which it points out is conditioned or balanced by rules and standards on maritime safety and the protection of the marine environment.⁶¹ The role of the International Maritime Organisation (IMO) in adopting the appropriate rules and standards for shipping and maritime transport, such as traffic separation schemes, is fully acknowledged, as is the primacy of international agreements including the Protocol to the London Convention, which regulates dumping at sea.⁶²

The *Roadmap* was followed by a second Communication mapping out the achievements and the scope for the future development of MSP in the EU.⁶³ Specifically, shipping is mentioned as one of the areas where EU Member States ought to have a joint vision based upon common interests. In many respects, the Communication sets out a far more coherent view of the relevance of maritime spatial planning to the future growth and development of the European shipping industry in that it acknowledges that maritime transport is regulated at a multilateral level, through various international agreements including the LOS Convention, as well as by IMO Conventions and Resolutions.⁶⁴ At the same time, the Communication notes that the EU had adopted Directive 2002/59/EC, which establishes a vessel traffic monitoring and

⁵⁸ *Ibid.*

⁵⁹ COM(2008) 791 final, Brussels, 25.11.2008.

⁶⁰ *Ibid.*, at 3.

⁶¹ *Ibid.*, at 6

⁶² *Ibid.*, at 7.

⁶³ COM(2010) 771 final, Brussels, 17.12.2010.

⁶⁴ *Ibid.*, at 8.

information system in the Member States.⁶⁵ In the words of the European Commission, MSP can support the implementation of this Directive by ensuring the coordination of the related spatial measures.⁶⁶ Subsequently, the European Commission undertook extensive stakeholder consultation with the public and specialist interest groups, revealed that these were largely supportive of the introduction of spatial planning to address trans-boundary activities such as shipping, fishing, seabed cables, offshore energy, and for the purpose of protecting and preserving the marine environment.⁶⁷ In 2011, the European Commission publishes a study on the economic effects of MSP, which identified a number of benefits that could be derived from its introduction including enhancing co-ordination of decision-making, legal certainty for stakeholders, greater coherence with other planning systems including coastal zone management.

Given the complexity of the issues to be addressed and in light of the diversity of Member State practice in relation to spatial planning matters on land and at sea, the European Commission published a proposal for a Directive of the European Parliament and the European Council establishing a framework for maritime spatial planning and integrated coastal management in March 2013.⁶⁸ The Commission expressed the view that the selection of this particular form of instrument, that is to say a directive, will allow Member States to shape the national transposition measures to reflect their economic, social and environmental policies, as well as their distinctive legal traditions.⁶⁹ The Draft MSP Directive is at the time of writing following the law-making procedures in the European institutions and will require the approval of both the Council and Parliament before it passes into law. This process may take-up to two years to complete and there are many opportunities for the introduction of amendments and revisions to the Commission's initial legislative proposal. Notably, the European Parliament put forward many amendments to the proposal at its first reading in December 2013 and referred the proposal back to the competent committee for re-consideration prior to voting, which was postponed to a later plenary session in 2014. Some of the proposed amendments tables by the Parliament are discussed below.⁷⁰

Objectives of the Draft MSP Directive

⁶⁵ Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, OJ L 208/10, 05.08.2002.

⁶⁶ COM(2010) 771 final, Brussels, 17.12.2010 at 8.

⁶⁷ Summary report available at:
http://ec.europa.eu/dgs/maritimeaffairs_fisheries/consultations/msp/summary-results-of-msp-questionnaire_en.pdf

⁶⁸ COM(2013) 133 final. Brussels, 12.3.2013.

⁶⁹ *Ibid.*

⁷⁰ See, See European Parliament: Legislative Observatory. 013/0074(COD) - 12/12/2013. Procedural file on maritime spatial planning and integrated coastal management.

The Draft MSP Directive, similar to the United States Executive Order 13547, *Stewardship of the Ocean, Our Coasts, and the Great Lakes* as seen above, does not have a single purpose and is intended to address a whole range of concerns that impinge upon maritime transport, offshore development and the protection of the marine environment. Noticeably, the importance of avoiding conflicts between different commercial sectors regarding the use of maritime space is the principal purpose of the Draft MSP Directive. In this respect, the Directive aims to contribute to a number of specific objectives, which are extremely broad in ambit in so far as they include: promoting energy security; the development of alternative sources of marine energy; fostering the growth of fisheries and aquaculture; improving environmental protection in line with the objectives of various EU secondary legislation; and combating the effects of climate change.⁷¹ At the heart of these objectives, as mentioned previously, is the goal of improving maritime transport safety, access to ports, and the provision of shipping routes.⁷² On a similar note, the European Parliament highlighted the importance of establishing a framework that promotes the growth of maritime and coastal economies and the sustainable use of marine and coastal resources.⁷³ Moreover, the European Parliament expressed the view that MSP and ICM should contribute to the following objectives: “promoting multimodal links and sustainability; fostering the sustainable development of the fisheries sector and sustainable growth of the aquaculture sector; ensuring the preservation, protection and improvement of the environment through a representative and coherent network of protected areas and reduce and prevent marine and coastal areas pollution risks; and protect vulnerable coastal areas.”⁷⁴

An obvious and somewhat surprising omission in both the original proposal from the Commission and the amendments tabled by the Parliament in December 2013 is the absence of any specific reference of the importance of international law rights and duties in relation to shipping, including respect for and the preservation of navigational rights and freedoms under the 1982 LOS Convention. Indisputably, this ought to be one of the objectives of the Draft MSP Directive if one is to take into consideration the fundamental importance of the free flow of shipping for the future prosperity and growth of the European economy.

Rationale underpinning the MSP proposal

The Draft MSP Directive *raison d'être* can be gleaned from the above-mentioned objectives. Interestingly, the regulatory impact assessment of the Draft MSP Directive published by the European Commission identified several problems pertaining to the “inefficient and unbalanced use of maritime and coastal

⁷¹ Article 5, Draft MSP Directive.

⁷² *Ibid.*

⁷³ See European Parliament: Legislative Observatory. 013/0074(COD) - 12/12/2013 Text adopted by Parliament, partial vote at 1st reading/single reading.

⁷⁴ See European Parliament: Legislative Observatory. 013/0074(COD) - 12/12/2013 Text adopted by Parliament, partial vote at 1st reading/single reading.

space”, the “suboptimal exploitation of economic potentials”, and insufficient adaptation to climate change, as some of the principal reasons underpinning the need for EU legislative intervention in the domain of MSP.⁷⁵ Indeed, the rationale underpinning the Draft MSP Directive is founded ostensibly upon the belief that competition and conflicts pertaining to the use of maritime space is undermining the commercial development of various activities that are undertaken in the coastal environment and further offshore. In particular, competition between various sectors such as shipping, offshore energy, ports development, fisheries and aquaculture, as well as environmental considerations, are perceived as necessitating a more efficient planning framework for the use of maritime space.⁷⁶ Moreover the Draft MSP Directive is intended to give effect to a number of discrete European policies and strategies including: the Europe 2020 Strategy for smart, sustainable and inclusive growth;⁷⁷ the policy on the growth of maritime industries (referred to as “Blue Growth”);⁷⁸ the so-called “Motorways of the Sea”; the EU’s integrated maritime policy; as well as the common fisheries policy. Also, the Draft MSP Directive when adopted will complement many EU regulatory instruments that are applicable to the marine environment including the Renewable Energy Directive, as well as the Habitats and Birds Directives. Within this context, the Draft MSP Directive is aimed at introducing practical mechanisms in the form of planning tools that will facilitate Member States in discharging their various duties under the LOS Convention.⁷⁹

As mentioned above, there is no express statement in the Draft MSP Directive about the importance of preserving navigational rights and freedoms or how such rights are essential for preserving the EU’s economic prosperity, as well as its interest in promoting global stability, peace and security. This omission is all the more surprising as the importance of such rights were highlighted indirectly in the regulatory impact assessment, which called for the coordination of planning activities to avoid conflicts between shipping and other uses of the marine environment.⁸⁰ The assessment noted that shipping companies often contest decisions and engage in expensive legal redress regarding the location or adjustment of shipping lanes and navigation routes, and related port and infrastructural developments.⁸¹ The need to coordinate Member State actions in relation to transnational transport routes and to work through the good offices of the IMO are undoubtedly fundamental to avoiding conflict between maritime transport and other sectors. Apart from setting down a requirement that Member States must take maritime transport routes into consideration in their maritime spatial plans, there is little else of substance regarding navigation rights and freedoms in the Draft MSP Directive as currently presented.⁸² An obligation is placed on Member States,

⁷⁵ COM(2013) 133 final, SWD(2013) 65 final, Brussels, 12.3.2013, at 14-30.

⁷⁶ COM(2008) 791 final, Brussels, 25.11.2008, at 2.

⁷⁷ COM(2010) 2020 final.

⁷⁸ COM(2013) 133 final, p.6.

⁷⁹ Recital 7, Preamble, Draft MSP Directive.

⁸⁰ COM(2013) 133 final, SWD(2013) 65 final, Brussels, 12.3.2013, at 15-16.

⁸¹ *Ibid.*

⁸² Article 7(2)(c), Draft MSP Directive.

however, to take “into account” issues of a transnational nature and to ensure that their plans and strategies are coherent and coordinated with other Member States (emphasis added).⁸³

Normative justification

Apart from conflict avoidance and resolution, the normative methodology advanced by the Draft MSP Directive is aimed at implementing an ecosystem-based approach to manage the cross-boundary activities that take place in the marine environment.⁸⁴ This accords fully with the scheme of environmental protection set down by the MSF Directive, which aims to achieve good environmental status of all European marine waters by 2020.⁸⁵ Indicatively, “sustainable growth”, “sustainable use” and “sustainable management” of marine and coastal resources, as well as in relation to the maritime economies of the Member States, are three of the thematic themes that permeate the Draft MSP Directive. The importance of “sustainability” is also evident from the financial statement attached to the draft instrument, which emphasizes a similar theme and points out that “the ultimate objective of the proposal is to secure ...*sustainable* economic growth ...by considering the economic, social and environmental pillars of *sustainability* in line with the eco-system approach (emphasis added).”⁸⁶ Significantly, the Draft MSP Directive does not mention any of other environmental principles that are enumerated in the Treaty on the Functioning of the European Union such as the precautionary principle, pollution should be rectified at source and that the polluter should pay.⁸⁷

That said, many of the substantive and procedural provisions of the Draft MSP Directive reflect the principle of integration under the Treaty, which requires the incorporation of environmental considerations into all EU sector policies such as energy, fisheries, transport and communications, with a view to achieving sustainable development.⁸⁸ Indeed, one of the *leitmotifs* of the Draft MSP Directive is to improve the integrated planning and management of maritime infrastructure and systems that run across national borders such as pipelines, seabed cables, petroleum related development, the impacts of wind farms, as well as shipping lanes in areas where there is high maritime traffic. This accords fully with the EU’s integrated maritime policy, which identifies the integrated management of various sector activities as one of the main ways to promote growth of the maritime and coastal economies in the Member States.⁸⁹ One should not ignore the natural environment when considering the utility of this paradigm, indeed the Preamble of the Draft MSP Directive points out that marine ecosystems and the services derived therefrom,

⁸³ Article 12(1) of the Draft MSP Directive.

⁸⁴ Recital 15 of the Preamble and Article 5 of the Draft MSP Directive.

⁸⁵ Article 3(5) of Directive 2008/56/EC.

⁸⁶ COM(2013) 133 final, p.6.

⁸⁷ Article 191(2), TFEU.

⁸⁸ Article 11, TFEU.

⁸⁹ COM(2007) 575 final.

if integrated into planning and management decisions concerning the use of maritime space and the coastal zone, are capable of delivering “substantial benefits in terms of food production, recreation and tourism, climate change mitigation and adaptation, shoreline dynamics control and disaster prevention.”⁹⁰ The integrated management approach is of course foursquare with recent developments in international law and the move away from the zonal management approach which is clearly linked with the spatial distribution of the rights and duties of States under the 1982 LOS Convention.⁹¹ As noted in one significant study, however, the purpose of integrated management is not to replace one system with another but to resolve issues that are essentially transboundary in geographical and material scope and to provide appropriate mechanisms and procedures to ensure that this done in an expedient and efficient manner.⁹² Indeed, there is considerable scope for the adoption of such an approach under the LOS Convention.

Which legal actors are subject to the Draft MSP Directive?

There are many interested parties concerned with activities that take place in the marine environment including public and private bodies in the Member States, bodies with international legal personality, non-governmental organisations, economic operators, as well as various other categories of stakeholders. That said, the principal legal actors under the scheme advanced by the Directive are quite clearly EU coastal States, and to a lesser extent, third countries that border the European regional seas. Somewhat predictably and in line with the division of legal competence under the EU Treaties, Member States remain fully responsible for agreeing the substance of the plans and strategies that appertain to land and sea areas under their sovereignty and jurisdiction. They also retain full discretion regarding the apportionment of maritime space for different purposes, subject of course to the constraints imposed by international law on matters such as navigation rights. Moreover, the Draft MSP Directive does not appear to intrude upon the competence of national bodies to determine oceans-related matters. Such as the utilization of natural resources. Indeed, as expressly stated in the Preamble, national bodies are fully responsible for the “full cycle of problem identification, information collection, planning, decision-making, implementation,” as well as ensuring compliance with the national plan and strategies.⁹³

The Draft MSP Directive does not appear to place any great onus on Member States to take specific management measures, apart from preparing an inventory of the actions that are required to be taken to “prevent erosion and manage accretion, adapt to the effects of climate change, combat coastal and marine

⁹⁰ Recital 14, Preamble, Draft MSP Directive.

⁹¹ See UN General Assembly Resolution 60/30, Distrib. 8 March 2006.

⁹² See. Y. Tanaka, *A Dual Approach to Ocean Governance*, (Farnham, Ashgate, 2010) 16-25, especially 21-25.

⁹³ Recital 13, Preamble, Draft MSP Directive.

litter, develop green infrastructure and help prevent natural disasters”.⁹⁴ Likewise it does not dwell on the important functions discharged by international bodies in relation to the marine environment such as the regional seas bodies under the OSPAR, HELCOM and Barcelona Conventions. On the other hand, there is some emphasis on the collection of information about the marine environment and this will necessitate the consolidation of the nexus between the role of national bodies such as the regional seas commissions as well as specialist scientific bodies such as ICES. The European Parliament has also advocated for engagement with the relevant stakeholders and public so that their views are taken into account regarding the making and varying of plans and strategies by the Member States.⁹⁵

In general, one can conclude that all sectors concerned with maritime affairs will come within the planning and management scheme that are adopted by the Member States pursuant to the Draft MSP Directive. In this respect, the instrument is intended to complement many other EU measures that are much more sector specific such as those concerning the maritime transport sector. Conversely, we can see some noticeable differences between the Draft MSP Directive and the approach taken by the EU to address specific sector problems such as vessels source pollution.

A different approach under the EU Directive on ship source pollution

Noticeably, there are a number of questions that catch the eye about the extent of EU legislative and enforcement jurisdiction under the Draft MSP Directive, particularly when it is compared to the EU Directive on Ship Source Pollution.⁹⁶ The latter was first adopted in 2005 and has since been amended on a number of occasions. Perhaps it is best to start by pointing out that the EU transposes many of the international agreements adopted by international bodies such as the IMO by means of secondary legislation that binds the Member States. EU law is often drafted with a view to bolstering international measures and in response to the threats posed by shipping to marine biodiversity and the European coastal environment. These difficulties were highlighted in a dramatic and catastrophic fashion by the loss of the *Erika* in 1999 and again by the *Prestige* 2001. Similar to the loss of *Torrey Canyon* on the south coast of the United Kingdom in 1967, these events had a profound and long-lasting influence on the maritime policies pursued by European coastal States at the IMO and within the framework of EU law.⁹⁷ In

⁹⁴ Articles 5 and 8, Draft MSP Directive.

⁹⁵ *Ibid*

⁹⁶ 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, OJ L 255, 30.9.2005; Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, OJ L 280/52, 27.10.2009.

⁹⁷ On vessel source pollution and tankers, see, M. Nordquist, “International Law Governing Places of Refuge for Tankers threatening Pollution of the Coastal Environments” in T. Malick Ndiaye, R. Wolfrum

particular, the EU through its Member States has actively sought to push forward a tougher regulatory agenda addressing the contributory causes of vessel source pollution at the IMO.⁹⁸ In parallel, the EU has adopted a comprehensive package of legislative that impinges upon navigation rights and freedoms as codified in the 1982 LOS Convention, including the application of the criminal code to vessels or persons responsible for vessels source pollution.⁹⁹

In 2009, for instance, as a part of the 3rd Maritime Safety Package, the European Parliament and Council adopted the "New Inspection Regime" pursuant to the Paris MOU on Port State Control, which applies in all of the EU coastal States.¹⁰⁰ Specific legislative measures have also been adopted by the EU concerning: compliance with flag state requirements;¹⁰¹ classification societies;¹⁰² trafficking monitoring and double hull requirements (both discussed further below);¹⁰³ port reception facilities for ship-generated waste and cargo residues;¹⁰⁴ accident investigation, liability of carriers and insurance.¹⁰⁵ Clearly, it is well beyond the scope of this paper to examine any of these instruments in any detail. A few cursory remarks can however be made regarding the extent of EU legislative and enforcement jurisdiction under the EU Directive on Ship Source Pollution that indicate that it is fundamentally different from the regulatory approach advanced by the MSP Directive.

First, the personal scope (*ratione personae*) of the EU Directive on Ship Source Pollution is much wider than the spatial management measures proposed under the Draft MSP Directive in so far as the former is

(ed.) *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Leiden/Boston, Martinus Nijhoff, 2007) 497-519.

⁹⁸ See V. Frank, "Consequences of the Prestige Sinking for European and International Law" (2005) 2(1) *IJMCL* 1-64.

⁹⁹ Directive 2009/123/EC on the definition of ship- source pollution offences committed by natural or legal persons, the scope of their liability and the criminal nature of penalties that can be imposed for such criminal offences by natural persons, amending Directive 2005/35/EC, OJ L 280/52, 27.10.2009.

¹⁰⁰ Directive 2009/16/EC of 23 April 2009 on port State control, OJ L131/57, 28.05.2009.

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¹⁰² Directive 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations, OJ L131/47, 28.05.2009; Regulation (EC) No 391/2009 of 23 April 2009 on common rules and standards for ship inspection and survey organisations, OJ L131/11, 28.05.2009.

¹⁰³ Directive 2009/17/EC of the European Parliament and the Council of 23 April 2009 amending Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system, OJ L131/101, 28.05.2009.

¹⁰⁴ Directive 2009/21/EC of the European Parliament and of the Council of 23 April 2009 on compliance with flag State requirements, OJ L131/132, 28.05.2009.

¹⁰⁵ Directive 2009/18/EC of 23 April 2009 establishing the fundamental principles governing the investigation of accidents in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC of the European Parliament and of the Council, OJ L131/114, 28.05.2009; Regulation (EC) No 392/2009 of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents, OJ L131/14, 28.05.2009; Directive 2009/20/EC of 23 April 2009 on the insurance of shipowners for maritime claims, OJ L131/128, 28.05.2009.

targeted at flag States, ship owners and charterers, classification societies, port States and coastal States, with a view to ensuring that all of these entities comply their pollution obligations under national, EU and international law. In particular, it is aimed at ensuring that all persons responsible for discharges are subject to adequate penalties with a view to reducing and abating pollution by ships.¹⁰⁶ Moreover, this instrument applies to discharges of polluting substances “from any ship, irrespective of its flag, with the exception of any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service.”¹⁰⁷

The material scope (*ratione materiae*) of the EU Directive on Ship Source Pollution is far-reaching in so far as the term “ship” is defined to mean a “seagoing vessel, irrespective of its flag, of any type whatsoever operating in the marine environment and shall include hydrofoil boats, air-cushion vehicles, submersibles and floating craft.”¹⁰⁸ As noted above, however, naval ships are excluded from the scope of the Directive and it must be assumed by implication that this derogation extends to naval submarines or other underwater vehicles on government service in line with definition of warships under the LOS Convention.¹⁰⁹ A similar approach is evident with respect to some aspects of the MSP Directive as it provides explicitly that it does “not apply to activities the sole purpose of which is defence or national security.”¹¹⁰ Each Member State shall, however, strive to ensure that such activities are conducted in a manner compatible with the objectives of the MSP Directive.

The geographical scope (*ratione loci*) of the EU Directive on Ship Source Pollution is also broader than the Draft MSP Directive in so far as they are applicable to discharges of polluting substances into the following maritime jurisdictional areas: “(a) the internal waters, including ports, of a Member State, in so far as the MARPOL 73/78 regime is applicable; (b) the territorial sea of a Member State; (c) straits used for international navigation subject to the regime of transit passage, as laid down in Part III, section 2, of the LOS Convention, to the extent that a Member State exercises jurisdiction over such straits; (d) the exclusive economic zone or equivalent zone of a Member State, established in accordance with international law; and (e) the high seas.”¹¹¹ Within the overall scheme of protection afforded by the EU Directive on Ship Source Pollution, Member States are required to ensure that vessel source pollution is regarded as an infringement if committed with intent, recklessly or by serious negligence.¹¹² Again in line with the case law of the Court of Justice of the European Union, offences must be subject to effective, proportionate and dissuasive penalties, which may include criminal or administrative sanctions.¹¹³

¹⁰⁶ Article 1 of Directive 2005/35/EC, OJ L 255/11, 30.09.2005.

¹⁰⁷ Ibid.

¹⁰⁸ Article 2(4) of Directive 2005/35/EC, OJ L 255/11, 30.09.2005.

¹⁰⁹ Article 29 of the LOS Convention.

¹¹⁰ Article 2(2) of the Draft MSP Directive.

¹¹¹ Article 3 of Directive 2005/35/EC, OJ L 255/11, 30.09.2005.

¹¹² Article 4 of Directive 2009/123/EC.

¹¹³ Case 68/88 *Commission v Greece* [1989] ECR 2965, paragraph 23.

Most significantly, the Directive is enforceable on the basis of port State measures and only where there is clear and objective evidence in relation to offences in the territorial sea or the EEZ can coastal States institute enforcement proceedings that include detaining a ship.¹¹⁴ Instructively, the EU Directive on Ship Source Pollution provides that Member States must apply its provisions without “any discrimination in form or in fact against foreign ships and in accordance with applicable international law, including Section 7 of Part XII of the 1982 LOS Convention, and that they shall promptly notify the flag State of the vessel and any other State concerned of any measures invoked under its terms.”¹¹⁵

To finish, the case law of the Court of Justice of the EU sheds little light on the operation of the EU Directive on Ship Source Pollution from the point of view international obligations. In particular, whether it is lawful for the EU to legislate for third country vessels navigating in the EEZ or on the high seas.¹¹⁶ Most notably in a somewhat controversial judgment, the Court of Justice held that it could only review the validity of an EU measure such as the EU Directive on Ship Source Pollution in the light of the rules of international law, subject to two conditions: firstly, the EU must be bound by those rules; and secondly, the nature and the broad logic of the act of international law in question does not preclude such an examination. In relation to the case at hand, the Court noted that the EU was not party to the MARPOL 73/78 and therefore it was not willing to review the legality of EU measures in light of the provisions therein. More surprisingly, it concluded that the 1982 LOS Convention does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States. Accordingly, the Court did not review the contested provisions in light of the LOS Convention. A golden opportunity thus appears to have been missed by the Court to explore the scope for the EU to regulate environmental matters that impinge upon navigation rights and freedoms under the LOS Convention. This in turn would have clarified the latitude afforded to the EU and the Member States to encroach upon the navigation entitlements of international shipping in order to give effect to environmental objectives of the Draft MSP Directive, as well as the MSF Directive.

Reconciling competing values: EU regulation on double hull oil tankers

The proposed EU measures on maritime spatial planning are intended to provide a framework for reconciling competing values concerning the use of the maritime space. The EU has traditional been proactive in striving to balance environmental considerations with international navigation rights and this can be seen in the unilateral regulation adopted by the EU to address the safety of shipping and to reduce

¹¹⁴ Article 7(1) and 7(2) of Directive 2005/35/EC, OJ L 255/11, 30.09.2005.

¹¹⁵ Article 9 of Directive 2005/35/EC, OJ L 255/11, 30.09.2005.

¹¹⁶ See D. König, "The EU Directive on Ship-Source Pollution and on the Introduction of Penalties for Infringements: Development or Breach of International Law?" in T. Malick Ndiaye, R. Wolfrum, Ed., *Law of the Sea, Environmental Law and Settlement of Disputes* (Leiden/Boston: Martinus Nijhoff, 2007) at 767-785.

the risk of pollution from oil tankers, specifically by accelerating the phasing-in of double hull or equivalent design requirements for single hull oil tankers.¹¹⁷ The IMO had introduced the double hull requirement in response to *Exxon Valdez* by the amendment of Annex I of MARPOL 73/78 in 1992. This Annex was amended again in response to the unilateral measures adopted by the EU with a view to meeting the new target dates for the introduction of double hulls for different categories of oil tankers.¹¹⁸

Although the EU regulation is principally directed at improving the safety of shipping, one of its ancillary objectives is to mitigate the risk of damage to fauna and flora and other marine resources from the maritime transport of hydrocarbons.¹¹⁹ In this context, it should be kept in mind that the European Commission has pointed out that older ships are more prone to accident and that further regulatory action was required by the IMO to improve the safety of shipping and to prevent marine pollution.¹²⁰ Since the late 1990s, EU policy on these matters has informed the debate at the IMO and accelerated the schedule for the phasing-out of single hull oil tankers at both global and regional levels. The EU regulation is unambiguous in this regard as it sets down an express prohibition on oil tankers operating under the flag of a Member State, or indeed on all tankers irrespective of their flag from entering into ports or offshore terminals under the jurisdiction of a Member State, unless such a vessel is a double-hull oil tanker.¹²¹

The EU has actively sought to work with its Member States through the IMO to improve international standards on the safety of merchant vessels. Instructively, in notifying the IMO of the adoption of the regulation on single hull tankers in 2002, the EU made specific reference to article 211(3) of UNCLOS and the notification requirements set out therein.¹²² Article 211(3) of course operates “without prejudice to the continued exercise by a vessel of its right of innocent passage or to the application of Article 25(2) of the Convention”. Again with the general scheme of EU secondary legislation pertaining to vessel source pollution, the EU measures do not apply to warships, naval auxiliary or other ships owned or operated by a State and used only for government non-commercial services.¹²³ Furthermore, there are specific provisions aimed at not endangering the safety of crew or oil tankers in search of a safe haven or a place of refuge, as well as measures that are aimed at facilitating shipyards in the Member States repairing single hull oil tankers.¹²⁴

¹¹⁷ Consolidated by Regulation (EU) No 530/2012 of 13 June 2012 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers, OJ L172/3, 30.6.2012. See A. Boyle, “EU Unilateralism and the Law of the Sea” 21 (2006) *International Journal Marine and Coastal Law* 15.

¹¹⁸ Regulations 20.5 and 20.8.2 of Annex I to MARPOL 73/78.

¹¹⁹ Recital 3 of Regulation (EU) No 530/2012.

¹²⁰ Communication on a common policy on safe seas, COM(93)66.

¹²¹ Article 4(1) of Regulation (EU) No 530/2012.

¹²² Article 9 of Regulation (EC) No 417/2002.

¹²³ Article 2(2) of Regulation (EU) No 530/2012

¹²⁴ Article 8(a) of Regulation (EU) No 530/2012.

At first sight, the EU measures on single hull tankers cannot be said to be an ecosystem-based management measure, as these measures are limited to a specific sector (namely, maritime transport) and to a specific class of vessel (tankers). Nonetheless, they demonstrate the inherent tension and balancing-of-interests, as well a degree of symbiosis between the EU's transport and environmental policies. On the one hand, the former is aimed at facilitating trade including it must be assumed upholding navigation rights and freedoms. The environmental policy, on the other hand, is aimed at protecting and preserving the marine environment and at ensuring an effective regulatory regime to combat vessel source pollution. Most noticeable, the above-mentioned measures on ship source pollution and on double hull tankers were adopted within the framework of the common transport policy. Furthermore, although no mention is made to the relevant legal basis in the EU treaties, they also reflect the requirement under the Treaty on the Functioning of the European Union that environmental considerations are integrated into EU sector policies.¹²⁵ In effect, they provide the EU with a higher degree of protection at a regional level against accidental oil pollution in the event of collision or stranding of tankers. At a global level, they also resulted in the adoption of more stringent measures and tighter deadlines by the IMO. Despite the fact that the Third Maritime Safety Package (two Regulations and six Directives) is made-up of sector specific instruments,¹²⁶ they are nonetheless entirely complementary to the Draft MSP Directive in so far as the ultimate goal is to reduce the risk and incidence of environmental pollution.

Will the Draft MSP Directive impinge upon navigation rights and freedoms?

International trade is a fundamental feature of the European single market and crucial to maintaining the EU's position as a global economic power. Shipping is the lifeblood of the Union and it is thus somewhat surprising that the Draft MSP Directive is silent on how it proposes to influence the exercise of navigation rights and other freedoms in sea areas under the sovereignty and jurisdiction of the Member States including the right of innocent passage, the right of transit passage in international straits, as well as the freedom of navigation in the EEZ and on the high seas. In the fullness of time, however, it may well impinge upon the practice and procedures followed by EU coastal States in relation to the establishment of traffic separation schemes and in the adoption of other routeing measures such as traffic lanes, separation zone, roundabouts, inshore traffic zones, recommended routes, deep-water routes, precautionary areas or areas to be avoided.

The scope for EU coastal States to set down specific measures applicable to shipping in their national maritime spatial plans is clearly constrained by what is permissible under international law. More precisely, the IMO is the only international body vested with the power to establish ships' routeing systems

¹²⁵ Article 11 of the Treaty on the Functioning of the European Union.

¹²⁶ See discussion *supra*.

under the SOLAS Convention,¹²⁷ and is universally accepted and acknowledged as the “competent international organization” under the LOS Convention for this purpose. Indeed, IMO Contracting Governments such as EU Member States bear the initial responsibility for bringing forward draft proposals to the IMO concerning routing and reporting systems. Moreover, decisions about the adoption of such measures within territorial waters remain the prerogative of the coastal State who must take into account the recommendations of the IMO, as well as a number of other factors including any international navigation channels, the characteristics of particular ships and channels, as well as the density of traffic.¹²⁸ Nuclear powered ships or ships carrying hazardous cargoes may be obliged to confine their passage to designated sea lanes in accordance with the LOS Convention.¹²⁹

There is little scope for the EU or the Member States to act unilaterally in this regard as the IMO provides considerable guidance on the technical aspects of preparing proposals on ships' routing and reporting systems.¹³⁰ This process has served the interests of Member States well. Notably, the first traffic separation scheme was established in the Dover Strait in late 1960s and there are over 120 schemes in operation in the European regional seas at the time of writing. Many of these schemes do not set down mandatory requirements but are aimed at ensuring the safe and expeditious flow of shipping. Further details of the precise measures are published on navigation charts and described by the IMO in their annual publication, *Ships Routing*.¹³¹ In Europe, some of the most important traffic schemes are established for environmental purposes such as in approaches to the Scilly Isles, the Straits of Dover, and in southern part of the North Sea.

This experience suggests that the tension that sometimes arises between navigation and environmental interests in the European regional seas can be resolved by means of practical measures entailing the establishment of traffic separation schemes and the adoption of other routing measures. Indeed, as is evident from the IMO Guidelines, any proposal put forward by Contracting Governments for routing measures should contain information on environmental factors including the “prevailing weather conditions, tidal streams, and currents, and the possibility of ice concentrations.”¹³² What is more, proposals intended to protect the marine environment should have specific information as to how they will contribute to the prevention or reduction of pollution from shipping or the risk of environmental damage.¹³³

Although there is no mandatory requirement that coastal States designate sea lanes for the purpose of

¹²⁷ Regulation 10 of Chapter V of the 1974, International Convention for the Safety of Life at Sea (SOLAS), as since amended.

¹²⁸ Article 22(3) of the LOS Convention.

¹²⁹ *Ibid* Article 22(2).

¹³⁰ IMO Resolution A.572(14)), as amended. Also see, MSC/Circ.1060 Guidance Note on the Preparation of Proposals on Ships' Routing Systems and Ship Reporting Systems. Available at: <http://www.imo.org/OurWork/Safety/Navigation/Documents/1060.pdf>

¹³¹ IMO, *Ships Routing 2013*, (London:IMO, 2014).

¹³² Para 3.4(1) of the MSC/Circ.1060 Guidance Note, *op cit* note .

¹³³ *Ibid*.

enhancing the safety of navigation, the Draft MSP Directive may in the fullness of time have a major influence on the whole future process of establishing ship routing measures in Europe in order to give effect to EU legislation on nature conservation and marine environmental protection. When considering the veracity of this contention, it should not be forgotten that one of the principal aims of the Draft MSP Directive is to improve the effectiveness of shipping routes across Europe, including port accessibility and transport safety. Similarly, it is anticipated that the Draft MSP Directive will complement more specific instruments that have been adopted by the EU to protect the offshore environment from vessel source pollution, including Directive 2002/59/EC, which require the establishment of a vessel traffic monitoring and information system to improve the safety of maritime traffic and to prevent and detect pollution by ships.¹³⁴ The latter Directive provides for the establishment of mandatory ship reporting systems in the European coastal environment in accordance with the relevant IMO rules and thereby preventing maritime accidents and pollution incidents at sea. Furthermore, in line with the obligations set down by Commission Directive 2011/15/EU, certain categories of ships must comply with requirements of the automatic identification system (AIS), as well as the voyage data recorder (VDR) system.¹³⁵

In line with the general scheme of the LOS Convention, the freedom of navigation in the EEZ is constrained by the sovereign rights and jurisdictions vested in coastal States regarding the exploration and exploitation of natural resources in seas areas under their sovereignty and jurisdiction.¹³⁶ Although coastal States have extensive jurisdiction under the LOS Convention regarding the establishment and use of artificial islands, installations and structures for this purpose such as windfarms and oil rigs, as well as jurisdiction to take measures to protect and preserve the marine environment.¹³⁷ As seen above, such rights and jurisdictions are of course qualified by the obligation to “have due regard” to the rights and duties of other States such as freedom of navigation, overflight and of the laying of submarine cables and pipelines, as well as other internationally lawful uses of the sea relating to such freedoms.¹³⁸ Moreover, it is important to point out that the spatial planning of offshore development that entails the construction of artificial islands, installations and structures and the safety zones around them must not interfere with the “use of recognized sea lanes essential to international navigation” by virtue of the obligations set down in the LOS Convention.¹³⁹

At an operational level, we can expect to see that the plans adopted by Member States pursuant to the Draft

¹³⁴ Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, OJ L 208, 5.8.2002, 10–27.

¹³⁵ Commission Directive 2011/15/EU of 23 February 2011 amending Directive 2002/59/EC of the European Parliament and of the Council establishing a Community vessel traffic monitoring and information system Text with EEA relevance, OJ L 49, 24.2.2011, 33–36.

¹³⁶ Article 56, LOS Convention.

¹³⁷ Article 56(1)(b), LOS Convention.

¹³⁸ Articles 56(2) and 58 of the LOS Convention.

¹³⁹ Article 60(7) of the LOS Convention.

MSP Directive will also have a major bearing on the management of shipping incidents in the future. Specifically, they may incorporate a number of operational requirements that allow Member States to discharge their obligations under Commission Directive 2011/15/EU, which provides a legal basis for the emergency services to do any or all of the following: “(a) restrict the movement of the ship or direct it to follow a specific course; (b) give official notice to the master of the ship to put an end to the threat to the environment or maritime safety; (c) send an evaluation team aboard the ship to assess the degree of risk and to help the master to remedy the situation; and (d) instruct the master to put in at a place of refuge in the event of imminent peril, or cause the ship to be piloted or towed.”¹⁴⁰

The fire on board the very large German flagged container ship of 85,823 tons, *MSC Flaminia*, in the mid-Atlantic in 2012 revealed the difficulties encountered by EU Member States in dealing with shipping emergencies.¹⁴¹ This particular incident resulted in the deaths of three crewmembers, the abandoning of the ship, before the derelict hull was taken in tow by salvage vessels. Subsequently, it was reported in the media that Ireland, the UK, France, Belgium, the Netherlands, Spain and Portugal denied the salvage vessel and its consort a place or port of refuge ¹⁴² Germany in its capacity as the flag State ultimately arranged for the ship and its escort to enter the port of Willemhaven. This incident suggests that the identification of places of refuge ought to be addressed specifically as a matter or priority in national maritime spatial plans. As it stands, however, the Draft MSP Directive is silent on this subject matter and makes little reference to the risk of vessel source pollution or the adoption of appropriate management measures to deal with maritime emergencies.

As mentioned previously, maritime spatial planning is also relevant to the implementation of two EU initiatives “Motorways of the Sea” and the “European maritime transport space without barriers”. The former is aimed at moving the transport of freight from road to sea, thus reducing congestion on the roads and improving the environmental footprint of the transport sector.¹⁴³ This entails the designation of four motorways of the sea as part of the trans-European transport networks, and thus linking a number of distinctive European regions including: the Baltic Sea with the North Sea and the Baltic Sea canal; western Europe from the North Sea through to Portugal; south-east Europe, from the Adriatic Sea to the Ionian Sea and the Eastern Mediterranean; and the western Mediterranean through to south-east Europe and the Black Sea. Patently, the designation of such routes will form an important component of the national spatial plans

¹⁴⁰ Article 19(1) and Annex IV of Directive 2002/59/EC as inserted by Annex II of Commission Directive 2011/15/EU.

¹⁴¹ UK Maritime and Coastguard Agency Press Office, 14 July 2012. Available at: <http://hmcoastguard.blogspot.co.uk/2012/07/container-vessel-abandoned-mid-atlantic.html>.

¹⁴² Lloyd’s List, 30 August 2012.

¹⁴³ Decision No 884/2004/EC of the European Parliament and of the Council of 29 April 2004 amending Decision No 1692/96/EC on Community guidelines for the development of the trans-European transport network, OJ L 167, 30.04.2004. Also see, Communication from the Commission providing guidance on State aid complementary to Community funding for the launching of the motorways of the sea, OJ 2008 C 317, 12.12.2008.

adopted by the Member States under the MSP directive as soon as it enters force.

Conclusions

The EU is endeavoring to take a leadership role in implementing the Rio+20 conference chapter on the oceans. The application of the ecosystem approach through the medium of EU secondary legislation such as the MSF Directive is informed by developments in international and regional law, as well as by state practice worldwide. Similarly, the EU's integrated maritime policy and the Draft MSP Directive give effect to this approach and are both aimed at achieving environmental, economic and social objectives. All of these instruments acknowledge in both form and content the interdependency of activities undertaken in the marine environment. In this respect, the new generation of EU instruments such as the legislative proposal on maritime spatial planning is very much focused on delivering sophisticated regulatory solutions that incorporate integrated and holistic management of competing uses of the marine environment. In light of the innovative nature of EU legislation, one can legitimately pose the question: will the application of the ecosystem approach and the rolling out of maritime spatial plans by the Member States in due course undermine navigation rights and freedoms under the LOS Convention? The answer is not yet apparent but we can deduce important elements that ought to inform EU and Member State practice in this regard. First and foremost, the EU is a major trading entity and freedom of navigation is fundamental to the prosperity of the Union. Secondly, all EU secondary legislation has to be interpreted in accordance with the LOS Convention. Thirdly, the ecosystems-based approach itself requires a "balancing of interests" between economic and environmental pillars of EU policies. Hence it is easy to conclude that this balance must respect the carefully crafted provisions of the Convention on navigation rights and other freedoms.

Ultimately, in order to give full effect to these vital interests, the author of this paper proposes that the European Parliament Committee should give serious consideration to amending the Draft MSP Directive at their second reading by inserting an express provision that provides that the EU and Member States in implementing maritime spatial planning and coastal management strategies are obliged to uphold and preserve navigational rights and freedoms in accordance with applicable international law. Such an amendment will send out a clear signal to the global community about the leadership role of the EU as an international actor that is committed to implementing both the letter and the spirit of the LOS Convention.