

## CHAPTER 33

### Principles and Normative Trends in EU Ocean Governance

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#### Introduction

The regulation of maritime activities is undergoing fundamental change in the European Union (EU). Much of this change is orchestrated under the rubric of the so-called EU's Integrated Maritime Policy (IMP) and is aimed at promoting a more harmonious and efficient approach to ocean governance by the EU and the Member States. In parallel with this development, the EU is supporting several academic research projects that are exploring different ways to improve marine resources management in the EU. Among these projects, the ODEMM project<sup>1</sup> is reviewing management options that will improve the implementation of the ecosystems approach in the European marine environment in line with the obligations set down in a new generation of EU Directives including the Marine Strategy Framework Directive (MSFD) and its more complex sister the Water Framework Directive (WFD),<sup>2</sup> as well as the Habitats and Birds Directives,<sup>3</sup> to name but a few.

One common feature in these instruments is that they codify a number of fundamental principles that are applicable to the task of maritime regulation and ocean governance in the EU. This is not a unique development, stemming from the *sui generis* nature of the European legal order, as many similar principles permeate a growing range of multilateral and regional agreements that set down legally binding obligation for the EU and the Member States in relation to the protection and preservation of the marine environment and the resources that it supports. Unsurprisingly, these normative influences are also at the heart of the ten principles identified by the International Union for Conservation of Nature (IUCN) that are applicable to modern ocean governance.<sup>4</sup> They are clearly germane to managing the jurisdictional overlaps and conflicts arising between the various maritime sectors that come within the scope of EU law and policy. Their application is necessary because in the words of the European Commission "all matters relating to Europe's seas and oceans are interlinked" and

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<sup>1</sup> This acronym refers to "Options to Deliver Ecosystem-Based Marine Management". This project is supported by the European Commission's 7th Framework Research Programme, Theme ENV.2009.2.2.1.1, Project No. 244273. Further information: <http://www.liv.ac.uk/odemmm/>. The author wishes to acknowledge the comments and proof reading skills of Margaret Armstrong MSc and Erin McVeigh in preparing this chapter, which remains the sole and original work of the author.

<sup>2</sup> 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 June 2008. Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327/1, 22.12.2000. For commentary on the MSFD, see Ronán Long, "The EU Marine Strategy Framework Directive: A New European Approach to the Regulation of the Marine Environment, Marine Natural Resources and Marine Ecological Services," *Journal of Energy and Natural Resources Law*, 29 (1) (2011): 1-45.

<sup>3</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L 2067, 22.7.1992; Council 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.

<sup>4</sup> See, David Freestone, "Principles Applicable to Modern Oceans Governance," *International Journal of Coastal and Marine Law*, 23(3) (2008): 385-391; David Freestone, "The Modern Principles of High Seas Governance. The Legal Underpinnings," *International Environmental Policy and Law*, 39(1) (2009): 44-49.

maritime sector policies need to be coherent and integrated.<sup>5</sup> They are thus a vital mechanism for mitigating the environmental effects of maritime activities, a key objective of the IMP and its so-called environmental pillar the MSFD.

With this in mind, the overall focus of this chapter is to describe a number of key ocean governance principles that are applicable to the nascent IMP and to present a brief assessment of their status and effectiveness within the European legal order. In order to tackle this subject, this chapter describes briefly the objectives and legal basis of the IMP and goes on to outline four of the principles that are beginning to shape various aspects of the EU's approach to maritime policy and regulation in general. As will be seen below, some of these principles have a clear legal basis in the EU Treaties such as the principle of sustainable development, the requirement to integrate environmental considerations into EU policies, and the precautionary principle.<sup>6</sup> Others are relatively new and are shepherded onto the EU legal landscape by secondary legislative instruments such as the MSFD. The latter, for example, provides a sophisticated scheme for the application of the ecosystem approach to the task of ocean management on a regional basis in the absence of definitive scientific knowledge regarding the functioning of marine ecosystems and the resources that they support.<sup>7</sup>

Apart from the principles that are canvassed in this paper, there are of course many other normative influences that are shaping the implementation of EU legislative instruments such as the MSFD. Indeed, as far back as 1998, the authoritative journal *Science* published a thought provoking article based on a scientific workshop conducted in Lisbon which called for the implementation of six core principles to guide governance regarding the use of ocean resources and to promote sustainability, namely: responsibility, scale-matching, precaution, adaptive management, full cost allocation, and participation.<sup>8</sup> As will be seen below, within the decade, the European approach to ocean governance embodies similar principles to those advocated in the *Science* article. Before pressing ahead and delving further into these matters, it is pertinent to our discussion to highlight the significance and place of these principles within the European legal order as it applies to the marine environment.

### **How Important are the Normative Principles?**

In order to understand why EU maritime governance and regulation are changing it is essential to understand some of the principles that inform and shape its development. In addition, the codification by the EU of certain 'core' principles applicable to the task of ocean governance is noteworthy for several well-documented reasons. Firstly, some of these principles are mentioned expressly in the European Treaties, albeit in an environmental law context, and therefore they constitute primary sources of EU marine environmental law.<sup>9</sup> As such, they can be used by the Court of Justice of the EU to interpret or supplement other

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<sup>5</sup> European Commission, *An Integrated Maritime Policy for the European Union*, COM (2007) 575.

<sup>6</sup> Articles 11 and 191 of the *Treaty on the Functioning of the European Union (TFEU)*. The *Treaty on European Union (TEU)* and *TFEU* came into force on 1 December 2009 as a result of the ratification of the *Lisbon Treaty* by the 27 Member States. A copy of the Consolidated Treaties is published in the *Official Journal of the European Union* at OJ C 306/50, 17.12.2007

<sup>7</sup> Ronán Long, "Legal Aspects of Ecosystem-Based Marine Management in Europe," in Aldo Chircop, Moira L. McConnell, Scott Coffen-Smout (eds.), *Ocean Yearbook, Volume 26* (Boston/Leiden: Brill Academic Publishers, 2012), 417-484.

<sup>8</sup> Robert Costanza *et al.*, "Principles for Sustainable Governance of the Oceans" (1998) 281 (5374) *Science*, 198-199. Also see, "Lisbon principles of sustainable governance" in Cutler Cleveland (eds.), *Encyclopaedia of Earth* (Washington, D.C.: Environmental Information Coalition, National Council for Science and the Environment).

<sup>9</sup> Article 191(2) of the *TFEU*.

sources of EU law such as regulations, directives and decisions.<sup>10</sup> Secondly, they provide us with the *raison d'être* of instruments such as the MSFD and WFD. Indeed, the European institutions have clearly stated that measures adopted by Member States to give effect to the obligations that arise under the MSFD should be based on the ecosystem-based approach and the various environmental principles set down in the Treaties, in particular the precautionary principle.<sup>11</sup> Thirdly, as is well known, many European maritime activities have a worldwide footprint and the EU has actively sought to promote its position as an international leader in maritime affairs at a global level.<sup>12</sup> In this context it should not be forgotten that the EU has legal personality and is party to many international agreements including the *United Nations Convention on the Law of the Sea*<sup>13</sup> (LOSC) and its related agreements, which in the words of the Court of Justice “form an integral part of the EU legal order.”<sup>14</sup> As noted by Professor Freestone and the IUCN, these agreements codify many similar principles and therefore set down the normative parameters for ocean governance both within and beyond the EU.<sup>15</sup> Fourthly and following on from the previous point, the EU is an important source of marine environmental law in its own right and therefore it is crucial that the international community keeps pace with best practice in the EU regarding the regulation and management of offshore activities.<sup>16</sup> Such an exercise is all the more pertinent in view of the fact that the Court of Justice has long since identified environmental protection as one of the EU’s “essential objectives.”<sup>17</sup>

When considering the importance of these principles it must be kept in mind that several international organisations and European research projects, including the ODEMM project, have revealed that the EU is facing major challenges in relation to the conservation and management of offshore resources stemming from unsustainable fisheries, biodiversity loss, eutrophication, pollution, and climate change.<sup>18</sup> These problems have multiple causes and demand a much broader regulatory response than the traditional light touch sector-orientated legislation favoured heretofore by the Member States and offshore industries. This is particularly evident when one takes into account the preliminary findings of the ODEMM project which suggests that several of the high-level operational objectives (described as “descriptors”) set down under the MSFD relating to non-indigenous species, commercial fish and shellfish, food webs, seafloor integrity and marine litter have a “high risk of failure” in

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<sup>10</sup> See for instance the approach of the Court to the application of the precautionary principle in EU law, discussed *infra*.

<sup>11</sup> Recital 44 of the MSFD.

<sup>12</sup> See, Communication from the Commission of 15 October 2009 - Developing the international dimension of the Integrated Maritime Policy of the European Union, COM (2009) 536 final. Not published in the Official Journal.

<sup>13</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, entered into force 16 November 1994, 1833 UNTS 3 (LOSC).

<sup>14</sup> Council Decision of 8 June 1998 on the ratification by the European Community of the Agreement for the implementing of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling stocks and highly migratory fish stocks. OJ L 189, 3.07.1998, 14. Entered into force 18.01.2004. Case 13/00 *Commission v Ireland* [2002] ECR I-2943 paragraph 14. Also note, Article 216(2) of the TFEU.

<sup>15</sup> Freestone, “Principles Applicable to Modern Oceans Governance,”

<sup>16</sup> Ronán Long, “The EU and the Law of the Sea Convention at the age of 30”, *The International Journal of Marine and Coastal Law*, 27(4), 2012: 711-721.

<sup>17</sup> Case 240/83 *Procureur de la République v ADBHU* [1985] ECR 531.

<sup>18</sup> See, for example, OSPAR Quality Status Report 2010 (London, OSPAR Commission, 2010); Temel Oguz *et al.*, “Current state of overfishing and its regional differences in the Black Sea” 58 (2012) *Ocean and Coastal Management* 47-56.

achieving the prescribed threshold of good environmental status by 2020 in line with the scheme set down by the Directive.<sup>19</sup>

In light of these findings, the EU regulatory response needs to be flexible and underpinned by a normative approach that provides for sustainable ocean use, the adoption of precautionary measures, and the management of the various sector activities and policies in an integrated manner. Indeed, the principles reviewed in this paper, if applied properly, ought to facilitate the transition from the current fragmented regulatory regime that applies to offshore activities in the wider European environment to a system of integrated management which balances the short-term economic objectives with long-term ecosystem sustainability objectives set down by instruments such as the MSFD, the Habitats Directive, the European Commission's Blue Book, and the Guidelines for the Integrated Approach to Maritime Policy. This is one of key tasks of the ODEMM project, which is developing a set of fully-costed ecosystem management options for this purpose.

Turning now to the term "ocean governance", which is an obvious starting point for the rest of our discussion.

## Ocean Governance

Governance as a term-of-art is open to many definitions and often appears as an umbrella or catch-all term in the specialist literature to describe "any strategy, tactic, process, procedure, or programme for controlling, regulating shaping, mastering or exercising authority over others in a nation, organization or locality".<sup>20</sup> Similarly, the term "ocean governance" remains undefined in EU law and it may therefore be appropriate to draw upon a frequently cited political science perspective in the United States, which describes it as:

those formal and informal rules, arrangements, institutions and concepts which structure the ways in which sea space is used, how ocean problems are monitored and assessed, what activities are permitted or prohibited, and how sanctions are other responses are applied.<sup>21</sup>

Although there is a maturing body of specialist academic commentary on the subject matter, some of it undertaken within the framework of the ODEMM project,<sup>22</sup> the concept of ocean governance remains very much an open-ended hypothesis from a legal perspective.

In the context of European maritime affairs it appears, *prima facie*, to embrace a complex array of legal actors (both public and private), instruments and sector policies that operate at international, regional and national levels within the Member States. Further complexity in relation to the EU is added by constraints such as: the unique institutional architecture of the European institutions; the divergence of Member States interests in relation to the various activities in the maritime domain; the cumbersome division of legal competence between the EU and the Member States regarding the regulation of maritime sectors such as fisheries and transport; as well as the differences that exist between the

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<sup>19</sup> Anthony Knights *et al.*, "Sustainable use of European regional seas and the role of the Marine Strategy Framework Directive" in *Options for Delivering Ecosystem-based Marine Management* (Liverpool: University of Liverpool, 2011), 1-165 at XIII.

<sup>20</sup> See Nicholas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: CUP, 1999), 15. Also David Levi-Faur, *Oxford Handbook of Governance* (Oxford: OUP, 2012).

<sup>21</sup> See Lawrence Juda and Timothy Hennessy, "Governance Profiles and the Management of the Uses of Large Marine Ecosystems," *Ocean Development and International Law*, 32/1 (2001): 61, 74, cited in Donald Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford and Portland: Hart Publishing, 2001), 462.

<sup>22</sup> See, *inter alia*, Judith Van Leeuwen, Luc Van Hoof, Jan van Tatenhove, "Institutional Ambiguity in implementing the European Union Marine Strategy Framework Directive," *Marine Policy*, 36(3) (2012): 636-643.

juridical and administrative systems that are in operation in the twenty-three coastal Member States.

Undoubtedly, all of these factors are influencing the attainment of the objectives of the IMP.

### **What are the Objectives of the IMP?**

Surprisingly enough, there is no definitive or easy answer to this question as the objectives of the IMP are very much the outcome of the policy process and thus subject to the cut and thrust of political imperatives within the EU institutions. This is evident if one examines the complex labyrinth of publications emanating from the EU institutions on the subject matter of the IMP.<sup>23</sup> These reveal that much of the original vision for the policy was largely hortatory in nature and aimed at cajoling various parties into establishing coherent structures and procedures for maritime policy decision-making in the Member States. Conspicuously, since the initial launch of the policy, European institutions appear to have taken slightly different perspectives on the core objectives of the IMP. In 2007, for example, the European Commission stated that an integrated policy:

will enhance Europe's capacity to face the challenges of globalisation and competitiveness, climate change, degradation of the marine environment, maritime safety and security, and energy security and sustainability.<sup>24</sup>

At that particular time, the primary goal of the policy was to “develop and implement integrated, coordinated, coherent, transparent and sustainable decision-making in relation to the oceans, seas, coastal, insular and outermost regions and in the maritime sectors.”<sup>25</sup> The same year, similar strategic thinking on the topic of ocean governance is also evident in the conclusions of the December European Council meeting, which fully endorsed the principal thrust of the policy and suggested the following objectives:

The future IMP should ensure synergies and coherence between sectoral policies, bring added value and fully respect the principle of subsidiarity. Furthermore, it should be developed as a tool to address the challenges facing Europe's sustainable development and competitiveness. It should take particular account of the different specificities of Member States and specific maritime regions which should call for increased cooperation, including islands, archipelagos and outermost regions as well as of the international dimension.<sup>26</sup>

Again in 2009 and partly in response to the European Commission's progress report on the implementation of the IMP, the General Affairs Council of the EU (made-up of the Ministers from the Member States) reaffirmed the importance of a whole Pandora's Box of objectives for the IMP.<sup>27</sup> In particular, the Council called for the implementation of a suite of management measures including: cross-cutting policy tools, maritime spatial planning,

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<sup>23</sup> Communication published by the European Commission COM (2005) 504 and COM (2005) 505; the 2006 Green Paper on the subject COM 2006-275. The subsequent proposal from the Commission (commonly referred to as the *Blue Book*) accompanied by an Action Plan in 2007, COM (2007) 575 and SEC 2007-1278. Also see, Report on the Consultation process - COM(2007) 574.

<sup>24</sup> COM (2007) 575 at 2-3.

<sup>25</sup> Ibid.

<sup>26</sup> Doc. 16616/1/07, REV 1, Presidency Conclusions of European Council Meeting, Brussels, 14.02.2008, paragraph 58, [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressData/en/ec/97669.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressData/en/ec/97669.pdf)

<sup>27</sup> SEC (2009) 1343. General Affairs Council, 16.11.2009. Press Release 15913/09. [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/gena/111231.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/111231.pdf).

integrated maritime surveillance, sea-basin strategies, enhanced regional cooperation; further linkages between the IMP and the climate change policy; an Action Plan for European Maritime Transport; and the strengthening of global maritime governance on matters such as piracy, IUU fishing, and the protection of sensitive ecosystems.<sup>28</sup>

A brief perusal of soft law publications reveals that the relationship between economic development and marine environmental protection has peppered EU institutional statements on the IMP since its inception. Most notably, the Commission has concentrated on the economic theme in recent years and emphasised that the,

aim of the IMP is to promote the sustainable growth of both the maritime economy in particular, and the coastal regions more generally, by improving coordination between the different sectoral policies and by developing crosscutting tools.<sup>29</sup>

The preponderance of economic considerations is also very evident in the position taken by the European Parliament which has expressed the view that the primary objective of the IMP,

is to maximise the sustainable development, economic growth and social cohesion of coastal, island and outermost regions through coherent and coordinated maritime-related policies and relevant international cooperation.<sup>30</sup>

Apart from the rather nebulous objective of enhancing the visibility of maritime Europe, the Parliament has identified three immediate objectives for the IMP under the current programme for the period 2011-2013.<sup>31</sup> Briefly paraphrased, these include: supporting the development and implementation of sea-basin strategies for the various regional seas such as the Baltic Sea, the Mediterranean Sea, the Black Sea and the Atlantic Ocean;<sup>32</sup> promoting the protection of the marine environment, in particular its biodiversity under a range of EU legal instruments such as the Habitats and Birds Directives; and supporting sustainable economic and regional growth in maritime sectors with an emphasis on the development of new technologies and industrial innovation.<sup>33</sup>

When viewed from a distance, one can easily see that the central thrust of the IMP is on economic uses of the marine environment, which is conditioned occasionally by oblique references to the requirement of “sustainable use” or in some instances balanced by reference to the need for responsible stewardship of the marine environment. When discussing this aspect of the IMP, however, we should keep firmly in mind that the EU Treaties set down a broad range of economic, social, political and environmental objectives for the EU.<sup>34</sup> In this context, it needs to be emphasised that the policy has to satisfy certain *legal* requirements (emphasis added) under the Treaties, including *inter alia*: a high level of protection and improvement in the quality of the environment, a prudent use of natural resources, the promotion of scientific and technological advancement, and the strict observance and development of international law.<sup>35</sup> The latter extends to the promotion of measures at an international level to deal with regional or worldwide environmental problems including

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<sup>28</sup> Ibid.

<sup>29</sup> COM (2009) 536 final, Brussels, 15.10.2009.

<sup>30</sup> European Parliament Report on the proposal for a regulation of the European Parliament and of the Council establishing a Programme to support the further development of an Integrated Maritime Policy, COM(2010)0494 – C7-0292/2010 – 2010/0257(COD), 30.05.2011.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Article 3 of the *TEU*

<sup>35</sup> Article 3(3) and Article 191 of the *TFEU*.

measures to combat climate change.<sup>36</sup> As is evident in the ODEMM project, EU secondary legislation as well as many regional agreements spell-out in far greater detail operational objectives and milestones for achieving good environmental status in the European regional seas.<sup>37</sup>

Quite clearly, achieving the correct balance between the divergent and numerous objectives of the IMP is one of the most difficult challenges facing the EU and the Member States regarding maritime regulation and ocean governance in general. This task is frequently compounded by the absence of definitive science regarding the status of the marine environment.<sup>38</sup> In striking this balance, however, it is impermissible for the European institutions to ignore the legal obligations that arise in relation to protection and preservation of the environment under the Treaties when discharging their key functions in the law-making and law enforcement processes.

This leads directly to the main argument presented in this chapter, namely: that environmental legal principles and approaches will continue to play a crucial role in shaping the substance and direction of EU policy and law on maritime matters, irrespective of the contemporary emphasis on economic considerations and the implementation of fiscal austerity programmes in several Member States. Furthermore, it should not be forgotten that all of the principles are supplemented by the legal requirements to undertake strategic and project environmental assessment, as well as to ensure public participation in the decision-making processes concerning environmental matters. All of these requirements, which exist as independent legal obligations under various EU Directives,<sup>39</sup> can make a vital contribution towards the overall attainment of the objectives of sustainable development, economic growth, social cohesion and environmental protection in the Member States.

### **Absence of a Specific Legal Basis in the Treaties**

The IMP lacks an express legal basis in EU Treaties.<sup>40</sup> At first sight, this appears to be a significant lacuna as one of the core principles of EU law is that the EU can only act within the limits of the powers conferred upon it by the Member States pursuant to the Treaties.<sup>41</sup> Furthermore, specific treaty provisions determine the law-making and voting procedures that must be followed in the EU institutions in relation to the preparation and subsequent adoption of draft legislation. Indeed, the use by the EU institutions of an incorrect legal basis in the Treaties in bringing forward draft legislation may lead to annulment proceedings subsequently in the Court of Justice of the EU.<sup>42</sup>

This lacuna, on the other hand, should not be overstated as it does not impede the European institutions from taking appropriate legislative action in the field of maritime affairs under the treaty provisions applicable to various policies such as fisheries, environment, transport, energy, budgetary and fiscal matters, research, tourism and the

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<sup>36</sup> Article 191(1) of the *TFEU*.

<sup>37</sup> Patricia Breen *et al.*, "A review of operational objectives in European Regional Seas" (Liverpool, University of Liverpool, 2011).

<sup>38</sup> See footnote 18.

<sup>39</sup> Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment OJ L 073/5, 14.03.1997 (the EIA Directive); 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, 21.7.2001; Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC OJ L 041/26, 14.02.2003.

<sup>40</sup> See footnote 5.

<sup>41</sup> Article 5(2) of the *TEU*.

<sup>42</sup> Article 263 of the *TFEU*.

regions. Generally, it is well settled in the case law that the choice of legal basis for a regulatory measure must rest on objective factors that are amenable to judicial review and that if there is more than one legal basis in the Treaty then the measure must be based on the legal basis that addresses the predominant purpose of the instrument.<sup>43</sup> In exceptional circumstances, if a legislative proposal pursues a number of objectives such as is the case with the IMP, then such measure can be rooted in more than one legal basis in the Treaties.<sup>44</sup>

This broad brush method of law-making remains controversial and is sometimes disputed by the Member States and the various EU institutions involved in the law-making process.<sup>45</sup> When considering the IMP, however, one can see considerable merit in this regulatory technique as it provides a large degree of flexibility for the EU legislature when bringing forward legislative proposals that reflect the diversity and plurality of the activities that take place in the marine environment. This can be seen in a recent Parliament and Council Regulation establishing a programme of measures under the IMP for the period 2011-2013 in the areas of policy, governance, sustainability and surveillance.<sup>46</sup> This Regulation has “regard” to nine different legal provisions in the Treaty on the Functioning of the European Union (TFEU)<sup>47</sup> ranging from the provisions in the Treaty on the common fisheries policy (CFP), the environment and transport policies, the competitiveness of the EU’s industry, as well as many other sector policies.<sup>48</sup> Indeed, one of the main objectives of this particular Regulation is to promote economic growth, innovation and employment in the Member States, as well as the use of marine and coastal resources in a sustainable manner.

In practice, the absence of an express legal basis for the IMP in the Treaties means that the EU law-making process is slow and requires a considerable amount of administrative coordination internally within the European institutions. The absence of a Treaty basis also strongly suggests that the policy will continue to evolve in a manner that is purposive in character and where a special place is given to the marine environmental law principles such as those that are the subject of this chapter.<sup>49</sup> Of course, this technique has a number of drawbacks and means that it is exceedingly difficult to know the precise normative weight the EU institutions give to a particular principle or concept in the law-making or policy implementation process. Furthermore, the boundaries between policy, principles and substantive legal obligations are often blurred in EU legislative measures. This in turn has the potential to create problems regarding the clarity and precise meaning of specific provisions in secondary legal instruments that apply to the marine environment.<sup>50</sup>

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<sup>43</sup> Case 176/03 *Commission v Council* [2005] ECR I-7879; Case C-91/05 *Commission v. Council* [2008] ECR I-3651

<sup>44</sup> Case C-338/01 *Commission v. Council* [2004] ECR I-4829.

<sup>45</sup> See, Alina Kaczorowska, *European Union Law, 2<sup>nd</sup> edition* (London: Routledge-Cavendish, 2011), 219-221.

<sup>46</sup> Regulation (EU) No 1255/2011 of the European Parliament and of the Council of 30 November 2011 establishing a Programme to support the further development of an Integrated Maritime Policy, OJ L 321/1, 05.12.2011.

<sup>47</sup> *Treaty on the Functioning of the European Union*, opened for signature 13 December 2007, entered into force 1 December 2009, OJ C83/47, 30.3.2010.

<sup>48</sup> Articles 43(2), 91(1) and 100(2), 173(3), 175, 188, 192(1), 194(2) and 195(2) of the *TFEU* are cited in this Regulation. In this context, it ought to be mentioned that the *TFEU* also provides a general legal base (Article 352(1) of the *TFEU*) for EU legislative action if this is necessary to attain one of the objectives set out in the Treaties. The Court has limited the scope of application of this catch-all-provision, which can only be relied upon for the “improvement of the conditions for the functioning of the internal market” Case C-491/01 [2002] ECR I-11453. In reality, few if any IMP objectives genuinely aim to achieve this market integration goal and therefore it is highly unlikely that the more goal focused IMP measures will be based solely on this provision in the Treaties.

<sup>49</sup> See discussion on trends in EU ocean governance *infra*.

<sup>50</sup> See, for example, the wide interpretation given by the Court to EU environmental directives in the following cases: Case C-337/89 *Commission v UK* [1992] ECR I-6103; Case C-56/90 *Commission v United Kingdom*

## Normative Influences on the IMP

As a general rule, the EU institutions use environmental principles and approaches as a guide to law-making and regulatory action in the field of maritime affairs. They are frequently used to supplement the substantive detail of regulatory measures adopted under various sector policies that are applicable to the conservation and management of marine resources and ecological systems, such as the conservation targets that are set down under the CFP or the emission limits in relation to vessel source pollution under the transport policy. They are intrinsic to giving practical meaning to the MSFD and many other marine environmental legislative instruments. Importantly, as explained above, they ensure that the IMP is not viewed solely through the cold prism of economic objectives but also reflects more flexible environmental and social considerations. These principles and approaches provide the policy backdrop for the IMP and establish a useful paradigm for resolving competing values.

Despite the utility of a principle led approach in the policy process, it should nonetheless be emphasised that they do not set down rigid and binding obligations with strict legal meaning in a given maritime context. This can be seen in *Re Peralta*, which concerned the discharge of caustic soda into the Mediterranean Sea by a vessel flying the Italian flag contrary to the Italian criminal code.<sup>51</sup> In this case, the Court of Justice held that the environmental principles set down in the Treaty such as the preventative principle defined general objectives of the EU in matters concerning the environment.<sup>52</sup> As such, they did not preclude a Member State from adopting stricter measures like the contested measure in Italian law, which was upheld by the Court in that it prohibited “all vessels, regardless of the flag which they fly, from discharging harmful chemical substances into its territorial waters and its internal waters, or from imposing the same prohibition on the high seas only on vessels flying the national flag, or, finally, in the event of infringement, from penalizing masters of vessels who are nationals of that State by suspending their professional qualification”.<sup>53</sup>

From a maritime legal perspective, it should also be noted that much of the jurisprudence of the Court of Justice on the precise meaning and applicability of these principles in substantive areas of EU law has evolved in the context of cases concerning the terrestrial environment.<sup>54</sup> Furthermore, like many other normative standards, they are open to a number of interpretations under international, EU, and national law in the Member States. Their importance and relevance to the future development of the IMP should therefore not be underestimated and demands comprehensive analysis that goes well beyond the limited scope of this chapter, which is focused mainly on the principle of sustainable development, the requirement to integrate environmental considerations into EU policies, and the precautionary principle. Very little is said about the ecosystem approach as this is the subject matter of a number of separate publications associated with the ODEMM Project.<sup>55</sup>

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[1993] ECR I-4109; Case C-494/01 *Commission v Ireland* [2005] ECR I-3331; Case C-287/98 *Luxemburg v Linster* [2000] ECR I-6917.

<sup>51</sup> Case C-379/92 *Re Peralta* [1994] ECR I-3453, para.57.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, paras 58 and 59.

<sup>54</sup> Elizabeth Fisher, Bettina Lange, Eloise Scotford, *Environmental Law: Text, Cases and Material* (Oxford: OUP, 2013) 415-432.

<sup>55</sup> See, *inter alia*, Ronán Long, “The EU Marine Strategy Framework Directive”; and, Ronán Long, “Legal Aspects of Ecosystem-Based Marine Management in Europe,” in Chircop, McConnell and Coffen-Smout (eds.), *Ocean Yearbook Volume 26*, 417-484.

### ***The Principle of Sustainable Development***

There is some discussion in both international and EU law as to whether the notion of sustainable development is a legal principle or a policy concept to be applied in environmental and in natural resource management.<sup>56</sup> Within the EU, sustainable development is a EU Treaty objective and is specifically mentioned in the Charter of Fundamental Rights of the EU.<sup>57</sup> There are many references to the principle in the TFEU, which clearly states that the EU must work as a global actor to achieve “peace, security and sustainable development of the Earth.”<sup>58</sup> The TFEU expressly requires that environmental considerations are integrated into EU policies with a view to promoting sustainable development.<sup>59</sup> Nonetheless, within the European legal order, the precise normative value of this principle is often disputed, with one authoritative commentator taking a very jaundiced view and going as far as to say that the principle in the context of EU environmental law is devoid of legal meaning and is nothing more than a political concept for political actors.<sup>60</sup>

The precise normative value of the principle is further clouded by the Charter of Fundamental Rights, which provides that,

a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.<sup>61</sup>

Although the Charter has the status of a primary source of EU law, it does not create any new rights or indeed modify any of the powers and tasks that are set out in the Treaties.<sup>62</sup> The Charter does, however, underscore the importance of the very general right to a clean environment.<sup>63</sup>

The Court of Justice of the EU has not amplified directly the precise meaning of sustainable development in its jurisprudence but it has held that environmental considerations take precedence over economic imperatives in the designation and management of protected areas and species in the marine environment under the Habitats and Birds Directives.<sup>64</sup>

The EU policy approach and objectives for achieving sustainable development are set out in the EU Strategy for Sustainable Development and in several environmental action programmes that will run to 2020. Similarly, there is frequent reference to sustainable development in a whole raft of IMP soft law publications concerning the marine environment. Again, few of these attempt to define what precisely this principle means in practice in relation to the conduct of maritime activities.<sup>65</sup> Take, for instance, the so-called *Blue Book*, which provides that the IMP will “provide a coherent policy framework that will

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<sup>56</sup> See, Phillippe Sands, Jacqueline Peel, *Principles of International Environmental Law*, 3 Ed., (Cambridge: CUP, 2012), 206-209.

<sup>57</sup> Recital 9, and Articles 3(3) and (5) of the *TEU*, Article 11 of the *TFEU*. For a policy update see, <http://ec.europa.eu/environment/eussd/>

<sup>58</sup> Article 3(5) of the *TEU*.

<sup>59</sup> Article 11 of the *TFEU*.

<sup>60</sup> See, *inter alia*, Ludwig Kramer, *EU Environmental Law*, 7<sup>th</sup> edition (London: Sweet and Maxwell, 2011), 9-11, and especially 365.

<sup>61</sup> Article 51(1) of the Charter of Fundamental Rights.

<sup>62</sup> Article 51(2) of the Charter of Fundamental Rights, Article 6(1) of the *TEU*.

<sup>63</sup> The Charter does not however create “new rights” and this is specifically spelt-out in Protocol 30 in relation to the United Kingdom, Poland, and the Czech Republic

<sup>64</sup> For example, *Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping* [2001] ECR I-9235.

<sup>65</sup> Preamble and Article 3 of the *TEU* and Article 11 of the *TFEU*.

allow for the optimal development of all sea-related activities in a sustainable manner.”<sup>66</sup> Similarly, maritime spatial planning is identified as “a key planning tool for sustainable decision-making.”<sup>67</sup> Indeed, the *Blue Book* goes as far as to say that the first objective of the IMP is to create “optimal conditions for the sustainable use of the oceans and seas” with a view to facilitating growth in maritime sectors.<sup>68</sup> How this is to be achieved is not fleshed out in any great detail apart from the relatively solid commitment to manage fish stocks at maximum sustainable yield by 2015 in line with the World Summit on Sustainable Development (WSSD) targets. On a similar note, marine scientific research is identified as being “crucial” for the sustainable development of sea-based activities. As a follow-up, a range of solid targets to harmonise European scientific endeavours were set down by the Commission in 2007 including the establishment of a European Marine Observation and Data Network.<sup>69</sup>

The thematic strategy for the protection of the marine environment under the Sixth Environmental Action Programme 2002-2012 is couched in similar “sustainable development” language in so far as it aims to promote sustainable uses of the seas and the conservation of marine ecosystems.<sup>70</sup> Moreover, what constitutes sustainable development is not defined in any greater detail in secondary legislation such as the MSFD, which applies an ecosystem-based approach to the management of human activities in the marine environment to ensure the sustainable use of marine goods and services.<sup>71</sup> Indeed, this Directive is partly intended to give effect to the position taken by the EU regarding the conservation and sustainable use of marine biodiversity under the Convention on Biological Diversity and related international instruments.<sup>72</sup>

Gauging how well the EU and the Member States are implementing the principle of sustainable development in relation to maritime activities presents a major challenge. Some guidance can be derived from the 2006 Council Declaration on Sustainable Development which identified ten leading principles as well as seven challenges in implementing the concept in practice.<sup>73</sup> A progress report by Eurostat published in 2011 describes the results in achieving sustainable development in the EU as “mixed” and concludes that the EU is not on a pathway to sustainable development.<sup>74</sup> Somewhat ominously for the IMP, the over-exploitation of fish stocks is singled out in the report as one of the contributor factors with nearly a quarter of the total fish catches in 2009 outside safe biological limits. Moreover, the report notes that the establishment by the EU of a network of marine protected areas has been tardy, with the number of sites designated under EU nature conservation instruments accounting for approximately 6 per cent of species and 10 per cent of habitats to date.<sup>75</sup> The

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<sup>66</sup> COM(2007) 575 final, 4.

<sup>67</sup> *Ibid.*, 5.

<sup>68</sup> *Ibid.*, 7.

<sup>69</sup> See, Ronán Long, “Regulating Marine Scientific Research in the European Union: It Takes More Than Two Member States to Tango,” in Myron Nordquist, J. Norton Moore, Alfred Soons, and Hak-So Kim (eds.), *The Law of the Sea Convention: U.S. Accession and Globalisation* (Leiden/Boston: Brill Academic Publishers, 2012).

<sup>70</sup> COM(2005)504.

<sup>71</sup> Recital 8 of the MSFD.

<sup>72</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, entered into force 29 December 1993, 1760 UNTS 79; 31 ILM 818, which was approved by Council Decision 93/626/EEC OJ L 309, 13.12.1993, 1.

<sup>73</sup> Renewed EU Sustainable Development Strategy as adopted by the European Council on 15/16 June 2006, <http://register.consilium.europa.eu/pdf/en/06/st10/st10917.en06.pdf>

<sup>74</sup> Eurostat Statistics in Focus 58/201, “Is the EU on a Sustainable Development Path? Highlights of the 2011 Monitoring Report of the EU Sustainable Development Strategy,” (November 2011).

<sup>75</sup> COM(2011) 531 final, Brussels, 31.8.2011, p. 5.

EU therefore falls well short in contributing to the WSSD call for the establishment of a comprehensive global network of marine protected areas by 2012.<sup>76</sup>

In addition to these disappointing results, it should also be pointed out that there are relatively few ‘marine’ indicators in the list of 200 indicators that are used by Eurostat in compiling their report. As a consequence, there appears to be little empirical data available that allows us to draw firm conclusions regarding the sustainability of the various maritime activities, apart from fisheries, that are addressed by the IMP. That said, on the broader landscape of EU policy, it is generally acknowledged by both the EU institutions and the Member States, that good governance mechanisms are crucial to the achievement of sustainable development. In accordance with the EU’s Strategy on Sustainable Development these mechanisms include: the integration of the economic, social and environmental dimensions of policy-making in a coherent manner; enhancing the participation of civil society in the decision-making process; and strengthening the educational and informational initiatives for sustainable development at all political levels. Somewhat disappointingly, the 2011 and 2013 Eurostat Reports again describes progress towards the attainment of these objectives as “mixed” and that the target of a higher share of environmental taxes in total tax revenues in the Member States remains unrealised.<sup>77</sup> Furthermore, there are moderately unfavourable changes for the indicators on the sustainability of fish stocks. This trend is now compounded by the ongoing fiscal crisis, which is clearly influencing the attainment of sustainable development in many economic sectors including the maritime sector.

The Eurostat reports accords with the findings of several international organisations including the World Bank and the FAO, which have reported that marine resources are not exploited sustainably both within and beyond the EU.<sup>78</sup> Many of these reports highlight that policies such as the CFP are not attaining specific targets to ensure sustainability of fish stocks both nationally and internationally. In the absence of improvements in fisheries management, it is therefore difficult to see how the EU and the Member States can realise the broader objectives set down by the WSSD in relation to protection and preservation of the marine environment. Moreover, the Court of Justice has yet to flesh out what the principle of sustainability means for the practical aspects of fisheries management under the CFP.

Importantly, “good environmental status” under the MSFD means “the environmental status of marine waters where these provide ecologically diverse and dynamic oceans and seas which are clean, healthy and productive within their intrinsic conditions and the use of the marine environment is at a level that is sustainable.”<sup>79</sup> The MSFD brings considerable precision to the question of sustainability by identifying eleven aspects of the marine environment that are to be monitored and managed by Member States on a regional basis with a view to achieving good environmental status by 2020. Instructively, these aspects are described in the Directive and the associated Commission Decision by reference to a combination of ecological characteristics of the environment, and/or pressures and impacts associated with human activities on the marine environment. Under the Directive, Member States are required to adopt marine strategies and apply an ecosystems-based approach to the management of human activities to ensure that the collective pressure of such activities is kept to sustainable levels. How this scheme will work in practice will depend very much on what baseline is selected for ensuring the long-term sustainable use or indeed sustainable development of offshore activities in the marine environment. The complexity of this

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<sup>76</sup> Johannesburg Plan of Implementation, paragraph 32(d). Available at: [www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/WSSD\\_PlanImpl.pdf](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf).

<sup>77</sup> Eurostat Statistics in Focus 58/201, 13.

<sup>78</sup> See, for example, *The Sunken Billions: The Economic Case for Fishery Reform* (Washington and Rome: World Bank and FAO, 2009).

<sup>79</sup> Article 3 of the MSFD.

exercise can be gauged from the ODEMM project, which by applying a pressure assessment approach in four European regional seas (the Atlantic, Baltic Sea, Mediterranean Sea, and North Sea) was able to identify 106 activities from 19 sectors which contributed 25 specific pressures and threats to the sustainable functioning of marine ecosystems.<sup>80</sup> As noted by the ODEMM project team, pressures may be physical, chemical or biological and the same pressure may be caused by several maritime activities.<sup>81</sup> Significantly, the project identified threats from four sectors, namely agriculture, coastal infrastructure, fishing and shipping, as common to all the European regional seas.<sup>82</sup> As pointed out previously, five of the eleven descriptors set down by the MSFD for the attainment of good environmental status under the MSFD were classified by ODEMM as currently being at high risk of failure in all regional seas.<sup>83</sup> The project concluded ominously that there was also a high likelihood of failure to reach favourable conservation status in relation to habitats and species protected under the Habitats Directive in the Baltic Sea, Mediterranean Sea and NE Atlantic. Furthermore, as pointed out by one of the technical reports completed under the ODEMM project, the attainment of good environmental status under the MSFD differs considerably from the achievement of favourable conservation status under the Habitats Directive since the latter instrument aspires towards the establishment of pristine conditions whereas the MSFD is aimed at achieving sustainable uses of the marine environment.<sup>84</sup> The ODEMM project will identify the various legal and governance factors that can help improve the implementation of the ecosystem approach in order to achieve the desired environmental status in Europe's regional seas in line with both instruments.

In all likelihood, the findings of the ODEMM project is only a precursor to the outcome of the more formal exercise that is currently being undertaken by the Member States under the MSFD. Ultimately, the true normative effectiveness of the principle of sustainable development will depend on how well the programme of measures adopted by the Member States and the European institutions under the MSFD responds to the range of threats that impede the attainment of prescribed environmental status under the Directive. In this context, it is important to keep in mind that the programmes and measures adopted by Member States must take into account other European directives on urban waste-water treatment,<sup>85</sup> bathing water quality,<sup>86</sup> river basin management including estuaries and coastal management, and the many international and regional agreements that are aimed at protecting and preserving the marine environment that have been ratified by the Member States. Accordingly, it will be a considerable period of time before the entire regulatory framework is given effect in practice. In the interim, the true normative effectiveness of this principle for taking decisions concerning marine resources management both within and beyond the EU remains uncertain as is evident from the debate at the United Nations Conference on Sustainable Development (Rio+20) in 2012. That said, sustainable development as both a concept and principle is likely to remain at the forefront of all EU policy and legal initiatives to advance the IMP and to implement the MSFD.

### ***The legal requirement to integrate environmental considerations into the IMP***

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<sup>80</sup> See, Anthony Knights, *et al.*, "Sustainable use of European regional seas and the role of the Marine Strategy Framework Directive", note 19 *supra*

<sup>81</sup> *Ibid* p.XI

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> See, Patricia Breen *et al.*, "A review of operational objectives in European Regional Seas" (Liverpool, University of Liverpool, 2011), at 73.

<sup>85</sup> OJ L 135, 30.5.1991

<sup>86</sup> OJ L 64, 4.03.2006.

Without doubt, the most important normative principle in EU marine environmental law stems from the provision in the *TFEU* which states that environmental considerations must be integrated into the definition and implementation of EU policies and activities, in particular with a view to promoting sustainable development.<sup>87</sup> The ‘principle of environmental integration’ is an important mandatory requirement under the Treaty and ensures that individual policies that make up the IMP can no longer be viewed in isolation as stand-alone policies but must also reflect an environmental dimension. As a consequence, this principle forms an important nexus between the concept of sustainable development discussed above and environmental protection. The European Commission has published a Communication on how environmental considerations are implemented under the CFP and there has been considerable effort to implement the principle under the various EU environmental action programmes and strategies.<sup>88</sup> The overall success of these initiatives is difficult to assess and for reasons of space only a few rudimentary comments can be made here.

At first sight, the laudable objective of ‘integration’ is undermined by the absence of specific guidance in the Treaties on what weight is to be given to environmental considerations in the policy formulation and implementation process. As a minimum, however, the requirement of ‘integration’ in the context of the IMP would certainly appear to include the attainment of the broader EU law environmental objectives mentioned elsewhere in the Treaties such as prudent and rational utilisation of natural resources, and the implementation of the precautionary principle, the principle that preventative action should be taken, the rectification of environmental damage at source, and the polluter pays principle.<sup>89</sup>

The adoption of concrete measures by the EU to give teeth to the principle has a major bearing on its utility and effectiveness as a principle of EU marine environmental law. The MSFD and the Habitats and Birds Directives are core legal measures adopted by the EU that protect and preserve biodiversity and the broader marine environment. Indeed, as seen previously, the ODEMM project is focused on identifying the ecosystem-based management options to achieve good environmental status of the European marine environment by 2020 in line with the scheme set down by the MSFD. Similarly, the Habitats Directive and Birds Directives aim to achieve favourable conservation status for an extensive list of marine and terrestrial habitats and species through the establishment of a network of protected areas. These instruments set down sophisticated schemes for the assessment, monitoring and reporting of the status of the marine environment and therefore add legal substance to the principle of integration. In this regard, the process of Regulatory Impact Assessment within the EU institutions of draft legislation is an important procedural step in law-making that is aimed at ensuring that the economic, social and environmental impact of proposed measures are taken into consideration at an appropriate stage in the law-making process.

The requirement of integration is reflected in many of the secondary legislative instruments that are applicable to the marine environment including the MSFD.<sup>90</sup> As a matter of practice, however, the precise level of integration is a political question to be decided by the European Council and the European Parliament in the law-making process within the EU institutions. This often leads to controversy regarding the adoption of specific measures in policies such as the CFP.<sup>91</sup> Thus, for example, one commentator has argued that the failure of

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<sup>87</sup> Article 11 of the *TFEU*.

<sup>88</sup> COM (2001)143final. See, Robin R. Churchill and Daniel Owen, *The EU Common Fisheries Policy* (Oxford: Oxford University Press, 2010), 258-266.

<sup>89</sup> Article 191(1) of the *TFEU*.

<sup>90</sup> See, Ronán Long, “The EU Marine Strategy Framework Directive,” 12.

<sup>91</sup> For a comprehensive discussion of the law applicable to the CFP see, Churchill and Owen, *The EU Common Fisheries Policy*.

the EU to take into account the environmental impact of the activities of EU fishing vessels on the sensitive ecosystem around the Azores under Regulation 1954/2003 contravened the requirement of “environmental integration” under the Treaty and should have led to the annulment of that particular instrument.<sup>92</sup>

Overall, the principle that environmental considerations are reflected in EU policies is taken seriously by the Court of Justice, which has been very proactive and strengthened the environmental dimension of EU policies generally.<sup>93</sup> The rigorous approach of the Court can be seen in their case law on the use of criminal sanctions for the purpose of EU environmental law enforcement.<sup>94</sup> Although the type and level of sanctions is a matter for each Member State,<sup>95</sup> the EU institutions have given considerable guidance on this matter by adopting a Directive on the protection of the environment through the use of criminal law.<sup>96</sup> Infringements of instruments that give effect to environmental dimension of the IMP (such as the MSFD, the WFD and the Habitats and Birds Directives) come within the scope of this Directive. Furthermore, the Court has held that national penalties or sanctions adopted by the Member States must be effective, proportionate and dissuasive.<sup>97</sup> This requirement also applies to sanctions that are aimed at giving effect to regulatory measures that apply to maritime activities.

Another area where the Court of Justice has underlined the importance of the environmental dimension of EU policies is in enforcement proceedings concerning the failure of Member States to uphold their obligations under the EU Treaties. The Court, for example, penalised France with a lump sum of €20 million and €56 million for every six months it remained non-compliant with EU fisheries conservation measures under the CFP.<sup>98</sup> This case arose out of a failure by France to comply with a previous judgement of the Court. In similar enforcement proceedings, Spain was fined €625,000 per year for each percent of inland waters that did not comply with the requirements of the EU Directives on bathing water quality.<sup>99</sup>

If one examines the many regulatory measures that now apply to the marine environment, it is clearly evident that the overall approach of the EU institutions has been very proactive and focused on ensuring that the both the substantive and procedural law of the EU reflect environmental considerations. Accordingly, we can expect to see that the principle of integration will continue to shape the European regulatory environment for many decades to come and will undoubtedly influence the shape of the management measures that are adopted by the Member States and the European institutions in the programme of measures to ensure

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<sup>92</sup> See, *inter alia*, Kramer, *EU Environmental Law*, 22. This issue was raised in Case T-37/04, *Azores v Council* [2008] ECR II-103. An application for such an annulment was deemed inadmissible by the General Court on grounds that the contested measure was not of individual concern which is a prerequisite for judicial review. See, Case C-444/08P *Azores v Council* 26 November 2011.

<sup>93</sup> See, Rory Brady, “The European Community and Environmental Protection” in Myron Nordquist, Ronan Long, Tomas Heidar and J. Norton Moore (eds.), *Law, Science and Ocean Management* (Boston/Leiden: Martinus Nijhoff Publishers, 2007), 99-129. Indeed the Court of Justice has been active in a number of areas where there is no reference to environmental protection such as the Treaty provisions on the free movement of goods within the internal market. See Case 125/88 *Criminal Proceedings against Nijman* [1989] ECR 3533 to ban the use of pesticides; Case C-473/98 *Toolex Alpha* [2000] ECR I-5681 to prohibit the use of trichloroethylene for industrial purposes; and in Case C-67/97 *Danish Bees Case* [1998] ECR I-8033 to protect brown bees on the Danish Island of Laesø.

<sup>94</sup> Case C-176/03 *Commission v Council* [2005] ECR I-7879

<sup>95</sup> Case C-440/05 *Commission v European Parliament and Council* (ship source pollution) [2007] ECR I-9097.

<sup>96</sup> Directive 2008/99 of the European Parliament and the Council of 19 November 2008 on the protection of the environment through criminal law L 328/28, 6.12.2000.

<sup>97</sup> Case 68/88 *Commission v. Greece* [1989] ECR 2965.

<sup>98</sup> Case C-121/07 *Commission v France* [2008] ECR I-9159.

<sup>99</sup> Case C-278/01 *Commission V Spain* [2003] ECR I-14141.

that the standard of good environmental status of European marine waters is achieved by 2020 under the MSFD.

### ***The Precautionary Principle***

The precautionary principle is well established in EU law and reflects the normative necessity of taking appropriate and timely action in the face of scientific uncertainty.<sup>100</sup> In some instances, it entails a reversal of the burden of scientific proof so that the potential impacts of a particular course of action must be taken into account at the planning stage and as a precursor to the implementation of a project or a particular activity that poses a risk to the protection and preservation of the marine environment and the resources it supports.

The precautionary approach is codified in Principle 15 of the 1992 Rio Declaration on Environment and Development and there is extensive academic commentary about its precise normative status in international law.<sup>101</sup> In the context of seabed mining activities, its normative standing has been clarified to a degree by the International Tribunal for the Law of the Sea in its *Advisory Opinion with respect to Activities in the Area*, where it held that:

the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States, which is applicable even outside the scope of the Regulations. The due diligence obligation of the sponsoring States which requires them to take all appropriate measures to prevent damage that might result from the activities of contractors that they sponsor. This obligation applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks. A sponsoring State would not meet its obligation of due diligence if it disregarded those risks. Such disregard would amount to a failure to comply with the precautionary approach.<sup>102</sup>

The precautionary principle has figured on the landscape of European regional law since the early 1980s and its importance was highlighted as far back as 1984 in the Ministerial Declaration of the International Conference on the Protection of the North Sea.<sup>103</sup> One of the most frequently cited definitions of the principle is set down in the 1992 *OSPAR Convention* and this has since been replicated to a greater or lesser degree in many other European regional agreements that apply to the marine environment such as the 1992 Baltic Sea Convention.<sup>104</sup> The former provides that:

Contracting Parties shall apply the precautionary principle, by virtue of which preventive measures are to be taken when there are reasonable grounds for concern that substances or

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<sup>100</sup> See Sep. Op. of Judge Wolfrum in *MOX Plant Case (Ireland v United Kingdom)* (Provisional Measures, 3 December 2001 Sep ITLOS Reports 2001).

<sup>101</sup> For commentaries see, Simon Marr, "The Precautionary Approach and Conservation and Management of Fish Resources," *European Journal of International Law*, 11 (2000): 815; David Freestone and Ellen Hey (eds.), *The Precautionary Principle and International Law: The Challenge of Implementation* (The Hague: Kluwer Law International, 1996); Nicholas de Sadeleer, "The Precautionary Principle in EC Health and Environmental Law," *European Law Journal*, 12(2) (2006): 139-172.

<sup>102</sup> ITLOS Case No. 17, *Advisory Opinion on Responsibility and Liability for International Seabed Mining*, paragraphs 125-135

<sup>103</sup> Recital VII, Ministerial Declaration Second International Conference on the Protection of the North Sea, London, 24-25 November 24 1987.

<sup>104</sup> *Convention for the Protection of the Marine Environment of the North-East Atlantic*, opened for signature 22 September 1992, entered into force 25 March 1998, 32 (1993) ILM 1069 (*OSPAR Convention*); Article 3(2) of the *Convention on the Protection of the Marine Environment of the Baltic Sea Area*, opened for signature 9 April 1992, entered into force 17 January 2000, BNA 35: 0401.

energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects.<sup>105</sup>

Essentially, preventive measures include the use of best available techniques, best environmental practice, and clean technology. At a pan-European level, the OSPAR Commission work with several regional and international organisations to achieve its mandate regarding the design and implementation of preventative measures including ICES, the Regional Fisheries Management Organisations, the regional seas commissions, the IMO and the European Commission. As will be seen below, both the MSFD and the WFD provide a mechanism to implement the precautionary principle through the medium of EU law in line with the obligations that arise under regional and multilateral agreements.

In relation to the European approach to ocean governance under the IMP, it is important to keep in mind that the precautionary principle is an autonomous legal principle in EU law and stemming from its solid legal basis in the *TFEU*.<sup>106</sup> In addition, there has been considerable guidance from the European institutions regarding the practical application of the principle in the energy, fisheries, and many other maritime sectors. In 2000, the European Commission published a Communication which provides that:

the precautionary principle may be invoked when the potentially dangerous effects of a phenomenon or process have been identified by scientific and objective evaluation, and this evaluation does not allow the risk to be determined with sufficient certainty.<sup>107</sup>

The Communication goes on to state that:

where action is deemed necessary, measures based on the precautionary principle should be, *inter alia*: proportionate to the chosen level of protection; non-discriminatory in their application; consistent with similar measures already taken; based on an examination of the potential benefits and costs of action or lack of action (including, where appropriate and feasible, an economic cost/benefit analysis); subject to review in the light of new scientific data; and capable of assigning responsibility for producing the scientific evidence necessary for a more comprehensive risk assessment.<sup>108</sup>

This interpretation of the precautionary principle is fully consistent with the decisions of the Court of Justice, which has a substantial body of case-law concerning the application of precaution in the field of human health, consumer and environment protection, as well as under the environmental integration clause discussed above in the *TFEU*. The Court of First Instance has held that where there is uncertainty as to the existence or extent of risks to human health, then the European institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.<sup>109</sup> Indeed, under

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<sup>105</sup> Article 2(2)(a) of the *OSPAR Convention*.

<sup>106</sup> Article 191 (2) of the *TFEU* and Case T-13/99 *Pfizer v European Commission* [2002] E.C.R. II-3305.

<sup>107</sup> COM(2000) 1, 02.02.2000.

<sup>108</sup> *Ibid.*

<sup>109</sup> Case C-157/96 *The Queen v Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise, Ex p. National Farmers' Union, David Burnett and Sons Ltd, R. S. and E. Wright Ltd, Anglo Beef Processors Ltd, United Kingdom Genetics, Wyjac Calves Ltd, International Traders Ferry Ltd, MFP International Ltd, Interstate Truck Rental Ltd and Vian Exports Ltd*. [1998] E.C.R. I-02211; Case C-180/96 *United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities* [1998] E.C.R. I-0226.

EU law, the precautionary principle applies where a risk exists even though the precise level of risk cannot be demonstrated completely.<sup>110</sup> Furthermore, the principle requires,

the competent authorities to take appropriate measures to prevent specific risks to public health, safety and the environment, by giving precedence to the protection of those interests over economic interests.<sup>111</sup>

The importance of the latter requirement cannot be overstated and means that in certain instances that the economic objectives of the IMP may well have to yield to environmental considerations on the basis of precaution.

Accepting that the latter statement is true and in view of the preliminary findings of the ODEMM project which used a pressure assessment to evaluate various human activities that have an effect on the marine ecosystem and subsequently developed a risk assessment approach to determine the likelihood of failure to achieve good environmental status under the MSFD, it may be appropriate to ask what evidence is required to “trigger” the application of the precautionary principle in relation to regulatory measures that advance IMP ocean governance policy objectives.<sup>112</sup> In recent decisions, the Court of Justice has shed some light on the issue of risk assessment in so far as the Court has held that risk assessment must not be based on purely hypothetical considerations but on the most reliable scientific data and most recent results of international research.<sup>113</sup> Further clarity was added subsequently when the Court set down a two-step process for risk assessment. The first step being that the obligation placed on Member States to identify all the negative effects of a phenomenon, product or process and then make a comprehensive assessment of the risk they represent based on the most reliable scientific data available and the most recent results of international research.<sup>114</sup> Following on from this and where it proves,

impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures, provided that they are non-discriminatory and objective.<sup>115</sup>

Despite the general thrust of these decisions, it needs to be emphasised that neither the Court nor the Commission consider it necessary for a risk assessment to be undertaken in all cases where there is a potential risk to human health,<sup>116</sup> and thereby by implication where there is a potential risk to the protection of the environment. Accordingly, undertaking risk assessment is not a prerequisite for the adoption of regulatory measures under the IMP. In fact, as Kramer points out, the Treaties make no reference to such a requirement.<sup>117</sup> This is an important consideration as risk assessment in relation to a proposed development that impinges upon the quality of the marine environment may entail several years of expensive scientific work, which ultimately produces inconclusive results.

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<sup>110</sup> Case T-13/99 *Pfizer v European Commission* [2002] E.C.R. II-3305.

<sup>111</sup> Joined Cases T-74/00 and T-76/00 *Artegodan a.o v Commission* [2002] ECR II-4945.

<sup>112</sup> See Stuart Bell, Donald McGillvray and Ole W. Pedersen, *Environmental Law*, 8<sup>th</sup> edition (Oxford: OUP, 2013), 68-76.

<sup>113</sup> Case C-236/01 *Monsanto Agricoltura Italia* [2003] ECR I-8105

<sup>114</sup> Case C-333/08 *Commission v France* 28.1.2010.

<sup>115</sup> *Ibid.*

<sup>116</sup> Case C-343/09 *Afton Chemical*, 8.07.2010.

<sup>117</sup> Professor Kramer has suggested that such a requirement could only arise under secondary legislation, see. Kramer, *EU Environmental Law*, 23.

Several substantive secondary legal instruments that apply to the marine environment and are central to the implementation of the IMP make reference to the precautionary principle including the WFD, the Environmental Impact Directive, and the Strategic Environmental Impact Directive. Similarly, the basic fishery management regulation governing the CFP requires the EU to apply the precautionary approach in taking measures designed to protect and conserve living aquatic resources, to provide for their sustainable exploitation and to minimise the impact of fishing activities on marine eco-systems.<sup>118</sup> In this context, the precautionary approach to fisheries management means:

that the absence of adequate scientific information should not be used as a reason for postponing or failing to take management measures to conserve target species, associated or dependent species and non-target species and their environment.<sup>119</sup>

For inexplicable reasons, the precautionary principle is only mentioned in the Preamble of the MSFD and not in its substantive provisions.<sup>120</sup> Although this instrument is silent on what specific management measures ought to be introduced to attain the requisite environmental quality standard in the European marine environment, the preamble nonetheless provides that those,

measures should be devised on the basis of the precautionary principle and the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay.

Significantly, the focus in this important Directive and many of its substantive provisions is on the practical application of the principle and not on its abstract nature as a legal concept.<sup>121</sup> Similarly, we can see the precautionary approach in operation under the procedures that apply under the Habitats Directive which protect marine habitats and species once these have been designated by Member States and placed on the draft list of sites.

### *The Ecosystem Approach*

As noted above, ecosystem-based management of the marine environment is the subject of a number of separate publications and is sufficient to note in this chapter that it is one of the most pragmatic developments in EU marine environmental law since the establishment of the IMP.<sup>122</sup> This is particularly important as the ecosystem approach is not specifically mentioned in the EU Treaties. Accordingly, much of the impetus for its implementation is derived by means of secondary legislation including the WFD, the Habitats and Birds Directives, the Environmental Impact Assessment and Sustainability Impact Assessment Directives. In this context, the MSFD is the principal legal instrument and this requires all Member States to achieve “good environmental status” (GES) of marine waters by 2020. The methodology and criteria on how this is to be achieved is further fleshed out in a Commission Decision.<sup>123</sup> As noted in the preamble of the Directive, applying an ecosystem-based approach to the management of human activities entails “giving priority to achieving or

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<sup>118</sup> Article 2 of Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ L 358, 31.12.2002, p 59 .

<sup>119</sup> Article 3(i) of Council Regulation 2371/2002.

<sup>120</sup> Recital 44 of Directive 2008/56/EC.

<sup>121</sup> Recital 27 of the Preamble, MSFD.

<sup>122</sup> See notes 3 and 7 above.

<sup>123</sup> Commission Decision of 1 September 2010 on criteria and methodological standards on GES of marine waters, OJ L 232/14, 2.09.2010.

maintaining GES in the European marine environment.”<sup>124</sup> The substantive parts of the Directive set down a sophisticated scheme of procedural and administrative steps for achieving GES and this entails utilising the various mechanisms for the adoption of management measures under the regional seas agreements that apply to the Atlantic, Baltic, Mediterranean and Black Sea. Measures to protect the environment and biodiversity will thus apply across the various jurisdictional zones established by the Member States. Ecosystem-based management under the MSFD is clearly predicated on a view that marine environmental protection is a pre-requisite for the EU to realise the full economic potential of maritime resources and offshore activities.<sup>125</sup>

### **What are the Normative Trends in EU Ocean Governance?**

The IMP is a blueprint for responsible ocean governance by the EU. The absence of a specific legal basis in the EU Treaties means that the policy is characterised by numerous and sometimes conflicting objectives. At the time of writing, these objectives must be viewed through the prism of the fiscal austerity programmes that are being implemented in several Member States with significant maritime sectors (most notably by Spain, Portugal, Italy, Greece and Ireland), as well as the spectre of economic recession and the threats to global prosperity. Similar to all EU sector policies, the IMP is supplemented recently by five ambitious EU economic targets to be achieved by 2020 in the areas of employment, innovation, education, social inclusion, energy and climate change.<sup>126</sup> These targets suggest that the regulatory and policy actions of the EU and the Member States over the coming decade will remain firmly focused on economic development and on improving competitiveness in the various maritime sector policies that make-up the IMP.

Following on from this, one could argue that economic considerations ought to shape the scope and substance of all future EU regulatory measures that are applicable to offshore activities. In this context, considerable care should be taken with the contextual and ephemeral nature of the EU’s economic objectives when discussing the IMP, as these will ultimately have to be reconciled with the normative principles and approaches set down in European Treaties and secondary legislation, in particular the principle of sustainable development, the principle of integration, the precautionary principle, and ecosystem-based marine management.

Forecasting the future orientation of EU law and policy governing maritime activities is a risky business. In the immediate future, nonetheless, we can expect to see that the focus of the IMP will continue to evolve along an axis of soft-law instruments such as the various regional seas strategies. Moreover, it is highly unlikely that the European institutions will seek to adopt a framework Directive in the area of ocean governance.<sup>127</sup> In March 2013, there was a major legislative initiative, however, when the European Commission tabled a draft directive to create a common framework for maritime spatial planning and integrated coastal management.<sup>128</sup> This instrument if adopted by the Council and Parliament has the potential to be a game-changer and to have a profound impact on the practical aspects of coastal and marine management with a view to achieving economic, environmental and social objectives of the IMP. Aside from this initiative, the legal framework for the IMP remains somewhat fragmented and directed at establishing practical programmes aimed at facilitating matters

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<sup>124</sup> Recital 8 of the MSFD.

<sup>125</sup> See, Note from the European Council, Brussels, 4 June 2010, <http://register.consilium.europa.eu/pdf/en/10/st10/st10545.en10.pdf>.

<sup>126</sup> See: [http://ec.europa.eu/europe2020/index\\_en.htm](http://ec.europa.eu/europe2020/index_en.htm)

<sup>127</sup> See footnote 1.

<sup>128</sup> COM(2013) 133 final, Brussels, 12.03.2013.

such as: the establishment of integrated decision-making structures and procedures in the Member States for maritime policy formulation and implementation; the promotion of a cross-sectoral approach to maritime governance, and; the fostering of synergies between the various policies which impinge upon the maritime environment such as the energy, transport, fisheries and regional policies.<sup>129</sup> The majority of these initiatives will continue to be informed to a greater or lesser degree by the various marine environmental law principles that are highlighted in this chapter. The scope for applying these principles will increase as soon as the results of EU framework projects such as the ODEMM project become more widely available. In particular, the establishment of comprehensive scientific monitoring programmes, as well as the development of a sophisticated risk assessment framework and predicative management tools, will help close the current knowledge deficit concerning how best to respond to the anthropogenic factors that are influencing the status of the marine environment in general and the on-going loss of biodiversity in particular. Research results will also help the EU balance the short-term economic objectives with long-term ecosystem sustainability objectives set down by a broad range of hard and soft law instruments that govern maritime activities.

With the benefit of hindsight, this allows us to conclude that after an initial surge in EU policy formulation, the IMP now appears to be moving steadily towards the application of new normative approaches to ocean governance where shared responsibility for the management of maritime space and ocean resources is the preferred paradigm in the EU. This is particularly evident when one examines the substantive detail of instruments such as the MSFD, which provide a legal basis for the establishment of marine regions/sub-regions on the basis of geographical and environmental criteria and not necessarily on the basis of the political boundaries established by Member States in accordance with general international rules on maritime delineation and delimitation.<sup>130</sup> The need to implement the various principles highlighted in this paper at a regional seas level is all the more pressing in light of the findings of the EU framework research such as the ODEMM project. Implementation and a principle led approach is of course fully in line with a central strand running through the *LOSC*, which is that the problems associated with the use of ocean space are closely interrelated and therefore need to be considered as a whole.<sup>131</sup> Accordingly, it is easy to conclude that EU approach to ocean governance under the IMP will continue to evolve in manner that is fully consistent with the objectives and principles set down in the *LOSC*.

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<sup>129</sup> COM(2007) 575 final, Brussels, 10.10.2007, 2.

<sup>130</sup> 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 June 2008. See Ronan Long, "The EU Marine Strategy Framework Directive"; Arie Trouwborst, Harm M. Dotinga, "Comparing European Instruments for Marine Nature Conservation: The OSPAR Convention, the Bern Convention, the Birds and Habitats Directives, and the Added Value of the Marine Strategy Framework Directive," *European Energy and Environmental Law Review*, 20(4) (2011): 129-149.

<sup>131</sup> Paraphrased from Recital 3, Preamble of the *LOSC*. As an aside it should also be noted that this also accords with Philip Allot's propitious prediction that this would become the "rule rather than the exception" in the progressive development of the international law of the sea. See Philip Allott "Mare Nostrum: A New International Law of the Sea," in Jon M. Van Dyke, Durwood Zaelke and Grant Hewison (eds.), *Freedom For The Seas in the 21st Century: Ocean Governance And Environmental Harmony* (Washington DC: Island Press, 1993), 52.