OFFSHORE OIL AND GAS EXPLORATION AND EXPLOITATION IN THE ADRIATIC AND IONIAN SEAS

Edited by
ANDREA CALIGIURI

EDITORIALE SCIENTIFICA

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PREFACE

The contents of this eBook deal with important subject matters that are highly relevant from numerous perspectives.

The primary issue concerns energy supply and safety. The current crisis between Russia and the Ukraine and the resulting repercussions (and conflict) throughout Europe serve as backdrop to the acceleration of offshore oil and gas exploration and exploitation initiatives in the Adriatic and Ionian Seas that we have witnessed over the past few years. Activities that call for new regulations and improved cooperation among the States involved. Which brings us to this book's second area of interest and some novel reflections regarding the question of "reinforcing" cooperation in enclosed and semi-enclosed seas. It is a known fact that it was the intention of UNCLOS to highlight this need to the coastal States of these seas, a need that is quite obvious in the Adriatic as it is, in effect, a "semi-enclosed Sea in a semi-enclosed Sea". But we also know that this need is anything but fulfilled, either in the Mediterranean or elsewhere. A great deal of attention is being given today, for example, to the conflicts and claims of the coastal States of the South China Sea (also called "Oriental Sea"), especially regarding the exploration and exploitation of energy resources. Although much less acute, the abundance of data available indicates there is a great deal of disagreement (rather than cooperation) in the Adriatic also.

This is shown, first of all, by the lack of any delimitation agreements concerning the continental shelf exploitation between States issuing from the disintegration of Yugoslavia, primarily because of incompatible claims. Secondly, by the existence of an ongoing crisis of the solutions that appeared to have been reached. Good examples are the Memorandum of Understanding between Italy and Malta and the agreement between Greece and Albania, the latter annulled by the Constitutional Court of Albania. In other cases it is nature itself that complicates solutions because of the geological and geomorphologic configuration of the seabed and the subsoil.

To all this we must add the continuing economic crisis. Consequently, in this sector also, and as happened in the past with regard to the exploitation of fishing and environmental governance, coastal States have proceeded unilaterally, issuing national laws and regulations and unhesitatingly attributing rights of exploration, exploitation and construction of offshore platforms. To this end we also point to Italy's "wait and see" approach, as it decided to take action (by initiating the National Energy Strategy through Law 12.9.14) only after the initiatives of other States made it inevitable for it to do so. Obviously at this point several questions emerge concerning the sustainability by such a fragile ecosystem as the Adriatic (and the Mediterranean in general) of the activities currently in progress as well as those to be implemented in the years to come in order to provide new sources of energy.

These environmental concerns represent the third aspect of general interest dealt with in the contributions that follow. The Mediterranean most probably could not assimilate and overcome an incident of a gravity comparable to what happened in the Gulf of Mexico in 2010. The authors of the essays contained herein also demonstrate that the existing legal and operational instruments, both on an international level (UNCLOS *in primis*) and within the European Union, are obsolete and certainly inadequate to deal

with the phenomena in question and that what is required at this point (in addition to cooperation as previously mentioned) is recourse to the general principles of precaution, prevention and environmental sustainability.

In conclusion, this is a highly useful work, as it provides information not always readily available and an in-depth analysis from diverse perspectives (as the authors belong to different scientific sectors), of a topic that will interest scholars and researchers in the years to come. It also proves that the Law of the Sea is in constant evolution and always of great relevance. Which cannot but gratify the President of the International Association of the Law of the Sea.

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INTRODUCTION

OFFSHORE SHARED NATURAL RESOURCES AND THE DUTY TO COOPERATE IN A SEMI-ENCLOSED SEA

Andrea Caligiuri

The Adriatic Sea is undoubtedly a semi-enclosed sea under Art. 122 UNCLOS.[1] It forms a long but relatively narrow gulf, generally aligned from northwest to southeast, toward its only access, the Strait of Otranto.[2] The Adriatic Sea connects the territories of seven States: Italy, Slovenia, Croatia and Greece, EU Member States; two candidate States, Montenegro and Albania and a potential candidate State, Bosnia and Herzegovina, which has a portion of territorial sea surrounded by the waters of Croatia.

Under Art. 122 UNCLOS, the Ionian Sea could also be regarded as a semi-enclosed sea when its coastal States – Albania, Greece and Italy – will proclaim their exclusive economic zones; indeed, a semi-enclosed sea may consist "entirely or primarily" of the territorial seas and exclusive economic zones of two or more States.[3]

It has long been recognized that the Adriatic and the Ionian are seas under stress; in particular, the Adriatic Sea especially in light of its semi-enclosed character with limited water exchange with the Mediterranean Sea. The marine environment of the Adriatic and Ionian is mainly vulnerable for a worrying combination of factors: pollution from land sources and ships, litter, impact on biodiversity, overfishing and coastal degradation.

Art. 123 UNCLOS states "States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. (…)".[4]

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[1] Under Art. 122 UNCLOS, "enclosed or semi-enclosed sea" means "a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States".

[2] The International Hydrographic Organization (IHO) defines the boundary between the Adriatic and the Ionian seas as a line running from the Butrinto River's mouth (39°44'N) in Albania to the Karagol Cape in Corfu, through this island to the Kephali Cape (these two capes are in latitude 39°45'N), and on to the Santa Maria di Leuca Cape (39°48'N); see IHO, *Limits of Oceans and Seas (Special Publication No. 28)*, 3rd Edition 1953, 17.

[3] The IHO defines the limits of the Ionian Sea as follows: *On the North* – A line running from the mouth of the Butrinto River (39°44'N) in Albania, to Cape Karagol in Corfu (39°45'N), along the North Coast of Corfu to Cape Kephali (39°45'N) and from thence to Cape Santa Maria di Leuca in Italy. *On the East* – From the mouth of the Butrinto River in Albania down the coast of the mainland to Cape Matapan. *On the South* – A line from Cape Matapan to Cape Passero, the Southern point of Sicily. *On the West* – The East coast of Sicily and the Southeast coast of Italy to Cape Santa Maria di Leuca"; see IHO, *Limits of Oceans and Seas (Special Publication No. 28)*, 3rd Edition 1953, 17.

[4] The peculiarity of closed and semi-enclosed seas is also taken into account by the 1995 *Agreement for the Implementation 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 Fish Stocks and Highly Migratory Fish Stocks*. See Art. 15 (Enclosed and semi-enclosed seas): "In implementing this Agreement in an enclosed or semi-enclosed sea, States shall take into account the natural characteristics of that sea and shall also act in a manner consistent with Part IX of the Convention and other relevant provisions thereof".

One of the most recent problems in the Adriatic and Ionian cooperation is related to exploration and exploitation activities of oil and gas by coastal States. There are two main reasons that make these activities a matter of direct confrontation rather than cooperation: the absence of delimitation agreements of the continental shelf between the States of the former Yugoslavia and the presence of oil and gas fields that are shared, because of geological and geomorphologic configuration of seabed and subsoil in the Adriatic Sea.

In relation to the first element, an example of rivalry between States is a consequence of the decision of the Government of Croatia to give to some foreign leaseholders the right to explore and exploit the hydrocarbons in blocks 27, 28 and 29 of the Adriatic Sea, which are located in whole or in part in the maritime area claimed by Montenegro. The unilateral action of Croatia was stigmatized by the Government of Montenegro with two diplomatic notes in 2014.[5] Montenegro asserted that the unilateral action of Croatia is in violation of the *Protocol establishing an interim regime along the southern border between the two States* in 2002, which, in its Preamble's fourth paragraph, reads: "Departing from principles of respect for reciprocal obligations, non-acceptability of unilateral acts and bona fide implementation of the Protocol"; and it is in violation of the UNCLOS Preamble's first paragraph which underlines that the Contracting States are "prompt by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution of the maintenance of peace, justice and progress for all peoples of the world". Montenegro also stressed that "the Republic of Croatia should not establish any valid concessionary contract on exploration and exploitation of hydrocarbonates with any company in the world in disputed territory before the definitive delimitation and demarcation of the joint state border with Montenegro, or before two states reach a mutually acceptable agreement, based on equitable and just instruments that have been already applied in resolving similar disputes".[6]

Problems concerning the exploration and exploitation of oil and gas shared deposits could also arise between Italy and the States that face it, primarily with Croatia.

It must be observed that the solution to this problem is not in the UNCLOS. This convention only states that "The coastal State exercise over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources" (Art. 77, para. 1).[7] Therefore, the solution can only be through bilateral negotiations between concerned States.

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[5] See *Communication from the Government of Montenegro, dated 2 July 2014, concerning exploration and exploitation of resources in the Adriatic Sea by the Republic of Croatia*; *Communication from the Government of Montenegro, dated 1 December 2014, concerning exploration and exploitation of resources in the Adriatic Sea by the Republic of Croatia*. Both documents are available on *http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/MNG.htm*.

[6] See *Communication from the Government of Montenegro, dated 2 July 2014, concerning exploration and exploitation of resources in the Adriatic Sea by the Republic of Croatia*, cit.

[7] The Secretariat of the Commission of International Law in the *Memorandum on the Regime of the High Seas* (UN Doc. A/CN.4/32 (1950), para. 339) proposed "*le principe de l'unité du gisement*" on the bases of which the rules concerning the delimitation of the continental shelf should be supplemented by special agreements to take into consideration that the deposits of natural resources does not coincide with the limits of the continental shelf. An obligation to cooperate is also affirmed by the United Nations General Assembly in resolution 3129 (XXVIII) "Co-operation in the field of the environment concerning natural resources shared by two or more States" of 13 December 1973 and in resolution 3281 (XXIX) "Charter of Economic Rights and Duties of States" of 17 December 1974. Finally, see UNEP, *Draft Principles of*

The 1968 *Agreement between Italy and Yugoslavia concerning the Delimitation of the Continental Shelf between the two Countries in the Adriatic Sea* includes a provision establishing an obligation to cooperate to resolve disputes concerning the exploitation of shared resources. Art. 2 states: "In case it is ascertained that natural resources of the sea bottom or under the sea bottom extend on both sides of the demarcation line of the continental shelf with the consequence that the resources of the shelf belonging to one of the contracting parties can be in whole or in part exploited from the part of the shelf belonging to the other contracting party, the competent authorities of the contracting parties will themselves be in contact with one another with the intention of reaching an understanding of the manner in which the aforesaid resources shall be exploited previous to consultations by the holders of any eventual concessions".[8] A similar provision is contained in the 1979 *Agreement between Italy and Greece on the delimitation of the continental* shelf.[9]

Art. 2 found application in the case of the exploitation of the Annamaria gas field, in the Northern Adriatic. This field is straddling the demarcation of the continental shelf of Italy and Croatia. With a technical agreement,[10] the Governments of both countries agreed on the programs of gas exploitation signed between the two leaseholders (ENI, for Italy, an INA, for Croatia);[11] however, they have indicated some conditions for applying this arrangement. In particular, the yearly gas exploitation programs shall be approved by the competent authorities of both Italy and Croatia; any possible suspension of activities imposed by the competent authorities of one side shall be shared with the other side; the competent authorities of both sides will jointly approve measurement systems on both platforms; the competent authorities of both sides will periodically verify the functioning of measurement systems on both platforms and

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Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States in *Report of the Fifth Session of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States* (UN Doc. UNEP/GC.6/17 (1978)) and *Cooperation in the field of the environment concerning natural resources shared by two or more States,* decision 6/14 of the Governing Council of UNEP (19 May 1978) (approving the principles). For an analysis on the legal implications of the exploitation of shared natural resources, see M. R. MARIO, *The Exploitation of Offshore Transboundary Marine Resources or those in Disputed Areas: Joint Development Agreements*, in A. DEL VECCHIO (ed.), *International Law of the Sea. Current Trends and Controversial Issues*, The Hague, 2014, 281-316.

[8] Art. 3 of the 1968 Agreement highlights that in case of controversy concerning the position of any installation or equipment with reference to the line of demarcation of the continental shelf, the competent authorities of the contracting parties shall determine by mutual agreement in which part of the continental shelf such installations or equipment may be actually situated.

[9] Art. 2 of the 1979 Agreement: « *Si un gisement de substance minérale, y compris les sables et graviers, est partagé par la ligne de séparation, et si la part du gisement qui est située d'un des côtés de la ligne de séparation est exploitable en tout ou en partie à partir d'installations situées de l'autre côté de celle-ci, les deux Gouvernements chercheront, en liaison avec les titulaires des titres miniers, s'il y en a, à se mettre d'accord sur les conditions de mise en exploitation du gisement, afin que cette exploitation soit la plus rentable possible et de telle sorte que chacune des Parties conserve l'ensemble de ses droits sur les ressources minérales du sol et du sous-sol de son plateau continental. / Dans le cas où auraient été exploitées des ressources naturelles d'un gisement situé d'un côté et de l'autre de la ligne de séparation, les Parties contractantes mettront tout en œuvre, après avoir consulté les titulaires de titres d'exploitation, s'il y en a, afin de parvenir à un accord sur une indemnisation équitable* ».

[10] *Technical Agreement between the Ministry of Economic Development of the Italian Republic (Directorate General for Energy and Mineral Resources) and the Ministry of Economy, Labour and Entrepreneurship of the Republic of Croatia (Directorate for Mining) on the Joint Exploitation of the Annamaria Gas Field in the Adriatic Sea*, 1 July 2009.

[11] *Annamaria Integrated Development and Operating Agreement*, 19 December 2006.

certify every three months production and withdrawal from both platforms in cross-examination of ENI and INA. Finally, the two Governments have expected that modifications of the allocation of reserves and compensation plans on past production shall be approved by the Ministry of Economic Development of the Italian Republic and by the Ministry of Economy, Labour and Entrepreneurship of the Republic of Croatia, each side referencing in its own acts the quantities to be compensated for past years.

However, Art. 2 of the 1968 Agreement establishes a basic cooperation mechanism, as the Annamaria gas field case shows; success in bilateral cooperation is based, *de facto*, on an arrangement between companies that have exploitation licenses for that deposit.

Rather, it must be emphasized that, in practice, the bilateral agreements between States that have the same problem of shared resources in the Persian Gulf, the North Sea, the Caribbean Sea and the Gulf of Mexico lay down rules more detailed which will condition the conclusion of an agreement between the companies that have exploitation licenses.

In particular, the *US-Mexixo Transboundary Hydrocarbons Agreement*, signed in 2012, facilitates the formation of voluntary arrangements – "unitization agreements" – between U.S. leaseholders and Petróleos Mexicanos for the joint exploration and development of transboundary reservoirs. It also provides appropriate incentives to encourage the formation of such arrangements if a reservoir is proven to be transboundary and a unitization agreement is not formed. The agreement also provides that development may proceed in an equitable manner that protects each nation's interests. Finally, the agreement provides for ongoing cooperation between the two Governments related to safety and the environment, and also provides for joint inspection teams to ensure compliance with applicable laws and regulations. Both Governments will review and approve all unitization agreements governing the exploration and development of transboundary reservoirs under the agreement, providing for approval of all safety and environmental measures.

The US-Mexico Agreement "can potentially generate the same normative impact as the 1945 Truman proclamation on the continental shelf";[12] and it can certainly be a model to apply in Adriatic and Ionian region.

[12] M. H. LOJA, *Who Owns the Oil that Traverses a Boundary on the Continental shelf in an Enclosed Sea? Seeking Answers in Natural Law through Grotius and Selden*, in *Leiden Journal of International Law*, 2014, 839-911, 909.

1

OFFSHORE HYDROCARBONS POLITICS AND POLICY IN THE ADRIATIC AND IONIAN REGION

ANDREA PRONTERA

1. Introduction

In recent years, energy security has become a prominent issue on the European Union (EU) energy policy agenda. The attention for this new 'old' issue has been mainly driven by the gas crisis between Russia and Ukraine at the end of the 2000s and by the growing tension between Russia and EU after the outbreak of war in Eastern Ukraine in 2014. The Adriatic and Ionian region is a very important area for the energy security strategy of the entire EU, especially with regard to the diversification of gas supply (e.g. the development of the Southern Gas Corridor), the completion of the wider European energy market (e.g. Energy Community), and the increase in sustainable production of fossil fuels, owing to the hydrocarbon reserves located in the Adriatic and Ionian Seas. In particular, after the global financial crisis and the economic downturn in Southern Europe, many countries of the Adriatic and Ionian region, such as Italy, Greece, Croatia and Montenegro, have formulated new plans for the exploration and exploitation of their offshore petroleum resources as a strategy to reduce their energy dependence but also to boost economic recovery by attracting foreign investments and by exploiting oil and gas rent. These policies are coherent with the new 'EU Energy Security Strategy' and have emphasized the importance of increasing the EU energy production from fossils fuels in the next few years.[1] However, the relaunch of the offshore hydrocarbon sector in the region is also driven by an intra-regional competitive dynamic; that is, once a country starts to elaborate a new plan to exploit its resources, other countries which share a common marine border tend to be pushed to accelerate or review their plan in order to preserve their own resources.

In the next section, some basic data about the current oil and gas offshore activities and their future potential in the EU and the Adriatic and Ionian region are presented. Then, the paper focuses on the international dimension of offshore hydrocarbon politics and on recent developments at the national level in the main countries of the region: Italy, Croatia, Greece, Albania and Montenegro. In particular, with regard to the international dimension, attention will be paid to the emerging pattern of bilateral diplomacy related to government-to-government negotiations, cooperation or conflicts

[1] See the *European Energy Security Strategy*, Final Communication from the Commission to the European Parliament and the Council, COM (2014) 330 final, 28 May 2014.

for the delimitation of the continental shelf of each state. For the national level, a brief case-by-case overview of the historical origins and recent developments in the hydrocarbon and offshore sector will be provided. Finally, in the conclusion, the paper reviews the main findings and specifies the main drivers behind the current relaunch of offshore activities in the Adriatic and Ionian region, along with the resulting patterns of cooperation and/or competition among national governments.

2. Offshore Oil and Gas Activities and Perspectives in the Adriatic and Ionian Region

Offshore hydrocarbon production represents an important indigenous energy source for the European Union, especially with regard to natural gas. In 2012, the offshore crude oil production of the EU-28 corresponded to almost 9% of the gross petroleum products consumption, whereas EU-28 offshore gas production covered 13.8% of the gross energy consumption. With regard to crude oil, most of production is located in the North Sea, with the UK as the major contributor (75%), followed by Denmark (18%). Other important producers are Germany (2.10%), Romania (1.41%), The Netherlands (1.33%), Italy (0.83%), Poland (0.33%), Spain (0.25%), Greece (0.17%) and Bulgaria (0.02%).[2] With regard to gas, the UK and the Netherlands have a crucial role, with 54.6% and 25.23% of production, respectively. Other important producers are Italy (8.06%), Denmark (7.12%), Romania (2.76%), Croatia (1.59%), Ireland (0.29%), Bulgaria (0.25%), Spain (0.08%) and Greece (0.01%).

Table 1. EU Main Oil and Gas Offshore Producers (% of Total EU Production).

Country	Oil %		Country	Gas %
UK	75.3		UK	54.6
Denmark	18.1		Netherlands	25.2
Germany	2.1		Italy	8.06
Romania	1.4		Denmark	7.12
Netherlands	1.33		Romania	2.76
Italy	0.83		Croatia	1.59
Poland	0.33		Ireland	0.29
Spain	0.25		Bulgaria	0.24
Greece	0.17		Greece	0.01

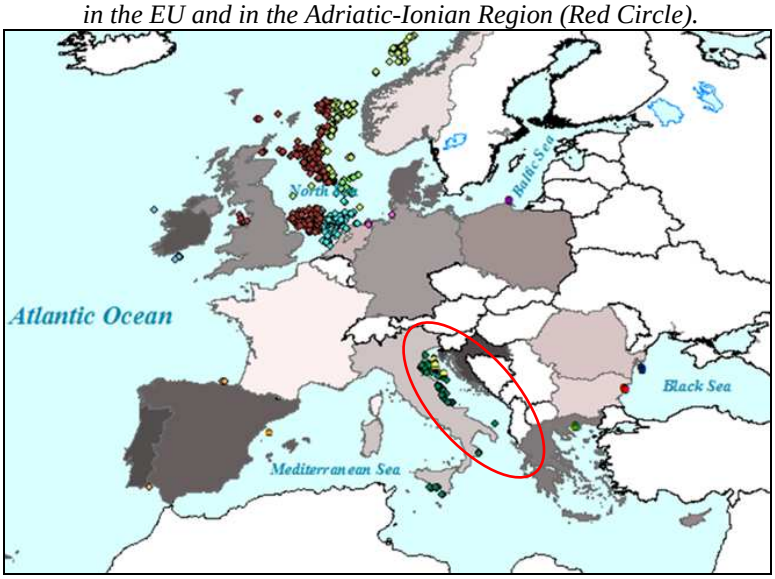
Source: EU Offshore Authorities Group (http://euoag.jrc.ec.europa.eu/node/63).

With regard to offshore installations, more than 600 platforms (not counting the large number of subsea structures connected to them) are operating in the continental shelves of the European member states. The North Sea is the area with the highest concentration

[2] Additional, considerable quantities of oil were extracted from the continental shelf of Norway. In 2012 offshore oil production in Norway was almost 78 million tons, more than 130% of the total European offshore oil production (http://euoag.jrc.ec.europa.eu/node/63).

of hydrocarbon offshore activities, which take place in the Danish, Dutch, German, Irish, Norwegian and UK sections. However, the Adriatic and Ionian Sea basins represent the second area for hydrocarbon installations, mainly due to the offshore production that is taking place in the Italian continental shelf as well as in Croatia and Greece (figure 1).

Figure 1. Distribution of Offshore Installations (Oil and Gas) in the EU and in the Adriatic-Ionian Region (Red Circle).



Source: EU Offshore Authorities Group (http://euoag.jrc.ec.europa.eu/node/63).

According to the data on proven hydrocarbon reserves (both onshore and offshore), the potential of the Adriatic and Ionian region in a wider European perspective is not impressive: proven oil reserves represent about 6.5% of the entire European continent (EU member states plus Norway), whereas proven gas reserves account for about 2.1% of the total (table 2).

Table 2. Adriatic-Ionian Region (AI) Proven Oil (Billion Barrels) and Gas (Trillion Cubic Feet) Reserves by Country.

Country	Oil (Bb)	Gas (Tcf)
Italy	0.52	2.20
Croatia	0.07	0.88
Greece	0.01	0.04
Albania	0.17	0.03
Montenegro	0	0
Slovenia	0	0
Tot. Adriatic-Ionian region (AI)	0.77	3.15
Tot. EU (+Norway)	12	146
%AI/EU(+Norway)	6.4%	2.1%

Sources: U. S. Energy Information Administration statistics, 2013

(http://www.eia.gov).

However, these resources can play an important role from a regional perspective. The most promising countries in terms of hydrocarbons development seem to be Italy and Croatia, followed by Albania for oil and Greece for gas reserves. In particular, Italy is the country with the most significant gas reserves of the region, and more than the half of these reserves are located in the Adriatic Sea[3] (table 3).

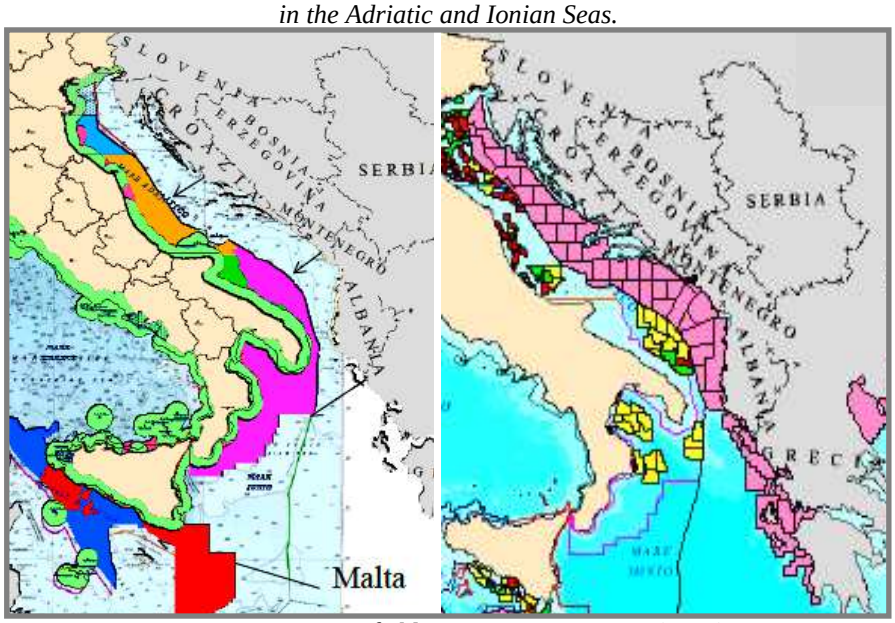
Table 3. Italian Offshore Gas Reserves per Marine Zones.
Source: DGRME (2014).

	Gas (million cubic meters)			
Marine zone	**Proven reserves**	**Probable reserves**	**Possible reserves**	**% Proven reserves**
Zone A	25.926	18.679	7.981	44%
Zone B	4.444	6.30	1.290	7%
Zone C+D+F+G	5.389	13.210	2.445	9%
Tot Sea	35.758	38.250	11.717	60%
Tot Italy	59.425	63.382	21.684	100%

Note: Zone A and Zone B correspond to the Italian sections of the Northern Adriatic Sea.

Moreover, these data are incomplete, since apart from the Italian section, many portions of the continental shelves of the region have not been yet explored, and extensive data are lacking for several areas. Additionally, in the next few years, according to the recent plans formulated by the governments of the EU (Croatia and Greece) and non-EU countries (Montenegro and Albania) in the region, the offshore activities in the Adriatic and Ionian Seas are expected to increase (figure 2).

Figure 2. Marine zones open to offshore exploration and production activities in the Adriatic and Ionian Seas.



Sources: Mappa Infield-2013. Data DGRME (2014).

[3] Data for table 3 and figure 2 are from 'Lo sfruttamento sostenibile selle risorse minerarie del mare', Direzione generale per le risorse minerarie ed energetiche, 2014 (DGRME 2014).

3. The International Offshore Politics in the Adriatic and Ionian Seas

Offshore oil and gas activities in the countries of the Adriatic and Ionian Sea basins take place in their territorial sea and off the continental shelf. Sovereignty over these areas is established pursuant to the United Nations Convention on the Law of the Sea (UNCLOS), which provides a legal framework for its Contracting States for sovereign rights and jurisdiction concerning their territorial seas, continental shelves, and eventually, exclusive economic zones. This legal framework covers, among other things, a Contracting state's rights to natural resources in those three areas (none of the countries in the region have established exclusive economic zones), its right to exercise jurisdiction over them, controls to protect and preserve the marine environment in them, and claims for compensation. All the states of the Adriatic and Ionian region became parties to the UNCLOS during the 1990s and the 2000s[4] (table 4).

Table 4. UNCLOS Parties in the Adriatic and Ionian Region.

Country	UNCLOS
Croatia	1995
Greece	1995
Italy	1995
Slovenia	1995
Albania	2003
Montenegro	2006

However, the regime of bilateral agreements to delimitate each state's continental shelf date back to the 1960s.[5] In particular, since the end of the 1960s, the Italian government has negotiated different agreements with the other states of the region in order to improve the development of its offshore hydrocarbon resources.[6] In 1968, an agreement between Italy and Yugoslavia was signed[7] (and later Croatia, Montenegro and Slovenia would become successor states of Yugoslavia in this agreement). Then, an agreement between Italy and Greece was finalized in 1977, and Italy and Albania negotiated an agreement in 1992.[8]

With the Albania-Italy continental shelf agreement of 1992, the process of delimitation between the Adriatic's opposite coasts was virtually completed. However, in the following years, with the breakup of the former Republic of Yugoslavia, the emergence of four new Adriatic littoral states, Bosnia-Hercegovina, Croatia,

[4] See, Current status of the ratification/accession of the United Nations Convention on the Law of the Sea (http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm).

[5] For a detailed account of the bilateral agreements in the Adriatic regions from the 1960s to the 1990s, see Gerald Blake and Duško Topalović, *The Maritime Boundaries of the Adriatic Sea*, International Boundaries Research Unit, Maritime Briefing, Vol. 1, No. 8, 1996.

[6] Italy has also negotiated agreement with many other States of the Mediterranean Sea (e.g. France, Spain, and Tunisia).

[7] *Agreement between Italy and Yugoslavia concerning the Delimitation of the Continental Shelf between the two Countries in the Adriatic Sea*, 8 January 1968.

[8] *Accord entre la République Italienne et la République de Grèce sur la Délimitation des zones du plateau continental propres a chacun des deux états*, 24 May 1977; *Agreement between Albania and Italy for the determination of the continental shelf of each of the two countries*, 18 December 1992.

Montenegro and Slovenia, significantly complicated the maritime boundary delimitation picture in the region. With regard to the Italian marine border, the problems were easily solved after Croatia, Montenegro and Slovenia became successor states of Yugoslavia in the 1968 agreement. In 2005, a new agreement between Italy and Croatia was also signed in order to facilitate the common development of a gas field located between the Italian and Croatian continental shelves[9] (the Annamaria gas field). According to this framework, in 2009, Italy and Croatia signed a technical agreement for the joint exploitation of this gas field[10] (this agreement was renewed in 2013).

With regard to the new Balkan countries, the situation has been more complicated, and the recent Croatian plan to develop its offshore resources – according to which the Croatian government has opened twenty-nine offshore blocks in the Adriatic Sea to exploration and exploitation (see the next section) – has prompted new issues with both Montenegro and Slovenia. A definitive agreement for the common delimitation of the state border at sea among these countries has not yet been concluded. In particular, an 'interim regime' has been at work between Croatia and Montenegro since 2002.[11] However, the government of Montenegro has expressed concern about the Croatian offshore plan. In 2014, the Montenegrin Ministry of Foreign Affairs officially filed a complaint against Croatia arguing for the inclusion of the Prevlaka peninsula in the government-issued geographic maps that are offered to interested concessionaires for oil and gas exploration.[12]

With regard to the sea border between Croatia and Slovenia, an agreement was first negotiated in 2001, but the resulting treaty was not signed by the Croatian government.[13] In the period between 2002 and 2008, no substantive negotiations took place, but the two governments agreed to resolve the dispute with the assistance of a third party. Accordingly, in 2009, an arbitration agreement was signed, but the process has not yet been concluded (the arbitral award should be final by 2015).[14] In this context, the Croatian offshore plan has prompted a reaction from the Slovenian government and could jeopardize the solution of the dispute.[15]

After two years of negotiations, an agreement was also signed in 2009 between Greece and Albania. In particular, the deal was reached in April 2009 during a high-profile meeting between visiting Greek Prime Minister Costas Karamanlis and his

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[9] *Correzione tecnica della linea di delimitazione Italia-Croazia*, Comunicato Ministeriale 30 settembre 2005, Rome.

[10] *Technical Agreement between the Ministry of Economic Development of the Italian Republic (Directorate General for Energy and Mineral Resources) and the Ministry of Economy, Labour and Entrepreneurship of the Republic of Croatia (Directorate for Mining) on the Joint Exploitation of the Annamaria Gas Field in the Adriatic Sea*, 1 June 2009.

[11] *Protocol between the Government of Croatia and the Government of the Federal Republic of Yugoslavia, 10 December 2002, establishing a provisional cross-border regime on the Prevlaka peninsula*.

[12] Montenegro recalled that the Protocol on the Provisional Regime of 2002 obliges the two countries to refrain themselves from unilateral actions that would prejudice the decision of the common border at sea and on land. Accordingly for the Montenegrin government, the unilateral acts from Croatia calling public tenders in the southern part of the Adriatic is inconsistent with the Protocol (see, 'Montenegro objects on Croatian tender for oil and gas exploitation', 4 April 2014, at http://www.balkaneu.com/montenegro-objects-croatian-tender-oil-gas-exploitation/).

[13] *Treaty Between the Republic of Slovenia and the Republic of Croatia on the Common State Border*, 2001.

[14] See http://www.vlada.si/en/projects/arbitration/#c10819.

[15] See 'Slovenia Fears Croatia's Bidding Round Launch Would Jeopardize Maritime Dispute', 17 April 2014 (http://www.naturalgaseurope.com/croatia-slovenia-maritime-dispute).

Albanian counterpart, Sali Berisha. However, the signing of the agreement was followed by different statements made in the national media by Albanian military and international law experts, who claimed that the agreement had been subject to irregularity and abusive border delimitation. Following these public statements, the issue was addressed by the Albanian Constitutional Court, which nullified the agreement due to 'procedural and substantial violations' of the constitution and the UN Convention of the Law of the Sea.[16]

In summary, as far as the situation of the maritime border delimitation in the Adriatic and Ionian region is concerned, Italy is the only country that has signed international agreement with all the relevant parties. Moreover, technical cooperation between Italy and Croatia has been established for the joint development of some gas fields in the Adriatic Sea (table 5). Unresolved issues still remain between Croatia and Slovenia, Croatia and Montenegro, and Greece and Albania, whereas the marine border between Montenegro and Albania has not yet been defined (table 5).

Table 5. Maritime Border Delimitation Agreements/Issues in the Adriatic and Ionian Region (2014).

	Italy	**Croatia**	**Greece**	**Albania**	**Montenegro**	**Slovenia**
Italy		IA/TA	IA	IA	IA	IA
Croatia	IA/TA				IR/U*	U*
Greece	IA			U*		
Albania	IA		U*		No	
Montenegro	IA	IR/U*		No		
Slovenia	IA	U*				

Note: IA = intergovernmental agreement; TA = technical agreement; IR = interim regime; U = unresolved issues; No = marine border/no agreement; Orange square = no marine border.*

4. National Offshore Policy in the Adriatic and Ionian Region: Historical Background and Recent Developments

Italy

Offshore activities in the Italian territorial sea and continental shelf date back to the 1950s, when the first oil wells were drilled off the coast of Sicily and the first gas was found in the Northern Adriatic Sea by the state-owned companies Agip and ENI.

In 1957, a new public agency was established to promote the development of national resources and to manage the sector, the UNMI (Ufficio Nazionale Minerario Idrocarburi), which later became UNMIG (Ufficio Nazionale Minerario per gli Idrocarburi e la Geotermia) under the DGERM (Direzione Generale per le Risorse Minerarie ed Energetiche) of the Ministry of Economic Development. In 1967, the legislative framework for offshore activities was set up with Law No. 613, which defined the regime for exploration and exploitation of offshore resources and which identified the marine areas open for such activities. In particular, Law No. 613 defined

[16] See 'Albanian constitutional court nullifies maritime boundary agreement with Greece', 10 February 2010 (https://www.dur.ac.uk/ibru/news/boundary_news/?itemno=9534).

five marine areas (so-called '*zone marine*') A, B, C, D and E, in which offshore activities should have been developed by operators after obtaining a concession from the Ministry of Economic Development[17] (the so called '*titoli minerari*'). In the following years, others marine areas were opened to offshore activities, including zone F in 1975 (with the Ministerial Decree 13/06/75) and zone G in 1981 (with Ministerial Decree 26/06/81).

Until the 1980s, offshore activities increased, but different factors at the end of the decade reversed this trend.[18] At the beginning of the 1990s, various measures were enacted by the government to comply with EU requirements and to relaunch the sector. In 1996, with the Legislative Decree no. 625, Italy applied directive 94/22/CE, which opened the sector to competition and reviewed the annual fees for concession and the royalties regime. It also provided a distribution of the royalties between the state and the sub-national governments, that is, municipalities and regions.[19]

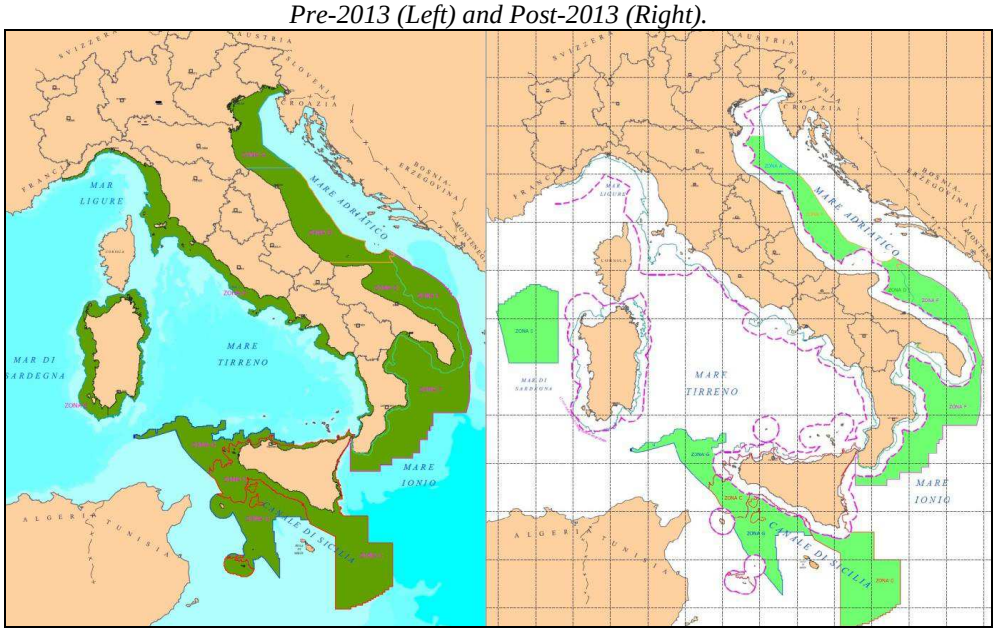
Despite the new legislative framework, offshore activities continued to decrease in the 1990s and 2000s. During the 2000s, other changes in the royalties regime were enacted, and new procedures to hasten the authorization processes for granting the license for exploration and exploitation were established. Nevertheless, the new measures did not reverse the trend, and offshore activities continued to decrease. At the beginning of the 2010s, in response to the concern created by the Deepwater Horizon disaster in the Gulf of Mexico, the government enacted the Legislative Decree 128/2010, which imposed a ban on research, exploration or exploitation of oil and gas in coastal and marine areas protected in any capacity for environmental purposes, as well as outside it, in marine areas within twelve miles of the protected areas. Moreover, Legislative Decree 128/2010 provided the same prohibition, applicable only to liquid hydrocarbons, within five miles from the Italian baselines. This decision was reviewed in 2012 with Legislative Decree 83/2012, according to which the ban established with the previous decree was applied only for new requests (i.e. according to the new law, continuing hydrocarbon exploration and production activities is allowed in areas located within twelve nautical miles for concessions and ongoing authorization procedures at the date of enforcement of Legislative Decree 128/10). However, the Legislative Decree 83/2012 extended the ban on hydrocarbon research, exploration and exploitation within the twelve miles to the entire national coastal perimeter. In accordance to this measure, the Minister of Economic Development, with a Ministerial Decree issued on 9 August 2013, redefined the Italian marine areas open for hydrocarbon activities. As a result, the total extension of the Italian marine zones open to such activities was reduced from 227, 160 to 139,656 square kilometres (figure 3).

[17] The Italian concession regime was originally structured into three different type of licenses: a 'prospecting permit', an 'exploration license' and a 'production license'. This regime has been recently reviewed with Law No. 164 of 11 November 2014.

[18] *L'upstream petrolifero in Italia: normative, stato e prospettive*, Direzione Generale per l'Energia e le Risorse Minerarie, Ministero dello Sviluppo Economico, Rome, 2008.

[19] In particular, with regard to offshore activities located in the Italian territorial sea (within 12 miles) royalties are to be given to the Regions, whereas for the oil or gas fields located in the Italian continental shelf they are entirely at disposal of the State.

Figure 3. Italian Marine Zones Open to Hydrocarbon Activities.
Pre-2013 (Left) and Post-2013 (Right).



Source: Ministerial Decree 9 August 2013 (Annexes C and D).

In 2013, with the National Energy Strategy ('Strategia Energetica Nazionale', SEN), the Italian government decided again to take action to improve domestic hydrocarbon production, both onshore and offshore, in order to enhance its energy security, reduce its dependence on foreign countries, and to boost economic growth.[20] The SEN also set very ambitious targets for oil and gas national production by 2020 (+ 46% for gas and + 148% for oil starting from the quotas of 2011). Moreover, to support domestic hydrocarbon development, the government proposed to reform the concession regime by providing a single concession instead of two separate concessions (one for exploration and one for production) and by recentralizing the decision-making processes on onshore activities to overcome regional and local opposition. Accordingly, on 13 September 2014, the new Italian government of Matteo Renzi enacted the so-called 'Unlock Italy' (*Sblocca Italia*) Law (Law Decree of 12 September 2014, No.133), which introduced some relevant changes into upstream sector governance.[21] In particular, with regard to the provisions which also affect the offshore sector, the new law introduced a 'Sole Concession' (*Titolo Concessorio Unico*), which includes both exploration and production activities, and it established that the procedure for the award of the Sole Concession must be completed within 180 days. Moreover, the new law provided for the issuance of temporary experimental concessions designed to last five years in the Gulf of Venice in the Northern Adriatic Sea, in order to 'preserve the national resources of hydrocarbons located in the sea and in the continental shelf in areas in the vicinity of the areas of other coastal countries which are undergoing

[20] See *Strategia Energetica Nazionale*, Inter-Ministerial Decree 8 March 2013.
[21] The Decree 'Unlock Italy' has been converted into Law No. 164 of 11 November 2014. However, the new Law has raised many concerns and protests from the Italian Regions, since it produces a recentralization of the decision-making process concerning upstream activities. Currently six Italian Regions (Abruzzo, Campania, Lombardia, Marche, Puglia, and Veneto) have appealed to the Constitutional Court against the articles 37 and 38 of the Law Decree of 12 September 2014, No.133.

exploration and production activities'.[22] This measure was intended in particular to respond to the new offshore Croatian plan and to preserve the Italian resources at the marine border between the two countries.[23] Finally, the new law assigned to the Ministry of Economic Development in cooperation with the Ministry of the Environment (and with the Italian Regions for onshore activities) the task to elaborate a plan to identify the areas in which exploration and production activities will be allowed in the next few years.

Greece

Hydrocarbon exploration activities in Greece began during the 1960s and have been conducted both by private companies and the Ministry of Industry. The first hydrocarbon resources were discovered in the offshore area of the Isle of Thasos by the company Oceanic. These discoveries stimulated the government to create a state-owned company (DEP) in 1975 to promote hydrocarbon exploration and exploitation. In 1976, the government also enacted the first comprehensive legislative framework for the exploration and development of hydrocarbons (Law No. 468). Then, in 1985, the government created another state-owned company, the DEP EKY (a subsidiary of DEP), to improve upstream activities and to manage the concession for exploration and exploitations in the hands of private companies. Subsequently, the government granted about twenty-four areas, both onshore and offshore, to the two state-owned companies to develop the country's domestic resources. In 1995, the legislative framework changed with the transposition at the national level of the directive 94/22/EC with Law No. 2289, which opened the sector to competition. In 1996, the government launched the first international licensing round to grant new concessions for exploration and exploitation in six areas onshore and offshore in the Patraikos Gulf in the Ionian Sea. However, the research activities did not produce the expected results, and in practice, they were terminated by the beginning of the 2000s. The first efforts to relaunch the sector traces back to the 2007, when the government took over the concessions that were previously granted to the state-owned companies DEP and DEP EKY. Since the explosion of the debt crisis in 2009–2010, this strategy has been improved. In particular, with Law No. 4001, the legislative framework for granting the rights over exploration and exploitation was modified in 2011 in order to attract international companies. According to Law 4001/2011, a new public agency was established (the Hellenic Hydrocarbons Management Company, HHRM SA) to manage the relationship between the government and the companies involved in upstream activities. Moreover, with the new law, three different procedures could be used by the HHRM SA to grant the right of hydrocarbon exploration and exploitation on behalf of the state: 1) an invitation to tender for specific areas previously approved by the competent Greek authority (the Minister of Environment, Energy and Climate Change); 2) a submission of an application by an interested entity for areas that have not been yet defined (and that then have to be approved by the Minister of Environment, Energy and Climate Change) and 3); an open invitation (open door) for the expression of interest when the area for which the concession is requested is available on a permanent basis or has been the subject of

[22] Law Decree of 12 September 2014, No.133, art. 38, para. 10.

[23] See, for example, the statement of Simona Vicari, Italian undersecretary for economic development: 'We cannot ignore that other Adriatic and Mediterranean riparian countries are acting with resolution to valorise their undersea resources' (www.eiranews.com/index.php/en/past-issues/37-volume-2-issue-12/220-adriatic-hydrocarbon-triangle-is-in-low-intensity-mess).

a previous procedure which has not resulted in the conclusion of a lease agreement or a production sharing agreement or has been abandoned by a contractor. Currently the Greek government has launched its second international licensing round ('Call for Tenders for the exploration and exploitation of hydrocarbons in Greece') for twenty marine areas (blocks), eleven in the Ionian Sea and nine in the offshore area south of Crete, and an open-door invitation for two offshore areas in the Patraikos Gulf and Katakolo.[24]

Croatia

Since the 1960s, hydrocarbons exploration and exploitation activities in Croatia have been realized by the state-owned company INA. In 1993, INA became a public company, and since 2003, it has been progressively privatized. In this period, Croatian energy policy focused on the liberalization and privatization of the energy sector, and the country gradually adopted the EU legislative energy framework. However, INA is still, currently, the only hydrocarbon producer in the country, running different onshore oil fields and five offshore gas fields located in the Northern Adriatic Sea in a joint venture with the Italian ENI. The first attempt by the Croatian government to relaunch hydrocarbon production was sketched in the policy document 'Energy Strategy of the Republic of Croatia' issued in 2009'.[25] However, only after 2012, the new Croatian government decisively began to develop a strategy to improve exploration and exploitation activities. In the wake of the Ukraine-Russia energy crisis, the government also decided to improve its gas supply security by promoting new infrastructure projects, the Ionian-Adriatic Pipeline and an LNG facility near the Island of Krk. In 2013, the government combined the three projects (pipeline, LNG and hydrocarbon development), with the idea of making Croatia an important 'energy hub' for the energy security of the EU. With regard to offshore activities, in 2013, the government assigned the task of conducting a seismic acquisition survey of offshore Croatia to the Spectrum company, as a precursor to the offshore licensing round that the government planned to hold in the following years. In 2013, a new regulatory framework was also enacted in order to align Croatian legislation to the EU (Directive 94/22/EC) and to attract foreign companies. The new 'Exploration and Exploitation of Hydrocarbons Act' (Official Gazette Nos. 94/13 and 14/14) introduced an Exploration and Production Sharing Agreement or a Tax and Royalty Agreement model for the upstream Croatian sector and established a new public agency, the Croatian Hydrocarbons Agency, to manage the licensing rounds and to help the Ministry of the Economy to administrate the sector. Finally, in 2014, the government defined twenty-nine offshore blocks in the Croatian section of the Adriatic Sea (eight blocks in the Northern Adriatic and twenty-one in the Middle and South Adriatic), and in April, it launched its first 'Offshore round for licences for the exploration and production of hydrocarbons'.[26]

Albania

Albania has been a hydrocarbon producer since the 1950s–60s, and oil has especially been an important source of revenue for the state since that period. However, since the 1990s, the activities in the area of exploration and exploitation have been performed by

[24] See http://www.ypeka.gr/Default.aspx?tabid=765&language=en-US.
[25] See *Energy Strategy of the Republic of Croatia*, Ministry of Economy, Labour and Entrepreneurship, Zagreb, June 2009.
[26] See http://www.azu.hr/en-us/1st-Offshore-License-Round.

a state-owned company, Albpetrol. At the beginning of the 1990s, the government began to open the hydrocarbon sector to international companies, and the first competitive bidding to conclude production sharing agreements for onshore and offshore areas were organized. In particular, with regard to offshore activities, the first international bidding took place in 1990–91 after the Albanian territorial sea and its continental shelf was divided into five areas that had been unexplored until then. As a result of the bidding, five production sharing agreements were finalized, and in the subsequent years, other international bids were organized for onshore sections of the Albanian territory. In the meanwhile, the main legislation for hydrocarbon exploration and exploitation was reviewed in order to attract foreign companies, albeit the state-owned company Albpetrol continued to play a crucial role in the governance of the sector. In particular, in 1993, the government enacted Law 7746/93 (Petroleum Law on Exploration and Production), which was modified in 1994 (Law 7853/94 and Law 7811/94) in accordance to the directive 94/22/EC. However, according to this law, Albpetrol was in charge of the management of the Albanian hydrocarbon sector. Moreover, the law granted the right to explore new areas in Albanian territory to Albpetrol. This organizational structure was modified in 2006, when a new public agency, the National Agency of Natural Resources (AKBN), was established to manage the relationships between the government and the companies involved in the hydrocarbon sector, including Albpetrol. In particular, since 2006, AKBN has taken the responsibility to operate the production sharing agreement on behalf of the Albanian government and to support the exploration of additional areas in the Albanian territory. Currently, some areas have still to be assigned, especially onshore (nine areas), whereas the only offshore block to be assigned is the 'Rodoni North' block at the marine border between Albania and Montenegro.[27] Moreover, in order to open the sector to competition and to continue to attract foreign companies, the government has also sought to privatize Albpetrol since 2011. Though the first attempt to privatize the company failed, a new plan of privatization was issued by the government in 2014.

Montenegro

Montenegro is not a hydrocarbon producer country. During the 1960s and the 1970s, some activities in the field of exploration were carried out by the state-owned company 'Jugopetrol Kotor' in cooperation with foreign companies, but no important discoveries of hydrocarbons were realized. After its independence in 2006, Montenegro started to reform its energy sector and to harmonize its laws and standards according to the EU energy policy (in 2005, Montenegro joined the Energy Community). Since 2006, the economy of Montenegro has experienced progress, and it has continued to grow despite the global financial crisis of the late 2010s. However, the country is heavily dependent on tourism and refined aluminium. Imports account for most of its energy requirements, so the development of hydrocarbon resources through exploration of Montenegrin offshore reserves represents an important addition to the national economy. In 2011, the government of Montenegro formulated a comprehensive energy strategy, which explicitly stated that part of the government energy policy should be based on the exploitation of domestic hydrocarbon resources and on improvement in the security of supplies in the gas sector.[28] In 2010–2011, two laws were enacted by the government to establish a new legislative framework in line with the directive 94/22/CE ('Law on

[27] See http://www.akbn.gov.al/index.php/en/hydrocarbon/opportunities-for-exploration.
[28] See *Energy Policy of Montenegro until 2030*, Podgorica, February 2011.

Exploration and Production of Hydrocarbons', No. 41/10 of 23 July 2010, 40/11 of 8 August 2011). Then, in 2012–13, thirteen offshore blocks were defined in the Adriatic Sea, and an international bidding round was launched to assign the concessions for exploration and exploitation in these areas. Finally, the government recently manifested its intention to proceed with additional international bidding rounds in 2015 and 2016.[29]

5. Conclusion

The development of offshore hydrocarbons politics and policy in the Adriatic and Ionian region can be divided into three main periods. In the first period, from about the 1960s to the beginning of the 1990s, the basic legislative framework and the bilateral international regime of the sector were established. In particular, at the national level, the offshore sector was basically organized around the main state-owned companies (or 'national champion'), which managed the sector along with the respective minister responsible for economic development or industry – obviously with a difference among the Italian and the Greek cases and the Yugoslavian and Albanian cases, with the latter two countries being less open to foreign companies. With regard to the delimitation of the continental shelf for the exploration and production of hydrocarbon resources, Italy – the major producer country – took the lead in negotiating and defining its sea border with respect to Yugoslavia, Greece and Albania. In this period, no serious disputes were open which could have blocked or undermined the national plans for offshore hydrocarbon development. The second period, from the beginning of the 1990s to the end of the 2010s, was characterized by two different trends: homogenization and fragmentation. On one hand, on the national level, the sector was progressively opened to competition and harmonized, also due to the implementation of the directive 94/22/EC. Additionally, countries such as Greece and Albania realized their first international bidding round. On the other hand, the international regime for the delimitation of the marine borders was complicated by the breakup of Yugoslavia. Among the new Balkan countries, especially, disputes emerged, and Albania and Greece were also not able to conclude a definitive agreement. Finally, in the most recent period (since 2008–2009), there has been a relaunch of offshore activities, mainly driven by three factors: the economic crisis, the concern about the security of supply (especially in the gas sector) and intra-regional competition. The relaunch of national plans for offshore development have also created further tensions among the Balkan countries, in particular between Croatia, Montenegro and Slovenia.

[29] See http://www.petroleum.me/index.php?jezik=eng.

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EXPLOITATION OF RESOURCES IN LIGHT OF SHARED ENERGY GOVERNANCE: THE ENERGY CHARTER TREATY AND THE ENERGY COMMUNITY

GIULIA D'AGNONE

1. European Union Initiatives in the Energy Sector

It is well known that, as the world's largest importer of energy, the European Union has always had a high level of energy dependence, and a low production rate.

The existing imbalance between (insufficient) energy production and the need for energy supply, in addition to the absence of an international organization entrusted with global governance of energy, led the European Union (at that time, the European Community) to become an important actor in the energy field. Since the 1990s, the European Union has moved forward on two courses. On the one hand, it has concluded bilateral treaties with third party states, principally energy producer states, in order to secure access to energy supplies.[1] On the other, it has been the promoter of two important multilateral treaties aimed at integration of markets in the energy sector.

This article does not discuss the first of these paths; rather, it will examine the external energy policy of the European Union, as driven through multilateral instruments of governance: the Energy Charter Treaty (ECT) and the Energy Community Treaty (EnCT). The two systems will be analyzed in light of the principles which, according to the Commission of the European Union, should inform the internal action of the European Union: openness, participation, accountability, effectiveness, and coherence.[2] The question is whether those principles also inform the European Union's external action, as the importance of those principles has been emphasized in reinforcing the role of the European Union in the multilateral system.[3] Lastly, this article poses some questions relating to the possible interplay between the two systems of governance in order to draw some conclusions on the governance of the energy sector put in place by the European Union through multilateral treaties.

2. The Energy Charter Treaty

[1] K. TALUS, *EU Energy Law and Policy: A Critical Account*, Oxford, 2013, 226-230.

[2] Commission of the European Union, *European Governance - A White Paper*, COM(2001) 428 final (2001/C 287/01).

[3] See European Parliament resolution of 11 May 2011 on the *EU as a global actor: its role in multilateral organisations* (2010/2298(INI)) stating that "*there is a need to further involve non-state actors in multilateral policy-making, to promote and facilitate improved consultation of civil society organisations and social partners in the future governance structures of international organisations*".

Aimed at establishing "*a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter*," the ECT was born from the ashes of the Cold War.[4] Putting aside previous economic divisions with Eastern states, the European Community became the proponent of an initiative that would have supplied energy to European states, thus facilitating Western investment in Eastern European states, rich in energy reserves as well as the transit of energy within the European continent.[5]

The first step in this direction was a non-binding instrument, the European Energy Charter of 1991, which paved the way for the adoption of the Energy Charter Treaty within a legally binding foundation. As a result, the ECT rapidly became the most important comprehensive multilateral instrument on energy. The ECT does not establish a conventional system for the exploitation of energy resources: in accordance with international law, it is based on state sovereignty over natural resources, explicitly recognizing the right of the contracting parties to determine the territory to be exploited and their policies for economic use.[6] The ECT's aim is to provide a "*multilateral framework for energy cooperation*" based on the principles of "*open, competitive markets and sustainable development*".[7] Its key elements are investment protection; trade in energy, energy products, and energy related equipment, based on the WTO rules; freedom of energy transit; improvement of energy efficiency; international dispute settlement, including investor-state arbitration and inter-state arbitration; and greater legal transparency.[8] Clearly, the need for transparency emerges from Art. 20 ECT, which aims at ensuring openness of the states parties' activity in the energy field by requiring them to publish laws, regulations and judicial decisions, and to designate enquiry points to which requests for information about their energy policies may be addressed.[9] This provision guarantees public access to state legislation in the energy

[4] Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation*, Brussels, 2004, Art. 2.

[5] Cfr. A. Konoplyanik, T. Wälde, *Energy Charter Treaty and its Role in International Energy*, in *Journal of Energy & Natural Resources Law*, Vol. 24, 2006, p. 524: "*Russia and many of the neighbor states of the Former Soviet Union (FSU) were rich in energy resources but needed major investments to ensure their development, while the states of Western Europe had a strategic interest in diversifying their sources of energy supplies to diminish their dependence on the Middle East. There was therefore a recognized need to ensure that a commonly accepted foundation was established for developing energy cooperation among the states of the Eurasian continent*".

[6] Art. 18, para. 1, ECT provides that "[t]*he Contracting Parties recognize state sovereignty and sovereign rights over energy resources. They reaffirm that these must be exercised in accordance with and subject to the rules of international law*".

[7] Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation*, Brussels, 2004, 13.

[8] "*The ECT has a pioneer role for treaty-based international energy co-operation. It: Is unique in covering all forms of international energy co-operation simultaneously, i.e. investment, trade, transit and energy efficiency; May create an intermediary step towards WTO membership for those ECT countries that are not yet WTO members; Is the first binding multilateral agreement on the promotion and protection of foreign investment, covering all important investment issues and providing high standards of protection, including a fully developed dispute settlement mechanism; Is the first multilateral treaty on energy transit issues and energy efficiency; Establishes a permanent discussion forum between members concerning all aspects of international energy co-operation*", Energy Charter Secretariat, *The Energy Charter Treaty A Reader's Guide*, 10.

[9] Art. 20 ECT reads as follows: "1. *Laws, regulations, judicial decisions and administrative rulings of general application which affect trade in Energy Materials and Products are, in accordance with Article 29(2)(a), among the measures subject to the transparency disciplines of the GATT and relevant Related Instruments. 2. Laws, regulations, judicial decisions and administrative rulings of general application*

field, and in particular to the legislative activity of those states parties which, having an economy in transition, are usually characterized by clumsy legislation. A secondary but equally relevant consequence of Art. 20 is that it encourages coherence of legislation and of judicial decisions, ultimately guaranteeing accountability of states parties to the ECT for their implementing activity. On the other hand, provisions aimed at guaranteeing openness—and thus accountability—of the ECT's institutions with regard to the voting and decision-making process seem to be lacking.

The ECT's transparency problems have been raised in relation to two main issues: its dispute settlement system and, in particular, the investor-state arbitration mechanisms provided by Art. 26 ECT, and the provisional application of the treaty under Art. 45 of the text.

Art. 26 ECT provides investors with various options for seeking redress, including: taking host states to international arbitration to resolve complaints about investment protection; establishing alternatives among the International Centre for Settlement of Investment Disputes; a sole arbitrator or *ad hoc* arbitration tribunals established by UNCITRAL rules; or arbitral proceedings under the Arbitration Institute of the Stockholm Chamber of Commerce.[10] The issue of transparency in investor-state arbitration is a thorny one. It is well known that confidentiality is the general rule in investor-state arbitration. Arbitrators and the parties are therefore under an obligation not to divulge or release information relating to proceedings. Moreover, awards are generally not public. For example, pursuant to UNCITRAL rules, parties are forbidden from disclosing awards, unless otherwise stated.[11] Analogously, ICSID arbitration rules provide that the Centre shall not publish the award without the parties' consent.[12] It is not by chance that UNCITRAL has recently adopted its Rules on Transparency in

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made effective by any Contracting Party, and agreements in force between Contracting Parties, which affect other matters covered by this Treaty shall also be published promptly in such a manner as to enable Contracting Parties and Investors to become acquainted with them. The provisions of this paragraph shall not require any Contracting Party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of any Investor. 3. Each Contracting Party shall designate one or more enquiry points to which requests for information about the above mentioned laws, regulations, judicial decisions and administrative rulings may be addressed and shall communicate promptly such designation to the Secretariat which shall make it available on request".

[10] Art. 26, para. 4, ECT states that "*In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to: (a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or (ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention; (b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce"*.

[11] United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules* as revised in 2010, Art. 34, para. 5, stating that "*An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority*".

[12] World Bank, *ICSID Convention, Regulations and Rules*, Art. 48, para. 5.

Treaty-based Investor-State Arbitration in order to overcome the problem of lack of transparency in investor-state proceedings and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.[13]

With respect to provisional application of the ECT, under Art. 45, para. 3 (b), of the treaty, "[i]*n the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory (…) remains in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c)*". This provision, together with the so-called "domestic exception" contained in the first paragraph of Art. 45, stating that each signatory applies the treaty provisionally "*to the extent that such provisional application is not inconsistent with its constitution, laws or regulations*", has raised problems of transparency inasmuch it is unclear whether signatory states must make an express declaration in the event they are unable to provide provisional application of the treaty.[14] During the ECT negotiations it was quite clear that under Art. 45 transparency should have been granted with respect to provisional application of the treaty. However, it is not clear whether Art. 45, para. 2 (a), imposes a legal obligation on signatory states to make a declaration. Provisional application of the ECT was a flashpoint in the famous *Yukos* case, in which the investors argued that Russia, which had signed the ECT but never ratified it, could not avoid provisional application of the treaty, having made no declaration in conformity with Art. 45, para. 2 (a), of the treaty. For its part, Russia argued that neither Art. 45, para. 1, nor Art. 45, para. 2, imposed any obligation to make such a declaration. The Permanent Court of Arbitration, which decided the case under the UNCITRAL arbitration rules, though recognizing that the importance of transparency had been emphasized during negotiations of the treaty in the context of provisional application, decided that under the text of Art. 45, para. 1, no form of declaration was required.[15] The text of Art. 45 therefore, would not seem to require ECT signatory states to guarantee transparency in provisional application of the treaty.

Turning to participation, two aspects shall be taken into account: first, "internal" participation, i.e., the effective participation of all member states in the ECT's decision-making process, and, second, "external" participation, by so hinting at the participation

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[13] United Nations Commission on International Trade Law, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, January 2014 and *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, 2015.

[14] Under Art. 45, para. 2 (a), ECT "*Notwithstanding paragraph (1) any signatory* may, *when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository*".

[15] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, 282-289. See, on provisional application under Art. 45 ECT, *ex multis*, M. POLKINGHORN, L. GOUIFFÈS, *Provisional Application of the Energy Charter Treaty: the Conundrum*, in G. COOP (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, New York, 2011; A. GRAMONT, E. M. ALBAN, *The Sun never sets: Provisional Application and the Energy Charter Treaty*, in G. COOP (ed.), *cit.*; Y. BANIFANTEMI, *Provisional Application of the Energy Charter Treaty: the Negotiating History of Article 45*, in G. COOP (ed.), *cit.*; H. M. ARSANJANI, W. M. REISMAN, *Provisional Application of Treaties in International Law: the Energy Charter Treaty Awards*, in E. CANNIZZARO (ed.), *The Law of Treaties beyond the Vienna Convention*, Oxford, 2011; G. HAFNER, *The Provisional Application of the Energy Charter Treaty*, in C. BINDER, U. KRIEBAUM, A. REINISCH, S. WITTICH, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford, 2009; A. M. NIEBRUGGE, *Provisional Application of the Energy Charter Treaty: the Yukos Arbitration and the Future Place of Provisional Application in International Law*, in *Chicago Journal of International Law*, 2007, 355-376.

of citizens to that process. Art. 34 guarantees the participation of member states in the ECT's decision-making process by allowing each contracting party a representative at the principal organ of the ECT,[16] the Energy Charter Conference. Moreover, it should be noted that the most important decisions must be unanimous,[17] while less critical decisions are usually adopted by consensus.[18] The voting system's unanimity requirement thus clearly guarantees equality among all the states parties. By contrast, citizen participation in the decision-making process represents a large gap in the system, as the ECT does not provide for public participation.

3. The Energy Community

In 2005, the Energy Community Treaty, whose signatories are the European Union[19] and several third-party States,[20] established a regional organization whose purpose was to extend the EU energy market beyond its borders, particularly to southeastern Europe. As has been observed, this "*represents a unique product which sets up a quasi supranatural legal system (…) a unique chance to implement and apply dynamic sectoral EU acquis within third countries' legal systems*".[21]

The institutions of the Energy Community are the Ministerial Council, the Permanent High Level Group, the Regulatory Board, the Fora and the Secretariat. The Ministerial Council, the main decision-making and judicial body of the organization, and the PHLG, which prepares the work of the Ministerial Council, consist of one representative of each contracting party and two representatives of the European Community (today the European Union).[22] The Regulatory Board, which is the executive organ of the Energy Community, is composed of one representative of the energy regulator of each contracting party, pursuant to the relevant parts of the *acquis*

[16] The Energy Charter Conference, an inter-governmental organization, is the governing and decision-making body for the Energy Charter process, and was established by the 1994 Energy Charter Treaty. All states who have signed or acceded to the Treaty are members of the Conference, which meets on a regular basis to: discuss policy issues affecting energy cooperation among the Treaty's signatories; review implementation of the provisions of the Energy Charter Treaty and the Protocol on Energy Efficiency and Related Environmental Aspects; and consider possible new instruments and projects on energy issues.

[17] Cfr. Art. 36 ECT, which requires unanimity for the following decisions: (a) adoption of amendments to the Treaty other than amendments to Articles 34 and 35 and Annex T; (b) approval of accessions to the Treaty under Article 41 by states or Regional Economic Integration Organizations which were not signatories to the Charter as of 16 June 1995; (c) authorization the negotiation of and approval or adoption of the text of association agreements; (d) approval of modifications to Annexes EM, NI, G and B; (e) approval of technical changes to the Annexes to the Treaty; and (f) approval of the Secretary-General's nominations of panelists under Annex D, para. 7.

[18] Art. 36, paragraphs 1 and 2, ECT.

[19] Any EU Member State may obtain the status of a Participant to the Treaty. The number of Participants to the Treaty amounts presently to 19 EU Member States: Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Netherlands, Poland, Romania, Slovakia, Slovenia, Sweden, united Kingdom.

[20] Third-party States are Albania, Bosnia and Herzegovina, former Yugoslav Republic of Macedonia, Moldova, Montenegro, Serbia, Kosovo and Ukraine. Pursuant to Title IX of the Treaty, neighbouring third parties may apply for Observer status. Observers to the Treaty presently are Armenia, Georgia, Norway and Turkey.

[21] R. Petrov, *Energy Community as a promoter of the European Union's "energy acquis" to its Neighbourhood*, in *Legal Issues of Economic Integration*, 2012, 331-255, 335.

[22] Articles 47, 48, 53 and 54 EnCT.

communautaire on energy. The European Union is represented by the European Commission, assisted by one regulator of each participant, and one representative of the Agency for the Cooperation of Energy Regulators.[23] The institutions of the Energy Community, therefore, exhibit a balanced composition between the European Union and partner states. Moreover, Art. 77 of the treaty provides that each party has one vote in the decision-making process. Therefore, "internal" participation of all parties to the decision-making process is guaranteed. By contrast, the treaty does not provide for any means of public participation by the institutions and, thus, to the decision-making process. However, Arts. 63-66 of the EnCT establish two organs which represent civil society, namely, the Fora, composed of representatives of interested parties (stakeholders and consumers). It must be noted that the Fora cannot adopt binding measures, but merely conclusions to be forwarded to the PHLG, which is not bound to follow them. Moreover, as the High Level Reflection Group of the Energy Community (a group of experts appointed by the Ministerial Council to make proposals for improvements to the treaty) has emphasized, the Fora do not represent a real instrument of consultation, since "[d]*iscussions take place in other bodies and through other channels, including public consultation. They also duplicate to a large extent discussions which take place in the EU Fora*".[24]

The absence of effective mechanisms of publicity and control over the acts adopted by the EnCT institutions manifests a clear *lacuna* as regards transparency, which would ultimately guarantee accountability in the system. The sole provision that guarantees openness is Art. 96, under which third party states can be admitted as observers and therefore attend the meetings of the Ministerial Council, the Permanent High Level Group, the Regulatory Board and the Fora, without, however, participating in the discussions. The treaty thus provides for no form of real participation by civil society.

Some observations can also be made on the effectiveness of the system created by the EnCT to guarantee implementation of the treaty obligations. The system adopted by Artt. 90-93 of the treaty is modeled on the European infringement procedure. However, the mechanism's efficacy is clearly conditioned by the fact that "*there is no recourse to a traditional* adjudicative *agency that could lead to a* judicial *decision within the EnC's dispute settlement regime. Instead, what we have within the EnC's DSM is recourse to a diplomatic forum to render what appears to ultimately remain a diplomatic decision*".[25] It is not a judicial organ, but rather the Ministerial Council that determines the existence of a breach of a parties' obligations. The treaty provides for no means of implementation of its decisions. Only in the case of a party's serious and persistent

[23] See Art. 59 EnCT.

[24] High Level Reflection Group of the Energy Community, *An Energy Community for the Future*, May 2014, Available online at https://www.energy community.org/portal/page/portal/ENC_HOME/DOCS/3178024/Energy_Community_HLGR_Report_FINAL_WEB.pdf. In this regard, the Group made Proposal 4.4 providing that "[t]*he role of the institutions of the Energy Community should be strengthened in order to better support the achievements of the Energy Community Treaty's objectives. In particular (…) (4) The Energy Community Fora should be re-examined case by case in terms of their efficiency, role and relevance. They could be replaced by pan-European Fora also open to the stakeholders in the Contracting Parties, and/or by participation of experts from Contracting Parties in the existing EU Fora. The role of civil society and business in the institutions should be strengthened by granting them an observer role in the Permanent High Level Group"*.

[25] R. LEAL-ARCAS, A. FILIS, *The Energy Community and the Energy Charter Treaty: Special Legal Regimes, their Systemic Relationship to the EU, and their Dispute Settlement Arrangements*, in *Oil, Gas & Energy Law Journal*, 2014, 1-42, 23.

breach of its obligations may the Ministerial Council, at the request of a party, the Secretariat or the Regulatory Board, suspend some rights under the treaty. The EnCT's implementation system contains a clear *lacuna* insofar as there is no judicial protection for individuals and companies against decisions of the institutions of the Energy Community. Moreover, under Art. 90 EnCT, private bodies can only "approach" the Secretariat with complaints, and have no direct means for calling the Ministerial Council's attention to the breach of the treaty by one of the states parties.

4. Interplay between the ECT and the EnCT

The Energy Charter and the Energy Community have much in common: they are both international instruments promoted by the European Union for the governance of the energy sector. Strange to say, the two instruments seem to ignore one another, and the doctrine itself has paid little attention to the relationship between the two.[26]

It can first be observed that most of the states parties to the EnCT are also parties to the ECT. However, while the EnCT aims at integrating Eastern countries in the European market, the ECT has rapidly became an attractive instrument also for countries outside the European continent, such as Australia and Japan, and has broken free from its European Union origins.[27]

However, the theoretical compatibility between these two instruments of international law, which are both aimed at energy sector governance, cannot exclude practical problems of overlap between the two treaties.

If a conflict between the obligations arising from the ECT and those of the EnCT occurs, Art. 59 of the Vienna Convention on the Law of Treaties would be of no use, since there is no overlap of states that are parties to the two treaties.[28]

Under Art. 101 EnCT, obligations arising from agreements concluded before the signature of the EnCT cannot be affected by the provisions of that treaty. To the contrary, Art. 16 ECT gives preference to provisions which are favourable to the investor.[29] However, the mere inclusion of compatibility clauses does not exclude, in

[26] One should have expected to see some references to the ECT at least in the preamble of the EnCT, in so much the ECT represents the first multilateral treaty concluded by the European Union in the energy sector. One of the few studies on the interaction between the ECT and the EnCT, although it does not properly focus the interplay between the two instruments, is that of R. LEAL-ARCAS, A. FILIS, *The Energy Community and the Energy Charter Treaty: Special Legal Regimes, their Systemic Relationship to the EU, and their Dispute Settlement Arrangements*, *cit*..

[27] Albania, Bosnia and Herzegovina, Kosovo, former Yugoslav Republic of Macedonia, Moldova, Montenegro, Serbia and Ukraine are member states of the EnCT. Georgia, Armenia, Norway and Turkey participate as Observers. Georgia is presently in the process of joining the Energy Community as a full-fledged member. Nineteen European Union Member States have the status of Participants. Afghanistan, Albania, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Union and Euratom, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, The former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan are parties to the ECT.

[28] Art. 59, para. 1 (b), of the Vienna Convention on the Law of Treaties would come into play if all the parties of a former treaty conclude another treaty relating to the same subject matter.

[29] Art. 16 provides that "*Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the*

principle, possible conflict between the obligations under the ECT and those under the EnCT.

A recent decision of an ICSID tribunal, established under the ECT, dealt with inconsistencies between EU law and the ECT. It can thus offer some guidance on the issue of compatibility between the EnCT and the ECT.[30] Electrabel S.A., a Belgian company, brought an action against Hungary for breaches of the ECT following Hungary's pricing regime changes and its decision to terminate a power purchase agreement with Electrabel's Hungarian subsidiary. The agreement had been terminated following an EU Commission decision, which established that such power purchase agreements constituted unlawful state aid. The tribunal was asked to address the issue of the relationship between the ECT and EU law. It found that the ECT and EU law are regimes that could and should be harmoniously interpreted in that case. Incompatibility between the two bodies of law was excluded "*for three important legal reasons. The first derives from the ECT's genesis (…) [t]he second derives from the ECT's objectives (…) [t]he third derives from the ECT's implicit recognition that decisions by the European Commission are legally binding on all EU Member States which are party to the ECT*".[31]

It is well known that ICSID tribunals are not bound by precedent. Therefore the *Electrabel* decision may not be followed in the future. Moreover, it should be remembered that in this case the compatibility question at stake was between ECT and EU law rules. There is, therefore, no evidence that the decision in the *Electrabel* case could impact the relationship between ECT and EnCT rules. However, in principle it cannot be excluded that ICSID tribunals eventually asked to verify the compatibility between ECT obligations and rules under the EnCT could be tempted to make reference to arguments employed in the *Electrabel* case, even though the approach used in that case to analyze the relation between the ECT and EU law is debatable. The reasoning relating to the ECT's genesis could also be applied to the EnCT. It could be said, *mutatis mutandis*, that the EnCT's conclusion by the European Union and its then-Member States should be presumed, in the absence of clear language or cogent evidence otherwise, to have been made in conformity with the ECT, and that therefore the interpretation of the EnCT's text should be made under Art. 32 of the Vienna Convention on the Law of Treaties by taking into account the ECT as a "circumstance of its conclusion".[32] Analogously, nothing impedes application of the "objectives argument" to the relationship between the ECT and the EnCT, since the two treaties share the same objective of market integration in the energy sector. It is not implausible, therefore, to imagine that the arguments used in the *Electrabel* case could be used by

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subject matter of Part III or V of this Treaty, (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment".

[30] *Electrabel S.A. v. the Republic of Hungary (ICSID Case No. Arb/07/19), Decision on Jurisdiction, Applicable Law and Liability*, 30 november 2012, available at http://www.italaw.com/cases/documents/1624.

[31] *Electrabel S.A. v. the Republic of Hungary, cit.*, 4.133.

[32] It has been used provocatively the same words adopted by the *Electrabel* tribunal at 4.134 of the decision.

other tribunals to justify the compatibility between obligations arising under the ECT and those arising under the EnCT.

5. Concluding remarks

On February 25th, the European Commission adopted the communication, *A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy*, a forceful call for "*an integrated continent-wide energy system*".[33] The brief analysis presented in this article has argued that multilateral instruments of international law implemented by the European Union to regulate the energy sector should be improved in order to guarantee better governance of the field. Moreover, greater attention should be paid to coordination of obligations arising under multilateral instruments adopted by the European Union in its external energy action.

It would seem that the road for a truly integrated energy system within the European space is still long and winding.

[33] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, *A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy*, COM(2015) 80 final, 25 February 2015.

3

COASTAL STATES' POWERS OVER OFFSHORE OIL PLATFORMS

GEMMA ANDREONE

SUMMARY: 1. Coastal States' Rights over the Economic Resources of the EEZ. – 2. Coastal State' Jurisdiction over Artificial Islands and Installations. – 3. The Limits of the Coastal State's Powers over the Offshore Platforms in Recent Practice. – 4. Final Remarks.

1. Coastal States' Rights over the Economic resources of the EEZ

The expansion in exploration and exploitation of oil and gas resources in the seabed has led to an increase in the number of artificial islands and structures in the seas, and also to the proliferation of mobile structures positioned in marine areas which are subject to the jurisdiction of coastal States.

As is foreseen in the UNCLOS and in customary law, productive activities carried out by the coastal State, either directly by them or with their consent, within the territorial sea, that is within 12 nautical miles from the base line, fall under the control of the State as regards both regulation and all the coercive activities which may derive from the application of the State laws, in virtue of the almost absolute sovereignty the State enjoys.

In fact, the right of innocent passage of the ships of third States through the territorial sea of a State cannot be invoked where the pre-eminent economic interests of the State impose either the banning or the restriction of navigation in areas closed to fixed or mobile structures situated within the area of exploitation of non-living resources of the seabed and its subsoil. Moreover, the passage within the territorial sea of foreign vessels interfering with the activity of the oil rig can be considered as non-inoffensive, and it can be suspended in the areas adjacent to the platforms, if the interference can be considered as an attempt to coastal State's security.

In the territorial sea, the coastal State has a wide and highly discretionary power to regulate the navigation by imposing limitations on navigation or traffic schemes and sea lanes to prevent and protect the safety of oil platforms, being the state only required to take into account International Maritime Organization (IMO) recommendations and customary navigational uses in its territorial waters.

When oil exploration and exploitation activities are decided upon or authorized by the coastal State in areas beyond the 12 nautical miles, within the Economic Exclusive Zone (EEZ) and/or the Continental Shelf (CS), these are to be considered legitimate in virtue of the sovereign rights of the Coastal State over the economic resources according to Articles 56 and 77 UNCLOS, but the powers of coastal States to protect the rigs or to regulate navigation in the areas closed to the rigs appear to be more limited.

Art. 56 provides for coastal States' 'sovereign rights' over the living and non-living resources of the EEZ, as well as over other activities connected with the exploration and economic exploitation of the zone, and for 'jurisdictional rights' over the establishment

and use of artificial islands, installations and structures, scientific research, and the protection of the marine environment, thus introducing a distinction between 'sovereign rights' over resources and more simple 'jurisdictional powers' attributed to the coastal States in the other domains[1].

If, on one hand, therefore, the coastal State has sovereign rights over resources, on the other hand, its powers over artificial structures seem to be more limited, having the appearance of exclusive powers to regulate exploration and exploitation structures, but having to coordinate with the rights of third party States to navigate and exercise the freedom of the High seas recognized within the EEZ and the CS.

Indeed, the rights, whether sovereign or jurisdictional, and the related duties of coastal States cannot be intended to be absolute, since due regard to the rights and duties of other States is expressly provided for by Articles 55, 56, para. 2, and 58 UNCLOS.[2]

Art. 58, para. 2, allows for the application of the provisions regarding the high seas and the pertinent rules of international law only if these are compatible with the EEZ regime. The controversial nature of the EEZ was well known to the drafters of the UNCLOS, who, by the introduction of Articles 56, 58, and 59, aimed to create a 'permanent legal arrangement' for balancing the diverse interests inside the EEZ. Indeed, Art. 59 seeks to resolve possible conflicts over the attribution of residual rights and jurisdiction within the EEZ not attributed or covered by the UNCLOS, with reference, at the same time, to equity and to all relevant circumstances.[3] Nevertheless, it does not offer a definite solution to possible conflicts between coastal and third States[4] and it does not call for a presumption in favour of one freedom or power over another.[5]

When the coastal state has proclaimed its EEZ, the legal regime of this zone will absorb the CS legal regime, since, according to Art. 56 UNCLOS, coastal states powers are extended to the waters superjacent to the seabed and of the seabed and its subsoil within the distance of 200 nautical miles from the coast. The CS legal regime will be then applied to the outer CS, if claimed by the coastal state and up to the limit fixed unilaterally by it and accepted by the Commission for the CS (art. 76 UNCLOS).

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[1] For a deeper examination of the EEZ see G. ANDREONE, *The Economic Exclusive Zone*, in D. R. ROTHWELL, A. G. OUDE ELFERINK, K. N. SCOTT, T. STEPHENS (eds.), *The Oxford Handbook of Law of the Sea*, Oxford, 2015, 159-180.

[2] R. BECKMAN, T. DAVENPORT, *The EEZ Regime Reflection After Thirty Years*, in H. N. SCHEIBER, M. S. KWON (eds.), *Securing the Ocean for the Next Generation: Papers from the Law of the Sea Institute-Korea Institute of Ocean Science and Technology Conference held in Seoul, Korea, May 2012* (2013) 9, web symposium available at http://www.law.berkeley.edu/15589.htm .

[3] See D. R. ROTHWELL, T. STEPHENS, *The International Law of the Sea*, Oxford, 2010, 97; I. SHEARER, *Ocean management challenges for the law of the sea in the first decade of the 21st century*, in A. G. OUDE ELFERINK, D. R. ROTHWELL (eds), *Ocean Management in the 21st Century: Institutional Frameworks and Response*s, Leiden, 2004, 10.

[4] According to some authors, the reference to equity in Art. 59 substantially indicates that, in case of a dispute, it is necessary to recurring firstly to negotiations and to consensual means of settlement, before referring the dispute to judicial bodies. See R. R. CHURCHILL, A. V. LOWE, *The Law of the Sea*, 3rd ed., Manchester, 1999, 176; D. BECKMAN, T. DAVENPORT, *The EEZ Regime Reflection After Thirty Years*, cit., 12.

[5] R. VIRZO, *La convention des Nations Unies sur le droit de la mer et la pollution provenant d'activités militaires dans la zone économique exclusive*, in G. ANDREONE, A. CALIGIURI, G. CATALDI (eds.), *Droit de la mer et émergences environnementales*, Napoli, 2012, 255, 257; S. KARAGIANNIS, *L'article 59 de la Convention des Nations Unies sur le droit de la mer*, in *Revue Belge de Droit International*, 2004, 392, 402.

In the absence of the proclamation of an EEZ, the norms to be applied to the activities of exploitation of oil and gas resources are those foreseen by the UNCLOS for the CS (Part VI of the Convention), being a zone automatically determined, requiring neither effective occupation nor an ad hoc proclamation on the part of the coastal State. This is nowadays a very rare hypothesis, relating to the minority of States which have not yet proclaimed their EEZ, among them many Mediterranean States.

2. Coastal state' Jurisdiction over Artificial Islands and Installations

As for the coastal State's jurisdictional rights on the establishment and use of artificial islands, installations, and structures, these are regulated by Art. 60 UNCLOS. The legal regime envisaged by this provision is then applied, *mutatis mutandis*, to the continental shelf in accordance with the requirements of Article 80. The rights of the coastal State relating to islands and installations within the EEZ and the CS are similar, with the sole difference that in this latter zone they are far more limited,[6] since within the EEZ such islands and structures can be legitimately constructed and used for many other purposes, such as the exploitation of renewable energy.

According to Art. 60, an almost total exclusivity is accorded to the coastal State to authorize and regulate various kinds of offshore construction, their placement, and their use within the EEZ. The distinction between artificial islands, installations, and structures for all the authorized economic purposes expressly provided for in Article 56 and 'installations and structures which may interfere with the exercise of the rights of the coastal States in the zone' is rather vague and often not reproduced in national legislation,[7] but it seems to admit, in principle, the placement of such constructions by third States, as not interfering with coastal States' rights.[8]

The legal regime provided by Art. 60 is identical for all these types of construction, in relation both to rights and to duties. It is expressly provided that the coastal State can exercise on those constructions exclusive jurisdiction with respect to customs, tax, health, safety, and immigration.[9] Moreover, the coastal State has the right to establish safety zones around those constructions, with the aim of ensuring safer navigation, or the protection of the construction itself, to an extent fixed by the coastal State and not exceeding a radius of 500 meters around the construction.[10]

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[6] See R .R. CHURCHILL, A. V. LOWE, *The Law of the Sea*, 3rd ed., Manchester, 1999, 168.

[7] For national legislation not distinguishing among the different types of constructions, see R. R. CHURCHILL, A. V. LOWE, *The Law of the Sea*, cit., 168; S. KOPELA, *The "Territorialisation" of the Exclusive Economic Zone: Implications for Maritime Jurisdiction', International Boundary Research Unit on 'The State of Sovereignty*, 20th Anniversary Conference, Durham UK (1–3 April 2009) 6, available at www.dur.ac.uk/resources/ibru/conferences/sos/s_kopela_paper.pdf.

[8] On this point, see E. D. BROWN, *The International Law of the Sea*, Vol. 1, Dartmouth, 1994, 243–244. The author argues that the construction of those installations by third States could be for military purposes.

[9] Art 60, para. 2, UNCLOS: "The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations".

[10] Art. 60, paragraphs 4 and 5. Art. 60, para. 5, also provides for an possible extension of the safety zone breadth if authorized by generally accepted international standards or as recommended by the competent international organization. Nevertheless, to date, the IMO has never accepted the proposals to agree on more extended safety zones. See A. HAREL, *Preventing Terrorist Attacks on Offshore Platforms: Do States Have Sufficient Legal Tools?*, in *Harvard National Security Journal*, 2012, 131.

Coming to the duties, the coastal State is obliged to keep third States continuously informed about the placement of those constructions, as well as their falling into disuse, and also regarding all relevant technical aspects in order to ensure the safety of navigation. Towards this end, Art. 60, para. 3, specifically requires dismantlement according to general international standards established by international organizations, taking into account other possible implications concerning fisheries, protection of the marine environment, or other rights and duties of third States.

Inevitably, the exercise of exclusive jurisdiction over those spaces implies an assumption of responsibility on the part of the coastal State for all the activities and the events occurring on them. In this context, the position of the Court of Justice of the European Union is worth noting. The Court stated that, according to Articles 77, 60, and 80 UNCLOS, an EU Member State has sovereignty (albeit functional and limited sovereignty) over the continental shelf adjacent to it and exclusive jurisdiction over the artificial islands and installations positioned on it. As a consequence, the "work carried out on these fixed or floating installations (…) is to be regarded as work carried out in the territory of that State for the purposes of applying EU law" and in particular EU law provisions designed to ensure the freedom of movement of persons.[11]

3. The Limits of the Coastal State's Powers over the Offshore Platforms in Recent Practice

The features of artificial constructions at sea, as well as their legal implications, vary dramatically according to their characteristics and to the function to which they are destined. Looking, then, at oil, gas, or renewable energy platforms, the extent of the enforcement powers of coastal States over these items has recently caused concern and, in particular, the question of their protection and of their environmental impact is likely to lead to significant developments in the EEZ legal regime. The major and irreparable damage to the environment which occurred in the case of the 2010 explosion of the British Petroleum *Deepwater Horizon* platform in the Gulf of Mexico, drew attention to the particular vulnerability of such installations, including the possibility of terrorist attacks.[12]

Then, the 2013 seizure of the Greenpeace vessel *M/V Arctic Sunrise*, and of the activists protesting against Gazprom's oil platform in the Russian Arctic EEZ, raised a number of questions about the extent of coastal State enforcement powers to protect offshore platforms.[13] Indeed, upon the Netherlands' request for provisional measures as the flag State of the *M/V Arctic Sunrise*, the International Tribunal of the Law of the Sea ordered that the *Arctic Sunrise* and all detained persons be released,[14] but did not rule on the merits of the dispute between the Netherlands and Russia or on the lawfulness of the seizure and detention of the vessel and of the 30 volunteers, most of whom were

[11] Court of Justice of the European Union, *A Salemink v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, C-347/10, judgment of 17 January 2012.

[12] A. HAREL *Preventing Terrorist Attacks on Offshore Platforms: Do States Have Sufficient Legal Tools?*, cit., 131; S. KAYE, *Threats from the Global Commons: Problems of Jurisdiction and Enforcemen*t, in *Melbourne Journal of International Law*, 2007, 8.

[13] A. G. OUDE ELFERINK, *The Arctic Sunrise Incident: A Multi-faceted Law of the Sea Case with a Human Rights Dimension*, in *International Journal of Marine and Coastal Law*, 2014, 250, 256.

[14] International Tribunal for the Law of the Sea, *'Artic Sunrise' Case (Netherlands v Russian Federation)*, Case No. 22, Order of the 22 November 2013.

arrested on board the *Arctic Sunrise* outside the 500-metre safety zone established by Russia around its platform.[15]

The order of the Tribunal did not deal with the merits of the dispute, that is to say the legitimacy of the coercive acts on the part of the Russian authorities towards the *Arctic Sunrise* and its crew, but this question lies at the heart of the arbitration procedure set in motion on 4th October 2013 by Netherlands against the Russian Federation, in which the latter refused to take part. On one side, in fact, Netherlands complains of the violation of the freedom of navigation of the Greenpeace vessel within the Russian EEZ, and also of the violation of individual freedoms laid down in International law and Human Rights treaties. On the other, Russia, through some *notes verbales*, has asserted the full legitimacy of coercive actions within its EEZ if these are aimed at the protection of economic interests regarding the platforms and resources of the seabed.

Putting to one side the possible results of the arbitration procedure under way, in the absence of any defense on Russia's part, and also quite apart from the outcome of the appeals made by the 30 Greenpeace activists to the European Court of Human Rights against Russia, for presumed violations of Art. 5 and 10 of the European Convention of Human Rights, what comes to the fore in this matter is the vulnerability of off-shore platforms and the considerable uncertainty that exists regarding the extent of coastal State's powers to regulate or protect them.

The most difficult problem arising from the *Arctic Sunrise* case concerns the question of enforcement powers within the EEZ, and within the safety zone which can be instituted around a platform up to a maximum extension of 500 meters.

The Resolution on "Safety zones and safety of navigation around offshore installations and structures" (No. A.271 (16)) adopted by the IMO General Assembly on 19 October 1989 provided that, within the safety zone, States must take every possible measure to ensure that, unless specifically authorized to do so, their ships do not enter or cross safety zones legitimately instituted by coastal States within their own EEZs. This resolution also describes some measures which should be adopted by ships when they find themselves in proximity to off-shore platforms, such as prudence, the observance of safe speed and distance criteria etc.

Although these measures are contained in a recommendation, they may be considered as "generally accepted international norms" on navigation in proximity to artificial islands as set out in Art. 60, para. 6, UNCLOS.

What raises the greatest doubts regarding interpretation, looking at disputes like the *Arctic Sunrise* case, is undoubtedly the fact that Art. 60 gives no explicit description of the enforcement powers of the coastal State over ships which may represent a danger to exploitation activities and/or to the platform itself.

The doctrine holds, however, that these powers must be understood to be very wide, since they derive from the exercise of full jurisdiction.

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[15] According to Art. 16 of the Federal Law on Continental Shelf, adopted on 25 October 1995, the Russian Federation established safety zones around its installations extended for not more than 500 meters. The English version of the Law text is available at www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1995_Law.pdf. It has to be recalled that the Russian Federation's Coast Guard communicated over the radio to the M/V Arctic Sunrise that it was not permitted to enter in a radius of 3 nautical miles around the platform, but the Greenpeace vessel did it. On the irrelevance of the excessive Russian claim to a 3 nm zone, see A. G. OUDE ELFERINK, *The Arctic Sunrise Incident: A Multi-faceted Law of the Sea Case with a Human Rights Dimension*, cit., 250 and 256.

Art. 60, para. 4, however, gives the impression of a limitation of enforcement powers within the safety zone, since it provides for the adoption of "appropriate measures" for the safety of navigation and of the installation within the safety zone and not outside it, and therefore not beyond a distance of 500 meters from the fixed or mobile installation.

This provision means that the coastal State cannot be considered to enjoy all the coercive powers necessary to prevent and repress actions harmful or potentially harmful to the economic interests or safety of a platform which occur outside a radius of 500 meters from that platform. Outside the safety zone, if one has been instituted, the State is thus obliged to guarantee freedom of navigation, and would not have any great margin of possible action to prevent interference with or attacks on its platforms.

In any case, Art. 60, para. 4, with the term "appropriate measures" implies a high level of discretionary powers of the coastal State to evaluate the kind of measures necessary to eliminate the unauthorized presence of foreign ships in these areas, and to prevent any attempt at unauthorized access into the safety zones. Precautionary measures such as the confiscation of documents of a ship found in the proximity of a platform were adopted by Norway in 1993 in a case involving the Greenpeace ship *Solo*, which was engaged in peaceful protest activity against off-shore oil drilling.

This interpretation of the enforcement powers of the coastal State seems to be confirmed by Art. 111, para. 2, UNCLOS which says "The right of hot pursuit shall apply mutatis mutandis to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones."

Something may be deduced from the general principle according to which enforcement powers may be exercised as long as the ship is inside the maritime zone over which the State enjoys such powers. Since coastal States enjoy greater powers inside the safety zones than they do within the EEZ or CS, the State may be deemed unable to exercise enforcement powers over a ship when that ship is outside the safety zone.

4. Final Remarks

Several critical aspects have emerged with regard to the exercise of Coastal States' powers over offshore platforms and to the balancing of States sovereign and jurisdictional rights with the freedom of navigation in the zones beyond the territorial seas. In particular, when difficulties in interpreting international rules occur, the negative impact of them in semi-enclosed and fragile seas is much more evident and risky. Furthermore it must be emphasized that in a semi-enclosed sea, such as the Adriatic, an eventual attack to operating offshore installations could provoke serious consequences and, then, should be prevented by all lawful means.

The Adriatic Sea is also well known by biologists, and not only by lawyers, for the difficulties of marine living resources management and marine biodiversity conservation in disputed areas. These marine areas have been recently object of interest from the scientific community who has launched a proposal for the creation of Marine

Peace Parks.[16] The creation of a Marine Peace Park in the Adriatic Sea could have some implications for the existing and future gas and oil offshore platforms in the area.
There is another interesting development regarding the life of the offshore platforms which could interest the Adriatic Sea. The oil and gas rigs at the end of their use should be dismantled, as mentioned above. Nevertheless, it has been observed that the practice of abandoning the rigs, without dismantling them, has produced in some cases interesting consequences for the marine ecosystem and has raised the issue of possible re-use of platforms as artificial reefs.[17] The scientific discussion on this unexpected effects of accidental sinking or voluntary abandonment has been developed after the tragic case of the wreck of the "Paguro" Agip platform, which sank in the northern Adriatic Sea in 1965.[18] Many years after this accident, thanking to the exceptional aquatic life which developed in the artificial reef, the wreck of the Paguro platform has turned into a popular destination for sport divers. Indeed, the ecosystem adapted to the rigs, after years, has in some cases created a new and rare ecosystem that becomes itself worthy of protection.

[16] See P. MACKELWORTH, D. HOLCER, B. LAZAR, *Using conservation as a tool to resolve conflict: Establishing the Piran–Savudrija international Marine Peace Park*, in *Marine Policy*, 2013, 112-119.
[17] M. PONTI, M. ABBIATI, V. U. CECCHERELLI, *Drilling platforms as artificial reefs: distribution of macrobenthic assemblages of the "Paguro" wreck (northern Adriatic Sea)*, in *ICES Journal of Marine Science*, 2002, 316–323. The authors argue as follows on the biological changes occurred to the ecosystem on the wreck of a oil platform: "The offshore wreck of the 'Paguro' drilling platform also hosted a rich fauna, presumably reflecting a high structural complexity as well as its wide bathymetric range. (…) This is important in light of potential re-use of decommissioned platforms as artificial reefs in the northern Adriatic Sea, because an appropriate disposal strategy should take into account these effects."
[18] The accident, during the drilling of a new methane, caused the offshore platform *Paguro* to explode and sink to the bottom of the sea. This tragedy also caused the death of three persons. The sunk platform is located now at 12 miles away from the port of Marina di Ravenna at a depth of 25 meters.

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PROBLEMS OF MARINE POLLUTION RESULTING FROM OFFSHORE ACTIVITIES ACCORDING TO INTERNATIONAL AND EUROPEAN UNION LAW

NATHALIE ROS

1. Introduction

Up to now, the oil and gas industry is not as well established in the Mediterranean region as in other parts of the world, but the number of offshore installations is increasing and future perspectives exist. Furthermore, new deposits have been discovered that may be exploited, since deep and even ultra-deep drilling is now possible. But the risks involved in a fragile and semi-enclosed sea with seismic activity, as the Mediterranean, are even more important. Indeed, a disaster on a platform in the region would have a dramatic effect and irreversible consequences, because of the small size of the basin and the low rate of water renewal.[1]

Obviously, these risks are also of great concern in the Adriatic Sea, a semi-enclosed sea in a semi-enclosed sea, and Ionian Sea, where offshore exploration and exploitation are already a reality. Albania, Bosnia and Herzegovina, Croatia, Italia, Greece, Montenegro and Slovenia are involved as bordering States, as well as all Mediterranean States and the European Union, since four of the seven riparian are also Member States, and as shown by the Maritime Strategy for the Adriatic and Ionian Seas.

In this context, problems of marine pollution resulting from offshore activities are to be understood both according to International and European Union Law.[2]

2. International Law: Regional Sea and Environmental Protection

[1] On legal challenges, see N. ROS, Exploration, Exploitation and Protection of the Mediterranean Continental Shelf, in C. CINELLI, E. M. VÁSQUEZ GÓMEZ (eds), *Regional Strategies to Maritime Security: a Comparative Perspective*, Valencia, 2014, 101-132; *Quel régime juridique pour l'exploitation offshore en Méditerranée?*, in *Annuaire de Droit Maritime et Océanique* 2015, Tome XXXIII (forthcoming).

[2] N. ROS, *La réglementation euro-méditerranéenne des activités offshore*, in *Diritto del Commercio Internazionale*, 2015, 121-164; L. SCHIANO DI PEPE, *Offshore oil and gas operations in the Mediterranean Sea: regulatory gaps, recent developments and future perspectives*, in J. JUSTE RUIZ, V. BOU FRANCH (ed.), *Derecho del Mar y Sostenibilidad ambiental en el Mediterráneo*, Valencia, 2014, 363-387; *International Marine Environmental Law and the EU: An Adequate Framework to Address Environmental Emergencies?*, in I. GOVAERE, S. POLI (ed.), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises*, Leiden – Boston, 2014, Chapter 14, 298-303.

The profile of International Law, Regional Sea and Environmental Protection, relies on a conventional framework, the Barcelona System, involving the twenty-one bordering States and the European Union, and more specifically on a governance framework, the Offshore Protocol.

2.1. A Conventional Framework: The Barcelona System

a) The Barcelona Convention and Protocols

The Barcelona Convention and its Protocols constitute the legal dimension of the Mediterranean Action Plan, developed in the framework of UNEP, according to International Law and United Nations cooperation principles.[3] The Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, the amended version adopted on 10 June 1995,[4] is an umbrella-treaty integrating all the Rio outcomes and intending to set up an environmental and sustainable governance, fighting against all the forms of marine pollution, including *Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil*.[5]

With its seven thematic Protocols, all in force since March 2011, it forms a global regional system addressing the different forms of pollution and environmental challenges: Dumping;[6] Prevention and Emergency;[7] Land-Based Sources;[8] Specially Protected Areas and Biological Diversity;[9] Offshore;[10] Hazardous Wastes;[11] Integrated Coastal Zone Management.[12]

b) The 1994 Offshore Protocol

The Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its

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[3] See http://www.unepmap.org/index.php.

[4] See http://195.97.36.231/dbases/webdocs/BCP/bc95_Eng_p.pdf. The initial version of the Barcelona Convention, the *Convention for the Protection of the Mediterranean Sea against Pollution*, was adopted on 16 February 1976 and entered into force on 12 February 1978; the 1995 Convention entered into force on 9 July 2004.

[5] Art. 7 Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil: "*The Contracting Parties shall take all appropriate measures to prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil*".

[6] *Protocol for the Prevention and Elimination of Pollution in the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea*, adopted in 1976 and entered into force in 1978; the amended version, adopted in 1995, is not yet in force.

[7] *Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea*, adopted in 2002 and entered into force in 2004.

[8] *Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities*, adopted in 1996 and entered into force in 2008.

[9] *Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean*, adopted in 1995 and entered into force in 1999.

[10] *Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil*, adopted in 1994 and entered into force in 2011.

[11] *Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal*, adopted in 1996 and entered into force in 2008.

[12] *Protocol on Integrated Coastal Zone Management in the Mediterranean*, adopted in 2008 and entered into force in 2011.

Subsoil was adopted in Madrid on 14 October 1994, and entered into force on 24 March 2011.[13]

It's not only a dedicated conventional act but also one of the two existing treaties in the world currently dealing with offshore activities; the other is the Protocol Concerning Marine Pollution Resulting from Exploration and Exploitation of the Continental Shelf, adopted in 1989 and entered into force in 1990, in the framework of the 1978 Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution, in the ROPME Sea Area, including the Persian Gulf and the Sea of Oman, a region where offshore issues are very important.

This aspect enhances the pioneering dimension of the Protocol as an integrated conventional act, adopted in 1994 to be part of the new framework integrating the Rio outcomes. In addition to the Barcelona Convention, it also refers to two of its protocols, now replaced in their latest version by the 1995 Convention, the 1995 Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean,[14] and the 2002 Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea.[15] The systemic integration has also an institutional dimension, since the Offshore Protocol gives an operational role, in case of emergency, to the Regional Activity Center of the Prevention and Emergency Protocol, the Regional Marine Pollution Emergency Response Center for the Mediterranean Sea (REMPEC).[16]

2.2. A Governance Framework: The Offshore Protocol

a) A Global and Ambitious Protocol

In practice, and despite the financial difficulties encountered by UNEP/MAP, REMPEC seems intended to play an important role in the implementation of a governance framework, under the Offshore Protocol, defined as global and ambitious, as evidenced by its legal scope. From the vantage point of geography, and contrary to what might suggest the reference to the continental shelf in the title of the Protocol, it encompasses the whole Mediterranean Sea area. As regards the activities, the Offshore Protocol adopts a holistic approach of offshore operations, including scientific research, all the forms of exploration and the global process of exploitation, from the establishment of an installation to its removal, from drilling to transportation. Finally, all mineral resources are concerned, whether solid, liquid or gaseous; therefore, the Protocol is not only applicable to conventional oil and gas activities.

This broad scope is associated with a high level of requirements. Although the Protocol is now twenty years old and, therefore, can't integrate the latest legal and technological innovations, it still appears pioneering and characterized by a high level of requirements for the Parties and operators: written authorization for exploration and exploitation; use of the best available techniques and standards to minimize the risk of pollution; sanctions for breaches of conventional obligations; environmental impact assessments; mutual assistance in cases of emergency; insurance and other financial

[13] See http://195.97.36.231/dbases/webdocs/BCP/ProtocolOffshore94_eng.pdf.
[14] See http://195.97.36.231/dbases/webdocs/BCP/ProtocolSPA95_eng.pdf.
[15] See http://195.97.36.231/dbases/webdocs/BCP/ProtocolEmergency02_eng.pdf.
[16] See http://www.rempec.org.

security to cover liability.[17] Actually, this high level of requirements is the reason of the low level of ratifications, particularly by the European States, and it explains the late entry into force, especially because of the compulsory insurance, with the six ratifications of Albania, Cyprus, Libya, Morocco, Syria, and Tunisia. Although the European Union has now accessed to the Protocol, its Member States don't manifest their intention to ratify the Protocol in the near future: they have all signed it with the exception of France; and outside the EU, the situation is not so different, Israel and Monaco have signed, but other States have neither signed nor ratified.

b) Towards a Legal Governance

By the fact, the system is evolving towards a legal governance. The implementation of the Protocol began during the CoP 17 of the Barcelona Convention in 2012, with the adoption of a Decision establishing an *ad hoc* working group coordinated by REMPEC, in order to develop a dedicated Action Plan, by CoP 19 at the end of 2015.[18]

The future of the Protocol relies on the effective adoption of this Action Plan whose main three objectives are: setting-up a governance framework, defining regional offshore standards and guidelines, and develop a regional reporting and monitoring mechanism. Without considering the revision of the Protocol, it seems necessary to update some provisions, especially in the Annexes. Amendments should be rapidly adopted, while the number of Parties is still limited and the three-fourths majority vote, legally necessary, *a priori* easier to obtain, in order to enter into force afterwards automatically for each new Contracting Party.

3. European Union Law: Economic Integration and Industrial Safety

Obviously, this traditional approach of International Law is complemented and reinforced by the profile of European Union Law, Economic Integration and Industrial Safety; in order to cope with problems of marine pollution resulting from offshore activities, the European strategy requires the integration of the Mediterranean *acquis* into EU Law and the application of EU Law to Mediterranean governance.

3.1. Integration of the Mediterranean Acquis *into EU Law*

a) The Accession of the EU to the Offshore Protocol

[17] Concerning the Protocol and its legal contribution, see E. RAFTOPOULOS, *Sustainable Governance of Offshore Oil and Gas Development in the Mediterranean: Revitalizing the Dormant Mediterranean Offshore Protocol*, Thursday 19 August 2010, MEPIELAN E-Bulletin (http://www.mepielan-ebulletin.gr/default.aspx?pid=18&CategoryId=4&ArticleId=29&Article=Sustainable-Governance-of-Offshore-Oil-and-Gas-Development-in-the-Mediterranean:-Revitalizing-the-Dormant-Mediterranean-Offshore-Protocol); L. SCHIANO DI PEPE, *Offshore oil and gas operations in the Mediterranean Sea: regulatory gaps, recent developments and future perspectives*, in J. JUSTE RUIZ, V. BOU FRANCH (ed.), *Derecho del Mar y Sostenibilidad ambiental en el Mediterráneo*, Valencia, 2014, 371-375.

[18] Report of the 17th Ordinary Meeting of the Contracting Parties to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols, Paris, France, 10th-12th February 2012, UNEP(DEPI)/MED IG.20/8, 14 February 2012, Part I, Annex II *Thematic Decisions*, Decision IG.20/12, 217-218, http://195.97.36.231/dbases/MAPmeetingDocs/12IG20_8_Eng.pdf.

The first step is the integration of the Mediterranean *acquis* into EU Law, and first of all the accession of the EU to the Offshore Protocol. Prior to its adoption, the Commission had proposed to the Council to sign the Protocol,[19] but it was then deemed more appropriate to work further on a Community regime for environmental liability rather than anticipate it through an international agreement. The current situation is clearly the result of a strategic change of mind occurred, in the aftermath of the accident in the Gulf of Mexico, on the *Deepwater Horizon*, on 20 April 2010, when the European Union became more aware of all the potential for resulting risks, especially in the Mediterranean. A Commission Communication adopted on 12 October 2010, and titled *Facing the challenge of the safety of offshore oil and gas activities*, recommended to re-launch the process towards bringing into force the Offshore Protocol, in close collaboration with the Member States concerned and the REMPEC.[20] This proposition was supported by the Parliament in its resolution of 13 September 2011,[21] while the Protocol was already entered into force. One month later, on 27 October 2011, the Commission published a proposal for a Council Decision to approve the accession of the European Union to the Offshore Protocol, in a global legal framework including the development of EU Law.[22]

b) Legal Consequences of the Accession

On 20 November 2012, the Parliament finally consented[23] and the Decision of accession was adopted by the Council on 17 December 2012,[24] with all the legal consequences according to EU Law and due to the integration of the Protocol into the European Union legal order. The immediate legal effects are twofold because the Offshore Protocol may be rightly considered to enter into the legal framework of Art. 216 of the Treaty on the Functioning of the European Union (TFEU), and to be an agreement "*binding upon the institutions of the Union and on its Member States*".[25]

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[19] Commission of the European Communities, *Proposal for a Council Decision concerning the Signature of a Protocol for the Protection of the Mediterranean Sea against Pollution resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil*, COM(94) 397 final, 22 September 1994.

[20] Communication from the Commission to the European Parliament and the Council, *Facing the challenge of the safety of offshore oil and gas activities*, COM(2010) 560 final, 12 October 2010,

[21] European Parliament resolution of 13 September 2011 on facing the challenges of the safety of offshore oil and gas activities (2011/2072(INI)), P7_TA(2011)0366.

[22] European Commission, *Proposal for a Council Decision on the accession of the European Union to the Protocol for the Protection of the Mediterranean Sea against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil*, COM(2011) 690 final, 2011/0304 (NLE), 27 October 2011

[23] *European Parliament legislative resolution of 20 November 2012 on the draft Council decision on the accession of the European Union to the Protocol for the Protection of the Mediterranean Sea against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil (09671/2012 – C7-0144/2012 – 2011/0304(NLE))*, P7_TA(2012)0415.

[24] Council Decision of 17 December 2012 on the accession of the European Union to the Protocol for the Protection of the Mediterranean Sea against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil (2013/5/EU), *Official Journal of the European Union*, 9 January 2013, L 4/13-14.

[25] Art. 216 TFEU: "*1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. 2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*".

Anyway, after the accession of the European Union, and the integration of the Offshore Protocol into EU Law, the obligations relating to its implementation are not only incumbent upon the European Union, but also largely upon its Member States, which have to transpose its provisions into domestic law even though they have not ratified the Protocol. Furthermore, EU Law shall contribute to reinforce the contribution of the Offshore Protocol, through the *acquis* and the new role assigned to the European Maritime Safety Agency. Indeed a Regulation adopted in 2013 extends EMSA competencies, both from the material and geographical point of view, first to response to marine pollution caused by oil and gas installations, and second to States applying for accession to the Union and European Neighbourhood partner countries, which include Mediterranean non-Member States.[26] Therefore, EMSA is able to be involved in the implementation of certain aspects of the Offshore Protocol and may even collaborate with REMPEC.

Obviously, the Decision of accession also has consequences for Member States due to their legal status of Parties to the Barcelona System. This should encourage or incite the Mediterranean Member States to ratify, although they remain the most fervent opponents to the Protocol; but more than two years later, and even though some of them have announced their intention to ratify (France, Italy, Malta), implement (Greece) or transpose (Slovenia), the *status quo* remains... and Cyprus is still the only EU Member State Party to the Offshore Protocol. However, ratification by Mediterranean EU Member States is not unnecessary, furthermore at the Mediterranean level where the Protocol needs more ratifications, and a better balance between EU and non-EU Member States, to become more effective and enhance cooperation and environmental protection.

3.2. Application of EU Law to Mediterranean Governance

a) The Directive on Safety of Offshore Oil and Gas Operations

The other option is the application of EU Law to Mediterranean governance, especially the Directive on safety of offshore oil and gas operations, adopted on 12 June 2013,[27] following a formal evolution from a proposed regulation to a directive. Like the accession to the Protocol, this normative process, specifically European, originates in the awareness resulting from the *Deepwater Horizon* accident, and the aforementioned Communication from the Commission of October 2010. For the first time, the adoption of a comprehensive legislative framework is planned at EU level; to this end, the Commission made, on 27 October 2011, the initial and ambitious choice of a regulation, directly binding upon Member States, in order to establish a harmonized EU system, automatically incorporated into the domestic legal order of all the Member States.[28] On 3 December 2012, this strategy was definitely challenged in the Council, at the instigation of the States particularly concerned by offshore activities. By 21 February

[26] Regulation (EU) N° 100/2013 of the European Parliament and of the Council of 15 January 2013 amending Regulation (EC) N° 1406/2002 establishing a European Maritime Safety Agency, *Official Journal of the European Union*, 9 February 2013, L 39, 30-40.

[27] Directive 2013/30/EU of the European Parliament and the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC, *Official Journal of the European Union*, 28 June 2013, L 178, 66-106.

[28] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on safety of offshore oil and gas prospection, exploration and production activities*, COM(2011) 688 final, 2011/0309 (COD), 27 October 2011.

2013, the European Parliament and the Council reached a political agreement and recommended the adoption of a directive, a disappointing option, much less ambitious, since it only establishes objectives and leaves the Member States free of the means to achieve them during the transposition.

In practice, there are some synergies with the Offshore Protocol and such a complementarity is even necessary in the perspective of a regional governance.[29] The accession Decision and the Directive must be considered in close relation; they have a common purpose, but they are not of the same generation and have specific objectives and focus, with rather different geographic and functional scopes. The Protocol has a profile of International Law, dedicated to environmental protection and fight against pollution of the Mediterranean Sea; it's a legal instrument of regional cooperation, with the broad objective to protect against pollution from offshore activities, and a holistic approach, including the whole process of offshore activities, scientific research, exploration and exploitation, and all the mineral resources of the continental shelf. The Directive has a profile of EU Law, focused on economic integration and industrial safety. It has a more specific scope than the Protocol, that is to ensure the safety of offshore activities, excluding research and transport, and is limited to the oil and gas operations, in the maritime areas under Member States jurisdiction. Its main objective is to prevent major accidents and limit their consequences, by establishing minimum safety requirements likely to contribute to an indirect improvement of environmental conditions and health of workers.[30]

b) Participation of EU Law to Mediterranean Governance

In this context, participation of EU Law to Mediterranean governance may be very complex to implement; it's a real but disappointing normative contribution. Complementary to the Directive, the EU *acquis* is relatively important; it encompasses fifteen European legal acts, in the field of environment, including marine issues, safety and health of workers and civil protection, and industrial safety, including the oil industry.[31] As regards the Directive, its main objective is threefold: to reduce as far as

[29] See *Final Report - Safety of offshore exploration and exploitation activities in the Mediterranean: creating synergies between the forthcoming EU Regulation and the Protocol to the Barcelona Convention*, May 2013, http://ec.europa.eu/environment/marine/international-cooperation/regional-sea-conventions/barcelona-convention/pdf/Final%20Report%20Offshore%20Safety%20Barcelona%20Protocol%20.pdf.

[30] For a doctrinal analysis of the Directive, see J. JUSTE RUIZ, *La directive européenne sur la sécurité des opérations pétrolières et gazières en mer*, in *Revue Juridique de l'Environnement*, 2014, 23-43; and more specifically in a Mediterranean perspective, L. SCHIANO DI PEPE, *Offshore oil and gas operations in the Mediterranean Sea: regulatory gaps, recent developments and future perspectives*, in J. JUSTE RUIZ, V. BOU FRANCH (ed.), *Derecho del Mar y Sostenibilidad ambiental en el Mediterráneo*, Valencia, 2014, 378-387.

[31] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive); Council Directive 92/91/EEC of 3 November 1992 concerning the minimum requirements for improving the safety and health protection of workers in the mineral-extracting industry through drilling (eleventh individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (Health and safety of workers Directive); Directive 94/9/EC of the European Parliament and the Council of 23 March 1994 on the approximation of the laws of the Member States concerning equipment and protective systems intended for use in potentially explosive atmospheres; Directive 94/22/EC of the European Parliament and the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons (Hydrocarbons Directive); Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances (Seveso II Directive); Directive 97/23/EC of the

possible the occurrence of major accidents relating to offshore oil and gas operations; to limit their consequences, thus increasing the protection of the marine environment and coastal economies against pollution; to improve the response mechanisms in case of an accident. Obviously, it is a step forward, but it's far below initial expectations. Indeed, the lobbies of the oil and gas industry, as well as States particularly involved in offshore activities, have not only worked in favor of a directive rather than a regulation, but also to reduce the scope of the text that appears really very disappointing. Overall, the established rules lack clarity and provide only partial solutions to global problems; most of the provisions are mere soft law... and no independent monitoring and supervision role was granted to EMSA.

In practice, the Directive appears a future contribution with geographical limits. *Ratione temporis*, and as regards States, the transposition of the Directive shall occur within a period of two years (July 2015); regarding industrial operators, a three years period is granted in the case of planned installations (July 2016) and a five years period in relation to existing installations (July 2018). *Ratione personae*, the scope of the Directive varies according to circumstances. Only coastal Member States having offshore oil and gas operations carried out in the waters under their jurisdiction shall transpose the whole Directive. Other coastal Member States shall be obliged to bring into force only those measures which are necessary to ensure compliance with three articles,[32] and particularly Art. 20 which mentions the eventuality of a report in case of a major accident occurred during offshore oil and gas operations conducted outside the Union, the only provision that shall be transposed even by landlocked States; but States where no offshore company is registered in are not concerned by this requirement, and the Commission has underlined the risks associated with this precedent, both as regards the integrity of EU Law and in terms of possible circumvention. *Ratione loci*, the transposition is only an obligation for offshore operations conducted in the maritime areas under the jurisdiction of Member States. In the Mediterranean, it concerns only

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European Parliament and of the Council of 29 May 1997 on the approximation of the laws of the Member States concerning pressure equipment; Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Liability Directive or ELD); Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC; Regulation (EC) N° 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH); Council Decision of 8 November 2007 establishing a Community Civil Protection Mechanism; 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); Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (Waste Framework Directive); Regulation (EC) N° 1272/2008 on classification, labelling and packaging of substances and mixtures (CLP Regulation); Directive 2009/147/EC on the conservation of wild birds (Birds Directive); Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. Three relevant conventions can also be considered to be part of the EU *acquis*: United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982; Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) of 25 February 1991; and United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) of 25 June 1998.

[32] Art. 20 Offshore oil and gas operations conducted outside the Union; Art. 32 Transboundary emergency preparedness and response of Member States without offshore oil and gas operations under their jurisdiction; Art. 34 Penalties.

eight States and the areas under their jurisdiction, so it could lead to a fragmentation of the legal regime, *a fortiori* when there are little or no convergences with the Protocol.

4. Concluding Remarks

In the Adriatic and Ionian Seas, as in the whole Mediterranean, problems of marine pollution resulting from offshore activities require both International and EU Law profiles. Solutions should arise at the crossroads between a Mediterranean Protocol dedicated to protection against pollution from offshore activities, to which Member States of the European Union remain largely refractory, and the logic of economic integration and industrial safety, initiated by the European Directive, which is functionally more restrictive and applies only to Member States. We just have to hope that this effective improvement will be possible without the occurrence of disasters, unlike maritime navigation with *Erika* and *Prestige* shipwrecks.

5

CIVIL LIABILITY AND COMPENSATION FOR DAMAGE CAUSED IN CONNECTION WITH OFFSHORE OIL AND GAS ACTIVITIES: WHERE ARE WE NOW?

Lorenzo SCHIANO DI PEPE

1. Liability for Damage Arising out of Offshore Accidents … as a Measure of Last Resort?

As with any human activity likely to cause sudden or persistent environmental degradation, also offshore oil and gas exploration and exploitation are nowadays subject to a considerable body of international, European and national rules. A comprehensive assessment of the relevant norms goes clearly beyond the scope of the present contribution; suffice it to say that differing views exist on the completeness of such normative system and the adequateness of the level of protection accorded by it.[1]

What can be remarked here is that, undoubtedly, legislative efforts have so far focussed especially on accidents prevention and response rather than on liability and compensation. In a sense, this is understandable for at least two main reasons. On the one hand, as it is well known, the principle of prevention which forms an integral part of environmental law at all levels, requires that, first and foremost, measures are put in place in order to prevent the occurrence of accidents likely to cause environmental damage or, at least, to minimise their impact. On the other hand, whilst it may be (relatively) easy to agree on (and, conversely, impose on the relevant operators) a set of preventative rules – as these will be broadly speaking based on a common ground of practical knowledge and technical expertise – the same may be less true of liability and compensation regimes.[2]

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[1] For a general outline of the subject, with particular regard to the prevention aspects, reference can be made Lorenzo SCHIANO DI PEPE, *Offshore Oil and Gas Operations in the Mediterranean Sea: Regulatory Gaps, Recent Developments and Future Perspectives*, in J. JUSTE RUIZ, V. BOU FRANCH (ed.), *Derecho del mar y sostenibilidad ambiental en el Mediterráneo*, Valencia, 2014, 363.

[2] The debate around the question of liability for damage arising out of offshore accidents has been quite active, as demonstrate for example by contributions such as the following: R. ABEYRATNE, *The Deepwater Horizon Disaster – Some Liability Issues*, in *Tulane Maritime Law Journal*, 2010, 125 ff.; B. J. BUSH, *The Answer Lies in Admiralty: Justifying Oil Spill Punitive Damages Recovery Through Admiralty Law*, *Lewis & Clark Law School Environmental Law*, 2011, 1255 ff.; Martin DAVIES, *Liability issues raised by the Deepwater Horizon blowout*, in *Australian & New Zealand Maritime Law Journal*, 2011, 35 ff.; K. G. ENGERRAND, *Indemnity for Gross Negligence in Maritime Oilfield Contracts*, in *Loyola Maritime Law Journal*, 2011-2012, 319 ff.; V. J. FOLEY, *Post-Deepwater Horizon: the changing landscape of liability for oil pollution in the United States*, in *Albany Law Review*, 2010, 515 ff.; T.

Examples of such an approach are provided by the 1982 United Nations Convention on the Law of the Sea[3] as several provisions contained therein require contracting parties to establish global and regional rules to prevent marine environmental degradation with particular reference to activities such as drilling and the operation of offshore installations. More on point, at the regional level, significant results have been achieved in the North East Atlantic and, to a lesser extent (as it shall be seen), in the Mediterranean Sea, as demonstrated, respectively, by the 1992 Convention for the Protection of the Marine Environment of the North East Atlantic[4] (Art. 5 and Annex III) and the 1994 Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil,[5] part of the so-called "Barcelona system" made up of (what is now) the 1995 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its seven thematic protocols.[6]

More recently, and in the same vein, Directive 2013/30/EU of the European Parliament and of the Council, of 12 June 2013,[7] purported to introduce a set of rules establishing "*minimum requirements for preventing major accidents in offshore oil and gas operations and limiting the consequences of such accidents*".

The very wording used by the Directive's Art. 1, reproduced above, reminds us, however, that sometimes the occurrence of an accident simply cannot be excluded, notwithstanding the existence of sophisticated, state-of-the-art preventive regimes, and that some damage is likely to be occur when the relevant rules of prevention are not complied with or fail to meet their objective for other reasons.

This demonstrates the pressing need for a specific liability regime to function not only as an additional deterrent for operators but also as a tool to ensure that victims are adequately compensated if and when one of such accidents occurs. In this respect, liability and compensation are to be seen not only as a measure of last resort or as a "mere" safety net to come into play … just in case something goes wrong, but rather as a complementary instrument working together with preventive regimes.

2. Civil Liability for Offshore Oil and Gas Activities at the Global and Regional Level ... or not?

KURTZ-SHEFFORD, *Liability for offshore facility pollution damage after the Deepwater Horizon? What happened to the global solution?*, in *Journal of International Maritime Law*, 2012, 453 ff.; K. NOUSSIA, *The BP Oil Spill – Environmental Pollution Liability and Other Legal Ramifications*, in *European Energy and Environmental Law Review*, 2011, 98 ff.; A. D. PAUL, *Rethinking Oil Spill Compensation Schemes: The Causation Inquiry*, in *Loyola Maritime Law Journal*, 2011, 137 ff.; T. J. SCHOENBAUM, *Liability for Damages in Oil Spill Accidents: Evaluating the USA and International Law Regimes in the Light of Deepwater Horizon*, in *Journal of Environmental Law*, 2012, 395 ff.; T. SCOVAZZI, *Maritime Accidents with Particular Emphasis on Liability and Compensation for Damage from the Exploitation of Mineral Resources of the Seabed*, in A. DE GUTTRY, M. GESTRI, G. VENTURINI (eds.), *International Disaster Response Law*, The Hague, 2012, 287 ff.

[3] Adopted on 10 December 1982; entered into force at the international level on 16 November 1994.

[4] Adopted on 22 September 1992; entered into force at the international level on 25 March 1998.

[5] Adopted on 14 October 1994; entered into force at the international level on 24 March 2011.

[6] Adopted 10 June 1995; entered into force at the international level on 9 July 2004.

[7] Directive 2013/30/EU of the European Parliament and of the Council on safety of offshore oil and gas operations and amending Directive 2004/35/EC, *Official Journal of the European Union*, 28 June 2013, L 178, 66.

As it has been authoritatively noted, liability and compensation issues are not properly dealt with by any global or regional legal instrument currently in force, when it comes to offshore oil and gas activities.[8]

As a starting point, despite the moving nature of many offshore platforms, a successful liability and compensation regime such as the one jointly established by the 1992 International Convention on Civil Liability for Oil Pollution Damage[9], on the one hamd, and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage[10], on the other hand, will be clearly not applicable insofar as the "object" involved does not fall within the definition of 'ship' provided thereby, *viz.*,according to art. I.1 of the former, "*any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard*".

A more pertinent instrument, the 1977 Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources[11] (designed to apply to the North Sea, the Baltic Sea and the Northern Atlantic Ocean), whilst containing provisions channelling the liability towards the operator and entitling the latter to limit such liability to a certain monetary amount, has not entered into force so far and is highly unlikely to do so in the future.

Other regimes, such as the Mediterranean Offshore Protocol[12] that has already been touched upon above, whilst mentioning the *need* for a liability and compensation mechanism, have fallen short of devising a comprehensive regime. Its Art. 27, par. 1, in fact, merely requires contracting parties to "*cooperate as soon as possible in formulating and adopting appropriate rules and procedures for the determination of liability and compensation for damage resulting from the activities dealt with in* [the] *Protocol*".

In the meantime, "*pending development of such procedures*", parties are called upon by Art. 27, par. 2, on the one hand, (a) to "*take all measures necessary to ensure that liability for damage caused by activities is imposed on operators, and that they shall be required to pay prompt and adequate compensation*" and, on the other hand, (b) to

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[8] See, for example, L. CHABASON, *Offshore oil exploitation: a new frontier for international environmental law (IDDRI Working Paper no. 11/11)* (available online at http://www.iddri.org/Publications/Collections/Idees-pour-le-debat/WP%201111_chabason_offshore.pdf).

[9] Originally adopted on 29 November 1969 and entered into force at the international level on 19 June 1975; subsequently replaced by a new version thereof adopted on 27 November 1992 which entered into force at the international level on 30 May 1996.

[10] Originally adopted on 18 December 1971 and entered into force at the international level on 16 October 1978; superseded by a new version thereof adopted on 27 November 1992 which entered into force at the international level on 1 May 1996.

[11] Adopted on on 1 May 1977 and never entered into force.

[12] On which see also T. SCOVAZZI, *UNEP: The Fifth Protocol to the Barcelona Convention on the Protection of the Mediterranean*, in *The International Journal of Marine and Coastal Law*, 1995, 543 ff., as well as E. RAFTOPOULOS, *Sustainable Governance of Offshore Oil and Gas Development in the Mediterranean: Revitalizing the Dormant Mediterranean Offshore Protocol*, available online at http://www.mepielan-ebulletin.gr/default.aspx?pid=18&CategoryId=4&ArticleId=29&Article=Sustainable-Governance-of-Offshore-Oil-and-Gas-Development-in-the-Mediterranean:-Revitalizing-the-Dormant-Mediterranean-Offshore-Protocol.

"*take all measures necessary to ensure that operators shall have and maintain insurance cover or other financial security of such type and under such terms as the Contracting Party shall specify in order to ensure compensation for damage caused by the activities covered by* [the] *Protocol*".

The position within the Barcelona system in general is, to say the truth, not much more advanced, if one considers that the only instrument existing on liability and compensation is currently represented by (non-mandatory) guidelines adopted by the 16th Meeting of the Contracting Parties in January 2008.[13]

As a consequence of the (late) entry into force of the Offshore Protocol, which is now binding for six States plus the European Union, we now face a situation which is, in all fairness, no much less uncertain and fragmented than it used to be in the past, at least from the standpoint of liability and compensation for damages caused in connection with offshore oil and gas activities.

Admittedly, for those States that are contracting parties to the Offshore Protocol (as well as for the European Union) we have clearly moved from a scenario where no international regime (of regional character) existed to one which is indeed subject to a definite set of rules devoted to exploration and exploitation activities of the continental shelf, its seabed and its seafloor.

If we look at the substance of such rules, however, it has to be recognized that, far from having introduced a uniform legal regime (unlike the 1992 Civil Liability Convention that has been mentioned above), the Offshore Protocol heavily relies on the legislation of its contracting parties for the purpose of ensuring, on the one hand, a certain degree of cooperation for the formulation and adoption of "*appropriate rules and procedures for the determination of liability and compensation*". On the other hand and on an *interim* basis (*i.e.*, pending the development of the relevant procedures), operators are required to pay "*prompt and adequate compensation*" (to what extent, according to what standards and for what kind of damage is not specified, though), should an accident occur, and an "*insurance cover or other financial security*" shall be set up "*of such type and under such terms*" … as the contracting party concerned itself shall specify!

The current scenario is, in addition, legally fragmented, too, if one considers that the above rules only apply, within the Mediterranean Sea area, to a handful of coastal States, giving them a competitive disadvantage in the lucrative offshore oil and gas business *vis-à-vis* States that have not yet ratified the Offshore Protocol. This is bound to potentially negatively affect the success of the Protocol in two different (although interrelated) ways: first of all, by possibly discouraging Mediterranean States from becoming parties to the Protocol and, secondly, by driving those that may decide to become parties towards the adoption of liability standards and compensation rules that are not particularly stringent.

The above considerations, which apply to the Mediterranean Sea as a whole, are particularly significant in sub-regional contexts which feature the presence of EU as well as non-EU Member States, which is notably the case of the Adriatic and Ionian area with specific regard to the position of Albania, Bosnia-Herzegovina and Montenegro. Indeed, especially due to the increasing interest for offshore activities in

[13] See, in this respect, T. SCOVAZZI, *The Mediterranean Guidelines for the Determination of Environmental Liability and Compensation: The Negotiations for the Instrument and the Question of Damage that Can Be Compensated*, in *Max Planck Yearbook of United Nations Law Online*, 2009, 183 ff..

that part of the Mediterranean Sea, one may see the Adriatic-Ionian Initiative (also) as an appropriate framework for ensuring a prompt ratification process of the Offshore Protocol (to which Albania, but not the two other non-EU Member States, is at present a contracting party).

3. Directive 2013/30/EU on Safety of Offshore Oil and Gas Operations: What Room for the Polluter Pays Principle?

Given the unsatisfactory situation that currently exists at the international level, as briefly represented in the previous section, it is important to ascertain whether or not the European Union has been able to take the lead towards the establishment of more adequate liability and compensation rules in the field of offshore oil and gas exploration and exploitation. Reference has therefore to be made, in this respect, to the already mentioned Directive 2013/30 on safety of offshore oil and gas operations.

At the outset, however, it is appropriate to recall that, as widely know, art. 191.2 of the Treaty on the Functioning of the European Union, provides that the environmental policy of the European Union shall, *inter alia*, be based on the principle that the polluter shall pay. Such principle is generally considered to imply, on the one hand, a prohibition of environmental State subsidies and, on the other hand, the enactment of appropriate liability and compensation rules.

The principle has been implemented in several pieces of secondary legislation and has been addressed in a comprehensive manner through the adoption of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedy of environmental damage.[14]

In a paper which is the process of being published, I have taken the view (which I maintain here) that, so far, the European Union has failed to properly implement the polluter pays principle into its offshore oil and gas legislation.

On the one hand, in fact, it appears from the wording of that the European Union (and its legislators) are fully aware of the intricate liability issues that are likely to arise out of an accident occurred in connection with the running of an offshore installation, especially when such accident happens to have transboundary implications. On the other hand, however, no significant substantive measure has been provided for by the 2013 Directive in order to address such issues, perhaps due to the perceived urgency to adopt at least a set of minimum preventive rules, which brings us back to the considerations that have been developed in the first section of the present paper concerning the (wrong) perception of liability as a measure of last resort.

It is interesting to recall, by way of an example, that recital No. 9 of the Directive recognises the limits of the existing (national) liability regimes, by pointing out that under such regimes "*the party responsible may not only be clearly identifiable and may not be able, or liable, to pay all the costs to remedy the damage it has caused*". Later on, it is also stated that "*as no existing financial security instruments, including risk pooling arrangements, can accommodate all possible consequences of major accidents, the Commission should undertake further analysis and studies of the appropriate measures to ensure an adequately robust liability regime for damages relating to*

[14] *Official Journal of the European Union*, 30 April 2004, L 143, 56. See, for a recent commentary, L. BERGKAMP, B. J. GOLDSMITH, *The EU Environmental Liability Directive*, Oxford, 2013.

offshore oil and gas operations, requirements on financial capacity including availability of appropriated financial security instruments or other arrangements" (recital no 63).

The result is that, under Art. 39 of the Directive, the Commission is required, by the end of 2014, to submit to the European Parliament and to the Council a report "*on the availability of financial security instruments and on the handling of compensation claims, where appropriate, accompanied by proposals*" and that, in turn, by 19 July 2015, the Commission shall submit to the same institutions "*a report on its assessment of the effectiveness of the liability regimes in the Union in respect of the damage caused by offshore oil and gas operations*", along with an "*assessment of the appropriateness of broadening liability provisions*", to be accompanied again, "*where appropriate, by proposals*".

At a closer scrutiny there appears to have been only one (limited) intervention of substance effected by Directive 2013/30, consisting in the amendment of the 2004 Liability Directive in order to take into account some of the peculiarities of the offshore oil and gas sector.

Art. 38, in this respect, extends the scope of application of the said Directive also to damage adversely affecting the environmental status of "*waters, the seabed and subsoil on the seaward side of the baseline from which the extent of territorial waters is measured extending to the outmost reach of the area where a Member State has and/or exercises jurisdictional rights, in accordance with the* [United Nations Convention on the Law of the Sea], *with the exception of waters adjacent to the countries and territories mentioned in Annex II to the Treaty and the French Overseas Departments and Collectivities*".

The Liability Directive, however, is in itself open to criticism due to its restricted definition of 'recoverable damage' and the limited role accorded to individuals as opposed to public authorities. It is therefore unfortunate that the Offshore Directive confines itself to requesting to Member States, "[w]*ithout prejudice to the existing scope of liability relating to the prevention and remediation of environmental damage pursuant to Directive 2004/35/EC*", to "*ensure that the licensee is financially liable for the prevention and remediation of environmental damage as defined in that Directive, caused by offshore oil and gas operations carried out by, or on behalf of, the licensee or the operator*" (Art. 7).[15]

4. Civil Liability and Compensation for Offshore Activities under EU and International Law: What Lies ahead?

Within the on-going normative process that has been described in the previous section, a report dealing with "*civil liability, financial security and compensation claims for offshore oil and gas activities in the European Economic Area*" was published on behalf of the European Commission on 14 August 2014.[16]

[15] For a critical account of the Directive from the perspective of marine environmental protection, reference can be made to S. M. CARBONE, F. MUNARI, L. SCHIANO DI PEPE, *The Environmental Liability Directive and liability for damage to the marine environment*, in *Journal of International Maritime Law*, 2007, 341 ff.

[16] BIO by Deloitte, *Civil liability, financial security and compensation claims for offshore oil and gas activities in the European Economic Area, Final Report prepared for European Commission – DG*

The study, which is based on the analysis of the legislations of 20 "Target States" (18 EU Member States and two EEA Member States), is intended to assist the Commission in the preparation of the two reports provided for by Art. 39 of the Offshore Directive by assessing, for each and every State concerned, the effectiveness of existing liability regimes for bodily injury, property damage and economic loss (so-called "traditional damage"), the handling of compensation claims and the availability of financial security instruments for compensation of the above heads of damage from offshore oil and gas operations.

The conclusions reached by the report are quite discomforting. The point is made, in particular, that, should an accident such as the *Deepwater Horizon* disaster occur in European waters, there would be no liability, in most Target States, for many third-party claims for "traditional damage" as well as no regime, in the vast majority of Target States, to handle compensation payments.

The grounds on which such conclusions are based are of various nature, and include the non-recognition of liability for pure economic loss (*i.e.* loss which is independent from a bodily or otherwise physical damage) in a number of jurisdictions or, alternatively, the existence of general tort law criteria that may render difficult (and sometimes almost impossible) for the criteria themselves to be met in pure economic loss cases. In addition, the geographical scope of application of the laws of some Target States is sometimes doubtful, as it is not sure whether accidents occurring on the continental shelf or in the exclusive economic zone would be covered or not.

It is likely that the findings of the above-mentioned study will prompt the European Commission to propose a series of amendments to the Directive, with a view to fill the liability loophole that has been identified in the previous sections.

There is no room, in the context of the present paper, to discuss the features of a possible, future European liability offshore regime in any detail. It has to be noted, however, that in the past European legislators have been unable to agree on crucial issues such as the notion of recoverable damage, the standard of liability, the establishment of a compensation fund and other relevant aspects. This has been the case, for example, in the context of the proposed (and later abandoned) European-wide oil pollution liability regime to supplement the already mentioned 1992 International Convention on Civil Liability for Oil Pollution Damage and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. More recently, the project to insert civil liability provisions into the 2004 Liability Directive also failed, thus rendering the Liability Directive a "public law" instrument. Whilst one has to be that better results can be achieved in the field of offshore oil and gas activities, the diverging legal traditions and approaches of the various Member States may well turn out to be an insurmountable obstacle.

A few closing remarks have to be made in respect of possible developments at the international level. It is interesting to note, for example, that in a recent speech delivered in April 2015 at the Sea Asia 2015 conference, the outgoing Secretary-General of the International Maritime Organization (IMO) called for the offshore sector to establish some form of global governance similar to the one that exists in shipping.

According to available reports (the speech has not yet been made available on the website of the IMO), the Secretary-General pointed out that the level of regulation in the offshore industry remained relatively light compared to shipping and that it would

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Energy, 2014, available online at https://ec.europa.eu/energy/sites/ener/files/documents/201408_offshore_oil_and_gas_activities.pdf.

be, at the end of the day, for the relevant actors themselves to figure out about the appropriateness and desirability of a global governing body[17]

For the time being, as it has been explained in the previous paragraphs, in spite of recent efforts, including within the IMO, no global regime exists or is being negotiated with regard to oil and gas offshore activities either dealing with the preventive aspects thereof or with compensation and liability for damage arising therefrom.

Such a situation, which is perceived as being clearly unsatisfactory by an increasing number of observers, may change in the future especially thanks to the efforts carried out by prominent non-governmental organizations. The *Institut du Développement Durable et des Relations Internationales* (IDDRI)[18], based in Paris, has for example put the issue of offshore activities at the top of its agenda, which has led to a series of events and publications calling for a "*strengthening of the framework regulating offshore oil and gas activities*" that have significantly contributed to the debate.

With particular regard to the liability implications, the *Global Oceans Commission*,[19] in addition, has put forth a specific proposal (out of a total of eight) concerning offshore oil and gas and, in particular, the establishment of "*binding international safety standards and liability*", highlighting its support for "*the elaboration of an international convention regulating liability and compensation*" covering "*economic loss and ecological damages", providing for "strict liability of operators*", *including "provisions for a shared liability between licence holders and their subcontractors*", binding "*States to ensure that operators have adequate financial capacity to pay for possible compensation*" and setting "*a liability cap at a level that can ensure the recovery of costs associated with environmental remediation and compensation and losses born by public and private entities, as well as a compensation fund to address major disasters that are likely to exceed the liability cap*".

Last but not least, the *Comité Maritime International* (CMI)[20].has set up an International Working Group on "*offshore activities*" that, pursuant to the well-established CMI "method", has produced a questionnaire for national maritime associations (which has received eighteen replies so far) and two interim reports. Work is still going on and is likely to bring about significant results in terms of possible recommendations to the international community in the near future.

[17] See http://www.seatrade-global.com/news/americas/imo-urges-offshore-to-explore-possibility-of-global-governance.html.
[18] See www.iddri.org for recent developments.
[19] See www.globaloceancommission.org for recent developments.
[20] See www.comitemaritime.org for recent developments.

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