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THE BLACK SEA AT A LEGAL CROSSROADS: PERSPECTIVES FROM THE INTERNATIONAL LAW, EUROPEAN UNION LAW AND NATIONAL LAW

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Edited by / Sous la direction de

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Gabriela A. Oanta and Manuela Tăbăraș (eds./dirs.)

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SUMMARY

PART III: NATIONAL LEGAL ASPECTS

FOREWORD

Gabriela A. Oanta and Manuela Tăbăraș

The Black Sea is at the crossroads of Western and Eastern culture. Since ancient times, the peoples living around it have interacted with each other, often peacefully, but also in repeated episodes of war which have regrettably clouded the history of this region.

This is a semi-enclosed sea within the meaning of art. 122 of the United Nations Convention on the Law of the Sea (hereinafter, UNCLOS),[1] and also one of the most isolated seas on the planet. The Black Sea has six coastal States – Bulgaria, Georgia, Romania, the Russian Federation, Turkey, and Ukraine – and its basin includes other States, such as Armenia, Azerbaijan, Belarus, and the Republic of Moldova. We are undoubtedly facing one of the most emblematic seas in the history of the law of the sea, one which presents the most diverse international legal-maritime problems: delimitation of marine spaces, maritime security, violence at sea, protection of fisheries resources, overexploitation of fisheries resources, maritime transport, massive pollution of its waters through the chemical products present in the Danube, nuclear pollution, climate change, invasive species, anoxic environment below a depth of 180 metres, etc.

Added to this complex overview is the great relevance of the Black Sea *geopolitically* – as it connects Eastern Europe with Central Asia and the Caucasus -, *geoeconomically* – as it is considered a vital route for international trade in hydrocarbons, grains and fertilisers, and, more recently, for the energy sector -, and *geostrategically,* given the numerous frozen conflicts as well as the war between two of its coastal States.[2]

[1] United Nations Convention on the Law of the Sea (adopted and opened for signature 10 December 1982, entered into force 16 November 1994) 1833 *UNTS* 3. According to art. 122 UNCLOS, it is "a gulf, basin or sea surrounded by two or more States and connected with another sea or the ocean by a narrow outlet, or consisting wholly or mainly of the territorial seas and exclusive economic zones of two or more coastal States".

[2] On the geopolitical, geostrategic and geoeconomic considerations of the Black Sea, see, among others: COJOCARU, D., *Géopolitique de la Mer Noire*, Ed. L'Harmattan, Paris, 2007; HAMILTON, D. and MANGOTT, G. (eds.), *The Wider Black Sea Region in the 21st Century: Strategic, Economic and Energy Perspectives*, Center for Transatlantic Relations, The Johns Hopkins University/Austrian Institute for International Affairs, Washington DC/Vienna, 2008; KAKAC, K., MALERIUS, S. and MEISTER, S. (eds.), *Security Dynamics in the Black Sea Region: Geopolitical Shifts and Regional Orders*, Springer, Cham, 2024; MARCU, S., *The Black Sea. Geopolítica de una región encrucijada de caminos*, Ed. Universidad de Valladolid, Valladolid, 2007; TSANTOULIS, Y., *The Geopolitics of Region Building in the Black Sea: A Critical Examination*, Routledge, Abingdon/New York, 2021.

More recently, the Black Sea has become an obvious concern for the European Union (hereinafter, EU),[3] as not only two of its Member States border the Black Sea,[4] but others have also expressed their intention to join the EU,[5] and still others maintain special cooperative relations with this international organisation through the European Neighbourhood Policy.

Likewise, the situation in the Black Sea is a subject of concern and analysis by the coastal states and, as far as we are concerned in this book, by Romania. Each of the above-mentioned international maritime-legal areas is a field of interest for Romania, as it has demonstrated throughout its recent and not so recent history. Moreover, as a Member State of the EU, the North Atlantic Treaty Organisation (NATO) and other cooperation fora in the Black Sea region, as well as party to UNCLOS and other international treaties relevant to the Black Sea, Romania has emerged as one of the key actors in the challenging scenarios presented by the Black Sea.

Furthermore, the Port of Constanța's great potential should be considered; with an area of more than 3,900 hectares, it is the largest seaport in Romania and

[3] Of the EU documents on the Black Sea, see: COM (97) 597 final, *Communication from the European Commission "Regional Cooperation in the Black Sea Area: State of Play, Perspectives for EU Action to Encourage it*", Brussels, 14.11.1997; COM (2007) 160 final, *Communication from the Commission to the Council and the European Parliament "Black Sea Synergy – A New Regional Cooperation Initiative"*, Brussels, 11.04.2007; COM (2008) 391 final: *Communication from the Commission to the Council and the European Parliament "Report of the First Year of Implementation of the Black Sea Synergy"*, Brussels, 19.06.2008; European Parliament Resolution of 17 January 2008 on a Black Sea Regional Policy Approach, OJ C 41 E, 19.02.2009; COM (2010) 715: *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU Strategy for the Danube Region*, Brussels, 8.12.2010; SWD (2015) 6, *Joint Staff Working Document "Black Sea Synergy: Review of a Regional Cooperation Initiative"*, Brussels, 20.01.2015; JOIN (2018) 31 final, *Joint Communication to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank "Connecting Europe and Asia – Building blocks for an EU Strategy"*, Brussels, 19.09.2018; SWD (2019) 100 final, *Joint Staff Working Document "Black Sea Synergy: Review of a regional cooperation initiative – period 2015-2018"*, Brussels, 5.03.2019. For a detailed analysis of these issues, see: AYDIN, M., *Europe's next shore: The Black Sea region after EU enlargement*, European Union Institute for Security Studies, Occasional Paper no. 53, June 2004; CHATRÉ, B. and DELORY, S. (dirs.), *Conflicts and Security in the Black Sea: The European Union, the Rivers and Others*, Panthéon Assas, Paris, 2010; NITOIU, C., "The European Union Brings a Balance of Power in the Black Sea Region", *Romanian Journal of European Affairs*, vol. 9, no. 3, 2009, pp. 53-64; OANTA, G.A., "La Unión Europea ribereña de un nuevo mar: el Mar Negro" in CARDONA LLORENS, J.; PUEYO LOSA, J.; RODRÍGUEZ-VILLASANTE Y PRIETO, J.L.; SOBRINO HEREDIA, J.M. (dirs.); and AZNAR GÓMEZ, M. (coord.), *Estudios de Derecho Internacional y Derecho Europeo en Homenaje al Profesor Manuel Pérez González*, Tirant lo Blanch, Valencia, 2012, pp. 1705-1729; SAMAKHVALOV, V., *Russian-European relations in the Balkans and Black Sea region: Great power identity and the idea of Europe*, Palgrave Macmillan, Cham, 2017.

[4] Namely: Bulgaria and Romania.

[5] In reference to Georgia, Turkey, and Ukraine.

one of the largest in Europe. This port has a long, rich history due to its strategic position between Europe and Asia. Nowadays, it shows great maritime potential after the significant modernisation and digitalisation process it has undergone in the last two decades or so, subsequent to Romania's recent entry into the Schengen area. It is also worth mentioning that the Port of Constanța currently handles 100 million tonnes of goods per year and has the capacity to increase its activity in the coming years in fields such as the storage of cereals, oil, chemical products and containers of all types.[6]

It is therefore significant that the Association Internationale du Droit de la Mer (AssIDMer) and the Jean Monnet Chair "European Union Law of the Sea" (101047678 – SEALAW), co-financed by the EU at the University of A Coruña, have decided to organise an international conference at a Romanian university on the shores of the Black Sea—in this case, "Ovidius" University of Constanța—together with another young and dynamic Romanian university as is "Titu Maiorescu" University of Bucharest. Thus, on 27-28 June 2024 AssIDMer organised its 8th Ordinary Conference for the first time in Romania, which was held in Constanța under the title "The Black Sea at a Legal Crossroads: Perspectives from the International Law, European Union Law, and National Law". It was attended by professors from 16 universities from six different countries – France, Greece, Italy, Japan, Romania, and Spain – with English and French used as the working languages during the Conference sessions.

The scientific results of that academic event are reflected here in this book. They aim to reflect the complexity and topicality of many of the issues affecting the Black Sea, analysed from the perspective of the international law, the EU law, and national law, depending on the case. Thus, this book is structured in three main parts, each with five chapters and with different international, European and national legal approaches. Just before the first part of the book, Professor Tullio Scovazzi dedicates a few words to Ovid, whom he considers to be an unexpected forerunner of freedom of the sea.

Thus, the first part of the book puts forwards various questions concerning the international legal aspects related to the Black Sea. In this regard, the five chapters that make up this part address: the complex issue of the legal protection of biodiversity in the Danube Delta Biosphere Reserve (by Florica Brașoveanu, from "Ovidius" University of Constanța – Romania), to what extent the Black Sea has been present in the resolutions of the United Nations General Assembly so far (by Ana Badía Martí, from the University of Barcelona – Spain), the atten-

[6] See: "Documentar: 110 ani de la inaugurarea oficiala a Portului Constanta", 27/09/2019; available at: https://www.agerpres.ro/documentare/2019/09/27/documentar-110-ani-de-la-inaugurarea-oficiala-a-portului-constanta--375928, last accessed on 10 February 2025; "Portul Constanta"; available at: https://ro.wikipedia.org/wiki/Portul_Constanța, last accessed on 10 February 2025.

tion that this sea has received from the International Court of Justice (by Gabriela A. Oanta, from the University of A Coruña – Spain), the International Tribunal for the Law of the Sea (by Guillaume Le Floch, from the University of Rennes – France), and the arbitral tribunals constituted under Annex VII of UNCLOS (by Mariko Kawano, from Waseda University – Japan).

The second part of the book shifts the focus to the prominent role of the EU in relation to a number of issues that are of great interest to the Black Sea region. Five chapters address various issues, such as: the EU Maritime Security Strategy and its implications for the Black Sea (by José Manuel Sobrino Heredia, from the University of A Coruña – Spain), the environmental challenges that the Black Sea is currently facing (by Fiammetta Borgia, from Tor Vergata University of Rome – Italy), the marine protected areas in the regional seas with special emphasis on the Mediterranean and Black Seas (by Tullio Scovazzi, from the University of Milano-Bicocca – Italy), the presence of Black Sea in the case law of the European regional courts or tribunals (by Felicia Maxim, from "Titu Maiorescu" University of Bucharest – Romania), and the sustainable blue economy that the EU has been creating and developing specifically for the Black Sea (by Annina Cristina Burgin, from the University of Vigo – Spain).

The third part of the book examines various national legal aspects on the Black Sea, such as: the cooperation mechanisms in the Black Sea region that have been used by Romania so far (by Daniela Panc, from "Titu Maiorescu" University of Bucharest – Romania), considerations regarding the ships' seizure and forced execution under the civil and civil procedural law (by Manuela Tăbăraș, from "Titu Maiorescu" University of Bucharest – Romania), the special procedural rules applicable in criminal proceedings concerning maritime and river offences under the Romanian law (by Mihail Udroiu, from the University of Oradea – Romania), the legal framework of maritime transport contracts that apply to the Black Sea area (by Bogdan Cristian Trandafirescu, from "Ovidius" University of Constanța – Romania), and the characters of the arbitration clause in maritime transport contracts, which can be applied in this maritime area under the Romanian law (by Mădălina Dinu, from "Titu Maiorescu" University of Bucharest – Romania).

The publication of this book has been possible thanks to the collaboration of the AssIDMer with the "Salvador de Madariaga" University Institute of European Studies at the University of A Coruña and the Jean Monnet Chair "European Union Law of the Sea" (reference: 101047678 – SEALAW), co-financed by the EU and attached to this university institute, as well as the contribution of the Xunta de Galicia through the Project "Group with Growth Potential" (reference: ED431B 2023/05) and the research project "The Maritime Dimension of the European Green Deal" (reference: PID2020-117054RB-I00) funded by the Spanish Ministry of Science and Innovation and the State Research Agency (Spain).

We would like to end the presentation of the book *The Black Sea at a Legal Crossroads: Perspectives from the International Law, European Union Law, and National Law / La mer Noire à un carrefour juridique : Perspectives du droit international, du droit de l'Union européenne et du droit national* by expressing our gratitude to all those who have participated in this editorial project. Thus, our thanks are directed especially to the members of the Scientific Committee who, through their support for the event, also helped develop its international character (namely: Constantin Anechițoae, from "Ovidius" University of Constanța; Beatrice Berna, from "Titu Maiorescu" University of Bucharest; Nathalie Ros, from the University of Tours and Second Vice-president of AssIDMer; Marieta Safta, from "Titu Maiorescu" University of Bucharest; and Simone Vezzani, from the University of Perugia) and the members of the Organising Committee (Mădădălina Botină, Mariana Mitra-Niță, Anthony Murphy and Adrian Stoica from the "Ovidius" University of Constanța, and Felicia Maxim from "Titu Maiorescu" University of Bucharest). Moreover, we would like to thank the speakers who accepted the challenge of participating in the Conference, some of whom had to travel from quite far away and contribute to this volume. Finally, we would like to extend our thanks to: Adrian Stoica, Dean of the Faculty of Law and Administrative Sciences at "Ovidius" University of Constanța with whom we have had the privilege of co-organising this international Conference; Giuseppe Cataldi, full professor of international law at the University of Naples "L'Orientale" in his capacity as President of AssIDMer, for his receptiveness and support in organising this Conference in Romania, and the Board of this prestigious international association for having supported such an initiative. We equally thank José Manuel Sobrino Heredia, full professor of public international law at the University of A Coruña, for facilitating, once again, relations between European universities.

A Coruña and Bucharest, February 2025

OVID AS AN UNEXPECTED FORERUNNER OF FREEDOM OF THE SEA

*Tullio Scovazzi**

Many know that the Latin poet Ovid (Publius Ovidius Naso, 43 B.C. – 17 or 18 A.D.) spent the last eight years of his life on the shores of the Black Sea, precisely in Tomi, the present Rumanian city of Constanţa, where for a mysterious fault – *culpa* as he says[1] – he was deported by the Roman emperor Augustus. Today in the main square of Constanţa the bronze monument of Ovid can be found. The statue was sculptured by the Italian artist Ettore Ferrari and unveiled in 1887.[2]

Less known is that Ovid had the destiny of being recalled as a forerunner of the doctrine of freedom of the sea.

In the *De iure belli libri III*, published for the first time in Hanau in 1598, Alberico Gentili (1552-1608) takes a position for the doctrine of freedom of the sea:

"Nunc de mare. Hoc natura omnibus patet & communis eius usus omnibus est, ut aëris. Non igitur prohiberi a quoquam potest. Littora item a natura omnibus vacant: item ripae: item flumina, hoc est, aquae fluentes".[3]

To confirm the assumption, Gentili quotes a number of classical authors, as it was customary in legal works of his time. In addition to Vergil, Cicero, Seneca and Plautus, the first author recalled is Ovid, with three verses of the *Metamorphoses*:

> "Quid prohibetis aquis? usus communis aquarum est.
> Nec solem proprium natura, nec aëra fecit,
> nec tenues undas. In publica munera veni".[4]

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[1] "Perdiderint cum me duo crimina, carmen et error / alterius facti culpa silenda mihi" (Ovidius, *Tristia*, b. II, v. 207-208).

[2] The same Ferrari sculptured Ovid's bronze monument in the Italian city of Sulmona, where the poet was born ("Sulmo mihi patria est", Ovidius, *Tristia*, b. IV, v. 10). It was unveiled in 1925.

[3] Gentilis, *De iure belli libri III*, Hanoviae, 1612 (reprinted, with English translation by Rolfe and introduction by Phillipson, Oxford, 1933), b. I, chap. XIX, p. 146: "I shall now speak about the sea. This is by nature open to all men and its use is common to all, like that of the air. It cannot therefore be shut by any one. Its shores, too, are by nature accessible to all, as well as the banks of rivers, and rivers themselves, that is to say, running waters" (*ibidem*, p. 90).

[4] Ovidius, *Metamorphoseum*, b. 6, v. 349. "Why do you forbid the waters? Their use is common to all. Nature has not made the sun the property of any one, nor the air, nor running streams; I have come to make use of public property": translation quoted *supra* (note 3), p. 90.

A few years later, the above-mentioned verses were also recalled in the *Mare liberum* of Hugo Grotius (Huig van Groot; 1583 - 1645).[5] Here the platoon of forerunners is increased from five to eight: besides Ovid, Grotius recalls in support of freedom of the sea also Cicero, Horace, Seneca, Virgil, Plautus, Martial and Ennius.

It thus appears that Ovid, a poet involved in affairs very different from the legal ones, involuntarily gave a contribution to the doctrine of freedom of the sea. In the imagination of the Latin poet, the words on freedom of use of public goods are uttered by goddess Latona who, having arrived in Lycia, is prevented from drinking the water of a stream by the uncouth inhabitants of the place ("rusticis Lyciis, qui de fonte bibere eam, vetabant", as Gentili emphasizes). Accordingly, in the poetical context, the words "tenues undae" are to be referred to the sources of fresh water and not to the waves of the sea. However, due to the authority of Gentili and Grotius, also Ovid may be listed among those who pleaded for the juridical freedom of the sea, even though he never thought about that.[6] These are the events of life.

Yet, Ovid, rather than for having been smuggled by Gentili and Grotius as a forerunner of legal doctrines, got a much better satisfaction from Dante who included him in the elect group of the six masters of poetry, namely Virgil, Homer, Horace, Ovid, Lucanus and, of course, Dante himself.[7]

[5] Anonymous (the name of Grotius appeared for the first time in a Dutch translation published in 1614), *Mare liberum sive de jure, quod Batavis competit ad Indicana commercia, dissertatio*, Lugduni Batavorum, 1609.

[6] At the most, due to the above-mentioned verses of the *Metamorphoses*, today Ovid could be celebrated as a forerunner of the human right to water.

[7] "Sì ch'io fui sesto tra cotanto senno" (Dante, *Divina Commedia*, *Inferno*, IV, 102).

PART I: INTERNATIONAL LEGAL ASPECTS

LA PROTECTION JURIDIQUE DE LA BIODIVERSITÉ DANS LA RÉSERVE DE BIOSPHÈRE DU DELTA DU DANUBE

*Florica Braşoveanu**

1. Introduction

Le Delta du Danube constitue la deuxième plus grande zone humide d'Europe après les marais de la Volga, couvrant plus de 4 000 km², dont environ 82 % se situent sur le territoire roumain, le reste appartenant à l'Ukraine.[1] Le cours final du Danube, avant de se jeter dans la mer Noire, forme un écosystème unique à bien des égards : diversité de la faune et de la flore, présence d'espèces endémiques, importance stratégique pour la migration des oiseaux, etc.[2]

Le contexte historique de la Roumanie, marqué par la transition post-communiste, a influé sur la manière dont le pays a progressivement adopté et adapté les normes internationales et européennes en matière de protection de l'environnement.[3] Dès l'effondrement du régime, la communauté internationale a manifesté un vif intérêt pour l'avenir de ce territoire d'exception, comme en témoignent son inscription rapide sur la liste du Patrimoine mondial de l'UNESCO et la création de l'Administration de la Réserve de Biosphère (ARBDD).[4]

Cependant, l'attribution de statuts de protection, bien que symboliquement forte, ne suffit pas toujours à garantir une conservation effective, surtout lorsque les enjeux économiques et sociaux[5] interagissent avec les objectifs de préserva-

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[1] MITROI, V., « Le Delta du Danube, entre enjeux socio-économiques et préservation des ressources naturelles : exemple d'une "double transition" », *Pour*, n° 1, 2013, pp. 115-124.

[2] BIOSPHERE, D. D., RESERVE, D. B., SEA, B., « Accessory Publication. Patterns, determinants, and management of freshwater biodiversity in Europe », 2016, p. 188.

[3] BURSAN, I., MITROI-TISSEYRE, V., « La restauration écologique dans un 'No man's land'. Une histoire socio-écologique récente du polder Popina dans la Réserve de Biosphère du Delta du Danube, Romania », *Cinq Continents*, vol. 6, n° 14, 2016, pp. 235-267.

[4] UNESCO, https://whc.unesco.org/en/list/588/, dernier accès le 1 octobre 2024.

[5] Pêche, navigation, tourisme, extraction de roseaux, etc.

tion.[6] L'adhésion de la Roumanie à l'Union européenne a constitué un « accélérateur législatif », imposant une transposition rapide des directives environnementales. Toutefois, la réalité du terrain montre que des difficultés de mise en œuvre persistent, en raison d'un manque de moyens financiers et d'un déficit de coordination entre acteurs, aggravé par le caractère transfrontalier de l'écosystème.[7]

Cette étude se propose d'examiner le cadre juridique international, européen et national applicable au Delta du Danube, d'en évaluer la portée et les limites, et d'analyser les mécanismes institutionnels de gouvernance, notamment le rôle de l'ARBDD.[8] Le présent travail abordera également les perspectives offertes par la participation citoyenne et les projets de coopération transfrontalière, tout en soulignant l'urgence de concilier le développement socio-économique et la préservation des écosystèmes.

2. Reconnaissance internationale de l'importance écologique du Delta du Danube

Le Delta du Danube est reconnu comme Réserve de Biosphère par l'UNESCO depuis 1990 et inscrit sur la liste du Patrimoine mondial depuis 1991. Ces classements résultent d'une double reconnaissance : d'une part, la singularité et la valeur exceptionnelle de ce territoire pour l'humanité, et d'autre part, la nécessité de mettre en place des mesures de conservation à long terme dans le cadre du Programme sur l'Homme et la Biosphère (MAB).[9]

Au niveau conceptuel, le statut de Réserve de Biosphère illustre l'ambition de concilier la préservation des écosystèmes[10] et le développement local durable (à travers les zones tampons et les zones de transition).[11] Cela implique l'élaboration de plans de gestion intégrée, l'encadrement des activités humaines et le soutien à la recherche scientifique. Toutefois, malgré ces principes, l'UNESCO ne dispose pas d'un pouvoir de sanction en cas de non-respect des engagements souscrits par l'État.[12]

[6] DREYFUS, M., « Principe de précaution », *in* PISSALOUX, J-L. (éd.), *Dictionnaire Collectivités territoriales et Développement Durable*, Lavoisier, Cachan, 2017, pp. 390-393.

[7] GAMBARDELLA, S., « La procédure de non-respect des conventions environnementales : une procédure de contrôle sui generis? », *L'Observateur des Nations Unies*, n° 24, 2009, pp. 363-384.

[8] UNESCO, *Programme sur l'Homme et la Biosphère* (MAB), https://en.unesco.org/mab, dernier accès 1 octobre 2024.

[9] ARBDD, http://www.ddbra.ro, dernier accès 1 septembre 2024.

[10] Cones de protection intégrale.

[11] DREYFUS, *op. cit*., p. 392.

[12] Ramsar, https://www.ramsar.org/ , dernier accès 1 septembre 2024.

La Convention de Ramsar (1971), qui vise à assurer la conservation et l'utilisation rationnelle des zones humides, a inscrit le Delta du Danube sur sa liste en 1991.[13] Cette inscription impose à la Roumanie de préserver les caractéristiques écologiques de la zone, de contrôler les activités susceptibles d'affecter l'intégrité des écosystèmes et d'encourager une participation élargie aux efforts de conservation.

Toutefois, l'efficacité de cette convention dépend en grande partie de la coopération entre les États riverains. Dans le cas du Delta, la Roumanie et l'Ukraine sont encouragées à coordonner leurs politiques afin d'éviter des impacts transfrontaliers négatifs (pollution, barrages, aménagements hydrauliques).[14] Le développement controversé du Canal de Bystroe, par exemple, a mis en lumière la complexité des questions environnementales transfrontalières et l'insuffisance de mécanismes d'arbitrage coercitifs.

En novembre 1993, la Roumanie a créé l'Administration de la Réserve de Biosphère du Delta du Danube (ARBDD), dirigée par un gouverneur ayant rang de secrétaire d'État et placée sous l'autorité directe du ministère de l'Environnement.[15] Cette administration dispose de prérogatives bien plus larges que celles d'un simple parc national, puisqu'elle peut :

- délivrer des permis d'exploitation ;[16]
- établir des quotas et réglementations spécifiques ;
- surveiller l'application des mesures via une Garde écologique.[17]

En tant que Réserve de Biosphère, l'ARBDD est censée appliquer une approche de gestion intégrée, visant un équilibre entre la conservation stricte des zones à haute valeur écologique et l'utilisation durable des ressources naturelles.[18] Son champ d'action recouvre également la reconstruction écologique des zones anciennement poldérisées durant la période communiste, les activités d'éducation à l'environnement et la coordination de la recherche scientifique.

[13] RICHARD, V., « Learning by doing. Les procédures de non-respect de la Convention d'Espoo et de son Protocole de Kiev », *Revue juridique de l'environnement*, vol. 36, nº 3, 2011, pp. 327-344.

[14] URBINATI, S., « La contribution des mécanismes de contrôle et de suivi au développement du droit international: le cas du Projet du Canal de Bystroe dans le cadre de la Convention d'Espoo », *in* BOSCHIERO, N. et al. (eds.), *International Courts and the Development of International Law*, Asser Press, The Hague, 2013, pp. 409-429.

[15] ARBDD, *Rapport annuel*, Tulcea, 2022, pp. 15-18.

[16] Pêche, roseau, etc.

[17] MITROI, *op. cit*., p. 118.

[18] Commission européenne, https://ec.europa.eu/neighbourhood-enlargement, dernier accès 1 septembre 2024.

3. Politiques publiques, entre obligations et opportunités de développement

La Roumanie a entamé son processus d'adhésion à l'Union européenne dans les années 1990, formalisant sa demande en 1995 et concrétisant son entrée le 1er janvier 2007. L'environnement constituait un chapitre essentiel, l'UE disposant de compétences partagées et d'un arsenal législatif étendu, notamment en matière de protection de la nature.

La transposition de l'acquis communautaire oblige la Roumanie à adapter sa législation nationale aux directives, règlements et décisions pris au niveau européen. La Commission européenne, en sa qualité de « gardienne des traités », peut engager une procédure en manquement devant la Cour de justice de l'Union européenne (CJUE) si les obligations ne sont pas respectées. Dans ce contexte, les directives « Oiseaux » et « Habitats » jouent un rôle fondamental dans la préservation de la biodiversité du Delta du Danube.[19]

La directive « Oiseaux » (la directive 2009/147/CE, refonte de la directive 79/409/CEE) vise la conservation de toutes les espèces d'oiseaux sauvages présentes dans l'UE, en mettant l'accent sur les zones de nidification et de migration. Les États membres doivent désigner des Zones de Protection Spéciale (ZPS) destinées aux espèces les plus vulnérables. Le Delta du Danube accueille plus de 300 espèces d'oiseaux, parmi lesquelles figurent des espèces menacées, comme le pélican frisé, rendant le classement en ZPS incontournable.

La directive « Habitats » (92/43/CEE) instaure la création de Zones Spéciales de Conservation (ZSC) afin de protéger les habitats naturels ainsi que la faune et la flore d'intérêt communautaire. Les ZSC, associées aux ZPS, constituent le réseau Natura 2000, conçu pour former un maillage cohérent à l'échelle de l'UE. En Roumanie, leur transposition a été effectuée par l'Ordonnance n° 1964/2007, souvent critiquée pour la rapidité de son adoption et le manque de concertation préalable.

Dans la pratique, l'intégration complète du Delta dans le réseau Natura 2000 impose des obligations strictes de conservation, notamment l'évaluation des incidences pour tout projet susceptible de nuire aux habitats ou aux espèces protégées. Cette contrainte peut ralentir certains projets d'aménagement, mais elle garantit une meilleure prise en compte des enjeux écologiques.

La Convention sur la Diversité Biologique (CDB) adoptée à Rio en 1992, ratifiée par l'Union européenne et la Roumanie, établit un cadre général pour la préservation et l'utilisation durable des ressources vivantes.[20] Elle consacre

[19] Directive 2009/147/CE (refonte de la directive 79/409/CEE), JO L 20 du 26.1.2010, p. 7.

[20] CAROZZA, L., MICU, C., « Le bas Danube et son delta durant les huit derniers millénaires », *in* CAROZZA, L., MICU, C., CAROZZA, J-M. (eds.), *Au-delà de la nature : le bas Danube et son delta durant les huit derniers millénaires*, Ed. Mega, Cluj-Napoca 2022, pp. 17-24.

notamment le principe de « conservation in situ » pour les zones de grande importance écologique et introduit la notion de partage des bénéfices liés à l'exploitation de la biodiversité.

Au niveau européen, la Stratégie pour la biodiversité à l'horizon 2030 vise à restaurer les écosystèmes dégradés et à enrayer la perte de biodiversité.[21] Le Delta du Danube, en tant que zone humide d'importance mondiale, figure parmi les régions prioritaires pour la mise en œuvre concrète de ces objectifs. Les mesures prévues incluent la restauration des zones humides, le renforcement des obligations de conservation et l'amélioration de la connectivité écologique.

La politique de cohésion de l'UE repose sur des fonds structurels[22] destinés à réduire les inégalités régionales et à favoriser un développement équilibré. Dans la région du Delta, ces fonds peuvent soutenir :

- des projets de restauration écologique ;[23]
- des infrastructures locales respectueuses de l'environnement (notamment en matière d'assainissement et de gestion des déchets) ;
- le développement de l'écotourisme, une alternative durable au tourisme de masse, qui pourrait dégrader l'écosystème.

Cependant, l'accès à ces financements nécessite des capacités administratives et une concertation locale solides, sans lesquelles les projets risquent de ne pas atteindre leurs objectifs ou de générer des conflits d'usage.

4. Enjeux de gouvernance: l'administration de la réserve de biosphère et la participation locale

L'ARBDD, créée par la loi de 1993, se distingue par :

- son rang institutionnel : le gouverneur est assimilé à un secrétaire d'État ;
- ses attributions multiples : délivrer des permis d'exploitation, assurer le contrôle écologique, imposer des quotas de pêche, etc. ;
- son rôle de coordination avec les autorités locales, nationales et internationales, les ONG et les acteurs privés.

Au niveau opérationnel, l'ARBDD élabore des plans de gestion pour les différentes zones du Delta, en veillant à leur articulation avec les exigences de Natura 2000 et les orientations de l'UNESCO. L'autorité de l'ARBDD est essentielle pour harmoniser les usages[24] avec les objectifs de protection.

[21] Commission européenne, « Stratégie de l'UE en faveur de la biodiversité à l'horizon 2030 », https://ec.europa.eu/environment/strategy_biodiversity_2030, dernier accès 1 septembre 2024.

[22] FEDER, Fonds de Cohésion, etc.

[23] Remise en eau de polder, régénération des roselières.

[24] Pêche, navigation, coupe des roseaux, tourisme.

Néanmoins, cette institution fait parfois face à des contraintes budgétaires et à des dilemmes politiques lorsque des projets d'envergure[25] sont soutenus par d'autres ministères ou collectivités.

Le Delta compte des villages à l'habitat traditionnel dispersé, dont les habitants dépendent historiquement de la pêche et d'autres ressources naturelles.[26] L'introduction de restrictions, comme l'arrêt de la pêche dans certaines zones ou la limitation de la chasse, peut être perçue comme une atteinte aux droits ancestraux. La Convention d'Aarhus (1998), ratifiée par la Roumanie, promeut la participation du public à l'élaboration des décisions environnementales.

En pratique, la participation locale reste inégale. Les ONG œuvrent pour renforcer la sensibilisation et l'éducation à l'environnement, tandis que l'ARBDD cherche à développer une gouvernance participative.[27] Toutefois, cette démarche est freinée par le manque de tradition participative en Roumanie, hérité de la période communiste, et par l'absence d'un réseau associatif suffisamment solide dans certaines localités.[28]

5. Bilan et perspectives pour un développement durable

Malgré une couverture juridique renforcée, le Delta du Danube demeure vulnérable face aux pressions anthropiques :

- pollution chimique en provenance de l'amont du Danube ;[29]
- surpêche et braconnage portant atteinte aux stocks de poissons et aux espèces menacées ;
- projet d'aménagement hydraulique (canaux, poldérisation, etc.) affectant le régime hydrologique et la dynamique sédimentaire.

L'inscription du Delta sur des listes prestigieuses (Ramsar, Patrimoine mondial) et sa soumission aux directives européennes ne garantissent pas, à elles seules, la résorption de ces menaces, surtout lorsqu'il existe des intérêts économiques forts ou une faible culture écologique.

Le réseau Natura 2000 apporte un cadre normatif stricte à travers l'article 6 de la Directive « Habitats », qui impose une évaluation d'incidence sur l'intégrité des sites pour tout projet susceptible de modifier substantiellement l'habitat. Cette obligation a

[25] Infrastructures ou industrialisation.

[26] BRAȘOVEANU, F., « Environmental Protection and Sustainable Development Strategy », *Ovidius University Annals*, *Economic Sciences Series*, vol. XIII, nº 2, 2013, pp. 87-90.

[27] CĂZĂNEL, M., « Suspending the Performance of Obligations by Invoking Contract Non-Performance to The 5th International Multidiscilpinary Scientific Conference on Social sciences and Arts SGEM 2018 », held in Vienna, Austria on March 19-21, 2018, *Modern Science*, nº 1.1, 2018.

[28] BURSAN, MITROI-TISSEYRE, *op. cit*., p. 250.

[29] Engrais, pesticides, déchets industriels.

permis de renforcer le principe de précaution : en cas de doute, l'administration doit solliciter des études approfondies et, si nécessaire, refuser ou modifier le projet.

Cependant, certains retards et lacunes dans la désignation des sites ou l'élaboration des plans de gestion Natura 2000 demeurent, en raison notamment de la complexité administrative et du manque d'expertise technique. Les autorités locales peuvent percevoir les contraintes environnementales comme un frein au développement, conduisant à des tensions politico-économiques.

En raison de la dimension transfrontalière du Delta, la coopération avec l'Ukraine est essentielle pour une préservation globale. Les conventions internationales (Espoo, Aarhus, Ramsar) encouragent le dialogue et la prévention de dommages transfrontaliers. Toutefois, la situation géopolitique dans la région[30] complique parfois la mise en place de projets communs, malgré l'existence de mécanismes bilatéraux.[31]

L'exemple du Canal de Bystroe montre que les intérêts économiques (accès maritime pour l'Ukraine) peuvent prévaloir sur les considérations écologiques, malgré des avertissements répétés des ONG et des instances internationales. Les instances internationales peuvent jouer un rôle de médiation ou d'alerte, mais leurs décisions ne sont pas toujours dotées d'effets contraignants.

Le développement durable du Delta suppose :

- une gestion intégrée des ressources, avec des plans de gestion adaptés ;
- une participation citoyenne réelle, selon les principes de la Convention d'Aarhus ;
- une intégration des populations locales dans des activités économiques durables.[32]

La politique de cohésion de l'UE et les financements internationaux[33] offrent des opportunités de financement pour des initiatives éco-innovantes.[34] L'enjeu est de susciter la volonté politique et la capacité de gouvernance nécessaires pour transformer ces opportunités en résultats concrets.[35]

6. Conclusion

Le Delta du Danube illustre la complexité d'une gouvernance multi-niveau, où se rencontrent les obligations internationales (UNESCO, Ramsar, CDB), le

[30] Tensions ponctuelles, priorités politiques divergentes.
[31] MITROI, *op. cit*., p. 120.
[32] Tourisme vert, pêche artisanale contrôlée, valorisation des produits locaux.
[33] Projets LIFE, programmes INTERREG.
[34] CAROZZA et al., *op. cit*., p. 20.
[35] RICHARD, *op. cit*., p. 340.

droit de l'Union européenne (directives « Oiseaux » et « Habitats ») et la législation nationale (loi portant sur la création de l'ARBDD, Ordonnance n° 1964/2007). La création d'une Administration de la Réserve de Biosphère, dotée de compétences élargies, atteste la volonté de l'État roumain de préserver ce patrimoine unique, tout en reconnaissant la nécessité de maintenir certaines activités économiques traditionnelles.

La protection juridique de la biodiversité dans la Réserve de biosphère du Delta du Danube nécessite une coopération internationale et locale entre la Roumanie et l'Ukraine, l'UE, les ONG et les communautés locales.

La sensibilisation et l'éducation environnementale sont essentielles pour garantir un engagement continu en faveur du développement durable du Delta.

L'engagement politique et la participation citoyenne sont primordiaux pour surmonter les défis environnementaux et assurer la préservation de ce territoire unique pour les générations futures.

L'année 2010 marque un tournant dans la prise en considération des enjeux environnementaux par la communauté internationale. Les Nations Unies lui ont dédié la défense de la biodiversité, et des actions ont été menées partout sur la planète.

Cependant, la mise en œuvre de ce dispositif juridique et institutionnel se heurte à plusieurs contraintes :

1. les intérêts économiques (transport fluvial, pêche, tourisme) susceptibles de menacer l'équilibre écologique ;
2. la coopération transfrontalière avec l'Ukraine, dont la réussite dépend de la conjoncture politique et géopolitique ;
3. la participation locale encore insuffisante, malgré les principes consacrés par la Convention d'Aarhus ;
4. la multiplicité d'acteurs (Commission européenne, ministères nationaux, collectivités locales, ONG), exigeant une coordination accrue et une clarification des responsabilités.

Au-delà de ces difficultés, le Delta du Danube peut servir de laboratoire pour expérimenter et démontrer la faisabilité d'une gestion intégrée, où la préservation de la biodiversité est compatible avec le développement socio-économique. Les financements européens, associés à une gouvernance participative, pourraient encourager des projets novateurs (écotourisme, restauration écologique, recherche scientifique appliquée). Il appartient désormais aux décideurs publics, aux acteurs locaux et à la société civile de traduire le potentiel législatif et institutionnel en actions concrètes, afin que ce « joyau humide » reste un patrimoine vivant pour les générations futures.

THE BLACK SEA IN UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS

Ana M. Badia Martí *

1. Introduction

The Black Sea is an enclave where the culture and history of Eastern Europe and the Near East meet. History shows that trade plays a decisive role in this area; the importance of the land, sea and river trade routes that cross this geographical area of the Black Sea means that these are the driving force behind the establishment of secure alliances to successfully carry out the economic activity that derives from them. The need and concern to establish secure corridors is growing due to the strategic component of oil and gas trade.

The specificity of this field deserves a focused study in order to know its peculiarity and how it influences its close geographical environment – the geographical boundaries between Europe and Asia – and also at a general, global level. To this end, the goal of this study is to approach the Black Sea from the hand of the United Nations General Assembly (UNGA). The starting point has been to look for UNGA resolutions that contain at least one reference to the Black Sea. In this search, 36 resolutions were found,[1] according to their title, which tend to respond, with details, to the items on the agenda of the General Assembly (GA) on which it must pronounce itself. Their reading and perception from the perspective of the international legal system has led me to identify two systematisation criteria: 1. UNGA Resolutions related to the purposes and competencies of the Organisation. 2. UNGA Resolutions aimed at cooperation and coordination between International Organisations, namely the United Nations (UN) and the

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All the websites were last accessed on 19 December 2024.

[1] Adopted between 1996 and 2023. References to extraordinary emergency periods are excluded. Session 11 corresponds to the situation in Ukraine, convened in February 2022.

Organization of the Black Sea Economic Cooperation (BSEC). In this regard, it should be pointed out from the outset that the central point of the issue at hand revolves around the BSEC, which is the subject of the largest number of UNGA resolutions and its construction and activity is a true reflection of what is happening in the Black Sea environment.

For a proper understanding of the object of study, it is appropriate to devote some space to the general framework of the specificity of the Black Sea geographical area. The complexity of the political, cultural, economic, geographical and historical manifestations cannot be masked in a formal study from the perspective of the law of international organisations.

The proposed systematisation is based on the identification by the UNGA of a recurrent element that is the "diversity" or "variability" of "situations" or "relations" that involve the interest in the Black Sea, from the Universalist perspective provided by the UNGA.

From my point of view, the recurrent element in the set of selected resolutions is manifested in relation to four areas: geography, culture, the economic organisation of states and the modalities of cooperation between the states of the area.

A first consideration, in the sense indicated, is that the term Black Sea encompasses different geographical references: Eastern Europe, Southeast Europe,[2] the Balkans, the Caucasus, Central Asia, each one used in relation to the problems at hand. Thus, for example, in the UNGA resolutions aimed at finding stability in the environment affected by the break-up of the Federal Republic of Yugoslavia, the reference is to the Balkans.

In the geographical sense itself is clear that the reference Black Sea is used in a narrow or broad sense, in this case using the expression Black Sea basin. The reference to the littoral states Bulgaria, Romania, Ukraine, Russia, Georgia and Turkey, joined by Greece, Armenia, Azerbaijan and Moldova forming the geographical area of the Black Sea in a narrow sense, and broadened by the consideration of the Black Sea basin, of which 21 states are part, should be taken into account.[3]

The first consideration to retain is that the term Black Sea is a variable geographical reference in terms of the political division of the states. The context in

[2] UNESCO includes Albania, Bosnia-Herzegovina, North Macedonia, Montenegro, and Serbia. See: UNESCO, "Science report: The race against time for smart development, chapter 10, Southeast Europe". The same group of states is called the Western Balkans by the EU in connection with the accession process of the countries resulting from the break-up of the Federal Republic of Yugoslavia to the European Union.

[3] Albania, Austria, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, Czech Republic, Germany, Georgia, Hungary, Macedonia, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, Turkey, and Ukraine.

which the referent Black Sea is expressed is necessary in order to understand the scope of the issue being addressed by the UNGA.

The cultural diversity of the Black Sea area is another remarkable element for the UNGA. Different cultures coexist in the area, which in itself is a cultural manifestation. The term cultural diversity is manifested through religion, customs and languages that endure over time and regardless of political systems. Predictably, the UNGA takes this cultural identity into account, a good example being that it recognises 21 March as the international day of Novruz,[4] the name given to the "...day of the vernal equinox, the beginning of the new year, which has been celebrated in Central Asia, the Balkans, the Caucasus, the Black Sea basin, the Middle East and other regions for more than 3,000 years".[5] The UNGA adopts this decision in the context of UNESCO's recognition of Novruz as Intangible Heritage of Humanity and other declarations aimed at protecting cultural diversity; Novruz is also linked to the Dialogue among Civilisations.

A third manifestation of "diversity" is to be found in the economic organisation of the states in the region. Apart from the usual economic indicators, two very significant conditions are evident and have a clear impact on the weaving of alliances: 1. the distinction between members and non-members of the European Union,[6] to which that of being a candidate for membership of the Union is added, and 2. that of qualifying as economies in transition, that is, moving from a planned economy system to a market economy system.

The previous paragraph leads us to the last identifying element of the area: the significant number of cooperation initiatives between the countries of the Black Sea area and surrounding or linked states, either by geographical context or by links of common interest, in which the economy plays an important role. I select four instances of practice from a set of cooperation initiatives that range from mere ad hoc agreements under the umbrella of political declarations, to genuine institutionalised structures such as regional organisations with competences to achieve their objectives.

The four cooperation modalities chosen are of different nature and content, but all of them are relevant to show the geographical uniqueness of the Black Sea environment, and the diversity of models that fit within the scope of institutionalised international cooperation.[7]

The first modality is a reference framework established in 1999, under the name of the Stability Pact for South-Eastern Europe and at the initiative of the

[4] A/RES/64/253 of 23 February 2010 "International Day of Novruz", adopted without a vote.

[5] *Ibidem*.

[6] It already affects the hard core of Black Sea coastal states. Bulgaria and Romania are Members.

[7] The numerical order of the four selected models does not imply a ranking order.

EU. Its objective is to promote peace and stability and economic development in the Western Balkans. The Pact leads to the process of accession of the states resulting from the break-up of the Federal Republic of Yugoslavia to the EU. This process of cooperation in South-Eastern Europe continues today under the name of the Western Balkans.[8]

The second modality is to resort to the establishment of a subsidiary body of a universal OI. In our example it's the FAO, whose constitutive treaty[9] provides for the establishment of regional conferences, in this case the Regional Conference for Europe.[10] This is a way of organising universal cooperation, taking into account the particularities of the geographical area.[11]

The third example of a selected modality is the Danube Commission, composed of 15 Members.[12] Its objective is the preservation of the Danube with a management based on two criteria or principles, sustainability and equity, and within the framework of the Convention for the Protection of the Danube, signed in Sofia (Bulgaria) in 1994 and in force since 1998.[13] This Convention can be described as a framework agreement, because it establishes management principles for a geographical area, monitoring bodies that frame the normative development and the application of the mandatory decisions adopted within the Danube Commission.

However, the envisaged organisation chart goes further and incorporates an annual rotating chairmanship among the 15 parties to the convention, a permanent secretariat based at the UN Office in Vienna, a conference of the parties convened by the Danube Commission[14] and working groups. The latter includes experts, representatives of the states and so-called "observers", which are organisations that have an interest in the Danube from different perspectives.[15]

Finally, it should be noted that the impact of the International Commission for the Preservation of the Danube takes into account the scope of application of the Convention. The application of this Convention includes the States crossed by the Danube River, the sub-basins of its tributaries,[16] the Danube Del-

[8] https://www.europarl.europa.eu/factsheets/es/sheet/168/zahodni-balkan%C5%BE.

[9] Art, VI.5 of the founding treaty: https://www.fao.org/4/K8024s/K8024s.pdf#page=11

[10] See: https://www.fao.org/about/meetings/regional-conferences/erc34/documents/es/

[11] The conference has 57 members, including the European Union. To find out what issues it deals with, how it adopts agreements, and the documentation on which it is based, it is useful to refer to the report of its sessions (see, for example, FAO, "2024 Report of the 34th Session of the Regional Conference for Europe", Rome (Italy) FAO Doc. ERC/24/REP).

[12] Austria, Bosnia and Herzegovina, Czech Republic, Germany, Bulgaria, Croatia, Hungary, Moldova, Montenegro, Romania, Slovenia, Slovakia, Serbia, Ukraine, and the European Union.

[13] Published in:https://www.icpdr.org/about-icpdr/framework/convention

[14] Art. 22 of the agreement.

[15] 24 organizations currently have this status.

[16] Four in total, namely: Drara, Sava, Tizza, and Prunt.

ta and the Black Sea, which receives water from the entire basin and conditions life in this sea.[17]

These elements suggest that describing the Danube Convention as a framework convention and, in this case, the Danube Commission as a body for the implementation of the Danube Convention is limiting. I have doubts as to whether what is really intended is a framework convention or whether it is to establish a management process for this area, the Danube basin, as is the case with the International Seabed Authority through an international organisation responsible for the management and protection of the seabed.

The fourth and last cooperation modality selected is to resort to the establishment of a regional organisation – subject to international law – particularly exemplary for our sea: the Black Sea Economic Cooperation Organisation, mentioned at the beginning of this paper.

I have identified four areas – geographic, cultural, economic models and typologies of state relations – all of which reflect and exemplify the criterion of "diversity", which underpins the 36 resolutions identified and which will be studied.

In order to establish the criteria for systematising the resolutions, firstly, the UNGA agenda to which the resolutions are assigned has been used. In this sense, two thematic areas were identified; the first related to the purposes and competences of the UN, in which two areas are included: 1. security and economic cooperation; 2. codification and progressive development of the law of the sea. The second, in relation to the relationship between IOs, shows that the largest number of selected resolutions, eleven in total, refer to relations between the UN and the BSEC and that all of them, without exception, have been adopted by consensus. In this second thematic area, BSEC plays a very relevant role; the UNGA has unwaveringly supported its institutionalisation process and its activities to contribute to establishing an area of peace, stability and economic prosperity, a key issue in a traditionally troubled area. Cooperation and coordination relations between the UN and BSEC are organised around the following: 1. institutional framework; and 2. content.

The process followed for the identification of the systematisation criteria facilitates that the UNGA issues and pronouncements in relation to the Black Sea are of interest to the international community as a whole. This assertion is derived from three characteristics of the body – UNGA - : a. Universal membership (all States are called to take part and other forms of participation are foreseen, such as observer status and permanent observer status); b. the negotiation mechanism to include and discuss the agenda items (multilateralism); and c. the voting system of the body to reach majorities (one vote for each Member State of the Organisation).

[17] https://www.icpdr.org/

The ordering, systematisation and analysis of the 36 resolutions identified around the Black Sea are a case study of how the contributions coming from universalist actions interrelate with those coming from regionalist actions; relations that operate in both directions: universalism influences regionalism and the latter influences the universal dimension. Moreover, this relational framework is through the institutionalised cooperation provided by IOs.

The development of this work is aimed at sustaining that: *the Black Sea in the resolutions of the United Nations General Assembly* is a case study on the relations between universal and regional international organisations, which is reflected in the Final Considerations.

2. United Nations general assembly resolutions related to the purposes and competencies of the organisation

The systematisation of UNGA resolutions, related to the purposes and competences of the Organisation, is done around two thematic areas: 1. security and economic cooperation, and 2. codification and progressive development of the law of the sea.

The first statement responds to the serious situation that occurred in Europe in the last decade of the last century in the territory of the Federal Republic of Yugoslavia and which continues in this century in Ukraine until reaching the war of aggression in February 2022. These historical events all fall within the scope of the organisation's competences relating to the maintenance of international peace and security, and it is the Security Council that bears the main responsibility. This is why the term "security and economic cooperation" is used, terms that in my opinion better reflect the UNGA's contribution in the sense that it contributes to the definition of concepts, the qualification of factual assumptions and the support of measures carried out by other IO.

The second statement refers to the competences attributed to the UNGA, in Article 13.1-a of the UN Charter, in matters of codification and progressive development of international law. This competence is attributed to the UN, but not exclusively, to which the FAO and the IMO contribute within their spheres of competence: fisheries and maritime traffic.

The specific aspects that can be framed under each of the statements are identified below.

2.1. Security and Economic Cooperation

The specificity of the Black Sea in relation to security and economic cooperation lies in three events provided by recent European history: the dismemberment

of Yugoslavia, specifically the last stage between 1999 and 2001, the declaration of independence of Crimea in 2005 and finally Russia's war of aggression in Ukraine that started in February 2022. This section is aimed at identifying what the UNGA's contributions have been in relation to the three events indicated, with the limitation of the reference to the Black Sea, which undoubtedly provides a particular vision of them.

The dismemberment of the Socialist Republic of Yugoslavia, in its last phase between 1999 and 2001, is reflected in the UNGA by supporting the stability of Southeast Europe[18] which the European Union (EU) is concerned with.[19] The concrete situation is reflected in the UNGA agenda under three headings: stability and development in South Eastern Europe, assistance to Eastern European states and good neighbourliness. This approach allows all resolutions to be adopted without a vote,[20] and includes support for the UNSC resolutions on Macedonia and Kosovo.[21]

In relation to the Autonomous Republic of Crimea, the second relevant development in the area, the UNGA begins by reaffirming the unity of Ukraine, and therefore the non-recognition of the independence of Crimea, and continues with the militarisation of this Republic, including the Black Sea and the Sea of Azov, due to the repercussions this has for maritime traffic, especially the danger it poses for the transport of goods and the obstacles to navigation.

The text, which brings all the elements together, is adopted in 2019. The resolution[22] reports on Ukraine's request for interim measures to the International Court for the Law of the Sea in relation to Russia's use of force against three military vessels and their crew. Such a dispute contributes to increasing tension[23] of a military nature.

Also, in relation to maritime traffic, the construction of the Kerch Strait bridge between the Russian Federation and occupied Crimea is condemned, as it restricts the size of ships that can reach Ukrainian ports, and the militarisa-

[18] Remember the variations in area designations.

[19] In 1999, the Union launched the Stabilization and Association Process, a framework for relations between the Union and the countries of the region, as well as the Stability Pact, which is a broader initiative. In this context, the process of integration of the states resulting from the break-up of the Republic of Yugoslavia into the European Union has been managed.

[20] Two resolutions were adopted at each session from 1999 onwards. One on "Maintenance of international security - good neighborliness, stability and development in South-Eastern Europe" and the other on "Economic assistance to the Eastern European States affected by the events in the Balkans" (see A/RES/55/27 and A/RES/55/170). (see A/RES/55/27 and A/RES/55/170).

[21] Five resolutions were adopted between 1999 and 2001.

[22] See: A/RES/74/17, "Problems of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine), as well as parts of the Black Sea and the Sea of Azov" of 9 December 2019.

[23] *Ibidem*, paras 8-13.

tion of the Black Sea waters. It notes *"... harassment by the Russian Federation of commercial vessels and the restriction of international shipping in this area, which further aggravates the economic and social situation in the entire Donetsk region"*.[24]

With the outbreak of the war of aggression, there is growing concern about maritime traffic causing constraints to food security and nutrition, on which measures have been taken to ensure safe transport from Ukrainian ports, at the initiative of the Secretary General.[25]

For the time being, in November 2024, the war between Ukraine and Russia, the UNGA qualifies it as a war of aggression and adopts resolutions with the title: *the human rights situation in the temporarily occupied territories of Ukraine, including the Autonomous Republic of Crimea and the city of Sevastopol*.[26] This resolution focuses its efforts on two lines, 1. to gather and expose all that the bodies involved in the field of human rights and the maintenance of peace and security are doing, trying to exercise their competences, and 2. to recall the existence of international law, international human rights law and international humanitarian law.

In this framework of dealing with the effects of the "Black Sea", the following points are of interest. Firstly, the need to keep Ukraine's ports operational, so as not to hinder trade and the supply of goods. Secondly, the implementation of the 1954 Convention on the Protection of Cultural Property, one of the burning issues in the whole armed conflict, which has its specific reality here as the Black Sea is a concentration of cultural diversity. Thirdly, ethnic, linguistic and religious diversity, applicable in terms of international human rights law. This situation makes the Black Sea area (in a broad and strict sense) a highly vulnerable situation.

The UNGA resolutions reflect the polarisation of views against Russia's behaviour in that none of these resolutions have been adopted by consensus, always with a recorded vote.

The specific contributions in this delimitation of the space imposed by the object of study corroborate that we are dealing with a joint interpretation of peace, security, economic and social stability and human rights. My position is that this is the form of interpretation facilitated by the organs of the organisation.

[24] *Ibidem*, para 13.

[25] An MOU´s was concluded between the Secretary General and the Russian Federation to ensure the transport of cereals and food products (see A/RES/77/186 "Agricultural Development, Food Security and Nutrition" of 14 December 2022).

[26] A/RES/78/221 of 19 December 2023.

2.2. Codification and Progressive Development of the Law of the Sea

The UNGA's competencies include the codification and progressive development of international law, and specifically the law of the sea. This activity has been the responsibility of the organisation since its creation, and in which the capacity shown to find the necessary consensus to establish legal norms opposable to the international community as a whole, capable of incorporating the changes taking place in the field of the law of the sea, stands out.[27] In this process, the role of the UN Secretariat through the Division for Ocean Affairs and the Law of the Sea, which is part of the Division of Legal Affairs, is particularly relevant.[28]

It is not the International Law Commission, the main subsidiary body of the UNGA in the task of codification and progressive development of international law, which deals with the law of the sea, although it had done so prior to the convening of the Third United Nations Conference on the Law of the Sea.[29] This conference led, after a long period of negotiation, to the adoption in 1982 of the United Nations Convention on the Law of the Sea (UNCLOS), which establishes the international legal regime of marine spaces and is the framework for its normative development.

In this context, a resolution on "oceans and the law of the sea" is adopted every year, which shows the evolution of all the issues arising from the application of the international regime on marine spaces, to these resolutions are added specific activities on issues of particular concern and that at the present time are totally conditioned by the issue of sustainability that is embodied in the 2030 Agenda on sustainable development, in particular in SDG 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development. The incorporation of the notion of sustainable development into the law of the sea dates back to 2012, with the Rio conference of that year, and is assumed by the UNGA, through the resolution, "The Future We Want".[30]

In our efforts to identify the Black Sea, five resolutions have been found: three on sustainable fisheries and two on "oceans and the law of the sea". I present two clarifications on these resolutions.

[27] SOBRINO HEREDIA, J.M., "La participación de las Naciones Unidas en el desarrollo del derecho del mar", in QUINTERO, A. (coord.) and PONS RAFOLS, X. (dir.), *Las Naciones Unidas desde España: 70 aniversario de las Naciones Unidas, 60 aniversario del ingreso de España en las Naciones Unidas*, Ed. Asociación de Naciones Unidas de España, 2015, pp. 449-464.

[28] https://www.un.org/ola/en/content/div-doalos

[29] The UN Seabed Committee will be responsible for the preparation of the 3rd UN Conference.

[30] A/RES/66/288 of 27 April 2012.

On the one hand, it is sustainable fisheries through efforts to implement the UNCLOS, together with the fisheries-related provisions under the FAO,[31] that the UNGA supports the specificity of the Black Sea through the: Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area.[32]

On the other hand, some of these resolutions are not adopted by consensus,[33] due to the particularity that Turkey is not a party to the UN Convention on the Law of the Sea, which obliges it, due to its strategic location in the Black Sea, to register a negative vote.

3. United Nations general assembly resolutions on cooperation and coordination between the United Nations and the Black Sea economic cooperation organisation

The relationship between intergovernmental IOs is the framework for studying the relationship between the UN and BSEC, in terms of both institutional and organisational issues, as well as the issues that are dealt with or should be dealt with in a coordinated manner, under the principle of cooperation. The specific case at hand concerns the relationship between a universal and a regional organisation. The subject is foreseen in the UN Charter and completed by the subsequent practice of the organisation, which is set out under the heading: Institutional framework; this includes the presentation of the general lines of BSEC, as a regional organisation for economic cooperation.

The second part entitled "Content", of the relations of cooperation and coordination between the UN and BSEC, is articulated around two axes of this relationship. Firstly, the support that the UN should give to an organisation – of which the 13 States of what is known as the extended Black Sea area form part – aimed at economic cooperation as a way to establish good neighbourly relations between its Members in a traditionally convulsive area; in short, it is a matter of fulfilling the purpose of cooperation in economic matters between States.[34] The second axis of this relationship between the UN and BSEC lies in the efforts

[31] The first resolution of this group of resolutions to be adopted on the law of the sea is the 2004 resolution A/RES/59/25 "Sustainable fisheries, including through 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 or highly migratory fish stocks and related instruments" of 17 November 2004.

[32] *Ibidem*, para. 46

[33] See for example A/RES/71/257, "Oceans and the Law of the Sea".

[34] Art. 1-3º of the UN Charter.

aimed at supporting multilateralism in the "UN System", which today focuses on the "2030 Agenda for Sustainable Development".[35]

Russia's war of aggression against Ukraine, with area-wide consequences and yet unclear impact, cannot be ignored. Despite this, the special structure of BSEC is apparently not dead.[36] The following exposition has two dates to keep in mind. Firstly, 23 November 2020, date of the last resolution on "Cooperation between the United Nations and the Organisation of the Black Sea Economic Cooperation".[37] Secondly, "The BSEC Economic Agenda: Towards a sustainable future of the wider Black Sea area",[38] of 2023 and other recent contributions, are manifestations that contribute to reaffirm the relationship of cooperation and coordination between the UN and BSEC and that it continues. The relative vitality of BSEC allows us to see what is happening in the area with a different perspective, remembering that controversies, by concept, have an expiry date.

3.1. Institutional Framework

The relationship between universal and regional IGOs had to be contemplated in the UN Charter, and it is in its approach, as the text that establishes the international order of today, that this relationship is to be found. In the debate prior to its establishment, the perspective provided by universalism and regionalism were considered as suitable institutional ways of developing the legal framework envisaged in what would become the UN Charter. The latter opts for universalism, but without forgetting the contributions of regionalism, giving them entry, in principle, into matters of peacekeeping and international security.

Likewise, UN practice has been broadening the participation of entities other than states in its decision-making process and facilitating debate in the broadest forms. In this sense, the door has been opened to the participation of IGOs with observer status in the UNGA, with different and complementary profiles to the strictly legal framework.

This section describes how the provisions of the Charter have been implemented with respect to BSEC and how BSEC has been granted observer status in the UNGA. This last section includes the main characteristics of BSEC, as these

[35] A/RES/70/1 "Transforming our world: the 2030 Agenda for Sustainable Development" of 25 September 2015.

[36] Vid. Armenian BSEC Chairmanships-in-office, July-December 2024 "Priorities of the Armenian Chairmanship-in-office, Engagement, Outreach, Resilience".

[37] A/RES/75/12 is the last resolution adopted under this title, out of a series of 11. It should also be noted that the issue of relations between the UN and regional and other organizations is changing in the process of revitalizing the UNGA, with the idea of rationalizing its *modus operandi.*

[38] Annex VII to BS/FM/R(2023)2.

must be known to the UNGA in order for BSEC to be granted observer status in the UNGA.

a. Charter provisions

The UN Charter refers to regional organisations, using the term "regional agencies or arrangements", in the field of the maintenance of peace and security and, in this context, refers to the function of peaceful settlement of disputes. Article 33(1) of the Charter lists the procedures for the peaceful settlement of disputes and includes recourse to regional arrangements as one of them. The title of Chapter VIII of the Charter is "Regional Arrangements", which is aimed at safeguarding the role of regional organisations with competence for the maintenance of international peace and security. This chapter establishes that regional organisations are under the international order established in the Charter and, therefore, that they will respect the primary responsibility of the Security Council (SC) in this area. It also establishes that in local disputes, if there are regional organisations competent in the peaceful settlement of disputes, they will be called upon both by the parties to the dispute and in the decisions of the SC recommending settlement procedures. These provisions are complemented by the practice of the Organisation.

Indeed, the desirability of strengthening the role of regional organisations, in the context of joint work with the UN in peacekeeping, is found in the UNGA Declaration on "...enhancing cooperation between the United Nations and regional arrangements and agencies in the maintenance of international peace and security" of 9 December 1994.[39]

There are two fundamental clarifications of this Declaration in relation to the object of study of this paper. First, it emphasises the role of conflict prevention as an important part of the "peaceful settlement of disputes" purpose and principle of the UN. Secondly, the implementation of this declaration is the formal framework that commits the UN Secretary General to submit annually a report on the "relations between the UN and regional arrangements", to underpin the UNGA agenda item and, as part of this, a specific resolution entitled, "Cooperation between the United Nations and the Black Sea Economic Cooperation Organisation".[40]

[39] A/RES/49/57 of 9 December 1994. It was adopted without a vote. It was drafted by the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organisation. It is a subsidiary body that was created in the context of fulfilling the statutory provision to convene a review conference of the UN Charter; after various initiatives, the review has resulted in this Committee codifying and progressively developing the Principle of peaceful settlement of disputes and peaceful settlement procedures.

[40] We have 11 resolutions on this subject between 1996 and 2023.

b. BSEC's observer status in the UNGA

Observer status is one of the forms of participation in the UN, without having the status of Member. Although this status is not provided for in the UN Charter or in the UNGA Rules of Procedure, it is through the practice of the organisation that this figure has been established. The first case dates back to 1946, when Switzerland was granted permanent observer status.

In the case at hand, we are dealing with a case of observer status at the UNGA, not at the organisation. The 1994 UNGA decision on: "Question of criteria for granting observer status in the General Assembly",[41] establishes the path to be followed to achieve this status from that year onwards and reflects UN practice in the matter.[42]

This participation is reserved for non-Member States[43] and intergovernmental organisations[44] *"...whose activities cover matters of interest to the* General *Assembly*". This decision indicates, on the one hand, that the condition is limited to these two subjects of international law and, on the other, the conditions for obtaining it, which is the concurrence of interests between the two organisations.

This general framework was followed by the BSEC, which obtained observer status at the UNGA on 8 October 1999.[45] Referring to this process allows us to delve deeper into relevant aspects of our study, but a fundamental question must first be resolved: the qualification of the BSEC as an international intergovernmental organisation, which will allow us to present the general outlines of this organisation.

The aim is for BSEC to meet the necessary requirements for the UNGA to consider it an international intergovernmental organisation[46]. Practice shows that this status is achieved through an invitation by the GA, which decides to grant

[41] Decision A/ 49/496 of 9 December 1994, item allocated to the Sixth Committee.

[42] This is expressed in the UNGA discussions in the adoption of the decision by India, which held the chairmanship of the working group set up to establish the criteria (A/C.6/49/SR.40).

[43] With the almost total universalization of the UN, only the Holy See and the Palestinian State currently have this status.

[44] Currently (December 2024) 28 international organizations have observer status at the UNGA. Prior to this decision, observer status had been granted to national liberation movements, recognized as such by the OAU or the League of Arab States, with a significant role in the implementation of the declaration on the Principle of Self-Determination of Colonial Peoples (Resolution 1514(XV), "Declaration on the Granting of Independence to Colonial Countries and Peoples", 14 December 1960).

[45] A/RES/54/5, "Observer status for the Black Sea Economic Cooperation Organization in the General Assembly" of 8 October 1999, adopted without vote.

[46] The *modus operandi* for this is that the Explanatory Memorandum accompanying the request for the inclusion of an item on the UNGA agenda sets out those characteristic features that identify an international intergovernmental organization. In the light of practice in this area, applicants refer to the fact that they act as subjects of international law. For example, Jordan's application for observer status for the UfM in Doc. A/70/232.

it through a resolution.[47] In order for the UNGA to take its decision and adopt the resolution inviting the organisation to participate, it must first assess whether the applicant is an international intergovernmental organisation. For which purpose the characteristics that make it a subject of international law are taken into account, referring to the constituent elements: "*Instituted by a treaty or other instrument established by international law and possessing its own legal personality*".[48] The UNGA's position, after consulting the UN Legal Counsel, is to follow the practice followed by UN organs when referring to an international organisation of an intergovernmental nature.[49]

BSEC was established in 1992 in Istanbul[50] as an "intergovernmental mechanism for economic cooperation" between 11 states.[51] It worked and functioned as an intergovernmental forum until May 1999 when it was transformed into a regional international organisation, following the adoption of the Charter of the Organisation of the Black Sea Economic Cooperation adopted in Yalta on 5 June 1998, in other words, the founding Treaty. It was at this Yalta meeting that it was decided to apply for observer status in the UNGA, with the consensus of all its members, which *"... would contribute substantially to the strengthening of the organisation's presence on the* international *political and economic scene*".[52]

The treaty describes the organisation it creates as a regional organisation for economic cooperation. The objectives[53] are to develop and diversify it in a "spirit of good neighbourliness" and with the participation of states and private entities (companies and firms). It based on international law, in respect of existing cooperation frameworks in which the member states participate and taking into account the specific economic situation and interests of the member states.

It is an organisation open to states that consider themselves capable of fulfilling its obligations and share its lines of action.[54] Its openness is best seen in its

[47] It will be Greece, a member of the UN, who will lead the BSEC request. At that time, in October 1999, it held the BSEC presidency, and was a member of the UN, so it can request an agenda item to be included in the UNGA.

[48] Art. 2(a) of the draft articles on international responsibility of international organizations, reproduced in A/RES/66/100 of 9 December 2011.

[49] The position of the Legal Department can be seen in the question of whether the International Conference on the Great Lakes could be considered an international organization for the purposes of Decision 49/426 of 19 December 1994. Reproduced in Legal Yearbook 2008 (https://legal.un.org/unjuridicalyearbook/volumes/2008/).

[50] Istanbul Black Sea Economic Cooperation Summit Declaration of 25 June 1992.

[51] The founding states are Albania, Armenia, Azerbaijan, Bulgaria, Georgia, Greece, Moldova, Romania, the Russian Federation, Turkey and Ukraine, joined by North Macedonia and Serbia, bringing the current membership to 13.

[52] Exposed by Romania, in Doc. A/54/PV.31 of 8 October 1999.

[53] Art 3 of the BSEC Charter.

[54] It is the Council of Ministers that decides on the accession of new members.

provision for other forms of participation in addition to membership, such as observer status, which is available to both States[55] and international organisations.[56] It also establishes two genuine forms of participation: dialogue partnerships and sectoral dialogue partnerships.[57]

The institutional structure consists of main bodies, with their rules of procedure:[58] the Council of Foreign Ministers, to which we have already referred, a rotating president, elected every 6 months, a troika,[59] a Committee of Senior Officials, a permanent international secretariat (PERMIS) based in Istanbul, headed by the Secretary.[60] Subsidiary bodies, called ad-hoc working groups for matters of interest (economy, finance, tourism, science and technology, among others).

The related or affiliated Bodies[61] complemented the standard organigram of the IGO. They have their own budget, and acting according to their constitutive texts and the legal framework foreseen by BSEC,[62] they are: The Parliamentary Assembly (PABSEC),[63] The Business Council,[64] the Black Sea Commercial Development Bank,[65] and the International Centre for Black Sea Studies (ICBSS).[66]

An important characteristic of the organisation is that of broadening its "horizons", in the sense that it maintains formal relations with a significant number of bodies of international organisations and with other IGOs. It is this characteristic that has driven the UN in its relational framework.

3.2. Contents

The content of the cooperation and coordination relations between the UN and BSEC is based on the support provided by the UN, through the Secretary General in application of UNGA resolutions, to the activities carried out by BSEC to achieve its objectives.

The UNGA's interest in maintaining the greatest stability in the Black Sea area is unwavering, therefore, any initiative is welcome in this sense and it uses

[55] Egypt has this condition.

[56] Art. 8. The following organizations have observer status in BSEC: Black Sea Pollution Protection Commission, International Black Sea Club, Energy Charter Secretariat, European Commission.

[57] Art. 9 of the charter. The model agreement between BSEC and the Sectoral Dialogue Partnership can be found at: https://www.bsec-organization.org

[58] Can be found at https://www.bsec-organization.org

[59] Composed of the current president, his predecessor and his successor.

[60] Can be found at https://www.bsec-organization.org

[61] https://www.bsec-organization.org

[62] Chap.VII of the BSEC Charter, art. 19 et seq.

[63] https://www.pabsec.org/

[64] https://www.bsecbc.com/

[65] https://www.bstdb.org/

[66] His studies and works are a must-see resource https://icbss.org/

all the means at its disposal, which are those provided by the Charter and the practice of the UN, as described in the previous section. It is now time to analyse the concrete actions.

The presentation is systematised around two aspects: 1. the specific characteristics of the regional organisation, in which the subjects and mechanisms on which it focuses its activity are briefly identified, and 2. models of coordination and cooperation of BSEC in the UN System. The aim here is to see in which areas the need has been seen to link BSEC to the multilateral framework that facilitates the fulfilment of the objectives of both the UN and BSEC.

a. The specific characteristics of the regional organisation

The aim is to show the characteristics of BSEC that contribute to the promotion of international cooperation, and are relevant to highlight as they are for the UNGA and contribute to the achievement of the purposes of the UN Charter.

BSEC, like any process of institutionalisation of international relations, reflects the environment in which it develops. In the extended Black Sea area, political, economic, cultural and historical differences are the norm, which is probably the reason for the interest in this organisation.

Its virtuality lies in identifying those areas that are needed to move forward and that its management requires the participation of all those involved for it to be truly useful. Therefore, as it is not easy, the BSEC must be contemplated with a process in which a pragmatic vision of reality stands out in order to achieve its objectives, and provide it with flexible elements to be operative, in terms of the organisation chart,[67] and in terms of decision-making, seeking consensus.

The UNGA resolutions state, very clearly, the objectives of the organisation "[…] to promote effective economic, social and democratic reforms in the region by applying the pragmatic principle that economic cooperation is an effective confidence-building measure".[68] Over time, the wording of the organisation's objectives became more nuanced, as follows, "[…] to work constructively and fruitfully together in a wide range of spheres of economic activity with the aim of developing the Black Sea economic cooperation region into a region of peace, stability and prosperity".[69]

The means to achieve its objectives are political declarations to adapt the situation to its objectives, taking advantage of commemorative declarations and establishing its economic cooperation programmes.[70] Within the framework of its

[67] I refer to related or affiliated bodies, which do not necessarily have to support the governmental position, because of their composition and institutional framework (with *ad hoc* design).

[68] A/RES/55/211 of 20 December 2000.

[69] A/RES/75/12 of 23 November 2020.

[70] Black Sea Economic Cooperation Program "Towards a strengthened Black Sea Economic Cooperation Alliance", endorsed at the 20th Anniversary Summit in Istanbul.

activities, the energy transition in the context of sustainable development has an increasingly relevant role. A Green Energy Strategy has been approved, which "[…] provides the Member States of this organisation with new opportunities with regard to the development and adoption of green energy policies and the strengthening of regional cooperation in the field of green energy approved at the 38th meeting of the Council of Foreign Ministers […],held in Yerevan on 27 June 2018";[71] which is complemented by the Green Energy Network.

An important aspect of its activities is to work through projects, with public and private participation. To promote this, a Project Development Fund of the Organisation[72] and a Regional Project Promotion Facility were established in the following areas: renewable energy, energy efficiency, green technology, development of small and medium-sized enterprises, promotion of the knowledge economy, and promotion of the export possibilities of BSEC member states.[73]

In addition to the projects, the specific issues of interest reflect the degree of consensus on the matter, using more or less binding formulas between States, be it international treaties on the fight against crime and terrorism or Memorandums of Understanding (MoUs) on transport and on roads.

b. Models of BSEC coordination and cooperation in the UN System

BSEC attains observer status at the UNGA in 1999; the following session marks the beginning of a strengthened relationship between the two organisations, which lasts to the present day. The UNGA mandates the Secretary-General to organise BSEC's relations within the UN and with other organisations of the UN system.

The UNGA, "[i]nvites the Secretary-General of the United Nations to initiate consultations with the Secretary-General of the Black Sea Economic Cooperation Organization with a view to promoting cooperation and coordination between the two"[74]. It makes the same invitation to "[…] specialised agencies and other organisations of the United Nations system" to cooperate with both secretariats "in order to initiate consultations and programmes with that Organisation and its associated institutions to achieve their objectives".[75]

Practice shows that the models of coordination and cooperation between regional organisations and the complex UN System[76] are not standardised, nor are

[71] A/RES/73/13 of 26 November 2018, para 8.

[72] A/RES/75/12, para. 20.

[73] *Ibidem*, para.21.

[74] A/RES/55/211, "Cooperation between the United Nations and the Black Sea Economic Cooperation Organization" of 20 December 2000, para. 2.

[75] *Ibidem*, para. 3.

[76] The official UN website states, in the following terms, who makes up the UN system: the UN system consists of the UN itself and numerous affiliated organizations known as programs, funds and specialized agencies. Each has its own membership, leadership and budget. Thus, for

they within the framework of the European Union.[77] In order to understand them and draw conclusions about them, each of the agreements made (ad-hoc agreements) must be studied, paying attention to the parts of each of them and their content, and contemplating them from the perspective of the constituent treaties of the IOs and the regulations of the bodies involved. We will leave this study for a later date, as it is not appropriate here as it exceeds the objectives of this paper.

In the context of this chapter, the contribution is to identify the relationship framework contained in UN resolutions. Once identified, only those agreements that are stable will be taken into account, and a distinction is made as to whether the parties are: BSEC and an organ of an organisation, or BSEC and an IO.

BSEC's interest in co-operating and/or co-ordinating with other institutions lies in the scope of the body or organisation.

The first in time to show interest in carrying out joint actions is the UN-ECE (Economic Commission for Europe)[78]. Both formalised their relations in the agreement signed in Istanbul on 2 July 2001; the planned areas of cooperation are: transport, environment and small and medium-sized enterprises[79]. This agreement allows them to intensify their relationship, which is described by the UNGA as "multifaceted and fruitful [...] especially in the field of transport".[80]

Together with the UNECE, due to its objectives and modus operandi, the UN Development Programme (UNDP) stands out, with which a cooperation agreement was signed, also in Istanbul, on 28 June 2007, and which jointly executes the Trade and Investment Promotion Programme.[81] In this same block of agreements with subsidiary bodies, it is worth mentioning the agreement signed on 20 February 2002 with the United Nations Environment Programme (UNEP), aimed at supporting BSEC's activities for: the exchange of information, creation of environmental information systems, implementation of joint environmental assessment and monitoring programmes.

A second block of agreements is with members of specialised funding agencies, which the UNGA calls on "to intensify their collaboration with a view to

example, the programs and funds are financed through voluntary contributions, while the specialized agencies, which are independent IOs, are financed through compulsory dues and voluntary contributions.

77 BSEC has an important relationship with the range of cooperation initiatives operating in the area. It is with the European Union with whom it has the closest cooperation, apart from the political and economic sphere; it is probably in the management of the Black Sea marine spaces and resources that there is a mutual interest to act in a coordinated manner. It should be recalled that Romania and Bulgaria are Black Sea littoral states and full members of the EU and BSEC.

78 Subsidiary body of ECOSOC, (https://unece.org/).

79 A/RES/57/34 of 21 November 2002.

80 A/RES/65/128 of 13 December 2010, para. 13.

81 *Ibidem*, para 14.

co-financing feasibility and predictability studies for projects in the Black Sea area".[82] The search for funding is extended to "the Asian Development Bank, the Asian Infrastructure Investment Bank, the Silk Road Fund and other financial institutions to explore the possibility of co-financing projects in the wider Black Sea area that are economically prudent and consistent with their respective mandates".[83]

A third block of agreements are aimed at "the commitment of the Black Sea Economic Cooperation Organisation to promote fruitful cooperation with the United Nations and its specialised agencies, in particular to develop practical and targeted projects in areas of common interest".[84] Relations have been established with FAO, WTO, UNIDO, and UN-Tourism.

4. Final Remarks

At the beginning of this paper, in its *Introduction*, I stated that this work is aimed at sustaining that "the Black Sea in the resolutions of the United Nations General Assembly" is a case study on the relations between universal and regional international organisations. To maintain this assertion, it is necessary to delve deeper into the agreements made between BSEC and UN System organisations, and to contrast it with other regional organisations in the same area. In other words, the general considerations, for the moment, are left aside and pending further studies.

Based on the selection made by the UNGA when incorporating the Black Sea in its resolutions and the methodological criteria set out in the selection of the resolutions on which this study is based, it is possible to formulate three statements regarding this specific case, that being, the specificity between the BSEC and the UN. The referent is BSEC, a regional organisation, not the Black Sea as a geographical area.

First, the geographic space of the Black Sea and its surroundings[85], is a "variable" space in terms of the states that make it up. This is clearly reflected in the references to the Black Sea by the UNGA resolutions: littoral states, Black Sea *stricto sensu*, etc. and those with BSEC membership, namely: Albania, Armenia. Azerbaijan, Bulgaria, Georgia, Greece, North Macedonia, Moldova, Romania, Russia, Serbia, Turkey, Ukraine.

Second, BSEC is aimed at solving practical problems of communication, transport, how to deal with the energy transition, etc., involving as many actors

[82] A/RES/61/4 of 20 October 2006, para. 7.
[83] A/RES/73/18 of 21 November 2016, para.6.
[84] A/RES/71/18 of 21 November 2016, para. 9.
[85] Including the Danube basin.

as possible. It tries to avoid issues where there is no consensus and even those that require decision-making, directing the activities in another direction: promoting good neighbourliness.

Third, the paper identifies three avenues of coordination and cooperation – not always standardised on an ad-hoc basis – between BSEC and the UN system: 1. Between cooperation and development bodies (UNECE, UNDP, UNEP) of the UN and BSEC; 2. Seeking support for project funding from the World Bank, but also, encouraged by the UN, from funding organisations in the Asian region, and 3. Selecting specialised bodies of the UN system to enter into agreements with BSEC, if there is a concurrence of activities.

THE BLACK SEA AND THE INTERNATIONAL COURT OF JUSTICE

*Gabriela A. Oanta**

1. Introduction

Between 22 May 1947, when the United Kingdom filed a claim against Albania before the International Court of Justice (ICJ), accusing it of having laid or allowed a third State to lay mines in the Corfu Channel after the allied naval authorities had carried out mine clearance operations in that area[1] and 29 April 2024, when Ecuador filed a claim against Mexico, accusing it of having violated several of its obligations under international law in relation to Jorge David Glas Espinel, a national of Ecuador,[2] the ICJ (the principal judicial organ of the United Nations)[3] has ruled—under art. 38(1) of its Statute and in accordance with international law—over slightly more than 170 of the 195 disputes it has heard to date.

Of the cases concluded so far at the ICJ, almost one sixth of them dealt with numerous issues of the Law of the Sea in general and with the United Nations Convention on the Law of the Sea (UNCLOS)[4] after its entry into force, in particular.[5] Among the maritime issues analyzed in the ICJ's long-standing case law,

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All websites mentioned in this paper were last consulted on 30 November 2024.

[1] It is: *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania), Application instituting proceedings and documents of the written proceedings,* 22 May 1947.

[2] This case is known as "Glas Espinel (Ecuador v. Mexico)". See: *Glas Espinel (Ecuador v. Mexico), Application Instituting Proceedings*, 29 April 2024.

[3] According to art. 92 of the Charter of the United Nations.

[4] United Nations on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 3.

[5] Up to the date of writing of this book chapter, the ICJ has ruled on various maritime issues in 27 cases, of which 26 cases were conducted under the contentious procedure, and one case was brought before it under the advisory procedure, namely: 1. Judgment of 4 December 1998 on questions of jurisdiction and/or admissibility: 1st *Corfu Channel case, Judgment of April 9th , 1949: I.C.J. Reports 1949,* p. 4; 2. *Fisheries case, Judgment of December 18th, I951: I.C.J. Reports 1951*,

those referring to maritime delimitations stand out; so far, they have emerged as the main international law issue addressed by this court,[6] as well as constituting

p. 116; 3. *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960, I.C.J. Reports 1960,* p. 150; 4. *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969,* p. 3; 5. *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969,* p. 3; 6. *Fisheries Jurisdiction (Federal Republic of Germany v. Zeeland), Merits, Judgment, I.C.J. Reports 1974,* p. 175; 7. *Fisheries Jurisdiction (United Kingdom v. Zeeland), Merits, Judgment, I.C.J. Reports 1974,* p. 3; 8. *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978,* p. 3; 9. *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* p. 18; 10. *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984,* p. 246; 11. *Continental Shelf (Libyan Arab Jarnahiriya/Malta), Judgment, I.C.J. Reports 1985,* p. 13; 12. *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985,* p. 192; 13. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992,* p. 351; 14. *Maritime Delimitation between Guinea-Bissau and Senegal, Order of 8 November 1995, I.C.J. Reports 1995,* p. 423; 15. *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998,* p. 432; 16. *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning* the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon), *Judgment, I. C. J. Reports 1999,* p. 31; 17. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001,* p. 40; 18. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* p. 303; 19. *Application for Revision of the Judgment of 11 September 1992 in the Case concerning* the Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras: Nicaragua intervening) *(El Salvador v. Honduras), Judgment, I.C.J. Reports 2003,* p. 392; 20. *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007,* p. 659; 21. *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009,* p. 61; 22. *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012,* p. 624; 23. *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014,* p. 3; 24. *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2018,* p. 139; 25. *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment, I.C.J. Reports 2021,* p. 206; 26. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2022,* p. 266; and 27. *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Judgment, 13 July 2023*, pending publication in the I.C.J. Reports (available at: https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-00-en.pdf).

[6] In this regard, see: EVANS, M., "Maritime Boundary Delimitation", in ROTHWELL, D. *et al.* (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford University Press, Oxford, 2015, p. 255. At the time of finalization of writing of this book chapter, there were three pending matters brought before the ICJ through the contentious procedure, namely 1. *Guatemala's Territorial, Insular and Maritime Claims (Guatemala v. Belize*) - filed on June 12, 2019, available at: https://www.icj-cij.org/sites/default/files/case-related/177/177-20190612-PRE-01-00-EN.pdf; 2. *Land and Maritime Delimitation and Sovereignty over Islands (Gabon v. Equatorial Guinea)* - filed on March 5, 2021, available at: https://www.icj-cij.org/sites/default/files/case-related/179/179-20210305-PRE-01-00-EN.pdf; and 3. *Sovereignty over the Sapodilla Cayes (Belize v. Honduras). Application instituting proceedings*, November 16, 2022, available at: https://www.icj-cij.org/sites/

one of the few international law issues that have mainly been driven by the work of international judicial and arbitral bodies, rather than by the practice of States[7].

In this connection, we would like to point out that according to art. 287(1) UNCLOS, the ICJ is one of the four mechanisms for the settlement of disputes concerning the interpretation or application of UNCLOS[8]. The other three are the International Tribunal for the Law of the Sea (ITLOS),[9] an arbitral tribunal constituted under Annex VII of UNCLOS, and a special arbitral tribunal established under Annex VIII of UNCLOS in matters relating to fisheries, the protection and preservation of the marine environment, marine scientific research, and navigation (including pollution caused by ships and dumping)[10].[11] Since UNCLOS en-

default/files/case-related/185/185-20221116-APP-01-00-EN.pdf In addition, the advisory opinion of the ICJ in the case *Obligations of States in respect of Climate Change*, requested by the United Nations General Assembly on April 12, 2023, is pending; available at: https://www.icj-cij.org/sites/default/files/case-related/187/187-20230412-app-01-00-en.pdf

[7] In this regard, see: PAPASTAVRIDIS, E., "The contemporary law of maritime delimitation: Lesson learnt by the recent case-law", in BOISSON DE CHAZOURNES, L. et al. (coords.), *Liber Amicorum Haritini Dipla. Melanges en l'honneur de la Professeure Haritini Dipla. Enjeux et perspectives : droit international, droit de la mer, droits de l'homme*, Ed. Pedone, Paris, 2020, p. 137.

[8] On the ICJ's contribution to the interpretation and application of the provisions of UNCLOS, see: KWIATKOWSKA, B., *Decisions of the World Court Relevant to the UN Convention on the Law of the Sea: A Reference Guide*, 2nd ed., Martinus Nijhoff Publishers, Leiden/Boston, 2010; ODA, S., *Fifty Years of the Law of the Sea: With a Special Section on the International Court of Justice: Selected Writings of Shigeru Oda, Judge of the International Court of Justice*, Nijhoff, Dordrecht, 2003; OLORUNDAMI, F., "Objectivity versus Subjectivity in the Context of the ICJ's Three-stage Methodology of Maritime Boundary Delimitation", *The International Journal of Marine and Coastal Law*, vol. 32, no. 1, 2017, pp. 36-53.

[9] A detailed analysis of the case law of the ITLOS can be found in: GARCÍA GARCÍA-REVILLO, M., *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea*, Brill Nijhoff, Leiden/Boston, 2016; KITTICHAISAREE, K., *The International Tribunal for the Law of the Sea*, Oxford University Press, New York, 2021; RAO, P.C. and GAUTIER, P., *International Tribunal for the Law of the Sea: Law, Practice and Procedure*, Edward Elgar Publishing, Cheltenham, 2018; ROTHWELL, D. and STEPHENS, T., *The International Law of the Sea*, 3rd ed., Hart, London, 2023; TANAKA, Y., *The International Law of the Sea*, 4th ed., Cambridge University Press, Cambridge, 2023."

[10] On the contribution of arbitral tribunals to the development of the law of the sea, see: CALIGIURI, A., *L'arbitrato nella Convenzione delle Nazioni Unite sul diritto del mare*, Editoriale Scientifica, Napoli, 2018; JIMÉNEZ PINEDA, E., *El arbitraje internacional y el Derecho del mar*, Tirant lo Blanch, Valencia, 2022.

[11] On a general basis, see, among others: FIETTA, S. and CLEVERLY, R., *Practitioner's Guide to Maritime Boundary Delimitation*, Oxford University Press, Oxford, 2016; JENSEN, Ø., *The Development of the Law of the Sea Convention: the Role of International Courts and Tribunals*, Edward Elgar Publishing, Cheltenham, 2020; KLEIN, N. and PARLETT, K., *Judging the Law of the Sea: Judicial Contributions to the UN Convention on the Law of the Sea*, Oxford University Press, Oxford/New York, 2022; NGUYEN, L.N., *The Development of the Law of the Sea by UNCLOS Dispute Settlement Bodies*, Cambridge University Press, Cambridge, 2023; TANAKA, Y., *Predictability and Flexibility in the Law of Maritime Delimitation*, 2nd ed., Hart, Oxford, 2019.

tered into force three decades ago, the ICJ has established itself as the second most widely used mechanism for the settlement of maritime disputes, behind only the ITLOS.

The Black Sea is one of the maritime areas on which the ICJ was called upon to rule in connection with the delimitation of the maritime boundary between two States bordering this sea. It is also one of the maritime areas where, at present, other interests of several of the States bordering this sea are projected and on which the ICJ will be called upon to rule in the context of the conflict between the Russian Federation and Ukraine.

As a preliminary, and embarking on the analysis of each of these issues, we would like to point out that the Black Sea represents one of the enclosed or semi-enclosed seas within the meaning of art. 122 UNCLOS.[12] It has six coastal States (Bulgaria, Georgia, Romania, Russian Federation, Turkey and Ukraine), all of which have ratified UNCLOS,[13] apart from Turkey. In addition, two of them (Bulgaria and Romania) are Member States of the European Union (EU), two others (Turkey[14] and Ukraine) are candidate countries for accession, and another (Georgia) is a potential EU accession country.[15] Bulgaria, Romania and Turkey are furthermore members of the North Atlantic Treaty Organization (NATO), Georgia is a candidate country for NATO membership and Ukraine is expected to join NATO in the future.

[12] According to art. 122 UNCLOS, an enclosed or semi-enclosed sea is "a gulf, basin or sea surrounded by two or more States and connected with another sea or the ocean by a narrow outlet, or consisting wholly or mainly of the territorial seas and exclusive economic zones of two or more coastal States". The Black Sea is also considered one of the most isolated seas on the planet. It communicates only with the Mediterranean Sea through the Bosphorus and Dardanelles Straits, and the Kerch Strait connects it with the Sea of Azov. It has an area of approximately 432,000 km^2, a length of 1,145 km, a width of 630 km, and the average depth is 1,271 meters.

[13] Bulgaria on May 15, 1996, the Russian Federation on March 12, 1997, Georgia on March 21, 1996, Romania on December 17, 1996, and Ukraine on July 26, 1999.

[14] However, in the case of this State, EU accession negotiations have been frozen for several years due to successive human rights violations.

[15] On EU membership and the possible enlargement of the Union towards the Black Sea, see, among others: HENDERSON, K., *The Black Sea Region and EU Policy: The Challenge of Divergent Agendas*, Ashgate, Farnham, Surrey/Burlington, VT, 2010; NITOIU, C., "The European Union Brings a Balance of Power in the Black Sea Region", *Romanian Journal of European Affairs*, vol. 9, no. 3, 2009, p. 61; OANTA, G.A., "La Unión Europea ribereña de un nuevo mar: el Mar Negro", in CARDONA LLORENS, J.; PUEYO LOSA, J.; RODRÍGUEZ-VILLASANTE Y PRIETO, J.L.; SOBRINO HEREDIA, J.M. (dirs.); AZNAR GÓMEZ, M. (coord.), *Estudios de Derecho Internacional y Derecho Europeo en Homenaje al Profesor Manuel Pérez González*, Ed. Tirant lo Blanch, Valencia, 2012, pp. 1705-1729.

Regarding the maritime spaces under the sovereignty or jurisdiction of the Black Sea coastal States,[16] it is worth mentioning that Bulgaria, the Russian Federation, Romania, and Ukraine expressly state that they have internal waters, in addition to which all the coastal States have claimed a territorial sea of 12 nautical miles. In addition, Bulgaria, the Russian Federation, Georgia, and Romania have established a contiguous zone up to 24 nautical miles.[17] However, due to the geographical and geomorphological characteristics of the Black Sea – there are no high seas in this sea – some of the maritime spaces partially overlap. Hence the necessity for and, at the same time, the difficulty of the delimitation of maritime spaces in the Black Sea.

To date, the maritime delimitations between Turkey and Bulgaria in 1997,[18] and between Turkey and the former USSR in 1973[19] - which was completed in 1978,[20]

[16] For a detailed presentation of the delimitation of maritime spaces in the Black Sea, see: OANTA, G.A., "In the Search of an Appropriate Legal Framework to Prevent Environmental Risks Caused by Navigation in the Black Sea", *International Community Law Review*, vol. 19, 2017, pp. 225-226; POPESCU, I., *Le pêche en mer Noire*, Direction Générale des Politiques Internes de l'Union, Parlament européen, Bruxelles, 2010, pp. 18-20; SCOVAZZI, T., "The Mediterranean and Black Sea Maritime Boundaries. The Mediterranean Sea Maritime Boundaries", in COLSON, D.A. and SMITH, R.W. (eds.), *International Maritime Boundaries*, vol. 5, Martinus Nijhoff Publishers, Leiden/Boston, 2005, p. 3490. The complete official information communicated to the United Nations by each of these States on this matter is available in: "Maritime Zones and Maritime Delimitation", Division for Ocean Affairs and the Law of the Sea" (DOALOS), https://www.un.org/depts/los/LEGISLATIONANDTREATIES/europe.htm

[17] On unilateral delimitations of maritime spaces made by Black Sea costal States, see: OUDE ELFERINK, A.G., *The Law of Maritime Boundary Delimitation: A Case Study of the Russian Federation*, Martinus Nijhoff Publishers, Dordrecht, 1994, pp. 275-300; TIROCH, K., "Black Sea", in WOLFRUM, R., *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2012.

[18] Agreement between the Republic of Turkey and the Republic of Bulgaria on determination of the boundary in the mouth area of the Mutludere/Rezovska river and delimitation of the maritime areas between the two states in the Black Sea (adopted 4 December 1997, entered into force 4 November 1998), 2087 UNTS 5.

[19] Protocol between the Government of the Union of Soviet Socialist Republics and the Government of the Republic of Turkey concerning the Establishment of the Maritime Boundary between Soviet and Turkish Territorial Waters in the Black Sea (adopted 17 April 1973, entered into force 27 March 1975), 990 UNTS 205.

[20] Agreement between the Government of the Republic of Turkey and the Government of the Union of Soviet Socialist Republics concerning the delimitation of the continental shelf between the Republic of Turkey and the Union of Soviet Socialist Republics in the Black Sea (with maps) (adopted 23 June 1978, entered into force 15 May 1981); available at:

https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/TUR-RUS1978CS.PDF

1986[21] and 1997[22] - have been agreed upon by conventional means.[23] This second maritime delimitation by conventional means is currently being implemented between Turkey on the one hand and the Russian Federation, Georgia and Ukraine on the other hand, and was confirmed on 14 July 1997 as far as Georgia and Turkey are concerned,[24] although it is not known exactly where the lateral maritime boundaries between these three former Soviet republics would intersect the limits of Turkey's jurisdiction. Furthermore, despite the negotiating efforts made over the last three decades or so, to this day, the maritime border between Bulgaria and Romania has not yet been agreed upon. This delimitation, as expressed in the doctrine,[25] would be the prelude to the eventual start of negotiations between Romania and Turkey to delimit their respective maritime spaces in the Black Sea. In addition, there is the judicial delimitation carried out by the ICJ regarding the exclusive economic zone (EEZ) and the continental shelf of Romania and Ukraine.[26] This is the case of *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*,[27] which will be discussed in *section 2* of this chapter, and whose projection on the work of other international tribunals and arbitral bodies in the last three decades or so will be the subject of special attention in *section 3* of this chapter.

[21] Exchange of notes constituting an agreement on the delimitation of the USSR and Turkey economic zone in the Black Sea (adopted 23 December 1986-6 February 1987, entered into force 6 February 1987); available at: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/RUS-TUR1987EZ.PDF.

[22] Exchange of Notes constituting an Agreement on the Delimitation of the USSR and Turkey Exclusive Economic Zone in the Black Sea, 23 December 1986-6 February 1987 (entered into force 6 February 1987), 1460 UNTS 135.

[23] For a detailed analysis of the delimitations in the Black Sea embodied in a treaty, see: AURESCU, B., "Démitations par voie d'accord en mer Noire", in AURESCU, B., PELLET, A., THOUVENIN, J-M., GALEA, I. (dirs.), *Actualité du droit des mers fermées et semi-fermées*, Ed. Pédone, Paris, 2019, pp. 41-48.

[24] Protocol between the Government of the Republic of Turkey and the Government of Georgia on the Confirmation of the Maritime Boundaries between them in the Black Sea (adopted 14 July 1997, entered into force 22 September 1999); available at:
https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/TUR-GEO1997BS.PDF

[25] In this sense, AURESCU, "Délimitations par voie ...", *op. cit.* p. 47.

[26] In general on the judicial delimitation of marine spaces in the Black Sea, see: DINESCU, C., "Délimitation jurisdictionnelle en mer Noire", in AURESCU, B., PELLET, A., THOUVENIN, J-M., GALEA, I. (dirs.), *Actualité du droit des mers fermées et semi-fermées*, Ed. Pédone, Paris, 2019, pp. 67-74.

[27] Maritime Delimitation in the Black Sea (Romania v. Ukraine), *sent. cit.*

2. The Black Sea in the Case Law of the International Court of Justice

To date, the Black Sea has been the subject of ICJ attention in two contentious cases, namely: *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*. Thus, in the first of these cases, on 16 September 2004, Romania submitted a claim against Ukraine to the ICJ requesting the maritime delimitation of the continental shelf and the EEZ between these two countries bordering the Black Sea.[28] Romania brought this claim following the failure of bilateral negotiations since 1997 between the two countries regarding the delimitation of the maritime boundary, and after the signing and entry into force of the political treaty and the related agreement reached by Romania and Ukraine, under which each of these countries could resort to the ICJ in the future to request the delimitation of the continental shelf and EEZ between the two countries, as well as under the Treaty on the Romanian-Ukrainian border regime which entered into force in May 2004.[29] The second case had arisen on the occasion of the "five-day war" fought in August 2008 between the Russian Federation and Georgia,[30] when the Russian armed forces shelled the Georgian port of Poti located on the Black Sea just south of Abkhazia, and reached as far as near Tbilisi.[31]

In our view, the Black Sea benefited from greater attention by the ICJ in the first of these cases, since in the second case the references to the Black Sea were rather incidental, and were only made by Georgia when explaining the facts[32]

[28] *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Application instituting proceedings*, 16 September 2004.

[29] For a detailed presentation of the legal framework that preceded the development of the case before the ICJ, see: "11 ani de la procesul Romaniei la Haga care a adus Romaniei 9.700 km2 de platou continental si zona economica exclusiva", Ministerul Afacerilor Externe, Bucuresti, 2020; available at:

https://www.mae.ro/sites/default/files/file/anul_2020/pdf_2020/2020.02.03_brosura_web_proces_haga.pdf

[30] For more information on this war, see: ASMUS, R.D., *A Little War that Shook the World: Georgia, Russia, and the Future of the West*, Palgrave Macmillan, New York, 2010; CORNELL, S.E., *The Guns of August 2008: Russia's War in Georgia*, M.E. Sharpe, Armonk New York, 2009; KING, C., "The Five-Day War: Managing Moscow After the Georgia Crisis", *Foreign Affairs*, vol. 87, no. 6, 2008, pp. 2-11.

[31] *Application of the international Convention on the elimination of all forms of racial discrimination (Georgia v. Russian Federation), Application instituting proceedings*, 12 August 2008.

[32] In this sense, see: *Application of the international Convention on the elimination of all forms of racial discrimination (Georgia v. Russian Federation), Request for the Indication of Provisional Measures of Protection submitted by the Government of Georgia*, 14 August 2008, para. 13; *Application of the international Convention on the elimination of all forms of racial discrimination (Georgia v. Russian Federation), Memorial of Georgia, Volume I*, 2 September 2009, paras. 2.3,

which, in its opinion, had violated several of the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination[33] and had thus led to the filing of this claim against the Russian Federation. That is why our attention in this section of our chapter will solely focus on the case of *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*.

Thus, on 19 September 2008, four years after Romania had filed its application with the ICJ for the delimitation of the maritime border with Ukraine, the oral hearing in the case of *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* came to an end. Half a year later, on 3 February 2009, the ICJ released its judgment on this case, which represented its 100th judgment and the first in which its Plenary unanimously ruled on the issues raised, without any dissenting or individual opinion being expressed nor any statement to the contrary. As we will see in the next section of our chapter, this judgment had a significant influence on the maritime delimitation cases that were subsequently brought before the international courts and arbitral bodies.[34] The ICJ recognized Romania's sovereign and jurisdictional competences, depending on the case, over 9,700 km^2 of continental shelf and EEZ, that is, about 80% of the surface of the maritime spaces in dispute.[35]

In our opinion, one of the central issues in this dispute between Romania and Ukraine was closely related to what legal consideration Serpents' Island should have, and therefore what role it should play in the delimitation of the disputed maritime spaces between these two countries. This could not be otherwise since this island had been a source of tension and confrontation between the two countries during the decades that had preceded the filing of the lawsuit by Romania against Ukraine.[36]

In this connection, it should be noted that Serpents' Island is one of the few rocky and island formations in the Black Sea. It is under the sovereignty of Ukraine, although it is only about 20 nautical miles east of the Danube Delta,

2.5, 2.11, 3.46, 6.71 and 9.5; *Application of the international Convention on the elimination of all forms of racial discrimination (Georgia v. Russian Federation), Preliminary objections, Judgment of 1 April 2011*, para. 106.

[33] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969), 660 UNTS 195.

[34] In this regard, TANAKA, *Predictability and Flexibility ...*, *op. cit.*, p. 126.

[35] Data consulted in: "11 ani de la procesul Romaniei la Haga care a adus Romaniei 9.700 km^2 de platou continental si zona economica exclusiva", *op. cit.*, p. 2. See also: "Delimitarea platoului continental si a zonelor economice exclusive ale Romaniei si Ucrainei in Marea Neagra", Ministerul Afacerilor Externe din Romania; available at: https://www.mae.ro/node/9854

[36] For a detailed analysis of these issues, see: AURESCU, B., "Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine)", *The International Journal of Marine and Coastal Law*, vol. 21, no. 4, 2006, pp. 535-537.

has an area of 0.17 km^2 and a circumference of about 2,000 meters.[37] Romania considered that Serpents' Island was only entitled to a territorial sea of 12 nautical miles and that in no case could it "be used as a base point for the delimitation beyond the 12-mile limit" since it constituted a rock within the meaning of art. 121 UNCLOS,[38] incapable of supporting human habitation or an economic life of its own.[39] In fact, this was in line with Romania's statement under art. 287 UNCLOS at the time of signing UNCLOS.[40] For its part, Ukraine argued the opposite: that Serpents' Island constituted "indisputably an island within the meaning of art. 121(2) of UNCLOS, and not a rock".[41] In support of its claim, Ukraine argued, inter alia, that Serpents' Island did have human habitation and an economic life of its own, and that it had the necessary infrastructure and accommodation to accommodate an active population.

With regards to these issues, we would like to mention that arts. 74 and 83 UNCLOS—which establish the obligations of States with adjacent or opposite coasts, as is the case of Romania and Ukraine in the Black Sea—require the parties involved in a dispute to reach an "equitable solution" in the delimitation of their respective EEZs and continental shelves. This is undoubtedly an ambiguous expression, which is silent on the methods that should be used in this matter, and it is here where the ICJ intervenes. Over time, this court has progressively elaborated maritime delimitation rules.[42] This has been a consequence of the presen-

[37] Data consulted in Maritime Delimitation in the Black Sea (Romania v. Ukraine), *sent. cit.*, para. 16. For more data on Serpents' Island and its relevance to this case, see: OANTA, G.A., "The impact of Serpents' Island on the delimitation of maritime spaces in the Black Sea", in SOBRINO HEREDIA, J.M. (coord.), *The contribution of the United Nations Convention on the Law of the Sea to good governance of the oceans and seas*, Editoriale Scientifica, Napoli, 2014, pp. 365-366; PADUREANU, D.I., "Insula Serpilor", *Istoria Magazine*, no. 9-10, 1995, pp. 825-845; TOUZÉ, S., "Affaire relative à la delimitation maritime en mer Noire (Roumanie/Ukraine): Une clarification didactique de la régle de "l'equidistance - circonstances pertinentes", *Annuaire Français de Droit International*, vol. LV, 2009, pp. 222-223.

[38] Art. 121 UNCLOS regulates the legal regime of islands and provides that: "1. An island is a natural extension of land, surrounded by water, which is above the level of the water at high tide. Except as provided in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island shall be determined in accordance with the provisions of this Convention applicable to other land areas. Rocks unsuitable for sustaining human habitation or economic life of their own shall not have an exclusive economic zone or continental shelf".

[39] Maritime Delimitation in the Black Sea (Romania v. Ukraine), *sent. cit.*, para. 180.

[40] Romania had stated that: "the uninhabited islands and without economic life can in no way affect the delimitation of the marine spaces belonging to the main land coasts of the coastal State".

[41] Maritime Delimitation in the Black Sea (Romania v. Ukraine), *sent. cit.*, para. 184.

[42] In this sense, LEGAULT, L.; HANKEY, B., "Method, Oppositeness and Adjacency and Proportionality in Maritime Boundary Delimitation", in CHARNEY, J. I.; ALEXANDER, L. M. (eds.), *International Maritime Boundaries*, vol. I, Martinus Nijhoff Publishers, Dordrecht, 1993, p. 205; PRESCOTT, J. R. V.; SCHOFIELD, C. H., *The Maritime Political Boundaries of the World*, Marinus Nijhoff Publishers, Leiden/Boston, 2005, p. 239.

tation before the ICJ of numerous claims for the delimitation of maritime spaces, and the result of its rulings is that most of the maritime boundaries fixed by the ICJ have been based to a large extent on equidistance. Regardless of this highly important jurisprudential work, it is common knowledge that to date, an estimated 250 disputes related to maritime boundaries have not yet been resolved, approximately half of them involving islands in one way or another.[43]

With regard to ICJ case law on island-related issues, one should bear in mind that this court has shown an inclination towards the primacy of the mainland over small islands in the delimitation of maritime areas.[44] This was precisely what the doctrine and observers equally expected to happen in relation to Serpents' Island in the case presently discussed in this book chapter.

After the judgment in the case of *Maritime Delimitation in the Region between Greenland and Jan Mayen (Denmark v. Norway)*,[45] the method of maritime delimitation followed by the ICJ consisted of the *"equidistance – special circumstances"* rule. This method consisted of two phases.[46] Thus, in the first phase, a provisional equidistant line was drawn unless it was not allowed by imperative reasons specific to the case, as the ICJ later affirmed in the case of the *Territorial and Maritime Difference between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*.[47] In the second phase, it was analysed whether there were special circumstances justifying the adjustment of such a line in order to achieve equitable results, as with the islands in the case concerning the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Merits)* of 16 March 2001.[48]

[43] In this regard, see: SCHOFIELD, C., "The Trouble with Islands: The Definition and Role of Islands and Rocks in Maritime Boundary Delimitation", in HONG, S-Y.; VAN DYKE, J. M. (eds.), *Maritime Boundaries Disputes, Settlement Processes, and the Law of the Sea*, Martinus Nijhoff Publishers, Leiden/Boston, 2009, p. 31; VAN DYKE, J. M., "Disputes over Islands and Maritime Boundaries in East Asia", in HONG, S-Y.; VAN DYKE, J. M. (eds.), *Maritime Boundaries Disputes, Settlement Processes, and the Law of the Sea*, Martinus Nijhoff Publishers, Leiden/Boston, 2009, p. 39.

[44] In this regard, see: ANDERSON, D., "Islands and Rocks in the Modern Law of the Sea", in NORDQUIST, M.H. et al. (eds.), *The Law of the Sea Convention. US Accession and Globalization*, Martinus Nijhoff Publishers, Leiden/Boston, 2012, p. 316.

[45] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 38.

[46] In this regard, see Judge Ranjeva's speech delivered on the occasion of the 20th anniversary of the adoption of UNCLOS, quoted by: JACOVIDES, A., "Some Aspects of the Law of the Sea: Islands, Delimitation, and Dispute Settlement Revisited", in JACOVIDES, A., *International Law and Diplomacy. Selected Writings by Ambassador Andrew Jacovides*, Martinus Nijhoff Publishers, Leiden, 2011, p. 107.

[47] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, para. 281.

[48] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001,* p. 40, para. 227: PRESCOTT, V.; TRIGGS, G., "Islands and Rocks and their Role in Maritime Delimitation", in CHARNEY, J. I.; COLSON, D. A.; ALEXANDER,

This real state of affairs, when the ICJ had to face the resolution of the case of the *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, allowed it further develop a delimitation method composed of three phases,[49] which for part of the doctrine was already appreciated in some previous ICJ resolutions.[50] In this way, the ICJ first established a single provisional line of delimitation using objective methods from a geometrical point of view, and adapted to the geographical characteristics of the affected area.[51] This line (which will be drawn by means of an equidistant line in the case of the adjacent coasts, according to this tribunal) will only be affected if there are imperative reasons of its own impeding this. In the case of opposite coasts, this provisional line will be a median line. However, the method of delimitation will be the same in both cases.

Second, the ICJ proceeded to examine whether there were relevant circumstances that would justify adjusting or shifting the provisional line of equidistance drawn in the first phase with the aim of reaching an equitable result,[52] respecting its decision in its previous case law.[53]

Thirdly, the ICJ proceeded to carry out a proportionality test[54] to confirm whether the provisional line drawn in the first phase would not cause an inequitable result due to a possible disproportion between the length of the coasts of the affected States, on the one hand, and the maritime spaces attributed to each of the

L. M.; SMITH, R. W. (eds.), *International Maritime Delimitation*, Martinus Nijhoff Publishers, 2005, p. 3272.

[49] For an analysis of this judgment, see: ANDERSON, "Maritime Delimitation in ...", *op. cit.* pp. 305-327; MAHINGA, J-G., "La delimitation de la frontière maritime entre la Roumanie et l'Ukraine dans la mer Noire", *Journal du Droit International*, no. 4, 2010, pp. 1157-1195; VON MÜHLENDAHL, P., "L'arrêt de la Cour Internationale de Justice dans l'affaire de la delimitation maritimes en Mer Noire (Roumanie v. Ukraine): L'aboutissement d'un processus vieux de quarante ans?", *Review Québecoise de Droit International*, vol. 22, no. 1, 2009, pp. 1-23; ORAL, N., "Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine) Judgment of 3 February 2009, *The International Journal of Marine and Coastal Law,* vol. 25, 2010, pp. 115-141; TOUZÉ, *op. cit.*, pp. 221-251 ; VAN DYKE, J.M., "The Romania v. Ukraine Decision and Its Effect on East Asian Maritime Delimitations", *Ocean and Coastal Law Journal,* vol. 15, no. 2, 2010, pp. 261-283.

[50] CHURCHILL, R., "The Bangladesh/Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation", *Cambridge Journal of International and Comparative Law,* vol. 1, no. 1, 2012, p. 141.

[51] *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment*, *sent. cit.*, para. 116.

[52] *Ibidem,* paras. 120-121.

[53] For example, in the case of the *Territorial and Maritime Boundary between Cameroon and Nigeria* (see: *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, para. 288), and in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* (see: *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2002, sent. cit*, para. 271).

[54] *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment*, *sent. cit.*, para. 122.

States in that first phase, on the other hand. This would not mean, however, that such maritime spaces should be proportionate to the length of the coasts.

Bearing these details in mind in the case we are now examining, the ICJ considered in its first phase at the time of delimitation (when the ICJ faced the problem of the Serpents' Island when drawing the provisional line of equidistance) that this island was only entitled to a territorial sea of 12 nautical miles. In other words, the island did not generate either an EEZ or a continental shelf. The ICJ considered that Serpents' Island, located off the coast of Romania and considerably distant from the coast of Ukraine, was not part of the Ukrainian coastline, and that if it were to be used as a baseline, this would lead to a judicial reshaping of the territorial sea. This would result in a *judicial refashioning of geography*[55] and recalled its earlier case law in the *Continental Shelf (Libya/Malta)* case[56] where the Maltese Island of Filfla had not been taken into account at the outset when the provisional equidistance line was drawn.

Therefore, and without entering, to the disappointment of many,[57] into the legal qualification of Serpents' Island in relation to art. 121 UNCLOS, the ICJ considered that it *"is not part of the general coastal configuration"*, and, therefore, *"could not serve as a basis for constructing the provisional equidistant line between the coasts of the Parties*".[58] Furthermore, the ICJ found that *"any rights eventually generated by Serpents' Island in an easterly direction are entirely covered by those generated by the western and eastern continental coasts of Ukraine*".[59] This court ruled that Serpents' Island did not justify any adjustment to the provisional equidistant line fixed in the first phase of the maritime delimitation carried out. Furthermore, it did not need to examine whether Serpents' Island was covered by paragraph 2 or paragraph 3 of art. 121 UNCLOS, nor did it need to consider its relevance to the maritime delimitation requested in the present case. Therefore, Serpents' Island already had a territorial sea of 12 nautical miles and should not have any further bearing on the maritime delimitation between Romania and Ukraine in the Black Sea.[60]

[55] *Ibidem*, para. 149.

[56] *Continental Shelf (Libyan Arab Jamahiriya / Malta), sent. cit.*, p. 48.

[57] In this regard, see: ORAL, N., *op. cit.*, p. 140; SONG, Y-H., "The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean", *Chinese Journal of International Law*, vol. 9, 2010, p. 688.

[58] *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment*, *sent. cit.*, paras. 149 and 186.

[59] *Ibidem*, para. 187.

[60] *Ibidem*, para. 188. See, likewise, paras. 57-58 of this judgment. In this regard, see: MINASSIAN, G., "Conflits infra-étatiques et litiges territoriaux autour de la mer noire", in CHATRÉ, B.; DELORY, S. (dirs.), *Conflits et sécurité dans l'espace mer Noire: L'Union européenne, les riverains et les autres*, Éditions Panthéon Assas, Paris, 2009, pp. 259-260.

Indeed, and in the light of the international case law, maritime delimitation has crystallised as a process consisting of three stages, namely: first, the construction of the mean or equidistant provisional line based on the characteristics of the coasts and by means of geodetic calculations; second, the determination of the relevant circumstances and the adjustment, if necessary, of such provisional line; and, third, the performance of the proportionality test or examination consisting in the verification of whether the line drawn results in a significant disproportion between the ratio of the lengths of the coasts and that of the relevant maritime spaces assigned to each State.[61]

It has been expressed from the doctrine[62] that equidistance is present in the first stage of this three-stage delimitation process in which equity is present in the form of the second and third stages of this process. This method of delimitation seeks to achieve an equitable delimitation of the disputed maritime spaces and not a mere division of the maritime zones. However, "equity does not necessarily imply equality", as the ICJ had stated in 1969 in the *North Sea Continental Shelf case (FR Germany/Denmark and FR Germany/Netherlands)*[63] and reiterated forty years later in the *Black Sea Maritime Delimitation case (Romania/Ukraine)*.[64]

3. The Impact on Future Disputes of Case Law of the International Court of Justice on the Black Sea

The judgment rendered by the ICJ in the case *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* is considered an important step in the process of developing consistent rules in the field of maritime boundary delimitation.[65]

[61] The method of maritime delimitation in three phases has been widely discussed by the doctrine, see, among others: ROS, N., "El derecho jurisprudencial de la delimitación marítima", *Revista Española de Derecho Internacional*, vol. LXV, no. 2, 2013, pp. 71-115; VON MÜHLENDAHL, P., *L'equidistance dans la delimitation des fronterieres maritimes. Etude de la jurisprudence internationale*, Ed. Pedone, Paris, 2016, pp. 243-336; YIALLOURIDES, C., *Maritime Disputes and International Law. Disputes Waters and Seabed Resources in Asia and Europe*, Routledge, London/New York, 2019, pp. 27-42.

[62] In this regard, DELABIE, L., "The Role of Equity, Equitable Principles, and the Equitable Solution in Maritime Delimitation", in OUDE ELFERINK, A.G.; HENRIKSEN, T.; VEIERUD BUSCH, S. (eds.), *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?*, Cambridge University Press, Cambridge, 2018, pp. 145-172.

[63] *North Sea Continental Shelf (Federal Republic of Germany/Denmark*; *Federal Republic of Germany/Netherlands, Judgment, I.C.J. Reports 1969*, p. 3, para. 91.

[64] *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, sent. cit.*, paras. 110-111.

[65] See: MÜHLENDAHL, *op. cit.*, p. 13; ORAL, *op. cit.*, p. 138; TOUZÉ, *op. cit.*, p. 228.

By referring to *"the established case law on maritime delimitation*",[66] this court designed a single method for maritime delimitation between these two countries. Moreover, given that the ICJ judges' pronouncement was unanimous, without any dissenting or individual opinion or a statement to the contrary (along the lines of what first occurred within the ICJ Praetorium), it is considered to have been a sign of maturity of international law with respect to the field of maritime delimitation.[67] Far from focusing on the precise aspect of the delimitation of the continental shelf and the EEZ, it reflected a more general position referring to all the legal points to be taken into account when defining the different maritime spaces.[68] It could, however, be considered as a missed opportunity to introduce the necessary clarification or respect for art. 121(3) UNCLOS.

Shortly after the publication of this judgment, another international tribunal took it into account. We are referring to the ITLOS in relation to the *Dispute concerning the delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*.[69] It is precisely this judgment that was a landmark in the history of the Hamburg Tribunal. Thus, this case was the first opportunity for the ITLOS to rule on a question of delimitation of a maritime boundary, in this case concerning the establishment of a single maritime boundary in the north-eastern part of the Bay of Bengal.[70] It was also the first judgment to establish a continental shelf boundary beyond 200 nautical miles,[71] also referring to the presence of "grey zones" in the international law of the sea.[72]

As did the case with Serpents' Island in the *Black Sea Maritime Delimitation* case *(Romania v. Ukraine)* before the ICJ, the present case involved, *inter alia*, the role of a relatively small and uninhabited island belonging to Bangladesh – St. Martin's Island – in the maritime delimitation of part of the Bay of Bengal.

[66] *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment*, *sent. cit.,* para. 118.

[67] MAHINGA, *op. cit.*, pp. 1157 and 1161.

[68] TOUZÉ, *op. cit.*, p. 228.

[69] For doctrinal contributions on this matter, see: CHURCHILL, R., "Dispute Settlement under the UN Convention on the Law of the Sea: Survey for 2009", *The International Journal of Marine and Coastal Law*, vol. 25, no. 4, 2010, pp. 457-482; KALDUNSKI, M.; WASILEWSKI, T., "The International Tribunal for the Law of the Sea on maritime delimitation: The 'Bangladesh v. Myanmar' Case", *Ocean Development and International Law*, vol. 45, no. 2, 2014, pp. 123-170.

[70] On the contribution of the ITLOS to the field of maritime delimitations, see: OANTA, G.A., "Las delimitaciones marítimas en la jurisprudencia del Tribunal Internacional de Derecho del Mar", in OANTA, G.A., "Las delimitaciones marítimas en la jurisprudencia del Tribunal Internacional de Derecho del Mar", in OANTA, G.A., VEZZANI, S.; VILLANUEVA, A.V. (dirs.), *El desarrollo del Derecho del mar desde una perspectiva argentina y europea / Lo sviluppo del diritto del mare in una prospettiva argentina ed europea*, Bosch Editor, Barcelona, 2023, pp. 125-136.

[71] ANDERSON, "Delimitation of the ...", *op. cit.*, p. 823.

[72] *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Balgladesh/Myanmar), sent. cit.*, paras. 463-476. See also: CHURCHILL, *op. cit.*, pp. 138 and 150-151.

At issue was the right of this island not only to a 12 nautical mile territorial sea, but also to an EEZ and a continental shelf. Finally, the ITLOS considered that St. Martin's Island, being immediately in front of the Myanmar mainland, could not be considered as one of the baseline points in this delimitation since the seaward projection of the Myanmar coast would be blocked otherwise. This would result in "a judicial reshaping of the geography".[73] Thus, the ITLOS uses the same argumentation as the ICJ. In other words, although they have a territorial sea of 12 nautical miles, neither Serpents' Island, in the previous case, nor St. Martin's Island, will be considered when delimiting the EEZ and the continental shelf in the Black Sea and the Bay of Bengal, respectively.

Moreover, since 2009, we have noted that this position has been used by the ICJ in almost all its judgments on maritime delimitation and has also been reflected in the judicial activity of other international courts and arbitral bodies with jurisdiction in this area. Suffice it to mention, the case of the arbitral tribunal constituted in the case of the *delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/India)* which considered that the equidistance/relevant circumstances method "lies in the fact that it clearly separates the stages to be followed and is therefore more transparent".[74]

Now, any maritime delimitation carried out according to the three-step method could, in a way, cause a reshaping of nature, but at no time should it completely reshape the geography nor compensate for the inequalities of nature. This has been ruled on several occasions by the ICJ,[75] considered by the ITLOS in its *Ghana/Ivory Coast* (2017) judgment,[76] and has also been affirmed by the arbitral tribunal constituted in the *Bay of Bengal maritime boundary* case *between Bangladesh and India*.[77]

In our opinion, the crystallization and consolidation of the three-step method of maritime delimitation constitutes an outstanding judicial contribution to an already delicate and complex issue. As the ICJ noted in the *Case of the territorial*

[73] *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), sent. cit.*, para. 265.

[74] *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, *Award of 7 July 2014*, para. 343. For a detailed study of this case law, see: JIMÉNEZ PINEDA, E., "El arbitraje internacional y su contribución a la definición y delimitación de los espacios marinos", *Anuario Español de Derecho Internacional*, vol. 37, 2021, pp. 342-351; TANAKA, *Predictability and Flexibility ...*, *op. cit.*, pp. 144-150.

[75] The first time it did so in the North Sea cases, and subsequently it was reiterated on many occasions starting with the 1985 judgment on the continental shelf between Libya and Malta. See: *ICJ Judgment of 3 June 1985 in Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, para. 46.

[76] *Ghana/Ivory Coast* (2017), *sent. cit.,* p. 409.

[77] *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, *sent. cit.,* para. 397.

and maritime delimitation case between Nicaragua and Honduras in the Caribbean (Nicaragua/Honduras), "the establishment of a permanent maritime boundary is a matter of great importance and agreement cannot easily be presumed".[78]

The three-step "equidistance – relevant circumstances" method is currently the main procedure for the delimitation of different maritime spaces of States with adjacent or opposite coasts. In our opinion, this shows that the international tribunals and arbitral bodies have been reducing the elements of subjectivity that could be considered in this matter, and have been refining the trend that began, as we said, in 1993 with the case of the *Maritime Delimitation in the area between Greenland and Jan Mayen (Denmark v. Norway).* Additionally, as the judges of the ITLOS Nelson, Chandrasekhara Rao and Cot stated on the occasion of the *Dispute concerning the delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*,[79] when this method is applied in the future, other methods of delimitation should not be reintroduced.[80]

Shortly after the ICJ's decision in the case of *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Romania began to develop an important diplomatic effort to get as many States as possible to accept the compulsory jurisdiction of the ICJ. In this connection, it should be noted that, according to art. 36(2) of the ICJ Statute, the States

> "may at any time declare that they recognize as compulsory ipso facto and without special agreement, in respect of any other State accepting the same obligation, the jurisdiction of the ICJ in all legal disputes concerning 1. the interpretation of a treaty; 2. any question of international law; 3. the existence of any fact which, if established, would constitute a breach of an international obligation; 4. the nature or extent of the reparation to be made for the breach of an international obligation."

Such a declaration may be made, according to art. 36(3) of the ICJ Statute, either unconditionally or "on condition of reciprocity on the part of several or certain States, or for a certain period of time", and shall have the legal status of a unilateral act of the State, which shall be deposited with the Secretary-General of the United Nations. To date, 74 States have already made such declarations.[81]

[78] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 659, para. 253.

[79] *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Balgladesh/Myanmar), Judgment, ITLOS Reports 2012*.

[80] *Vid*: "Joint Declaration of Judges Nelson, Chandrasekhara Rao and Cot", 12.03.2012; available at http://www.itlos.org

[81] A complete list of these States can be found at: https://www.icj-cij.org/declarations.

Indeed, Romania accepted the compulsory jurisdiction of the ICJ on 23 June 2015,[82] and a few months later Bulgaria declared the same.[83] Earlier, on June 20, 1995, Georgia had already done so.[84] However, the Russian Federation, Turkey, and Ukraine have not made any declaration on this matter so far. It is also worth mentioning that at the United Nations headquarters in New York, on November 3, 2021, Romania made the "Declaration for the promotion of the jurisdiction of the International Court of Justice", for which it had the support of a group of States formed by Spain, Japan, Liechtenstein, Mexico, Norway, New Zealand, Poland, the Netherlands, and Switzerland.[85]

While Georgia accepted the compulsory jurisdiction of the ICJ without any qualification for the commitments undertaken after making such a declaration, both Bulgaria and Romania excluded numerous matters from the compulsory jurisdiction of the ICJ. In our opinion, these matters are particularly relevant in the current context of the war between Ukraine and the Russian Federation and have numerous implications for the Black Sea.[86] In addition, Bulgaria stipulated an initial period of five years for the validity of its declaration, which is automatically prolonged if its denunciation is not notified to the UN Secretary-General.[87]

[82] The full text of this statement is available at: https://www.icj-cij.org/declarations/ro.

[83] The full text of this statement is available at: https://www.icj-cij.org/declarations/bg.

[84] The full text of this statement is available at: https://www.icj-cij.org/declarations/ge.

[85] Data accessed at: http://www.mae.ro/node/57077

[86] Thus, Romania included the following as exceptions to the compulsory jurisdiction of the ICJ: "(a) any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement for its final and binding decision; (b) any dispute with any State which has accepted the compulsory jurisdiction of the International Court of Justice under Article 36 (2) of the Statute less than twelve months prior to filing an application bringing the dispute before the Court or where such acceptance has been made only for the purpose of a particular dispute; (c) any dispute regarding the protection of the environment; (d) any dispute relating to, or connected with, hostilities, war, armed conflict, individual or collective self-defence or the discharge of any functions pursuant to any decision or recommendation of the United Nations, the deployment of armed forces abroad, as well as decisions relating thereto; (e) any dispute relating to, or connected with, the use for military purposes of the territory of Romania, including the airspace and territorial sea, or maritime zones subject to its sovereign rights and jurisdiction; (f) any dispute relating to matters which by international law fall exclusively within the domestic jurisdiction of Romania". See: https://www.icj-cij.org/declarations/ro. For its part, Bulgaria mentioned as such exceptions the following issues: "disputes arising under the United Nations Convention on the Law of the Sea or any other multilateral or bilateral treaty or agreement on the law of the sea, or customary international law on the sea, including but not limited to disputes concerning navigational rights, exploration and exploitation of living and non-living natural resources, protection and preservation of the marine environment, delimitation of maritime boundaries and areas, and for disputes with any State which has accepted the compulsory jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute less than twelve months prior to filing an application bringing the dispute before the Court or where such acceptance has been made only for the purpose of a particular dispute". See: https://www.icj-cij.org/declarations/bg

[87] As of the writing of this book chapter, Bulgaria tacitly renewed its acceptance of the ICJ's compulsory jurisdiction in 2020.

The war conflict between the Russian Federation and Ukraine that started on 24 February 2022 has highlighted the existence of numerous complex issues of geopolitical, geostrategic and geo-economic nature in the Black Sea.[88] Several of them are already reflected in some of the more recent claims filed by Ukraine before the ICJ and other international courts and arbitral bodies, and others, which may derive from the Black Sea's status as a semi-enclosed or enclosed sea within the meaning of art. 122 UNCLOS and, also, that the legal regime of the Turkish Straits of Bosphorus and Dardanelles – which allow the connection between the Black Sea and the Mediterranean Sea – is regulated in the Montreux Convention of 1936,[89] may be subject to future judicial developments.

The solution that could be provided to the disputes that could arise from these circumstances will be highly conditioned, we believe, by the declarations and reservations to various international treaties that could be applied in the Black Sea – as is the case, for example, of the UNCLOS – and that will have been formulated, up to now, by the various countries bordering the Black Sea and that undoubtedly affect the legal mechanisms for the settlement of (maritime) disputes that have arisen or that could arise in the not too distant future.

As we advanced at the beginning of this book chapter, according to art. 287(1) UNCLOS, the ICJ is one of the four legal mechanisms that States parties to UNCLOS may choose for the settlement of their maritime disputes. Regarding the choice of legal means of settlement of maritime disputes between UNCLOS parties, we would also like to point out that in the event that the parties have not chosen such legal means, the arbitration procedure provided for in Annex VII of UNCLOS (art. 287(3) UNCLOS) shall be deemed to have been accepted. Likewise, it is arbitration "unless otherwise agreed by the parties" that will be responsible for the settlement of a maritime dispute in the event of the parties not accepting the same procedure for the settlement of such dispute (art. 287(5) UNCLOS).

[88] For a detailed presentation of the highlights of the current war conflict between the Russian Federation and Ukraine, see, among others: ALLISON, R., "Russia's Case for War against Ukraine: Legal Claims, Political Rhetoric, and Instrumentality in a Fracturing International Order", *Problems of Post-communism*, vol. 71, no. 3, 2024, pp. 271-282; CORTEN, O. and KOUTROULIS, V., "The 2022 Russian intervention in Ukraine: What is its impact on the interpretation of *jus contra bellum*?", *Leiden Journal of International Law*, vol. 36, 2023, pp. 997-1022; FEDORCHAK, V., *The Russia-Ukraine war: Towards Resilient Fighting Power*, Routledge, London, 2024.

[89] The Convention on the Regime of the Straits was signed at Montreux, provisionally on August 15, 1936 and definitively on November 9, 1936. This treaty was endorsed by nine States, namely: Australia, Bulgaria, France, Germany, Greece, the United Kingdom, Romania, Turkey, the former Yugoslavia, and the former Soviet Union. Japan also did so on April 19, 1937. See: Convention regarding the Régime of Straits, 173 UNTS 213. For an analysis of this treaty, see: GEROLYMATOS, A., "The Turkish Straits: History, Politics and Strategic Dilemmas", *Ocean Yearbook*, vol. 28, 2014, pp. 72-74.

Therefore, in order to ascertain which legal means could be used to settle maritime disputes among the Black Sea coastal States, it would be necessary to refer to the declarations made by each of these States at the time of signature, ratification or accession to UNCLOS "or at any time thereafter", and also to take into account that Turkey has not yet ratified this convention, as noted above. Thus, Bulgaria has chosen the ITLOS as the only mechanism for the settlement of its maritime disputes. On the other hand, the Russian Federation and Ukraine have preferred the ITLOS for the settlement of issues relating to the prompt release of ships and their crews, a special arbitral tribunal established under Annex VIII of UNCLOS for disputes relating to fisheries, protection and preservation of the marine environment, marine research, and navigation (including ship-source pollution and dumping), and an arbitral tribunal established under Annex VII of UNCLOS for all other disputes excepting those disputes to which the provisions of art. 298(1)(a)-(c) UNCLOS refer.[90] Meanwhile, Bulgaria and Romania did not make any statement in this regard.

In relation to this problem, it seems significant to us to mention that none of the six Black Sea coastal States has ratified the Optional Protocol on the Compulsory Settlement of Disputes,[91] which was adopted on April 29, 1958, within the framework of the First United Nations Conference on the Law of the Sea. In this

[90] Art. 298(1) UNCLOS refers to one or more of the following categories of maritime disputes: "(a) (i) Disputes concerning the interpretation or application of articles 15, 74 and 83 concerning the delimitation of maritime zones, or concerning historic bays or titles, provided that the State which has made such a declaration, where such a dispute arises after the entry into force of this Convention and no agreement is reached within a reasonable period of time in negotiations between the parties, agrees, at the request of any party to the dispute, to submit the matter to the conciliation procedure provided for in section 2 of Annex V; furthermore, any dispute which necessarily involves the concurrent consideration of an unresolved dispute concerning sovereignty or other rights over a continental or island territory shall be excluded from such submission;

(ii) Once the conciliation commission has submitted its report, stating the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not lead to an agreement, the parties shall, unless they agree otherwise, submit the matter, by mutual consent, to the procedures provided for in section 2;

(iii) The provisions of this subparagraph shall not apply to any dispute relating to the delimitation of maritime zones which has already been settled by agreement between the parties, nor to any such dispute to be settled pursuant to a bilateral or multilateral agreement binding on the parties;

(b) Disputes relating to military activities, including military activities of State vessels and aircraft engaged in non-commercial services, and disputes relating to activities to enforce legal rules concerning the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297(2) or (3);

(c) Disputes in respect of which the Security Council of the United Nations exercises the functions conferred upon it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or requests the parties to settle the dispute by the means provided for in this Convention".

[91] Optional Protocol of signature concerning the compulsory settlement of disputes (adopted 29 April 1958, entered into force 30 September 1962), 450 UNTS 169.

context, we consider fundamental the existence of a bilateral agreement between the parties interested in having recourse to an international court or arbitral body, stipulating either the international court – the ICJ or the ITLOS – or the international arbitral body (constituted under Annex VII of UNCLOS or under Annex VIII of UNCLOS) which they recognize as competent to settle the maritime dispute that may exist between them.

The armed conflict between the Russian Federation and Ukraine has also caused, among other things, the latter State to bring an action before the ICJ against the Russian Federation for alleged genocide under the Convention on the Prevention and Punishment of the Crime of Genocide[92] . This is the *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* case initiated on February 22, 2022 by Ukraine,[93] i.e. almost immediately after the violation of the integrity of its territory by the Russian Federation or the beginning of the "special military operation" in the words of President Vladimir Putin.[94] So far, under art. 63(2) of the ICJ Statute and art. 82 of the ICJ Rules,[95] more than twenty countries that ratified the above-mentioned international treaty have requested its intervention in this matter,[96] including Romania on 13 September 2022[97] and Bulgaria on 18 November 2022.[98] This will also imply that the judgment rendered by the ICJ in

[92] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277.

[93] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the Indication of Provisional Measures Submitted by Ukraine*, 26 February 2022.

[94] "Address by the President of the Russian Federation of 24 February 2022", February 24, 2022; available from: http://en.kremlin.ru/events/president/transcripts/statements/67843

[95] Art. 82(1) of the ICJ Rules provides: "A State which desires to avail itself of the right of intervention conferred upon it by Article 63 of the Statute shall file a declaration to that effect, signed in the manner provided for in Article 38, paragraph 3, of these Rules. Such a declaration shall be filed as soon as possible, and no later than the date fixed for the filing of the Counter Memorial".

[96] They are: Austria, Bulgaria, Canada, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, New Zealand, Poland, Portugal, Romania, Slovenia, Spain, Sweden, and the United Kingdom. Complete information on the intervention declarations and subsequently generated documents are available at: https://www.icj-cij.org/case/182/intervention

[97] *Declaration of intervention of the Government of Romania in the case concerning Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), pursuant to Article 63 Paragraph 2 of the Statute of the International Court of Justice*, 13 September 2022; available at: https://www.icj-cij.org/sites/default/files/case-related/182/182-20220913-WRI-01-00-EN.pdf

[98] *Declaration of intervention of the Republic of Bulgaria, intervention pursuant to Article 63 of the Statute of the International Court of Justice in the case concerning Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation),* 18 November 2022; available at: https://www.icj-cij.org/sites/default/files/case-related/182/182-20221118-WRI-01-00-EN.pdf

this case will be binding on them.[99] The Black Sea is mentioned incidentally in this case, explicitly at the oral hearing held on 7 March 2022 at the ICJ headquarters,[100] and implicitly when reference is made to possible cases of genocide for the population of Crimea which, as is well known, is a peninsula in the Northern part of the Black Sea.

Finally, in our view, the Black Sea could become the subject of attention in the advisory opinion that the ICJ has pending publishing in connection with the request transmitted, on 12 April 2023, by the United Nations General Assembly (UNGA) on the Obligations of States in relation to climate change.[101] In this regard, it should be recalled that the Black Sea is an enclosed or semi-enclosed sea within the meaning of art. 122 UNCLOS. The Montego Bay Convention and two resolutions adopted by the UNGA on issues relating to the seas and oceans highlighting the dangers and challenges posed by rising sea levels for the maritime environment[102] are the reference texts that the UN Secretariat sent, along with many other documents, to the ICJ[103] to be considered when issuing its advisory opinion on the issues raised. For the time being, the phase of submission of written observations in accordance with art. 66(2) of the ICJ Statute has been completed, as well as the phase of submission of written comments from those who submitted written observations in accordance with art. 66(4) of the ICJ Statute.

4. Some Final Remarks

Together, the ICJ, the ITLOS and the international arbitral bodies constituted under Annexes VII and VIII of UNCLOS have gradually emerged in recent decades as essential instruments for the delimitation of various maritime areas.

[99] According to art. 63 of the ICJ Statute, "1. In the case of the interpretation of a convention to which States other than the parties to the dispute are parties, the Registrar shall forthwith notify all the States concerned. Any State so notified shall have the right to intervene in the proceedings; but if it exercises that right, the interpretation contained in the judgment shall be binding upon it as well".

[100] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Oral Proceedings*, 7 March 2022, para. 30.

[101] For a first approach to this ICJ case, see: KHNG, N.; CHAND, K.; SOLANO, L., "Res. 77/276 on Request for an Advisory Opinion of the I.C.J. on the Obligations of States in Respect of Climate Change", *International Legal Materials*, vol. 63, no. 1, 2024, pp. 47-64.

[102] These are, firstly, United Nations General Assembly: "Sustainable fisheries, including through 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, and related instruments", A/RES/77/118, 15 December 2022; and, secondly, United Nations General Assembly: "Oceans and the law of the sea", A/RES/77/248, 30 December 2023.

[103] Complete information can be found at: www.icj-cij.org/case/187

They have influenced each other in their activities and have also contributed to the consolidation of the three-step method of maritime delimitation (provisional median or equidistance line/relevant circumstances/proportionality test) in the last two decades or so. The collaboration between these tribunals and international arbitral bodies is a clear demonstration that the activities of the maritime dispute settlement bodies provided for in art. 287(1) UNCLOS are complementary and feed into each other to ensure their consistent and efficient application in relation to maritime delimitation.

The Black Sea fits perfectly into this dynamic of legal mechanisms for the settlement of disputes between States. As we have had the opportunity to see in this chapter, this maritime space has been present in the judicial activity of the ICJ, and the decision of this court in the case of *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* has subsequently been used by international courts and arbitration bodies in practically all maritime delimitation cases. This allows us to corroborate the existence, at present, of a dialogue between international courts and arbitral bodies in the field of delimitation of maritime spaces between States.

In the light of the case law analysed, we have seen that the legal classification of a maritime formation above sea level at high tide has significant legal consequences in the field of maritime delimitation. As we pointed out in the first part of this chapter, if such a formation is considered an "island" it will have not only territorial sea, but also EEZ and continental shelf. On the other hand, if it is considered a "rock" not suitable for human habitation or economic life, the State to which it belongs will not have the right to an EEZ or a continental shelf. Likewise, as the ICJ stated in the above-mentioned case, it is necessary to take into account the place where these maritime formations are located. Their consideration in the delimitation of the disputed maritime spaces will depend on this.

It is argued that it should also be noted that the Black Sea is located in a geographical area marked by divisions and major differences between its own coastal States, whose activity has been marked for the last decade or so by tensions and the subsequent war between its two northern States. There is no doubt that this geopolitical situation has a negative impact on the development of the activities of each of the six countries bordering this sea, as could be seen in the case of oil extraction on the continental shelf recognized in 2009 by the ICJ for Romania, to give an example.

Moreover, this war scenario, together with the maritime delimitations yet to be established, may result in the presence of the Black Sea in future ICJ and other international courts and arbitral bodies.

LA MER NOIRE ET LE TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

*Guillaume Le Floch**

Sommaire: 1. Les liens entre le Tribunal international du droit de la mer et les Etats riverains de la mer Noire. – 2. Les nombreuses potentialités du Tribunal international du droit de la mer pour régler des différends en lien avec la mer Noire. – 2.1. Une procédure efficace. – 2.2. L'autorité incontable de la jurisprudence du Tribunal international du droit de la mer. – 3. La mer Noire dans la jurisprudence du Tribunal international du droit de la mer.

La mer Noire est un espace maritime stratégique[1] qui depuis l'Antiquité fait l'objet de nombreuses convoitises[2]. Consécutivement au démantèlement de l'Union des républiques socialistes soviétiques (URSS), son accès est désormais partagé par six Etats: la Bulgarie, la Géorgie, l'Ukraine, la Roumanie, la Russie et la Turquie[3].

Celle que les Grecs appelaient Pont Euxin est, selon la Cour internationale de Justice (CIJ), une mer « fermée »[4]. C'est une catégorie spécifique qui a été forgée par la convention des Nations Unies sur le droit de la mer[5]. Le régime juridique qui en découle, en revanche, ne présente pas véritablement de particularités, si ce n'est que le droit de la mer ne s'applique sur cet espace qu'à la condition que les riverains le veuillent[6]; ce qui est le cas en mer Noire. La « Constitution des

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[1] OUDOT DE DAINVILLE A., « La mer Noire : espace stratégique », *Revue Défense Nationale*, n° 850, mai 2022, pp. 33-36.

[2] SUR S., « Ouverture – Le réveil de la mer Noire », *Questions internationales*, n° 72, mars/avril 2015, pp. 2-10, p. 6.

[3] Il faut également faire mention de l'Abkhazie, entité séparatiste reconnue par une poignée d'Etats dont les côtes bordent la mer Noire.

[4] CIJ, 3 février 2009, *Délimitation maritime en mer Noire (Roumanie c. Ukraine)*, *Rec. CIJ*, 2009, p. 68, para. 15 et p. 100, para. 112.

[5] La partie IX de la CNUDM est consacrée aux mers fermées et semi-fermées. Selon l'article 122, « on entend par « mer fermée » ou « semi-fermée » un golf, un bassin ou une mer entouré par plusieurs Etats et relié à une autre mer ou à l'océan par un passage étroit, ou constitué, entièrement ou principalement, par les mers territoriales et les zones économiques exclusives de plusieurs Etat ». La consécration juridique du concept de mer fermée et semi-fermée est une des innovations de la CNUDM.

[6] THOUVENIN J.-M., ANDIA F. , « Les mers fermées ou semi-fermées en droit international (dans la Convention de Montego Bay) », *in* AURESCU B. *et al*. (dir.), *Actualité du droit des mers fermées et semi-fermées*, Pedone, Paris, 2019, pp. 5-13, p. 13.

océans » est donc pleinement applicable sur cette étendue maritime pour les Etats qui l'ont ratifiée.

Comme le précise expressément son préambule, la CNUDM « constitue une contribution importante au maintien de la paix »[7]. Elle ne se contente pas de poser des normes, mais vise également à en assurer le respect. En cas de difficultés d'interprétation ou d'application de la convention, les parties ont en effet la possibilité de se tourner vers différents organes juridictionnels[8] dont le Tribunal international du droit de la mer (TIDM).

Etabli en 1996, le TIDM est une juridiction internationale permanente et universelle, spécialisée dans le règlement des différends survenant dans les espaces marins. Depuis son établissement, il a rendu de nombreuses décisions qui ont permis de mettre un terme à des litiges relatifs au droit de la mer[9]. Par sa jurisprudence, le Tribunal a également clarifié plusieurs dispositions de la CNUDM. Il a incontestablement trouvé sa place parmi les différents organes juridictionnels chargés du règlement des différends[10]. Dès lors que la mer Noire est le théâtre de tensions croissantes entre ses Etats riverains – en particulier mais pas seulement –, le TIDM est une institution qui pourrait être mise à profit. Le Tribunal a du reste d'ores et déjà eu à statuer sur une demande en indication de mesures conservatoires dont les faits à l'origine du différend s'étaient déroulés en mer Noire[11]. Avant de revenir brièvement sur cette affaire (III), il convient de s'interroger sur les liens qui unissent les Etats riverains de cet espace maritime au Tribunal (I) ainsi que sur les potentialités que recèlent le TIDM pour régler les litiges en lien avec la mer Noire (II).

1. Les liens entre le Tribunal international du droit de la mer et les Etats riverains de la mer Noire

Avec l'Autorité internationale des fonds marins et la Commission des limites du plateau continental, le TIDM est l'une des trois institutions établies par la CNUDM. Si les Etats riverains de la mer Noire sont en très grande majorité partie

[7] CNUDM, préambule para. 1.

[8] Art. 287 de la CNUDM.

[9] V. notamment : GAUTIER Ph., « The ITLOS Experience in Dispute Resolution » in *The Future of Ocean Governance and Capacity Development. Essays in Honor of Elisabeth Mann Borgese (1918-2002)*, Brill/Nijhoff, 2019, pp. 181-188.

[10] V. notamment sur le sujet : LE FLOCH G. (dir.), *Les vingt ans du Tribunal international du droit de la mer*, Pedone, Paris, 2018.

[11] V. l'*Affaire relative à l'immobilisation de trois navires militaires ukrainiens (Ukraine c. Fédération de Russie)*, mesures conservatoires, 25 mai 2019.

à cette convention[12], il en est un qui s'y refuse et qui ne l'a même pas signé. La Turquie demeure en effet résolument tiers à ce traité. Pour autant, à l'exception des dispositions de la convention à l'égard desquelles cet Etat dispose du statut d'objecteur persistant[13], celles qui ont acquis la qualité de normes coutumières lui sont opposables[14]. Cela ne vaut toutefois pas pour les dispositions de nature institutionnelle. La Turquie est donc un Etat tiers vis-à-vis du TIDM. Elle ne peut par exemple pas prendre part à l'élection des juges.

Telle n'est en revanche pas la situation des cinq autres Etats riverains qui participent chaque année pleinement à la réunion des Etats parties à la CNUDM. Plusieurs des ressortissants de ces Etats ont au demeurant été élus juges. Ce fut le cas du juge Yankov pour la Bulgarie[15] et du juge Kulyk pour l'Ukraine[16] ainsi que des juges Kolodkin, Golitsyn et Koldkin pour la Russie[17]. Depuis l'établissement du Tribunal, il y a ainsi toujours eu un Russe parmi les juges élus[18]. Le juge Golitsyn a même accédé à la présidence du Tribunal en 2014 pour trois ans.

Le TIDM n'est pas le seul mode de règlement juridictionnel des différends qu'envisage la CNUDM. Faisant suite au célèbre compromis de Montreux[19], les Etats parties ont la possibilité de choisir entre la Cour internationale de Justice (CIJ), le Tribunal international du droit de la mer et l'arbitrage. Les tribunaux

[12] La convention a respectivement été ratifiée par la Géorgie le 21 mars 1996, par la Bulgarie le 15 mai 1996, par la Roumanie le 17 décembre 1996, par la Russie le 12 mars 1997 et par l'Ukraine le 26 juillet 1999.

[13] La Turquie revendique le statut d'objecteur persistant concernant l'extension de la mer territoriale à 12 milles nautiques. V. GREEN, J. A., *The Persistent Objector Rule in International Law*, Oxford University Press, Oxford, 2016, p. 53.

[14] Les positions de la Turquie fluctuent cependant en fonction de la zone considérée : mer Noire ou mer Egée. V. sur la question : KARIOTIS Th. C., « A Greek Exclusive Economic Zone in the Aegean Sea », *Mediterranean Quarterly*, 2007, vol. 18, n° 3, pp. 56-71.

[15] Le juge Alexander Yankov a siégé de 1996 à 2011.

[16] Le juge Markiyan Z. Kulyk a été élu en 2011 et réélu en 2020.

[17] Anatoly Lazarevich Kolodkin a siégé de 1996 à 2008, Vladimir Vladimirovich Golitsyn de 2008 à 2017. Roman Kolodkin siège depuis 2017. Il est à noter que le juge Kolodkin a été élu au Tribunal dès 1996 alors que la Russie n'a ratifié la convention qu'en 1997.

[18] Il en est allé de même à la CIJ jusqu'en novembre 2023. Lors des dernières élections à la CIJ, le candidat russe a été battu par le candidat roumain.

[19] En 1975, juste avant que ne s'ouvre la troisième session de la conférence, un groupe de juristes s'est réunit à Montreux de façon tout à fait informelle. Cette réunion fut doublement décisive pour le règlement des différends. C'est à cette occasion que fut entérinée, d'une part, la proposition visant à instituer une juridiction spécialisée dans le domaine du droit de la mer et, d'autre part, à l'initiative du professeur Riphagen, le principe du libre choix des organes de règlement des différends. Sur le compromis de Montreux v. notamment : ROSENNE Sh, *An International Law Miscellany*, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1993, pp. 495-506 ; RANJEVA R., « Aux origines de l'article 287.1 *b)* de la Convention des Nations Unies sur le droit de la mer », in *La Mer et son droit. Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec*, Pedone, Paris, 2003, pp. 545-550, pp. 546-549.

arbitraux disposent cependant d'une compétence obligatoire résiduelle. En effet, non seulement « un Etat Partie qui est partie à un différend non couvert par une déclaration en vigueur est réputé avoir accepté la procédure d'arbitrage prévue à l'annexe VII », mais en outre « si les parties en litige n'ont pas accepté la même procédure pour le règlement du différend, celui-ci ne peut être soumis qu'à la procédure d'arbitrage prévue à l'annexe VII, à moins que les parties n'en conviennent autrement »[20]. En d'autres termes, en l'absence de déclaration ou en cas de désaccords sur le mode de règlement des différends, les parties doivent se tourner vers l'arbitrage. Il leur est néanmoins possible de s'entendre par voie de compromis pour porter l'affaire devant un autre forum juridictionnel. Cette dernière possibilité a pu profiter à différentes reprises au Tribunal international du droit de la mer. Autrement dit, des affaires initiées devant un tribunal arbitral constitué en application de l'annexe VII ont été *in fine* transférées par compromis au TIDM[21].

Des cinq Etats riverains de la mer Noire et partie à la CNUDM, seule la Bulgarie a opté pour la compétence du Tribunal[22]. La Russie et l'Ukraine retiennent la compétence du Tribunal, mais uniquement dans le cadre très étroit de la procédure en prompte mainlevée de l'immobilisation du navire ou prompte libération de son équipage[23]. Pour le reste, elles renvoient à l'arbitrage. Enfin, la Géorgie

[20] Art. 287, para. 3 et para. 5 de la CNUDM. Sur la question du choix entre l'arbitrage et une juridiction internationale : WOOD M., « Choosing between Arbitration and a Permanent Court : Lessons from Inter-State Cases », *ICSID Review*, 2017, pp. 1-16.

[21] V. par exemple l'*Affaire du navire « San Padre Pio » (No. 2) (Suisse/Nigéria)* et l'affaire du *Différend relatif à la délimitation de la frontière maritime entre Maurice et les Maldives dans l'océan Indien (Maurice/Maldives)*.

[22] Déclaration de la Bulgarie du 2 décembre 2015 : « Conformément aux dispositions du paragraphe 1 de l'article 287 de la Convention des Nations Unies sur le droit de la mer, la République de Bulgarie déclare par la présente qu'elle accepte la compétence du Tribunal international du droit de la mer pour le règlement des différends relatifs à l'interprétation ou à l'application de la Convention » [https://www.itlos.org/].

[23] Déclaration faite lors de la signature par l'Union des Républiques socialistes soviétiques : « L'Union des Républiques socialistes soviétiques déclare que, conformément à l'article 287 de la Convention des Nations Unies sur le droit de la mer, elle choisit comme principal moyen pour le règlement des différends relatifs à l'interprétation ou à l'application de la Convention, le tribunal arbitral constitué conformément à l'annexe VII. Pour l'examen des questions relatives à la pêche, la protection et la préservation du milieu marin, la recherche scientifique marine et la navigation, y compris la pollution par les navires ou par immersion, l'URSS choisit le tribunal arbitral spécial constitué conformément à l'annexe VIII. L'URSS reconnaît la compétence du tribunal international du droit de la mer prévue à l'article 292 pour les questions relatives à la prompte mainlevée de l'immobilisation d'un navire ou la prompte mise en liberté de son équipage » [https://www.itlos.org/]. Déclaration faite lors de la signature par la République socialiste soviétique d'Ukraine : « La République socialiste soviétique d'Ukraine déclare que, conformément à l'article 287 de la Convention des Nations Unies sur le droit de la mer, elle choisit comme principal moyen pour le règlement des différends relatifs à l'interprétation ou à l'application de la Convention le tribunal

et la Roumanie n'ont fait aucune déclaration sur le fondement de l'article 287[24]. Elles sont donc supposées avoir implicitement reconnu la compétence des tribunaux arbitraux.

Enfin, même si la situation ne s'est encore jamais rencontrée en pratique, rien n'empêche un Etat tiers de se tourner vers le Tribunal dans l'hypothèse où un accord international confèrerait à ce dernier une compétence acceptée par toutes les parties au différend[25]. Bien que non partie à la Convention des Nations unies sur le droit de la mer, la Turquie pourrait par ce biais de la sorte être impliquée dans une affaire devant le TIDM. Tout cela reste très théorique dans la mesure où la Turquie n'est partie à aucun des accords multilatéraux ou bilatéraux conférant une compétence au Tribunal. Cette situation est regrettable car le TIDM offre de nombreuses potentialités pour trancher des questions juridiques relatives au droit de la mer.

2. Les nombreuses potentialités du Tribunal international du droit de la mer pour régler des diffé-rends en lien avec la mer Noire

Bien qu'elle puisse être étendue par certains accords internationaux, la compétence matérielle du TIDM se limite principalement à la Convention des Nations Unies sur le droit de la mer. Si certains des différends qui opposent les Etats riverain de la mer Noire dépassent le cadre de cette convention, d'autres en revanche s'y rapportent directement. Dans cette perspective, le TIDM apparaît comme un *forum* juridictionnel intéressant. Il dispose en effet d'une procédure efficace (A) et d'une jurisprudence qui fait autorité (B).

2.1. Une procédure efficace

Le Tribunal international du droit de la mer, comme le souligna son premier Président, a, dès son institution, fait part de sa détermination à « rendre sa pro-

arbitral constitué conformément à l'annexe VII. Pour l'examen des questions relatives à la pêche, la protection et la préservation du milieu marin, la recherche scientifique marine et la navigation, y compris la pollution par les navires et par immersion, la RSS d'Ukraine choisit le tribunal arbitral spécial constitué conformément à l'annexe VIII. La République socialiste soviétique d'Ukraine reconnaît la compétence du tribunal international du droit de la mer, prévue à l'article 292, pour les questions relatives à la prompte mainlevée de l'immobilisation d'un navire ou la prompte mise en liberté de son équipage » [https://www.itlos.org/].

[24] L'une et l'autre ont en revanche souscrit à la déclaration facultative d'acceptation de la juridiction obligatoire de la Cour internationale de Justice. La Bulgarie en a fait de même [https://www.icj-cij.org/].

[25] V. art. 20, para. 2 du Statut du Tribunal. V. sur la question BORÉ-EVENO V., « Les Etats et le Tribunal international du droit de la mer : le choix du Tribunal », *in* LE FLOCH G. (dir.), *op. cit.*, pp. 61-83, pp. 74-75.

cédure aussi rapide, aussi peu onéreuse et aussi efficace que possible, tout en veillant au respect des règles de la procédure judiciaire et du droit qu'ont les parties d'avoir toute latitude de présenter leurs preuves et arguments »[26]. A cette fin, l'article 49 de son Règlement pose comme principe cardinal que la procédure « est conduite sans retard ni dépenses inutiles »[27]. Il s'agit, pour reprendre les mots de l'ancien juge Treves, de « l'étoile polaire de la politique judiciaire du Tribunal »[28]. Pour donner corps à ce principe, le TIDM s'est efforcé de rationnaliser sa procédure au maximum en l'enserrant par des délais relativement brefs[29]. L'ensemble des acteurs du procès, à commencer par le Tribunal lui-même, est astreint à une véritable discipline procédurale. Cette politique judiciaire produit ses résultats puisque le TIDM rend ses décisions dans des délais tout à fait raisonnables[30], ce qui ne peut que renforcer son attractivité pour ses potentiels jus-

[26] Déclaration du Président du Tribunal, M. Thomas MENSAH, au titre du point 38 de l'ordre du jour devant la cinquante-troisième session de l'Assemblée générale des Nations Unies, le 24 novembre 1998.

[27] Sur cette disposition : MENSAH Th., « Article 49 » *in* CHANDRASEKHARA RAO P. , GAUTIER Ph. (dir.), *The Rules of the International Tribunal for the Law of the Sea: A Commentary*, Martinus Nijhoff Publishers, Leiden/Boston, 2006, pp. 144-145; COT J.-P., « In Praise of Urgency: Reflections on the Practice of ITLOS », in *International Courts and the Development of International Law. Essays in Honour of Tullio Treves*, Asser Press, The Hague, 2013, pp. 269-280, p. 269.

[28] TREVES T., « Le Règlement du Tribunal international du droit de la mer », *Annuaire français du droit international*, 1997, vol. 43, pp. 341-367, p. 345. V. également en ce sens : ANDERSON D., « The Effective Administration of International Justice – Early Practice of the International Tribunal for the Law of the Sea », in *Liber Amicorum Tono Eitel*, Springer, Berlin, 2003, pp. 529-542, p. 536 ; AZNAR GOMEZ M. J. , « El Tribunal Internacional del Derecho del Mar », *in* VÁZQUEZ GÓMEZ E. M., ADAM MUÑOZ M. D., CORNAGO PRIETO N. (dir.), *El arreglo pacífico de controversias internacionales*, Tirant lo Blanch, Valencia, 2013, pp. 371-412, pp. 374-383.

[29] De manière générale, durant la phase écrite, les délais pour le dépôt de chaque pièce de procédure ne doivent pas excéder six mois : art. 59, para. 1 du Règlement. La phase orale, quant à elle, doit s'ouvrir au plus tard dans les six mois suivant la clôture de la procédure écrite : art. 69 du Règlement. Les délais retenus ne sont toutefois pas intangibles. Le Tribunal doit pouvoir faire preuve de flexibilité. Pour autant, il n'est fait droit à une demande de prorogation de délai qu'à la condition qu'elle soit dûment justifiée : art. 59, para. 2 du Règlement pour la procédure écrite, article 69, para. 1 et para. 2 pour la procédure orale. De manière générale, l'article 46 du Règlement rappelle que « les délais pour l'accomplissement d'actes de procédure (…) doivent être aussi brefs que la nature de l'affaire le permet ». Les procédures incidentes ont également fait l'objet d'un encadrement par des délais.

[30] Le Tribunal a même accepté de siéger un dimanche (le 29 mars 2015) « bien que cette option ait engendrée des frais additionnels pour le Tribunal (notamment le paiement d'heures supplémentaires pour le personnel présent), elle a été préférée afin de garantir la présence des juges *ad hoc* et des conseils principaux des deux parties, sans retarder l'audition de l'affaire » : MIRON A., « Le coût de la justice internationale : enquête sur les aspects financiers du contentieux interétatique », *Annuaire français du droit international*, 2014, vol. 60, pp. 241-277, p. 249.

ticiables[31]. De plus, en réduisant la durée des procédures, le TIDM en diminue nécessairement le coût.

Toute affaire portée devant une juridiction internationale entraîne des frais conséquents pour les parties. Ceux-ci sont encore plus importants dans le cadre d'une procédure arbitrale car elles doivent non seulement supporter les frais inhérents qu'induits tout procès[32], mais aussi à part égale rémunérer les arbitres et le personnel du greffe ainsi que louer des locaux[33]. Les dépenses institutionnelles du TIDM sont en revanche financées par le budget de l'Assemblée des Etats parties[34]. C'est un aspect qui est loin d'avoir échappé aux Etats. Dans l'affaire du *Virginia G*, par exemple, le Panama a proposé à la Guinée de transférer l'affaire au TIDM « afin de régler le différend sur une base contentieuse mais à moindre frais »[35]. De la même façon, c'est pour cette raison que Saint-Vincent-et-les-Grenadines et la Guinée dans l'affaire du *Saiga (No. 2)* tout comme l'Union européenne et le Chili dans l'*Affaire concernant la conservation et l'exploitation durable des stocks d'espadon dans l'océan Pacifique Sud-Est* ont respectivement transféré leur différend au TIDM[36]. D'aucuns remettent cependant en cause le présupposé selon lequel une procédure arbitrale se révèlerait toujours plus onéreuse qu'une procédure juridictionnelle. Le coût induit par l'arbitrage serait en effet compensé par la rapidité de la procédure[37]. La portée de cet argument mérite d'être relativi-

[31] Comparaison n'est certes pas raison. Néanmoins, il convient d'observer que le TIDM a rendu son avis relatif à la *Demande d'avis consultatif soumise par la Commission des petits Etats insulaires sur le changement climatique et le droit international* le 21 mai 2024 tandis qu'il a fallu attendre le 2 décembre 2024 pour que s'ouvrent les audiences dans l'affaire de la demande d'avis sur les *Obligations des Etats en matière de changement climatique*. Le nombre d'Etat ayant souhaité participer à la procédure consultative devant la CIJ est certes plus élevé que devant le TIDM, mais il faut aussi souligner que le rôle de la Cour est très engorgé et qu'en outre, certaines de ces affaires ont des implications politiques très fortes.

[32] Pour assurer leur défense, les parties doivent prendre en charge la rémunération des agents, des avocats, des conseils et éventuellement des experts. Viennent s'y ajouter des frais de documentation et de recherche, des frais linguistiques et différentes dépenses d'instruction.

[33] En ce sens : AUST A., « Peaceful Settlement of Disputes : A Proliferation Problem ? », in *Law of the Sea, Environmental Law and Settlement of Disputes. Liber Amicorum Judge Thomas A. Mensah*, Nijhoff, Leiden, pp. 131-141, p. 134.

[34] Art. 19, para. 1 du Statut du TIDM. Il ne faut de surcroit pas oublier que la traduction des mémoires et des annexes est prise en charge par le Tribunal. Ce qui constitue un poste non négligeable. V. GAUTIER Ph., « Le regard du greffier sur le Tribunal international du droit de la mer : quelques réflexions sur l'accès au Tribunal », *in* LE FLOCH G. (dir.), *op. cit.*, pp. 365-375, p. 374.

[35] TIDM, *Virginia G*, arrêt, para. 2.

[36] En ce sens : BOYLE A. E., « UNCLOS Dispute Settlement and the Uses and Abuses of Part XV », *Revue Belge de Droit international*, 2014, pp. 182-204, p. 190.

[37] Philippe Sands rappelle que la CIJ a mis sept ans à rendre son arrêt dans l'affaire du *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)* alors qu'il n'aura fallu que trois ans et demi au tribunal arbitral pour rendre sa décision dans l'affaire de la *Sentence arbitrale relative à la délimitation de la frontière maritime*

sée devant le Tribunal dans la mesure où celui-ci est capable de régler prestement des différends. L'affaire du *Golfe du Bengale* en est une bonne illustration. Le 8 octobre 2009, le Bangladesh a engagé deux procédures d'arbitrage : l'une contre l'Inde, l'autre contre le Myanmar. La première a été tranchée par un tribunal arbitral constitué sous l'égide de la Cour permanente d'arbitrage (CPA) en cinq ans[38] tandis que la seconde a été transférée au Tribunal international du droit de la mer et réglée en moins de trois ans. Autrement dit la procédure menée à Hambourg a été plus rapide et donc encore moins couteuse[39].

Le TIDM dispose également de procédures d'urgence extrêmement efficaces. En premier lieu, le Tribunal est investi du pouvoir de prescrire des mesures conservatoires[40]. La CNUDM lui reconnaît une double compétence à cet effet[41]. Il peut comme n'importe quelle autre juridiction internationale, connaître d'une demande en prescription de mesures conservatoires à partir du moment où il est saisi d'un recours principal[42]. Cependant, à la différence des autres juridictions internationales, il peut également être saisi d'une demande en prescription de mesures conservatoires alors que l'examen du fond du différend a été confié à un autre organe juridictionnel[43]. En effet, en l'absence d'accord entre les parties sur la détermination d'une cour compétente pour connaître d'une demande en indication de mesures conservatoires dans les quinze jours suivant sa soumission, l'examen de cette dernière peut être confié au Tribunal international du droit de la mer. Il bénéficie donc d'une compétence exclusive et résiduelle. Il lui est ainsi arrivé à différentes reprises d'être saisi d'une demande en indication de mesures conservatoires alors que l'affaire au fond avait été portée devant un tribunal arbitral constitué en application de l'annexe VII de la CNUDM. C'est notamment à ce titre qu'il a été conduit à se prononcer sur une demande en indication de me-

entre le Guyana et le Surinam. Il doute dès lors « *that there would be much material difference in cost between a case that runs at the International Court of Justice for seven years and one that runs in arbitration for three and a half years* » : SANDS Ph., « Of Courts and Competition : Dispute Settlement under Part XV of UNCLOS », in *Contemporary Developments in International Law. Essays in Honour of Budislav Vukas*, Leiden/Boston, Brill/Nijhoff, 2015, pp. 789-798, p. 795. Alina MIRON observe toutefois qu'une étude pratique montre que devant les tribunaux arbitraux « il n'y a pas de corrélation entre la durée de la procédure et les frais engagés par les Etats » : *op. cit.*, p. 253.

[38] CPA, *Délimitation de la frontière maritime entre le Bengladesh et l'Inde dans le golfe du Bengale*, SA du 7 juillet 2014.

[39] En revanche, la procédure dans l'affaire de l'*Arbitrage entre la Barbade et la République de Trinité-et-Tobago, relatif à la délimitation de la zone économique exclusive et du plateau continental entre ces deux pays* a duré un peu plus de deux ans.

[40] Sur la question : VIRZO R., « La finalité des mesures conservatoires du Tribunal international du droit de la mer », *in* G. LE FLOCH (dir.), *op. cit.*, pp. 145-161.

[41] V. TREVES T., « Article 290. Provisional measures », *in* PROELSS A. (ed.), *United Nations Convention on the Law of the Sea. A Commentary*, Beck/Hart/Nomos, 2017, pp. 1866-1878.

[42] V. art. 290, para. 1 de la CNUDM.

[43] V. article 290, para. 5 de la CNUDM.

sures conservatoires dans l'*Affaire relative à l'immobilisation de trois navires militaires ukrainiens (Ukraine c. Fédération de Russie)*. En second lieu, le Tribunal international du droit de la mer a très largement été amené à façonner la procédure en prompte mainlevée de l'immobilisation du navire ou prompte libération de son équipage. Cette procédure, consacrée à l'article 292 de la CNUDM, est sans équivalent dans le contentieux international[44]. Elle permet, dans ses grandes lignes, d'obtenir la libération d'un navire détenu par un Etat étranger dès le dépôt d'une caution raisonnable ou d'une autre garantie financière. Certaines conditions doivent toutefois être remplies. Le navire doit, d'une part, battre pavillon d'un Etat partie à la Convention et, d'autre part, avoir été arraisonné par un autre Etat partie pour certains types d'infractions limitativement énumérées[45]. Le Tribunal international du droit de la mer a été saisi à dix reprises sur le fondement de cette disposition. Il l'a notamment été à ce titre une fois par la Russie[46] et à deux reprises par le Japon contre la Russie[47]. Les faits ayant donné lieu à l'immobilisation du navire ne s'étaient cependant pas déroulés en mer Noire. Si en théorie, cette procédure n'est pas l'apanage du seul TIDM, en pratique elle l'est très largement. C'est la seule juridictions devant laquelle des demandes en prompte mainlevées ont été soumises. Cette situation s'explique tout à la fois par la compétence résiduelle dont dispose le Tribunal international du droit de mer ainsi que par le désintérêt manifesté par la CIJ envers cette procédure[48].

Le TIDM est par conséquent un organe juridictionnel qui dispose de nombreux atouts pour régler efficacement des différends relatifs au droit de la mer. C'est un organe qui est d'autant plus attractif que sa jurisprudence fait incontestablement autorité.

[44] Sur cette procédure v. notamment : ANDERSON D. H., « Investigation, Detention, and Release of Foreign Vessels under the U.N. Convention on the Law of the Sea of 1982 and Other International Agreements », *International Journal of Marine and Coastal Law*, vol. 11, n° 2, 1996, pp. 165-177 ; MENSAH Th. A., « The Tribunal and the Prompt Release of Vessels », *IJMCL*, vol. 22, n° 3, 2007, pp. 425-449 ; AKL J., « Jurisprudence for the International Tribunal for the Law of the Sea in Prompt Release Proceedings », in *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum*, 2012, Brill, 2 vol., vol. II, pp. 1591-1614 ; LEMEY M., « La procédure en prompte mainlevée », *in* LE FLOCH G. (dir.), *op. cit.*, pp. 163-179.

[45] V. les articles 73, 220 et 226 de la Convention.

[46] *Affaire du « Volga » (Fédération de Russie c. Australie)*, prompte mainlevée.

[47] V. *Affaire du « Tomimaru » (Japon c. Fédération de Russie), prompte mainlevée* et *Affaire du « Hoshinmaru » (Japon c. Fédération de Russie)*, prompte mainlevée.

[48] Contrairement au Tribunal, la CIJ n'a nullement pris en compte cette procédure dans son Règlement. Selon le juge Vukas, si les négociateurs ont confié la compétence résiduelle au TIDM et non à la CIJ, c'est sans doute parce qu'ils ont considéré que le Tribunal pourra agir à la vitesse demandée : VUKAS B., « The International Tribunal for the Law of the Sea : Some Features of the New International Judicial Institution », *Indian Journal of International Law*, vol. 37, n° 3, 1997, pp. 372-387, pp. 378-379. Il est dès lors possible de s'interroger sur sa capacité à examiner efficacement une demande en prompte mainlevée

2.2. L'autorité incontable de la jurisprudence du Tribunal international du droit de la mer

Les décisions du Tribunal sont dans l'ensemble équilibrées et juridiquement fondées. Elles ont du reste été bien accueillies par les parties[49] et par la doctrine[50] – si ce n'est peut-être à ses débuts certains arrêts en prompte mainlevée[51].

Le TIDM a par exemple très largement réussi son entrée dans le domaine de la délimitation maritime[52]. Il a su s'inscrire dans les pas de la CIJ et contribuer à faire évoluer de manière positive la jurisprudence de cette dernière. Son

[49] L'arrêt du *Golfe du Bengale* a par exemple été très bien accueilli par les deux parties. « Ainsi, le Bangladesh a félicité le Tribunal pour l'issue fructueuse de sa première affaire relative à la délimitation maritime, en déclarant que le fait que le Tribunal ait rendu son arrêt 28 mois après l'introduction de l'instance "témoignait d'une efficacité sans précédent". Il a également remercié le Tribunal d'avoir traité l'affaire de manière "transparente, juste et équitable". Pour sa part, le Myanmar a déclaré que l'arrêt en l'affaire No. 16 était "juste, équitable et équilibré pour les deux Etats" et avait mis fin à un différend qui durait depuis plus de 36 années. Il a fait observer que l'arrêt couvrait tous les aspects de la Convention et représentait "un jalon majeur et historique en droit international, en particulier s'agissant de la Convention des Nations Unies sur le droit de la mer" » : Allocution prononcée par le Président Shunji YANAI au titre du point 75 (a) de l'ordre du jour intitulé « Les océans et le droit de la mer », 11 décembre 2012, para. 19. Voy. également en ce sens : BUNDY R. R., « Asian Perspectives on Inter-State Litigation », *in* KLEIN N. (ed.), *Litigating International Law Disputes. Weighing the Options*, Cambridge University Press, Cambridge, 2014, pp. 148-165, p. 164 ; PELLET A., « Le regard du Conseil sur le Tribunal international du droit de la mer », *in* LE FLOCH G., *op. cit.*, pp. 383-389.

[50] V. notamment CHURCHILL R., « The Bangladesh/Myanmar Case : Continuity and Novelty in the Law of Maritime Boundary Delimitation », *Cambridge Journal of International and Comparative Law*, vol. 1, n° 1, 2012, pp. 137-152 ; GIRAUDEAU G., « La remarquable entrée en scène du TIDM dans le contentieux de la délimitation maritime. L'arrêt du 14 mars 2012 relatif au différend entre le Bangladesh et le Myanmar », *Annuaire du droit de la mer*, 2012, vol. 17, pp. 93-118. Pour une approche plus nuancée : ELFERINK A G. O., « ITLOS's Approach to the Delimitation of the Continental Shelf beyond 200 Nautical Miles in the Bangladesh/Myanmar Case : Theoretical and Practical Difficulties », in *Contemporary Developments in International Law. Essays in Honour of Budislav Vukas*, Brill/Nijhoff, Leiden/Boston, 2015, pp. 230-249.

[51] Telle que mise en œuvre par le Tribunal à ses débuts, la procédure en prompte mainlevée a plutôt contribué à privilégier les intérêts de l'Etat du pavillon sur ceux de l'Etat côtier. V. notamment : ROS N., « La France, le TIDM et les légines : Acte III. A propos de l'arrêt rendu le 20 avril 2001 dans l'affaire du *Grand Prince* », *Annuaire du droit de la mer*, 2000, vol. 5, pp. 245-283 ; QUÉNEUDEC J.-P., « A propos de la procédure de prompte mainlevée devant le Tribunal international du droit de la mer », *Annuaire du droit de la mer*, vol. 7, 2002, p. 79-92 ; ROTHWELL D. R., STEPHENS T., « Illegal Southern Ocean Fishing and Prompt Release : Balancing Coastal and Flag State Rights and Interests », *International Comparative Law Quarterly*, 2004, vol. 53, n° 1, pp. 171-187 ; TREVES T., « Fisheries Disputes : Judicial and Arbitral Practice since the Entry into Force of UNCLOS », in *Contemporary Developments in International Law. Essays in Honour of Budislav Vukas*, Brill/Nijhoff, Leiden/Boston, 2015, pp. 328-336, p. 333.

[52] Sur la jurisprudence du TIDM en matière de délimitation maritime : DEL CASTILLO L., « ITLOS Consolidation on Maritime Délimitation », in *L'ordre juridique international au XXIème siècle. Ecrits en l'honneur du Professeur Marcelo Gustavo Kohen*, Brill/Nijhoff, 2023, pp. 741-756.

fait d'arme majeur réside bien entendu dans l'extension du plateau continental au-delà des 200 milles nautiques[53]. Compte tenu de ces paramètres, il pourrait être tout à fait judicieux que les Etats riverains de la mer Noire s'en remettent au juge de Hambourg pour régler leurs différends maritimes. En dépit, en effet, de plusieurs délimitations conventionnelles[54] et d'une délimitation juridictionnelle[55], le processus de délimitation des espaces maritimes en mer Noire n'est toujours pas achevé[56]. A partir du moment où les négociations patinent, il pourrait être judicieux de se tourner vers le juge international. Si la Cour internationale de Justice a une très longue expérience dans le domaine des délimitations maritimes, elle doit aujourd'hui faire face à un engorgement sans précédent[57]. Dès lors que la jurisprudence du Tribunal international du droit de la mer est peu ou prou la même que celle de la CIJ, les parties qui souhaiteraient confier leur différend international relatif à une délimitation maritime peuvent avoir tout intérêt à se tourner vers ce dernier. Cela pourrait être par exemple le cas de la Bulgarie et de la Roumanie. En revanche, compte tenu de la situation entre la Russie et l'Ukraine, il n'est évidemment guère envisageable que ces deux Etats belligérants fassent appel au juge de Hambourg – ni même de La Haye – pour délimiter leur frontière maritime[58].

La jurisprudence du TIDM est loin de se cantonner au contentieux des délimitations maritimes. Au gré des affaires qui lui ont été soumises, le Tribunal a été amené à statuer sur des questions aussi diverses et variées que le droit de pour-

[53] V. *Golfe du Bengale*, paras. 182-184. Sur cette question v. notamment. : EIRIKSSON G., « The Bay of Bengal Case before the International Tribunal for the Law of the Sea », in *Law of the Sea. From Grotius to the International Tribunal for the Law of the Sea. Liber Amicorum Judge Hugo Caminos*, Brill/Nijhoff, Leiden/Boston, 764 p., pp. 512-528, pp. 524-527.

[54] V. notamment sur la question : AURESCU B., « Délimitations par voie d'accord en mer Noire », *in* AURESCU B. *et al.* (dir.), *Actualité du droit des mers fermées et semi-fermées*, Pedone, Paris, 2019, 214 p., pp. 41-48. Sur les accords de délimitations : https://www.un.org/depts/los/LEGISLATIONANDTREATIES/black_sea.htm.

[55] ANDERSON D. H., « Maritime Delimitation in the Black Sea Case (Romania v. Ukraine) », *Law and Practice of International Courts and Tribunals*, 2009, vol. 9, pp. 305-327, p. 306.

[56] STRIBIS I., « Grandes questions actuelles de droit de la mer en mer Noire », *in* ROS N., GALLETTI F. (dir.), *Le droit de la mer face aux « Méditerranées ». Quelle contribution de la Méditerranée et des mers semi-fermées au droit internationale de la mer ?*, Napoli, Editoriale scientifica, 2016, pp. 183-240, p. 189. V. pour l'état des délimitations *ibid*., pp. 189-193.

[57] Au 28 novembre 2024, 22 affaires étaient inscrites au rôle de la CIJ.

[58] « Le recours à une juridiction internationale pour faire solutionner les différends entre la Russie et l'Ukraine, et la Russie et la Géorgie, reste pour le moment théorique étant donné les circonstances de ces espèces et l'approche générale de la Russie concernant les tribunaux internationaux » : DINESCU C., « Délimitation juridictionnelle en mer Noire », *in* AURESCU B. *et al*. (dir.), *op. cit.*, pp. 67-74, p. 73.

suite[59], le recours à la force en mer[60], le soutage des navires de pêche étrangers dans la zone économique exclusive[61], le lien substantiel et la reconnaissance de la nationalité des navires[62], les obligations de l'Etat du pavillon et de l'Etat côtier en matière de pêche illicite, non déclarée et non réglementée (dite pêche INN)[63] ainsi que sur celles des Etats qui patronnent des entités dans la Zone[64]. A travers ses différents arrêts en prompte mainlevée, il a largement précisé les contours de cette procédure *sui generis* et notamment les critères permettant de déterminer le caractère raisonnable d'une caution[65].

De plus, si en raison de sa compétence spécialisée, le TIDM a toujours été saisi de différends se rapportant à la CNUDM, cela ne l'a pas empêché d'aborder des problématiques plus générales du droit international public. Dans le domaine de la responsabilité internationale, il est revenu par exemple sur la réparation du préjudice résultant de la confiscation illicite d'un navire[66], sur la responsabilité des Etats du pavillon[67] et sur ceux qui patronnent dans la Zone[68]. Il a aussi apporté des éclaircissements sur la nature et l'étendue de l'obligation de « veiller à » comme sur celle de *due diligence*[69]. Dans le domaine des droits de l'homme, le Tribunal a appelé à différentes reprises au respect des considérations élémentaires d'humanité[70] ainsi qu'à une procédure régulière[71]. Par ce biais, il a intégré aux droits de la mer des normes relatives au droit international des droits de l'homme. Après le droit de la mer, c'est toutefois indiscutablement

[59] V. *Saiga (No. 2)*, paras. 139 et s.

[60] *Ibid*., para. 156 et *Virginia G*, para. 360.

[61] V. *Virginia G*, para. 225-236.

[62] V. *Saiga (No. 2)*, paras. 80 et s. et *Virginia G*, para. 113 et paras. 322-323. V. nottament : ALOUPI N., « La jurisprudence du Tribunal international du droit de la mer et l'Etat du pavillon », *in* LE FLOCH (G.), *op. cit.*, pp. 223-244.

[63] V. *Demande d'avis consultatif soumise par la CSRP*, *passim*. paras. 106-140.

[64] V. *Responsabilités et obligations des Etats qui patronnent dans la Zone*, paras. 110-122.

[65] V. notamment *Camouco*, para. 67. Sur la question v. notamment : GALLALA I., « La notion de caution raisonnable dans la jurisprudence du Tribunal International du Droit de la Mer », *Revue générale de droit international public*, 2001, vol. 105, pp. 931-968 ; TANAKA Y., « Prompt Release in the United Nations Convention on the Law of the Sea: Some Reflections on the ITLOS Jurisprudence », *Netherlands International Law Review*, vol. 51, n° 2, 2004, pp. 237-271, p. 258-270.

[66] V. *Virginia G*., paras. 435-436.

[67] *Demande d'avis consultatif soumise par la CSRP*, paras. 146-148.

[68] *Responsabilités et obligations des Etats qui patronnent dans la Zone*, paras. 64-71 et paras. 176-204.

[69] *Ibid.*, paras. 107-120, *Demande d'avis consultatif soumise par la CSRP*, paras 126-139 et *Demande d'avis consultatif soumise par la Commission des petits Etats insulaires sur le changement climatique et le droit international*, avis, 21 mai 2024, paras. 234-243 et paras. 254-258.

[70] V. *Saiga (No. 2)*, para. 155, *Enrica Lexie*, para. 133, *Louisa*, para. 155 et *Juno Trader*, para. 77.

[71] Voy. *Louisa*, para. 155 et *Juno Trader*, para. 77.

dans le domaine de l'environnement[72] que le Tribunal a apporté sa contribution la plus significative[73]. Le Tribunal a par exemple très largement œuvré pour la promotion de l'approche de précaution[74]. Il a également apporté plusieurs précisions sur les études d'impact qui doivent être menées par les Etats[75]. Il a de même cherché à promouvoir les principes de coopération ainsi que de préservation et de protection de l'environnement marin[76]. Dans son avis sur la *Demande d'avis consultatif soumise par la Commission des petits Etats insulaires sur le changement climatique et le droit international*, il a été amené à détailler l'étendu de ce principe de préservation et de protection de l'environnement marin ainsi que son contenu dans le cadre du réchauffement des océans et de l'élévation du niveau de la mer, ainsi que de l'acidification des océans[77]. Il a notamment considéré que les émissions anthropiques de GES dans l'atmosphère constituent une « pollution du milieu marin » au sens de l'article 1, paragraphe 1, alinéa 4, de la CNUDM[78]. Il en a conclu qu'en vertu de l'article 194, paragraphe 1, de la Convention des Nations Unies sur le droit de la mer, « les Etats Parties à la Convention ont l'obligation spécifique de prendre toutes les mesures nécessaires pour prévenir, réduire et maîtriser la pollution marine due

[72] Il est vrai que contrairement à d'autres juridictions, il dispose d'un mandat clair en ce sens. Il peut notamment en application de l'article 290, paragraphe 1 de la Convention prescrire des mesures conservatoires afin de prévenir des dommages graves au milieu marin. Sur la question : LE FLOCH G., *L'urgence devant les juridictions internationales*, Pedone, Paris, 2008, pp. 51-53.

[73] V. not. : RASHBROOKE G., « The International Tribunal for the Law of the Sea : A Forum for the Development of Principles of International Environmental Law ? », *International Journal of Marine and Coastal Law*, vol. 19, n° 4, 2004, pp. 515-535 ; PROELSS A., « The Contribution of the ITLOS to Strengthening the Regime for the Protection of the Marine Environment », *in* DEL VECCHIO A., VIRZO R. (ed.), *Interpretation of the United Nations Convention on the Law of the Sea by International Courts and Tribunals*, Cham, Springer, 2019, pp. 93-106.

[74] V. notamment : *Thon à nageoire bleue*, para. 77, *Usine MOX*, para. 84 ; *Responsabilités et obligations des Etats qui patronnent dans la Zone*, para. 135.

[75] *Responsabilités et obligations des Etats qui patronnent dans la Zone*, para. 148. Sur la question : L. Pineschi, « The Duty of Environmental Impact Assessment in the First ITLOS Chamber's Advisory Opinion : Towards the Supremacy of the General Rule to Protect and Preserve the Marine Environment as a Common Value », in *International Courts and the Development of International Law. Essays in Honour of Tullio Treves*, The Hague, Asser Press, 2013, 951 p., p. 425-439 ; T. Scovazzi, « Where the Judge Approaches the Legislator : Some Cases Relating to Law of the Sea », in *ibid.*, pp. 299-309, pp. 307-308.

[76] *Usine MOX*, para. 82 ; TIDM, ordonnance du 23 décembre 2010, para. 76. V. également : *Délimitation maritime entre le Ghana et la Côte d'Ivoire dans l'océan Atlantique (Ghana/Côte d'Ivoire)*, mesures conservatoires, ordonnance du 25 avril 2015, para. 69.

[77] *Demande d'avis consultatif soumise par la Commission des petits Etats insulaires sur le changement climatique et le droit international*, para. 400.

[78] *Ibid*., para. 178.

aux émissions anthropiques de gaz à effet de serre et de s'efforcer d'harmoniser leurs politiques à cet égard »[79].

Ces quelques exemples tirés de différents domaines du droit international attestent que le TIDM est une juridiction qui est loin de se cantonner au seul droit de la mer. Comme les autres juridictions internationales, et compte tenu de la spécificité de l'ordre juridique international, il est amené à exercer un rôle de suppléance normative[80]. Il est parfaitement compétent pour dénouer nombre de différends qui se posent ou pourraient se poser en mer Noire. A titre d'exemple, il pourrait en aller de la sorte des différends relatifs à l'environnement marin. En attendant, il est arrivé une fois au Tribunal de statuer sur une affaire dont les faits à l'origine du différend se sont produits en mer Noire.

3. La mer Noire dans la jurisprudence du Tribunal international du droit de la mer

Outre se référer dans sa jurisprudence à l'arrêt de la Cour internationale de Justice en l'affaire de la *Délimitation maritime en mer Noire*[81], le Tribunal international du droit de la mer a été amené à connaître d'une affaire contentieuse, dont les faits à l'origine du différend, se sont déroulés en mer Noire, près du détroit de Kertch. Il s'agit de l'*Affaire relative à l'immobilisation de trois navires militaires ukrainiens (Ukraine c. Fédération de Russie)*.

Le 25 novembre 2018, deux navires d'artillerie (le *Berdyansk* et le *Nikopol*) et un remorqueur de mer (le *Yani Kapu*) de la marine ukrainienne sont interceptés et immobilisés par les autorités de la Fédération de Russie. Les vingt-quatre membres d'équipage qui se trouvaient à leur bord sont quant à eux arrêtés et placés en détention. Il leur est reproché d'avoir pénétré illégalement dans les eaux territoriales russes bordant la Crimée, en violation de l'article 91 du Code de procédure pénale russe qui condamne le délit aggravé de franchissement illégal de la frontière étatique. Kiev conteste cette version des faits et prétend que les trois navires ne faisaient que transiter dans la mer territoriale de l'Ukraine, et en

[79] *Ibid*., para. 143.

[80] Sur cette notion : CONDORELLI L., « L'autorité des décisions des juridictions internationales permanentes », *in* SFDI, *La juridiction internationale permanente*, Pedone, Paris, 1987, pp. 277-313, p. 312.

[81] V. *Différend relatif à la délimitation de la frontière maritime entre le Bangladesh et le Myanmar dans le golfe du Bengale (Bangladesh/Myanmar)*, para. 185, para. 233, para. 264 et para. 326 ; *Différend relatif à la délimitation de la frontière maritime entre le Ghana et la Côte d'Ivoire dans l'océan Atlantique (Ghana/Côte d'Ivoire)*, paras. 360-361, para. 388, para. 452, para. 533 ; *Différend relatif à la délimitation de la frontière maritime entre Maurice et les Maldives dans l'océan Indien (Maurice/Maldives)*, para. 97.

tout état de cause, qu'exercer leur droit de passage inoffensif dans les eaux territoriales, conformément à l'article 17 de la Convention de Montego Bay. Le 31 mars 2019, l'Ukraine a initié une procédure sur le fondement de l'article 287 de la CNUDM devant un tribunal arbitral de l'annexe VII[82]. A l'expiration du délai de quinze jours, elle a sollicité au TIDM des mesures conservatoires en application de l'article 290, paragraphe 5 de la convention[83]. Le Tribunal a rendu son ordonnance en indication de mesures conservatoires le 25 mai 2019 accédant très largement à la demande ukrainienne[84].

Comme dans l'affaire de l'*Arctic Sunrise*[85], la Russie n'a pas jugé bon de participer à cette phase de la procédure. Elle avait cependant pris le temps d'exposer sa position par écrit[86].

Depuis son institution en 1996, le TIDM a rendu de nombreuses ordonnances en indication de mesures conservatoires[87]. L'intérêt majeur de celle rendue dans

[82] V. sur cette procédure la contribution d'Andrea CALIGIURI dans le présent ouvrage.

[83] L'Ukraine avait en outre introduit une requête interétatique devant la Cour européenne des droits de l'homme le 29 novembre 2018 et avait obtenu des mesures provisoires le 4 décembre 2018. V. requête n° 55855/18.

[84] Sur cette ordonnance : COLLIN C., « L'Affaire relative à l'immobilisation de trois navires militaires ukrainiens (Ukraine c. fédération de Russie) : l'ordonnance du TIDM en prescription de mesures conservatoires du 25 mai 2019 », *Annuaire français de droit international*, vol. 65, 2019, pp. 169-182 ; NERI K., « L'ordonnance du Tribunal international du droit de la mer dans l'affaire relative à l'immobilisation de trois navires ukrainiens (Ukraine c. Fédération de Russie) du 25 mai 2019 », *Annuaire du droit de la mer*, vol. 24, 2019, pp. 103-117 ; WHITE M., « Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation) (Provisional Measures) (International Tribunal for the Law of the Sea, Case No 26, 25 May 2019) », *Australian and New Zealand Maritime Law Journal*, 2019, vol. 33 ; GÂLEA I., « The Interpretation of 'Military Activities', as an Exception to Jurisdiction : the ITLOS Order of 25 May 2019 in the Case Concerning the Detention of Three Ukrainian Naval Vessels », *Romanian Journal of International Law*, vol. 21, 2021, pp. 31-57 ; ORAL N., « Ukraine v. The Russian Federation: Navigating Conflict over Sovereignty under UNCLOS », *International Law Studies*, 2021, pp. 478-508 ; SHI X, CHANG Y.-C., « Order of Provisional Measures in Ukraine versus Russia and Mixed Disputes concerning Military Activities », *Journal of International Dispute Settlement*, 2020, vol. 11, pp. 278-294.

[85] *Affaire de l'« Arctic Sunrise » (Royaume des Pays-Bas c. Fédération de Russie)*, mesures conservatoires, 22 novembre 2013, para. 9.

[86] *Immobilisation de trois navires militaires ukrainiens,* para. 28 (ce qui n'avait pas été le cas dans l'affaire de l'*Arctic Sunrise*).

[87] Sur les 33 affaires inscrites au rôle du TIDM, des mesures conservatoires ont été sollicitées dans douze d'entre elles V. TIDM, *Navire « SAIGA » (No. 2) (Saint-Vincent-et-les Grenadines c. Guinée)*, mesures conservatoires, ordonnance du 11 mars 1998, *TIDM Recueil* 1998, p. 24 ; *Thon à nageoire bleue (Nouvelle-Zélande c. Japon ; Australie c. Japon)*, mesures conservatoires, ordonnance du 27 août 1999, *TIDM Recueil* 1999, p. 280 ; *Usine MOX (Irlande c. Royaume-Uni)*, mesures conservatoires, ordonnance du 3 décembre 2001, *TIDM Recueil* 2001, p. 95 ; *Travaux de poldérisation à l'intérieur et à proximité du détroit de Johor (Malaisie c. Singapour)*, mesures conservatoires, ordonnance du 8 octobre 2003, *TIDM Recueil* 2003, p. 10 ; *Navire « Louisa » (Saint-Vincent-et-les Grenadines c. Royaume d'Espagne)*, mesures conservatoires, ordonnance du 23 décembre 2010, *TIDM Recueil* 2008-2010, p. 58 ; *« ARA Libertad » (Argentine c. Ghana)*,

l'*Affaire relative à l'immobilisation de trois navires militaires ukrainiens* réside dans les précisions que les juges de Hambourg apportent à l'expression « activités militaires ».

Si la Convention des Nations Unies sur le droit de la mer consacre à titre de principe le règlement obligatoire des différends, elle n'en permet pas moins d'y déroger dans certaines circonstances. L'article 298 de la Convention reconnaît en effet aux Etats parties, la possibilité de soustraire de la compétence des organes juridictionnels, certaines catégories de litige. Il en va notamment ainsi des différends se rapportant aux « activités militaires ». Or, lorsqu'elles ont respectivement ratifié la convention des Nations Unies sur le droit de la mer, l'Ukraine et la Russie ont l'une et l'autre précisément fait une déclaration aux termes de laquelle elles entendaient écarter de la compétence des organes de règlement des différends les litiges concernant « des activités militaires »[88]. Compte tenu des faits de l'espèce, il n'est dès lors guère étonnant que la Russie ait excipé de l'incompétence du Tribunal arbitral pour connaître du litige qui lui avait été soumis.

Aux termes de l'article 290, paragraphe 5 de la CNUDM, le TIDM ne peut indiquer de mesures conservatoires qu'après s'être assuré de la compétence *prima facie* du Tribunal arbitral saisi à titre principal. L'examen de cette condition impliquait donc pour les juges de Hambourg de s'interroger sur la question de savoir si les faits à l'origine du litige portaient sur des « activités militaires ». Pour ce faire, ils ont au préalable dû se questionner sur le contenu de cette expression que la CNUDM ne définit pas et qui n'avait guère été explicitée par la jurisprudence internationale antérieure[89]. Tout au plus pouvait-on se fonder sur l'affaire de l'*Arbitrage relatif à la mer de Chine méridionale (Philippines c. Chine)* dans laquelle le tribunal arbitral avait laissé entendre que la présence d'un ou de plusieurs navires militaires pouvait en soi caractériser la situation comme un « dif-

mesures conservatoires, ordonnance du 15 décembre 2012, *TIDM Recueil* 2012, p. 332 ; « Arctic Sunrise » (Royaume des Pays-Bas c. Fédération de Russie), mesures conservatoires, ordonnance du 22 novembre 2013, *TIDM Recueil* 2013, p. 230 ; *Délimitation de la frontière maritime dans l'océan Atlantique (Ghana/Côte d'Ivoire)*, mesures conservatoires, ordonnance du 25 avril 2015, *TIDM Recueil* 2015, p. 146 ; *« Enrica Lexie » (Italie c. Inde)*, mesures conservatoires, ordonnance du 24 juillet 2015, *TIDM Recueil* 2015, p. 176 ; *Immobilisation de trois navires militaires ukrainiens (Ukraine c. Fédération de Russie)*, mesures conservatoires, ordonnance du 25 mai 2019, *TIDM Recueil* 2018-2019, p. 283 ; *Navire « San Padre Pio » (Suisse c. Nigéria)*, mesures conservatoires, ordonnance du 6 juillet 2019, *TIDM Recueil* 2018-2019, p. 375 ; *Affaire du « Zheng He » (Luxembourg c. Mexique)*, mesures conservatoires, ordonnance du 27 juillet 2024.

[88] V. la déclaration émise le 12 mars 1997 par la Russie et le 26 juillet 1999 par l'Ukraine.

[89] Sur la question : TANAKA Y., « Military Activities or Law Enforcement Activities?: Reflections on the Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen », *The Korean Journal of International and Comparative Law*, vol. 11, 2023, pp. 1-26.

férend concernant des activités militaires »[90]. Dans son ordonnance, le Tribunal international du droit de la mer ne s'est pas arrêté à cette analyse. Il s'est au contraire interrogé sur la question de savoir si les actes allégués « se sont inscrits dans le cadre d'une opération militaire ou d'une opération d'exécution forcée »[91]. La détermination de la nature de l'opération ne saurait reposer, selon le Tribunal, « uniquement sur l'emploi de navires militaires ou de navires chargés de missions de police en mer pour mener les activités en question »[92]. Il faut au contraire se livrer à une « une évaluation objective de la nature des activités en question, en tenant compte des circonstances pertinentes de chaque cas »[93]. En l'espèce, en dépit du fait que tous les navires impliqués étaient bel et bien militaires et que le contexte était celui de tensions récurrentes entre l'Ukraine et la Russie, le Tribunal a considéré que la situation ne tombait pas dans le champ d'application de l'exception de l'article 298. Selon les juges de Hambourg, il ne s'agissait pas d'activités militaires, mais d'une opération d'exécution forcée. Cette précision a été relativement bien accueillie par la doctrine[94].

Un mois après le prononcé de l'ordonnance, ainsi qu'elles en avaient l'obligation, les parties ont remis des rapports de suivi au TIDM. A la lecture de ces derniers, il apparaissait que la Russie n'avait pas respecté les mesures conservatoires prescrites par le Tribunal en dépit de leur caractère contraignant. Dans son arrêt au fond, le Tribunal arbitral aura peut-être l'occasion de revenir sur cette question et d'en tirer les conséquences juridiques[95].

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[90] « Although, as far as the Tribunal is aware, these vessels were not military vessels, China's military vessels have been reported to have been in the vicinity. In the Tribunal's view, this represents a quintessentially military situation, involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another. As these facts fall well within the exception, the Tribunal does not consider it necessary to explore the outer bounds of what would or would not constitute military activities for the purposes of Article 298(1)(b) » : CPA,12 juillet 2016, *Arbitrage relative à la mer de Chine méridoniale (Philippines c. Chine)*, PCA Case Nº 2013-19, para. 1161.

[91] *Immobilisation de trois navires militaires* ukrainiens, para. 67.

[92] *Ibid*., para. 64.

[93] *Ibid*., para. 66.

[94] Dans sa sentence sur les exceptions préliminaires du 27 juin 2022, le tribunal arbitral a retenu une position plus restrictive. Il est vrai que l'on ne peut pas parler de divergence de jurisprudence dans la mesure où le niveau de contrôle est différent. L'ordonnance du TIDM est provisoire et ne saurer préjuger d'une façon ou d'une autre le fond du différend. En pratique, néanmoins, cela donne une impression autre. Ce n'est du reste pas la première fois que ce type de situation se produit.

[95] Les audiences sur le fond et sur les questions en suspens relatives à la compétence et à la recevabilité se sont achevées le 5 octobre 2024. L'affaire est désormais en délibéré.

Bien que présentant de nombreux atouts, le TIDM est une institution qui demeure très largement inexploitée de manière générale, mais aussi et en particulier s'agissant des Etats de la mer Noire. Outre la fonction contentieuse, il est significatif de constater que ces Etats n'ont pas vraiment cherché à s'impliquer dans le cadre des procédures consultatives organisées par le Tribunal. La Roumanie – et encore uniquement au stade de la phase écrite – et la Russie sont les deux seuls Etats à avoir participé à la première procédure consultative relative à la demande d'avis sur les *Responsabilités et obligations des Etats qui patronnent des personnes et des entités dans le cadre d'activités menées dans la Zone*. Aucun n'a en revanche participé à la demande d'avis présentée par la Commission des petits Etats insulaires. Cela est quelque peu étonnant et témoigne sans doute du relatif désintérêt dont les Etats riverains de la mer Noire font preuve à l'égard du Tribunal international du droit de la mer.

DISPUTES IN THE BLACK SEA BEFORE ARBITRAL TRIBUNALS CONSTITUTED IN ACCORDANCE WITH ANNEX VII OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

*Mariko Kawano**

1. Introduction

Ukraine referred two disputes, hereafter referred to as the "*Black Sea* cases", respectively to the arbitral tribunal constituted by Annex VII of the United Nations Convention on the Law of the Sea, hereafter referred to as the "UNCLOS" against the Russian Federation, hereafter referred to as "Russia." The cases are as follow: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine* v. *The Russian Federation),* hereafter referred to as the *"Coastal State Rights* case"[1]; and *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, hereafter referred to as the "*Detention of Ukrainian Vessels* case."[2] Although the award on the merits has not been rendered in both cases yet, both Arbitral Tribunals decided to bifurcate the procedures and rendered the awards concerning the preliminary objections of Russia. The findings of the Tribunals reflect the salient issues of jurisdiction of international courts and tribunals in accordance with Part XV of the UNCLOS. In this paper, the principal issues argued in those cases are analyzed in light of the functions of the dispute settlement procedures under Part XV of the UNCLOS.

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[1] *Dispute Concerning Coastal State Rights in the Black Sea, and Sea of Azov, and Kerch Strait (Ukraine* v. *The Russian Federation), PCA Case No. 2017-06, Procedural Order No. 3, 20 August 2018*, and *Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020.*

[2] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine* v. *The Russian Federation), PCA Case No. 2019-28, Procedural Order No. 2, 27 October 2022*, and *Award Concerning the Preliminary Objections of the Russian Federation, 27 June 2022*.

2. Compulsory Jurisdiction of International Courts and Tribunals in Accordance with Section 2 of Part XV of the UNCLOS

Before analyzing the findings of the Arbitral Tribunals in the *Black Sea* cases, basic conditions for reference of the dispute to the compulsory regime under Part XV of the UNCLOS are to be explained briefly. Part XV establishes a particular dispute settlement regime allowing international courts and tribunals to have compulsory jurisdiction to render a judgment or award with legally binding effect. Article 286, the first provision of Section 2 of Part XV, sets out the following three conditions for international courts and tribunals to exercise compulsory jurisdiction: first, existence of a dispute concerning the interpretation or application of the UNCLOS; second, no settlement by recourse to Section 1; and third, no application of the limitations and exceptions under Section 3. The Applicant is required to satisfy these conditions in order to enjoy its right to refer a dispute to the compulsory procedures under Section 2.[3] A dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties

The nature and characterization of a dispute is the key to the first condition. The dispute concerning the interpretation or application of a convention means a disagreement on a point of law or fact, a conflict of legal views or interests between Parties regarding specific provisions of that convention. Regarding this condition, the issues relating to a "mixed dispute" is particularly important. As "the land dominates the sea,"[4] many maritime disputes intrinsically link with the dispute concerning the sovereignty over the land territory and the settlement of the latter dispute is the precondition of the settlement of the former. When the provisions in Part XV were drafted, there were concerns with the abuse of the compulsory procedure to refer disputes concerning sovereignty over land territory and those concerns were fully considered in the formulating the final text.[5] It is basically understood that the UNCLOS provides rules solely concerning the law of the sea, and the issues relating to sovereignty or territorial boundaries cannot be considered as a dispute concerning the interpretation or application of the UNCLOS. However, it should be admitted that the States have tried to discuss those territorial issues in relation to the rules provided by the UNCLOS.[6] Thus, certain rules for the treatment of a "mixed dispute" have been sophisticated through the precedents, which are discussed in the *Coastal State Rights* case.

[3] KLEIN, K., *Dispute Settlement in the UN Convention on the Law of the Sea*, 2005, pp. 52-59; TREVES, T., "Article 286", in PROELSS, A., *United Nations Convention on the Law of the Sea: A Commentary*, 2017, pp. 1844-1849.

[4] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 51, para. 96.

[5] NORDQUIST, M.H. et al. (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. V, 1989, p. 117, para. 298.20 and pp.120-121, para. 298.23.

[6] OXMAN, B. "Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals", in ROTHWELL, R. (ed.), *Oxford Handbook on the Law of the Sea*, Oxford University Press, Oxford, 2015, p. 400.

The second condition has been discussed in the context of respect for the freedom of choice of peaceful means to settle international disputes provided by Articles 2(3) and 33 of the UN Charter.[7] In accordance with Articles 281 and 282, when there is a certain instrument expressing the intent of the disputing parties to settle their dispute by means other than the compulsory procedures of the UNCLOS, that choice is to be respected. Article 283 provides for the obligation of the disputing Parties to exchange views concerning peaceful means to settle their dispute.[8]

The third condition is provided in response to States' reluctance to become a State Party to the UNCLOS because of the enhanced compulsory nature of Section 2, Part XV. As Article 309 of the UNCLOS provides that "no reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention," Once a State becomes a party to the UNCLOS, it cannot exclude the compulsory dispute settlement regime under Section 2 of Part XV. Thus, the drafters decided to balance the need for the establishment of effective compulsory dispute settlement regime, on the one hand, and the protection of essential interests of States, on the other by clarifying the certain categories of disputes, which relate to essential interests of States.[9]

The international tribunals have been rather strict in interpreting the terms of the limitations and optional exceptions under Articles 297 and 298 in the precedents, through which certain standards have been formulated in interpretation of respective phrases. The optional exceptions in accordance with Russia's declaration in accordance with Article 298[10] were core issues of Russia's objections concerning the jurisdiction of the Tribunals in the *Detention of Ukrainian Vessels* case.

[7] *Ibidem*, pp. 396-397. See also: RAO, P.C. and GAUTIER, P. *The International Tribunal for the Law of the Sea: Law, Practice and Procedure*, 2018, pp. 90-92.

[8] KLEIN, *op. cit.*, pp. 31-52; OXMAN, *op. cit.*, pp. 401-403; SERDY, A., "Article 279," "Article 280," "Article 281," "Article 282," and "Article 283", in PROELSS, A., *United Nations Convention on the Law of the Sea: A Commentary*, 2017, pp. 1813-1838; and KITTICHAISAREE, K., *The International Tribunal for the Law of the Sea*, 2021, pp. 3-5.

[9] KLEIN, *op. cit.*, pp. 121-123; OXMAN, *op. cit.*, pp. 403-408; SERDY, "Article 297" and "Article 298", in PROELSS, A., *United Nations Convention on the Law of the Sea: A Commentary*, 2017, pp. 1906-1932; RAO and GAUTIER, *op. cit.*, pp. 93-100; and KITTICHAISAREE, *op. cit.*, pp. 80-105.

[10] The Declaration of Russia is as follows:

"The Russian Federation declares that, in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations," https://www.itlos.org/en/main/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-298/.

3. Submissions of Ukraine in the *Black Sea* Cases

The nature of the disputes reflected in the Notification and Statement of Claim plays a particularly important role in the *Black Sea* cases. To be precise, those texts are indicated here.

3.1. Coastal State Rights Case

In the *Coastal State Rights* case, Ukraine requested the Tribunal the adjudgment and declaration concerning the following submissions in the Notification and Statement of Claim:

> "a. Ukraine has the exclusive right to engage in, authorize, and regulate exploration and exploitation of natural resources, including drilling related to hydrocarbons, in the areas of the Black Sea and Sea of Azov where the Russian Federation did not challenge Ukraine's jurisdiction and rights prior to February 2014; any such activities engaged in or authorized by the Russian Federation in those areas are not compatible with the Convention and constitute internationally wrongful acts for which the Russian Federation bears international responsibility;
> b. The Russian Federation's Federal Law 161-FZ of 29 June 2015, and the Decree of 31 August 2015 (#916), are not compatible with the Convention and constitute internationally wrongful acts for which the Russian Federation bears international responsibility;
> c. Ukraine has the exclusive right to authorize and regulate fishing in the areas of the Black Sea and Sea of Azov where the Russian Federation did not challenge Ukraine's jurisdiction and rights prior to February 2014; any fishing activities engaged in or authorized by the Russian Federation in those areas are not compatible with the Convention and constitute internationally wrongful acts for which the Russian Federation bears international responsibility;
> d. The Russian Federation shall refrain from preventing Ukrainian vessels from exploiting in a sustainable manner the living resources in the areas of the Black Sea and Sea of Azov where the Russian Federation did not challenge Ukraine's jurisdiction and rights prior to February 2014; any efforts by the Russian Federation to interfere with Ukrainian vessels in these areas are not compatible with the Convention and constitute internationally wrongful acts for which the Russian Federation bears international responsibility;
> e. Order #273 of the Ministry of Agriculture of the Russian Federation is not compatible with the Convention and constitutes an internationally wrongful act for which the Russian Federation bears international responsibility;
> f. Ukraine has the right to passage through the Kerch Strait; any restrictions placed by the Russian Federation on Ukrainian transit through the Kerch Strait is not compatible with the Convention and constitutes an internationally wrongful act for which the Russian Federation bears international responsibility;
> g. The Russian Federation shall cooperate with Ukraine in the regulation of the Ker-

ch Strait, including pilotage along the canal in the Kerch Strait; the Russian Federation's failure to cooperate is not compatible with the Convention and constitutes an internationally wrongful act for which the Russian Federation bears international responsibility;
h. The Russian Federation may not lay a submarine cable, construct a bridge, or construct a pipeline through and across the Kerch Strait from Russian territory to the Crimean Peninsula without Ukraine's consent; any such activities engaged in or authorized by the Russian Federation are not compatible with the Convention and constitute internationally wrongful acts for which the Russian Federation bears international responsibility;
i. The Russian Federation is required to provide all due cooperation to Ukraine in the prevention and preservation of the marine environment, including supplying information relating to any oil spill or other pollution incident in the areas of the Black Sea and Sea of Azov where the Russian Federation did not challenge Ukraine's jurisdiction and rights prior to February 2014, including the reported oil spill in the Black Sea near Sevastopol in May 2016;
j. The Russian Federation may not without Ukraine's consent and cooperation remove from the seabed or otherwise disrupt or disturb archaeological, historical, or cultural objects or heritage found in Ukraine's territorial sea and contiguous zone, including the sunken Byzantine ship located in the Black Sea near Sevastopol and any artifacts associated with it; any such activities engaged in or authorized by the Russian Federation in those areas are not compatible with the Convention and constitute internationally wrongful acts for which the Russian Federation bears international responsibility."[11]

Ukraine further requested the Arbitral Tribunal to order immediate cessation of internationally wrongful actions of Russia, appropriate assurances and guarantees of non-repetition of all internationally wrongful acts and full reparation to Ukraine, including both restitution and monetary compensation.[12]

In its Memorial, Ukraine stated the following submissions:

"a. The Russian Federation has violated Article 2 of the Convention by excluding Ukraine from accessing gas fields in its territorial sea, extracting gas found in such fields, and usurping Ukraine's exclusive jurisdiction over the hydrocarbons in such fields.
b. The Russian Federation has violated Articles 56 and 77 of the Convention by excluding Ukraine from accessing gas fields in its exclusive economic zone and continental shelf, exploring such gas fields, extracting gas found in such fields, and usurping Ukraine's exclusive jurisdiction over the hydrocarbons in such fields.
c. The Russian Federation has violated Articles 2, 56, and 77 by causing proprietary data on the hydrocarbon resources of Ukraine's territorial sea, exclusive economic zone, and continental shelf to be transferred to Russia and to Russian entities.

[11] *Coastal State Rights* case, *supra* note 1, para. 9.
[12] *Ibid*., para. 10.

d. The Russian Federation has violated Articles 2, 56, 58, 77, and 92 of the Convention by unlawfully interfering with Ukraine's exclusive jurisdiction over, and unlawfully taking possession of, Ukrainian-flagged CNG-UA vessels, including mobile jack-up drilling rigs in Ukraine's territorial sea, exclusive economic zone, and continental shelf.
e. The Russian Federation has violated Articles 2, 56, 60, and 77 of the Convention by unlawfully interfering with Ukraine's exclusive jurisdiction over, and unlawfully taking possession of, fixed platforms on Ukraine's territorial sea, exclusive economic zone, and continental shelf.
f. The Russian Federation has violated Articles 2 and 21 of the Convention by excluding Ukraine from accessing fisheries within 12 miles of the Ukrainian coastline, by exploiting such fisheries, and by usurping Ukraine's exclusive jurisdiction over the living resources of its territorial sea.
g. The Russian Federation has violated Articles 56, 58, 61, 62, 73, and 92 of the Convention by excluding Ukraine from accessing fisheries within its exclusive economic zone, by exploiting such fisheries, and by usurping Ukraine's exclusive jurisdiction over the living resources of its exclusive economic zone.
h. The Russian Federation has violated Articles 2, 56, 58, 77, and 92 of the Convention by unlawfully interfering with Ukraine's exclusive jurisdiction over Ukrainian-flagged fishing vessels in Ukraine's territorial sea, exclusive economic zone, and continental shelf.
i. The Russian Federation has violated Articles 2, 21, 33, 56, 58, 73, and 92 of the Convention by unlawfully interfering with the navigation of Ukrainian Sea Guard vessels through Ukraine's territorial sea and exclusive economic zone.
j. The Russian Federation has violated Article 2 of the Convention through its unauthorized and unilateral construction of submarine power cables across the Kerch Strait.
k. The Russian Federation has violated Article 2 of the Convention through its unauthorized and unilateral construction of a submarine gas pipeline across the Kerch Strait.
l. The Russian Federation has violated Article 2 of the Convention through its unauthorized and unilateral construction of the Kerch Strait bridge.
m. The Russian Federation has violated Articles 38 and 44 of the Convention by impeding transit passage through the Kerch Strait as a result of the Kerch Strait bridge.
n. The Russian Federation has violated Articles 43 and 44 of the Convention by failing to share information with Ukraine concerning the risks and impediments to navigation presented by the Kerch Strait bridge.
o. The Russian Federation has violated Articles 123, 192, 194, 204, 205, and 206 of the Convention by failing to cooperate and share information with Ukraine concerning the environmental impact of the Kerch Strait bridge.
p. The Russian Federation has violated Articles 123, 192, 194, 198, 199, 204, 205, and 206 of the Convention by failing to cooperate with Ukraine concerning the May 2016 oil spill off the coast of Sevastopol.
q. The Russian Federation has violated Article 2 of the Convention by interfering with Ukraine's attempts to protect archaeological and historical objects in its territorial sea and by usurping Ukraine's right to regulate with regard to such archaeological and historical objects.

r. The Russian Federation has violated Article 303 of the Convention by unlawfully interfering with Ukraine's exercise of jurisdiction in its contiguous zone and preventing the removal of archaeological and historical objects from the seabed of its contiguous zone.
s. The Russian Federation has violated Article 303 of the Convention by failing to cooperate with Ukraine concerning archaeological and historical objects found at sea.
t. The Russian Federation has violated Article 279 of the Convention by aggravating and extending the dispute between the Parties since the commencement of this arbitration in September 2016, including by completing construction of the Kerch Strait bridge, expanding its hydrocarbon and fisheries activities in Ukraine's territorial sea, exclusive economic zone, and continental shelf, and continuing to disturb and remove archaeological artifacts found in Ukraine's territorial sea and contiguous zone."[13]

Ukraine also requested the Tribunal to order the remedies in the forms of cessation and *restitutio in integrum*, assurance and guarantees of non-repetition, and monetary compensation.[14]

Most submissions are closely related to the rights in the territorial sea, exclusive economic zone and continental shelf and the dispute concerning the territorial dispute concerning the land may constitute the bases for those rights.

3.2. Detention of Ukrainian Vessels case

In the *Detention of Ukrainian Vessels* case, Ukraine requested the Tribunal the adjudgment and declaration concerning the following submissions in its Memorial:

"a. The Russian Federation has violated the complete immunity of three Ukrainian naval vessels in breach of Articles 58, 95, and 96 of the Convention by boarding, arresting, and detaining the *Berdyansk*, the *Nikopol*, and the *Yani Kapu*, as well as the 24 Ukrainian servicemen on board, on the evening of 25 November 2018.
b. The Russian Federation has violated the complete immunity of three Ukrainian naval vessels in breach of Articles 58, 95, and 96 of the Convention by continuing to detain them until 18 November 2019, and repeatedly examining the vessels, removing items from the vessels, and otherwise damaging the *Berdyansk*, the *Nikopol*, and the *Yani Kapu*.
c. The Russian Federation has violated the complete immunity of the three Ukrainian naval vessels in breach of Articles 58, 95, and 96 by continuing to detain until 7 September 2019 the 24 Ukrainian servicemen who were on board on the vessels, and commencing and maintaining criminal prosecutions of those servicemen based on their alleged actions on board the vessels.
d. The Russian Federation has violated the immunity of three Ukrainian naval vessels in breach of Articles 30 and 32 of the Convention by ordering the *Berdyansk*, the

[13] *Coastal State Rights* case, *doc. cit.*, para. 17.
[14] *Ibidem*, para. 18.

Nikopol, and the *Yani Kapu* to stop and attempting to prevent them from exiting the territorial sea.
e. The Russian Federation has violated Articles 290 and 296 of the Convention by failing to comply with the ITLOS provisional measures order.
f. The Russian Federation has violated Article 279 by continuing to aggravate the dispute between the Parties."[15]

Ukraine also requested the Tribunal the following remedies as legal consequences of the violation of international legal rules by Russia: immediate termination of the criminal prosecutions concerned, assurance of non-repetition and monetary compensation.[16]

4. Salient Issues of the Preliminary Objections Raised by Russia

In the *Black Sea* cases, the following three issues are taken up in this article as intrinsic matters concerning the jurisdiction of the Tribunals: First, the nature of the dispute referred to the Arbitral Tribunal in a dispute behind which the sovereignty over land territory is disputed; Second, distinction between military and law enforcement activities as the optional exceptions under Article 298(1)(b) of the UNCLOS; Third, law enforcement activities as the optional exceptions under Article 298(1)(b).

4.1. Nature or Characterization of a Dispute Between the Parties and the Jurisdiction of the Tribunals in the Coastal State Rights *Case*

In the *Coastal State Rights* case, Ukraine argued several rights as a coastal State in the territorial sea, exclusive economic zone, and continental shelf under the UNCLOS. The Tribunal notes that, "while Ukraine formulates its dispute with the Russian Federation in terms of the alleged violation of its rights under the Convention, thus as a dispute concerning the interpretation or application of the Convention, many of its claims in the Notification and Statement of Claims are based on the premise that Ukraine is sovereign over Crimea, and thus the 'coastal State' within the meaning of the various provisions of the Convention it invokes," and "unless the premise that Crimea belongs to Ukraine is to be taken at face value, the claims as advanced by Ukraine cannot be addressed by the Arbitral Tribunal without first examining and, if necessary, rendering a deci-

[15] *Detention of Ukrainian Vessels* case, *doc. cit.*, para. 19.
[16] *Ibidem*, para. 20.

sion on the question of sovereignty over Crimea."[17] The Tribunal also notes that Ukraine emphasizes the sole objective of its claims is the interpretation and application of the UNCLOS in relation to the Russia's actions in the Black Sea, the Sea of Azov, and the Kerch Strait. It further states that even if the real objective of Ukraine's claims concerns the UNCLOS, "the fact remains that a significant part of Ukraine's claims under consideration rests on the premise that Ukraine is sovereign over Crimea, the validity of which is challenged by the Russian Federation."[18]

Although Ukraine took the view that the legal status of Crimea is settled, the Tribunal admitted Russia's view that it is unsettled. Therefore, the Tribunal found that "the question as to which State is sovereign over Crimea, and thus the 'coastal State' within the meaning of several provisions of the Convention invoked by Ukraine, is a prerequisite to the decision of the Arbitral Tribunal on a significant part of the claims of Ukraine." According to the Tribunal, for the purposes of determining the jurisdiction, the characterisation of the dispute raises two questions: first, the scope of the jurisdiction of the Tribunal under Article 288(1) of the UNCLOS, and second, the existence *vel non* of a sovereignty dispute over Crimea.[19]

The Tribunal examined the first question concerning the scope of its jurisdiction under Article 288(1). It admitted that in accordance with the findings in the precedents, a court or tribunal referred to in Article 287 had been circumspect and generally answered in the negative in exercising the jurisdiction, except where a sovereignty issue is "ancillary" to a dispute. In the view of the Tribunal, there was a fundamental difference of the views of the Parties regarding the existence of a prerequisite dispute regarding the sovereignty over Crimea and, thus, it concluded that "the real issue of contention between the Parties in the present case is whether there exists a sovereignty dispute over Crimea, and if so, whether such dispute is ancillary to the determination of the maritime dispute brought before the Arbitral Tribunal by Ukraine."[20]

In examining the question concerning the existence *vel non* of a sovereignty dispute over Crimea, the Tribunal found that "it is clear that the Parties are in disagreement on various points of law and facts relating to the question as to which State is sovereign over Crimea, and thus who is the 'coastal State' within the meaning of various provisions of the Convention invoked by Ukraine."[21]

The Tribunal reached the conclusion that "a sovereignty dispute exists between the Parties." The Tribunal further rejected the arguments of Ukraine con-

[17] *Coastal State Rights* case, *doc. cit.*, para. 152.
[18] *Ibidem*, paras. 153-154.
[19] *Ibidem*, para. 154.
[20] *Ibidem*, paras. 157 and 161.
[21] *Ibidem*, para. 165.

cerning the inadmissibility of Russia's claim because of the principle of non-recognition of the situation in Crimea and the implausibility of Russia's claim of sovereignty.[22] The Tribunal did not accept Ukraine's argument that "the relative weight of the dispute lies with the interpretation or application" of the UNCLOS rather than territorial sovereignty dispute.[23]

For these reasons, the Tribunal concluded that "it lacks jurisdiction over the dispute as submitted by Ukraine to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide expressly or implicitly, on the sovereignty of either Party over Crimea," and that it "cannot rule on any claims of Ukraine presented in its Notification and Statement of Claim and its Memorial which are dependent on the premise of Ukraine being sovereign over Crimea."[24]

(ii) Mixed dispute in the precedents: Cases of the *Chagos Marine Protected Area* and the *South China Sea*

The jurisdiction over a mixed dispute was a principal matter in the *Chagos Marine Protected Area* case, hereafter referred to as the "*Chagos MPA* case."[25] In the sense that there was a dispute between the Parties concerning the sovereignty over the land territory and the Applicant seemed to intend to discuss the issues closely related to the sovereignty over the land territory in the context of a dis-

[22] *Ibidem*, paras. 182 and 189.

[23] *Ibidem*, para. 196.

[24] *Ibidem*, para. 197.

[25] The Submissions of Mauritius were as follows:

"(1) the United Kingdom is not entitled to declare an "MPA" or other maritime zones because it is not the "coastal State" within the meaning of inter alia Articles 2, 55, 56 and 76 of the Convention; and/or

(2) having regard to the commitments that it has made to Mauritius in relation to the Chagos Archipelago, the United Kingdom is not entitled unilaterally to declare an "MPA" or other maritime zones because Mauritius has rights as a "coastal State" within the meaning of inter alia Articles 56(1)(b)(iii) and 76(8) of the Convention; and/or

(3) the United Kingdom shall take no steps that may prevent the Commission on the Limits of the Continental Shelf from making recommendations to Mauritius in respect of any full submission that Mauritius may make to the Commission regarding the Chagos Archipelago under Article 76 of the Convention;

(4) The United Kingdom's purported "MPA" is incompatible with the substantive and procedural obligations of the United Kingdom under the Convention, including inter alia Articles 2, 55, 56, 63, 64, 194 and 300, as well as Article 7 of the 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 of 4 August 1995," *Chagos Marine Protected Area (The Republic of Mauritius* v. *the United Kingdom), Award, 18 March 2015*, para. 158.

pute concerning the interpretation or application of the UNCLOS. The First and Second submission of Mauritius reflected that intention.

In this case, the Arbitral Tribunal examined its jurisdiction on respective submissions and fully considered the issues relating to the dispute behind the dispute before it. Regarding the First Submission, the Arbitral Tribunal, first, decided its nature and concluded that "the Parties' dispute with respect to Mauritius' First Submission is properly characterized as relating to land sovereignty over the Chagos Archipelago" and that "the Parties' differing views on the 'coastal State' for the purposes of the Convention are simply one aspect of this larger dispute."[26] It found that it was possible for a court and tribunal under Article 287 to exercise jurisdiction over land sovereignty when that dispute touches in some ancillary manner on matters regulated the UNCLOS.[27] The Arbitral Tribunal pointed out as follows:

> "[As a general matter, the Tribunal concludes that, where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it. … Where the "real issue in the case" and the "object of the claim" (…) do not relate to the interpretation or application of the Convention, however, an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1)."[28]

The Arbitral Tribunal concluded as follows:

> "The Tribunal does not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention. That, however, is not this case, and the Tribunal therefore has no need to rule upon the issue. The Parties' dispute regarding sovereignty over the Chagos Archipelago does not concern the interpretation or application of the Convention. Accordingly, the Tribunal finds itself without jurisdiction to address Mauritius' First Submission."[29]

Regarding the Second Submission, the Arbitral Tribunal found that "Mauritius' Second Submission must be viewed against the backdrop of the Parties' dispute regarding sovereignty over the Chagos Archipelago" and that "the Tribunal finds that the Parties' underlying dispute regarding sovereignty over the Archipelago is predominant." The Arbitral Tribunal concluded that "notwithstand-

[26] *Ibidem*, para. 212.
[27] *Ibidem*, para. 213.
[28] *Ibidem*, para. 220.
[29] *Ibidem*, para. 221.

ing the difference in presentation, the Tribunal concludes that Mauritius' Second Submission is properly characterized as relating to the same dispute in respect of land sovereignty over the Chagos Archipelago as Mauritius' First Submission" and that it lacked jurisdiction to address the Second Submission.[30]

In the *South China Sea* case, it was also obvious that the Philippines had a dispute concerning the sovereignty over maritime features as well as maritime areas and activities in the South China Sea. Thus, the whole dispute was a mixed dispute. It is possible to say that the Philippines, fully noting the restriction of the scope of the jurisdiction of the Arbitral Tribunal, formulated its submissions strategically to avoid the issues concerning the sovereignty over the land territory in these arbitral proceedings.[31] The Arbitral Tribunal stated that "the Philippines has challenged the existence and extent of the maritime entitlements claimed by China in the South China Sea"

[30] *Ibidem*, paras. 228-230.

[31] The submissions of the Philippines in its Memorial were as follows:

"1) China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those permitted by the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention");

2) China's claims to sovereign rights and jurisdiction, and to "historic rights", with respect to the maritime areas of the South China Sea encompassed by the so-called "nine-dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under UNCLOS;

3) Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf;

4) Mischief Reef, Second Thomas Shoal and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and are not features that are capable of appropriation by occupation or otherwise;

5) Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines;

6) Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but their low-water line may be used to determine the baseline from which the breadth of the territorial sea of Namyit and Sin Cowe, respectively, is measured;

7) Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf;

8) China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf;

9) China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines;

10) China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal;

11) China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal;

12) China's occupation and construction activities on Mischief Reef

(a) violate the provisions of the Convention concerning artificial islands, installations and structures;

and that "this is not a dispute over maritime boundaries."[32] Thus, the Arbitral Tribunal gave the decision on respective submission by indicating the submission concerned was not the dispute concerning the sovereignty or maritime delimitation.[33]

The approach of these two Arbitral Tribunals were different. While the Arbitral Tribunal in the *Chagos MPA* case decided its jurisdiction over the mixed dispute by assessing the ancillary nature or predominance of the dispute concerning sovereignty, the Arbitral Tribunal in the *South China Sea* case distinguished the legal status of and entitlement over the maritime features, on the one hand and the dispute concerning sovereignty or maritime boundaries. The approach of the Arbitral Tribunal in the *Coastal State Rights* case took the approach of the Arbitral Tribunal in the *Chagos MPA* case in the sense that the ancillary nature of the land territory dispute was examined.

(iii) Function of arbitral tribunal

In the *Coastal State Rights* case, after the award concerning the preliminary objections, Ukraine filed a revised Memorial as the Arbitral Tribunal requested.[34]

(b) violate China's duties to protect and preserve the marine environment under the Convention; and

(c) constitute unlawful acts of attempted appropriation in violation of the Convention;

China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal;

14) Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:

(a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;

(b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal; and

(c) endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal; and

15) China shall desist from further unlawful claims and activities,"

South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, *International Arbitral Awards*, Vol. XXXIII (2020), pp. 40-42, para. 101.

Submission No. 11 was amended by the Philippines in a letter on 30 November 2015 with leave of the Tribunal granted on 16 December 2015 read as follows:

"11) China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef,"

South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China, Award, 12 July 2016, *International Arbitral Awards*, Vol. XXXIII (2020), p. 180 and p. 473, para. 815.

[32] *South China Sea* case, *Award of 2015*, *sent. cit.*, p. 65, para. 157.

[33] *Ibidem*, pp. 143-150, paras. 397-412.

[34] Ukraine agreed to submit revised Memorial and the Arbitral Tribunal decided the new schedule for the proceedings, Procedural Order N° 7, Regarding the Revised Procedural Timetable for Further Proceedings, 21 February 2021.

Ukraine amended its submissions in the oral pleadings held from 23 September 2024.[35]

It is necessary to point out the form of the conclusion of the Arbitral Tribunal in the *Coastal State Rights* case is different from those in the cases of the *Chagos MPA* and the *South China Sea* regarding the treatment of the submissions. In the cases of the *Chagos MPA* and the *South China Sea*, Arbitral Tribunals determined their jurisdiction on the respective submissions while in the *Coastal State Rights* case, the Arbitral Tribunal decided its jurisdiction concerning the whole dispute referred to it and did not clarify its findings of respective submission. In the *Coastal State Rights* case, the Arbitral Tribunal stated as follows: "it is in the interest of procedural fairness and expedition for Ukraine to revise its Memorial so as to take full account of the scope of, and limit to, the Arbitral Tribunal's jurisdiction as determined in the present Award, before the Russian Federation is called upon to respond in a Counter-Memorial."[36]In order to respond to this request, Ukraine was requried to reconsider and reformulate its submissions completely.

There are not so many precedents of international courts or tribunals to order (or request) the Applicant to reconsider or reformulate its submissions. In the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, the ICJ requested the Applicant to reformulate its submissions in order to cover the whole dispute between the Parties.[37] In this case, there existed special circumstances. The dispute referred to the ICJ in this case had a long history and both disputing Parties, initially agreed to refer this dispute by filing the Special Agreement. Although they continued negotiations bilaterally and through Tripartite Committee, Qatar decided to refer the dispute unilaterally to the ICJ before reaching finally an agreement with Bahrain regarding the contents of the dispute.[38] It founded the jurisdiction of the Court upon two agreements between the Parties stated to have been concluded in December 1987 and December 1990 respectively, the subject and scope of the commitment to jurisdiction being determined, according to the Applicant, by a formula proposed by Bahrain to Qatar on 26 October 1988 and accepted by Qatar in December 1990.[39] The ICJ concluded that the Minutes of 25 December 1990 constituted an international agreement creating rights and obligations for the Parties.[40] However, the ICJ found that "the submissions in the Application by Qatar comprises only some of the elements

[35] Verbatim records of the opening and closing statements of the Parties are available on https://pca-cpa.org/en/cases/149/ (last visited 27 January 2025).

[36] *Coastal State Rights* case, *doc. cit.*, para. 198.

[37] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I. C. J. Reports 1994*, p. 127, para. 41(3).

[38] *Ibidem*, pp. 116-120, paras. 15-20.

[39] *Ibidem*, p. 114, para. 3.

[40] *Ibidem*, p. 122, para. 30.

of the subject-matter intended to be comprised in the Bahraini formula."[41] Thus, the ICJ decided "to afford the Parties the opportunity to ensure the submission to the Court of the entire dispute as it is comprehended within the 1990 Minutes and the Bahraini formula."[42] After this Judgment, Qatar reformulated and filed its submissions and the ICJ was satisfied with the new submissions filed by Qatar.[43] Thus, it rendered the final Judgment on those new submissions covering a whole dispute.[44] It is possible to say that the Arbitral Tribunal in the Coastal State Rights case tried to contribute to the settlement of the dispute referred to it under the condition of restricted scope of its jurisdiction. Even if the Arbitral Tribunal is competent to take up limited aspects of the dispute, the arbitral proceedings as such may contribute to the peaceful settlement of the dispute between the Parties.

4.2. Optional Exception of Military Activities in the Detention of Ukrainian Vessels *Case*

(i) Difference in evaluation of the circumstances in the Order of the ITLOS and in the Award of the Arbitral Tribunal

In the *Detention of Ukrainian Vessels* case, the principal objection of Russia concerning the jurisdiction of the Arbitral Tribunal was the applicability of the optional exception under Article 298(1)(b). Russia argued that because of its declaration in accordance with Article 298(1), dispute concerning military activities should be excluded from the jurisdiction of the Arbitral Tribunal while Ukraine contended that its claims were based on "Russia's unlawful exercise of jurisdiction in a law enforcement context."[45] That objection was raised both in the Oder prescribing provisional measures before the International Tribunal for the Law of the Sea, hereafter referred to as the "ITLOS," and in the Award concerning preliminary objections before the Arbitral Tribunal.

In the arguments before the ITLOS, the applicability of the optional exception of military activities under Article 298(1)(b) constituted the principal objection of Russia concerning the jurisdiction *prima facie*. The ITLOS, first, pointed out that the "distinction between military and law enforcement activities cannot be based solely on whether naval vessels or law enforcement vessels are employed in the

[41] *Ibidem*, p. 124, para. 36.

[42] *Ibidem*, p. 125, para. 38.

[43] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I. C. J. Reports 1995*, p. 25, para. 48.

[44] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I. C. J. Reports 2001*, p. 40.

[45] *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine* v. *Russian Federation), Request for the Prescription of Provisional Measures, Order, 25 May 2019*, p. 299, para. 63.

activities in question" because the traditional distinction between those vessels "has become considerably blurred." The ITLOS also noted the subjectivity and variance with the actual conduct of the characterization by the disputing Parties.[46] Then, it took the view that "the distinction between military and law enforcement activities must be based primarily on an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case."[47]

It examined the circumstances of the dispute in the present case by distinguishing the following three phases: First, underlying dispute leading to the arrest concerned the passage of the Ukrainian naval vessels through the Kerch Strait; Second, the specific cause of the incident that occurred on 25 November 2018 and denial of the passage through the Kerch Strait by Russia; and third, use of force by Russia in the process of arrest. Regarding the first phase, the ITLOS found that "the passage of naval ships *per se* amounts to a military activity." It also noted that "the particular passage at issue was attempted under circumstances of continuing tension between the Parties." However, the ITLOS took the view that a "non-permitted 'secret' intrusion" by Ukrainian naval vessels, as alleged by the Russian Federation, would have been unlikely under the circumstances of the present case. As far as the second phase is concerned, the ITLOS found that "the core of the dispute was the Parties' differing interpretation of the regime of passage through the Kerch Strait" and that "such a dispute is not military in nature." At the third phase, the ITLOS admitted that force was used by Russia, but it was the use of force by the Russian Coast Guard with first firing warning shots and then targeted shots. Thus, the ITLOS concluded that from the arrest and detention of the Ukrainian naval vessels by Russia took place in the context of a law enforcement operation and that the subsequent proceedings and charges against the servicemen supported the law enforcement character of the activities of Russia. For theses reasons, the ITLOS concluded that *prima facie* article 298(1)(b), of the UNCLOS "does not apply in the present case."[48]

The Arbitral Tribunal reached a rather different conclusion in its award concerning preliminary objections while it confirmed the correctness of the approach of the ITLOS to pursue an objective evaluation of the nature of the activities in question.[49] After examining the arguments of the Parties, the Arbitral Tribunal pointed out that "activities that initially have a law enforcement character may become activities with a military character, and vice versa." It distinguished the following three phases: first, a confrontation between the militaries of two States

[46] *Ibidem*, pp. 299-300, paras. 64-65.
[47] *Ibidem*, p. 300, para. 66.
[48] *Ibidem*, pp. 300-302, paras. 68-75.
[49] *Detention of Ukrainian Vessels* case, *sent. cit.*, para. 109.

and a lengthy period of standoff between the two States with the vessels of one surrounded by the vessels of the other; second, from the time that the Ukrainian vessels began to leave the anchorage area and were ordered to stop until the Ukrainian vessels were boarded and the vessels and their crews arrested; and third, the continued detention of the vessels and their crews and the prosecution of the Ukrainian servicemen after the arrest of the Ukrainian vessels. The Arbitral Tribunal found that "the actions of the Parties in the first phase were military activities over which the Arbitral Tribunal has no jurisdiction, and that the actions of the Parties in the third phase were not military activities, over which the Arbitral Tribunal has jurisdiction.[50]

Although both the ITLOS and the Arbitral Tribunal admitted the blurred distinction between military and law enforcement activities in the current international community and took the same approach to assess the circumstances primarily on the basis of an objective evaluation of the nature of the activities in question in their distinction, they reached very different conclusions. It is true that while the ITLOS determined its jurisdiction *prima facie*, the Arbitral Tribunal determined the jurisdiction to entertain the case. The Arbitral Tribunal's findings are based on full hearing of the Parties' pleadings concerning the preliminary objections. However, it may still be difficult to see which aspects the tribunals will put weight on when they assess the circumstances. In fact, Judge Jesus commented that equal importance could have been put on the characterization of the activities of the Ukrainian warships while exercising their right of passage through the territorial sea.[51]

(ii) Precedents concerning the distinction between military and law enforcement activities in the context of the applicaiton of Article 298(1)(b)

The *Guiana* v. *Surinam* case was the first case in which the difficulty and uncertainty in distinguishing military activities from law enforcement activities. In the determination of the wrongfulness of the measures taken by Suriname against the oil exploration activities in the disputed area under the Concession issued by Guyana, the Arbitral Tribunal did not agree with the argument of Suriname justifying its measures as reasonable and proportionate law enforcement measures to preclude unauthorized drilling in a disputed area of the continental shelf. Although it accepted "the argument that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary," "in the circumstances of the present case, this Tribunal is of the view that the action mounted by Suriname on 3 June 2000 seemed more akin to a

[50] *Ibidem*, paras. 121-125.

[51] *Detention of Ukrainian Vessels* case, *Order prescribing provisional measures, Separate Opinion of Judge Jesus*, *supra* note 45, paras. 3-20.

threat of military action rather than a mere law enforcement activity." It concluded that "Suriname's action therefore constituted a threat of the use of force in contravention of the Convention, the UN Charter and general international law."[52]

In the *South China Sea* case, the distinction between military and law enforcement activities was argued in the context of the application of Article 298(1)(b) to the items (a) to (c) in the Fourteenth submission of the Philippines. On the basis of the record concerning the activities of the Parties at Second Thomas shoal, it concluded as follows:

"the essential facts at Second Thomas Shoal concern the deployment of a detachment of the Philippines' armed forces that is engaged in a stand-off with a combination of ships from China's Navy and from China's Coast Guard and other government agencies. In connection with this stand-off, Chinese Government vessels have attempted to prevent the resupply and rotation of the Philippine troops on at least two occasions. Although, as far as the Arbitral Tribunal is aware, these vessels were not military vessels, China's military vessels have been reported to have been in the vicinity. In the Arbitral Tribunal's view, this represents a quintessentially military situation, involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another. As these facts fall well within the exception, the Arbitral Tribunal does not consider it necessary to explore the outer bounds of what would or would not constitute military activities for the purposes of Article 298(1)(b)". Consequently, the Arbitral Tribunal concluded that it lacked jurisdiction to consider the Philippines' Submission No. 14 *(a)* to *(c)*.[53]

On the other hand, the Arbitral Tribunal simply admitted China's repeatedly affirmed position that civilian use comprises the primary (if not the only) motivation underlying the extensive construction activities on the seven reefs in the Spratly Islands and at Mischief Reef and concluded that it had jurisdiction to consider the Philippines' Submissions 11 and12*(b)*.[54]

It can be said that the distinction between military and law enforcement activities has been made principally through objective assessment of the facts by the tribunals in the precedents so far. In this sense, the decisions of the ITLOS and the Arbitral Tribunal in the *Coastal State Rights* case basically follow the approach of the previous cases. However, it should be repeated that the conclusions were different because of the difference of the aspects on which the Tribunal put emphasis.

[52] *Arbitration between Guyana* v. *Surinam, Award of the Arbitral Tribunal, 17 September 2007*, paras. 441-445.

[53] *South China Sea* case, *Award of 2016, sent cit.,* p. 597, paras. 1160-1162.

[54] *Ibidem*, pp. 517-518, paras. 936-938, and p. 555, paras. 1027-1028.

4.3 Limitation and Optional Exception of Law Enforcement Activities

In the *Coastal State Rights* case, the Arbitral Tribunal took the view that Russia's argument concerning the optional exception of law enforcement activities within an disputed area could not be determined because of the uncertainty of the sovereignty over Crimea.[55]

In the *Guyana* v. *Suriname* case, Suriname contended that the limitation of law enforcement activities under Article 297 was applicable to the Guyana's third submission seeking for damages suffered as a result of Surinam's allegedly unlawful actions against Guyanese concession holders. The Arbitral Tribunal noted that the limitation concerning a coastal State's enforcement of sovereign rights under Article 297(3)(a) was restricted to the issues relating to sovereign rights over living resources and, thus, that limitation is not applicable to the coastal State's enforcement of its sovereign rights with respect to non-living resources.[56]

In the *Arctic Sunrise* case, although Russia did not appear before the Arbitral Tribunal, it issued the position paper,[57] in which Russia took up the optional exception of law enforcement activities in accordance with Article 298(1)(b) as one of its objections concerning the jurisdiction of the Arbitral Tribunal. In this case, both the Netherlands and Russia admitted that the activities against the Arctic Sunrise and the people aboard were law enforcement activities. The Arbitral Tribunal considered that the optional exception of law enforcement activities under Article 298(1)(b) does not allow that optional exception to law enforcement activities in general but is restricted to the disputes "concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction" that are excluded from the "jurisdiction of courts and tribunals under article 297, paragraph 2 or 3." It concluded that the dispute in the present case did not fall within the scope of Article 297(2) or (3).[58]

In the *South China Sea* case, the Arbitral Tribunal pointed out that the optional exception of law enforcement activities under Article 298(1)(b) was applicable only to the activities of the coastal State in its own exclusive economic zone. As the area of the South China Sea at issue for Submission 8 could only constitute the exclusive economic zone of the Philippines, this exception was not applicable to China's activities.[59] The Arbitral Tribunal did not admit the applicability of

[55] *Coastal State Rights* case, *doc. cit.*, para. 358.

[56] *Guyana* v. *Surinam* case, *sent. cit.*, paras. 411-416.

[57] The Ministry of Foreign Affairs of the Russian Federation on certain legal issues highlighted by the action of the Arctic Sunrise against Prirazlomnaya platform.

[58] *Arctic Sunrise Arbitration (The Kingdom of the Netherlands* v. *the Russian Federation), PCA Case Nº 2014-02, Award on Jurisdiction, 26 November 2014*, paras. 72-78.

[59] *South China Sea* case, *Award of 2016, sent cit.*, p. 436, para. 695.

this exception to China's activities at Scarborough Shoal and the Second Thomas Shoal in the Submission No.8. It found that it concerns a coastal State's rights in its exclusive economic zone and did not apply to incidents in a territorial sea and, thus, the exception could not be relevant to incidents at Scarborough Shoal. With regard to the Second Thomas Shoal, as a low-tide elevation, located in an area that can only form part of the exclusive economic zone of the Philippines, this exception could not be applicable either.[60]

It can be concluded that the arbitral tribunals have taken a common approach to the applicability of the optional exception of law enforcement activities under Article 298(1)(b) that the scope of this exception should be interpreted in a strict way.

5. Concluding Remarks

From the analysis of the *Black Sea* cases, the Arbitral Tribunals have faced various limitations in exercising their compulsory jurisdiction in accordance with relevant provisions of Part XV. However, the Arbitral Tribunals have examined the facts and laws and have tried to contribute to the effective settlement of the disputes. As far as these disputes originate from the serious political situation in the Black Sea, the compulsory dispute settlement regime under the UNCLOS may contribute to the settlement of only small parts of the whole dispute. It is still possible to expect the settlement of those small parts of the dispute may lead to the mitigation and prevention of the situation.

[60] *Ibidem*, pp. 515-516, paras. 928-930.

PART II: EUROPEAN LEGAL ASPECTS

LA STRATÉGIE DE SÛRETE MARITIME DE L'UNION EUROPÉENNE ET SA PROJECTION EN MER NOIRE

*José Manuel Sobrino Heredia**

1. Introduction

L'Union européenne (UE) est devenue avec l'adhésion de la Roumanie et de la Bulgarie en 2007 un nouvel acteur dans le bassin de la mer Noire[1]. En tant que riveraine de cet espace maritime elle est donc directement concernée par la situation d'instabilité croissante dans cette région qui doit faire face à des crises multiples et interconnectées[2]. Cette situation préoccupante met à l'épreuve la capacité de l'UE à se positionner en tant qu'acteur fiable dans le domaine de la sûreté, et en particulier de la sûreté maritime.

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[1] Une mer, la mer Noir, qui a été mer intérieure ottomane jusqu'à la fin du XVIIIe siècle. Sa situation au XIXe siècle a été marquée par l'hégémonie russe, par le contrôle étroit de l'URSS pendant la guerre froide, par la perte d'influence de la Russie après 1991 au profit de l'Occident et de nouveau aux mains, dans une large mesure, de la Fédération russe à l'heure actuelle. Dans une perspective maritime, la région de la mer Noire compte actuellement quatre acteurs majeurs : la Russie, l'OTAN, les États-Unis et la Turquie. Un acteur économique, l'UE et d'autres États riverains confrontés à des conflits internationales et internes, comme l'Ukraine ou la Géorgie.

[2] La guerre du Dniestr (1992), la guerre d'Abkhazie (1992-1993), la guerre civile géorgienne (1991-1993), les guerres en Tchétchénie (1994-1996 ; 1999-2000), la deuxième guerre d'Ossétie du Sud (2008), la guerre du Donbass, commencé en 2014 et qui se poursuit à la suite de l'invasion russe du 24 février 2022. Dans ce contexte, la mer Noire est devenue le lieu 'de la plus grande instabilité et le terrain où une UE géopolitique peut être mis à l'épreuve.

Face à ces nouveaux défis, le rôle que l'UE peut jouer dans la région est conditionné, à notre avis, par trois facteurs. Le premier est la dimension physique du littoral de la mer Noire occupé par ses États membres, le deuxième est la complexité des tensions dans la région et le troisième la concurrence entre modèles de sûreté dans cet espace maritime. En ce qui concerne le premier aspect, il convient de rappeler que les eaux relevant de la juridiction de la Bulgarie et de la Roumanie ne couvrent que 13 % des eaux de la mer Noire (environ 65 396 km2), sans oublier que toutes les eaux de la mer Noir relèvent de la juridiction des pays côtiers et qu'il n'existe pas de haute mer. Par conséquent, la présence de l'UE par rapport à celle des autres pays riverains, notamment la Russie, l'Ukraine et la Turquie, n'est pas très significative. Concernant le deuxième aspect mentionné ci-dessus, le poids de l'UE dans la région est affecté par les particularités qui expliquent l'instabilité de la région, la mosaïque de groupes ethniques qui caractérise la région caucasienne de la mer Noire et la persistance des conflits armés qui sont depuis longtemps enracinés dans la région. Enfin, le troisième facteur à prendre en compte est la concurrence constante entre des modèles de sûreté rivaux, des modèles proposés à la fois par l'OTAN et la Russie, qui ravivent la rivalité des grandes puissances et qui sont en grande partie à l'origine des conflits armés dans la région et, en particulier, de celui qui oppose l'Ukraine à la Russie.

Si la mer Noire est aujourd'hui considérée comme une mer régionale européenne par l'UE, cela ne s'est manifesté que tardivement et partiellement. Tardivement, car l'attention portée par l'UE à la région est le fruit de ses récents processus d'élargissement en 2004 et 2007 qui ont affecté â une grande partie de la région du Danube ce qui a conduit l'UE à se tourner également vers l'Est. L'adhésion à l'UE de la Roumanie et de la Bulgarie, qui avaient déjà rejoint l'OTAN en 2004, a marqué un tournant dans l'évolution du concept de la mer Noire en tant que mer régionale européenne. Ce virage a d'ailleurs coïncidé avec la désintégration de l'URSS, l'émergence de nouveaux États côtiers dans la mer Noire et la déstabilisation territoriale croissante.

Et cette prise en compte de la mer Noire comme une mer régionale européenne est également partielle, car l'UE, dans ses relations avec ses pays membres riverains de cette mer et avec les pays tiers de la région, a privilégié la dimension économique au détriment de la dimension sécuritaire. En effet, les politiques, y compris la politique maritime, développées par l'UE dans la mer Noire ont été fondées sur l'idée que la sécurité et la stabilité dans la région pourraient être obtenues par l'intégration économique et politique[3]. Cependant, la dure réalité montre

[3] La stratégie européenne de la mer Noire a été structurée notamment par la «Synergie de la mer Noire - une nouvelle initiative de coopération régionale», lancée à Kiev en 2008 dans le cadre de la politique de voisinage. Elle se concentre sur la bonne gouvernance, l'environnement, la sécurité et l'énergie. Le Parlement européen s'est saisi de la question et a adopté en 2011 une résolution

que cette sécurité est affectée par des facteurs externes qui témoignent de la faiblesse de l'UE pour y faire face, lui réservant un rôle de partenaire économique ce qui a conduit les États de la région à se tourner vers l'OTAN pour leur défense.

Dans un contexte de guerre qui, bien que directement concentrée dans une partie de la mer Noire, finit par affecter l'ensemble de celle-ci, on peut se demander si l'UE ne devrait pas également recourir à ses politiques et stratégies de sûreté et de défense afin de protéger ses citoyens, défendre ses valeurs et préserver ses intérêts maritimes en mer Noire. Il s'agit de stratégies que, comme nous le verrons plus loin, l'UE applique depuis 2014 dans d'autres mers et océans, que ce soit dans les eaux dites européennes[4], dans celles d'États tiers ou en haute mer[5]. Cette stratégie devrait, a priori, couvrir également le littoral et les eaux de la mer Noire, en tant que mer régionale européenne, à partir du moment où ses intérêts maritimes stratégiques sont fortement menacés par l'évolution des conflits dans la région. Notamment, ses intérêts concernant : la sécurité des infrastructures maritimes critiques telles que les ports et les terminaux, les installations offshores, les canalisations sous-marines, les câbles de télécommunications, etc. ; le contrôle des frontières maritimes extérieures mis en difficulté par la crise des réfugiés résultant des conflit armés dans la région ; ou l'impact du conflit armé

sur une stratégie de l'UE pour la mer Noire, notant que «la région de la mer Noire a besoin de politiques actives et de solutions durables pour relever les grands défis transnationaux auxquels elle est confrontée». Adoptée par le Conseil en avril 2011, la stratégie pour la région du Danube (EU Strategy for the Danube Region (EUSDR)) est la deuxième stratégie macro régionale européenne (EUMRS). La Présidence roumaine du Conseil de l'UE, pendant la première moitié de 2019, s'est concentrée sur la promotion de la coopération régionale dans la région de la mer Noire, avec l'appui de l'UE. Le résultat le plus notable de cet effort a été l'adoption par le Conseil, le 21 mai, de deux documents-cadres : l'Agenda maritime commun pour la mer Noire et l'Agenda stratégique pour la recherche et l'innovation dans la région de la mer Noire. Les deux font partie intégrante de la Synergie de la mer Noire, contribuant à sa concrétisation et à sa mise en oeuvre.

[4] Les eaux relevant de la souveraineté ou de la juridiction de ses États membres, y compris les eaux, les fonds et le sous-sol marin. À cet égard, le règlement (UE) 1380/2013, qui régit la PCP, lorsqu'il détermine son champ d'application, à l'article 1er, paragraphe 2, points b) et c), fait référence aux « eaux de l'Union ». Espace qu'il définit ensuite, à l'article 4.1.1), comme « les eaux relevant de la souveraineté ou de la juridiction des États membres, à l'exception des eaux adjacentes aux territoires énumérés à l'annexe II du traité ». Ces territoires sont les pays et territoires d'outre-mer qui entretiennent une relation particulière avec l'un des États membres. Voir : Règlement (UE) 1380/2013 du Parlement européen et du Conseil du 11 décembre 2013 relatif à la politique commune de la pêche, modifiant les règlements (CE) n° 1954/2003 et (CE) n° 1224/2009 du Conseil et abrogeant les règlements (CE) n° 2371/2002 et (CE) n° 639/2004 du Conseil et la décision 2004/585/CE du Conseil, [2013] OJ L354/22. En ce qui concerne les fonds et le sous-sol marin, voir l'article 3.1 de la directive 2008/56/CE du Parlement européen et du Conseil du 17 juin 2008 établissant un cadre d'action communautaire dans le domaine de la politique pour le milieu marin (directive-cadre stratégie pour le milieu marin) [2008] OJ L164/19.

[5] Dans le golfe de Guinée, dans le golfe d'Aden, dans la mer Rouge, dans la zone Indo-Pacifique, dans la mer Méditerranéenne

en Ukraine sur la chaîne d'approvisionnement, sur la liberté de navigation, sur le droit de passage inoffensif des navires battant pavillon d'un des États membres de l'UE, ainsi que sur la sécurité des gens de mer et des passagers.

L'application de cette stratégie met à l'épreuve la capacité de l'UE à devenir un fournisseur de sûreté maritime dans la région. Mais, la question qui se pose immédiatement est de savoir si les compétences de l'UE dans le domaine de la sûreté maritime et les instruments dont elle s'est dotée pour sa mise en œuvre sont applicables à un conflit de l'ampleur de celui qui se déroule actuellement en mer Noire, ou au contraire, ses caractéristiques limitent le déploiement par l'UE de sa stratégie de sûreté maritime dans la région, abandonnant toute illusion d'action autonome et poussant les pays côtiers à se réfugier sous le parapluie de l'OTAN. Indépendamment de cette question, on peut aussi se demander si cette situation pourrait également être l'occasion pour l'UE d'essayer d'adapter à un conflit de cette ampleur certaines des mesures et actions qui figurent dans sa stratégie de sûreté maritime. Ce qui pourrait paradoxalement avoir par conséquence son renforcement.

Cette contribution examine la possibilité pour l'UE d'utiliser des éléments de sa stratégie de sûreté maritime dans la région de la mer Noire dans un contexte d'extrême violence maritime. À cet égard, nous examinerons les raisons pour lesquelles l'Union européenne a intégré une dimension maritime dans sa stratégie de sûreté et ses principaux résultats (2) et dans quelle mesure l'application de certains éléments de cette stratégie serait envisageable en mer Noire, ce qui soulève la question de savoir si le conflit armé dans la région pourrait conduire à un renforcement de cette stratégie ou, au contraire, à témoigner de son inopérance (3).

2. L'intégration d'une dimension maritime dans la stratégie de sûreté de l'Union européenne

2.1. La sûreté maritime de l'Union européenne face à la maritimisation croissante des relations internationales

L'UE, en tant que puissance maritime civile mondiale, dépend des mers et des océans, d'où l'importance pour elle des aspects liés à la sécurité de la navigation, des navires, des personnes, des marchandises et, en général, des espaces maritimes de ses propres États membres.

L'importance de la mer pour l'UE, ainsi que les menaces et les risques croissants qui pèsent sur les espaces et les activités maritimes, ont conduit les autorités européennes à inscrire la question de la sécurité et de la sûreté maritimes à l'ordre du jour de leur politique maritime. Au cœur de cette démarche se trouve la conviction que les risques et les menaces qui pèsent sur la sûreté maritime

dépassent, dans certaines situations, les capacités nationales des États membres de l'Union. De même la surveillance des côtes, des ports, de la flotte et des eaux de l'UE nécessite des moyens très importants (moyens aériens, navires, satellites, systèmes de recherche et d'identification des navires, etc.) qui ne sont pas toujours à la portée de tous ses États membres, et que leur efficacité serait accrue s'ils étaient intégrés dans des stratégies européennes.

Cette conviction répond au fait que l'UE est un acteur majeur dans le processus de maritimisation de l'économie et du commerce mondial. En ce sens, l'économie et le bien-être de ses États et des citoyens européens eux-mêmes reposent en grande partie sur les usages de la mer, tels que le libre-échange maritime et la capacité scientifique et industrielle d'exploiter ses ressources, ce qui implique une forte dépendance à l'égard des voies de communication et des infrastructures maritimes. Des menaces et des risques pèsent sur ces voies de navigation et sur les intérêts maritimes de l'UE, qui sont aggravés par les tensions actuelles en mer Noire, en mer d'Azov et en mer Baltique, liées à la guerre en Ukraine.

La maritimisation du monde a également entraîné des menaces transnationales, des conflits internationaux et l'expansion d'activités illégales dans les espaces maritimes, ce qui explique sa préoccupation croissante pour la composante sûreté et la recherche de mécanismes et d'actions visant à améliorer la sûreté maritime. En effet, la prospérité économique et la sécurité de l'UE dépendent de mers ouvertes, sûres et sécurisées qui facilitent la liberté de navigation, le trafic maritime, le libre-échange, la sécurité énergétique et un environnement marin sain.

La dépendance de l'UE s'accroît à mesure que le processus de maritimisation de l'économie et du commerce mondiaux s'accélère. Les mers et les océans du monde redeviennent des vecteurs de la géopolitique et des lieux de concurrence stratégique. L'importance de la puissance navale revient à l'ordre du jour politique. Développements géopolitiques récents comme la guerre d'Ukraine et son théâtre maritime, la mer Noire, perturber le commerce maritime international et mettre en péril les infrastructures maritimes stratégiques et montrent à quel point les intérêts maritimes de l'UE sont affectés et mettent en garde contre la nécessité urgente pour l'UE d'améliorer sa sûreté maritime et d'accroître sa capacité à agir non seulement sur son propre territoire et dans ses propres eaux, mais aussi dans son voisinage et au-delà.

Par ailleurs, la région pontique est devenue une zone de projection et de réaffirmation de la puissance navale des pays voisins, comme c'est le cas pour la Russie et la Turquie, dont la présence est renforcée par la situation complexe en Syrie, les conflits liés à l'exploitation des hydrocarbures dans la région et l'extension du conflit de Gaza aux pays voisins, alors que l'UE se trouve dans une grave impasse dans cet espace maritime, sans que ni elle ni ses Etats membres

ne semblent en mesure d'assumer le rôle de garant de la sécurité maritime aux portes de l'Europe.

Ce contexte et la persistance des problèmes liés à la sécurité des mers et des océans expliquent que le Conseil de l'UE ait décidé, le 24 juin 2014, de mettre en place une Stratégie de sûreté maritime (SSMUE) [6], complétée par un plan d'action établi le 16 décembre 2014, et mis à jour en 2018[7]. Ces instruments, qui font partie de la Stratégie européenne de sûreté[8], ont été révisés en 2023 dans le but de les renforcer et de les adapter à l'évolution des menaces maritimes, afin de mieux protéger l'espace maritime européen[9], d'assurer la fluidité du trafic sur les voies maritimes et la protection des biens publics mondiaux, ainsi que les intérêts commerciaux et environnementaux de l'UE[10]. Elle a donné lieu à un plan d'action qui s'articule autour de différents thèmes : surveillance maritime, échange d'informations, gestion des risques, protection des infrastructures maritimes critiques, recherche et innovation... Des sujets vastes, mais qui ont tous en commun la vocation de protéger les intérêts maritimes européens.

Cette Stratégie combine de mesures préventives et correctives visant à protéger le domaine maritime contre les menaces et les actes illicites délibérés, ainsi qu'à renforcer l'autonomie et la capacité de l'UE à répondre aux menaces maritimes, à sauvegarder ses intérêts en mer, à protéger ses citoyens, ses valeurs et son économie. Sa mise en œuvre doit être développée de manière articulée et cohérente avec les autres mesures que l'UE elle-même adopte pour la mise en place d'un espace de liberté, de sécurité et de justice, la création d'un marché intérieur, sa politique étrangère et sa politique de sécurité et de défense commune, qui ont également une dimension maritime, En bref, l'objectif est de créer un cadre permettant de créer des synergies entre toutes les politiques de l'UE ayant un impact

[6] Conseil de l'Union européenne: Stratégie de sûreté maritime de l'Union européenne, Doc. 11205/14, Bruxelles, 24.6.2014.

[7] Conseil de l'Union européenne: Stratégie de sûreté maritime de l'Union européenne. Plan d'Action. Doc.17002/14, Bruxelles, 16.12.2014.

[8] "Estrategia Europea de Seguridad: una Europa segura en un mundo mejor", 2003; https://www.consilium.europa.eu/meida/30808/qc7809568esc.pdf; "Estrategia global para la política exterior y de seguridad de la Unión Europea. Una visión común, una actuación conjunta: una Europa más fuerte", 2016; http://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_es_pdf.

[9] Sur la création d'un espace maritime européen commun, voir l'ouvrage collectif: SOBRINO HEREDIA, J.M.; OANTA, G.A. (coords.), *La construcción jurídica de un espacio marítimo común europeo*, Bosch Editor, Barcelona, 2020.

[10] Comisión europea y Alto representante de la Unión para asuntos exteriores y política de seguridad: Comunicación conjunta al Parlamento Europeo y al Consejo relativa a la actualización de la Estrategia de Seguridad Marítima de la UE y su Plan de Acción. "Una Estrategia de Seguridad Marítima de la UE reforzada para hacer frente a unas amenazas marítimas cambiantes", JOIN (2023) 8 final, Bruselas, 10.3.2023. Council conclusions on the Revised EU Maritime Security Strategy (EUMSS) and its Action Plan, 24.10.2023, www.consilium.europa.eu/st14280-en23.

sur la sécurité des mers et des océans, et d'éviter les mesures inefficaces ou incohérentes, les dépenses inutiles et les conflits d'utilisation à cet égard[11].

À cette fin, la stratégie fixe un cadre d'action dont la particularité est de reposer sur une approche trans-secteurs et d'améliorer ainsi la coordination entre les différents acteurs concernés (sécurité intérieure / extérieure, coopération civils / militaires…), avec la finalité de que l'espace maritime européen commun soit également un «espace européen de sécurité maritime», en éliminant ou en réduisant les multiples risques auxquels il est confronté. Pour cela, elle définit deux types d'actions : d'une part, l'adoption de nouvelles mesures et la définition de nouveaux instruments visant à renforcer la sécurité maritime européenne et, d'autre part, l'utilisation des mécanismes et mesures existants pour améliorer leur coordination et leur complémentarité. Cela nécessite un soutien mutuel entre les États membres pour permettre une planification commune de la sécurité en cas d'urgence, la gestion des risques et la prévention des conflits, ainsi que la réponse aux crises et la gestion des crises.

Cette Stratégie repose sur une approche globale sur la sûreté maritime, qui englobe le terrorisme ainsi que les menaces cybernétiques, hybrides, chimiques, biologiques, radiologiques et nucléaires dans le domaine maritime. Cette stratégie s'appuie sur une perspective régionale à un défi mondial, cherchant à répondre aux défis de sécurité dans les bassins maritimes européens et les points chauds clés tels que le Golfe de Guinée et la Corne de l'Afrique ou la mer Rouge. Elle met l'accent sur la protection des infrastructures maritimes critiques telles que les ports, les navires et les installations énergétiques en mer. Elle cherche établir, également, une collaboration plus étroite entre les acteurs civils et militaires, entre différents organismes et au-delà des frontières.

Parmi les principaux objectifs de cette stratégie figurent : - Intensifier les activités en mer en organisant des exercices annuels de sécurité maritime, menés par les garde-côtes et les forces armées des États membres. - Coopérer avec les pays partageant les mêmes idées et avec les organisations régionales et internationales afin de promouvoir le dialogue et les bonnes pratiques, et de plaider en faveur de l'ordre maritime. - Prendre l'initiative en matière d'appréciation de la situation maritime améliorant la collecte et l'échange d'informations. Gérer les risques et les menaces. - Améliorer la résilience et la préparation collectives de l'UE dans le but de protéger les infrastructures maritimes essentielles telles que les pipelines,

[11] Parlamento Europeo, Informe sobre la dimensión marítima de la política común de seguridad y defensa, 12.6.2013, 2012/2318(INI); https://www.europarl.europa.eu/doceo/document/A-7-2013-0220_ES.html Sur l'articulation avec d'autres politiques, SOBRINO HEREDIA, J.M., "The European Union's Integrated Maritime Policy: Intersection of security and irregular migration by sea", *in* OANTA, G.A.; SÁNCHEZ RAMOS, B. (eds.), *Irregular Migrations in Europe: A Perspective fron the Sea Basins*, Ed. Scientifica, Napoli, 2022, pp. 23-54.

les câbles sous-marins, les ports, les terminaux méthaniers, etc. - Renforcer les capacités élaborant des exigences communes pour les technologies de défense de surface et sous-marine, et créant des systèmes sans équipage interopérables pour surveiller les infrastructures maritimes critiques. Et - Éduquer et former afin d'atteindre un niveau élevé d'éducation, de compétences et de formation spécialisées en matière de sûreté maritime.

2.2. Le recours aux mesures et instruments de la stratégie de sûreté maritime de l'Union européenne dans les situations d'instabilité maritime en mer Noire

La stratégie de sûreté maritime de l'UE et les plans d'action successifs ont fourni depuis 2014 un cadre global pour la dissuasion et la réponse aux défis en matière de sûreté maritime, étayé par le respect du droit international de la mer et une coopération plus étroite entre les autorités civiles et militaires, y compris par le partage d'informations. Cette initiative a renforcé l'autonomie et la capacité de l'UE à répondre aux menaces et aux défis en matière de sûreté maritime, notamment en lui permettant de mener ses propres opérations navales ou de coopérer avec d'autres partenaires extérieurs, voire en encourageant la production conjointe de navires à cette fin.

La stratégie de sûreté maritime de l'UE et son plan d'action définissent une série de mesures dont la mise en œuvre dans la région de la mer Noire semble dans certains cas réalisables, dans d'autres difficiles et dans d'autres encore clairement impossibles.

À cet égard, des mesures concertant la connaissance de la situation maritime, la surveillance et l'échange d'informations entre les autorités civiles et militaires responsables pourraient être applicables en mer Noire. En effet dans le cadre de cette stratégie de sûreté maritime, des mesures ont déjà été prises pour garantir que les informations de surveillance maritime recueillies par une autorité civile ou militaire et jugées nécessaires aux activités opérationnelles d'autres autorités puissent être partagées et utilisées à de multiples fins. À cette fin, un cadre commun de partage de l'information a été mis en place, comme illustré, par exemple : - le renforcement de l'environnement commun de partage de l'information (ECII) ; - le projet européen «CLOSEYE» (mené par la Guardia Civil espagnole) ; - le système opérationnel de surveillance maritime et frontalière Copernicus (complété par les services satellitaires Galileo) ; - la création de l'Agence européenne de garde-frontières et de garde-côtes (FRONTEX - 2016) ; - l'établissement d'un réseau européen d'échange d'informations sur la gestion intégrée des frontières.

L'UE a mis en place une coopération interservices entre l'AECP, l'AESM et Frontex afin de soutenir les autorités nationales de garde-côtes, y compris dans

le domaine de l'appréciation de la situation maritime. Le Forum européen des fonctions de garde-côtes et le Forum des fonctions de garde-côtes de la Méditerranée peuvent contribuer à renforcer l'appréciation de la situation maritime et la coopération opérationnelle grâce à l'échange de bonnes pratiques. En matière de défense, le projet de surveillance maritime (MARSUR) soutenu par l'Agence européenne de défense (AED) a été conçu pour permettre aux forces navales des États membres contributeurs d'échanger des informations et des services maritimes opérationnels. Le projet MARSUR apporte une valeur ajoutée opérationnelle et la preuve en est que les États membres et l'AED travaillent actuellement au renforcement de MARSUR au moyen d'un programme spécifique. Il convient que l'Union, conformément à la boussole stratégique, qui l'invite à renforcer son appréciation de la situation fondée sur le renseignement et ses capacités, tire pleinement parti de toutes les capacités de surveillance maritime (par exemple, les drones, les aéronefs de patrouille et les technologies spatiales).

Toutes ces initiatives visent à améliorer l'efficacité et la rentabilité de la surveillance maritime en établissant un système approprié, légal, sûr et efficace d'échange de données entre les secteurs et les frontières dans l'ensemble de l'Union, en encourageant les performances des autorités responsables dans ces domaines et la coopération entre elles pour le contrôle des frontières maritime y compris celles de la mer Noire.

Un autre domaine prévu par la stratégie de sûreté maritime de l'UE concerne le renforcement des capacités maritimes européennes. A cet égard, une série de mesures sont proposées ou adoptées visant à développer les technologies à double usage et la coopération en matière de normalisation et de certification, visant à améliorer l'interopérabilité civil-militaire et la compétitivité industrielle (il ne faut pas oublier que les capacités militaires appartiennent actuellement aux États membres et sont utilisées par eux). À cette fin, la mise en commun et le partage des initiatives concernant les capacités maritimes devraient être encouragés en ce qui concerne également les États membres riverains de la mer Noire.

L'amélioration des capacités de prévention des conflits et de réaction aux crises est un autre domaine couvert par la stratégie de sûreté maritime de l'UE, qui repose sur l'idée qu'un espace européen de sécurité maritime nécessite des mesures visant à prévenir les conflits et les incidents, à réduire les risques et à améliorer la protection de l'environnement marin de l'UE et la sécurité de ses frontières extérieures, ainsi que de ses infrastructures maritimes essentielles.

Des progrès ont déjà été réalisés dans ce domaine, par exemple en organisant des exercices maritimes réels à l'échelle de l'UE impliquant des entités civiles et militaires de différents États membres sur la sécurité des ports, les menaces cybernétiques et hybrides. Une autre action clé vise à accroître la résilience et la protection des infrastructures offshore critiques telles que les gazoducs, les câbles

sous-marins, les ports, les installations énergétiques offshore et les terminaux de gaz naturel liquéfié dans tous les bassins maritimes de l'UE.

L'élaboration d'un plan régional pour la surveillance des infrastructures offshore et sous-marines progresse donc, et l'attaque du gazoduc Nord Stream 2 le 26 septembre 2022 est sans doute un point d'inflexion pour l'UE. En effet, en raison des attaques perpétrées en 2022 contre les gazoducs Nord Stream en mer Baltique, des sabotages répétés en 2024 dans la mer Baltique sur des câbles de télécommunications sous-marins affectant le réseau de fibres optiques de l'Allemagne, de la Suède et de la Finlande[12], de la présence de véhicules sans équipage non autorisés autour d'installations au large en mer du Nord et des menaces hybrides et cyberattaques récurrentes ciblant les infrastructures maritimes, l'UE doit renforcer son action et protéger plus efficacement ses infrastructures critiques, notamment en développant des technologies innovantes. Cela pourrait également s'appliquer à la mer Noire.

Le secteur maritime, du fait de son passage au numérique, s'est complexifié et est devenu potentiellement plus vulnérable. Les acteurs malveillants sont de plus en plus susceptibles d'utiliser des moyens hybrides et informatiques pour cibler les infrastructures maritimes, y compris les conduites et câbles sous-marins, ainsi que les ports et les navires[13]. Le conflit armé entre l'Ukraine et la Russie met également en péril ces installations, de sorte que ces mesures pourraient également être utilisées dans ce contexte.

Des développements ont également lieu dans le domaine des technologies de défense, comme l'illustrent l'adoption de projets communs tels que la corvette de patrouille européenne (un nouveau type de navire de guerre) ou enfin l'amélioration des capacités de lutte anti-sous-marine et de neutralisation des munitions non explosées (qui représentent actuellement un grave danger pour la navigation en mer Noire en raison de la guerre russo-ukrainienne) ou le développement de systèmes interopérables sans pilote pour surveiller les infrastructures maritimes critiques et l'intensification des travaux sur un certain nombre de projets de coopération structurée permanente liés à la sécurité maritime. Les développements dans ce secteur et dans cette technologie pourraient également être utiles en mer Noire.

La protection des infrastructures critiques et la localisation et l'élimination des munitions non explosées, de armes actives et des armes chimiques en mer Noire constituent des domaines dont l'action de l'UE en coopération avec l'OTAN est possible et urgente[14]. Depuis le début du conflit, des milliers de mines

[12] https://efe.com/economia/2024-11-19/danos-cables-submarinos-telecomunicaciones-baltico/

[13] La recommandation du Conseil relative à une approche coordonnée à l'échelle de l'Union pour renforcer la résilience des infrastructures critiques14 reconnaît la nécessité d'agir. 2023/C 20/01

[14] CES, Avis du Comité économique et social européen sur le thème « La stratégie de sûreté maritime de l'UE et son plan d'action « Renforcement de la stratégie de sûreté maritime de

dérivantes – qui se déplacent au gré des courants – et de mines à orin – lestées par un câble pour les maintenir à la surface ou entre deux eaux – ont été immergées par la Russie et l'Ukraine[15]. A cet égard, l'action de l'UE dans le cadre de sa stratégie pourrait appuyer des initiatives régionales comme le mémorandum signé le 11 janvier 2024 par la Turquie, la Bulgarie et la Roumanie créant une coalition maritime pour éliminer les mines flottantes, russes et ukrainiennes, dérivant en mer Noire et entravant la navigation civile.

L'agression militaire de la Russie contre l'Ukraine, d'autre part, a conduit l'Agence européen de défense à examiner les technologies clés nécessaires pour gérer les essaims maritimes de drones et protéger les infrastructures critiques des fonds marins. Dans ce contexte, l'européanisation des programmes d'armement naval est un facteur déterminant. Toutefois, à l'exception de la France, les États membres n'investissent pas suffisamment dans les navires et les capacités navales et la coopération n'est pas aussi intense que dans d'autres secteurs tels que l'industrie aérospatiale. L'UE devrait améliorer les évaluations actuelles des risques liés aux câbles sous-marins et proposer, en sus de ces évaluations, des options d'intervention et des mesures d'atténuation fondées sur l'expertise et les capacités transsectorielles. Il est impératif de fournir un soutien sans faille aux États membres pour mettre au point des moyens de protection sous-marins et des solutions anti drones[16]. La création d'un espace européen de sécurité maritime nécessite donc davantage d'investissements dans les capacités navales et la crise de sûreté maritime en mer Noire pourrait stimuler une telle évolution. En effet, les drones maritimes ont devenu des armes clefs dans le conflit armé maritime dans la mer Noire. Ces armes sont utilisées de manière particulièrement efficace par l'Ukraine[17]. Il ne fait aucun doute que l'arrivée de l'administration Trump au

l'UE pour faire face à l'évolution des menaces dans le domaine maritime», JOUE C 2023/884, 8.12.2023, p. 7.

[15] Avec le temps et les tempêtes, nombre d'entre elles se sont déplacées, heurtant à plusieurs reprises des navires commerciaux. Le 27 décembre 2023, un cargo grec battant pavillon panaméen, qui se dirigeait vers un port ukrainien pour y charger des céréales, a été touché dans le golfe du Danube, deux marins ont été blessés. *Le Monde*, 27 décembre 2023.

[16] Avec la directive sur la résilience des entités critiques (Directive (UE) 2022/2557) et la directive révisée sur la sécurité des réseaux et des systèmes d'information (directive SRI 2, Directive (UE) 2022/2555), l'UE est à la pointe du progrès, avec un cadre juridique complet lui permettant d'améliorer à la fois la résilience physique et la cyber résilience des entités et des infrastructures critiques. Il y a lieu pour l'UE d'intensifier sa coopération avec ses principaux partenaires et les pays tiers concernés dans ce domaine, en particulier dans le cadre du dialogue structuré UE-OTAN sur la résilience et de la task force sur la résilience des infrastructures critiques.

[17] L'utilisation efficace de bateaux-drones télécommandés chargés d'explosifs a permis à l'Ukraine de faire pencher la balance de la guerre navale en sa faveur, malgré l'énorme supériorité de la Russie en termes de puissance de feu. Les drones Magura sont équipés d'un GPS avancé et de caméras, et leur faible signature radar les rend difficilement détectables. https://fr.euronews.com/2024/03/06/les-drones-navals-armes-clefs-de-lukraine-contre-la-flotte-russe-en-mer-noire.

gouvernement américain en janvier 2025 et sa politique sur le conflit russo-ukrainien obligerons les États membres de l'UE et l'UE elle-même à renforcer leur politique de défense et à investir dans le réarmement militaire, ce qui affectera également la mer Noire.

Un autre domaine prévu par la stratégie de sûreté maritime de l'UE se concentre sur l'identification et le regroupement des possibilités de formation disponibles en matière de sécurité maritime dans des modules communs de formation maritime. Des travaux sont en cours pour établir un programme de recherche civil-militaire sur la sûreté maritime, y compris le développement de capacités à double usage et polyvalentes. Des efforts sont également déployés pour créer de nouveaux réseaux de développement des connaissances et des compétences pour les instituts, centres et académies d'enseignement civils et militaires, et pour développer les réseaux existants. Ces actions dans le domaine de l'éducation et de la formation sont basées sur une approche civile-militaire, impliquant et mobilisant les institutions éducatives civiles et militaires pour construire des réseaux d'expertise et de connaissance dans le domaine de la sécurité maritime[18]. Ces actions, selon nous, peuvent également être mises en œuvre dans les États membres de l'UE riverains de la mer Noire, en y améliorant la formation dans ce domaine et en renforçant leur capacité d'action conjointe avec le reste des États membres.

3. L'action maritime internationale de l'UE en réponse aux menaces contre ses intérêts maritimes

3.1. L'Union européenne, un partenaire émergent en matière de sécurité maritime dans plusieurs mers et océans

Les déclarations contenant la stratégie de sûreté maritime et ses plans d'actions sont l'un des premiers textes dans lequel l'UE n'hésite pas à mentionner l'utilisation de moyens militaires et reconnaît l'importance des marines natio-

Des drones maritimes TB-2 ont été utilisés pour désigner les cibles d'une batterie de missiles antinavires P-360 Neptune basée à terre contre le croiseur Moskva, navire amiral de la flotte russe de la mer Noire. Ces mêmes drones ont également été directement responsables de la destruction de plusieurs petits patrouilleurs (16 m) de la classe Raptor avec des missiles MAM-L, ainsi que d'une petite embarcation de débarquement, https://www.navalnews.com/naval-news/2022/05/watch-ukrainian-tb2-striking-two-russian-raptor-assault-boats.

[18] Le Collège européen de sécurité et de défense (CESD) assure, à l'échelle de l'UE, la formation et l'éducation du personnel civil et militaire afin de promouvoir une compréhension commune des défis affectant la sécurité maritime et de sensibiliser au rôle de plus en plus important de l'UE dans ce domaine. Avec le soutien du CESD, six académies navales européennes travaillent actuellement sur le contenu d'un semestre naval international commun.

nales dans des missions considérées comme étant d'intérêt général européen. Par ailleurs, la déclaration de la Commission de l'UE selon laquelle « Les changements radicaux qui ont bouleversé l'environnement stratégique global, remodelé par la crise climatique et la dégradation de l'environnement et détérioré par l'agression militaire illégale et injustifiée de la Russie contre l'Ukraine, rendent nécessaire une intensification de l'action de l'UE en tant que garant de la sécurité internationale »[19], trouve en mer Noire une occasion de tester son efficacité.

Le conflit entre la Russie et l'Ukraine a mis en évidence l'importance de la sûreté de la mer Noire, qui a des répercussions mondiales considérables dans des domaines tels que la sécurité alimentaire, la sécurité énergétique, la prospérité et la stabilité. En d'autres occasions et dans d'autres régions où ces intérêts étaient en jeu, l'UE n'a pas hésité à lancer des opérations aéronavales dans le cadre de sa PSDC, ou à promouvoir des opérations maritimes coordonnées entre ses États membres.

Le savoir-faire de l'UE, son expérience dans la conduite d'opérations aéronavales dans des contextes maritimes difficiles comme l'océan Indien ou la Méditerranée orientale et centrale et maintenant la mer Rouge, la mise en œuvre d'initiatives telles que les présences maritimes coordonnées dans le golfe de Guinée et le nord-ouest de l'océan Indien[20] , son soutien à des initiatives régionales comme le Code de Djibouti ou le Code de Yaoundé, structures destinées à lutter contre la piraterie et les vols à main armée en mer, démontrent clairement l'intérêt stratégique de l'UE pour l'amélioration de la gouvernance maritime au niveau mondial et l'importance que les autorités européennes accordent aux risques qui la mettent en péril[21]. Il ne fait aucun doute que la situation de guerre qui affecte ces intérêts en mer Noire rend de telles actions difficiles, voire impossibles.

L'action internationale maritime de l'UE repose en primer lieu sur la construction d'une défense européenne dans le domaine maritime. Cette démarche a commencé en 1995 lorsqu'elle a établi la première force maritime multinationale, Euromarfor, sur la base de la déclaration de Petersberg de 1992 avec la participation de la France,

[19] Communication conjointe ou Parlement européen et au Conseil sur la mise à jour de la stratégie de sûreté maritime de l'UE et de son plan d'action « Renforcement de la stratégie de sûreté maritime de l'UE pour faire face à l'évolution des menaces dans le domaine maritime», JOIN/2023/8 final, 10.3.2023, p.2.

[20] "Conclusiones del Consejo por las que se prorroga y refuerza la aplicación del concepto de presencias marítimas coordinadas en el Golfo de Guinea", 21.2.2022; www.consilium.europa.eu/st06256-en22; "Conclusiones del Consejo sobre la ejecución del concepto de presencias marítimas coordinadas en el océano Índico noroccidental", 21.2.2022; www.consilium.europa.eu/st06255-en

[21] En ce qui concerne ces initiatives, voir, entre autres, SOBRINO HEREDIA, J.M., "The European Union as a Maritime Security Actor in the Gulf of Guinea: From Its Strategy and Action Plan to the New Concept of Coordinated Maritime Presences", *Ocean Development & International Law*, 2022, DOI: 10.1080/00908320.2022.2071783.

l'Italie, l'Espagne et le Portugal[22]. La première opération, *Coherent Behaviour*, a eu lieu fin 2002 en Méditerranée en coordination avec l'OTAN. De décembre 2011 à août 2013, Euromarfor a été déployée en soutien à l'opération Atalante afin de contribuer aux efforts de lutte contre la piraterie dans l'océan Indien. Dans ce contexte, et afin d'aider les cinq pays de la corne de l'Afrique et de l'océan Indien dans le développement de leur capacité de sécurité maritime, le Conseil européen décide le 16 juillet 2011 d'établir une mission complémentaire à Atalante, EUCAP Nestor[23]. De même, l'opération AGENOR, pilier militaire de la mission EMASoH (European-led Maritime Awareness in the Straight of Hormuz), vise à protéger les intérêts maritimes européens en garantissant la liberté de mouvement dans le golfe Persique et le détroit d'Ormuz[24]. Contrairement aux opérations PSDC, il s'agit d'une opération ad hoc, activée en 2002, qui offre l'avantage d'une certaine flexibilité.

Par la suite, en 2014, l'Union européenne se dote d'une stratégie de sûreté maritime, comme nous l'avons déjà indiqué. Cette stratégie reprend les travaux entrepris en matière de défense maritime européenne et met à jour de nouvelles perspectives pour l'UE. L'action maritime internationale rendue possible par la stratégie sûreté maritime s'inscrit dans le cadre de la stratégie de sécurité et de défense de l'UE et est liée à sa politique de sécurité et de défense commune (PSDC). Grâce aux compétences qui lui sont conférées, l'UE dispose de capacités qui lui permettent de mener des actions civiles et militaires, notamment des opérations de sécurité maritime par lesquelles les forces maritimes européennes contribuent à dissuader, à prévenir et à combattre les activités illicites.

Les exemples sont nombreux, comme l'opération EUNAVFOR-ATALANTA (2008) contre la piraterie maritime dans l'océan Indien, ainsi que la protection du trafic maritime dans l'océan Indien occidental, en particulier des navires du Programme alimentaire mondial des Nations unies. Au fil du temps, ses objectifs se sont élargis pour inclure la surveillance de nouvelles activités, telles que la pêche INN et le trafic de drogue, d'armes et de charbon de bois, ce qui en fait une opération de sécurité maritime plus large[25].

[22] https://euromarfor.org/.

[23] https://eeas.europa.eu/topics/common-security-and-defence-policy-csdp/430/military-and-civilian-missionsand-operations_en.

[24] L'opération AGÉNOR est le volet militaire de l'initiative « European-led Maritime Awareness in the Straight of Hormuz ». EMASoH est soutenue politiquement par 9 pays européens, dont la France, principal contributeur, qui commande l'opération depuis le 15 juillet 2021. AGÉNOR a pour mission d'apaiser les tensions et de protéger les intérêts économiques européens en garantissant la liberté de circulation dans le golfe Arabo-Persique et le détroit d'Ormuz. À plus de 2000 miles nautiques des côtes du vieux Continent, EMASOH renforce l'interopérabilité des marines européennes et rappelle l'attachement de l'Europe au droit de la mer et à la liberté de circulation. https://www.emasoh-agenor.org/.

[25] https://eunavfor.eu/.

Un autre exemple de cette activité est l'opération EUNAVFOR-IRINI au large des côtes libyennes (2020), qui vise à faire respecter l'embargo sur les armes décrété par les Nations unies à l'aide de moyens aériens, satellitaires et maritimes, ainsi que d'autres tâches secondaires, telles que la surveillance et la collecte d'informations sur les exportations illicites de pétrole, de pétrole brut et de produits pétroliers en provenance de la Libye, contribuer au renforcement des capacités et à la formation des garde-côtes et de la marine libyens en matière de police maritime, et contribuer à la perturbation du modèle économique des réseaux de contrebande et de trafic par la collecte de renseignements et les patrouilles aériennes[26].

La dernière manifestation de cette activité à déplacée l'action de l'UE a un autre scénario géographique, la mer Rouge. À cet égard, les actions des milices houthies en mer Rouge, artère vitale pour le commerce maritime mondial (et pour l'UE elle-même), constituent un terrain d'essai pour la capacité de réaction de l'UE et la solidarité de ses États membres. En effet, dans ce conflit, elle n'est pas confrontée à des pirates aux moyens d'attaque modestes, mais à des forces militaires dotées d'un armement sophistiqué capable de paralyser ou au moins d'entraver la navigation dans la région. Face à cette situation, l'UE, avec un certain retard, a lancé le 8 février 2024 une opération navale indépendante de celle menée par les Etats-Unis et d'autres pays, pour assurer la sécurité des navires en transit en mer Rouge, baptisée EUNAVFOR ASPIDES. Cette opération se fonde sur la résolution 2722 (2024) du Conseil de sécurité des Nations unies du 10 janvier 2024, qui condamne les attaques des Houthis et reconnaît le droit des États membres à défendre leurs navires contre les attaques ou les entraves à la liberté de navigation[27]. Cette opération de sécurité maritime, basée à Larissa (Grèce), devrait contribuer au maintien de la sécurité maritime le long des principales lignes de communication maritimes dans une zone qui comprend la mer Rouge, la mer d'Arabie et le golfe Persique, en coopération avec d'autres acteurs clés, et s'accompagner d'une action diplomatique auprès des partenaires du Conseil de coopération du Golfe, des acteurs régionaux et des États côtiers[28]. Il faudra attendre de voir l'efficacité de cette opération et ses conséquences sur la sécurité du trafic maritime dans la région. Cependant, à ce stade, il existe déjà des désaccords entre les États membres, qui ne sont pas tous disposés à fournir des navires pour l'opération. Ce manque de moyens navals va sans doute réduire la portée de cette opération, nuire à sa crédibilité et, en définitive, peser sur la capacité de réaction qu'est censée avoir une éventuelle force navale mondiale.

[26] https://www.operationirini.eu/.

[27] https://documents.un.org/access.nsf/get?OpenAgent&DS=S/RES/2722(2024)&Lang=F.

[28] https://www.eeas.europa.eu/eeas/eunavfor-operation-aspides_en.

Par ailleurs, ces opérations sont coûteuses, tant au niveau de la mise en place que, surtout, de l'entretien. Les autorités européennes ont donc recours à des formules plus souples qui tiennent compte des déploiements des forces navales existantes des États membres dans les zones où les intérêts stratégiques européens sont menacés, afin d'utiliser ces ressources maritimes pour coordonner leurs actions. C'est ce qui se passe avec les présences maritimes coordonnées lancées dans le golfe de Guinée en 2021 pour lutter contre la piraterie et la violence maritime dans cette région, et étendues en 2022 au nord-ouest de l'océan Indien. La stratégie de sûreté maritime de l'UE dans sa révision en 2023 reflète l'intention d'étendre ces présences à de nouvelles zones maritimes d'intérêt.

3.2. La difficile mise en œuvre de la stratégie de sécurité maritime de l'Union européenne en mer Noire et la coopération nécessaire avec l'OTAN

Les pratiques de l'UE en matière de sécurité maritime dans les différentes mers et océans sont nombreuses. Mais, comme nous l'avons vu, il s'agit de faire face à des actes de violence en mer de courte ou moyenne ampleur. La question est de savoir si ces capacités peuvent être adaptées à une situation de violence maritime extrême telle que celle que l'on trouve dans certaines parties de la mer Noire.

À la lumière de ces considérations, il serait souhaitable que la stratégie de sécurité maritime de l'UE soit également déployée, bien que partiellement, dans la mer Noire, par exemple, en adoptant des mesures visant à organiser des opérations aéronavales, à mettre en œuvre le concept de coopération maritime renforcée, à renforcer sa coopération avec l'OTAN, à soutenir la surveillance des navires de patrouille, ainsi qu'à renforcer l'environnement commun de partage de l'information (Common Information Sharing Environment - CISE), ou encore à renforcer les inspections de sécurité dans les ports des Etats membres de l'UE dans la mer Noire.

Mais, compte tenu des limites de la PSDC, il reste difficile pour l'UE de planifier des opérations militaires communes ou de mettre en place des financements partagés. Par ailleurs, la politique sécurité et défense de l'UE reste un sujet où les décisions doivent être prises à l'unanimité, ce qui reste difficile à obtenir sur certains sujets sensibles. En ce qui concerne le conflit armé dans la mer Noire, l'Union est divisée entre certains Etats qui prônent des sanctions plus sévères et ceux qui, au contraire, proposent une ligne plus souple.

La question qui se pose, suite à la pratique significative de l'UE dans le domaine de la coopération maritime régionale et des opérations de lutte contre les menaces en mer et à partir de la mer, est de savoir si l'UE serait déjà en mesure d'organiser une opération aéronavale majeure pour faire face à l'insécurité dans

d'autres régions du monde aujourd'hui plus troublées, en d'autres termes, si l'UE est, aujourd'hui, une puissance navale capable d'assurer la sécurité maritime à l'échelle mondiale.

Face à cette difficulté, la sûreté dans la région échappe à l'UE et dépend de l'OTAN, mais la stabilisation étant loin d'être acquise il faudrait que l'UE, cherche, au moins, à améliorer sa coopération avec l'organisation atlantique. Cette coopération est prévue et encouragé par la stratégie de sûreté maritime de l'UE qui vise à ce que l'Union approfondisse sa coopération l'OTAN, en renforçant la complémentarité entre les efforts respectifs des deux organisations, en s'appuyant sur des déclarations communes UE-OTAN de 2016, 2018 et 2023 et des actions conjointes ultérieures pour leur mise en œuvre. Face à l'invasion de l'Ukraine par la Russie, l'OTAN et l'UE ont continué de faire preuve d'une unité sans précédent sur le plan politique[29]. Elles se sont notamment attachées à optimiser l'aide fournie de part et d'autre. À assurer la cohérence et la complémentarité des mesures prises en réaction à la guerre d'agression menée par la Russie ainsi que des efforts visant à soutenir l'Ukraine dans l'exercice de son droit naturel de légitime défense. À cet effet, les hauts responsables de l'OTAN et de l'UE ont continué d'entretenir des contacts réguliers et de participer à des réunions de haut niveau organisées par l'autre organisation, et les consultations interservices se sont poursuivies avec régularité à tous les niveaux. Ces interactions ont notamment eu lieu dans le cadre du Groupe de contact pour la défense de l'Ukraine, des réunions des directeurs nationaux des armements et du mécanisme de coordination OTAN-UE consacré à l'Ukraine.

Par ailleurs, le dialogue politique s'est poursuivi de manière soutenue, le secrétaire général de l'OTAN participant à la réunion du Conseil européen de juin 2023 et à une réunion du collège des commissaires de l'UE en novembre 2023, tandis que le président du Conseil européen et la présidente de la Commission européenne ont participé au sommet de l'OTAN qui s'est tenu à Vilnius en juillet 2023. Le haut représentant de l'Union européenne pour les affaires étrangères et

[29] L'OTAN et l'UE, ainsi que leurs membres, ont fourni à l'Ukraine un soutien substantiel sur les plans politique, militaire, financier et humanitaire, et ils ont continué d'examiner ensemble les besoins urgents du pays en vue de lui apporter une aide supplémentaire. Comme l'année précédente, les services des deux organisations – mission d'assistance militaire de l'UE en soutien à l'Ukraine (EUMAM Ukraine), facilité européenne pour la paix et Représentation de l'OTAN auprès de l'Ukraine (NRU), notamment – ont eu des échanges réguliers, à Bruxelles comme sur le terrain, au sujet de l'aide fournie de part et d'autre à l'Ukraine. La délégation de l'UE auprès de l'Ukraine et la NRU, toutes deux situées à Kyïv, ainsi que l'EUMAM ont continué de travailler en étroite coopération au sein du Groupe consultatif international, à l'appui de la réforme du secteur de la sécurité. Neuvième rapport d'étape sur les suites données aux propositions communes entérinées le 6 décembre 2016 et le 5 décembre 2017 par le Conseil de l'Union européenne et le Conseil de l'atlantique nord, https://www.nato.int.240613-progress-report-nr9-eu-nato-fr.

la politique de sécurité a continué d'assister régulièrement aux réunions des ministres de la Défense et des ministres des Affaires étrangères des pays de l'OTAN, et le secrétaire général de l'OTAN aux réunions du Conseil des affaires étrangères (Défense) de l'UE. L'équipe spéciale pour la résilience des infrastructures critiques, créée par le secrétaire général de l'OTAN et la présidente de la Commission européenne suite au sabotage des gazoducs Nord Stream, a présenté son rapport d'évaluation final en juin 2023. Les recommandations figurant dans ce rapport sont mises en œuvre dans le cadre du dialogue structuré sur la résilience. Lors de leur discussion annuelle consacrée aux questions maritimes, qui a eu lieu en avril 2024 et à laquelle ont pris part des représentants du Commandement maritime allié (MARCOM) et du Centre d'excellence OTAN pour la guerre des mines navale, les services ont abordé un large éventail de sujets, dont les opérations navales des deux organisations, la protection et la sécurité des infrastructures sous-marines critiques ou encore la présence en mer de dispositifs explosifs non explosés.

Dans le contexte du conflit armé entre l'Ukraine et la Russie, tant l'OTAN que l'UE accordent une importance accrue au développement de leurs capacités de défense et de sécurité, ce qui se traduit par une nette augmentation des demandes d'aide en la matière. Face à ces besoins, l'OTAN et l'UE ont intensifié leur soutien à l'Ukraine, à la République de Moldova, et à la Géorgie.

Dans le cadre de l'initiative de l'OTAN pour l'interopérabilité avec ses partenaires, destinée à maintenir et à approfondir la coopération entre les Alliés et les partenaires ayant apporté d'importantes contributions aux opérations et missions dirigées par l'OTAN, la Géorgie a obtenu en 2014 le statut de partenaire bénéficiant du programme « nouvelles opportunités » (enhanced Opportunity Partner [eOP]). L'Ukraine bénéficie du même statut depuis le 12 juin 2020[30].

La coopération avec l'OTAN est au cœur de l'actuation de l'UE dans la région. Mais cette collaboration doit laisser l'espace à que l'UE déploie ses propres initiatives et actions dans la région. Il va de soi que l'UE ne peut pas remplacer l'OTAN, qui est active dans la région de la mer Noire depuis des années. En effet, Zone d'intérêt prioritaire depuis le sommet de l'OTAN du Pays de Galles en 2014[31], la région de la mer Noire bénéficie des mesures d'assurance et d'adaptation de l'Alliance, mais aussi depuis le sommet de Varsovie en 2016 de la mise en place du dispositif de présence avancée adaptée (tailored Forward Presence [tFP]) [32]. Dans le cadre de ces initiatives, les États membres de l'OTAN y effectuent des rotations et déploient des capacités terrestres, maritimes ou aériennes. L'élément terrestre repose sur une brigade multinationale sous commandement

[30] https://www.nato.int/cps/fr/natohq/topics_132726.htm.
[31] https://www.nato.int/cps/fr/natohq/110343.htm.
[32] https://www.nato.int/cps/en/natohq/events_132023.htm.

de la division multinationale sud basée en Roumanie et sur un état-major de corps d'armée multinational créé en Roumanie en 2020. L'initiative combinée d'entraînement renforcé (Combined Joint Enhanced Training Initiative) vise par ailleurs à coordonner l'entraînement multinational et à garantir une présence régulière des Alliés. Grâce aux moyens aériens déployés en Roumanie et en Bulgarie et à une présence navale en mer Noire, les membres de l'OTAN participent à la protection des espaces aériens et maritimes du bassin de la mer Noire.

Compte tenu des limites de la stratégie de sécurité maritime de l'UE et de ses difficultés à se déployer en mer Noire, la coopération avec l'OTAN est essentielle, et il conviendrait de la renforcer par un meilleur partage des connaissances relatives à la situation maritime et une coordination plus efficace dans différents domaines d'intérêt commun, y compris la protection des infrastructures critiques[33].

4. Considerations Finales

Une fois de plus, et en cette occasion dans la mer Noire, l'UE est confrontée au problème de son manque d'autonomie en matière de sûreté maritime. Cette situation devient encore plus préoccupante si l'on tient compte de la maritimisation croissante des relations internationales et de l'importance grandissante des intérêts maritimes de l'UE découlant de son statut de puissance maritime civile.

La crise russo-ukrainienne depuis 2014 a clairement démontré à quel point la Russie n'accepte pas l'ingérence de l'UE dans la région. Afin de ne pas provoquer de réaction de la part russe, l'UE a jusqu'à présent été largement absente de la région en matière de sûreté, privilégiant une approche plus économique et limitant son action à des opérations de surveillance et de contrôle des frontières. C'est pourquoi la plupart des États de la région ne considèrent pas l'UE comme un acteur de la sûreté, mais plutôt comme un partenaire économique, se tournant vers l'OTAN pour cette protection.

L'agression de la Russie contre l'Ukraine et sa projection maritime en mer Noire et en mer Baltique a placé l'UE devant un dilemme : soit utiliser et renforcer les mesures et instruments prévus dans sa stratégie de sûreté maritime, soit les écarter et se placer sous l'égide de l'OTAN et de son initiative en matière de sécurité et de défense. Peut-être cette agression soit l'évènement tragique à faire réagir l'UE, comme elle l'a fait dans le passé face à la piraterie et à d'autres actes de violence en mer en l'amenant à utiliser, sinon tous, du moins les éléments les

[33] CES, Avis du Comité économique et social européen sur le thème « La stratégie de sûreté maritime de l'UE et son plan d'action Renforcement de la stratégie de sûreté maritime de l'UE pour faire face à l'évolution des menaces dans le domaine maritime » , JOUE C 2023/884, 8.12.2023, p. 7.

plus viables de sa stratégie de sûreté maritime. Si tel est le cas, nous assisterons à un renforcement de cette stratégie et à sa mise en œuvre adaptée à une situation de violence maritime extrême.

Pour qu'une UE autonome en matière de sécurité maritime voie le jour, il faudrait qu'elle dispose de ses propres capacités navales en mer Noire. Or, ces conditions ne sont pas réunies à l'heure actuelle, de sorte que la responsabilité dans ce domaine reste du ressort de l'OTAN. Cela remet évidemment en question l'image et les possibilités pour l'UE d'être un fournisseur de sûreté en mer, même lorsque, comme c'est le cas la violence se produit à proximité de ses frontières maritimes et dans une mer que les autorités de l'UE qualifient de mer régionale européenne. Le scénario incertain créé par les allers-retours de l'actuelle administration américaine dans le conflit russo-ukrainien et en mer Noire rend urgent non seulement le renforcement de la coopération entre l'UE et l'OTAN, mais aussi le renforcement de l'autonomie navale de l'UE. Cela nécessite inévitablement une augmentation des dépenses militaires et un réarmement naval européen, condition sine qua non pour que l'UE soit une puissance navale militaire capable de contribuer à la sûreté en mer Noire.

BLACK SEA ENVIRONMENTAL GOVERNANCE THROUGH THE LENS OF REGIME COMPLEXES

*Fiammetta Borgia**

1. Introduction

The Black Sea is a semi-enclosed sea with a total surface area of approximately 436,000 square kilometers and a maximum depth of over 2,200 meters. It is connected to the Mediterranean Sea through the Bosporus Strait, the Sea of Marmara, and the Dardanelles. It is characterized by its unique hydrographic and ecological features, including its anoxic deep layers, which result from poor water exchange and high rates of organic matter decomposition. It creates a distinct and fragile marine environment that supports a wide range of biodiversity.

From a geopolitical point of view, the basin is a dynamic and intricate marine ecosystem surrounded by six countries: Bulgaria, Romania, Ukraine, Russia, Georgia, and Turkey. This region is characterized by a variety of ecological, economic, and geopolitical interactions, making its environmental protection a complex and multifaceted challenge. Harmonizing international, regional, and national efforts requires strong interaction and cooperation mechanisms among States to ensure effective implementation. This multiplicity of actors, coupled with overlapping jurisdictions, complicates efforts to coordinate environmental policies and actions.

Over the decades, the Black Sea has faced persistent and evolving environmental challenges. Traditional issues such as eutrophication, industrial pollution, and overfishing have endured as major threats to the region's ecological balance. Eutrophication, driven by nutrient runoff from agriculture and untreated wastewater, contributes to harmful algal blooms and hypoxic conditions, disrupting ecosystems and fisheries. Industrial pollution, including heavy metals and toxic

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substances, continues to degrade water quality, posing risks to marine life and human health. Overfishing and illegal, unreported, and unregulated (IUU) fishing exacerbate the depletion of fish stocks and undermine the livelihoods of coastal communities.[1]

These historical challenges are now intensified by emerging threats, including the impacts of climate change, marine litter, and invasive species. Rising sea temperatures, ocean acidification, and sea-level rise associated with climate change are already altering the Black Sea's ecosystems and threatening its coastal regions. Marine litter, particularly plastic pollution, has become a pervasive issue affecting marine life and posing long-term environmental hazards. The introduction of invasive species through ballast water and other human activities disrupts native ecosystems, creating additional complexities for environmental management.

This analysis seeks to address the environmental challenges facing the Black Sea region, both traditional and emerging, through the lens of "regime complexes"[2]. This theoretical framework views governance as a dynamic interplay of interconnected institutions, agreements, and stakeholders operating across global, regional, and national levels. The objective is to analyze and predict the system's evolution over the medium term by leveraging the complex regime matrix. This approach allows for a deeper understanding of the dynamic interactions within the system, providing insights that can guide decision-making and strategy development.

To achieve this, the essay will first reconstruct the fragmented governance landscape of the Black Sea, where overlapping jurisdictions and uncoordinated regimes hinder coherent policymaking and effective implementation. By analyzing the interactions among these governance structures, it will identify key obstacles to environmental management while uncovering opportunities for enhancing resilience and fostering cooperation.

Then, adopting the regime-complex perspective, the analysis will demonstrate how fragmented governance regimes influence policy alignment and implementation. It will emphasize the importance of adaptive governance structures and integrated mechanisms, such as data-sharing frameworks, transboundary cooperation, and predictive governance models. These tools are critical for addressing both persistent and emerging environmental threats effectively.

Finally, the essay will explore how regime complexes may evolve toward stability through the alignment and adaptation of overlapping frameworks. It will demonstrate the potential for innovative governance approaches to harmonize

[1] BAKAN, G., BÜYÜKGÜNGÖR, H., "The Black Sea", *Marine Pollution Bulletin*, vol. 41, n° 1-6, 2000, pp. 24-43.

[2] See footnote 3 below.

efforts across different levels, offering actionable strategies to strengthen resilience and cooperation. The Black Sea's ecological and geopolitical importance underscores the need for such approaches, positioning the region as a model for addressing complex governance challenges in similar contexts.

2. The Environmental Protection of the Black Sea: Understanding a Regime Complex

The environmental protection of the Black Sea is a significant example of the challenges and opportunities presented by regime complexes in international law, particularly in the governance of semi-enclosed seas. In international relations, the concept of regime complexes emphasizes the fragmented [3] yet interconnected array of legal frameworks, institutions, and stakeholders operating across different levels of governance. It is also often used to capture the proliferation of institutions, agreements, and sites where states negotiate legal text to codify the values, norms, and rules that should govern a particular issue area.[4]

Regime complexes are inherently dynamic and evolve through distinct phases,[5] with varying levels of involvement from states and non-state actors.[6] In the early stages of regime-complex formation, actors often compete for authority, resources, and influence, as each seeks to establish its role within the governance framework.

[3] BIERMANN, F., PATTBERG, P., VAN ASSELT, H., ZELLI, F., "The Fragmentation of Global Governance Architectures: A Framework for Analysis", *Global Environmental Politics*, vol. 9, n° 4, 2010, pp. 14-40; ISAILOVIC, M., WIDERBERG, O., PATTBERG, P., "Fragmentation of Global Environmental Governance Architectures: A Literature Review", *Institute of Environmental Studies*, Report W-13/09, 2013; OBERTHÜR, S., POZÀROWSKA, J., "Managing Institutional Complexity and Fragmentation: The Nagoya Protocol and the Global Governance of Genetic Resources", *Global Environmental Politics*, vol. 13, n° 3, 2013, pp. 100-118; LAWRENCE, P., "The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions", *Transnational Environmental Law*, vol. 5, n° 2, 2016, pp. 451-455; GREENHILL, B., LUPU, Y., "Clubs of Clubs: Fragmentation in the Network of Intergovernmental Organizations", *International Studies Quarterly*, vol. 61, n° 1, 2017, pp. 181-195; RAKHYUN E.K., "Is Global Governance Fragmented, Polycentric, or Complex? The State of the Art of the Network Approach", *International Studies Review*, vol. 22, n° 4, 2019, pp. 1-29.

[4] LANGLET, A., VADROT, A., "Negotiating Regime Complexity: Following a Regime Complex in the Making", *Review of International Studies*, vol. 50, n° 2, 2024, pp. 231-251 at p. 232.

[5] ORSINI, A., MORIN, J.F., YOUNG, O.R., "Regime Complexes: A Buzz, a Boom, or a Boost for Global Governance?", *Global Governance*, vol. 19, n° 1, 2013, pp. 27-39; GOMEZ-MERA, L., MORIN, J.F., VAN DE GRAAF, T., "Regime Complexes", in BIERMANN, F., KIM, R.E. (eds.), *Architectures of Earth System Governance: Institutional Complexity and Structural Transformation*, Cambridge University Press, Cambridge, 2020, pp. 137-157.

[6] HOLLWAY, J., "What makes a 'regime complex' complex? It depends", *Complexity, Governance and Networks*, vol. 6, n° 1, 2020, pp. 68-81.

This competition can result in inefficiencies and conflicts, as overlapping mandates may lead to redundancies or jurisdictional issues. However, over time, the players involved tend to specialize, focusing on areas where they have unique expertise or established mandates. This specialization can foster a division of labor, reduce conflicts, and create synergies that enhance the effectiveness and coherence of governance efforts. Despite these potential benefits, the dynamics of regime complexes also present significant challenges. The competition among actors can encourage "forum shopping," where states or organizations selectively engage with institutions that best align with their interests, potentially undermining the coherence of the governance system. Similarly, "regime shifting" may occur when actors attempt to reframe issues or move negotiations to alternative forums to bypass unfavorable outcomes or constraints. These behaviors highlight the need for mechanisms that promote coordination and alignment among the various elements of a regime complex.

The governance of the Black Sea confirms these dynamics, as it involves a range of international, regional, and national actors, each with distinct priorities and mandates. For instance, agreements such as the United Nations Convention on the Law of the Sea (UNCLOS),[7] the Bucharest Convention on the Protection of the Black Sea Against Pollution,[8] institutions like the International Maritime Organization (IMO)[9], and programs like the United Nations Environment Programme (UNEP) operate within this complex governance backdrop.[10] These legal instruments have to navigate overlapping mandates while addressing both persistent and emerging challenges, such as climate change impacts, marine pollution, and declining fish stocks.[11]

[7] United Nations Convention on the Law of the Sea, 1833 UNTS 397, 21 ILM 1261 (1982). On the role of UNCLOS in governing sea and oceans, see: KOH, T.T.B., "A Constitution of the Oceans: Remarks by Tommy T.B. Koh of Singapore, President of the Third United Nations Conference on the Law of the Sea", 10 December 1982, reproduced in United Nations, *The Law of the Sea. Official Text of the United Nations Convention on the Law of the Sea with Annexes an Index. Final Act of the Third United Nations Conference on the Law of the Sea. Introductory Material on the Convention and the Conference*, 1983, xxxiii–xxxvii; see also SCOTT, K.N., "The LOSC: 'A Constitution for the Oceans' in the Anthropocene?", *Australian Yearbook of International Law Online*, vol. 41, n° 1, 2023, pp. 269-296; see for critical discussion on the matter HAVERCROFT, J., KLOKER, A., "A Constitution for the Ocean? An Agora on Ocean Governance", *Global Constitutionalism*, vol. 13, n° 1, 2023, pp. 1-3.

[8] See Convention for the Protection of the Black Sea Against Pollution, 32 ILM 1101 (1992).

[9] See Convention on the International Maritime Organization, 289 UNTS 3, 9 UST 621, TIAS 4044 (adopted 06 March 1948, entry into force 17 March 1958).

[10] See on the role of the UN in environmental governance: BOYLE, A., REDGWELL, C., *Birnie, Boyle and Redgwell's International Law and the Environment*, 4th ed., Oxford University Press, Oxford, 2021, pp. 62-71.

[11] DIMENTO, J.F.C., "Black Sea Environmental Management: Prospects for New Paradigms in Transitional Contexts", in BLATTER, J., INGRAM, H. (eds.), *Reflections on Water: New Approaches to Transboundary Conflicts and Cooperation*, MIT Press, Cambridge, 2001, pp. 239-266.

To have a clearer understanding of these dynamics, it is useful to take in account – even for a first overview – the legal framework, the institutions, and the actors involved, as each of these components plays a pivotal role in shaping the complex governance architecture of the Black Sea.[12]

First and foremost, from a legal framework perspective, this interplay is reflected in the multitude of overlapping regimes, including global instruments such as the UNCLOS, regional agreements like the Bucharest Convention on the Protection of the Black Sea Against Pollution, and a variety of bilateral and multilateral initiatives. This complex governance architecture reflects the competing interests and priorities of the coastal states, while also presenting significant barriers to coherent and effective environmental management.[13] UNCLOS provides the foundational framework, articulating principles such as the duty to protect the marine environment and the duty to cooperate, particularly salient for semi-enclosed seas like the Black Sea. However, translating these principles into actionable measures has proven challenging due to divergent national policies and the lack of robust enforcement mechanisms. The Bucharest Convention complements UNCLOS by establishing a regional platform to address pollution and other environmental threats, but its effectiveness is frequently hindered by limited resources, uneven commitment among parties, and the absence of binding compliance measures. These structural weaknesses are further compounded by geopolitical tensions, particularly the ongoing conflict between Russia and Ukraine, which disrupts regional coordination and undermines trust among states.

This governance framework is further complicated by persistent environmental issues such as eutrophication, industrial pollution, and overfishing, which are deeply entrenched and require coordinated regional responses.[14] While the Bucharest Convention and its protocols address these issues, their implementation remains fragmented, and they lack integration with broader global frameworks like the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities (GPA).

Moreover, overfishing and IUU fishing exacerbate ecological degradation, with efforts to regulate these practices often impeded by overlapping jurisdictions and weak enforcement. Emerging challenges, such as climate change, marine litter, and invasive species, add another layer of complexity to the governance

[12] DOUSSIS, E., "Environmental Protection of the Black Sea: A Legal Perspective", *Southeast European and Black Sea Studies*, vol. 6, n° 3, 2006, pp. 355-369.

[13] KNUDSEN, S., "Marine Governance in the Black Sea", in GILEK, M., KERN, K. (eds.), *Governing Europe's Marine Environment. Europeanization of Regional Seas or Regionalization of EU Policies?*, Ashgate, Farnham, 2015, pp. 225-247.

[14] VAN TATENHOVE, J., "How to Turn the Tide: Developing Legitimate Marine Governance Arrangements at the Level of the Regional Seas", *Ocean & Coastal Management*, vol. 71, 2013, pp. 296-304.

of the Black Sea.[15] These transboundary threats require adaptive and integrated approaches that can bridge existing gaps in the regime complex.[16] For example, aligning the Bucharest Convention's initiatives with global agreements like the Paris Agreement and the Basel Convention on hazardous waste could create synergies to address climate adaptation and marine litter more effectively. Similarly, enhancing cross-border cooperation and developing joint monitoring programs can strengthen the region's capacity to respond to invasive species and other ecological disruptions. The Black Sea Integrated Monitoring and Assessment Programme (BSIMAP) is a promising step in this direction, providing a framework for harmonized data collection and analysis, though its success depends on sustained funding and political will.

Secondly, as regime complexity is characterized by both fragmentation and interconnection, also in the case of the Black Sea, multiple institutions and agreements exist, often with overlapping mandates that create both synergies and tensions.[17] Examples of relevant programs and international organizations include the United Nations Environment Programme (UNEP), the International Maritime Organization (IMO), the Food and Agriculture Organization (FAO),[18] and European Union.[19] These players, alongside regional bodies and state actors, play critical roles in shaping the governance framework for the Black Sea. However, the coexistence of these entities often leads to competition for authority, resources, and legitimacy, particularly when new agreements or frameworks are introduced. As competition among different players is a defining feature of regime complexity in the context of the Black Sea, competition often arises when multiple organizations claim overlapping mandates. For example, the IMO may assert authority over shipping regulations, while UNEP emphasizes its role in addressing marine

[15] ÖZTÜRK, B., "Some Remarks of Illegal, Unreported and Unregulated Fishing in Turkish Part of the Black Sea", *Black Sea/Mediterranean Environment*, vol. 19, n° 2, 2013, pp. 256-267, at p. 257; SANDER, K., LEE, J., HICKEY, V., BUNDI MOSOTI, V., VIRDIN, J., MAGRATH, W.B., "Conceptualizing Maritime Environmental and Natural Resources Law Enforcement – The Case of Illegal Fishing, *Environmental Development*, vol. 11, 2014, pp. 112-122; BELOVA, G., "Illegal Unreported and Unregulated Fishing in the Black Sea", *International Conference Knowledge-based Organization*, vol. 21, n° 2, 2015, pp. 408-412.

[16] MEE, L.D., "Protecting the Black Sea Environment: A Challenge for Cooperation and Sustainable Development in Europe", in ADAMS, T.D., EMERSON, M., MEE, L.D., VAHL, M. (eds.), *Europe's Black Sea Dimension*, Centre for European Policy Studies, Brussels, 2002, pp. 79-140.

[17] BAYRAMOGLU, B., "Transboundary Pollution in the Black Sea: Comparison of Institutional Arrangements", *Environmental & Resource Economics*, vol. 35, 2006, pp. 289-325.

[18] As it is well known, the FAO has relevant competences in ocean governance, namely for fisheries and marine products. See BOYLE, REDGWELL, *op. cit.*, pp. 73-76.

[19] BAYRAMOGLU, B., HAITA-FALAH, C., "With or Without the European Union: The Convention for the Protection of the Black Sea Against Pollution", *Environment and Development Economics*, vol. 29, n° 4, 2024, pp. 296-318.

pollution.[20] Such overlaps can lead to tensions as different players often compete for resources, recognition, and influence. At the same time, specialization is another critical aspect of regime complexity. As negotiations progress, international organizations often adapt their strategies by focusing on areas where they have unique competencies or established mandates. This behavior reduces direct competition and fosters a division of labor within the regime complex. For instance, the Intergovernmental Oceanographic Commission (IOC) may concentrate on providing technical assistance related to marine science, while the Convention on Biological Diversity (CBD) focuses on issues of ecological conservation. In the Black Sea context, such specialization can enhance the efficiency and effectiveness of governance by leveraging the strengths of different organizations.

Another critical aspect of regime complexity in the Black Sea is the role of state actors. States play a dual role as both architects and participants in the regime complex. During negotiations, states may advocate for their interests and priorities. For instance, coastal states in the Black Sea may emphasize the role of regional organizations in addressing pollution or fisheries management, reflecting their preference for localized governance solutions. At the same time, these states have to balance regional interests with broader commitments or interests (especially in economic perspective) under international frameworks. National laws and policies also form a critical layer of the regime complex. Each Black Sea state has developed its own legal frameworks to address marine and coastal environmental issues. However, the effectiveness of these national laws is often contingent upon their alignment with international and regional commitments and the capacity for enforcement. For instance, national regulations on pollution control, fishing quotas, and habitat protection must be harmonized with the standards set by UNCLOS and the Bucharest Convention. Moreover, disparities in enforcement capabilities and economic priorities among the Black Sea countries can lead to inconsistent application of these laws, undermining collective efforts.

Finally, non-governmental organizations (NGOs) and civil society actors are vital components of the environmental regime complex in the Black Sea. They may contribute by raising awareness, conducting scientific research, monitoring environmental conditions, and advocating for stronger policies and actions. NGOs often serve as observers, holding governments accountable for their environmental commitments and providing critical data and insights that inform policy decisions. Their involvement is essential for fostering transparency, enhancing public participation, and ensuring that diverse perspectives are considered in environmental governance.

[20] BORISOVA, A.S., "International Legal Standards for the Protection of the Marine Environment from Pollution as a Result of the Lawmaking Activities of the International Maritime Organization", *Ocean Management*, vol. 1, n° 4, 2019, pp. 19-22.

However, the process of delimiting and defining roles within a regime complex is not so straightforward. While progress has been made in aligning regional and global governance instruments, significant gaps remain, particularly in addressing power asymmetries and ensuring equitable participation.

This first view of the Black Sea's geopolitical context underscores the need for inclusive governance structures that prioritize dialogue and consensus-building among all stakeholders. This should include not only coastal states but also non-state actors, such as international organizations, non-governmental organizations, and private sector entities, whose involvement can enhance capacity-building and facilitate innovative solutions. It remains to be determined whether the current governance system possesses the capacity to steer the region toward an effective systemic coordination.

3. The Key Role of UNCLOS for the Environmental Governance of the Black Sea

A key role for the environmental governance of the Black Sea is played by the United Nations Convention on the Law of the Sea (UNCLOS), which establishes a comprehensive legal framework for the protection and sustainable management of the world's oceans[21]. UNCLOS serves as a robust legal foundation for addressing marine environmental challenges in the Black Sea region. However, its effectiveness depends on the degree of coordination with regional agreements,[22] such as the Bucharest Convention on the Protection of the Black Sea against Pollution,[23] and the operational capacity of regional institutions like the Black Sea Commission.

Marine Environmental Protection (Part XII) outlines the obligations of states to prevent, reduce, and control pollution of the marine environment.[24] Arts. 192

[21] See BOYLE, A., "Climate Change, Ocean Governance and UNCLOS", in BARRETT, J., BARNES, R. (eds.), *Law of the Sea: UNCLOS as a Living Treaty*, British Institute of International and Comparative Law, London, 2016, pp. 211-214; BODANSKY, D., "The Ocean and Climate Change Law: Exploring the Relationships", in LONG, R., BARNES, R. (eds.), *Frontiers in International Law: Oceans and Climate Challenges: Essays in Honor of David Freestone*, Brill Nijhoff, Leiden, 2021, p. 6.

[22] TAKEI, Y., "Demystifying Ocean Governance", in TREVISANUT, S., GIANNOPOULS, N., HOLST, R.R. (eds.), *Regime Interaction in Ocean Governance: Problems, Theories and Methods*, Brill/Nijhoff, Leiden, 2020, pp. 23-26.

[23] Convention for the Protection of the Black Sea Against Pollution, 32 ILM 1101 (1992).

[24] FRACKX, E., "Regional Marine Environment Protection Regimes in the Context of UNCLOS", *International Journal of Marine and Coastal Law*, vol. 13, n° 3, 1998, pp. 307-324; NGUYEN, L.N., "Expanding the Environmental Regulatory Scope of UNCLOS Through the Rule of Reference: Potentials and Limits", *Ocean Development & International Law*, vol. 52, n° 4, 2022,

and 194 emphasize the duty of states to protect and preserve the marine environment and to take all necessary measures to mitigate pollution from various sources, including land-based activities, ships, and dumping. These principles are reinforced by arts. 207 and 213, which require states to adopt and implement measures to prevent land-based pollution. Cooperation among States, as highlighted in arts. 197 and 123, encourages states bordering semi-enclosed seas, like the Black Sea, to collaborate in the conservation and management of living resources and the protection of the marine environment. Art. 123 emphasizes the need for cooperation among states bordering semi-enclosed seas, urging them to coordinate in managing resources and addressing shared environmental challenges, and art. 200 underscores the importance of scientific research and data sharing as tools for informed governance. These provisions form the legal basis for regional agreements and collaborative initiatives.

UNCLOS plays a significant role in obliging states to take measures reducing pollution and cooperating on regional initiatives to fight pollution from land-based sources, including agricultural runoff, industrial waste, and untreated sewage. However, the effectiveness of these measures depends on the political will and capacity of the coastal states.[25] For example, the Protocol on Land-Based Sources of Pollution, developed under the Bucharest Convention, complements UNCLOS by targeting specific pollution sources. However, its impact remains limited due to inconsistent enforcement and insufficient financial and technical support from signatory states.

UNCLOS provides also guidelines for the sustainable use of living marine resources (Part VII and Part XII), obligating states to cooperate in the management of shared fish stocks, since sustainable fisheries management is another critical area, and overfishing and IUU fishing pose significant threats to the Black Sea's marine biodiversity. Regional mechanisms, such as the Black Sea Commission, are tasked with implementing these principles but face challenges in achieving compliance and data transparency. Similarly, marine biodiversity conservation is addressed under UNCLOS through provisions for the creation of marine protected areas (MPAs). Although regional initiatives have designated some MPAs in the Black Sea, their effectiveness is hindered by inconsistent enforcement and funding limitations. Strengthening the alignment between UNCLOS and regional biodiversity strategies is essential for improving conservation outcomes.

pp. 419-444; TANG, J., "On Legal Relationship between Marine Living Resources Conservation and Marine Environmental Protection", *Marine Law and Policy*, n° 1, 2023, pp. 73-93.

[25] MATZ-LÜCK, N., JENSEN, Ø., "From Fragmentation to Interaction? A Law of the Sea Perspective on Regime Interaction and Interdisciplinary Interfaces", in JOHANSEN, E., MATZ-LÜCK, N., JENSEN, Ø. (eds.), *The Law of the Sea: Normative Context and Interactions with other Legal Regimes*, Routledge, London, 2022, p. 3.

UNCLOS addresses these issues through provisions for sustainable fisheries management, such as arts. 61, 63, and 64, which emphasize the conservation of shared fish stocks. However, the regional mechanisms tasked with implementing these principles, like the Black Sea Commission, often struggle due to inadequate funding and limited political support: while UNCLOS supports the establishment MPAs, regional efforts to designate those in the Black Sea have been hampered by fragmented enforcement and insufficient resources.

Finally, even if art. 200 of UNCLOS provides a basis for scientific collaboration, and art. 210 obligates states to address pollution from dumping, (and these provisions align with global initiatives like the International Maritime Organization's Ballast Water Management Convention),[26] the success of these measures relies on harmonized implementation at the regional level. Moreover, the region's geopolitical tensions, particularly between Russia and Ukraine, undermine trust and cooperation, hindering the implementation of UNCLOS provisions. Indeed, while UNCLOS provides mechanisms for dispute resolution under Part XV, these are not always effective in politically charged contexts.[27] Finally, disparities in the technical and financial capacities of the coastal states exacerbate enforcement gaps.

It is evident that, despite the robust framework provided by UNCLOS, the current environmental governance of the Black Sea faces significant challenges, and it falls short of ensuring the effective protection of the basin. There is a strong need of coordination between UNCLOS and regional instruments for overcoming these challenges. While UNCLOS offers a global framework, regional agreements like the Bucharest Convention could address specific environmental priorities. However, the lack of effective communication and cooperation between the global and regional frameworks often leads to gaps in governance and enforcement.[28]

[26] International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004 (BWM Convention), entered into force globally on 8 September 2017, I:\CONF\BWM\36.DOC.

[27] IVANOVA, A.A., POLISHCHUK, A.V., "Organizational and Legal Regulation of International Cooperation in the Field of Safety and Protection of the Marine Environment", *Ocean Management*, vol. 1, n° 10, 2021, pp. 13-18.

[28] See also MEE, L., "Can the Marine and Coastal Environment of the Black Sea be Protected?", in AYBAK, T., *Dynamics of Cooperation and Conflict*, I.B. Tauris, London, 2001, pp. 133-161.

4. The Bucharest Convention and the Black Sea Commission: Gaps and Solutions

The implementation of UNCLOS in the Black Sea is complemented by regional agreements, most notably the Bucharest Convention on the Protection of the Black Sea Against Pollution. While UNCLOS provides a global framework, the Bucharest Convention offers a regional approach tailored to the specific environmental challenges of the Black Sea.[29] The synergy between these instruments underscores the importance of UNCLOS as a cornerstone for regional cooperation.

The Bucharest Convention, formally known as the Convention on the Protection of the Black Sea Against Pollution, was adopted in 1992 and ratified by the six Black Sea countries—Bulgaria, Georgia, Romania, Russia, Turkey, and Ukraine. It obliges the parties to cooperate in preventing and reducing pollution, as well as in protecting and preserving the marine and coastal environments of the Black Sea. It represents one of the most important regional mechanisms for environmental governance in the area and functions as a complement to the global framework provided by the UNCLOS. [30]

The Convention is structured around its protocols, which provide specific guidelines and commitments for the contracting parties. These protocols include the Protocol on the Protection of the Black Sea Marine Environment Against Pollution from Land-Based Sources, the Protocol on the Protection of the Black Sea Marine Environment Against Pollution by Dumping, and the Protocol on Cooperation in Combating Pollution in Emergency Situations.[31] Each protocol targets a distinct source or type of marine pollution, emphasizing the need for coordinated action and collective responsibility among the coastal states.[32]

[29] GÖKTEPE, B.G., "The Black Sea One Decade after the Bucharest Convention: An Overview of the International Activities in the Black Sea Region", *Turkish Journal of Marine Sciences*, vol. 8, n° 1, 2002, pp. 41-64; MORARU, A. M., DUSCA, I. A., "Is the Bucharest Convention on the Protection of the Black Sea against Pollution Still a Matter of General Concern? Has It Reached Its Purpose? *IBSU Scientific Journal,* vol. 5, n° 1, 2011, pp. 57-64; ORAL, N., "Chapter III: The Regional Legal Framework for the Protection and Preservation of the Black Sea Marine Environment", in ORAL, N., *Regional Co-operation and Protection of the Marine Environment Under International Law*, Brill/Nijhoff, Leiden, 2013, pp. 75-125; ÖZKAN, A., "Implementing International Environmental Law in the Black Sea Basin: An Analysis of Bucharest Convention", *Zeitschrift Für Die Welt Der Türken/Journal of World of Turks,* vol. 6, n° 1, 2014, pp. 229-240.

[30] ÖZKAN, *op. cit.*, pp. 229-240.

[31] Protocols available on the website of the Commission on the Protection of the Black Sea Against Pollution, <www.blacksea-commission.org>, last accessed on 9 January 2025.

[32] For instance, the Protocol on Land-Based Sources obliges states to adopt measures to control pollution from agriculture, industry, and urban discharges, which remain significant contributors to eutrophication and habitat degradation in the Black Sea. Similarly, the Protocol on Dumping aims to prevent the introduction of harmful substances and waste materials, ensuring that marine ecosystems are not further compromised by anthropogenic activities.

The synergy between UNCLOS and the Bucharest Convention highlights the importance of coordinated legal and institutional frameworks for addressing the complex environmental issues of the Black Sea.[33]

Despite its significant contributions, the Bucharest Convention faces several challenges that hinder its full implementation and effectiveness.

One of the primary issues is the uneven commitment and capacity of the contracting parties. Economic disparities and differing political priorities among the Black Sea states often result in inconsistent enforcement of the convention's provisions. For example, while some countries have made substantial progress in reducing land-based pollution, others continue to struggle with outdated infrastructure, insufficient funding, and weak regulatory frameworks. This lack of uniformity not only undermines the overall effectiveness of the convention but also creates tensions among the contracting parties, complicating efforts to achieve collective goals.

Another major challenge is the persistent geopolitical tensions in the region, particularly the conflict between Russia and Ukraine. These tensions disrupt regional cooperation and impede the implementation of joint actions under the Bucharest Convention. The conflict has also exacerbated environmental degradation in the Black Sea, as ongoing hostilities and economic sanctions have diverted attention and resources away from environmental protection efforts. In this context, the role of UNCLOS as a neutral and universally recognized legal framework becomes even more critical. By providing a common platform for cooperation and dispute resolution, UNCLOS can help mitigate some of the challenges faced by the Bucharest Convention, ensuring that regional initiatives remain aligned with international obligations and principles.

Climate change and emerging environmental threats further complicate the implementation of the Bucharest Convention. Rising sea levels, altered salinity patterns, and increasing temperatures are already impacting the Black Sea's ecosystems, leading to shifts in species distributions, loss of biodiversity, and changes in primary productivity. These changes exacerbate existing challenges such as eutrophication, overfishing, and pollution, placing additional strain on the region's governance mechanisms. While the Bucharest Convention and its

[33] While UNCLOS provides a comprehensive global framework that emphasizes principles such as the duty to cooperate, the duty to protect the marine environment, and the sustainable use of marine resources, the Bucharest Convention translates these principles into actionable commitments tailored to the specific needs and circumstances of the Black Sea region. For example, Article 123 of UNCLOS, which calls for cooperation among states bordering semi-enclosed seas, is operationalized through the cooperative mechanisms established under the Bucharest Convention and its protocols. This alignment ensures that the regional and global frameworks reinforce each other, creating a more coherent and effective governance system. See: AYDIN, M., "Regional Cooperation in the Black Sea and the Role of Institutions", *Perceptions*, vol. 10, n° 3, 2005, pp. 57-83.

protocols address many of these issues, their effectiveness is limited by gaps in scientific knowledge, monitoring capabilities, and adaptive management strategies. Strengthening the integration of the convention with global initiatives such as the Paris Agreement and the Convention on Biological Diversity could help address these gaps,[34] enhancing the resilience and adaptability of the Black Sea's governance framework.

A key role in facilitating the implementation of the Bucharest Convention and its protocols, as well as ensuring compliance among contracting parties, and fostering cooperation among the six Black Sea coastal states is played by the Commission on the Protection of the Black Sea Against Pollution (BSC). It represents the institutional mechanism established under the Bucharest Convention to oversee and coordinate regional environmental governance efforts in the basin.[35]

From a legal perspective, the BSC embodies a critical example of regional institutional governance aimed at addressing the specific challenges posed by a semi-enclosed sea with significant transboundary environmental concerns. Its establishment of the BSC aligns with art. 123 of UNCLOS, which encourages states bordering semi-enclosed seas to cooperate in managing and conserving marine resources and protecting the marine environment. The BSC's mandate reflects this principle by serving as a platform for dialogue, coordination, and the harmonization of policies across the Black Sea region. However, the effectiveness of the BSC in fulfilling its mandate is contingent upon several factors, including the commitment of member states, the availability of financial and technical resources, and the geopolitical context of the region.

Despite its ambitious objectives, also the BSC faces significant challenges that undermine its capacity to deliver effective regional governance.[36]

One of the primary obstacles is the uneven level of commitment and participation among member states. Economic disparities and differing political priorities often result in varying degrees of compliance with the provisions of the Bucharest Convention and its protocols. For example, some states prioritize economic development over environmental protection, leading to inconsistent implementation of pollution control measures. This lack of uniformity not only hampers the overall effectiveness of the BSC but also creates tensions among member states, complicating efforts to achieve collective goals.

[34] Convention on Biological Diversity. 1992. It came into force on 29 December 1993, (1760 UNTS 79).

[35] AVOYAN, E., VAN TATENHOVE, J.P.M., TOONEN, H., (2017). "The Performance of the Black Sea Commission as a Collaborative Governance Regime", *Marine Policy*, vol. 81, 2017, pp. 285-292.

[36] *Ibidem*.

Another critical challenge stems from the limited financial and technical resources available to the BSC.[37] As a regional body, the BSC relies on contributions from its member states to fund its activities and initiatives. However, these contributions are often insufficient to support the comprehensive implementation of its mandate. The lack of adequate funding impacts the BSC's ability to conduct scientific research, develop and enforce regulations, and facilitate capacity-building programs. Moreover, the scarcity of resources limits the BSC's capacity to respond to emerging environmental threats, such as climate change, marine litter, and invasive species, which require significant investments in monitoring, mitigation, and adaptation measures.

Geopolitical tensions in the Black Sea region further complicate the BSC's work.[38] The ongoing conflict between Russia and Ukraine has disrupted regional cooperation and undermined the trust necessary for effective collaboration among member states. These tensions hinder the implementation of joint initiatives and obstruct the functioning of the BSC's subsidiary bodies. Additionally, geopolitical disputes divert attention and resources away from environmental protection efforts, exacerbating existing challenges and delaying progress toward the convention's objectives. In this context, the BSC's role as a neutral platform for dialogue and cooperation becomes even more critical. By facilitating communication and fostering trust among member states, the BSC has the potential to mitigate some of the adverse effects of geopolitical tensions on regional environmental governance.

The BSC's work is further complicated by the transboundary nature of many environmental issues in the Black Sea.[39] Pollution from land-based sources, overfishing, and the introduction of invasive species are problems that transcend national boundaries and require coordinated regional responses. The BSC's efforts to address these challenges are guided by the principles of integrated coastal zone management and ecosystem-based approaches, which emphasize the interconnectedness of environmental, social, and economic factors. However, the successful implementation of these approaches depends on the active participation and cooperation of all member states, as well as the alignment of national policies with regional and international legal frameworks.

To enhance its effectiveness, the BSC could benefit from greater integration with global initiatives and organizations. Strengthening collaboration with inter-

[37] GAVRAS, P., "The Current State of Economic Development in the Black Sea Region", *Journal of Southeast European and Black Sea Studies*, vol. 10, n° 3, 2010, pp. 263-285.

[38] ACHIMESCU, C., CHIRICIOIU, V., OLTEAN, I., "Challenges to Black Sea Governance. Regional Disputes, Global consequences?", *Romanian Journal of International Law*, vol. 26, 2021, pp. 35-61.

[39] VINOGRADOV, S., "Marine Pollution via Transboundary Watercourses — An Interface of the 'Shoreline' and 'River-Basin' Regimes in the Wider Black Sea Region", *The International Journal of Marine and Coastal Law*, vol. 22, n° 4, 2007, pp. 585-620.

national bodies could provide the BSC with additional resources, technical expertise, and political support. Additionally, aligning the BSC's activities with the objectives of global agreements, such as the Paris Agreement on climate change and the Convention on Biological Diversity, could amplify its impact and ensure that regional efforts contribute to broader international goals.

The adoption of advanced technologies and innovative solutions also holds promise for enhancing the BSC's capacity to address environmental challenges. For example, satellite monitoring and remote sensing technologies can improve the accuracy and efficiency of pollution tracking and habitat mapping, while big data analytics can support the development of predictive models for ecosystem management. By leveraging these tools, the BSC can strengthen its monitoring and assessment capabilities, enabling more effective responses to environmental threats and informed decision-making.

Capacity-building and stakeholder engagement are equally important for the success of the BSC. Providing training programs and technical assistance to member states can enhance their ability to implement the provisions of the Bucharest Convention and its protocols. Furthermore, involving non-state actors, such as non-governmental organizations, academic institutions, and the private sector, in the BSC's activities can foster a more inclusive and participatory governance framework. These stakeholders can contribute valuable knowledge, resources, and perspectives, enriching the BSC's work and promoting a sense of shared responsibility for the protection of the Black Sea.

As described, the Black Sea Commission plays a pivotal role in the environmental governance of the Black Sea, serving as a regional mechanism for implementing the Bucharest Convention and addressing transboundary environmental challenges. However, the analysis here offered demonstrated how its effectiveness is constrained by factors such as limited resources, uneven commitment among member states, and geopolitical tensions. Strengthening the BSC's institutional capacity, fostering regional and international collaboration, and leveraging technological innovations are essential steps toward overcoming these challenges. By addressing these issues, the BSC could fulfill its mandate more effectively, contributing to the sustainable management and protection of the Black Sea's unique marine environment.

5. The 2009 Strategic Action Plan for the Rehabilitation and Protection of the Black Sea

The 2009 Strategic Action Plan for the Rehabilitation and Protection of the Black Sea represents a relevant update to regional efforts aimed at addressing the

environmental challenges of the Black Sea.[40] Building on earlier frameworks, the action plan incorporates modern scientific insights and focuses on contemporary issues such as climate change, marine litter, and biodiversity loss. From a legal perspective, it reflects the alignment of regional priorities with international obligations under the UNCLOS, while tailoring its provisions to the unique needs of the Black Sea region.

The Plan chosen prioritizes pollution prevention and control, recognizing land-based sources as the primary contributors to the Black Sea's environmental degradation. It outlines measures to reduce nutrient and contaminant inputs into the marine environment, promoting practices such as advanced wastewater treatment and stricter industrial emission controls. These initiatives align with arts. 207 and 213 of UNCLOS, which address pollution from land-based activities and call for the adoption of international standards to mitigate their effects.

Marine pollution from shipping is also addressed in the action scheme, emphasizing compliance with international regulations on ship-generated waste and the promotion of cleaner technologies. These efforts align with art. 211 of UNCLOS, which governs pollution from vessels. Regional cooperation in monitoring and responding to pollution incidents is highlighted as a key component of the plan, reinforcing the importance of joint initiatives to safeguard marine ecosystems. The sustainable management of living marine resources is another cornerstone of the document. Overfishing and IUU fishing have long threatened the ecological balance of the Black Sea. In line with UNCLOS arts. 61 and 62, the action plan advocates for science-based fisheries management and enhanced enforcement mechanisms. These measures aim to ensure the sustainability of fish stocks while supporting the livelihoods of coastal communities.

Biodiversity conservation features prominently in the action plan, reflecting its importance for the ecological integrity of the Black Sea. Critical habitats, such as wetlands and seagrass beds, are targeted for restoration, with efforts to mitigate the impacts of invasive species and habitat destruction. The plan's focus on preserving marine biodiversity aligns with arts. 192 and 194 of UNCLOS, which obligate states to protect marine environments and prevent harm to ecosystems. Climate change adaptation is integral to the 2009 strategy, addressing the rising sea levels, changing salinity patterns, and increased frequency of extreme weather events that threaten the region. By advocating for the restoration of natural coastal defenses and the development of early warning systems, the plan seeks to enhance the resilience of marine and coastal ecosystems. These efforts are consistent with global frameworks like the Paris

[40] Black Sea Commission, Strategic Action Plan for the Environmental Protection and Rehabilitation of the Black Sea, adopted in Sophia, Bulgaria, 17 April 2009, <www.blacksea-commission.org>, last accessed on 9 January 2025.

Agreement, which emphasize the integration of climate considerations into environmental governance.

The plan's success hinges on effective regional cooperation, capacity-building, and stakeholder engagement.[41] Joint monitoring programs and the harmonization of environmental policies are essential for addressing the transboundary nature of the Black Sea's challenges. Additionally, the engagement of non-state actors, such as NGOs and the private sector, can enrich the implementation process by providing expertise and resources. Finally, it properly aligns regional efforts and initiatives with international legal standards and fostering regional cooperation, lays the foundation for sustainable management and protection of the marine environment. However – once again – its effectiveness depends on the sustained commitment of the Black Sea states and the resolution of persistent challenges, including resource limitations and geopolitical tensions. Through innovative approaches and strengthened collaboration, the action plan could serve as a model for regional environmental governance in similar contexts.[42] However, several notable weaknesses undermine its efficacy and enforceability.[43]

A significant shortcoming of the current framework lies in the absence of a binding legal structure that compels compliance among the Black Sea riparian states. While the instrument outlines key objectives and strategies, it predominantly relies on voluntary commitments rather than legally enforceable obligations. This voluntary approach weakens accountability and creates disparities in how the countries implement the plan, reflecting varying levels of political will, economic resources, and environmental priorities. Additionally, the legal foundation underpinning the cooperation in the region is fragmented. Although the Bucharest Convention offers a basic framework for collaboration, its integration with the Strategic Action Plan remains insufficiently strong. The lack of clear mechanisms to mediate conflicting national interests and coordinate enforcement mechanisms exacerbates this fragmentation, particularly given the legal asymmetries across the riparian states. These disparities are amplified by differing domestic environmental laws and regulatory capacities, creating inconsistencies in how effectively the plan's objectives are achieved.

[41] PĂDUREANU, M.A., ONEAȘCĂ, I., "From Synergy to Strategy in the Black Sea Region: Assessing Opportunities and Challenges", EIR Working Papers Series, n° 51, European Institute of Romania, Bucharest, 2024.

[42] VELIKOVA, V., ORAL, N., "Governance of the Protection of the Black Sea: A Model for Regional Cooperation", in LAGUTOV, V., (ed.), *Environmental Security in Watersheds: The Sea of Azov*, Springer, Netherlands, 2012, pp. 159-171.

[43] DIMADAMA, Z., TIMOTHEOU, A., "Greening the Black Sea: Overcoming Inefficiency and Fragmentation through Environmental Governance", *International Centre for Back Sea Studies*, Policy Brief n° 21, 2010.

Another critical gap is the lack of effective dispute resolution mechanisms within the Strategic Action Plan. Transboundary marine issues often lead to disputes regarding resource use, pollution control, and conservation, yet the plan does not provide a robust legal structure for resolving such conflicts. This omission leaves key issues unresolved and risks undermining long-term cooperation among the states. Moreover, the reliance on soft law principles, such as mutual cooperation and shared responsibility, while helpful for fostering initial collaboration, fails to establish a solid foundation for enforcement or long-term sustainability. The principles of international environmental law, including the precautionary principle and the polluter-pays principle, are acknowledged in the plan but are not operationalized in a way that imposes concrete obligations on states or private actors contributing to the degradation of the Black Sea. This lack of enforceable mandates undermines the plan's ability to proactively prevent environmental harm or ensure that those responsible for pollution bear the costs of remediation. The role of non-state actors, such as private enterprises and civil society organizations, is also notably absent from the legal framework. Despite the significant impact these groups can have on environmental outcomes, the plan does not define formal legal responsibilities or roles for them. This omission reduces the plan's capacity to harness broader societal resources and engagement, which are crucial for addressing complex environmental challenges in the region.

Finally, while monitoring and reporting mechanisms are in place, their legal effectiveness is questionable. Without clear sanctions or penalties for non-compliance, the mechanisms lack the necessary legal force to ensure transparency and compliance. This undermines the reliability of progress assessments and weakens the incentive for states to meet their obligations, further diminishing the potential for meaningful progress in protecting the Black Sea's environmental health.

In conclusion, the 2009 Strategic Action Plan, even noteworthy, suffers from legal weaknesses that require binding commitments, stronger governance, and effective dispute mechanisms. Therefore, the EU's complementary role in addressing these gaps could be crucial to revitalize and to enhance regional cooperation and enforcement.

6. The complementary role of the European Union in protecting the Black Sea Environment

The European Union's (EU) obligation to marine environmental protection is grounded in Article 191 of the Treaty on the Functioning of the European Union (TFEU), which outlines the Union's objectives in preserving, protecting, and improving the quality of the environment. This commitment is further reinforced by

art. 3(3) of the Treaty on European Union (TEU), which emphasizes the promotion of sustainable development. In the context of the Black Sea, these principles guide the EU's actions to address environmental challenges such as pollution, biodiversity loss, and the impacts of climate change.

In the context of the Black Sea, the EU plays a significant, albeit indirect, role within the regional legal and institutional framework aimed at environmental protection.[44] While the EU itself is not a party to the Bucharest Convention, it contributes to the Convention's implementation through its member states, particularly Bulgaria and Romania.[45] These two states, as contracting parties to the Bucharest Convention, act as intermediaries through which the EU's environmental laws, particularly the Marine Strategy Framework Directive (MSFD),[46] and the Water Framework Directive (WFD),[47] are integrated into regional governance efforts. The short analysis following seeks to demonstrate that - although the EU's has no formal place in the Convention - its legal and institutional frameworks profoundly influence the Convention's operational dynamics, thereby fostering a more robust environmental governance system for the Black Sea.

A critical aspect of the EU's involvement lies in the harmonization of national environmental legislation with EU standards, facilitated through directives such as the MSFD and the WFD. These directives impose binding obligations on member states like Bulgaria and Romania to ensure the protection of marine waters, setting high standards for environmental quality, pollution control, and biodiversity preservation. By incorporating these EU directives into national legislation, Bulgaria and Romania have contributed to raising environmental standards in the Black Sea region. This, in turn, places pressure on non-EU coastal states to align their policies with the EU-driven standards, thereby indirectly enhancing the overall environmental governance of the Black Sea.

Moreover, the EU provides substantial financial and technical assistance to support the implementation of the Bucharest Convention's provisions. EU-fund-

[44] ANDREEV, S.A., "The Future of European Neighborhood Policy and the Role of Regional Cooperation in the Black Sea Area", *Southeast European and Black Sea Studies*, vol. 8, n° 2, 2008, pp. 93-108.

[45] TASSINARI, F. (2006). "A Synergy for Black Sea Regional Cooperation: Guidelines for an EU Initiative", *CEPS Policy Brief*, n° 105, June 2006, pp. 1-16.

[46] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), OJ L 164, 25.6.2008, p. 19, amended by the Commission Directive (EU) 2017/845 of 17 May 2017, OJ L 125, 18.5.2017, p. 27.

[47] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1, amended by the Commission Directive 2014/101/EU of 30 October 2014, OJ L 311, 31.10.2014, p. 32.

ed projects such as the Marine Information System for the Black Sea (MISIS),[48] and the Environmental Monitoring of the Black Sea (EMBLAS)[49] have significantly improved monitoring capacities, providing reliable environmental data essential for decision-making. This funding also comes with conditionalities that link financial support to compliance with environmental standards, which strengthens the institutional capacity for effective enforcement. In this regard, the EU's financial mechanisms do not merely support operational needs but also function as tools for enforcing adherence to regional and international environmental norms.[50]

One of the more profound legal contributions of the EU lies in its ability to influence the development of compliance and enforcement mechanisms within the regional legal framework. The Bucharest Convention, though crucial in its objectives, lacks robust enforcement tools, which has led to challenges in ensuring consistent compliance among the contracting parties. The EU's extensive experience in enforcing environmental legislation through its own regulatory mechanisms provides a model that could strengthen the enforcement capabilities of the Bucharest Convention. By emphasizing transparency, the rule of law, and accountability in environmental governance, the EU offers a potential framework for improving the institutional structures underpinning the Convention's operational effectiveness.

Furthermore, the EU leverages its diplomatic and legal expertise to facilitate cooperation among the Black Sea states, providing a platform for legal and policy dialogue. Through the Black Sea Synergy (SS), [51] the EU works to bridge the gaps between different legal systems and priorities.[52] The need for consensus in the Bucharest Convention's decision-making process makes the EU's role

[48] MISIS Summary Report, Period: April 2012 – July 2014, <www.projects.eionet.europa.eu>, last accessed on 9 January 2025.

[49] EMBLAS-Plus, Summary of EMBLAS Project Findings, Gaps and Recommendations, April 2021, <www.emblasproject.org>, last accessed on 9 January 2025.

[50] See also ABAD CASTELOS, M., "The Black Sea and Blue Energy: Challenges, Opportunities and the Role of the European Union", in ANDREONE, G. (ed.), *The Future of the Law of the Sea Bridging Gaps Between National, Individual and Common Interests*, Springer, Berlin, 2017, pp. 145-161, at p. 145.

[51] The Black Sea Synergy aims to ensure policy coherence and further cooperation between the countries surrounding the Black Sea, as a flexible framework for developing practical region-wide solutions. In 2024, European Commission and the European External Action Service adopted the 4th implementation report of the Black Sea Synergy, offering a review of this regional cooperation initiative for the 2019-2023 period. See European Commission, Black Sea Synergy: 4th review of a regional cooperation initiative - period 2019-2023, Brussels, 2.7.2024 SWD (2024) 175 final, <www.data.consilium.europa.eu>, last accessed on 9 January 2025.

[52] YAZGAN H., "Black Sea Synergy: Success or Failure for the European Union?", *Marmara University Journal of Political Science*, vol. 5, 2017, pp. 83-94.

particularly valuable in mediating between states with divergent interests and priorities. The EU's involvement in this process helps to overcome legal and political barriers, offering incentives and aligning the interests of states to further the Convention's goals.

Finally, the EU could play an even more formal role within the Bucharest Convention. By either becoming a contracting party or being granted enhanced observer status, the EU's participation could potentially improve the Convention's enforcement mechanisms. The EU's ability to provide financial support and legal incentives could reduce free-rider behavior among non-EU member states, encouraging greater compliance and coordination. Furthermore, a more formalized role could solidify the EU's influence in shaping the regional governance landscape, ensuring that its commitment to environmental protection is more effectively translated into regional practice.

Therefore, the EU's role in the preservation of the Black Sea's marine environment is characterized by a multifaceted legal framework that includes legislative harmonization, financial mechanisms, and diplomatic engagement.[53] While not a formal party to the Bucharest Convention, the EU has played an essential role in strengthening its operational framework, ensuring higher environmental standards, and improving the enforcement of regional agreements. By aligning its efforts with the Bucharest Convention's objectives and addressing the legal and institutional shortcomings that currently hinder its full implementation, the EU has significantly enhanced the Convention's effectiveness. Future legal and policy developments should focus on formalizing the EU's role within the Convention, thus unlocking its full potential in promoting sustainable marine governance, and fostering long-term environmental protection in the Black Sea region.

7. Final Remarks

The concept of regime complexes highlights the interconnected nature of international institutions and legal instruments, which are neither created nor operate in isolation. Understanding the creation, evolution, implementation, or effectiveness of a specific institution requires examining its broader institutional environment. The environmental governance of the Black Sea offers a compelling example of a regime complex in action. It demonstrates the challenges and opportunities inherent in managing overlapping, interacting, and occasionally fragmented legal frameworks aimed at addressing complex environmental issues.

[53] COUTTO, T., BALKAN, D., "Environmental Concerns in EU–Black Sea Affairs", in ACIKMESE, S.A., TRIANTAPHYLLOU, D. (eds.), *The European Union and the Black Sea: The State of Play*, Routledge, London, 2016, pp. 48-64.

The Black Sea's governance is managed by a multi-layered regime complex that includes international agreements, national laws, regional policies, and institutional mechanisms. This intricate framework aims to tackle pressing challenges such as pollution, overfishing, habitat degradation, and the impacts of climate change. However, the effectiveness of this system depends on the ability (of the States) to harmonize diverse regulatory instruments and ensure coordinated implementation across multiple levels of governance.

As seen above, a key feature of the Black Sea's environmental governance is the intersection between the UNCLOS and regional instruments such as the Bucharest Convention on the Protection of the Black Sea Against Pollution. These frameworks provide complementary legal bases for addressing environmental issues, but their interaction often reveals gaps and inefficiencies. Efforts to enhance coordination between these instruments should prioritize strengthening institutional frameworks and promoting adaptive governance approaches.

Improving institutional coordination is critical for addressing the fragmented nature of the Black Sea's governance regime. This involves not only strengthening the capacities of existing bodies like the Black Sea Commission but also fostering greater collaboration among regional and international stakeholders. Initiatives such as joint enforcement programs, shared data platforms, and coordinated research projects can enhance synergies and reduce duplication of efforts. Additionally, building trust and fostering dialogue among coastal states is essential for overcoming political and institutional barriers to cooperation. For example, confidence-building measures such as joint training programs and collaborative environmental assessments can help bridge differences and create a shared understanding of the region's challenges and priorities.

An adaptive governance is also necessary to address such complex and evolving challenges. Regime complexes are inherently dynamic, responding to new scientific developments, geopolitical shifts, and emerging threats such as climate change. The increasing impacts of climate change on the Black Sea ecosystem, including rising sea levels, warming waters, and changes in biodiversity, underscore the need for flexibility in governance. Adaptive governance requires mechanisms for integrating new knowledge, stakeholder perspectives, and technological innovations into decision-making processes. For instance, the adoption of climate resilience strategies, informed by the latest scientific research, could enhance the ability of the Black Sea states to mitigate and adapt to climate-related risks. Similarly, mechanisms for periodic review and revision of regulatory instruments can ensure that governance frameworks remain fit for purpose in a rapidly changing context.

The interconnectedness of international institutions and legal instruments also underscores the dynamic nature of regime complexes, which are neither stat-

ic nor isolated. This dynamic nature is particularly evident in the environmental governance of the Black Sea. The interplay of global, regional, and national legal frameworks in this semi-enclosed sea exemplifies both the potential and the limitations of fragmented governance systems in addressing multifaceted environmental challenges. The instruments analyzed in this essay, while complementary in their objectives, often have revealed institutional gaps and inefficiencies in practice.

The regime's evolution (in Black Sea as well as in other regions) thus hinges on whether these fragmented mechanisms can transition towards a more systemic and coherent organization or remain constrained by inherent challenges.

A systemic organization would require the harmonization of overlapping legal frameworks and the strengthening of institutional capacities. The UNCLOS provides foundational principles for marine environmental protection and obliges states to cooperate in addressing shared challenges. However, its effective implementation in the Black Sea is contingent upon regional instruments, such as the Bucharest Convention, aligning with its provisions. This alignment must include integrating pollution control measures, coordinating scientific research, and fostering compliance mechanisms. Strengthening the BSC as a regional coordinating body is essential in this regard. The BSC's ability to enforce existing protocols, facilitate data-sharing, and promote uniform standards among coastal states could significantly enhance governance coherence.

However, the potential for systemic coordination is hindered by persistent geopolitical tensions, uneven commitment among states, and resource disparities. For example, conflicts such as those between Russia and Ukraine disrupt regional cooperation and undermine trust among stakeholders. These tensions exacerbate existing gaps in enforcement and impede the implementation of collaborative initiatives. Furthermore, economic and technical disparities among Black Sea states contribute to inconsistent application of environmental regulations. Such fragmentation not only undermines collective efforts but also perpetuates a status quo in which governance mechanisms remain reactive rather than proactive.

In conclusion the optimistic preliminary view, the fragmented nature of the Black Sea's governance framework raises questions about its ability to achieve systemic organization. The competition among institutions, coupled with overlapping mandates, often leads to inefficiencies and redundancies. For instance, the proliferation of agreements addressing similar issues without clear coordination mechanisms can result in fragmented implementation. Addressing these overlaps requires a concerted effort to rationalize institutional mandates and promote synergy among existing frameworks. This could involve formalizing cooperation agreements between UNCLOS, the Bucharest Convention, and other relevant instruments to streamline decision-making and reduce conflicts. The

engagement of non-state actors, including NGOs, private sector entities, and academic institutions, is another critical factor in the regime's evolution. These actors can provide expertise, resources, and innovative solutions to complement state-led initiatives. For example, NGOs can play a pivotal role in monitoring compliance, raising public awareness, and advocating for stronger environmental policies. Similarly, partnerships with the private sector can drive investments in sustainable technologies and practices, while academic institutions can contribute to capacity-building and research initiatives. The inclusion of these stakeholders in governance frameworks can foster a more participatory and inclusive approach to environmental management.

Ultimately, the future trajectory of the Black Sea's governance regime will depend on the commitment of coastal states and their willingness to prioritize environmental protection over short-term economic and political interests. While the evolution towards a systemic organization offers the potential for greater coherence and effectiveness, achieving this goal requires addressing the root causes of fragmentation. These include resolving geopolitical tensions, harmonizing national policies with regional and international obligations, and enhancing the capacity of institutions like the BSC to coordinate and enforce measures. If these challenges are not adequately addressed, the regime is likely to remain fragmented, with limited capacity to address the complex and transboundary environmental issues facing the Black Sea. Such a scenario would perpetuate the cycle of reactive governance, characterized by ad hoc responses to emerging crises rather than proactive and integrated management. This would undermine the region's ability to achieve long-term sustainability and resilience in the face of escalating threats such as climate change and biodiversity loss.

In conclusion, the evolution of the Black Sea's governance regime represents a critical test case for the capacity of regime complexes to transition towards systemic organization. While the current framework offers a foundation for collaboration, its effectiveness is constrained by institutional fragmentation, geopolitical tensions, and resource disparities. Achieving a systemic organization will require concerted efforts to harmonize legal frameworks, strengthen institutional capacities, and foster trust and cooperation among stakeholders. By addressing these challenges, the Black Sea states and the other regional players can create a governance regime that not only meets the region's environmental needs but also serves as a model for addressing similar challenges in other semi-enclosed seas and transboundary ecosystems.

MARINE PROTECTED AREAS IN THE MEDITERRANEAN AND BLACK SEAS

*Tullio Scovazzi**

1. Marine Protected Areas and Area-Based Mangement Tools

As defined in the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity beyond National Jurisdiction (New York, 2023),[1] "marine protected area" means

> "(…) a geographically defined marine area that is designated and managed to achieve specific long-term biological diversity conservation objectives and may allow, where appropriate, sustainable use provided it is consistent with the conservation objectives" (Art. 1, para. 9).

It appears that three cumulative conditions are required to qualify an area of marine waters or seabed as a marine protected area, namely that it is delimited within precise boundaries (including, if appropriate, buffer zones), it is afforded a stricter protection than the rest of marine spaces and it is intended to ensure specific nature conservation objectives. It follows that the exploitation of natural resources, provided that it is carried out in a sustainable way,[2] is compatible with marine protected areas.

Additional characteristics that should preferably be met, also in order to avoid that marine protected area are established only on paper, are a suitable size, lo-

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[1] Hereinafter: BBNJ Agr. It applies only "to areas beyond national jurisdiction" (Art. 3) that is beyond the 200-mile limit where exclusive economic zones have been established by the coastal States.

[2] According to Art. 1, para. 13, of the BBNJ Agr., "'Sustainable use' means the use of components of biological diversity in a way and at a rate that does not lead to a long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations".

cation and design, a management plan or equivalent addressing the need for conservation and achieving social and economic goals and the provision of financial resources and staff capacity to effectively implement the protection measures.[3]

In no provision of the United Nations Convention on the Law of the Sea (Montego Bay, 1982)[4] marine protected areas are mentioned. However, marine protected areas are implicitly referred to in Art. 194, para. 5, which includes among the measures for the protection and preservation of the marine environment

> "those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life".

The provision has a general scope of application. It covers any kind of rare or fragile marine ecosystems, including their living and non-living components, as well as any kind of depleted, threatened or endangered species, irrespective of the legal condition of the waters or seabed where they are located (marine internal waters, territorial sea, exclusive economic zone, continental shelf, high seas, seabed beyond national jurisdiction). It goes without saying that the typical, even if not the only, measure to protect such ecosystems and species is the establishment of a marine protected area.

Post-UNCLOS developments in international law of the sea have led to envisaging a more comprehensive category of areas, called "area-based management tools". As defined in the BBNJ Agr., it means

> "a tool, including a marine protected area, for a geographically defined area through which one or several sectors or activities are managed with the aim of achieving particular conservation and sustainable use objectives in accordance with this Agreement" (Art. 1, para. 1).

It can be inferred that, while marine protected areas are established exclusively for nature conservation purposes, area-based management tools, even if indirectly contributing to conservation, can be adopted also for other specific purposes, such as fishing, safety of navigation or protection of the cultural heritage.

Instances of area-based management tools are, *inter alia*, the Fishery Restricted Areas (FRAs), created under the 1949 Agreement for the establishment of the General Fisheries Commission for the Mediterranean (GFCM). An FRA is understood as "a geographically defined area in which some specific fishing

[3] See IUCN-WCPA, *Applying IUCN's Global Conservation Standards to Marine Protected Areas (MPA)*, Gland, 2018, p. 2.

[4] Hereinafter: UNCLOS. See Proelss, A. (ed.), *United Nations Convention on the Law of the Sea – A Commentary*, C.H. Beck/Hart/Nomos, München, 2017.

activities are temporarily or permanently banned or restricted in order to improve the exploitation patterns and conservation of specific stocks as well as of habitats and deep-sea ecosystems".[5] An FRA is, for example, the "Bari Canyon" in the southern Adriatic Sea, established under GFCM Recommendation 44/2021/3.

Another instance is given by the Particularly Sensitive Sea Areas (PSSAs), created under International Maritime Organization (IMO) Resolution A.720(17), adopted in 1991. A PSSA is understood as "an area that needs special protection through IMO because of its significance for recognized ecological or socio-economic or scientific reasons and which may be vulnerable to damage by international maritime activities" and is intended to function as "a comprehensive management tool at the international level that provides a mechanism for reviewing an area that is vulnerable to damage by international shipping and determining the most appropriate way to address that vulnerability".[6] An example is the "North-Western Mediterranean Sea" PSSA, established under IMO Resolution MEPC.380(80) of 7 July 2023.[7]

In a policy perspective, the establishment of area-based management tools can help achieving target 3 of the Kunming-Montreal Global Biodiversity Framework (so-called 30+30 target), adopted in 2022 by the States parties to the Convention on Biological Diversity (Rio de Janeiro, 1992), that is to

> "ensure and enable that by 2030 at least 30 per cent of terrestrial, inland water, and of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem functions and services, are effectively conserved and managed through ecologically representative, well-connected and equitably governed systems of protected areas and other effective area-based conservation measures, recognizing indigenous and traditional territories, where applicable, and integrated into wider landscapes, seascapes and the ocean, while ensuring that any sustainable use, where appropriate in such areas, is fully consistent with conservation outcomes, recognizing and respecting the rights of indigenous peoples and local communities, including over their traditional territories".

2. Marine Protected Areas under Regional Agreements

The provisions of the UNCLOS – the only global treaty on the law of the sea from the point of view of both its general subject matter and its world application – do not prejudice the obligations assumed by States under specific conventions and agreements concluded previously which relate to the protection and preser-

[5] GFCM website.

[6] *Guidance Document for Submitting PSSA Proposals to IMO*.

[7] See Scovazzi, T., "The North-Western Mediterranean Particularly Sensitive Sea Area", in *Mepielan eBulletin*, 2024 (electronic format).

vation of the marine environment and under agreements which may be concluded in the furtherance of the general principles set forth in the UNCLOS itself (Art. 237, para. 1). However, "specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives" of the UNCLOS (Art. 237, para. 2).[8]

Today treaties that provide for the establishment of marine protected areas and have a regional or sub-regional scope of application are in force for several seas[9]. Serious substantive conflicts between the UNCLOS and environmental treaties operating at a limited geographical level are not expected to occur, as all these instruments are inspired by similar general principles and protection objectives. The regional or sub-regional treaties usually provide for a more specific and enhanced protection than that achieved through global treaties (criterion of the added value). It would be useless to merely reproduce at the regional or sub-regional level the same regime that can already be found in global treaties.

The call for regional co-operation is particularly strong in the case of enclosed or semi-enclosed seas[10]. Under Art. 123 of the UNCLOS,

> "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. To this end they shall endeavour, directly or through an appropriate regional organization: (…)
> (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment; (…)".

Consideration will be given hereunder to the marine protected areas which have been established under regional or sub-regional treaties applying to the Mediterranean and Black Seas.

[8] The conditional mood ("should be carried out") does not contribute to the clarity of this provision.

[9] Instances are the Protocol concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region (Nairobi, 1985), the Protocol for the Conservation and Management of Protected Marine and Coastal Areas of the South-East Pacific (Paipa, 1989), the Protocol concerning Specially Protected Areas and Wildlife in the Wider Caribbean Region (Kingston, 1990), Annex V (Area protection and management) to the Protocol on Environmental Protection (Madrid, 1991) to the Antarctic Treaty and Annex V concerning the Protection and Conservation of the Ecosystems and Biological Diversity (1998) to the Convention for the Protection of the Marine Environment of the North East Atlantic.

[10] Under Art. 122 of the 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". See Scovazzi, T., "The Regime of Enclosed or Semi-Enclosed Seas with Special Regard for the Mediterranean Sea", *Portuguese Yearbook of Law of the Sea*, 2024, p. 154.

3. The Barcelona Protocol

The Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (Barcelona, 1995),[11] which is today in force for 16 States and the European Union, was concluded within the framework of the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona, 1976, amended in 1995).

The Barcelona Protocol is applicable to all the marine waters of the Mediterranean, irrespective of their legal condition, as well as to the seabed, its subsoil and to the terrestrial coastal areas designated by each party, including wetlands[12]. The extension of the geographical coverage of the instrument was felt necessary to protect also those highly migratory marine species, such as marine mammals, which cross the artificial boundaries drawn by man in the sea.

In order to overcome the difficulties due to different types of Mediterranean coastal zones and unsettled maritime boundaries, the Barcelona Protocol includes two disclaimer provisions (Art. 2, paras. 2 and 3). Apart from the legal technicalities, the idea behind them is that, on the one hand, the development of international cooperation in the field of the marine environment should not prejudice unsettled political and legal questions that have a different character, such as the determination of maritime boundaries; on the other hand, the existence of such legal questions should not prevent or delay the adoption of measures necessary for the preservation of the ecological balance in the Mediterranean Sea.

Under the Barcelona Protocol, parties are called to protect areas of particular natural or cultural value, through the establishment of specially protected areas (Art. 5). The Protocol specifies a number of protection measures that can be adopted in a marine protected area (Art. 6) and binds parties to provide for planning, management, supervision and monitoring measures (Art. 7).

Sites which "are of importance for conserving the components of biological diversity in the Mediterranean", "contain ecosystems specific to the Mediterranean area or the habitats of endangered species" or "are of special interest at the scientific, aesthetic, cultural or educational levels" may be included in the List of Specially Protected Areas of Mediterranean Importance (SPAMIs). The procedures for the establishment and listing of SPAMIs are specified in detail. For

[11] Hereinafter: Barcelona Protocol. It entered into force on 12 December 1999 and was intended to replace the previous Protocol concerning Mediterranean Specially Protected Areas (Geneva, 1982). See Scovazzi, T., "Marine Protected Areas in the Mediterranean", in Juste Ruiz, J.; Bou Franch, V. (eds.), *Derecho del mar y sostenibilidad ambiental en el Mediterráneo*, Tirant lo Blanch, Valencia, 2014, p. 425; Grbec, M., Scovazzi, T., Tani, I. (eds.), *Legal Aspects of Marine Protected Areas in the Mediterranean Sea – An Adriatic and Ionian Perspective*, Routledge, London, 2023.

[12] On the contrary, the application of the previous instrument, concluded in 1982, was limited to the territorial sea of the parties and did not cover the high seas.

instance, as regards an area located partly or wholly on the high seas, the proposal must be made "by two or more neighbouring parties concerned" and the decision to include the area in the SPAMI List is taken by *consensus* by the parties during their periodical meetings (Art. 9). In fact, the establishment of a SPAMI, far from affecting in any way the position taken by any State party on pending legal and political questions, could, especially in the case of sensitive maritime boundary issues, contribute to the cooling off of the tension and to the building of a climate of progressive confidence and cooperation between the States concerned[13].

Once the areas are included in the SPAMI List, all the parties agree "to recognize the particular importance of these areas for the Mediterranean", "to comply with the measures applicable to the SPAMIs and not to authorize nor undertake any activities that might be contrary to the objectives for which the SPAMIs were established" (Art. 8, para. 3, b). This gives to the SPAMIs and to the measures adopted for their protection an *erga omnes partes* effect.

So far, 39 SPAMIs have been listed, as proposed by 11 States parties to the Barcelona Protocol (Albania, Algeria, Cyprus, France, Italy, Lebanon, Monaco, Morocco, Slovenia, Spain, and Tunisia). Among them, the *Pelagos Sanctuary for the conservation of marine mammals*, jointly proposed by France, Italy, and Monaco, and the *Cetacean Migration Corridor* off the coasts of Spain are the only two SPAMIs that cover also waters located beyond the 12-mile limit of the territorial sea.

As regards the relationship with third countries, the parties are called to "invite States that are not Parties to the Protocol and international organizations to cooperate in the implementation" of the Protocol. They also "undertake to adopt appropriate measures, consistent with international law, to ensure that no one engages in any activity contrary to the principles and purposes" of the Protocol (Art. 28). This provision aims at facing the problems arising from the fact that any treaty, including the Barcelona Protocol, can create rights and obligations only for the parties.

The Barcelona Protocol is completed by three Annexes, which were adopted in 1996, namely the "Common criteria for the choice of protected marine and coastal areas that could be included in the SPAMI List" (Annex I), the "List of

[13] As it has been remarked, "in a delicate phase of transition, characterized by the 'rush' of Mediterranean Countries towards proclaiming EEZs [= exclusive economic zones] by the multiplication of maritime delimitation disputes, the creation of transboundary SPAMIs may contribute to enhancing the spirit of cooperation among Mediterranean States with opposite or adjacent coasts and in certain circumstances may represent an alternative to the definition of a precise maritime boundary" (Vezzani, S., "The Conservation of Biodiversity in the Mediterranean Sea through Marine Protected Areas: The Barcelona System Faced with the Expansion of Coastal State Jurisdiction", *Italian Yearbook of International Law*, vol. 31, 2021, p. 143.

endangered or threatened species" (Annex II) and the "List of species whose exploitation is regulated" (Annex III).

According to Annex I, the sites included in the SPAMI List must be "provided with adequate legal status, protection measures and management methods and means" (para. A, e) and must fulfil at least one of six general criteria ("uniqueness", "natural representativeness", "diversity", "naturalness", "presence of habitats that are critical to endangered, threatened or endemic species" and "cultural representativeness"). The SPAMIs must be awarded a legal status that guarantees their effective long-term protection (para. C.1) and must have a management body, a management plan, and a monitoring programme (paras. from D.6 to D.8).

4. The Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS)

The Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (Monaco, 1996; ACCOBAMS),[14] which is one of the agreements concluded under the Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 1979),[15] was opened for signature in Monaco on 24 November 1996. It entered into force on 1st June 2001 and is now binding on 24 out of the 29 States that border the marine waters to which it applies.

The ACCOBAMS parties declare in the preamble that cetaceans[16] "are an integral part of the marine ecosystem which must be conserved for the benefit of present and future generations, and that their conservation is a common concern". Several threats adversely affect the conservation status of cetaceans in the waters

[14] See Scovazzi, T., "The Agreement on the Conservation of Cetaceans of the Black Sea, the Mediterranean Sea and the Contiguous Atlantic Area", in Mekouar, M.A., Prieur, M. (eds.), *Droit, humanité et environnement – Mélanges en l'honneur de Stéphane Doumbé-Billé*, Bruylant, Bruxelles, 2020, p. 589.

[15] Art. IV, para. 4, of the Bonn Convention encourages the parties "to take action with a view to concluding agreements for any population or any geographically separate part of the population of any species or lower taxon of wild animals, numbers of which periodically cross one or more national jurisdictional boundaries".

[16] According to Art. I, para. 2, the ACCOBAMS applies to all cetaceans that have a range which lies entirely or partly within the Agreement area or that accidentally or occasionally frequent the Agreement area. A list of cetaceans covered by the Agreement is drawn up in Annex 1. It includes three species of the Black Sea and eighteen species of the Mediterranean Sea and contiguous Atlantic waters. The list is only indicative (Art. I, para. 2) and, consequently, also other species of cetaceans can be covered by the ACCOBAMS. See Notarbartolo di Sciara, G., Tonay, A.M., *Conserving Whales, Dolphins and Porpoises in the Mediterranean Sea, Black Sea and Adjacent Areas*, Ed. ACCOBAMS, Monaco, 2021.

where ACCOBAMS applies, such as degradation and disturbance of the habitats, pollution, reduction of food resources, use and abandonment of non-selective fishing gear, as well as deliberate and incidental catches, as also stated in the ACCOBAMS preamble.

The ACCOBAMS binds the parties to achieve and maintain a favourable conservation status for cetaceans. The main obligations of the parties are to prohibit any deliberate taking of cetaceans[17], to adopt the measures specified in the conservation plan (Annex 2), as well as – what is here mostly relevant – to create and maintain a network of specially protected areas (Art. II, para. 1). Cetaceans use vast spaces and require specific environments for their natural needs and behaviours. This is why to establish a network of marine protected areas would contribute to achieve and maintain a favourable conservation status for them. Leaving open the possibility to use "other appropriate instruments", para. 3 of Annex 2 to the ACCOBAMS makes a specific reference to the Barcelona Convention and the Bucharest Convention,[18] as the appropriate framework within which specially protected areas can be established that serve as habitats for cetaceans or provide important food resources for them.

In fact, the ACCOBAMS parties still have to achieve the objective of creating and maintaining a network of specially protected areas to conserve cetaceans. Resolution 3.22, adopted in 2007 by the Meeting of the parties and entitled "Marine Protected Areas for Cetaceans", includes a set of marine protected areas recommended by the Scientific Committee of the ACCOBAMS, where 18 sites are listed. The resolution contains a number of criteria for the selection of protected areas, as well as guidelines for the establishment and management of marine protected areas for cetaceans (Annex 2). Resolution 4.15, adopted in 2010 and entitled "Marine Protected Areas of Importance for Cetaceans Conservation", adds new sites to the previous list – which reaches now 22 sites[19] – and encourages the States concerned to promote the institution of areas of special importance for cetaceans to ensure their effective management. Resolution 6.24, adopted in 2016 and entitled "New Areas of Conservation of Cetaceans Habitats", takes note, *inter alia*, of the revised guidelines for the establishment and management of marine protected areas for cetaceans and encourages parties to update regularly the list of areas containing cetacean conservation habitats.

[17] Under Art. I, para. 3, the term "taking" is to be intended in the very broad meaning as it is defined in Art. I, para. 1, i, of the Bonn Convention, that is "taking, hunting, fishing, capturing, harassing, deliberate killing or attempting to engage in any such conduct".

[18] See *infra*, para. 6.

[19] See the "map of proposed Marine Protected Areas" attached to ACCOBAMS Resolution 4.15 (doc. ACCOBAMS-MOP4/2010/Res.4.15).

The ACCOBAMS parties are still working on the revised identification of cetacean conservation habitats in the ACCOBAMS area, with the view of proposing spatial management measures. Prospects do not seem particularly promising, as the last Meeting of ACCOBAMS Parties, held in 2022, failed to adopt, because of the opposition of Italy, a draft resolution that encourages parties to implement relevant measures in identified cetacean conservation habitats.[20]

5. The Sanctuary Agreement

At the sub-regional level, France, Italy and Monaco are parties to the Agreement establishing the Sanctuary for Marine Mammals (Rome, 1999; also called Pelagos Sanctuary).[21] It entered into force on 21 February 2002 and is the first treaty ever concluded with the specific objective to establish a protected area for marine mammals.

The Sanctuary extends for about 87,500 km^2 of waters located between the continental coasts of the three countries and the islands of Corsica (France) and Sardinia (Italy). These waters are inhabited by the eight cetacean species regularly found in the Mediterranean, namely the fin whale (*Balaenoptera physalus*), the sperm whale (*Physeter catodon*), Cuvier's beaked whale (*Ziphius cavirostris*), the long-finned pilot whale (*Globicephala melas*), the striped dolphin (*Stenella coeruleoalba*), the common dolphin (*Delphinus delphis*), the bottlenose dolphin (*Tursiops truncatus*) and Risso's dolphin (*Grampus griseus*) In the area of the sanctuary, the water currents create conditions favouring phytoplankton growth and abundance of northern krill (*Meganyctiphanes norvegica*), a small shrimp that is preyed upon by pelagic vertebrates.

Depending on their location, the waters included in the Sanctuary have the legal status, of marine internal waters (in the case of France and Italy), territorial sea, ecological protection zone (in the case of Italy), exclusive economic zone (in

[20] "The representative of Italy expressed concerns on the legal framework and the scientific robustness of the mechanism proposed in this resolution and emphasized the position of Italy that it is not the moment to accept the proposed draft resolution" ("Report of the Eighth Meeting of the Parties to ACCOBAMS", doc. MOP8/2022/Doc. 31 of December 2022, para. 212).

[21] See Le Hardy, M., "La protection des mammifères marins en Méditerranée – L'accord créant le sanctuaire corso-liguro-provençal", in Cataldi, G. (ed.), *The Mediterranean and the Law of the Sea at the Dawn of the 21st Century*, Bruylant, Bruxelles, 2002, p. 241; Notarbartolo di Sciara, G., Agardy, T., "Building on the Pelagos Sanctuary for Mediterranean Marine Mammals", in Mackelworth, P. (ed.), *Marine Transboundary Conservation and Protected Areas*, Routledge, London, 2016, p. 162.

the case of France)[22] or high seas.[23] The parties undertake to adopt measures to ensure a favourable state of conservation for every species of marine mammals and to protect them and their habitat from negative impacts, both direct and indirect (Art. 4). They are bound to prohibit in the sanctuary any deliberate "taking" (defined as "hunting, catching, killing or harassing of marine mammals, as well as the attempting of such actions") or disturbance of mammals. Non-lethal catches may be authorized in urgent situations or for *in situ* scientific research purposes (Art. 7, a).

The parties commit themselves to exchange their views with the objective to regulate and, if appropriate, prohibit high-speed offshore races in the sanctuary (Art. 9), as well as to regulate whale watching activities for purposes of tourism (Art. 8).[24] The parties are required to encourage national and international research programmes, as well as public awareness campaigns directed at professional and other users of the sea and non-governmental organizations, relating, *inter alia*, to the prevention of collisions between vessels and marine mammals and the communication to the competent authorities of the presence of dead or distressed marine mammals (Art. 12, para. 2). The parties also undertake to exchange their views, if appropriate, in order to promote, in the competent fora and after scientific evaluation, the adoption of regulations concerning the use of new fishing methods that could involve the incidental catch of marine mammals or endanger their food resources, taking into account the risk of loss or discard of fishing instruments at sea (Art. 7, c).

As regards the crucial question of driftnet fishing,[25] the parties are bound to comply with the relevant international and European Union rules (Art. 7, b). This is today an implicit reference to the European Union regime on driftnets that can be found in Regulation 2019/1241 of 20 June 2019 on the conservation of

[22] After the establishment by France of an exclusive economic zone in the Mediterranean (Decree No. 2012-1148 of 12 October 2012), the high seas area within the sanctuary is restricted to the waters that would become the exclusive economic zone of Monaco, if this State were to establish such a zone.

[23] From a strictly legal point of view, the most interesting provision in the Agreement is Art. 14, relating to the enforcement on the high seas of the measures agreed upon by the parties.

[24] Whale watching for commercial purposes is carried out in the Sanctuary by a certain number of vessels. There are promising prospects for the development in the sanctuary of this kind of activity, which, if well regulated, is a benign way of exploiting marine mammals.

[25] This method of fishing, used to catch some highly migratory species of high commercial value, such as tuna and swordfish, is considered highly indiscriminate and wasteful. As recalled in United Nations General Assembly Resolution 44/225, adopted in 1989, "in addition to targeted species of fish, non-targeted fish, marine mammals, sea birds and other living marine resources of the oceans and seas can become entangled in large-scale pelagic driftnets, either in those in active use or in those that are lost or discarded, and as a result of such entanglement are often either injured or killed".

fisheries resources and the protection of the marine ecosystem through technical measures.[26] Art. 9 of Regulation 2019/1241 provides as follows:

> "1. It shall be prohibited to have on board or deploy one ore more driftnets the individual or total length of which is more than 2,5 km.
> 2. It shall be prohibited to use driftnets to fish for the species listed in Annex III".

It thus appears from the European Union regime that driftnets are altogether prohibited, irrespective of their length, only if they are used for fishing a certain number of species, as listed in Annex III.[27]

However, the ACCOBAMS, which is also implicitly referred to by Art. 7, b, of the Sanctuary Agreement as including relevant international rules, provides for a different regime:

> "Parties to this Agreement shall adopt the necessary legislative, regulatory or administrative measures to give full protection to cetaceans in waters under their sovereignty and/or jurisdiction and outside these waters in respect of any vessel under their flag or registered within their territory engaged in activities which may affect the conservation of cetaceans. To this end, Parties shall:
> a) work out and implement measures to minimize the fishing negative effects on the conservation of cetacean. Most particularly, no vessels will be authorized to keep on board or to use any drift nets; (…)" (Annex 2, para. 1).

Notably, the prohibition of driftnets under the ACCOBAMS regime is stricter than in other international or European Union instruments, as the ACCOBAMS prohibition applies to any kind of driftnets, irrespective of their length.

6. The Sofia Protocol

The Black Sea Biodiversity and Landscape Conservation Protocol (Sofia, 2002),[28] which was adopted within the framework of the Convention for the Protection of the Black Sea against Pollution (Bucharest, 1992), entered into force

[26] OJEU L 198 of 25 July 2019.

[27] Namely: albacore, bluefin tuna, bigeye tuna, skipjack, Atlantic bonito, yellowfin tuna, blackfin tuna, little tuna, Southern bluefin tuna, frigate tuna, oceanic sea breams, two species of marlins, sailfish, swordfish, two species of sauries, dolphinfish, seven species of sharks and all species of cephalopods.

[28] Hereinafter: Sofia Protocol. See Oanta, G.A., "The Black Sea Biodiversity and Landscape Conservation Protocol to the Convention on the Protection of the Black Sea against Pollution, 2002", in Fitzmaurice, M., Tanzi, A., Papantoniou, A. (eds.), *Multilateral Environmental Treaties*, Edward Elgar, London, 2017, p. 118.

on 20 June 2011 and is today binding on four States.[29] It was concluded with the purpose

> "to serve as a legal instrument for developing, harmonizing and enforcing necessary environmental policies, strategies and measures in preserving, protecting and sustainably managing nature, historical, cultural and aesthetic resources and heritage of the Black Sea states for present and future generations" (Art. 1, para. 2).[30]

The States parties to the Sofia Protocol are bound to take all necessary measures to, *inter alia*:

> "protect, preserve, improve and manage in a sustainable and environmentally sound way areas of particular biological or landscape value, notably by the establishment of protected areas according to the procedure in Annex I" (Art. 4, para. 1, a).[31]

Art. 1 of Annex 1 states the objective of protected areas that is to safeguard:

> "a) representative types of coastal and marine ecosystems, wetlands and landscapes of adequate size to ensure their long-term viability and to maintain their unique biological and landscape diversity;
> b) habitats, biocoenoses, ecosystems or landscapes which are in danger of disappearing in their natural area of distribution or distraction in the Black Sea or which have a reduced natural area of distribution or aesthetic values;
> c) habitats critical to the survival, reproduction and recovery of threatened species of flora or fauna;
> d) sites of particular importance because of their scientific, aesthetic, landscape, cultural or educational value".
> It is envisaged that States parties take
> "all necessary measures to ensure integrity, sustainability and development of protected areas", namely:
> "a) the strengthening of the application of the other Protocols to the Convention and of other relevant treaties to which they are Contracting Parties;
> b) the prohibition of the dumping or discharge of wastes and other substances likely directly or indirectly to impair the integrity of the protected area or species;
> c) the regulation of the passage of ships, any stopping or anchoring;
> d) the regulation or prohibition of the introduction of alien species, or of genetically modified species;
> e) the regulation or prohibition of any activity involving the exploration or modification of the soil or the exploration of the subsoil of the land part, the seabed or its subsoil;

[29] Bulgaria, Georgia, Turkey and Ukraine.

[30] The Sofia Protocol applies to the Black Sea as defined in the Bucharest Convention, i.e. to the north of Capes Kalagra and Dalyan. The Sea of Azov is also included in the Sofia Protocol's area of application (Art. 3). The Protocol also covers the coastal areas and wetlands designated by States parties.

[31] Annex 1 relates to "protected areas".

f) the regulations of any scientific research activity;
g) the regulation or prohibition of fishing, hunting, taking of animals and harvesting of plants or their destruction, as well as trade in animals (or parts thereof) and plants (or parts thereof) which originate in protected areas;
h) the regulation, and if necessary the prohibition, of any other activity or act likely to harm or disturb species or ecosystems, or that might impair the natural or cultural characteristics of the protected area;
i) any other measure aimed at safeguarding ecological and biological processes and the landscapes;
j) to this end, the Contracting Parties shall provide appropriate legislation to protect and enforce protection of protected areas" (Annex 1, Art. 3).

Within their national environmental legislation and policies, States parties to the Sofia Protocol are required to take all necessary steps for the harmonization of environmental protection measures in protected areas, including management of transboundary protected areas, coordinated research and monitoring programmes in the Black Sea basin. Such measures should include for each protected area:

"a) the development and adoption of a management plan to a standard format;
b) a comprehensive integrated regional monitoring programme;
c) the active involvement of local communities in both planning and implementation, including assistance to local inhabitants who might be affected by the establishment of such areas;
d) adoption of appropriate financial mechanisms;
e) the regulation of activities including the issuing of permits;
f) training of staff as well as the development of appropriate infrastructure" (Annex 1, Art. 4, para. 2).

It is also envisaged that States parties develop national contingency plans incorporating measures for responding to incidents that could cause damage or constitute a threat to the protected area (Annex 1, Art. 4, para. 2).

The Sofia Protocol contains a specific provision (Art. 9) on the duty of information to the public. It provides that States parties "shall endeavour to inform the public of the value of protected areas, species and landscapes and shall give appropriate publicity to the establishment of these areas and regulations relating thereto". They "shall also endeavour to promote the participation of all stakeholders including their public in measures that are necessary for the protection of the areas, species and landscapes concerned, including environmental impact assessments".

As regards the establishment of a regional list,

"the Contracting Parties shall adopt a list of landscapes and habitats of the Black Sea importance that may be destroyed, or important by their nature, cultural or historical

value that constitute the natural, historical and cultural heritage or present other significance for the Black Sea region preferably within three years of this Protocol coming into force" (Art. 4, para. 4).

Some differences may be noticed with respect to the SPAMI List provided for in the Barcelona Protocol[32]. The Black Sea List explicitly includes also landscapes and specifically refers also to sites that are in danger of destruction. However, the drawing of the Black Sea List is deferred to a future initiative and it does not appear that action in this direction has been taken by States parties so far.

7. Conclusive Remark

This review made above shows that the legal instruments for establishing a coherent network of marine protected areas and area-based management tools in the Mediterranean and Black Seas are already in place. What is needed is further action by coastal States to complete and develop the purpose at a more comprehensive and specific level.

[32] *Supra*, para. 3.

BLACK SEA AND THE EUROPEAN REGIONAL COURTS OR TRIBUNALS

*Felicia Maxim**

1. The Black Sea: A Strategic Area of Utmost Importance in International Relations

Located between Europe and Asia, the Black Sea is considered a strategic area that ensures the prosperity of the littoral states, as well as other states, by supporting economic stability, facilitating maritime transport to maintain global food security, and fostering cooperation among states in all other sectors of activity, but primarily their security. Since ancient times, the Black Sea has been regarded as an important region for international trade, serving as a bridge between multiple states, enabling the exchange of cultural values, and harmonizing diverse economies to achieve a significant number of objectives. States must support the stability of the Black Sea region and enhance political relations to neutralize potential threats to the security of the area. The Black Sea region provides clean and renewable energy resources.[1] In this regard, a series of actions are established to ensure the existence of healthy marine and coastal ecosystems, to promote a competitive, innovative, and sustainable blue economy, and to support investments in the Black Sea economy.[2]

The existence of common interests among states in the Black Sea region, the establishment of bilateral and multilateral relations, and the diversification and expansion of areas underpinning inter-state cooperation have led to the involvement of international and regional courts in resolving disputes between states. Conse-

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[1] SCUTARU, G., ILDEM, T., BOZHILOV, Y. (coords.), *The Strategic Importance of the Black Sea: Regional Cooperation for Energy and Defense*, New Strategy Center, Center for Economics and Foreign Policy Studies (EDAM), Sofia Security Forum, Bucharest, 2024, p. 5.

[2] "Common Maritime Agenda for the Black Sea", 2019.

quently, cases brought before the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU) have provided clarifications regarding the manner in which the protection of human rights is guaranteed, as well as the proper application of European Union regulations concerning the use, exploitation, and exploration of the Black Sea waters and its resources.

The European Convention on Human Rights, a treaty forming the foundation for the operation of the European Court of Human Rights (ECHR), entered into force on 3 September 1953. The Convention represents the first international treaty to provide a collective guarantee by the member states of the Council of Europe for the protection of human rights and fundamental freedoms. Romania signed the Convention on 7 October 1993, on which date the instruments of accession to the Statute of the Council of Europe were also deposited. The Convention was ratified through Law No. 30/1994 and entered into force on 20 June 1994. According to Article 11(2) of the Romanian Constitution, the Convention is an integral part of domestic law and has direct applicability. Furthermore, the provisions of Article 20 of the Constitution also apply to the Convention. Since the Convention entered into force, 16 additional protocols have been adopted, introducing amendments and clarifications aimed at expanding the rights guaranteed and improving procedural mechanisms.

The ECHR is the judicial authority competent to rule on applications lodged against a state for violations of the provisions of the European Convention on Human Rights and its 16 additional protocols.

According to Article 19 of the Treaty on European Union, the CJEU consists of the Court of Justice, the General Court, and specialized courts. Currently, the CJEU serves as the judicial institution of both the European Union and the European Atomic Energy Community (EURATOM). It is composed of two courts: the Court of Justice and the General Court, whose primary mission is to review the legality of the Union's acts and to ensure the uniform interpretation and application of Union law.

The jurisprudence generated by these two European courts can be analyzed separately, according to the specific jurisdiction of each court, but also in terms of the connections formed between the two European legal orders, particularly in the context of the Treaty of Lisbon, which stipulates that the European Union shall take the necessary steps to become a party to the European Convention on Human Rights.

Regarding the possible connections between the rulings of the two European courts, although in the vast majority of cases the CJEU has sought to avoid the risk of conflict by aligning its interpretation, in the field of human rights, with the jurisprudence of the Strasbourg Court, there have been instances where interpretations have diverged. The risks of divergent interpretations, although not

intended to systematically materialize, have not been entirely eliminated by the binding nature of the Charter of Fundamental Rights of the European Union. Article 52(3) of this document establishes the following: "Insofar as this Charter contains rights which correspond to rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms, their meaning and scope shall be the same as those laid down by the said Convention. This provision shall not prevent Union law from providing more extensive protection." With regard to the ECHR, it can be asserted that this court is actively involved in clarifying matters concerning the observance of human rights as regulated by the European Convention on Human Rights and its additional protocols, particularly in cases involving the application or non-application of European Union law.[3]

The resolution of cases brought before the courts has also highlighted issues concerning the observance of human rights related to fishing activities and the implementation of fishing policies, such as in Judgment of the Court of 6 December 2022, The Spasov Case against Romania (Application no. 27122/14) and Judgment of the Court of 26 February 2020, The Yaşar Case against Romania (Application no. 64863/13).[4]

2. The Spasov Case Against Romania

In the case of Spasov v. Romania, the Bulgarian citizen Hristo Spasov, as the applicant, lodged an application with the ECHR on 2 April 2014, claiming that the decisions rendered by the Romanian courts violated his rights guaranteed by Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention.

2.1. The Facts of the Case

On 13 April 2011, a Bulgarian-flagged fishing vessel under the command and ownership of Hristo Spasov was intercepted by a Romanian Border Police patrol vessel for inspection while operating in Romania's exclusive economic zone (EEZ) in the Black Sea. Following an on-board inspection, approximately 20 turbot fish and a net with mesh sizes smaller than the minimum required by Romanian domestic legislation regulating turbot fishing were discovered. The vessel was escorted to the Port of Mangalia, where it was detained, the

[3] CHERUBINI, F., "The Relationship Between the Court of Justice of the European Union and the European Court of Human Rights in the View of the Accession", *German Law Journal*, vol. 16, nº 6, 2015, p. 1375.

[4] DERVOVIC, M., KIRCHNER, S., DOWNES, A., "Fishing Rights Procedure at the European Court of Human Rights: Spasov v Romania", *Nordic Journal of European Law*, 2024, p. 94.

fish were confiscated, and Hristo Spasov was arrested. He was later released with the condition not to leave Romania during the investigation. It should be noted that the vessel was registered in Bulgaria, was being used for fishing in EU waters of the Black Sea, and was found 20 nautical miles within Romanian territorial waters. The vessel had a crew of 10 individuals, including the captain and nine other Bulgarian nationals. The vessel was subsequently returned to its owner.

In the case, criminal investigation was initiated against H. Spasov, with the indictment noting that he had illegally fished in Romania's exclusive economic zone, that he had failed to comply with Romanian legislation on fishing and aquaculture, had fished without a license issued by Romanian authorities, had used fishing nets that did not meet the minimum mesh size standards provided by Romanian legislation regulating turbot fishing, and had employed unauthorized persons, who, in turn, used prohibited tools and equipment. Following the trial in the first instance, the trial court acquitted H. Spasov of all the charges for which he had been indicted, considering him not guilty and imposing only an administrative sanction. However, the court of appeal upheld the prosecutor's appeal and remanded the case for retrial to the district court, arguing that in the absence of a bilateral agreement concluded between Romania and Bulgaria, the activities carried out by H. Spasov were illegal and non-compliant with Romanian legislation. The district court issued a ruling stating that no violations of the applicable legal provisions could be established in the case under review, and that the activities conducted were in compliance with European Union law, which is directly, immediately, and primarily applicable in Romanian domestic law. The trial court maintained the administrative sanction previously applied. The prosecutor challenged the ruling, and the court overturned the trial court's decision, arguing that the provisions of the United Nations Convention on the Law of the Sea and national legislation apply with priority in the case. H. Spasov was found guilty and sentenced to one year of imprisonment, suspended, and was required to pay three criminal fines and a series of complementary sanctions (including the confiscation of the equivalent value of the vessel and the prohibition of fishing in Romania's exclusive economic zone for one year).

H. Spasov presented the following defense arguments: he claimed to have a valid fishing authorization, even though it was issued by Bulgarian authorities, which he argued allowed him to fish with an EU community fishing vessel, as his vessel should have been considered, in Romania's exclusive economic zone, regarded as EU waters, he asserted his right to fish for turbot within the catch quota allocated to Bulgaria, and he argued that the fishing nets did not belong to him and were retrieved from the water after becoming entangled with his own nets, with the intention to hand them over to the Bulgarian authorities.

In conclusion, the applicant requested through his application to the ECHR that it be found that the Romanian courts misinterpreted and misapplied EU rules concerning the Common Fisheries Policy, particularly the provisions related to the conservation of marine biological resources, thereby violating rights protected and guaranteed by the European Convention on Human Rights and its Additional Protocols, such as the right to a fair trial and the right to property. The applicant emphasized that the Romanian courts violated his right not to be deprived of his property by imposing financial sanctions and temporarily prohibiting him from conducting fishing activities in Romanian waters.[5]

2.2. The Relevant Legal Framework in the Case

In order to resolve the case, the courts that were notified took into account the interpretation and application of the provisions of the rules adopted at international level, the rules regarding the common fisheries policy adopted at the European Union level and Romanian legislation.

From the point of view of international regulations, the application of the provisions of the United Nations Convention on the Law of the Sea[6] and, implicitly, the norms of the domestic legislation adopted based on the convention to which the Romanian state is a party was discussed. The court to which the decision of the first instance court was challenged considered that the provisions of the United Nations Convention on the Law of the Sea and the national legislation adopted under this Convention were applicable in the area. It emphasized that under the aforementioned Convention, Romania exercises sovereign rights in its exclusive economic zone, and vessels operating under the Bulgarian flag conduct activities under Romania's jurisdiction, thus being obliged to comply with Romanian domestic law. The court before which the appeal was filed accepted that under Article 17 of Regulation (EC) No. 2371/2002, fishing vessels of EU member states have access to the EU's marine resources, but the right to fish is not free and unlimited. The court also invoked the provisions of Article 8 of the Regulation, highlighting the existence of an emergency situation in such cases, which grants EU member states the right to adopt emergency measures. Consequently, the establishment of special rules for turbot fishing responded to the existing threats.

[5] DERVOVIC, KIRCHNER, DOWNES, *op. cit.*, p. 99.

[6] The Convention entered into force on 16 November 1994, its entry into force being made possible after the adoption, in 1994, of the Agreement on the Implementation of Part XI of the Convention. By Law No. 110 of 10 October 1996, adopted by Parliament, Romania: ratified the United Nations Convention on the Law of the Sea (hereinafter referred to as the 1982 Convention); acceded to the Agreement relating to the Implementation of Part XI of the Convention, concluded in New York on 28 July 1994 (hereinafter referred to as the 1994 Agreement).

In order to understand the arguments of the ECHR, we present additional circumstances invoked during the proceedings. Thus, the Bulgarian authorities, acting in the interest of citizen H. Spasov, alerted the European Commission regarding the provisions of Romanian domestic law and interpretations made in disagreement with the EU law. During the case's resolution, the Directorate-General for Maritime Affairs and Fisheries (DG MARE) of the European Commission notified Romania that serious errors had been committed regarding the interpretation and application of the common fisheries policy rules, particularly Regulation (EC) No. 2371/2002 and Regulation (EU) No. 1256/2010. Therefore, the claim that H. Spasov used fishing nets that did not meet the requirements imposed by Romanian domestic law was contrary to the EU law, as Union law did not establish common technical standards for turbot fishing nets in the Black Sea. The net mesh size for turbot fishing could only be determined by Romania within 12 nautical miles from the baseline of the coast. Furthermore, it was emphasized that only EU bodies have exclusive competence to adopt measures for the conservation of fishery resources in the Black Sea, within the framework of the common fisheries policy, and national authorities cannot legislate in this area without their agreement. It was also pointed out that fishing vessels operating under the Bulgarian flag and holding a fishing license issued by the Bulgarian authorities have the right to fish in Romania's exclusive economic zone. Given the discrepancies between Romanian domestic law and the EU law, the European Commission initiated proceedings for the non-fulfillment of obligations under the EU law against Romania, sending, in this context, a letter of formal notice to the Romanian authorities, reminding them of the obligation to respect the principle of equal access to EU waters and resources in the Black Sea. Additionally, the Romanian courts were alerted that they had not referred preliminary questions to the CJEU that could have clarified any doubts about the correct interpretation of the EU law.

On March 28, 2017, the Ministry of Agriculture and Rural Development issued an order in which it "explicitly authorized access to the waters and resources of the Black Sea, under Romania's jurisdiction, for all fishing vessels operating under the flag of a member state and holding a fishing license issued by a member state."

Given that the Romanian authorities amended domestic legislation in accordance with the EU law, the European Commission concluded the procedure for determining non-compliance with obligations.

From the perspective of the regulations adopted at the EU level, the provisions of Article 258 (concerning the procedure for determining non-compliance with obligations by a member state), Article 267 of the Treaty on the Functioning of the European Union (concerning the referral of preliminary questions to

the CJEU), the provisions of Regulation (EC) No. 2371/2002 of the Council of 20 December 2002 on the conservation and sustainable exploitation of fishery resources in accordance with the common fisheries policy (which was in force at the time of the facts attributed to the claimant) (Regulation repealed by Regulation (EU) No. 1380/2013 on the common fisheries policy), the provisions of Regulation (EC) No. 1281/2005 of the Commission of 3 August 2005 on the management of fishing licenses and the minimum information they must contain (in force at the time of the facts), as well as the provisions of Regulation (EU) No. 1256/2010 of the Council of 17 December 2010, which set fishing opportunities for certain fishery resources applicable in the Black Sea for 2011, were taken into account. Additionally, the solutions formulated by the CJEU in the cases: Costa v. E.N.E.L., Van Gend and Loos, Amministrazione delle Finanze dello Stato v. Simmenthal SpA (Simmenthal II), Internationale Handelsgesellschaft, Euro Box Promotion, Katz Case, and VB Penzugyi Lizing were reiterated. In this context, the principles regarding the primacy of the EU law, the direct effect principle, the conditions for triggering the procedure for determining non-compliance with obligations by an EU member state, and the conditions for the exercise of preliminary actions by national courts were emphasized.

According to the provisions of Article 258 of the Treaty on the Functioning of the European Union (TFEU), concerning the procedure for determining non-compliance with obligations by a member state, this procedure provides the CJEU with the authority to sanction states that do not properly apply the EU law, i.e., those that fail to harmonize their domestic law with EU rules. The procedure is initiated by the European Commission, which gives the state concerned the opportunity to respond to the questions posed and to comply with the obligations assumed under the EU law. If no solution is reached before the European Commission, the Commission or even a member state may continue the procedure by filing an action before the CJEU.

Regarding the referral of preliminary questions to the CJEU, this court collaborates with national courts to ensure the uniform application of the EU law and to avoid divergent interpretations. The court that made the request for a preliminary ruling must take into account the solution provided by the CJEU, as the ruling is binding on all national courts. The procedure for making preliminary rulings has led to the proclamation of important principles in the EU law.

The direct and immediate applicability of the EU law in the domestic legal order of member states involves the interaction between the EU law and the national law. Until the Treaty of Lisbon, the EU law did not contain any express regulation confirming the priority of the EU law over national law of the member states, but the conflict between the two could only be resolved by recognizing the supremacy of the former over the latter.

In conclusion, priority represents an "essential condition" of the EU law, as the establishment of a Common Market requires the uniform application of the EU law, without which integration cannot occur.

Regarding the manner in which any potential conflict between the EU law and national law should be resolved, the Court adopts a more radical position, leaving national legal systems with no room for discretion. Thus, the national judge entrusted with the application of the EU law is required to ensure the full effect of these norms, leaving, if necessary, any contrary provision of national law, even if enacted subsequently, inapplicable, by their own authority, without the need to request or wait for its prior removal through legislative or constitutional procedures.

The EU law has the capacity to directly supplement the legal rights of individuals with new rights and/or obligations, both in their relations with other individuals and in their relations with the state to which they belong.

Specifically, direct effect or direct applicability means the right of any person to request the court to apply EU treaties, regulations, directives, or decisions. However, direct applicability requires certain conditions to be met: first, the regulation must be clear and precise, otherwise, the national judge will not be able to deduce its practical effects in terms of application; second, the regulation must be complete and legally perfect, meaning it must be sufficiently detailed; and finally, the regulation must be unconditional.

The practical action of the direct applicability principle varies depending on different categories of EU norms. Direct applicability allows individuals under national law to request national judges to ensure the enforcement of the rights granted by the EU norm that holds such a quality. In conclusion, EU norms create rights that national courts are obliged to protect. The specific methods for protecting these rights do not derive from the EU law itself, but from the legal systems of the member states. Direct applicability implies sanctioning member states that have not taken the necessary enforcement measures to apply the EU law.

Regarding the relevant Romanian domestic law, the provisions of Law No. 17/1990 on the legal regime of internal maritime waters, the territorial sea, the contiguous zone, and Romania's exclusive economic zone were applied, along with the provisions of Emergency Ordinance No. 23/2008 on fishing and aquaculture, and Order No. 36 of February 10, 2011 of the Ministry of Agriculture and Rural Development regarding the practice of commercial fishing of turbot in the Black Sea (in force at the time of the events).

In accordance with Law No. 17/1990, the provisions of this law regulate the legal regime applicable to internal maritime waters, the territorial sea, the contiguous zone, and the exclusive economic zone in line with the United Nations Convention on the Law of the Sea, adopted in 1982, which was ratified by Ro-

mania. Article 9 of Law No. 17/1990 establishes the legal regime applicable to Romania's exclusive economic zone, which is the maritime area located beyond the limit of the territorial sea and adjacent to it. The extent of this zone is determined through delimitation based on agreements concluded with neighboring states whose shores are adjacent or with states situated across from one another, considering the fact that the exclusive economic zone can extend up to 200 nautical miles from the baseline from which the territorial sea is measured. According to Article 10 of Law No. 17/1990, Romania exercises a series of rights in its exclusive economic zone, including: sovereign rights for exploration and exploitation, protection, conservation, and management of all biological and/or non-biological natural resources and other resources located on the seabed, its subsoil, the water column, and the airspace above it, as well as jurisdiction over the protection and conservation of the marine environment and marine fauna. Sovereign rights and jurisdiction are exercised in accordance with Romanian law. In accordance with Article 14 of Law No. 17/1990, Romania must ensure the optimal use of fishery resources and biological resources by taking appropriate measures for their conservation and management in waters up to the outer limit of the exclusive economic zone. The competent Romanian authorities have a series of rights, including the right to establish annually the total authorized catch volume for each species of fish. Additionally, under the provisions of Article 15 of the aforementioned law, the competent authorities of the Romanian state may allow fishing vessels from other states to access Romania's exclusive economic zone based on agreements, on a reciprocal basis, in compliance with domestic law and international law norms, for the purpose of exploiting an excess of the total authorized catch volume.

According to the provisions of Government Emergency Ordinance no. 23/2008 on fishing and aquaculture, the National Agency for Fisheries and Aquaculture has the right to issue licenses for the exercise of the right to fish in waters under the jurisdiction of Romania. At the same time, acts such as fishing without a fishing license, fishing carried out using gear with a mesh size below the minimum permitted size, the use of unauthorized fishing gear by unauthorized persons constitute offenses under the criminal law and also lead to the confiscation of fishing boats and gear.

According to Order no. 36 of 2011 of the Ministry of Agriculture and Rural Development on the practice of commercial turbot fishing in the Black Sea (in force at the time of the facts), commercial turbot fishing in the Black Sea is carried out on the basis of a special authorization issued and released annually by the National Agency for Fisheries and Aquaculture. In addition, the provisions of the Order also established the size of the meshes of the nets that could be used for turbot fishing.

2.3. The Decision of the European Court of Human Rights

Regarding the decision rendered by the ECHR, it is stated that the European court "is not required to examine factual or legal errors possibly committed by a domestic court, except when these have violated the rights and freedoms protected by the Convention. It is not obligated to substitute for a court of fourth instance and to challenge the assessments of domestic courts under Article 6 § 1, except in cases where their conclusions can be considered arbitrary or clearly unreasonable".

In conclusion, the ECHR had to determine whether the final decision of the court of appeal was the result of a manifest error of law. In this regard, the ECHR found that the court of appeal had committed a clear error of law, and that the claimant had been the victim of a "denial of justice," considering the provisions of the EU Regulation applicable to the case, the fact that the domestic authorities did not utilize the mechanism provided under Article 8 of the regulation, and the court did not take into account the European Commission's interpretation regarding the application of the common fisheries policy rules known to it before the judgment. Essentially, the ECHR established that the central issue of the dispute was the application of Union law in relation to fishing activities carried out in the exclusive economic zone of Romania in the Black Sea. The Court had to analyze whether the reasoning of the court of appeal regarding the application of domestic law was correct, or whether the judicial decision could be considered arbitrary, thus prejudicing the fairness of the trial, resulting in a denial of justice.[7]

Romania, as a Member State of the European Union, has the obligation to apply the EU law, in accordance with the established principles, namely immediately, directly, and with priority. These clarifications can be supplemented by mentioning that in the present case, the rights of a Bulgarian national are at stake, meaning a citizen of Bulgaria, a Member State of the European Union. Therefore, the relationship under analysis involves the application of legislation between two Member States of the European Union. At the same time, the European court emphasizes that the case concerns the application of the provisions of regulations adopted at the EU level, and as is well known, under Article 288 TFEU, a regulation has general applicability. It is binding in all its elements and applies directly in each Member State. Thus, the regulation is the primary source of law of the European Union, with a general influence. It contains general and impersonal provisions. The regulation is binding in all its provisions, and incomplete application of it is prohibited. In conclusion, a regulation does not only impose

[7] Judgment of the Court of 6 December 2022, The Spasov Case against Romania (Application no. 27122/14).

the result to be achieved, but it may also impose the means of application. A regulation applies within the national legal order of Member States without requiring any specific procedure for its introduction into national law, as is the case with treaties. Member States are obliged to apply regulations in their entirety, without altering their content or modifying their effects. Having direct effect, the regulation creates rights and obligations for the subjects of law to whom it is addressed.

According to the provisions of Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, which was in force at the time of the events but has since been repealed, the common fisheries policy is based on the following measures: conservation, management and exploitation of living aquatic resources, limitation of the environmental impact of fishing, conditions of access to waters and resources, structural policy and the management of the fleet capacity, control and enforcement, aquaculture, common organization of the markets, and international relations.[8]

At the same time, according to Article 3 of the regulation referred to, 'Community waters' means the waters under the sovereignty or jurisdiction of the Member States, 'Community fishing vessel' means a fishing vessel flying the flag of a Member State and registered in the Community, and according to Article 17 community fishing vessels shall have equal access to waters and resources in all Community waters. In addition, the invocation of the mechanisms provided by the provisions of Article 8 of the regulation requires the observance of a procedure that involves notifying the intention to adopt emergency measures to the Commission, the other Member States, and the regional advisory councils; this notification must be accompanied by a draft of the measures and an explanatory memorandum; the Commission's decision to confirm, annul, or modify the request to apply emergency measures; the notification of the Commission's decision to the relevant Member States and its publication in the Official Journal of the European Communities; the procedure before the Council if it is seized by the Member States concerning the Commission's decision; the application of emergency measures with a maximum duration of three months.

Therefore, the ECHR decided that the applicant was the victim of a "denial of justice", as his right to a fair trial was violated, taking into account the following:

- The provisions of Regulation (EC) No. 2371/2002 invoked in relation to the reasoning of the court of appeal in its final decision of October 2, 2013, whereby the court ruled that the legal regime applicable to Romania's exclusive economic zone in the Black Sea was not that of the EU,

[8] Article 1 of Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy

even though the applicant's defense was based on norms adopted at the EU level;
- The position of the European Commission, known to the court of appeal, before the ruling;
- The possibility for national courts to refer a preliminary action to the CJEU if there were doubts regarding the application of European Union law;
- The fact that the procedural steps outlined in Article 8 of Regulation (EC) No. 2371/2002 were not adhered to.

Regarding the violation of the right guaranteed by Article 1 of Protocol No. 1 to the European Convention on Human Rights, the ECHR found that the applicant held a valid fishing license issued by the competent authorities of a Member State of the European Union. The temporary fishing ban in Romania's exclusive economic zone restricted the scope of the license. The license for carrying out a commercial activity constitutes property, and the ban represented an interference with the applicant's right to enjoy his property. In conclusion, the ruling by the court of appeal in Romania resulted in a restriction on the exercise of the right to property guaranteed by Protocol No. 1.

3. The case of Yaşar against Romania

By application no. 64863/13, submitted on 7 October 2013 by the applicants Kadır Dıkmen and Erol Yaşar to the ECHR against Romania, a violation of Article 1 of Protocol No. 1 to the European Convention on Human Rights was alleged. Several claims were submitted by the two applicants; however, the claims brought by Kadır Dıkmen and certain claims by Erol Yaşar were declared inadmissible, with only Erol Yaşar's claim concerning the confiscation of his vessel being deemed admissible.[9]

3.1. The Facts of the Case

On 2 April 2010, the Romanian Coast Guard ordered the crew led by Kadır Dıkmen to stop their vessel. The ship, flying the Romanian flag, was navigating in the Black Sea approximately 42 nautical miles from Sfântu Gheorghe and 68 nautical miles from Gura Portiței. Initially, the crew refused to stop, but after warning shots were fired by the Coast Guard, the vessel complied and was inspected. The

[9] Judgment of the Court of 26 February 2020, *The Yaşar Case against Romania*, application no. 64863/13.

search revealed no fish on board, but unauthorized fishing equipment was discovered, which appeared to have been recently used. At the same time, the inspection conducted led to the following conclusions: the vessel was not authorized to carry out fishing activities in Romania's exclusive economic zone in the Black Sea, the ship's commander did not possess a fishing license, there was no fishing logbook recording the activities carried out onboard. The fishing activities were ordered by the ship's commander, without the crew being aware that they were violating applicable legal provisions. The vessel was escorted to the port of Constanța, where its confiscation, along with all onboard equipment, was ordered. The vessel's value was estimated at 800,000 Euros (EUR).

Regarding the national legal proceedings, it was established that the vessel did not belong to Kadır Dıkmen but was owned by Erol Yaşar. The vessel's owner presented evidence before the Romanian courts, demonstrating ownership and claiming that the vessel had been intercepted in Romanian territorial waters without his knowledge. Thus he requested the return of the vessel and its equipment, pledging never to enter Romanian territorial waters again or violate Romanian fishing laws. Following investigations, Kadır Dıkmen was indicted for several offenses under Government Emergency Ordinance No. 23/2008 on Fisheries and Aquaculture, facing trial for fishing without a license, using unauthorized fishing equipment, engaging in illegal fishing activities and unlawfully flying the Romanian flag. Kadır Dıkmen admitted guilt, stating that he operated the vessel based on a verbal agreement with the vessel's owner, that he did not always inform the owner when leaving Turkish waters, but upon returning, the crew reported the fishing locations when despite expressing anger, the owner provided bonuses for the catches. The Constanța Court of First Instance sentenced Kadır Dıkmen to 2 years of suspended imprisonment, confiscation of the equipment, and return of the vessel.

The prosecutor's office appealed the sentence, requesting a fine for Kadır Dıkmen, given his prior conviction for fishing offenses, and the confiscation of the vessel owned by Erol Yaşar. The appeals court rejected the request for a criminal fine to be imposed on Kadır Dıkmen, sent the case back to the court of first instance, requesting the summoning of Erol Yaşar in the case and the re-discussion of the claim regarding the confiscation of the ship, since he was the owner of the ship. In a ruling dated 8 April 2013, the Constanța Court of First Instance ordered the confiscation of the vessel, based on the characteristics of the fishing nets, which indicated their use in illegal fishing activities. The plaintiffs appealed against the decision pronounced by the Constanța Court, but the appeal court upheld the decision of the First instance court. In their defenses, the plaintiffs, through their chosen lawyer, challenged the definition of the exclusive economic zone, emphasized that under the internal law of the Romanian state, assets that are part of a person's means of

livelihood or that are used for the exercise of a profession should not be confiscated, challenged the measure of special confiscation of the ship and equipment, given that they belonged to the plaintiff who had no knowledge of the ship's movement in Romanian territorial waters, but also the fact that there was no evidence in the case to demonstrate the existence of any damage. Later, the ship's depreciation was discovered and it was sold at auction for EUR 1,900.

3.2. Relevant Legal Framework in the Case

From the analysis of the case under examination, it results that the existing legal provisions in Romanian domestic law and possible references to the 1982 United Nations Convention on the Law of the Sea (UNCLOS) regarding the delimitation of the exclusive economic zone (EEZ) and the applicable legal regime were taken into account. From the defenses formulated by the applicant, we highlight the argument that the special confiscation measure was not lawfully applied, as the acts cited in the case were not committed within Romania's exclusive economic zone in the Black Sea. It was argued that no bilateral treaty exists between the relevant coastal states to establish their respective exclusive economic zones.

As previously mentioned, Romania is a state party to the United Nations Convention on the Law of the Sea (1982), with domestic legislation adopted in accordance with the provisions of this Convention and aligned with European Union law. In this context, pursuant to Article 9 of Law No. 17/1990: "Romania's exclusive economic zone is established in the marine space of the Romanian Black Sea coast, located beyond the limits of the territorial sea and the adjacent waters, in which Romania exercises sovereign rights and jurisdiction over the natural resources of the seabed, its subsoil and the overlying water column and in terms of the various activities related to the exploration, exploitation, protection, preservation and management of their environment. (2) The specific conditions determined by the dimensions of the Black Sea, the extent of the exclusive economic zones of Romania is determined through demarcation on the basis of the agreement concluded with neighbouring States whose shores are adjacent to or located face to face with the Romanian Black Sea coast, bearing in mind that the maximum width of the exclusive economic zone in accordance with the provisions of the United Nations Convention on the law of the sea , ratified by Romania by law No. 110/1996, can be 200 nautical miles measured from the baselines Provided in Article 2. (3) Delimitation shall be in accordance with generally recognized principles of international law and in compliance with the Romanian legislation, applying, depending on the specific circumstances of each sector of the enclave, the principles and criteria generally recognized dividing, so as to reach a fair solution''.

In this regard, the Government of Romania states that Romania's jurisdiction in the area where the vessel was stopped is indisputable. The vessel's position could only raise jurisdictional discussions in relation to Ukraine, but the International Court of Justice ruled in 2009 on the maritime delimitation between Romania and Ukraine, and thus jurisdiction in the area cannot be contested. As is well known, maritime borders between states are established through agreements, and in the event that adjacent or opposite states cannot reach an agreement, they may seek the intervention of competent international courts, whose decision is binding with respect to the resolution of the case under adjudication. Moreover, the vessel's crew was aware of the area they were in, as they had illegally flown the Romanian flag, despite the vessel being registered with Turkish authorities.

Unlike the previously analyzed case, The Spasov case against Romania, the specific legal provisions of European Union law cannot be invoked in this matter, because the present case concerns a Turkish national, a citizen who held a fishing license issued by the Turkish authorities for the territorial waters of Turkey, a state that does not have the status of a European Union Member State.

In this case, the provisions of Government Emergency Ordinance No. 23/2008 regarding fishing and aquaculture and the relevant provisions of the Criminal Code concerning the conditions for the application of special confiscation are invoked. Regarding domestic practice concerning the application of the special confiscation measure, the Government of Romania emphasized that special confiscation is not applied automatically and is analyzed on a case-by-case basis, depending on whether the value of the vessel was disproportionate in relation to the nature and seriousness of the offense, its consequences, and the role played by the vessel in committing the offense.

3.3. Decision of the European Court of Human Rights

In order to substantiate its decision in this case, the ECHR refers to the general principles that must be respected, so that the measures adopted by national courts are considered interferences compatible with Article 1 of Protocol No. 1. Therefore, the interference in question must be justified by a cause of public interest, in accordance with legal provisions and the general principles of international law, with states enjoying a wide margin of appreciation in achieving the pursued objective.[10]

The application of these principles in this case leads to the following findings: the special confiscation was applied in accordance with Romanian legal provisions; the lack of jurisdiction of the Romanian courts cannot be invoked, as

[10] *Ibidem*.

those involved admitted from the outset that the offense was committed in Romania's exclusive economic zone in the Black Sea. The ECHR finds that there is a legitimate aim in this case, namely the protection of biological resources in the area; regarding proportionality, i.e., ensuring a fair balance between the measures employed by the national authorities to prevent illegal fishing activities in the Black Sea and the protection of the applicant's property rights, the ECHR highlights that several factors were taken into account and analyzed by the Romanian national court, concluding that the confiscation of the applicant's vessel did not impose an excessive burden on him.

In conclusion, the ECHR decides that, in this case, there was no violation of the provisions of Article 1 of Protocol No. 1 to the Convention.

4. Cases Brought Before the Court of Justice of the European Union

Starting from the central objective of the present analysis, we emphasize that the focus is on identifying the main causes and legal provisions that have led to disputes concerning the Black Sea area, disputes referred to regional courts for resolution. As we have seen, the first approach considered the jurisprudence of the ECHR and, implicitly, the human rights that may be violated in such cases, with the connection between the norms applied by the two European courts being particularly noteworthy.

However, the jurisprudential approach of the CJEU and the cases brought before it is particularly noteworthy, given that with the accession of Bulgaria and Romania to the European Union, the territorial waters of these states were included in the concept of "Community waters". As was naturally expected, some of the cases brought before the CJEU concerning the Black Sea arise from situations where infringement proceedings are initiated against a Member State for failing to fulfill its obligations under the EU law. Thus, in Case C-510/20, the European Commission requested the CJEU to find that Bulgaria had failed to comply with and implement the provisions of 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).[11] Similarly, in Case C-85/22, the European Commission requested the Court to find that Bulgaria had failed to fulfill its obligations under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural

[11] Judgment of the Court of 28 April 2022, *Commission v Bulgaria*, C-510/20, ECLI:EU:C:2022:324.

habitats and of wild fauna and flora, as amended by Council Directive 2013/17/EU of 13 May 2013.[12]

5. Conclusion

The strategic importance of the Black Sea region for the coastal states and other interested states generates numerous legal relations in various fields of activity and requires the application and interpretation of a significant number of legal provisions adopted at the international, regional, and domestic levels. The complexity of existing legal relations, along with the recent developments stemming from the ongoing armed conflict in the region, leads to the emergence of disputes among the states in the area. Depending on their jurisdiction, these disputes may be resolved either by international courts or regional courts. The central focus of this research has been on identifying disputes concerning the Black Sea resolved by regional courts and analyzing the applicable legal provisions and their interpretation. Therefore, emphasis has been placed on the jurisprudence of the ECHR and of the CJEU. Naturally, each of the two courts has been seized based on their jurisdiction, as established by the legal instruments underpinning their operation.

In conclusion, the ECHR adjudicates cases concerning violations of rights guaranteed by the European Convention on Human Rights, examining compliance with the protected rights and, where applicable, interpreting and applying European Union law within the limits of the Strasbourg Court's jurisdiction. As for the CJEU, judicial proceedings are triggered in connection with the incorrect application or non-application of European Union law by the two EU Member States bordering the Black Sea, implicitly addressing the application of the Charter of Fundamental Rights of the European Union.

[12] Judgment of the Court of 20 June 2024, *Commission v Bulgaria*, C-85/22, ECLI:EU:C:2024:535.

PROJECTION OF THE SUSTAINABLE BLUE ECONOMY IN THE BLACK SEA

*Annina Cristina Burgin**

1. Origins of the Sustainable Blue Economy

The relevance of the seas and oceans for the planet and the people is well known and undisputable as they regulate in great part our climate and provide especially coastal communities with valuable ecosystem services.[1] Humans' oceans activities have been known for centuries or even millennia; fishing, shipbuilding or maritime transport are traditional activities that can be found in all cultures. In the course of time, and mainly due to scientific and technological advancements, other activities appeared especially in the last decades. The exploration and exploitation of natural resources in the seabed and subsoil or the generation of renewable energy using the seas has added up to the traditional activities. Hence, blue economy is not at all new in practice, but in recent years a proper policy approach has been developed focusing on this specific natural environment.

The concept of the blue economy as such first appeared in the context of the green economy approach brought up during the Rio+20 United Nations Conference on Sustainable Development, held in June 2012. The international community expressed its determination in the Resolution "The future we want"[2] (A/RES/66/288) to act without delay to achieve sustainable development and presented the green economy as a tool for sustainable development and poverty erad-

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[1] UNCTAD, *Oceans Economy and Fisheries*, <https://unctad.org/topic/trade-and-environment/oceans-economy>, last accessed on 7 October 2024; UNITED NATIONS, *Blue Economy: oceans as the next great economic frontier*, 14/03/2022, <https://unric.org/en/blue-economy-oceans-as-the-next-great-economic-frontier/#:~:text=The%20UN%20first%20introduced%20%E2%80%9C-blue,productive%20when%20they%20are%20healthy>, last accessed on 7 October 2024

[2] UNITED NATIONS GENERAL ASSEMBLY, *The future we want*, UN Doc A/RES/66/288, 11 September 2012

ication, but also as an approach for a more sustainable and efficient use of natural resources and lower negative impact on the environment.[3] Policies related to the green economy should respect some principles, such as comply international law, and was understood as "[p]romot[ing] sustained and inclusive economic growth, foster innovation and provide opportunities, benefits and empowerment for all and respect for all human rights".[4]

Oceans and seas were dealt with in Resolution A/RES/66/288 in the context of the green economy as one of the thematic issues where action should be taken making reference to various concerns such as marine pollution, alien invasive species, rise of the sea-level, ocean acidification and fertilization, and the problems related to unsustainable fisheries practices.[5] Considering these challenges, the international community stressed that conservation, the sustainable use of the oceans and the protection of the marine biodiversity were of utmost importance as the seas were a fundamental part of the planet's ecosystem and important for sustainable development, contributing to, inter alia, poverty reduction and sustained economic growth.[6] A clear link between oceans and green economy was established, but the term blue economy was not introduced as such in Resolution A/RES/66/288 despite the advocacy of the group of Small Island Developing States (SIDS) who had expressed their concerns that the green economy concept didn't fit adequately their circumstances.[7] They urged during the preparatory process for the Rio+20 Conference to address blue issues more within the context of the green economy as they were convinced that "[a] worldwide transition to a low-carbon, resource-efficient Green Economy will not be possible unless the seas and oceans are a key part of theses urgently needed transformations."[8]

This led the United Nations (UN) in 2016 to elaborate a concept note on "blue economy" itself.[9] It delivered an assessment of the importance of oceans for the life on the planet for all populations, but also highlighted that human activities have strained their health referring to unsustainable fisheries, ocean acidification or pollution. Yet, it presented the opportunities that lie in the seas if they were managed properly based on the paradigm of sustainable development, meaning

[3] UNITED NATIONS GENERAL ASSEMBLY, *doc. cit.*, points 12, 56 and 59.

[4] *Ibidem*, point 58(d).

[5] *Ibidem*, points 163-175.

[6] *Ibidem*, point 158.

[7] UN ENVIRONMENT PROGRAMME, *Blue Economy Concept Paper*, 17 October 2016, p. 1, < https://www.unep.org/resources/report/blue-economy-concept-paper>, last accessed on 7 October of 2024

[8] UNEP, FAO, IMO, UNDP, IUCN, WORLD FISH CENTER, GRID-Arendal, *Green Economy in a Blue World*, 2012, p. 3, <https://www.undp.org/sites/g/files/zskgke326/files/publications/green_economy_blue_world_synthesis_report.pdf>, last accessed on 7 October 2024

[9] UN ENVIRONMENT PROGRAMME, *doc. cit.*, p. 2.

sustainable use of its resources and reducing the negative impacts of human activities. This is what, according to the UN in 2016, the blue economy concept is about: on the one hand to interiorise a new approach on the use of the oceans, namely the "de-coupling of socioeconomic development from environmental degradation"[10] – which was brought up by the United Nations Conference on Trade and Development (UNCTAD) in 2014[11] – and on the other hand to put this idea into practice by defining new policies and regulations.[12] It is interesting to note that originally, as presented by the UN in 2016, the concept was only meant for sustainable development in *developing* countries; an approach that has not been supported since its inception, proof of which is the Communication with the title "Blue Growth. Opportunities for marine and maritime growth"[13] presented by the European Union (EU) already in 2012.

The European Commission stated in this early Communication that "[t]he seas and coasts are drivers of the economy"[14] and identified challenges related to natural resources and greenhouse gas emissions (GHG), but also acknowledged opportunities for economic "blue" growth and job creation by making use of the potential that offer the European seas, coasts and oceans. The outline didn't disregard the sustainability requirement of a new growth approach recognising the fragility of the marine environment, something that had been already recognised years before when the EU adopted in 2008 the Marine Strategy Framework Directive,[15] which obliges Member states to achieve a good environmental status of the marine environment by protecting the marine ecosystems and biodiversity. The Commission identified in the Communication of 2012 five areas, which had potential for job creation, research and technological innovation and where action at EU level could promote blue growth although it didn't understand the list as being exhaustive. These areas were blue energy focusing on the potential of marine renewable energy, aquaculture, tourism, marine mineral resources and blue technology.

[10] *Ibidem*, p. 3.

[11] UNCTAD, *The Ocean's Economy: Opportunities and Challenges for Small Island Developing States*, United Nations, New York and Geneva, 2014, p. 2.

[12] UN ENVIRONMENT PROGRAMME, *doc. cit.*, p. 7.

[13] EUROPEAN COMMISSION, *Blue Growth. Opportunities for marine and maritime sustainable growth*, COM(2012) 494 final, Brussels, 13.9.2012.

[14] *Ibidem*, p. 2

[15] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), OJ L 164, 25.6.2008.

2. Conception of Sustainable Blue Economy

Since the first elaborations of the concept on blue economy – or ocean economy – the term is now well-known and employed all over the world. Despite this, there is no single unique definition and uniform concept on what blue economy is. Some international organizations employ the term ocean economy, such as the Organisation for Economic Co-operation and Development (OECD) or UNCTAD, while others, like the EU, use blue economy.

Despite the fact that there is no single terminology, what they have in common is that blue economy embraces all ocean-based activities[16] of whatever kind of sectors – from tourism to biotechnology – and shares the same aim as the green economy approach, namely to improve "human well-being and social equity, while significantly reducing environmental risks and ecological scarcities"[17] as put forward by the UN in 2016. The World Bank described it in 2017 the following way: "The "blue economy" concept seeks to promote economic growth, social inclusion, and the preservation or improvement of livelihoods while at the same time ensuring environmental sustainability of the oceans and coastal areas."[18]

This definition expresses in an accurate way the meaning behind the concept, namely combining growth with the preservation and sustainable use of the oceans. Economic growth and the protection of the marine environment are not diverging ambitions per se,[19] on the contrary, if the oceans and seas are not in a healthy state, numerous blue economic activities won't be possible anymore, for and foremost those related to the use of natural marine resources. Even though

[16] The International Union for Conservation of Nature (IUCN) presented in 2024 a report proposing the development of a new definition and concept of blue economy, the so-called *regenerative Blue Economy*, which should be "sustainable, inclusive, regenerative, and resilient" presenting a first definition: "A regenerative Blue Economy is an economic model that combines rigorous and effective regeneration and protection of the Ocean and marine and coastal ecosystems with sustainable, low, or no carbon economic activities, and fair prosperity for people and the planet, now and in the future." (LE GOUVELLO, R.; SIMARD, F., *Towards a regenerative Blue Economy. Mapping the Blue Economy*, IUCN, Gland, 2024, pp. ix and 6).

[17] Expression attributed to UNEP (<https://www.unep.org/pt-br/node/23750#:~:text=The%20UN%20Environment%20Programme%20has,in%20carbon%2C%20resource%20efficient%20and>, last accessed on 7 October 2024), cited in UN ENVIRONMENT PROGRAMME, *doc. cit.*, p. 2.

[18] WORLD BANK / UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *The Potential of the Blue Economy: Increasing Long-term Benefits of the Sustainable Use of Marine Resources for Small Island Developing States and Coastal Least Developed Countries*, World Bank, Washington DC., 2017, p. vi.

[19] For example, check the treatise of LEE, K-H., JOH, J., and KHIM, J.S., "The Blue Economy and the United Nations' sustainable development goals: Challenges and opportunities", *Environment International*, nº 137, 2020, 105528.

the European Commission's Communication was on *Blue Growth*, it already linked in 2012 growth with a wider sustainability perspective stating that the blue sectors can boost the competitiveness of the EU internationally and foster employment "whilst safeguarding biodiversity and protecting the marine environment, thus preserving the services that healthy and resilient marine and coastal ecosystems provide."[20]

The various international conferences on sustainable development, and prominently the adoption of the Sustainable Development Goals (SDG) in 2015, had an effect on the further development of the concept of blue economy itself. The Green Deal strategy of the EU,[21] presented at the end of 2019, has a huge impact on all policy fields and led to a reorientation of the blue growth concept, which resulted in the Sustainable Blue Economy (SBE) approach, presented in 2021, under the maxim "Putting the Blue into the Green".[22] It expressed its conviction that a SBE not only can contribute to reach the main objectives of the Green Deal – i.e. that the EU becomes a climate-neutral continent in 2050 – but it qualified that the oceans will be "indispensable"[23] to achieve the green transition as they might provide the economy with new (marine) renewable energy sources, contribute to the required changes in food supply, promote a greener transport and are essential to tackle the adverse effects of climate change.

The COM(2021) 240 final presented an agenda for a sustainable blue economy approach focusing on four key areas, i.e. on decarbonisation, conservation of the natural capital, circular economy and responsible food production. It's interesting to note that it identified ports as vital for a SBE for their traditional activities such as transhipment and logistics, but affirmed that they play also a key role for being or becoming energy hubs by promoting alternative fuels such as hydrogen, for promoting circular economy related to e.g. the disposal of waste from ships, communication related to cables, and promote the clustering of industry. But maritime ports must also tackle their own huge energy consumption and get more efficient and more sustainable, in short, to become zero-emission ports as laid out in the Sustainable and Smart Mobility Strategy of 2020.[24]

[20] COM(2012) 494 final, *doc. cit.*, p. 3.

[21] EUROPEAN COMMISSION, *The European Green Deal*, COM(2019) 640 final, 11.12.2019.

[22] EUROPEAN COMMISSION, *A new approach for a sustainable blue economy in the EU Transforming the EU's Blue Economy for a Sustainable Future*, COM(2021) 240 final, 17.5.2021.

[23] *Ibidem*, p. 2.

[24] EUROPEAN COMMISSION, *Sustainable and Smart Mobility Strategy – putting European transport on track for the future*, COM(2020) 789 final, 9.12.2020.

The World Bank[25] identified a series of challenges for the development and implementation of a blue economy. First, the economic models, including all stages of the value chain, were going to be changed because of the need to reduce unsustainable extraction of natural resources, pollution or alterations of marine habitats. Second, investments in human capital were going to be needed, and third, the concept as such of a blue economy should be strengthened because so far blue sectors are regulated separately, marine ecosystem services or resources were evaluated inadequately or because of lack of human, technical or institutional capacities, and, finally, insufficient implementation of United Nations Convention on the Law of the Sea (UNCLOS) or other legal instruments.

UNCTAD,[26] complying with its mandate on oceans and seas to support developing countries by identifying opportunities and challenges related to ocean economy, uses a five pillars approach to describe the different realms of the concept of ocean economy, namely economy and trade, science and technology, environmental, social, and governance. Three of these fields reflect the dimensions of sustainability but adding science and technology as well as governance, the latter including regulatory frameworks and national policies.

Back at the Rio+20 Conference in 2012, the parties acknowledged that there is no unique model of how to achieve sustainable development, but that every State determines its own priorities, visions and instruments.[27] However, governance is not only about policies, but also about legal frameworks. Although it shouldn't be any surprise, the parties acknowledged that it is international law that regulates the sustainable use of the oceans and their conservation, making particularly reference to the legal obligations stemming from UNCLOS and other international multilateral treaties, including trade and fisheries agreements.[28] UNCLOS is considered the cornerstone of SBE as global ocean governance is complex because numerous international legal instruments regulate specific issues, and a majority of them haven't been ratified on a universal level. Besides establishing the zonal regime of jurisdictions, UNCLOS lays down the obligations regarding conservation, protection and sustainable use of the marine environment and therefore is key for any blue economy approach and its implementation. The spirit of UNCLOS and its main aims are, in our view, very well synthetised in its preamble where the parties expressed their belief that the codification will promote the peaceful use of the oceans and contribute to the communication among

[25] WORLD BANK / UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *doc. cit.*, p. ix.

[26] Check the information provided on: <https://unctad.org/topic/trade-and-environment/oceans-economy>, last accessed on 7 October 2024.

[27] UNITED NATIONS GENERAL ASSEMBLY, *doc. cit.*, point 58.

[28] *Ibidem*, point 158.

the States, but also to enhance an equitable and efficient use of marine resources and the protection and preservation of the marine environment – specially the conservation of its living resources –, and research. But these aims are not only goals in themselves but fulfil a further purpose as they "will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole".[29]

3. Strategies and Initiatives in the Black Sea for Enhancing Sustainable Blue Economy

3.1. Regional International Context

As mentioned above, the conceptualisation of SBE is relatively new, but the concerns regarding the degradation of the marine natural environment goes back further in time. The general trend towards multilateralization of Public international law didn't stop at maritime environmental issues, proof of which are the early international treaties promoted by the International Maritime Organization (IMO) since the 1960s and the adoption of UNCLOS in 1982. Since then, regional approaches, or inclusive sea basin strategies, have been elaborated and in the following lines a closer look at the Black Sea (BS) region is taken.

Single BS coastal states have been anxious with one of the key pillars of SBE which is the state of the marine environment. Romania, for example, signed already in 1982 UNCLOS, has acceded the international treaty of MARPOL 73/78 in 1993 and signed in the same year the Convention on the Protection of the Black Sea Against Pollution (Bucharest Convention).[30] Its purpose is to protect the marine environment of the BS by establishing obligations for the State parties to prevent, reduce or control pollution from diverse sources (arts. VI to XIV) such as the pollution from land-based sources, vessels, dumping, activities on the continental shelf (including exploration and exploitation of natural resources…) and from/through the air. In addition, the State parties agree to protect the marine living resources when taking measures to implement the Convention.

In subsequent years, five protocols were adopted among them the "Black Sea Biodiversity and Landscape Conservation Protocol to the Convention on the Protection of the Black Sea Against Pollution" signed in 2002, which were driven

[29] UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, *Preamble*, accessible on <https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf>, last accessed on 7 October 2024.

[30] The Bucharest Convention is accessible on <http://www.blacksea-commission.org/_convention.asp>, last accessed on 9 October 2024.

by the fact that threats to the BS's marine biodiversity continued to persist such as pollution, over-fishing, the presence and introduction of alien species or eutrophication in general.[31] By adopting this Protocol, the State parties stated that they recognise that controlling pollution in the BS is important for conserving its biodiversity as well as maintaining and restoring its ecosystem functions (preamble). The adoption of this Protocol was based on a previous policy declaration of six BS states in 1993, namely the Ministerial Declaration on Protection of the Black Sea Against Pollution, agreeing of taking coordinated and comprehensive measures for the restoration and conservation of the BS biodiversity in accordance with the Convention on Biological Diversity of 1992.

As is common practice for international treaties, the Bucharest Convention establishes the Black Sea Commission whose main tasks are to implement the Convention and to make recommendations on measures to be taken to fulfil the purposes of the Convention via work programmes and specific policy actions. According to art. 18.6., the Commission also cooperates with international organisations such as the EU, who is an observer party since 2001, and the UN FAO General Fisheries Commission for the Mediterranean (GFCM) having the status of a partner, which was formalised via a Memorandum of Understanding (MoU) between the BS Commission and the regional fisheries management organization GFCM[32] in 2012.[33]

In the same year as the Bucharest Convention was signed, eleven States laid the foundation for the Black Sea Economic Cooperation (BSEC), which is today a regional international organization for economic cooperation with thirteen Member states and is endowed with a threefold mission: to contribute to peace, stability and prosperity. Its fields of activity are very diverse and range from agri-

[31] The Black Sea Biodiversity and Landscape Conservation Protocol to the Convention on the Protection of the Black Sea against Pollution, *Preamble*, 2002.

[32] The GFCM is a regional fisheries management organization (RFMO) established already in 1949 under art. XIV of the FAO constitutive convention for two main purposes: a collective effort for the conservation and sustainable use of living marine resources and the sustainable development of aquaculture. It must be highlighted that the GFCM has the competence to make legally binding recommendations for the management and conservation of fisheries as well as for the development of aquaculture. Regarding the BS, only three coastal states are full parties (Bulgaria, Romania, Türkiye), with Georgia and Ukraine being cooperating non-contracting parties (Russian Federation has no direct relationship). Check the information available on <https://www.fao.org/gfcm/en/>, last accessed on 9 October 2024.

[33] A concrete project of the GFCM is "BlackSea4Fish" (where all BS coastal states participate with public authorities and research institutions), established in 2016, to contribute to the sustainable management of fisheries in the BS by fostering scientific knowledge (and advice) for the management, training or the coordination and launch of monitoring and control mechanisms and systems (FAO, *BLACKSEA4FISH. Activities and achievements 2020-2021*, Rome, 2022, p. 2, <https://doi.org/10.4060/cc2735en>, last accessed on 7 October 2024).

culture, energy and healthcare to transport and trade. It's obvious that the BSEC represents the economic pillar of the SBE concept as its name suggests. In 2023, BSEC adopted an economic agenda with the title "Towards a sustainable future of the wider Black Sea area"[34] making reference twice to blue growth, namely under goal 11 related to strengthening regional cooperation in scientific research and technology, and goal 5 on Environment and Climate Action stipulating that the members should develop "common approaches on green and blue economies to better mitigate climate change effects of the climate, biodiversity and pollution crisis in the BSEC Region."[35]

A more recent initiative is the Common Maritime Agenda (CMA), which was endorsed in 2019 by the Ministerial Declaration on A Common Maritime Agenda for the Black Sea (Bucharest Declaration 2019) by seven BS states – namely the six coastal states plus the Republic of Moldova and the Russian Federation[36] – recalling the objectives of the Burgas Ministerial Declaration with the title "Towards a Common Maritime Agenda for the Black Sea" of 2018. The CMA defines three goals, which are directly related to each other, but allows to identify more specific challenges and priorities: "Healthy marine and coastal ecosystems; a competitive, innovative and sustainable blue economy for the Black Sea; and fostering Investment in the Black Sea blue economy". For each goal, challenges and gaps were identified and priorities defined.

The first goal seeks to improve the protection of the marine environment of the Black Sea via further cooperation as the sea basin is understood as a common natural heritage. The second goal seeks to find solutions to challenges related to the modernisation of established blue sectors and to make them environmentally more sustainable, resilient and internationally more competitive. In order to address these challenges, the CMA identified three priority areas, namely: foster innovative business models, stimulate research and innovation, and sustainable growth and up-to-date jobs; to promote transport and digital connectivity of the Black Sea; and to promote blue skills and blue careers as an engine for innovation and competitiveness. The third goal on "Fostering Investment in the Black Sea Blue Economy" addresses the necessary financial investment for example for

[34] BSEC, *THE BSEC ECONOMIC AGENDA. Towards a sustainable future of the wider Black Sea area*, Attachment 5 to Annex VII to BS/FM/R(2023)2, 2023, <https://www.bsec-organization.org/UploadedDocuments/BsecAtAGlance/Attach%205%20to%20Annex%20VII%20-%20BSEC%20Economic%20Agenda%20FINALFINAL.pdf>, last accessed on 7 October 2024

[35] *Ibidem*, p. 7.

[36] According to information provided on the webpage of the European Commission: "In response to Russia's unprovoked and unjustified military aggression against Ukraine, the participation of the Russian Federation in the CMA has been suspended, as well as all forms of cooperation at regional and national level with Russian stakeholders", <https://black-sea-maritime-agenda.ec.europa.eu/about/our-mission>, last accessed on 07.10.2024.

infrastructure and calls on commitment from national governments and seeking financial support from international institutions such as the Black Sea Trade and Development Bank or the diverse financial assistance programmes of the EU.[37]

3.2. European Union Approach to Sustainable Blue Economy in the Black Sea

The BS is a shared sea basin in the sense that not all coastal States are EU members, but the EU has been interested long before Romania and Bulgaria became EU Member states in 2007, proof of it is the observer status of the EU in the Black Sea Commission since 2001. Nevertheless, it goes without saying that the impact of the EU on two of the BS coastal states has changed radically since their adhesion.

Some months after Romania and Bulgaria joined the EU, the Commission presented the Communication "Black Sea Energy – A New Regional Cooperation Initiative".[38] The Commission stated that it didn't propose an independent sea basin strategy for the BS due to the fact that the EU has with all coastal States a structured relationship. The EU itself understands the initiative as complementary to existing policies and as "an institutionalised forum for EU cooperation encouraging cooperation between the EU and the countries surrounding the Black Sea and for tackling common problems while encouraging political and economic reform."[39] Since its beginning, the initiative has been the EU's main policy approach for the Black Sea region to contribute to a better cooperation within the region and between the EU and the region as a whole.

The COM(2007) 160 listed thirteen main cooperation areas, three of them with specific relevance for SBE, namely environment, maritime policy and fisheries. In addition, it mentioned three more horizontal issues, but not less important for SBE such as trade (e.g. closer economic cooperation including market economy reforms), energy (e.g. alternative energy, energy efficiency and saving) and transport (e.g. improving efficiency, safety, security).

One of the fields of cooperation within the initiative's framework is "blue growth, with particular focus on the integrated maritime policy, marine research and innovation".[40] For the period 2015 to 2018, thirteen projects were supported

[37] Example of a specific project was 4BIZ (1.6.2022 – 31.5.2024), visit for more information <https://icbss.org/4biz-project/>, last accessed on 25 September 2024.

[38] EUROPEAN COMMISSION, *Black Sea Synergy - A new regional cooperation initiative*, COM(2007) 160 final, 11.4.2007.

[39] Cited on the website of the EUROPEAN COMMISSION, available on <https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/black-sea-synergy_en>, last accessed 7 October 2024.

[40] HIGH REPRESENTATIVE OF THE UNION FOR FOREIGN AFFAIRS AND SECURITY POLICY, *Black Sea Synergy: review of a regional cooperation initiative – period 2015-*

or launched and completed, among them was the preparation of the already mentioned Common Maritime Agenda. The Commission established the so-called Black Sea Assistance Mechanism to support the implementation of the CMA, i.e. supporting national and regional projects.

Besides this, it is clear that the Green Deal Strategy has and will have major impacts on both Bulgaria and Romania – both at land and sea. The blue dimension of the Green Deal is many-faceted and the European Commission understood that a "sustainable blue economy offers many solutions to achieve the European Green Deal objectives."[41] It has been five years now that the Green Deal was presented and a huge number of strategies and initiatives as well as legislative acts were adopted. In the following lines, reference is made to two Regulations that will have a big impact on the SBE focusing on a specific example which is Romania and the port of Constanţa.

3.2.1. Fuel EU maritime regulation

The first example is a specific measure adopted within the package of the so-called "Fit for 55" package referring to the objective laid down in the European Climate Law[42] to reduce by 2030 at least 55% of the net GHG emissions. In order to achieve this overall goal, the EU adopted eighteen legislative acts and one was tabled.[43] One of the adopted new legislation is the Fuel EU Maritime Regulation[44] (Regulation (EU) 2023/1805), which will not only have impacts on vessels, but also on ports. Regarding vessels, the Regulation (EU) 2023/1805 establishes the following rules: first, ships must reduce their yearly average GHG intensity limit for energy used on board calling at a European port, independently of the flag they are flying. This rule will be applied for vessels, for both passenger and cargo, above 5.000 gross tonnage (GT).

The Regulation (EU) 2023/1805 provides a timetable for a phased-in reduction starting already in 2025 where all vessels stopping at a European port must

2018, Joint Staff Working Document SWD(2019) 100 final, European Commission, Brussels, 5.3.2019, p. 4.

[41] COM(2021) 240 final, *doc. cit.*, p. 3.

[42] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Law"), OJ L 243, 9.7.2021.

[43] Check the Legislative Train Schedule of the European Parliament on "Fit for 55 Package under the European Green Deal", available on <https://www.europarl.europa.eu/legislative-train/package-fit-for-55>, last accessed on 7 October 2024.

[44] Regulation (EU) 2023/1805 of the European Parliament and of the Council of 13 September 2023 on the use of renewable and low-carbon fuels in maritime transport, and amending Directive 2009/16/EC, OJ L 234, 22.9.2023.

reduce the GHG intensity by 2% compared to 2020, by 2030 this reduction of annual average carbon intensity is set at 6%, by 2035 14.5%, by 2040 31%, by 2045 62% to reach by 2050, eventually, a reduction of 80% of the GHG intensity. In practice, this Regulation will be applicable to the huge majority of merchant vessels as approx. 83% of the world's merchant fleet are considered large or very large vessels with GT over 25.000. If we include medium vessels (500 to 25.000 GT) the amount of percentage of affected vessels may rise to 99%.[45] This also affects cruise ships, who have an average GT of 120.000 – and just as a reference, one of the biggest cruise ships, which is the "Explorer of the Sea", has a GT of 138.194.[46] This reduction of GHG intensity applies to "100% of energy used on voyages and port calls within the EU or EEA, and 50% of energy used on voyages into or out of the EU or EEA."[47]

To prevent that actors circumvent these new obligations, the FuelEU Maritime Regulation introduced rules for so-called neighbouring container transhipment ports (NCTP). The Commission establishes a list of NCTP which are located within a radius of 300 nautical miles from a maritime port under the jurisdiction of a Member state. These ports are not considered ports of call under the application of the Regulation, but the preceding and following voyages of the vessel are considered consecutive voyages. This rule aims at reducing the risk that ports in the vicinity of the EU are used for stopovers – and doing transhipment – to avoid compliance. In practice: a vessel loads cargo in Shanghai with the destination of Rotterdam, stopping in Tanger to upload more containers. This rule says that the total voyage of this vessel is not Tanger-Rotterdam, but Shanghai-Rotterdam and therefore the vessel must comply with the reduction of carbon intensity for the whole voyage and not only from Tanger to Rotterdam. Thus, this vessel must comply with the corresponding proportion of reduction of energy intensity as established on the half of energy used on voyages arriving or departing from a third country (thus, 1% reduction of the voyage from Shanghai to Rotterdam and not 1% from Tanger to Rotterdam).

[45] The issue of the category of "medium vessels" is that it includes vessels from 500 to 25.000 GT, check the information provided by EQUASIS, *The 2021 World Merchant Fleet Statistics from Equasis*, p. 8, available on <https://www.equasis.org/Fichiers/Statistique/MOA/Documents%20availables%20on%20statistics%20of%20Equasis/Equasis%20Statistics%20-%20The%20world%20fleet%202021.pdf>, last accessed on 7 October 2024.

[46] Check the information provided by VesselFinder: <https://www.vesselfinder.com/es/vessels/details/9161728>, last accessed on 7 October 2024.

[47] DNV, *FuelEU Maritime*, 2024, available on <https://www.dnv.com/maritime/insights/topics/fueleu-maritime/>, last accessed on 7 October 2024.

3.2.2. TEN-T Regulation and the Port of Constanţa

Directly related to the Trans-European Transport Network (TEN-T) Regulation[48] and the goal to reduce GHG emissions are Regulation (EU) 2023/1804 on the deployment of alternative fuels infrastructure[49] and Regulation (EU) 2023/1805 on the use of renewable and low-carbon fuels in maritime transport.[50] Art. 6 of Regulation (EU) 2023/1805 in conjunction with art. 9 of Regulation (EU) 2023/1804 determine rules on the use of electricity for vessels with more than 5.000 GT *while moored* in a TEN-T maritime port. According to this provision, vessels must use all its electrical power at berth by onshore power supply (OPS) in a port belonging to the categories of a TEN-T *core* or *comprehensive* maritime port.[51] The requirement for vessels has direct implications for ports as they must provide this electricity to their clients. Therefore, this rule is comple-

[48] The legal basis of Trans-European Transport Network was renewed with the adoption by the Council on 14 June 2024 of the new TEN-T Regulation, which repeals the Regulation of 2013 (Regulation (EU) 2024/1679 of the European Parliament and of the Council of 13 June 2024 on Union guidelines for the development of the trans-European transport network, amending Regulations (EU) 2021/1153 and (EU) No 913/2010 and repealing Regulation (EU) No 1315/2013, OJ L, 2024/1679, 28.6.2024). The TEN-T Regulation establishes guidelines and sets priorities for the development of the network and its implementation, and identifies "corridors of highest strategic importance" (art. 1). The main purpose is to develop a high quality multimodal transport network which contributes to achieve four objectives: sustainability, cohesion, efficiency and more benefits for users. The development will take place in three stages creating different categories: core network which will be completed by 2030, a (new category of) extended core network with deadlines of 2040 and the comprehensive network which has a time limit of 2050. The priorities for all groups of the network are, among others, to increase sustainable transport, guarantee a better accessibility and connectivity of all regions, guarantee optimal interoperability and intermodality or to improve digitalisation (art. 12). As occurred with the previous, now repealed TEN-T Regulation, there is no clear definition of a core port. However, as laid down in the Staff Working Paper of the Commission of 2014, there are some quantitative thresholds, but also qualitative criteria such as being of "highest strategic importance for the development of sustainable and multimodal freight and passenger transport flows in Europe and for the development of interoperable high-quality infrastructure and operational performance" (art. 7 Regulation (EU) 2024/1679). In addition, the Regulation states in recital 24 that "[t]he core network has been identified on the basis of an objective planning methodology. That methodology has identified the most important urban nodes, ports and airports, as well as border crossing points."

[49] Regulation (EU) 2023/1804 of the European Parliament and of the Council of 13 September 2023 on the deployment of alternative fuels infrastructure, and repealing Directive 2014/94/EU, OJ L 234, 22.9.2023, pp. 1–47.

[50] Regulation (EU) 2023/1805 of the European Parliament and of the Council of 13 September 2023 on the use of renewable and low-carbon fuels in maritime transport, and amending Directive 2009/16/EC, OJ L 234, 22.9.2023, p. 48–100.

[51] There are some exemptions such as if the vessels are moored for less than two hours, if the vessel generates its electricity by zero-emission itself or if the power equipment used onshore and onboard is incompatible (ABS, *FUELEU MARITIME*, <https://ww2.eagle.org/en/rules-and-resources/regulatory-updates/fuel-eu-maritime.html>, last accessed on 7 October 2024).

mentary to the approach of zero-emission at ports or as is described in Regulation 2023/1804 "the deployment of shore-side electricity supply in maritime ports has to be seen together with the current and future deployment of equivalent alternative zero-greenhouse gas emissions technologies and zero-pollution technologies, in particular those technologies that deliver emission and pollution reductions both at berth and during navigation."[52]

Art. 9 of the Regulation (EU) 2023/1804 establishes targets for the shore-side electricity supply in maritime ports laying down that by the end of 2029, TEN-T core and comprehensive maritime ports – who have more than 100 container ships and 40 passenger ships above 5.000 GT – must assure to be able to supply for 90% of all port calls shore-side electricity. In addition, according to art. 11 of Regulation (EU) 2023/1804, TEN-T core maritime ports are obliged to guarantee an "appropriate number of refuelling points for liquefied methane" by the end of 2024. These new requirements will be a challenge for almost all maritime ports and to comply with will need significant financial investments. One of the EU financial programmes is the *Connecting Europe Facility (CEF) Transport* which provided in the Programme 2014-2020 1.5 billion of euros to actions in maritime ports in 22 EU member states including 119 TEN-T maritime ports.

4. Sustainable Blue Economy in the Black Sea: Example of Romania and Port of Constanța

The latest data available on the Romanian Blue Economy show that its contribution to the overall economy is relatively small because the approx. 58.000 people employed in the established blue sectors represent only 0.7% of the national employment and the blue sectors have a share of the national gross added value (GVA) of 0.5%.[53] As is very well known, macro data tell an uncomplete story of the importance of a situation. Due to its natural connection with the sea, the blue economy sectors are located (mainly) at the coast and thus play a major role for these regions. This is also the case for Romania as the sectors of shipbuilding and repair together with port activities represent almost 51% of all blue employments, or in concrete numbers they are almost providing 30.000 jobs. Ports and shipyards are usually situated in the same, or nearby, location thus having a huge impact on employment for the region. That coastal tourism is the second important sector regarding employment with a share of almost 30% of the total employment is not surprising and follows the trend in the general EU context as tourism

[52] Regulation (EU) 2023/1804, *doc. cit.*, recital 47.

[53] EUROPEAN COMMISSION, *EU Blue Economy Observatory*, <https://blue-economy-observatory.ec.europa.eu/romania_en>, last accessed on 7 October 2024.

represents 53,6% of the total blue employment. The three aforementioned sectors are also the leading contributors to the Romanian blue GVA, namely shipbuilding contributed in 2021 with 321 million €, port activities with 252 million € and coastal tourism with 235 million euros to the overall Romanian blue economy GVA. The blue GVA has been increasing since 2009 from 901 million euros to 1.038 million in 2021.[54]

Ports are fundamental as they connect sea and land and play a vital role for the states where they are located. They are both strategically and economically important as they are points of entry into the territory of the states both for commodities and people. From a legal point of view, ports are key because it is the place where controls and inspections are carried out to check whether goods and people fulfil requirements of entry into the national territory, but also it is a point where authorities check if international obligations are complied with. Vessels, for their part, are fundamental for a sustainable blue growth as they are the vehicle of all maritime activities. The elaboration of an international legal framework focusing on vessels started back in the 19th century[55] and the original text of one of the today's main treaties – the International Convention for the Safety of Life at Sea (SOLAS) setting minimum standards for the construction, equipment and operation of vessels – was adopted already in 1914. But international norms have been developed significantly over the last decades not only in numbers, but also regarding issues -such as MARPOL- , and the main driving force behind it has been IMO. Even though the main responsibility lies with the flag state, the importance of ports for the control of implementation of international norms has been recognised since the late 1970s when the first Paris MoU[56] was adopted. This MoU is an agreement between maritime authorities on effective control procedures in ports to ensure that foreign vessels stopping over at their ports or facilities comply with international standards, stemming from 14 international conventions listed in point 2.1 (including SOLAS, MARPOL 1973, STCW[57] 78 or MLC, 2006[58]). The content was subsequently amended to integrate new inter-

[54] Data for Romania in the EU Blue Economy Observatory using the *In dept Analytic Tool*, https://blue-economy-observatory.ec.europa.eu/depth-analytical-tool_en, last accessed on 7 October 2024.

[55] Check information provided by the International Maritime Organization, *Brief History of IMO*, <https://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx>, last accessed on 7 October 2024.

[56] Visit the Paris MoU on <https://parismou.org/system/files/2023-06/Paris%20MoU%20including%2045th%20amendment.pdf>, last accessed on 15 October 2024.

[57] International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW 78).

[58] Maritime Labour Convention, 2006 (MLC, 2006).

national standards and today not only includes living and working conditions on board, but also safety, security and environmental norms.

Romania is a party to the Paris MoU, but also to the Black Sea MoU which was adopted in 2000 and entered into force for Romania in 2002. It was designed at a Ministerial Conference of 1996 of the BS coastal states with the aim to establish a "harmonised system of port State control through the adoption of a Memorandum of Understanding on port State control".[59] As stated in 2023 by the Secretariat of the BS MoU, Port State Control is of special relevance for the maritime authorities of the BS coastal states due to the role of shipping for the regions trade and because of the vulnerability of its maritime and coastal spaces to environmental harms.[60] These controls are fundamental for promoting SBE as they help to ensure to prevent damages to the marine environment.

The EU introduced in its SBE a new focus: greening of maritime transport and ports via "decarbonisation and depollution".[61] Ports, as all economic sectors, will undergo important changes, too. In relation to its traditional activities – transhipment and logistics in handling cargo and passengers – the Commission attributed ports huge potentials to become "energy hubs" for alternative sustainable energy sources, for promoting circular economy (e.g. waste disposal from ships), communication (submarine cables) and its role as hub for industrial clusters. It presented the objective of zero-emission ports as many port services are energy-intensive and the objective is to reduce their own energy consumption while at the same time offer renewable energy sources for vessels at berth.

The Port of Constanţa is the major maritime port of Romania and due to its geographical location, it is considered an intersection connecting Europe with the South Caucasus region, Central Asia and even the Far East. It counts with the special characteristic that it's not only a maritime, but also a river port putting it into a privileged position facilitating a direct connection between Asia and the landlocked Eastern and Central European States via the Rhine-Danube Corridor and thus being the start or ending point of a wider pan-European transport system.[62] The port's total quay length is 32 kilometres, and it has 140 operational berths with depths that vary between seven and 19 meters, thus facilitating that

[59] BLACK SEA PORT STATE CONTROL SECRETARIAT, *Annual Report 2023*, Istanbul, p. 4, <https://bsmou.org/downloads/annual-reports/BSMOU-AR-2023.pdf>, last accessed on 7 October 2024.

[60] *Ibidem*, p. 1.

[61] COM(2021) 240, *doc. cit.*, p. 4.

[62] For more information check the information provided by the EUROPEAN COMMISSION on Mobility and Transport: <https://transport.ec.europa.eu/transport-themes/infrastructure-and-investment/trans-european-transport-network-ten-t/rhine-danube-corridor_en>, last accessed on 9 October 2024.

(very) large vessels can easily moor in the Port.[63] The attractiveness of the Port of Constanţa is reflected in the numbers with more than 4.700 ship calls in 2023, which is the highest number of the last six years, and the handling of containers ascended to 548.121 units being an increase of 35% compared to 2018. The main cargo type per tonnes handled by far are cereals representing almost 40% of the total cargo operated, followed by the categories of oil seed, oleaginous fruits/fats; crude oil; and iron ores, scrap.[64]

It's geographical position, its multi-purpose characteristic as well as intermodal services, i.e. container but also bulk handling as well as offering road and train connections with the *hinterland*, makes the Port of Constanţa being an important player in the European intermodal transport network.[65] Romania put forward the "Rail-2-Sea" project within the *Three Seas Initiative*,[66] which will connect the Black Sea (Constanţa) with the Baltic Sea (Gdanks) by railway. Some parts of the railway system will have to be constructed while other need to be modernised. It's funded by different programmes under the umbrella of the EU Cohesion Fund.

This unique position is reflected in the fact that the Port of Constanţa is a TEN-T *core* maritime port and thus both in a privileged position and confronted with challenges. On the positive side, it will be treated of high importance, but it must also meet specific requirements as laid down in art. 26 of Regulation (EU) 2024/1679, namely that Member states must ensure the following in the TEN-T core maritime ports (from the moment of the entry into force of the Regulation): infrastructure for alternative fuels is installed;[67] necessary infrastructure is improved for the environmental performance of berthed vessels; IT mechanisms are implemented, namely Vessel Traffic Monitoring & Information Systems (VTMIS) and European Union's Maritime Information and Exchange System (SafeSeaNet); National Maritime Single Windows are realized according to Regulation 2019/1239.[68] The Regulation sets a deadline – by the end of 2050 – to meet

[63] Check the information provided by DATAMARNEWS: "The Post Panamax Plus models have drafts of between 14 and 15 meters. The current Super container carriers, such as Emma Maersk, have a draft of 15.5 meters." (available on <https://www.datamarnews.com/draft/>, last accessed on 7 October 2024.

[64] BLACK SEA PORT STATE CONTROL SECRETARIAT, *doc. cit.*, p. 23.

[65] Check the information provided by the Port of Constanţa on: <https://www.portofconstanta.com/pn/page/np_prezentare_port>, last accessed on 7 October 2024.

[66] This is an initiative to improve the connectivity of 13 MS of the Baltic, Adriatic and Black Sea. Check information provided on <https://3seas.eu/>, last accessed on 7 October 2024.

[67] In accordance with Regulation (EU) 2023/1804, *doc. cit.*

[68] Regulation (EU) 2019/1239 of the European Parliament and of the Council of 20 June 2019 establishing a European Maritime Single Window environment and repealing Directive 2010/65/EU, 25.7.2019; see Romanian Maritime Single Window 2017, User Manual Authority, Version v0.4, 2017 December.

the requirements laid down in art. 26.2, namely: Connection with rail and road infrastructure, and with inland waterways; disposition of minimum one multimodal freight terminal (if the port has freight traffic); if the port has a connection to inland waterways – which is the case of the Port of Constanţa – the port needs to be equipped with the relevant handling capacity for vessels of the inland waterway and, in addition, these ports must fulfil addition requirements laid down in art. 23.

To prepare for the near future, the Port of Constanţa S.A. is carrying out different projects such as a CEF Infrastructure Projects to promote cold ironing[69] that runs from beginning of 2023 to the end of 2025 with a budget of approximately 13,5 million of euros. The overall aim is to green the port by increasing the efficiency of the use of electricity and to contribute to provide alternative energy infrastructure onshore. The Port of Constanţa already has infrastructure for onshore power supply, thus no new infrastructure will be installed with the investment, but units in ten berths will be modernised to "increase the versatility of existing power units."[70] The long-term benefits of the project are mainly to reduce GHG emissions in general and specifically CO2 that benefit the whole vicinity and not only the port area itself, but also noise and vibrations reductions. In addition, the modernisation of the power supply units will facilitate the use of renewable energy in the future.

The challenges for ports to become greener are huge and diverse. This is the reason why a consortium of four ports was created, named PIONEERS, uniting the ports of Constanţa,[71] Barcelona, Venlo and the Port of Antwerp-Bruges and which is financed by 75% of funds of the Horizon 2020 and runs from October 2021 to September 2026.[72] The main objective is that the four ports implement "green port innovation demonstrations across four pillars: clean energy production and supply, sustainable port design, modal shift and flows optimization, and digital transformation".[73] According to the information provided by the consor-

[69] This expression means the following: "This is the process of providing shoreside electrical power to a ship at berth, while its main and auxiliary engines are turned off." (SAFETY4SEA, *Cold Ironing: The role of ports in reducing shipping emissions*, 18.3.2019, < https://safety4sea.com/cm-cold-ironing-the-role-of-ports-in-reducing-shipping-emissions/>, last accessed on 9 October 2024.

[70] See the summary of the project in the EU Funding & Tenders Portal of the European Commission, *Providing shoreside electrical power to ships at berthing in the Port of Constanta (Cold Ironing)*, 21-RO-TC-E-COLD, <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/opportunities/projects-details/43251567/101079700/CEF2027>, last accessed on 7 October 2024.

[71] Check information provided on <https://www.transportevents.com/presentations/gdansk2023/ConstantaPort.pdf>, last accessed on 7 October 2024.

[72] CORDIS, *PORTable Innovation Open Network for Efficiency and Emissions Reduction Solutions*, <https://cordis.europa.eu/project/id/101037564>, last accessed on 7 October 2024.

[73] Check information provided by PIONEERS on <https://pioneers-ports.eu/>, last accessed on 7 October 2024.

tium, demonstrations will be developed by the Port of Antwerp-Bruges and then tested in all four ports because they are understood as a perfect mix as they are different in size, operation handling and locations. In contrast to the CEF cold ironing project, the addressees of this undertaking are the ports and their energy consumption and GHG emissions themselves and not vessels. The 19 demonstrations which will be elaborated should contribute to the reduction of the environmental footprint by promoting the production, storage and supply of energy from renewable sources.[74] In this context, one of the first demonstrations will focus on the heating of port buildings using hydrogen. Others will focus on road infrastructures which are used for services of the port, such as providing alternative fuel for its vehicle fleet. Moreover, the consortium also focuses on increased digitalisation to find more efficient logistics operations.[75] Within the PIONEER framework, the Port of Constanţa is elaborating its *Green Port Master Plan* that is understood as a guide towards enhanced sustainability and carbon neutrality. In March 2024, a workshop was held with relevant stakeholders to review a first version and to address main issues such as the port's role as "green logistics centre", geopolitical challenges and navigation issues, the requirements of the EU new regulations such as Fuel EU Maritime and questions related to the energy and digital transformations in general.[76]

As illustrates the participation of the Port of Constanţa in the PIONEERS project, the port is strongly integrated in the European ports network and thus it is not surprising that it is a member of the European Sea Ports Organisation (ESPO) being the only Romanian member. ESPO was created in 1993 and serves as port advocacy group whose objective is to speak with one voice on behalf of European ports authorities to the EU's institutions and to promote common interests and values, and to make policy makers understand the important role of ports. It has fourteen members and five observers including Iceland, Israel, UK, Montenegro and Ukraine. The green and digital transformation is also a core issue for ESPO setting up a flagship initiative focused on environmental issues – "EcoPorts Network" – mainly to provide information for EU policymakers on environmental questions ports are dealing with. Within this framework, ESPO elaborated an

[74] For example, development and testing of a device to generate energy from water currents, energy-efficient axial-flux engine/generator that connects to the electricity grid according to information provided on <https://pioneers-ports.eu/portfolio-item/energy-generation-from-water-currents-green-hydropower-platform/#>, last accessed on 7 October 2024.

[75] Check the information provided by PIONEERS on <https://pioneers-ports.eu/about-us/>, last accessed on 7 October 2024.

[76] Check the information provided by PIONEERS on <https://pioneers-ports.eu/portfolio-item/port-of-constanta-workshop-on-green-port-master-plan/>, last accessed on 7 October 2024; and information provided by the Port of Constanţa on <https://www.portofconstantza.com/pn/en/home>, last accessed on 7 October 2024.

environmental management standard specifically designed for ports (e.g. integrating environmental management standards such as ISO 14001), the Port Environmental Review System (PERS), which the Port of Constanţa has not reached (yet)[77] although the Port is ISO certified.[78]

5. Final Considerations

People have been using oceans for numerous endeavours such as fisheries, transport or communication for millennia. The plurality and intensity of the use of the oceans, and other non-seaborne factors such as climate change, have jeopardised the sustainability of the marine ecosystems. The focus on promoting effectively more sustainability has been applying to seas and oceans for years; it is in this context that the sustainable blue economy approach has emerged and being implemented in different regions of the world.

In a synthetised way, the contribution of the SBE concept is to unite two aims, namely the protection of the oceans and, at the same time, to guarantee a sustainable economic growth of the blue sectors. The added value of the SBE concept is, in our opinion, the notion to design and implement a holistic and harmonised approach to the management of maritime spaces, and not having separate policies that might conflict with each other.

The Black Sea basin is a blue crossroad joining continents and has a vibrant blue economy; however, the region is also facing important environmental challenges. It's not surprisingly that the regional cooperation schemes – including EU policies – have included sustainable blue economy aspects and elaborated concrete projects to promote blue sectors.

As is well known, ports play a crucial role for coastal states and for a State's (blue) economy as they are the entry and exit point for goods as well as persons. As an example, the Port of Constanţa has a privileged geographical position as it is both a maritime as well as a fluvial port, thus, connecting the Black Sea with the landlocked states in Eastern and Central Europe via the Rhine-Danube corridor. The EU legal framework directly related to the Green Deal will transform not only the blue sectors but will also have an impact on ports – the Port of Constanţa has been preparing for this transition to play a significant role in the future for a strong Black Sea sustainable blue economy.

[77] Check the information provided by ESPO on <https://www.ecoports.com/pers>, last accessed on 7 October 2024.

[78] ESPO, *Network (Romania)*, <https://www.ecoports.com/network>, last accessed on 7 October 2024.

PART III: NATIONAL LEGAL ASPECTS

ROMANIA'S COOPERATION MECHANISMS IN THE BLACK SEA REGION

*Daniela Panc**

1. Romania's Interests in the Black Sea Region

The Black Sea is an area of maximum strategic interest for Romania; therefore, it engages in different cooperation mechanisms in the Black Sea region, that are normative, institutional, diplomatic or political. The domains of cooperation are either military (peace, security and defence) or civil, as defined by the "blue economy" concept.

The European Commission defines[1] "blue economy" as "all economic activities related to oceans, seas and coasts", which encompasses a wide range of domains, such as fisheries and aquaculture, environmental protection, economy, port infrastructure and shipping, energy cooperation, connectivity, preventing and combating illegal migration and the specific facts of cross-border crime, tourism, maritime education, training and skills development of the blue economy.

Two main strategic national documents define the interests and objectives Romania has in the Black Sea region: the Governmental Program for the period 2024-2028[2] and the National Defense Strategy for the Period 2020-2024.[3]

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The views and opinions expressed in this paper do not represent official policy or position of the Romanian Ministry of Foreign Affairs.

[1] The official website of the European Commission, https://blue-economy-observatory.ec.europa.eu/eu-blue-economy-sectors_en, accessed on 7 January 2025.

[2] The official website of the Romanian Government, https://gov.ro/fisiere/pagini_fisiere/Program_de_Guvernare_PSD-PNL-UDMR-Grupul_minoritatilor_nationale_din_Camera_Deputatilor_2024-2028.pdf, accessed on 7 January 2025.

[3] "The National Defense Strategy for the period 2020-2024" was approved by Decision no. 22 of the joint meeting of the Senate and the Chamber of Deputies of 30 June 2020, and published in the Official Gazette, Part I, no. 574 of 1 July 2020.

The Governmental Program for the period 2024-2028 identifies the extended Black Sea region as a region of priority interest for Romania, with specific objectives in energy, national defense, foreign affairs, border security and transportation.

With regard to the energy sector, at regional level, the Romanian Government sets energy independence as primary objective of the government, focusing on diversifying energy supply sources. The exploitation of Black Sea gas deposits through the Neptun Deep strategic project could make Romania, by 2027, the largest producer of natural gas in Europe.

The national defense dimension of the Governmental Program includes both shaping Romania as a regional pole of stability and security, by maintaining substantial contributions in the regions of priority interest for Romania (the extended Black Sea region, the Western Balkans and the eastern neighbourhood of NATO and the European Union), but also, continuing to ensure a significant contribution to strengthening NATO's deterrence and defense posture, with an emphasis on the Allied Eastern Flank.

Increasing Romania's role within NATO also represents an objective set by the Ministry of Foreign Affairs, especially strengthening the Eastern Flank, with a direct impact on "increasing security in the Black Sea, as an area of major interest for Euro-Atlantic security". Moreover, Romania aims at strengthening the strategic partnership with the United States of America (US) at regional level, in order "to strengthen resilience, security and connectivity in the Black Sea region".

In terms of border security at the Black Sea, Romania intends to strengthen the surveillance capacities at the external borders of the European Union (EU) (through the Integrated System for Observation, Surveillance and Control of the Traffic at the Black Sea - SCOMAR), to prevent and manage cross-border threats and migration flows.

The other strategic national document that highlights the Black Sea as an area of utmost importance for Romania is the National Defense Strategy for the Period 2020-2024. The National Defense Strategy is of relevance for the present study, since the President of Romania has, in accordance with arts. 91 and 92 of the Constitution, responsibilities in the fields of defense and foreign policy.

Although *The National Defense Strategy for the Period 2020-2024* was adopted before the Russian aggression on Ukraine in 2022, the document still signals the importance of the Black Sea region. It states that Romania's foreign and security policy is based on a triad of actions: increasing the role and efforts of Romania in the EU; strengthening the strategic profile in NATO; as well as deepening and expanding the Strategic Partnership with the US.

The Strategy emphasizes the comprehensive approach Romania has, to ensure security in the region, that takes into account not only the security and de-

fense dimension, but also the economic, transport, energy and environmental relevant aspects.

From a foreign policy perspective, Romania aims at strengthening its profile as a relevant regional and international actor, connected to Euro-Atlantic principles and values, as Romania is not only a beneficiary, but also has a key role in ensuring regional, European and Euro-Atlantic security.

The Strategy identifies both threats and risks regarding the Black Sea region, representing major challenges to national strategic interests aimed at securing the EU and NATO borders and, respectively, ensuring energy security and stability in the Black Sea region. Obviously, the main threat is the security context generated by the Russian Federation. Among the risks to national and regional security, the Strategy identifies the limited prospects for solving the frozen conflicts in the extended Black Sea region.

The diplomatic dimension of the action to ensure national security is based on a proactive diplomacy, able to promote national interests, to identify developments in the international environment and their possible impact on Romania, to generate solutions so that this impact is not negative and to define concepts in accordance with national interests and accepted internationally.[4]

2. Relevant Geopolitical and Geostrategic Aspects

Romania's objectives and interests in the region are dynamic, defined by the eterogen regional geopolitics system determined by the current realities and challenges, among which the most relevant are the Russian war of aggression against Ukraine, EU enlargement to countries in the Black Sea region and frozen conflicts in the extended Black Sea region.

2.1. The Russian War of Aggression Against Ukraine

Since the 24th of February 2022, the Russian aggression against Ukraine has dominated life in Europe, impacting social, political and diplomatic endeavours, especially for states in the Black Sea region.

The Russian Federation has been the key statal actor in the region, that determined the deterioration of the regional security environment, starting with the aggression against Georgia in 2008, the illegal annexation of Crimea in 2014 and ending with the illegal war against Ukraine in 2022.

[4] *Ibidem*, para. 174..

The Rasmussen–Yermak Report[5], a strategic document published in 2023, provides recommendations for strengthening Ukraine's capabilities in the face of Russian aggression, with emphasis on its defense and security in the Black Sea region. The report was developed by a group of experts led by former NATO Secretary General Anders Fogh Rasmussen and Andriy Yermak - Ukrainian President Volodymyr Zelenskyy's Chief of Staff. The Report outlines key proposals to strengthen Ukraine's defense capabilities, particularly in the Black Sea region: enhanced naval power, greater integration with NATO and regional Allies, strengthening regional security and strategic partnerships, coordination with NATO in terms of air and missile defense, and expanding military training and support.

Romania has been giving support to Ukraine since the beginning of the war, both humanitarian and military aid. One of the latest support offered by Romania regards the transferring of a Patriot system to Ukraine, at the beginning of October 2024.

Romania advocates globally for the just peace in Ukraine, based on the United Nations Charter and the international law, in line with resolutions A/RES/ES-11/1 and A/RES/ES-11/6 adopted by the United Nations (UN). The Joint Communiqué on a Peace Framework[6] signed at Bürgenstock, Switzerland, on June 16, 2024, following The Summit on Peace in Ukraine, shows international support at international level for the territorial integrity of Ukraine.

2.2. EU Enlargement to Countries in the Black Sea Region

The boomerang effect of the Russian invasion in Ukraine has been the European trajectory for Ukraine and the Republic of Moldova (hereinafter Moldova) achieved in 2022.

In the week following Russia's invasion of Ukraine on February 24, 2022, all three East European states associated with the EU – Ukraine, Moldova, and Georgia – submitted applications to accede to the EU. In response, the European Commission published *Opinions* in June, setting out in each case the conditions that should be met for these applications to advance on the path towards membership.[7]

[5] "Ukraine's Euro-Atlantic Future: Paving the path to peace & security", 14 May 2023, https://rasmussenglobal.com/wp-content/uploads/2024/05/24-05-12_-_IWG_Ukraine_Report_Latest.pdf?, accessed on 7 January 2025.

[6] Currently, 95 states signed the Joint Communiqué, available at: https://www.eda.admin.ch/eda/en/fdfa/fdfa/aktuell/dossiers/konferenz-zum-frieden-ukraine/Summit-on-Peace-in-ukraine-joint-communique-on-a-peace-framework.html, accessed on 7 January 2025.

[7] EMERSON, M. et al., "The EU Accession Prospects of Ukraine, Moldova and Georgia", March 6, 2023, available at: https://cdn.ceps.eu/wp-content/uploads/2023/03/CEPS-In-depth-analysis-2023-06_EU-Accession-Prospects-of-Ukraine-Moldova-and-Georgia.pdf, accessed on 7 January 2025.

In the European Council Conclusions of June 23, 2022, the European Council decided to grant the status of candidate country to Ukraine and Moldova and status of candidate country to Georgia.[8]

In the December 17, 2024 Council Conclusions on Enlargement,[9] the Council stated that Russia's war of aggression against Ukraine underlines the importance of enlargement as a strategic priority for the EU.

Ukraine and the Republic of Moldova are on an irreversible path towards EU accession. More due to the results of the presidential elections in the Republic of Moldova, on November 3, 2024, when the pro-European candidate Maia Sandu won the presidency.

Regarding Georgia, the Georgian government's statement on November 28, 2024, suspending the EU accession process until 2028 triggered street unprecedented demonstrations and protests. Despite the latest developments, the Council reaffirms the Union's readiness to support the Georgian people on their European path.

2.3. Frozen Conflicts in the Extended Black Sea Region

Another regional particularity in the extended Black Sea region, which shapes cooperation mechanisms, are the frozen conflicts in the post-Soviet space. The term "frozen conflict" describes the secessionist disputes regarding Nagorno-Karabakh (in Azerbaijan), Transnistria (in Moldova), Abkhazia and South Ossetia (in Georgia). These territories - Nagorno-Karabakh, Transnistria, Abkhazia and South Ossetia remain recognized territories of Azerbaijan, Moldova and Georgia, respectively. But each has declared its independence and established de-facto elected governments, though all remain at least partially dependent on support from foreign sources, mostly Russia.[10]

The frozen conflicts in the areas around the Black Sea region reveal a pattern of Russian interference designed to keep these regions inside Russia's perceived sphere of influence.[11]

[8] Para. 11 and 13 of the European Council meeting (23 and 24 June 2022) – Conclusions, Brussels, 24 June 2022, available at: https://www.consilium.europa.eu/media/57442/2022-06-2324-euco-conclusions-en.pdf, accessed on 7 January 2025.

[9] Council of the European Union, Council conclusions on Enlargement, 17 December 2024, available at: https://data.consilium.europa.eu/doc/document/ST-16983-2024-INIT/en/pdf, accessed on 7 January 2025.

[10] https://www.marshallcenter.org/sites/default/files/files/2020-10/pC_V3N4_en-3_per_Concordiam_Staff.pdf, accessed on 7 January 2025.

[11] MITRESCU, S., PAVEL, A., *Frozen Conflicts in the Heat of War. The Changing Tide in the Black Sea region,* New Strategy Center, 2023, available at: https://newstrategycenter.ro/wp-content/uploads/2023/09/Frozen-conflicts_final.pdf, accessed on 7 January 2025.

Romania's Black Sea agenda encompasses the respect for the territorial integrity and sovereignty of all states in the region, respect for the international order based on norms and rules, peace and prosperity, development of international trade, and energy security.

3. Romania's Cooperation Mechanisms

In order to achieve its national objectives in the Black Sea region, Romania carries out international cooperation activities both bilaterally and in a multinational format, within the international organizations Romania is part of.

Romania's priorities for international cooperation in the Black Sea region aim to maintain an optimal system of economic and political-diplomatic relations, in order to promote the strategic interests of Romania, but also to fulfill its obligations in accordance with the commitments assumed at international level, within NATO and EU, and within regional initiatives.

Therefore, in order to strengthen Romania's strategic profile in the Black Sea region, international cooperation policies entail: bilateral cooperation with the states in the region, but also with NATO and/or EU member states, and within this bilateral framework, cooperation with strategic partners, primarily with the US; cooperation in a trilateral format; cooperation within regional initiatives in areas of common interest; and cooperation within organizations Romania is a member.

3.1. Bilateral Cooperation

Regarding Romania's bilateral relations in the region, it is appropriate to consider such cooperation agreements in the entire *Black Sea Extended Area,* a notion which comprises not only the littoral states - Bulgaria, Georgia, Romania, Russia, Turkey, Ukraine, but also Armenia, Azerbaidjan and Moldova. More to that, there are states outside the Black Sea region that have strategic interests in this area, especially the United States of America, which has had official initiatives to put the Black Sea at the forefront of their foreign policy interests.

3.1.1. Strategic partnership

Among these states, Romania has bilateral relations distinguished by their solidity and enshrined in partnership documents with littoral states - Bulgaria, Georgia and Turkey, with Azerbaidjan and Moldova in the Black Sea Extended Area, and with the US.

3.1.1.1. The Strategic Partnership between Romania and the Republic of Bulgaria

Bulgaria and Romania are neighboring states; thus, cooperation is substantial in numerous domains, both in bilateral dialogue and within the EU, NATO, and other regional and international fora. The strategic partnership was settled on March 15, 2023, in Sofia, when the two heads of state signed the "Joint Political Declaration of Strategic Partnership between Romania and the Republic of Bulgaria", thus confirming the upward character of the Romanian-Bulgarian relationship and providing a new, updated framework for cooperation and consolidation of the relationship.[12]

Both countries aim at strengthening their cooperation related to the Black Sea region, including with a view to increase situational awareness within NATO and the EU.

One of the main objectives of Romania and Bulgaria is to support peace, security and stability in the Black Sea region, working with all their partners, at local, national, regional and European level, from both public and private sectors, in order to see concrete blue economy projects developed within the EU framework of the Common Maritime Agenda and the Strategic Research and Innovation Agenda for the Black Sea.

Romania and Bulgaria international cooperation at the Black Sea involves also advocating for strong climate and environmental action, continuing their commitment towards achieving a climate-neutral EU.

Within NATO, the Joint Declaration states that Romania and Bulgaria decide to continue to work together to achieve full operational capability of the Allied operational projects and structures deployed on their territories in line with NATO policy and decisions, and to cooperate to ensure the effectiveness of the cross-border Allied air-policing missions over the Black Sea.

3.1.1.2. The Strategic Partnership between Romania and Georgia

Since 11 October 2022, when the heads of states of Romania and Georgia signed the Joint Declaration on the Establishment of a Strategic Partnership between Romania and Georgia,[13] the two countries deepen cooperation within this consolidated framework for their bilateral relation.

The solid partnership between the two countries is based on their common interests in the security of the Black Sea, which is of strategic importance and an

[12] The official website of the Romanian Ministry of Foreign Affairs, "Strategic partnership with the Republic of Bulgaria", available at: https://www.mae.ro/node/61527, accessed on 7 January 2025.

[13] The official website of the Romanian Ministry of Foreign Affairs, "Special relationship with Georgia", https://www.mae.ro/node/53014, accessed on 7 January 2025.

integral part of wider Euro-Atlantic security. Agreed cooperation programmes involve exercises and port visits in the Black Sea region, coast guard training, situational awareness, information sharing, resilience and strategic communication.

For both countries, the Black Sea is important for the security, economic development, free trade, transport and energy security of the EU, especially in the regional context defined by Russia-Georgia conflict and other unresolved conflicts in the Black Sea region, and the aggression of Russia against Ukraine.

The Strategic Partnership aims at "intensifying efforts to develop and expand transport, digital and energy routes along the Black Sea-Caspian Corridor, including in the wider neighbourhood, with a focus on: agreeing on and implementing the appropriate legal framework for the establishment of the Corridor Black Sea-Caspian Sea freight corridor, together with other interested Parties from the South Caucasus and Central Asia, opening of direct and regular sea links between Romanian and Georgian Black Sea ports; resumption of direct air links; deployment of a submarine fibre optic cable and a submarine power cable between Romania and Georgia." The Agreement on the Caspian Sea-Black Sea transport route represents an initiative of Romania and Turkmenistan, with the participation of Georgia and Azerbaijan, part of the Romanian efforts towards developing political and economic partnership relations with Central Asia.

Romania continues to support Georgia's candidacy for NATO membership, in accordance with the decision of the Bucharest Summit of 2008 and subsequent Summits. The two countries seek to continue to cooperate actively in the implementation of the substantial NATO-Georgia Package and the measures aimed at enhancing tailored political and practical support for Georgia, adopted at the 2022 NATO Summit in Madrid.

Romania and Georgia enhance their cooperation on peace and security issues, given Russia's ongoing aggressive actions and policies in the Black Sea region, using bilateral formats as well as available EU and NATO instruments and mechanisms, with a view to improving Georgia's resilience, including through regular exchanges and support for capacity building in the field of cybersecurity and countering disinformation.

3.1.1.3. The Strategic Partnership between Romania and Turkey

The Joint Declaration on the Strategic Partnership between Romania and Turkey, signed on the occasion of the state visit of the President of Romania to the Republic of Turkey, which took place between 12-13 December 2011, raised the level of the relations between the two countries to strategic partnership.

The Strategic Partnership Action Plan, signed on March 14, 2013 by the Ministers of Foreign Affairs, ensures the practical dimension of cooperation and im-

plements the directions of action agreed in the Joint Declaration. Furthermore, the Turkish-Romanian High-Level Strategic Cooperation Council was established on 21 May 2024.

The Romanian-Turkish partnership covers a wide range of fields, the most dynamic part of the cooperation covering the economic and commercial areas. The two countries enjoy also strong economic, cultural relations and humanitarian bonds based on deep-rooted historical ties.[14]

Turkey and Romania are two close allies in NATO and act in cooperation in international and regional organizations such as the United Nations and the Organization of the Black Sea Economic Cooperation.

In the maritime domain, Turkey, with the longest coastline and significant naval and air assets, remains a key player in addressing maritime security challenges. Under the 1936 Montreux Convention, Turkey manages the movement of commercial and military ships in and out of the Bosporus and Dardanelles straits. In February 2022, Turkey invoked the Montreux Convention, applying it to both Ukrainian and Russian warships, as well as nonlittoral states. Closing of the straits for Russian warships was hailed by Ukraine and Turkey's Western allies as a positive step in aiding Ukraine's war effort.[15]

To ensure maritime safety against the threat of naval mines in the Black Sea, on the 11th of January 2024, three NATO littoral states - Bulgaria, Romania and Turkey, signed the Memorandum of Understanding on the establishment of a Task Force to Counter the Sea Mines in the Black Sea. The Black Sea Mine Countermeasures Task Group (MCM Black Sea) represents a milestone for maritime security in the region, in the current war context.

In relation to the EU, Romania has been a supporter for Turkey's European Union accession.

3.1.1.4. The Strategic Partnership between Romania and Azerbaidjan[16]

Romania was the first EU Member State to conclude a strategic partnership document with Azerbaijan. The Republic of Azerbaijan was the first South Cau-

[14] Official website of the Turkish Ministry of Foreign Affairs, "Relations between Türkiye and Romania", available at: https://www.mfa.gov.tr/relations-between-turkiye-and-romania.en.mfa, accessed on 7 January 2025.

[15] Atlantic Council in Turkey, "A Sea of Opportunities: Exploring cooperation between Turkey and the West in the Black Sea", October 2024, available at: https://www.atlanticcouncil.org/wp-content/uploads/2024/10/A-Sea-of-Opportunities-L_2.pdf, accessed on 7 January 2025.

[16] Official website of the Romanian Ministry of Foreign Affairs, "Strategic partnership between Romania and the Republic of Azerbaidjan", available at: https://www.mae.ro/node/5322, accessed on 7 January 2025.

casian state with which Romania concluded strategic partnership relations, based on the progress recorded in bilateral relations on multiple levels.

The Declaration on the Stability of a Strategic Partnership between Romania and the Republic of Azerbaijan was signed in September 2009, during the official visit to Romania of the Azerbaijani President, Ilham Aliyev (28-30 September 2009).

The two countries aim at strengthening political dialogue, energy cooperation, economic and investment cooperation, cooperation on security issues, cooperation within international organizations, as well as in the field of culture.

The year 2022 marked the relaunch of the Strategic Partnership with Azerbaijan. On 17 December 2022, the President Ilham Aliyev visited Romania, participating in the signing ceremony of the Agreement on the development and transfer of green energy between Azerbaijan, Georgia, Romania and Hungary, aiming to implement the "Green Corridor", which comprises also a submarine energy cable through the Black Sea.

In the context of the exercise by the Embassy of Romania in Baku of four successive mandates as NATO Contact Point in the Republic of Azerbaijan (2009-2016), Romania had a sustained contribution to increasing the visibility of cooperation between Azerbaijan and NATO.

3.1.1.5. The Strategic Partnership between Romania and Moldova

The development of the relationship with the Republic of Moldova is a priority for Romania's foreign policy, especially due to the two countries' common history, language, traditions and culture.

The basic lines of the bilateral relationship are established by the Joint Declaration on the establishment of a strategic partnership between Romania and the Republic of Moldova for the European integration of the Republic of Moldova, signed in Bucharest, on 27 April 2010. The implementing Action Plan of the strategic partnership was signed on 3 March 2012, with a focus on the fundamental landmark of the relationship which is the Romanian support for the European path of Moldova, for the benefit of the Moldovan citizens.

The Governmental Program for the period 2024-2028 identifies several cooperation mechanisms with Moldova. Enhancing connectivity by doubling of road bridges over the Prut by 2028, and by expanding the natural gas and electricity transmission networks between Romania and Moldova. Further in the energy domain, Romania supports Moldova for the integration in the European Network of Transmission System Operators for Electricity (ENTSO-E) and supports Moldova's main objective to fulfill the conditions for accession to the EU regarding the introduction of competitive market rules, the protection of vulnerable consumers and the application of a market model compatible with EU rules.

Romania's government foreign affairs objectives involve supporting Moldova in its efforts to consolidate the rule of law, ensure political stability and prosperity; supporting the efforts of the Moldovan authorities to streamline the fight against corruption and reform the judicial system. Moreover, Romania plans on strengthening the Democratization and Sustainable Development Fund for the Republic of Moldova, by increasing the financial allocation within the Ministry of Foreign Affairs' budget for international development cooperation and humanitarian assistance to Moldova.

3.1.1.6. The Strategic Partnership with the United States of America

Romania and the United States of America adopted on the 13th September 2011, in Washington, the Joint Declaration on the Strategic Partnership for the 21st Century, establishing the pillars of the Romania – US relationship: political dialogue, security, economy, people-to-people contacts, science and technology, research, education, and culture. In 2018, the Interministerial Committee for the Implementation of the Objectives Resulting from the Strategic Partnership with the US was established.[17]

The first and one of the most important bilateral legal documents that enshrines the Partnership is the Agreement on the deployment of the United States ballistic missile defense system in Romania, signed and entered into force in 2011, successfully implemented at Deveselu, Olt county.

According to former Romanian Minister of Foreign Affairs - Bogdan Aurescu, a key dimension of the Strategic Partnership is cooperation in the Black Sea region. The meeting of the Helsinki Commission of the US Congress, organized for the first time in Romania, Constanța, on the 1st of July 2022, expressed the awareness, in Washington, of the strategic importance of the Black Sea, as the Allied Summit in Madrid also enshrined in the new NATO Strategic Concept, at the proposal of Romania.[18]

Following the war of the Russian Federation against Ukraine, the United States adopted The Black Sea Security Act of 2023,[19] and emphasizes that "the repeated, illegal, unprovoked, and violent attempts of the Russian Federation to ex-

[17] Government Decision No. 117 of 13 March 2018 on the establishment of the Interministerial Committee for the implementation of the objectives resulting from the Strategic Partnership with the US and other bilateral Romania-US projects.

[18] AURESCU, B., "After 25 years. The Romania-US Strategic Partnership and the transformative power of a long-term vision", 11 July 2022, available at: https://www.caleaeuropeana.ro/op-ed-bogdan-aurescu-dupa-25-de-ani-parteneriatul-strategic-romania-sua-si-puterea-transformatoare-a-unei-viziuni-pe-termen-lung", accessed on 7 January 2025.

[19] "Black Sea Security Act of 2023", available at: https://www.congress.gov/bill/118th-congress/senate-bill/804/text, accessed on 7 January 2025.

pand its territory and control access to the Mediterranean Sea through the Black Sea constitutes a threat to the national security of the United States and NATO".

The Black Sea Security Act is a bill initiated by the US Congress that authorizes the National Security Council to direct an interagency strategy to increase coordination with NATO and the EU; to deepen economic ties; and to strengthen the security and democratic resilience of partners in the Black Sea region in accordance with US values and interests.

In the sense of the Bill, the Black Sea states includes Turkey, Romania, Bulgaria, Moldova, Ukraine, and Georgia. Among these, the three NATO and Black Sea littoral states – Bulgaria, Romania, and Turkey, will heavily benefit from the increased US attention on the Black Sea region security. Ukraine, while not a NATO member, has received considerable support from Washington. The United States should lend focus also on the Black Sea region's smaller, non-NATO states, as Moldova and Georgia are under tremendous pressure from the Kremlin. Armenia and Azerbaijan should also be considered within a US strategy for the Black Sea region.[20]

3.1.2. Cooperation with Ukraine

Romania condemns in the strongest terms the war of aggression launched on 24 February 2022 by the Russian Federation against Ukraine, which represents a flagrant violation of international law, a breach of the United Nations Charter and a direct threat to international peace and security. Furthermore, Romania does not recognize the annexation of the Crimean Peninsula by the Russian Federation and considers this territory an integral part of Ukraine. In this regard, Romania supported the definition and promotion of international sanctions against the Russian Federation, including through active contributions to the shaping of the 15 sanctions packages adopted at the EU level.

Since the beginning of the war, Romania has provided multidimensional and consistent support to Ukraine, especially humanitarian aid. The Romanian Government has adopted concrete measures to support Ukrainian refugees (establishment of mobile camps, granting free access to medical services, education, and the labor market for Ukrainian citizens), while also providing emergency humanitarian assistance (providing fuel, medicines, food, or ambulances).

Another important measure adopted in support of Ukraine and of global food security is the facilitation of Ukrainian grain exports through the EU's Solidarity

[20] Atlantic Council, "The Biden administration finally has a Black Sea security strategy. It's what comes next that matters", available at: https://www.atlanticcouncil.org/blogs/new-atlanticist/the-biden-administration-finally-has-a-black-sea-security-strategy-its-what-comes-next-that-matters, accessed on 7 January 2025.

Lanes. According to the Romanian Minister of Foreign Affairs, Luminița Odobescu, at the 3rd Grain from Ukraine Summit on the 23rd of November 2024, through cross-border infrastructure and transport projects, carried out with national investments and those of international partners, Romania has contributed to the transit of more than 40 million tones of Ukrainian grain, representing more than 60% of the quantity transported through the Solidarity Lanes.[21]

On a diplomatic level, Romania has supported Ukraine's Euro-Atlantic aspirations, supporting NATO's Open-Door Policy, and its EU integration objective.

On the 11th of July 2024, Romania's president, Klaus Iohannis, and his Ukrainian counterpart, Volodymyr Zelensky, signed, in the framework of the NATO Washington Summit, the Agreement on security cooperation between Romania and Ukraine.[22]

3.1.3. Cooperation with the Russian Federation

For more than a decade, until the 2014 illegal annexation of Crimea, Romania and Russia have managed to build bilateral dialogue, mainly in the commercial, cultural, technical and scientific fields.

After the illegal annexation by the Russian Federation of the Autonomous Republic of Crimea and the city of Sevastopol on 18 March 2014, and more so with the launch of the Russian Federation's aggression against Ukraine on February 24, 2022, Romania aims to promote bilateral relations, around a pragmatic and constructive agenda, in respect for the fundamental principles and norms of international law.[23]

In this war context, Romania supported the application of the 15 sanctions packages adopted by the EU against the Russian Federation, aimed to freeze the assets and travel restrictions of senior Russian officials, persons responsible for the atrocities committed in Bucea and Mariupol, and those who participated in the forced deportation of Ukrainian children. The economic sanctions aim to exclude certain Russian banks from the SWIFT system, restrict the access of certain Russian banks and companies to the primary and secondary capital markets in the EU.

[21] The official website of the Romanian Ministry of Foreign Affairs, "Speech by Minister of Foreign Affairs Luminița Odobescu at the 3rd Grain from Ukraine Summit", 23 November 2024, available at: https://www.mae.ro/en/node/66005

[22] "Agreement on security cooperation between Romania and Ukraine", 11 July 2024, available at: https://www.presidency.ro/en/media/press-releases/agreement-on-security-cooperation-between-romania-and-ukraine1720707048, accessed on 7 January 2025.

[23] The official website of the Romanian Ministry of Foreign Affairs, "Bilateral relations - The Russian Federation", available at: https://www.mae.ro/bilateral-relations/4506, accessed on 7 January 2025.

On the 16th of December 2024, the EU Council adopted a 15th package of restrictive measures with the objective of further limiting Russia's ability to wage its illegal war against Ukraine (Council Decision (CFSP) 2024/3182 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine and Council Decision (CFSP) 2024/3187 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine). Measures adopted include: sanctions against 54 individuals and 30 entities; ban on port access and the provision of services related to maritime transport for a further 52 vessels that are part of Putin's shadow fleet; export restrictions on dual use goods and technologies for 32 new entities, some located in third countries; ban on the recognition or enforcement in the EU of rulings issued by Russian courts based on art. 248 of the Arbitration Procedure Code of the Russian Federation; a derogation allowing the release of cash balances held by EU central securities depositories; extension of the deadlines applicable to certain derogations required for divestments from Russia.[24]

3.2. Trilaterals Agreements

Trilateral agreements are an important tool in international relations, tackling various domains of cooperation, including security, trade, environmental protection, and scientific collaboration, which are often more flexible and focused than larger multilateral frameworks, while still bringing the benefits of collective action and joint problem-solving.

Starting from 1995, Romania advanced proposals for trilateral collaboration with several states, out of the desire to identify ways of cooperation in the region, complementary to the effort of European and Euro-Atlantic integration.[25] In the current geopolitic context, the two most relevant trilaterals are with other two littoral states - Bulgaria and Turkey, and within the Black Sea Extended Area, with Ukraine and Moldova.

Romania – Bulgaria – Turkey Trilateral was concluded in 1997, at Bulgarian initiative, focusing on political, security and economic cooperation. This trilateral proved to be extremely opportune for consolidating the support of Turkey for achieving the strategic objective of Romania and Bulgaria to join NATO. Currently, especially in the regional war context, these three NATO member countries ensure the stability and security of South-Eastern Europe.

[24] "Timeline – EU sanctions against Russia", available at: https://www.consilium.europa.eu/en/policies/sanctions-against-russia/timeline-sanctions-against-russia, accessed on 7 January 2025.

[25] The official website of the Romanian Ministry of Foreign Affairs: https://www.mae.ro/node/1504, accessed on 7 January 2025.

The most recent concrete cooperation initiative between Turkey, Romania and Bulgaria is the agreement of January 2024 on a joint plan to clear naval mines floating in the Black Sea because of the war in Ukraine, considering the fact that Black Sea has increasingly become a war zone since the start of Russia's aggression.

The Romania - Ukraine – Moldova Trilateral was initiated at the Izmail high-level meeting in July 1997, when the following agreements were signed: a Protocol of trilateral cooperation between the Governments of Romania, the Republic of Moldova and Ukraine, a Declaration of the Presidents of Romania, the Republic of Moldova and Ukraine on trilateral cooperation, and a Declaration of the Presidents of Romania, the Republic of Moldova and Ukraine on collaboration in combating organized crime.

Subsequently, the Romania – Moldova – Ukraine trilateral format at the level of foreign ministers was launched in 2022, at the initiative of the Romanian Minister of Foreign Affairs, with the objective of strengthening cooperation between the three neighboring states, both in the current war context, but also for establishing a long-term dialogue and coordination mechanism, including Romania's active support for the authorities in Chisinau and Kiev in order to implement the necessary reforms in the European integration process.

Within this trilateral, the third meeting of the Trilateral Meeting of Foreign Ministers took place on 5 July 2024 in Chisinau, with the participation of representatives of the ministries of energy and transport of the three states. The meeting represented a materialization of Romania's commitment to support the Republic of Moldova and Ukraine, being an important moment for applied discussions on topics with an impact on the economies, societies and lives of citizens, such as: energy interconnection, transport, the regional security situation, but also the European agenda. The trilateral meeting of the foreign ministers of Romania, the Republic of Moldova and Ukraine ended with the adoption of a Political Declaration renewing the joint commitment to act in solidarity in the context of the continuation of Russia's illegal war against Ukraine.[26]

3.3. Regional Cooperation

In terms of regional cooperation, the most emblematic organization on the Black Sea is the Organization of the Black Sea Economic Cooperation (BSEC). Established in Istanbul, on 25 June 1992, by 11 founding members (Albania, Armenia, Azerbaijan, Bulgaria, Georgia, the Hellenic Republic, Moldova, Romania, the

[26] "Joint Statement of the Ministers of Foreign Affairs of the Republic of Moldova, Romania and Ukraine / Chișinău", 5 July 2024, available at: https://www.mae.ro/node/65094, accessed on 7 January 2025.

Russian Federation, Turkey, and Ukraine), that signed the Summit Declaration on Black Sea Economic Cooperation, it has the purpose to foster cooperation mechanisms for obtaining peace, stability and prosperity in the Black Sea region.

The EU enjoys the status of Permanent Observer with the Organization of the Black Sea Economic Cooperation (BSEC) as of 2007.

BSEC has provided a formal framework for the signing of multilateral cooperation agreements in various areas of interest for state actors, but has also developed strategies by stimulating public-private partnerships and the involvement of civil society and academia. According to art. 4 of the BSEC Charter, its Member States shall cooperate in the following areas: trade and economic development; banking and finance; communications; energy; transport; agriculture and agro-industry; health care and pharmaceutics; environmental protection; tourism; science and technology; exchange of statistical data and economic information; collaboration between customs and other border authorities; human contacts; combating organized crime, illicit trafficking of drugs, weapons and radioactive materials, all acts of terrorism and illegal migration, or in any other related area.

Another important regional cooperation initiative relevant to the Black Sea region is *the Three Seas Initiative*. Established in 2015, the Three Seas Initiative (3SI) brings together 13 countries located between the Baltic, Black, and Adriatic seas: Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Austria, Croatia, Romania, Greece and Bulgaria. All member states, except Austria, share several common denominators, such as recent communist past and NATO membership, obtained prior to EU accession.[27] Romania's active participation in the 3SI led Moldova and Ukraine to receive the status of associated states in the 3SI.

Through strategic regional interconnection projects such as Rail2Sea and Via Carpathia, the 3SI prooves its relevance for the development of connectivity integrating the transport system of the participating states infrastructure on the north-south axis in the fields of transport, energy and digital.

The Bucharest Nine (B9) format was established in 2015 in response to the evolving security landscape in Europe, particularly in light of Russia's military actions against Ukraine and illegal annexation of Crimea. It brings together nine Central and Eastern European countries aiming to bolster their defense capabilities and to enhance collaboration with other NATO members.

Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, and Slovakia use the B9 primarily as a platform to coordinate their positions and exchange views on shared interests, particularly in security, defense, and

[27] KURECIC, P., *The Three Seas Initiative: geographical determinants, geopolitical foundations, and prospective challenges*, Hrvatski geografski glasnik/Croatian Geographical Bulletin, June 2018, p. 3.

energy security. Its primary focus is to enhance the security of NATO's eastern flank and stability of the region, which has been significantly impacted by Russia's aggression. This prompted the B9 countries to take robust action to address the challenges this poses. The B9 was established based on two complementary rationales: a strategic rationale to enhance collective security and safeguard the interests of the nine countries through strategic deterrence, and a political rationale to build and accumulate their political capital within NATO. The format has been instrumental for them to advocate increased defense spending, resilience building, and shaping NATO's strategic deterrence on its eastern flank.[28]

3.4. Multilateral Cooperation

Security at the Black Sea stretches beyond the regional concern, therefore the types of cooperation set by Romania in the region, are complementary to the Euro-Atlantic and EU maritime actions and policy objectives relevant for the Black Sea region.

3.4.1. The North Atlantic Treaty Organization

The international community has been witnessing in the last decade to the internationalization of the Black Sea, as Romania, and other interested states, have carried out numerous awareness-raising efforts within international cooperation frameworks, drawing attention on the importance of the Black Sea for the Alliance and with regard to Russian hostile actions in the region.

After accession to NATO on 29 March 2004, Romania first raised the Black Sea issue at the NATO Summit in Istanbul in 2004, when the Alliance emphasized the importance of the Black Sea for Euro-Atlantic security.[29] Ever since, the Black Sea region has consistently been recognized as crucial for Euro-Atlantic security in NATO's declarations.

In the Riga Summit Declaration, the Heads of State and Government participating in the meeting of the North Atlantic Council, on 29 November 2006, emphasized the importance of regional cooperation, dialogue, the effective use of existing initiatives and offered support to regional efforts aimed at strengthening cooperation, security and stability in the Black Sea region.[30]

The importance of the Black Sea region has increased over time, given its proximity to Russia's destabilizing actions, especially the annexation of Crimea

[28] NAGY, T., *The Bucharest Nine - Enhancing Security on NATO's Eastern Flank,* The German Marshall Fund of the United States Report, March 2024, p. 4.

[29] NATO North Atlantic Council, "Istanbul Summit Communiqué", 28 June 2004, para. 41.

[30] NATO North Atlantic Council, "Riga Summit Declaration", 29 November 2006, para. 14.

in 2014. At the 2014 Wales Summit, NATO expressed concern over Russia's violations of international law, particularly its actions toward Ukraine, Georgia, and Moldova. These actions threaten regional stability, with long-term implications for the Black Sea.

By the 2016 Warsaw Summit, NATO's focus on the Black Sea grew. Russia's military activities near NATO borders, heightened security risks. NATO committed to a defensive posture in the region, including tailored forward presence (TFP) to enhance deterrence. The alliance also underscored the importance of supporting Georgia and Ukraine, enhancing regional stability and security. In paragraph 41 of the Warsaw Declaration, participating Heads of State and Government stated that NATO's response includes increased maritime presence, improved situational awareness, and cooperative efforts with regional partners, including Romania's initiative to establish a multinational framework brigade to help improve integrated training of Allied units under Headquarters Multinational Division Southeast.

The 2021 Brussels Summit underscored NATO's strong commitment to the security and stability of the Black Sea region, emphasizing the territorial integrity of Ukraine, Georgia, and Moldova. The Alliance called on Russia to withdraw its forces from these countries and cease its military provocations. NATO also reaffirmed its support for Ukraine's and Georgia's sovereignty and their aspirations for NATO membership, as outlined in the 2008 Bucharest Summit. Furthermore, the Brussels Summit highlighted the importance of ongoing reforms in Ukraine and Georgia, particularly in the security sector. NATO reaffirmed its support for Ukraine's efforts to strengthen its defense capabilities and regional stability through practical assistance and the NATO-Ukraine Platform on Countering Hybrid Warfare.

The Brussels Summit reinforced NATO's enhanced presence in the region, with increased forward deployment and assurance measures, including joint exercises, and air, land, and maritime activities. NATO emphasized its commitment to supporting Black Sea littoral states and bolstering resilience against hybrid threats.

The NATO 2022 Strategic Concept, adopted at the Madrid Summit, underscores the Black Sea region's strategic importance, particularly in light of Russia's aggressive actions. Russia is identified as the most significant and direct threat to Euro-Atlantic security, that is using a combination of conventional, cyber, and hybrid means to destabilize neighbouring countries and challenge NATO interests. Russia's actions, including its invasion of Ukraine, have further highlighted the critical nature of the Black Sea region in terms of regional stability, freedom of navigation, and security.

The Strategic Concept also emphasizes NATO's ongoing support for the Euro-Atlantic aspirations of countries in the Black Sea region, encouraging their integration into broader Euro-Atlantic structures.

The Washington Summit in July 2024 outlined NATO's commitment to upholding the security, safety, and stability of the Black Sea, emphasizing cooperation with regional partners, to strengthen their defense capabilities and resilience against malign influence. NATO's support for the 1936 Montreux Convention and initiatives like the Black Sea Mine Countermeasures Task Group are key components of these efforts.

NATO's focus on the Black Sea remains central to its broader goal of ensuring security across the Euro-Atlantic area.

3.4.2. The European Union

The Black Sea is bordered by two EU countries – Bulgaria and Romania. Therefore, since their accession to the EU on the 1st of January 2007, the EU has strengthened regional cooperation with and between the countries in the Black Sea region. Moreover, Georgia, Turkey, and Ukraine - littoral states and Moldova – relevant state in the Black Sea Extended Area, are accession candidates to the EU, thus making the region a key focus of the EU in terms of security, energy, economic cooperation, environmental protection, and democratic development.

The EU's actions and policies are aimed at ensuring regional stability, enhancing its energy security, supporting economic growth, environmental protection, and strengthening democratic values in the Black Sea region.

In 2007, after the accession of Romania and Bulgaria, the EU launched the Black Sea Synergy (BSS) initiative, to support regional development in South-East Europe, within the Black Sea region and between the region as a whole and the EU. By encouraging cooperation between the countries surrounding the Black Sea, the synergy offers a flexible forum for developing practical region-wide solutions to address regional and global challenges.[31]

The implementation of the Synergy resulted in engagement of interested stated in its two milestone initiatives on maritime affairs and marine research and innovation, the Common Maritime Agenda for the Black Sea (2019), complemented by its scientific pillar, called The Common Strategic Research and Innovation Agenda for the Black Sea (2021).

The Common Maritime Agenda for the Black Sea[32] represents the cooperation framework for the Blue Economy, which facilitates dialogue between participating countries and stakeholders to jointly address the challenges and opportu-

[31] European Union External Action, "Black Sea Synergy", available at: https://www.eeas.europa.eu/eeas/black-sea-synergy_en, accessed on 7 January 2025.

[32] European Commission, "Common Maritime Agenda for the Black Sea", available at: https://black-sea-maritime-agenda.ec.europa.eu/about/our-mission accessed on 7 January 2025.

nities of blue economy sectors in the area, ensuring environmental sustainability while fostering growth and promoting blue economy projects.

The Common Strategic Research and Innovation Agenda for the Black Sea's primary objective is to align research efforts across the region to address common challenges and to foster a collaborative, multidisciplinary approach to scientific and technological progress. The initiative emphasizes sustainable management of marine ecosystems, climate resilience, and innovative solutions for the region's economic and social development.

4. Final Considerations

Current events and challenges in the Black Sea region represent an opportunity for Romania to increase its regional profile, through the different types of cooperation mechanisms in a wide range of domains. Despite Russia's ongoing war against Ukraine, littoral states and other interested states manage to implement such mechanisms in the region and to strengthen the interconnections among them.

Bilateral, trilateral and regional cooperation complement multilateral initiatives in the Black Sea region, in the effort of making it a safe and predictable region for Romania's national security, as well as for European and transatlantic security.

The success of a cooperation mechanism is measures by the extent to which it manages to create mutual trust between the states in the region, to run projects aimed at obtaining prosperity and, consequently, to increase the quality of life of the population in the region.

Romania's efforts in the past two decades to raise situational awareness in the Black Sea region have yielded results, which translate in the adoption of legislation, such as the Black Sea Security Act of 2023 adopted by the US Congress, in launching initiatives such as the EU's Common Maritime Agenda for the Black Sea, in including the Black Sea in programmatic frameworks or adopting measures to fulfil specific defense objectives within NATO.

In relation to the EU and NATO, Romania has proved to be a reliable and predictable state in the region, not relying solely on international organizations, but making efforts, nationally, bilaterally and regionally, in line with these international organizations' broader interests. Romania constitutes a pillar for Black Sea regional security at NATO and the EU external border.

Considering the cooperation mechanisms described in this paper, we hold the view that Romania defines a strategic approach on the Black Sea, in all areas of interest in the region, that needs to be translated in a coherent manner into a National Black Sea Strategy.

A "MOORING" IN THE CIVIL AND CIVIL PROCEDURAL LAW. CONSIDERATIONS REGARDING THE SHIPS' SEIZURE AND FORCED EXECUTION

*Manuela Tăbăraș**

1. A Too Common Right and a Special Matter

In the vision of a Romanian Maritime Code as announced by art. 230 (c) from Law no. 71/2011 for enacting the Civil Code Law, a few preliminary aspects can trigger the interest for the future of civil and civil procedure regulations. The second book of the 1887 Commercial Code named "About maritime trade and navigation" has survived the abrogation storms that were naturally, before the new Civil and Civil Procedure Codes. This is due to, in great part, because of the specialised scope of legal norms found in its content. The real guarantees matter from the Civil Code have failed in front of the maritime domain specialization stating within provisions of art. 2359 of Civil Code the fact that real guarantees over ships and aircrafts are regulated by special laws.

The New Code of Civil Procedure has introduced a new rule in respect of precautionary seizure on civil ships found in provisions of arts. 960-969. However, no special provision has been introduced in the forced execution regarding their way of capitalization.

The current regulation of seizure shows how specialised a ship seizure can be.

Such specialisation often entails the need for a special procedure, derogating from ordinary law, which some law professionals are thinking of reuniting in the framework of the maritime code.

However, unity of regulation should be sought by amending the Code of Civil Procedure and not by creating a special procedure in the Maritime Code, say

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the conservative side of the legal doctrine and the professionals in the field of enforced execution.

Moreover, over-regulation may give rise to a procedure that is far too difficult or with elements that are far too distinct from those of common law, the justification for which is difficult to argue.

Maintaining a balance by carefully adjusting the special rules could bring added value to a possible implementing regulation in this area.

Our objective is to gather arguments that under the conditions of a different regulation of forced execution in the maritime field it would be ideal for the law maker to follow the regulatory unit in principle, by amending the code of civil procedure and adapting the forced execution of mobile property to the specific execution of vessels and not by creating a special enforcement procedure in a maritime code.

Since 2011 we have witnessed fundamental changes in the Romanian law – and among them, the ones on the Civil Code (2011) and civil procedure (2013) are notable: The new Civil Code entered into force on 01.10.2011 – Law 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, "law contains provisions on the implementation of Law no. 287/2009 on the Civil Code, published in the Official Gazette of Romania, Part I, no. 511 of 24 July 2009, hereinafter referred to as the Civil Code, the main purpose of which is to bring existing civil legislation into line with its provisions, as well as to resolve the conflict of laws resulting from the entry into force of the Civil Code".

We appreciate that a short review of legal provisions within the precautionary seizure matter will take to the conclusion of the complexity of the scope of regulation and the need for some special norms within the forced execution matter. The 1887 Commercial Code was including a special chapter dedicated to vessels seizures, tracking and forced sales within art. 910-935,[1] but which has been abrogated by provisions of art. 230 (c) from Chapter X of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code. Therefore, we know today special disposals only in respect of precautionary seizure of civil ships. On this occasion, we only notice the existence of a "project" published by professor Marian Voicu and lawyer Maria Veriotti in 2017, which confirms the requirements of a distinct form or forced execution taking into account the specialised scope.[2] In order to make things easier, we will refer to it as to "the Proposal". From authors' title it comes out that for this missing item it looks like there is a wish to be replaced by a Maritime Code. However, we are appreciating that such a regulation of the forced execution procedure is required to be topographically

[1] In this form in force from the 1st of October 2011 until the 19th of April, 2012.

[2] VOICU, M., VERIOTTI, M., "Seizure of ships. Maritime Code Draft", *Maritime Law Magazine*, nº 1, 2017.

found within the foreclosure of the movable property regulated by the Civil Procedure Code. A benefit of the codification is, without question, the achievement of unity in regulations. We are appreciating that the regulation of a specific procedure of foreclosure of civil vessels must start with the premises (hypothesis) of unity of the executional norms. The specialisation of the foreclosures' scope must not take to their location among "special laws" or codifications of other matters.

We are going to introduce you next into a short reflection over the domestic rules within the precautionary seizure of civil ships by having a comparative analysis for foreclosure procedures with perspectives over a future likely special regulation in their forced execution matter.

The Civil Code – Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code – entered into force on 01.10.2011, the main purpose of which is to bring existing civil legislation into line with its provisions, as well as to resolve the conflict of laws resulting from the entry into force of the Civil Code".

Art. 230 of Law no. 71/2011 states: "On the date of entry into force of the Civil Code is repealed: "(c)the Commercial Code of 1887, published in the Official Gazette no. 31 of 10 May 1887, with the exception of the provisions of Articles 46-55, 57, 58 and 907-935, still applicable in relations between professionals, which shall be repealed on the date of entry into force of Law no. 134/2010, of Book II "On maritime trade and navigation", and of the provisions of Articles 948, 953, 954 para. (1) and Art. 955, which are repealed on the date of entry into force of the Maritime Code".

CONCLUSION No.1

Book II of the Commercial Code of 1887 entitled "On Maritime Trade and Navigation" survived the storms of repeal that preceded – naturally – the new codifications in civil and procedural-civil matters.

This is justified due to the specialized object of the execution, which in the opinion of the law maker should also determine a specialized framework of legal norms grouped in a maritime code.

However, Chapter 2 (from Book II of the Commercial Code) concerning the seizure, tracking and forced sale of vessels (art. 910 et seq.) was repealed by amended Law no. 71/2011 since February 2013.

CONCLUSION No. 2

Thus, the enforcement procedure in this specialized field of maritime enforcement has disappeared without the new civil procedure code adding anything new in the matter of seizure, tracking and forced sale of vessels, except for the precautionary seizure.

By repealing the Commercial Code and by repealing the Book II of the Commercial Code of 1887 entitled "On Maritime Trade and Navigation" regarding seizure, tracking and forced sale of vessels starting with February 2013, a legislative vacuum was therefore created in the matter of foreclosure of vessels.

Even the matter of security interests in the Civil Code has yielded to the specialisation of the maritime field, stating in the provisions of art. 2359 of the Civil Code that security interests in ships and aircraft are regulated by special laws.

CONCLUSION No. 3

The few articles mentioned by the law maker from the first Comercial Code, which are repealed on the date of entry into force of the Maritime Code, do not meet the needs of forced execution, but they are only important to inform us that they will also be repealed upon the entry into force of the future Maritime Code. Therefore, the only pertinent information given by the law maker in 2011 is: "Since I am a unifier, I am also a separator and I will separate the forced execution matter of the others".

The concern of the law maker was: How will I separate it? There are two options: (1) By the foreclosure of movable assets in the maritime and fluvial domain by the maritime code (2) By the foreclosure of all other movable assets by the civil procedure code. We understood that the law maker has unified certain codes (civil code with commercial code dedicated to professionals) but he proposed to create other codes such as the provision relating to the new maritime code.

CONCLUSION No. 4

There are 11 years since then and we still don't have a Maritime Code.

I am forced to emphasize that we do not have the announced code that justified the repeal of the old regulations in the context in which I repeat the procedure for forced execution of ships. Old regulations are disappeared today and currently we have only the classic rules of the civil procedure code that applies to seizure, traking and forced execution of movable assets.

New rules have been introduced and added to the Code of Civil Procedure that refer to precautionary seizure without having any other additional provisions into the Code of Civil Procedure regarding the Forced Execution of ships (seizure, traking and forced sale of vessels).

CONCLUSION No. 5

Let's not forget the law maker's change of philosophy, which does not seem to be constant and which generates mistrust: it seems that the law maker either got lost in the maze of regulations or he did it fully aware of it.

Regarding the professionals, their legislation was united with the legislation of non-professionals, the law maker repealing the Commercial Code and adapting all articles within the Civil Code.

Thus, the law maker gave up a millennial structure due to criticism from the doctrine.

We cannot forget that in such laws as special and technical as the maritime ones, similar to laws on insolvency and bankruptcy, the forced execution has remained uniformly regulated in the Code of Civil Procedure.

In this matter of maritime trade, it seems that the law maker reverts to the split position of the specialization of enforcement outside the common framework of forced execution regulated by the Code of Civil Procedure, by including the rules of enforcement in the future Maritime Code.

CONCLUSION No. 6

Criticizing the separatism of regulation and the dissipation of legal norms, the Romanian doctrine was a constant and supported unity, which led to the unification of civil and commercial legislation.

For the same reasons, we appreciate that it was necessary to preserve the regulatory unit and to maintain the general foreclosure rules, recognizing at the same time the need to specialize and adapt these rules in the matter of forced execution within the maritime field.

As we can notice, these are just a few problems, but let's analyse them one by one! This new philosophy calls for discussions on some preliminary aspects.

Thus, on the eve of a Romanian Maritime Code announced by the provisions of Art. 230 par, c) of Law no. 71/2011, some preliminary aspects may be of interest for the future of civil and procedural-civil regulation. So we are waiting for a maritime law, but what do we have now in the matter of guarantees or means of obligations enforcement?

The new Code of Civil Procedure that entered into force on February 2013 (therefore after the abrogation of the old Civil Code) has introduced a new regulation regarding the precautionary seizure of civil ships through provisions of arts. 960-969.

However, no special provision has been made in the enforcement procedure (seizure, traking and forced sale) regarding the way in which the pursuit and enforcement or the recovery of the assets are to be carried out.

We hope that in the case of a dispute related to the foreclosure of a ship, all the participants will think that the rules of the civil procedure code regarding the enforcement of movable assets are applied.

Security interests - attachment

A brief overview of the legal provisions on attachment of securities will reveal the complexity of the subject matter and the need for special rules on enforcement.

We propose to limit the search for answers on the need for a distinct codification of the civil procedure code through a new maritime code – only on the study of the new civil procedure code entered into force in February 2013 which, as it was said, it introduced a new regulation regarding the precautionary seizure of civil ships in provisions of arts. 960-969.

The essential message, however, goes beyond the scope of a doctrinal order, but it is meant to show the gaps from separate regulations and the importance of regulations in the matter of forced execution of ships.

In the following, we will briefly reflect on the national procedural rules on the precautionary seizure of civil ships with a comparative analysis of the enforcement procedures with the view to have a future and possible special regulation on such an enforcement – by nature to support our theory: the unitary regulation of maritime execution through the rules of the code relating to forced procedure – adapting the forced execution of mobile property to the specific seizure of ships.

2. Terminology. The provisions of art. 490 of the repeal 1887 Commercial Code used the term "vessels", stating that they belonged to the category of movable property and that this included "vessels, tools, instruments, guns, ammunition, provisions and in general all things intended for use or permanent use, even if for some time separated from the vessel".

Ordinance 42/1997 on maritime and inland waterway transport and the Code of Civil Procedure uses instead the notion of "ships"[3] [2] in its terminology [art. 23 of O.G. 42/1997].

A second observation is also related to the fact that the Civil Procedure Code does not describe the specialized object of precautionary seizure.

The legitimate question of any specialist with minimal practice in the enforcement of obligations would be: can any ship be subject to a precautionary seizure?

As long as the law does not distinguish or as the Latin says: *Ubi lex non distinguit, nec nos distinguere debemus*, we don't have to do it either.

The superficial answer would be that in the absence of any limitation (the limits being of strict interpretation and application) any ship can be the subject of the provisions of art 960, that meaning it can be the subject to precautionary seizure.

It is as clear as the day light that this is not what the law maker had in mind and that a ship of public utility such as the training ship of the Romanian Navy or military or historical ships (and other categories of ships that could be enu-

[3] To see: Veriotti, M., *Maritime ship – legal epicentre of maritime law. Legal nature of maritime vessel*, available at: www.juridice.ro/727316/nava-maritima-epicentrul-juridic-al-dreptului-maritim-natura-juridica-a-navei-maritime.html, last accessed on 8.06.2024.

merated) cannot be subject to forced execution by common law because they are inalienable at least from the perspective of the goal and the destination.

But let's not forget that the law contains no exceptions and that it seems that any (civilian) ship can be placed under precautionary seizure.

A third observation also relates to the fact that the civil procedure code does not describe the specialized object of precautionary seizure.

The claim/debt that generates the request for the establishment of a precautionary seizure under the provisions of art. 960 of the Civil Procedure Code is exclusively a maritime claim/debt, borned from a maritime report or can it be any claim/debt that can generate an enforcement from the assets of the debtor who owns maritime vessels?

The answer will generate different solutions regarding the material and the territorial competence, the forms of publicity and obviously, the procedures.

The fourth observation - it is quite dramati

If the precautionary seizure regulated by art. 960 CPC concerns only the maritime claim, it means that the ship can be subject to double procedures at the same time: a seizure under common law and a special one under art. 960 CPC. Should we believe that this is what the law maker had in intention to regulate meaning to create a more difficult situation for the ships than for any other movable assets?

The answer is, in our opinion, in the negative and certainly this was not his objective!

These are just some of the effects of the rush to repeal rules without thinking ahead, to specialize too much and to separate procedures from the common law and the effects will be seen soon.

Other observations – Clarifications can still be requested for the incomplete rules of art. 960 of the Civil Procedure Code.

For example, can the seizure concern only a part of the ship or its entirety or only a right over it?

Coming back to provisions of art. 960 of the CPC, we are mentioning that this right is part of the procedural means the civil claim is including [art. 29 CPC]. In a substantial transposal it is located over the pursue of a civilian ship[4]. It also states the special character of provisions included in section 2 of Chapter I dedicated to precautionary seizure in Title IV called "Precautionary and temporary measures" that involves the application of *specialia generalibus derogant* principle, but also adding general disposals from section 1. In addition, previous mentioned disposals are sending to the observance of international conventions over vessels, that Romania is part of. In this type we can find the

[4] We appreciate as useful the express regulation within the forced execution form (but also of precautionary measures over them) of typologises of ships that can't be pursued , such as military vessels, etc.

10th of May 1952 International Convention for the unification of certain rules over the precautionary seizure of maritime vessels (judicial sales) that we will refer to next, called hereinafter as the "Convention". It states the possibility that a ship wearing the flag of a member of Convention state to be seized in the jurisdiction of a contracting state based upon a maritime debt as defined by art. 1 item 1 para. a)-q) from Convention, however without limiting rights and competences that states, judicial authorities or harbor authorities hold according to their domestic laws or regulations, to seize, retain or stop in another way a vessel to navigate in their jurisdiction.

Old disposals of art.910 from the 1887 Commercial Code were were also providing the creditors' right to proceed to seizure and sale of a civilian vessel or an undivided part of it owned by their debtor. This right is recognised to the privileged creditors even though the vesses is in the hands of a third party. However, in a distinct form, in a substantial similar way, this right is supported in the "Proposal" of the normative document as well. In the subject of foreclosure of a mobile asset, traking of a share share is not an usual one. On substantial side provisions of art. 687 (1) of Civil Code state the possibility of a co-owner's creditor to enforce his share quota in the right over the common goods. As an alternative, they can ask for the goods' division. However, on civil-procedure side, a similar wording is found only in real estate matter. Provisions of art. 818 (3) CPC are stating the possibility of personal creditors of a debtor to track his determined share quota without asking for division procedure, if it is established and clarified with no doubts. This matter is easy to be achieved taking into account the nature of the goods, traking being mainly achieved in documents. Of course, practical difficulty appears when the share-quota of the real estate is handed over and an evacuation of the co-owner or even of the debtor, if this is tolerated by the co-owner, can't be achieved.

However, in mobile assets' matters, seized goods are usually left in the deposit of a person up to its sale [art.764 par.(1) CPC], and the debtor is missing his right of the goods' use . We notice within the framework of art. 740 par.(3) CPC disposals regulating the seizure over the road vehicles that the traffic police officer will be allowed to stop the seized car and they will proceed to retain the registration certificate, identity card, announcing the driver of the vehicle that the car is seized and he is obliged to go to the bailiff within a reasonable period of time. This procedure can harm the rights of the co-owner that is not a debtor in the foreclosure. Moreover, the handing over of the goods' issue to the successful tenderer [art. 774 (3) – (4) CPC] seems to be much more emphasized for mobile assets that cannot be used at the same time in different tasks by different persons. In addition, such a prerogative assumes a correct identification of the co-owners, of the co-ownership type (joint or divided ownership) as well as their owned

shares, if the case, through complete updated and public registers.[5] In such a case we appreciate that special judicial mechanisms such as: (i) recognition of the co-owner's right to buy with priority a share of the goods (by derogation from the creditor's availability principle), at a fixed price established by an authorised evaluator in a direct way (without public tender, this procedure having the benefit that it can be developed in a shorter period of time; (ii) arresting (immobilization) of the civilian vessel for a certain period with the requirement of a division action filing within it, on the contrary the goods being made available to the co-owner- can be implemented. In case the division action before the court is filed, the co-owner can pay a bail in order to be sure on the use of the goods by himself etc.

2. Considerations Regarding the Seizure of a Civil Ship Based upon Domestic Provisions of Civil Procedure Nature

2.1. Right to Seize a Civil Ship

Provisions of art. 960 of the Civil Procedure Code are regulating the creditor's right to use precautionary seizure mean of forced execution by seizing a civil ship. "The right to seize a civilian vessel", art. 960. CPC: *"The creditor may request the establishment of the insurance seizure on a ship, under the conditions of the provisions of this section, as well as of section 1 of this chapter which are applied accordingly"*.

The provisions of art. 960 of the Code of Civil Procedure regulates the creditor's right to seize a ship. This right is part of the set of procedural means that the civil action encompasses [art. 29 Civil Procedure Code].

A first observation is the Civil Procedure Code does not describe the specialized object of precautionary seizure. The Commercial Code of 1887 (repealed in 2011) contained a separate chapter dedicated to the seizure, traking and forced sale of vessels in arts. 910 to 935, but this was repealed by the provisions of art. 230 (c) of Chapter X of Law 71/2011 – provisions which are not included in the new legal texts.

2.2. Obtaining the Decision for Establishment of the Precautionary Seizure. Enforcement Court

Disposals of art. 961 (1) Civil Procedure Code are stating the possibility that, while justifying an emergency, the precautionary seizure can be disposed

[5] To see Order no. 889/19.06.2013 regarding evidence and registration of ships that have Romanian flag which regulates the form and content of vessels registers.

based upon a main claim even before filing the substantive civil action, being compulsory to notify the competent court[6] [4] or to originate due diligence for establishing the arbitral court within maximum 20 days since the approval of the precautionary measure having as a consequence the legal termination of the precautionary seizure. The mechanism presents a benefit for the creditor. In case the debtor's solvability is doubtful or costs of a substantive action are high, a precautionary seizure can make the difference between the debt and objective impossibility of its fulfilment because of the debtor's seizable goods. Therefore, in conclusion, if creditor files his substantive action as main claim, he can wait for the approval decision and if rejected, he can re-analyse from economic point of view the efficiency of such a diligence. We are noticing that, once it has been approved (obtained), the main precautionary seizure can be applied by the bailiff, but the seizure legal termination does not give the right to the last one to dispose himself the cancellation of the measure but only the Court has such a right, by definitive closure pronounced with Parties summoning.

Thus, the ship remains – and not only formal – under seizure after the expiration of the 20 days, too.

We are appreciating that once the decision through which the termination of the seizure has been pronounced there is no need for the bailiff to dispose such a thing through a minutes report, the ship's availability being done in its consideration.

If according to art. 954 (1) final thesis, a creditor that envisages to obtain the precautionary seizure subject to general disposals is not necessary to individualize the goods over which he/she asked for the seizure. As regards the vessels field, it is required to know the ship and its name, the European Sole Identification number of the domestic navigation, after case. Through art.3 of "Convention" any claimant has the possibility to seize either the ship related to the maritime debt or any other ship owned by the person who was the ship's owner when the concerned maritime debt arised, even when the seized ship is ready for navigation, but an important exception is introduced in the rules: only the vessel in relation with the claimed debt can be seized when the debt or the claimed right regards the contested ownership of a ship, its possession or exploitation or rights to the vessel's joint exploitation output or any maritime mortgage or guarantee.

2.3. Competence. Seizure Interdiction

According to provisions of art. 962 Civ. Procedure Code, the competence[7] for settlement of the precautionary seizure request over a ship is of the local

[6] TĂBÂRCĂ, M., BUTA, G., *Codul de Procedură Civilă din 15-sep-2008*, Universul Juridic.

[7] For details, see: DINU, M., *Drept procesual civil*, Ed. Hamangiu, Bucuresti, 2020, pp. 145-165.

court where the ship is located, regardless of the court where the claim has been filed or the substantive action follows to be introduced. As regards the territorial competence established depending on the location of the goods, practice meets challenges in connection to difficulties of proof of the location of this one at the time when foreclosure court has been notified. However, the proof of retaining the vessel by the harbour's captaincy facilitates the establishment of the territorial competence in respect of precautionary seizure.[8] Further leaving of the place where the vessel has not been regarded in the judicial practice as a competence problem, was rather regarded as a lack of the claim's merits. Thus, in the Previously shown Civil Sentence no.86/2020, the Court has mainly retained the fact that, by leaving port X (the claim for retaining the ship being previously rejected), the precautionary seizure cannot be installed because it supposes the vessel's unavailability and its presence in the harbour. The Court seems to use the *a fortiori* argument in order to interpret disposals of art. 963 C.P.C., that prevents the application of the seizure over a ship ready to go, *i.e.* over a ship for which the commander has on board the certificates, all vessel's documents as well as the leaving permit, which were handed over by the port master to commander. We appreciate that this interdiction is *expresis verbis* found in a special regulation regarding the ships enforcement, because *de lege lata* this disposal is found in the Civil Procedure Code exclusively in the precautionary seizure matter and not within the executory seizure. Although we have supported the idea that the execution court can and, in our opinion, it should remain that one established by art. 651 C.P.C., we appreciate that, the procedural incident regarding approval for a trip requires to give competence to the court where the vessel is located. This aspect would represent a derogation from provisions of art. 651 (3) C.P.C. that gives material and territorial competence to the court that approved the forced execution[9] of settlement and any other incidents appeared during enforcement.

2.4. Travels

Disposals of art. 94 CPC are recognizing to the (i) creditor that he has a privilege over a ship, (ii) co-owner of the vessel or (iii) debtor the prerogative to

[8] To see Civil Sentence no. 86/2020 pronounced by Constanta Court, Section II Civil where the court keeps in mind: "Judging with priority, within art. 248 C.P.C. conditions, the court will reject as not grounded the exception of not being territorial competent and that one of lack of the scope of the seizure request, reported to the fact that, on one hand on the filing time, the X ship was retained by the C master port in C port which triggers the territorial competence of C Court, according to art. 962 C.P.C. and, on the other hand, the object of the claim, namely C ship, still exists, even though it left its place of it detention , C Port."

[9] For details about force execution, see: DINU, M., STANCIU, R., *Executarea silită in Codul de procedură civilă. Comentariu pe articole*, Ed. Hamangiu, Bucuresti, 2019, pp. 3-15.

address to the court that disposed precautionary measure so that the vessel to be allowed to have one or several trips, however establishing precautionary measures that would be required, after case.[10] In their proposal of regulation for the enforcement of a ship, authors Marin Voicu and Maria Veriotti have proposed the need for a court to establish the deadline until which the vessel must come back to the seizure port, under the sanction to make available the guarantee (bail) for the creditor, except for the case of insured loss through a policy. In our opinion, such a regulation must foresee the amount made available to the bailiff, who will proceed to its distribution or its payment towards creditors within the inforce legal framework.

The summon sent to debtor and the seizure report. The enforcement procedure starts with the notification of the bailiff. The first foreclosure is the summons. The notion of "command" used in the "Proposal" can be replaced with the "summons" one, in order to align to terminology of the Civil Procedure Code. As regards the prohibitory term granted through summons for the payment of the debt, we are appreciating that it is pertinent and useful an established period fixed in hours, namely for 24 hours. The "Proposal" provides at the same time a term of 10 days for starting the foreclosure, the exceeding of the deadline preventing "the tracking" until a new command established. If this legal construction will be used, it will form a particular mechanism as compared to all enforcements regulated by the Civil Procedure Code.

[10] As an example, to see Decision no. 8/2019, of 11th of January, 2019 pronounced by Constanta Appeal Court through which we note: " Applying both art. 964 Civil Procedure Code and provisions of art. 5 from Convention, it comes out that when the Convention is applicable preventive measures must include bail or another sufficient guarantee, the appeal filed from the perspective of the applicant for the approval of trips using the seized vessel to be obliged to pay a bail or another guarantee is grounded. Besides the date of pronouncing the present decision, seized vessels have executed or they are finalizing the trips which were authorised until the 15th of January 2019 and no incident that could affect the enforced seizure has been claimed by the appellant until the current decision date, which does not exclude however the possibility the appellant to have been damaged as a consequence of trips by seized ships. In this circumstances, the appeal court is appreciating that to oblige the claimant to deposit a bail of 3% from the stated debt by the defendant D... K...BV represents an enough and proportional preventive measure, having in mind the short period for which trips were approved, limiting the payment term to 3 business days since the notification of the present decision". Moreover, taking from the recitals of the first court decision, we can emphasize: "Such (preventive) measures imposed by courts, after case, could be: informing the port master with regards to approvals to execute trips which in this way will be able to give to the ship's commander the documents required for navigation, establishing of a navigation route by indicating a precise destination or destinations for agreed trips, as well as the return data of the vessel in port and similar actions. On the other hand, among the preventive measures we can enumerate also the transcript of the trip approval in the respective maritime authority's register as well as transcript of the corresponding mention in the document proving the vessel's nationality, measures stated by art. 963 par.3; these publicity measures must be carried out before the ship's departure, as expressly provided by the respective norm".

In our opinion, this mechanism can miss *de lege ferenda.* The seizure report must include, besides the mentions stated by art. 679 C.P.C., some specific items as shown in the "Proposal" such as: name or denomination, domicile or headquarters of the ship's owner as well as the name of its captain; name, capacity, type and nationality of the vessel, description of boats, aggregates and apparatus, equipment, bunker as well as the other supplies of the ship etc. Civil procedural disposals from the precautionary seizure matter from the Civil Procedure Code do not make any mention with regards to foreclosure administrator of the vessel. However, by reference of art. 955 of Civil Procedure Code to corresponding application of the rules of Civil Procedure Code from the enforcement matter, disposals within the judicial execution of moveable assets regarding the seizure administrator will be consequently applied.

2.5. Seizure Execution

The measure of precautionary seizure involves to make the ship unavailable by the port master where this is located, and this one will not release the documents required for navigation and it will not admit the ship to leave the port according to provisions of art. 967 (1) C.P.C. In the enforcement matter we appreciate as being necessary to have a procedure through which the seizure administrator to obtain the approval of the court for the ship to be moved in another port.

De lege lata, civil procedural disposals do not provide for publicity of precautionary seizure. In the proposal of enforcement procedure made by Marin Voicu and Maria Veriotti we can find a few important items in this matter such as: (i) communication of a copy after the seizure report to the Romanian maritime authority where the ship is registered – if under construction -, in order to register it in the matriculation register, (ii) if the ship is under foreign flag, the seizure report is notified, by the creditor, to the maritime authority from the country of the vessel's registration. According to art 34 (1) from the G.D. no. 245/2003 for the approval of the Application Regulation of Governmental Decision no. 42/1997 regarding water transport, the seizure reports are also registered in the matriculation registers. Also, according to para. (2) of the same article, the port master will not carry out any transcription into the matriculation transcripts of constitution, transfer or termination of real rights and/or burdens over the ship from the date of seizure enforcement up to its termination.

In a forced execution procedure we do appreciate that it is not necessary to have established a notification period for communication of the copy after the seizure report to the owner (if this one hasn't been present to the seizure enforcement), as it is now drafted in the "Proposal". Also, there is no sanction for failure to respect the deadline, being a disciplinary one as regards the bailiff. The three days term from the "Proposal" is an unsufficient one for achievement of a com-

munication procedure of some documents towards the Parties of the procedure. In the same "Proposal" we can find the obligation of the pursuing creditor to transmit the minutes to privileged creditors or mortgauge ones from matriculation register of the ship or from the burdens certificate issued by the consular mission in Romania if the ship is under foreign flag, within 3 days after registering the seizure report. We do appreciate that such an obligation can't be given but only in the duty of the enforcement body and not to the puruing creditor, in order to be able to respect the attributions of each participant to the enforcement procedure.

2.6. Movement (Displacement) of the Seizure

Provisions of art. 965 C.P.C. are regulating the assumption of moving the seizure over another ship, for justified reasons, at the request of the debtor, or after case, of the creditor, by the court that disposed the precautionary seizure. Among the justified reasons we can mention: (i) the need to carry out some trips, (ii) the need to perform urgent repairs etc. Of course, this possibility is open only when another ship of the debtor can be seized. Although the value criteria of the other ship is not mentioned, we consider that it is required to basically check the value of this one. A less value of the ship could take to a failure in actual recovering the creditor's debt and a much higher value could damage the debtor due to the impossibility of its use.

2.7. Sale and Sale's Publicity

In our opinion, for a future regulation of the forced execution specific to ships, seing the "Proposal" of M. Voicu and M. Veriotti authors in an eforcement procedure it is not necessary to obtain new approval from the court or execution court. The sale procedure shall be performed by the bailiff according to rules of the forced execution of movable assets field. However, a specific content within the sale advertising is welcome for the enforcement procedure. We keep in mind from the "Proposal" the following: (i) name or denomination, domicile or headquarters of the ship's owner, as well as the name of the vessel's captain, (ii) characteristics of the mentioned ship in the matriculation register, (iii) description of boats, apparatus, aggregates, equipment, bunker and supplies included for sale etc. Also, it is important that such a regulation to state the location of placement of the sale advertisements issued with regards to vessels, such as the court display, maritime authority from the port where the ship is anchored etc., general provisions for movable assets couldn't be considered as being sufficient.

However, we consider that, for legal accuracy, establishment of some display conditions of the sale advertisements "on the most visible side of the ship" must

be avoided, because it involves a higher degree of subjectivism which could be a reason for appeal to execution by the interested person. In our opinion, there is no need for establishment of a special procedure that derogates from general provisions in the field of sale of movable assets, these being over regulated and they can support the specific object of tracking. Thus, we are advocacing for the unity of effective sale procedure. In the same way, we are appreciating as sufficient the procedure of distribution of the amounts resulted from enforcement, considering that there is no need for implementation of a derogatory procedure. As regards the effect of sale, it is necessary to cancel all privileges and all other burdens from the Matriculation Register based upon the adjudication certificate, except for those the buyer has taken and, at the same time, to register the vessel on his/her name or to release the removal certificate for a new registration purpose, after case, as judiciously stated by the "Proposal", too.

3. Conclusion

The current regulation from the field of precautionary seizure shows how specialized can a vessel's forced execution can be. Such specialization often triggers the need for a special procedure, derogatory from the common law one. However, we must follow the regulatory unity by amending the Civil Procedure Code and not by creating a special procedure within the maritime Code.

However, we consider that such a regulation of the enforcement procedure is necessary to be found topographically among the forms of movable enforcement regulated by the Code of Civil Procedure.

One benefit of codification is undoubtedly the achievement of regulatory unity. We believe that the regulation of a specific enforcement procedure for civil vessels must be based on the premise of unity of enforcement rules.

The specialisation of the subject matter of forms of enforcement should not lead to their placement in "special laws" or codifications of other matters.

Last but not in the least, for all these reasons and for those that are detailed in the written article we appreciate that nevertheless, regulatory unity must be pursued, by amending the Code of Civil Procedure and not by creating a special procedure in the Maritime Code.

Anyway, both the doctrinaires who made legislative proposals, even for codification through a maritime code, as well as the practitioners in the matter and obviously myself - we unanimously find that it is imperative to quickly regulate the matter of foreclosure of ships.

Clarifications and harmonizations are needed in a series of issues such as: the competence of the enforcement court in relation to the competence of the court

to settle the request for the precautionary seizure of a ship, the territorial jurisdiction, the standards for the individualization of the asset, the authorization of the movement of ships, the transfer of guarantees, but also indications regarding the forms of publicity of the seizure when it comes about a ship. Moreover, overregulating can give birth to a too difficult procedure or one with too different items as compared to those from common law whose justification can be difficult grounded and reasoned. Keeping a balance by careful amendment of special norms will bring a plus-value to an eventual executional regulation in this field.

... And these are just some of the big issues that require regulation ....

SPECIAL PROCEDURAL RULES APPLICABLE IN CRIMINAL PROCEEDINGS CONCERNING MARITIME AND RIVER OFFENCES

*Mihail Udroiu**

1. Introduction

The Code of Criminal Procedure establishes the general rules applicable in relation to criminal proceedings conducted before judicial authorities.

These rules are supplemented by provisions of the laws on judicial organization or by special laws that establish special derogations from the general rules.

Understanding the mechanism of criminal proceedings related to naval offenses requires, on the one hand, the determination of the general rules applicable to them, and, on the other hand, the determination of the special rules and competences.

2. General Rules of Jurisdiction

Jurisdiction is the capacity granted by law for a judicial body (criminal prosecution body, judge of rights and freedoms, preliminary chamber judge or court) to prosecute or try a particular criminal case or to rule on requests, proposals or complaints, complaints or any other referrals concerning acts and measures restricting the fundamental rights and freedoms of the person or the legality of the committal order, the evidence on which it is based or the acts carried out in the course of criminal proceedings, or the legality and merits of decisions not to commit a person for trial.[1]

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[1] In the specialized literature (MATEUȚ, G., *Tratat de procedură penală. Partea generală*, Universul Juridic, București, 2019, p. 325) it has been considered that: a) in a first sense, jurisdiction means the right and obligation of a judicial body to prosecute a specific criminal case, according to the law, or the ability of a specific jurisdiction to resolve a given case; b) in a second sense, jurisdiction means the right of a criminal case to be investigated by a specific judicial body. In this sense, jurisdiction is also known as justiciability.

In criminal matters, the main types of jurisdiction are:

(i) functional jurisdiction (according to the powers of the judicial body or *ratione officii*). This is the form of jurisdiction concerning the trial or criminal investigation activity that the court or the criminal investigation bodies may carry out. It is also the form of jurisdiction concerning the activity of the judge of rights and freedoms or the preliminary chamber judge (in the first instance or in resolving the appeal);

(ii) subject-matter jurisdiction (by subject-matter or *ratione materiae*). This is the form of jurisdiction determined by the subject matter of the criminal case (the offense that gave rise to the criminal law conflict), concerning which of the judicial bodies of different levels may prosecute or try a particular criminal case, respectively which is the court in which the judges of rights and freedoms or the preliminary chamber operate, who will rule according to the powers conferred by the Code of Criminal Procedure.

(iii) personal jurisdiction (according to the status of the person or *ratione personae*). This is the form of jurisdiction determined by a certain quality of the active subject of the offence, which determines, by way of derogation from material jurisdiction, which of the judicial bodies may prosecute or judge a particular criminal case, i.e. which court is the court within which the judges of rights and freedoms or preliminary chamber judges operate and which is to rule according to the powers laid down in the Code of Criminal Procedure;

(iv) territorial jurisdiction (by territory or *ratione loci*). This is the form of jurisdiction determined by the place where the offence was committed, the place where the suspect or defendant was caught, the place of residence of the suspect or defendant as a natural person or, where appropriate, the place of business of the defendant as a legal person, at the time the offence was committed, the place of residence or, where appropriate, the place of business of the injured party;

Regarding this last form of jurisdiction, in principle, in the trial phase, the determination of territorial jurisdiction is made according to the criterion of legal preference established imperatively by art. 41 para. (1) of the Code of Criminal Procedure.

According to art. 41 para. (1) of the Code of Criminal Procedure, the territorial jurisdiction of courts of the same level for offences committed by natural or legal persons on the territory of Romania is determined, in order, by the following legal criteria: (i) the place where the offence was committed (*forum delicti comissi*); (ii) the place where the suspect or the accused natural person was apprehended (*forum deprehensionis*); (iii) the place of residence of the suspect or the accused natural person or, where applicable, the place of business of the accused legal person, at the time the offence was committed (*forum domicilii*); (iv) the place of residence or, where applicable, the place of business of the injured person (*forum domicilii victimae*).

Criminal prosecution of offences committed on the territory of Romania shall be carried out by the criminal prosecution body within the jurisdiction of the court competent to hear the case, unless otherwise provided by law.

If the offence was committed on the territory of Romania, on a vessel flying the Romanian flag, the territorial jurisdiction shall belong to the court in whose jurisdiction the first Romanian port in which the vessel anchors is located, unless otherwise provided by law.

Thus, the general regulation contained in art. 41 of the Code of Criminal Procedure assumes that in the case of certain offenses, such as those relating to the regime of naval transport, special laws may stipulate special rules of procedure, derogating from the general rules.

3. Special Rules of Jurisdiction in the Case of Offences Against the Shipping Regime

In the case where the subject matter of the case is the commission of an offense against the safety of civil navigation (arts. 2-22 of Law no. 191/2003 regarding offenses against the regime of naval transport) or an offense against order and discipline on board ships (arts. 23-30 of Law no. 191/2023), the material jurisdiction to try the case in the first instance belongs to the tribunal.

By this rule, the full jurisdiction of the court of first instance in respect of offences against the shipping regime has been removed, without ruling out the possibility of the court of appeal or even the supreme court retaining jurisdiction according to the person's status.

Regarding territorial jurisdiction, art. 37 of Law no. 191/2003 stipulates that the territorial jurisdiction of the courts and prosecutor's offices attached to them is as follows:

(a) Constanța Court and the Public Prosecutor's Office attached to Constanța Court: the counties of Constanța and Tulcea, the territorial sea, the Danube up to and including nautical mile 64;

(b) Galati Court and the Public Prosecutor's Office of Galati Court: other counties, the Danube from nautical mile 64 upstream to km 1 075.

When the offenses provided for by Law no. 191/2023 are committed on a ship outside Romanian waters, jurisdiction lies with the Constanța Tribunal and the Prosecutor's Office attached to the Constanța Tribunal if the ship is maritime, and respectively with the Galați Tribunal and the Prosecutor's Office attached to the Galați Tribunal if the ship is fluvial.

These provisions, which are also partly reproduced in art. 47 of Law no 304/2022 on the organisation of the judiciary, have the character of special pro-

cedural rules, derogating from the general rules laid down in art. 41 of the Code of Criminal Procedure. They give the courts and public prosecutors' offices of Constanța and Galati respectively exclusive, special jurisdiction over the offences provided for by Law no 191/2003.

However, if it is found that the offence committed on Romanian territory, on a vessel flying a Romanian flag, is not one of those provided for by Law no 191/2003, the general procedural rules laid down in art. 41 of the Code of Criminal Procedure will become applicable. Thus, it is not excluded that these offences will be prosecuted by the court, regardless of whether or not a maritime or fluvial section is organised within the court.

If, however, a hypothesis of (optional or compulsory) consolidation of cases is retained and the judicial body orders consolidation, the prosecution or trial will be conducted by the judicial body with specialised jurisdiction.

In the case of offences under Law no 191/2003, the on-the-spot investigation and reconstitution carried out on ships or in port premises shall be carried out in the presence of the harbour master or his representative.

The taking of measures and carrying out of searches on board a ship flying the flag of another state with which the Romanian state has concluded conventions shall be carried out in accordance with the provisions of these conventions.

For the offences referred to in arts. 27 to 30 of Law no. 191/2003, the duties of the special criminal investigation bodies are carried out by specific officers appointed under the law, who have received the assent of the Prosecutor General of the Prosecutor's Office of the High Court of Cassation and Justice. The criminal investigation bodies of the judicial police and the special criminal investigation bodies carry out their criminal prosecution work under the direction and supervision of the public prosecutor.

4. Border Police

According to art. 1 and art. 6 of Government Emergency Ordinance no. 104/2001, the Romanian Border Police is part of the Ministry of Interior and Administrative Reform and is the specialized institution of the State that exercises its powers regarding the supervision and control of the crossing of the state border, the prevention and combating of illegal migration and specific acts of cross-border crime committed in the area of competence, the enforcement of the legal regime of the state border, passports and foreigners, the safeguarding of the interests of the Romanian State on the Inner Danube, including the Măcin arm and the Sulina canal located outside the border area, in the contiguous zone and in the exclusive economic zone, the enforcement of public order and peace in the area of competence, under the law.

The Romanian Border Police has the following organizational structure: a) General Inspectorate of the Border Police; b) Coast Guard; c) territorial inspectorates of the Border Police; d) territorial services of the Border Police; e) sectors of the Border Police; f) groups of vessels of the Border Police; g) points of the Border Police; h) educational units or institutions and vocational training centres; (i) centres, offices and contact points; (j) other establishments.

According to arts. 23 and 24 of the same normative act, the Minister of Internal Affairs, with the consent of the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, designates border policemen who have the capacity of criminal investigation bodies of the judicial police, under the conditions of the law.

In carrying out criminal prosecution activities, the border policeman has the territorial jurisdiction corresponding to the border police unit of which he is a part.

At the border crossing points, in the border waters, on the inner Danube, the Macin branch, the maritime Danube, the Danube-Black Sea Canal, the Sulina Canal located outside the border area, the internal maritime waters and the territorial sea, as well as the contiguous zone and the exclusive economic zone of Romania, in which the Romanian Border Police, the investigation bodies of the judicial police within the Romanian Border Police carry out the criminal investigation for any offense that is not mandatorily within the competence of other investigation bodies.

This iterated competence of the border policeman is also ensured in situations where investigations are extended from water to land.

In these situations, the border policeman cooperates with the competent bodies, according to the law.

By exception, for the finding of border offenses and offenses in the field of cross-border crime and the carrying out of investigations in relation to them, border policemen may exceed the area of competence, acting together with the specialized bodies of the police, throughout the entire territory of the country.

5. Conclusions

The existence of certain specific features of the offences covered by Law no 191/2003 has justified the introduction into the Romanian legal system of special procedural rules for both criminal prosecution and trial at first instance.

The procedural rules are explicitly regulated in order to determine the hypotheses of strict interpretation derogating from the general procedural rules.

THE UNIFORM FRAMEWORK OF MARITIME TRANSPORT CONTRACTS

*Trandafirescu Bogdan Cristian**

1. Maritime Contracts. The Charter Party and the Contract for the Carriage of Goods by Sea

A contract is defined, both in positive law[1] and legal doctrine,[2] as an agreement of will between two or more persons with the intention of establishing, modifying, or terminating a legal relationship.

Maritime contracts are those concluded in connection with the commercial operation of ships, specifically contracts used in maritime practice that involve maritime vessels.[3]

From a chronological perspective, the earliest form of a maritime transport contract was the charter party, by which the shipowner (charterer) provides the charterer with a ship or part of a ship for one or more voyages or for a specified period in exchange for a fee called freight.[4]

At present, the importance of tramp shipping has diminished, becoming an exception. It has been replaced by organized maritime transport, which operates regularly between specific ports. A trader interested in transportation is no longer

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[1] Art. 1166 of the Romanian Civil Code.

[2] JURCA C. et al. *Curs de drept civil. Drepturile reale* şi *Teoria generală a obligaţiilor*, Ed. BREN, Bucureşti, 2005, pp. 122.

[3] PANDELE A.L., *Contracte de transport maritim. Caiet de studiu individual*, Ovidius University Press, Constanţa, 2011, p. 2.

[4] SITARU D.A., BUGLEA C.P., STĂNESCU Ş.A., *Dreptul comerţului internaţional. Partea specială*, Ed. Universul Juridic, Bucureşti, 2008, p. 435.

required to find a vessel to charter for the desired route but instead enters into a simple transport contract with a shipping company that operates periodic voyages between specific maritime ports.[5]

The contract for the carriage of goods by sea (in this modern sense) is therefore understood as a contract under which the carrier undertakes to transport, by means of a maritime vessel and in exchange for a fee (freight), the goods delivered by the shipper and to deliver them to the consignee at the agreed port, a port served by the carrier.

What distinguishes these two types of contracts is their object.[6] While the object of the charter party is the ship in a seaworthy condition, the contract for maritime transport concerns the movement of goods by a carrier. The relationships between the parties are established between the shipowner and the charterer in the case of the charter party and between the carrier and the shipper in the case of the contract for the carriage of goods by sea. Regarding proof of the contract, the charter party is evidenced by a charter party, whereas the contract for maritime transport is evidenced by a bill of lading.[7]

2. The Element of Internationality and Conflict of Laws

Internationality is the fundamental element that distinguishes a simple commercial contract (subject to the national legal system) from an international commercial contract.

Not every foreign element present in a commercial contract automatically transforms it into one governed by international commercial law; only those foreign elements that can lead to a conflict of laws, meaning that at least two national legal systems could have jurisdiction over the contract, are relevant. In other words, only those foreign elements capable of causing a conflict of laws in terms of jurisdiction are considered.[8]

As noted in legal literature, the criteria for defining the international nature of legal relationships subject to international commercial law can be classified into two categories: a) Criteria related to the subject – The requirement is that the parties to the legal relationship, whether natural or legal persons, must have citizenship or nationality from different states. In other words, the relevant foreign

[5] *Ibidem.*

[6] The object of the contract consists of the legal operation agreed upon by the parties, as it results from the entirety of the contractual rights and obligations (art. 1,225 of the Romanian Civil Code).

[7] MACOVEI I., *Dreptul comerţului internaţional*, vol. II, Ed. C.H. Beck, Bucureşti, 2009, p. 130.

[8] TRANDAFIRESCU B., *Cadrul uniform al contractului de comerţ internaţional*, Ed. Universul Juridic, Bucureşti, 2019, p. 20.

elements are linked to the registered office of the legal entity or the domicile of the natural person, which must be located in different states; b) Criteria related to the object – The requirement is that the goods, work, service, or any other asset that is the subject of the contract must be in international circulation (transit), meaning that in the execution of the legal relationship, the asset must cross at least one border.[9]

The criteria related to the object are typically found in international transport conventions. These conventions generally stipulate that a transport is considered international when the point of departure and the point of arrival of the goods are located in two different states.[10]

The presence of an element of internationality in a contract raises the issue of the applicable law.

At the national level, the current development of law ensures comprehensive regulation of economic life. However, at the international level, certain uncertainties still persist, as there is no unified legal system worldwide and no authority to enforce such a system.

By applying uniform legal norms, many of the uncertainties caused by conflicts of law are eliminated, providing international commercial contracts with a legal regime similar to that of domestic contracts. This allows the parties to understand the applicable legal framework, making the entire transaction more secure and predictable.

In the absence of a uniform substantive law rule, a national law is applied. The conflict of laws inherent in any international commercial contract is resolved by applying conflict of law rules; the applicable national law is either chosen by the parties (the most common situation) or, in the absence of such a choice, determined based on automatic mechanisms established by conflict of law norms.

The solution offered by conflict of law norms is not ideal, as an international commercial contract ends up being subject to the national law of a particular state, despite having certain particularities that distinguish it from domestic contracts. Nevertheless, conflict of law rules provide a functional solution to the problem of the applicable law in international commercial contracts.[11]

3. The Legal Regime of Charter Contracts

There is no applicable international convention governing charter contracts.

The parties freely determine the rights and obligations as well as the legal

[9] SITARU, BUGLEA, STĂNESCU, *op. cit.*, p. 100.

[10] TRANDAFIRESCU, *op. cit.*, p. 24.

[11] *Ibidem*, pp. 31-32.

regime of the concluded contract. Contractual freedom is a fundamental principle recognized in all national private law systems, and applicable legal norms serve as supplementary provisions, applying only when the parties have not stipulated otherwise.

The legal regime of the contract is established by the parties, and in addition, relevant customs and legal norms contained in the national law determined under private international law rules apply.

3.1. Uniform Contractual Framework. Instruments for Standardizing Practices

Under the fundamental principle of contractual freedom, recognized by all legal systems, international commercial practice has created a uniform contractual framework for various international trade operations. This framework is materialized in model contracts, general conditions of delivery for various products, and commercial practices.[12]

The absence of national legislative provisions that take into account the requirements of dynamic international trade, as well as the failure to create a coherent and comprehensive uniform legal system, has led practitioners to develop their own rules based on practice. This process has been facilitated by the fact that international commercial relations generally involve professionals who consistently engage in the same types of commercial acts and transactions in a stable manner over time.[13]

Currently, standardized contractual instruments are increasingly being developed not by individual traders but by international governmental and non-governmental organizations. Given the prestige and recognition of these organizations, as well as the quality of the standardized instruments they adopt, an increasing number of traders use them in their field of activity. This leads to a significant uniformity of the contractual framework in international trade contracts.[14]

The commercial practices applicable to charter contracts are often codified in standard contracts developed by international shipowners' organizations, such as The Baltic and International Maritime Council (BIMCO). Among the contracts developed by BIMCO, we mention: Uniform General Charter (GENCON 1994) – voyage charter contract; General Time Charter Party (GENTIME 1994) – time charter contract; Standard Bareboat Charter (BARECON 2001) – bareboat charter contract.[15]

[12] RUCĂREANU I., *Dicţionar juridic de comerţ exterior*, ŞTEFĂNESCU B., CĂPĂŢANĂ O. (cords.), Ed. Ştiinţifică şi Enciclopedică, Bucureşti, 1986, p. 87.

[13] TRANDAFIRESCU, *op. cit.*, p. 75.

[14] *Ibidem*, p. 79.

[15] SITARU, BUGLEA, STĂNESCU, *op. cit.*, p. 436.

3.2. Conflict of Law Rules for Determining the Applicable National Law

According to the general principles of private international law, international trade contracts are subject, in terms of substance and effects, to the law chosen by the parties (under the principle of lex voluntatis). In the absence of such a choice (whether explicit or implicit), the applicable law is determined based on subsidiary solutions, generally favoring the law of the state most closely connected to the contract.

In the Romanian legal system, the conflict-of-law rules regarding the applicable law for contracts with an international element are found in Book VII of the new Civil Code, titled "Provisions on Private International Law" (arts. 2,557 - 2,664). However, the conflict-of-law rules in the Civil Code are subordinate to the rules contained in the Rome I Regulation (Regulation (EC) No. 593/2008), which takes precedence.

Internationally, two major conventions contain rules applicable to all categories of commercial contracts with an international element: The 1980 Rome Convention (replaced by Regulation (EC) No. 593/2008)[16] and The Inter-American Convention on the Law Applicable to International Contracts (Mexico City, 1994)

Both conventions belong to the field of uniform conflict-of-law rules, demonstrating that at this level, it is easier to harmonize conflict-of-law norms than substantive law rules.

3.2.1. Choice of Applicable Law by the Parties

The Rome I Regulation does not introduce significant changes regarding the parties' ability to determine the applicable law compared to the Rome Convention, except for the addition of para. 4 in art. 3.

Both the Rome I Regulation (art. 3(1)) and the CIDIP Convention (art. 7(1)) grant the parties full sovereignty in choosing the applicable law for the contract. The parties are not required to select a law that has an objective connection to the concluded contract.

The parties may designate the applicable law for the entirety or only a part of their contract.

They can choose the applicable law both at the time of contract conclusion and afterward. Additionally, they may modify the *lex contractus*, with their agreement having retroactive effect. However, this retroactive effect is subject to two

[16] Regulation (EC) No 593/2008 of the European Parliament and of the Council, OJEU L 177/6.

limitations: a) Modifying the *lex contractus* cannot invalidate the formal validity of the contract; b) Modifying the *lex contractus* cannot affect rights acquired by third parties in the meantime (art. 3(2) of the Rome I Regulation and art. 8 of the CIDIP Convention).

The parties' intention (for the designation of *lex contractus*) must be explicit or must clearly result from the contract provisions or the circumstances of the case (art. 3(1) of the Rome I Regulation and Article 7(1) of the CIDIP Convention).

3.2.2. Determination of Lex Contractus in the Absence of Party Choice

If the parties have not designated (explicitly or implicitly) the *lex contractus*, subsidiary solutions apply. Both instruments establish a general rule and exceptions, but the Rome I Regulation (unlike the CIDIP Convention) also provides specific solutions for certain contracts.

According to art. 5(1) of the Rome I Regulation, if the applicable law for a contract for the carriage of goods has not been chosen by the parties, the applicable law is the law of the country where the carrier has its habitual residence, provided that the place of loading, place of delivery, or the consignor's habitual residence is also located in that country. If these conditions are not met, the law of the country where the agreed-upon place of delivery is located applies.

The CIDIP Convention states that, in the absence of a choice of law by the parties, the contract is subject to the law of the state with which it has the closest connection, explicitly recognizing the principle of proximity (art. 9(1)). However, the convention does not provide presumptions or a list of contract types indicating the most closely connected law. Instead, it leaves the determination of *lex contractus* to the jurisdictional forum, which must consider all relevant objective and subjective elements (art. 9(2)).

Unlike the Rome I Regulation, the CIDIP Convention allows the jurisdictional forum (in the absence of the parties' choice of law) to consider *general principles of international commercial law accepted by international organizations (art. 9(2)).

Furthermore, art. 10 of the CIDIP Convention legitimizes the controversial concept of lex mercatoria. In addition to the law applicable to the contract, as determined by the Convention's provisions, guidelines, customs, and principles of international commercial law shall also apply where appropriate, alongside generally accepted commercial usages and practices. This aims to ensure a fair and equitable resolution of each specific case.

Such a reference to lex mercatoria is absent from the Rome I Regulation. Similarly, the 1980 Rome Convention did not include such a provision, likely due

to the legal value that most EU member states' legal systems attribute to international commercial usages and customs.

4. Legal Regime of the Sea Freight Transport Contract

4.1. International Conventions

Unlike the charter-party, the maritime transport contract currently benefits from two international conventions:

The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, adopted in Brussels on August 25, 1924 (the Hague Rules). Romania acceded to this convention through Law No. 43/1937.[17] The convention was amended by the Protocol of February 23, 1968, signed in Brussels ("Hague-Visby Rules").

The United Nations Convention on the Carriage of Goods by Sea, adopted in Hamburg on March 30, 1978, known as the "Hamburg Rules." The Convention was open for signature in Hamburg on March 31, 1978, and entered into force on November 1, 1992. Romania acceded to this convention through Decree No. 343/1981.[18] The 1978 Convention ("Hamburg Rules") replaces the old 1924 Convention, amended in 1968 ("Hague-Visby Rules"), between the contracting states. Unfortunately, until ratification or the accession of other countries that are parties to the 1924 Convention, the application of the aforementioned instruments will coexist.

4.2. Material Scope of the Hamburg Convention (1978)

The convention applies only to contracts for the international carriage of goods by sea, not to charter-party contracts. The international character required by the convention to trigger its application is determined exclusively by the location of the ports of loading and discharge in different states. The nationality of the ship or the parties is not a relevant factor for the purposes of the convention. However, when a bill of lading is issued following a charter-party contract, the provisions of the convention apply to such a bill of lading when it governs the relationship between the carrier and the holder of the bill of lading, provided the latter is not also the charterer. When a contract stipulates that in the future the

[17] Published in the Official Gazette no. 60/13.03.1937.
[18] Published in the Official Bulletin no. 95/28.11.1978.

goods will be transported by successive shipments within an agreed period, the provisions of the convention will apply to each shipment.[19]

4.3. Territorial Scope of the Hamburg Convention (1978)

The convention applies to the carriage of goods by sea between different states, i.e., international carriage of goods, if one of the following conditions is met (art. 2): a) The port of loading specified in the contract for sea transport is located in a contracting state, or b) The port of discharge specified in the contract for sea transport is located in a contracting state, or c) One of the optional discharge ports specified in the contract for sea transport is the actual discharge port and is located in a contracting state, or d) The bill of lading or any other document evidencing the sea transport contract is issued in a contracting state, or e) The bill of lading or any other document evidencing the sea transport contract stipulates that the provisions of this convention or the legislation of any state applying them govern the contract.

4.4. Legal Force of the Hamburg Convention (1978)

The application of the Convention is mandatory when the conditions outlined earlier are met. According to art. 23, any stipulation in a sea transport contract, in a bill of lading, or any other document evidencing the sea transport contract is void to the extent that it deviates, directly or indirectly, from the provisions of this convention. The invalidity of such a stipulation does not affect the validity of the other provisions of the contract or document from which it is part. A clause assigning to the carrier the benefit of insuring the goods or any other similar clause is void. We observe an important difference between the charter-party contract and the maritime transport contract. In the first case, the principle of consensualism applies, and there are no imperative rules to limit the will of the parties. In the second case, the transport contract is governed by generally imperative rules, and deviations are allowed only if they result in increasing the carrier's liability.

4.5. The Hamburg Convention and Lex Contractus Determined by Applying Conflict of Laws Rules

In addition to the Hamburg Convention (for those aspects not regulated by the convention), national law provisions may apply, determined according to con-

[19] ŞTEFĂNESCU B. (coord.); ENE C., LUPULESCU A.M., VARTOLOMEI B., *Dreptul comerţului internaţional. Documente*, Ed. Lumina Lex, Bucureşti, 2003, p. 566.

flict of laws rules (private international law). The determination of the applicable national law is done according to the same conflict of laws rules analyzed above concerning the charter-party contract: firstly, the law chosen by the parties (under the lex voluntatis principle) and, if no choice is made by the parties, the law determined by automatic rules (the law of the country where the carrier's habitual residence/head office is located). The national law so determined will only apply in complement to the Convention for aspects that are not regulated by it. Otherwise, the provisions of the Convention take precedence. Regarding these aspects, we must observe the provisions of art. 2(1)(e), according to which the Hamburg Convention applies even when the bill of lading or another document evidencing the sea transport contract stipulates that the provisions of this convention or the legislation of any state applying them govern the contract. In other words, the Hamburg Convention becomes applicable not only when the national law determined by applying the conflict of laws rules belongs to a contracting state (thus having the status of a special norm in relation to common law legislation) but also when the contracting parties choose voluntarily to subject the contract to the Convention, even if it would not apply under the criteria and conditions explicitly established in art. 2 (presented above).

FEATURES OF THE ARBITRATION CLAUSE IN MARITIME TRANSPORT CONTRACTS IN THE BLACK SEA

*Mădălina Dinu**

1. General Aspects Concerning the Competence of Courts and Arbitral Tribunals in Resolving Disputes in the Romanian Law

In the Romanian domestic law, the legislator grants full competence to state courts to resolve disputes. Thus, according to arts. 126 (1) and (2) of the Constitution of Romania, Justice is administered by the High Court of Cassation and Justice and by other courts established by law, with the competence of the courts and the procedure of judgment being provided only by law.

In the civil law disputes (including those between professionals), to establish the competent court, the rules regarding general, material, and territorial competence apply.

By general competence, we understand a delimitation of the activity of the courts from other bodies with jurisdictional activity, being regulated by public order norms. In situations where the court is seized, but the case would pertain to another jurisdictional body, any party, including the court ex officio, may invoke the exception of the court's general incompetence,[1] resulting in the transfer of the case to the competent jurisdictional body, according to the provisions of art. 132 (3) of the Code of Civil Procedure. However, if the case does not fall under the competence of a jurisdictional body or is not within the competence of Romanian

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[1] For details on the invocation and resolution of the plea of lack of jurisdiction see TĂBĂRAȘ, M., *Excepțiile de fond în procesul civil*, 2nd ed., Ed. C.H.Beck, Bucharest, 2009.

courts, the request shall be dismissed as inadmissible, in accordance with art. 132 (4) of the Code of Civil Procedure.[2] Once the court establishes that the dispute before it is under the competence of the court, it analyzes whether it is competent in terms of material[3] and territorial[4] jurisdiction in resolving the cause.

In the arbitration matters, there are derogatory norms from the above rules. Thus, in the hypothesis where parties establish an arbitration clause in a contract stipulating that in the event of a dispute, it will be resolved by the Arbitration Court, they practically exclude the competence of the state court to resolve any potential dispute between them. If, however, a party chooses to bring the matter before the court in violation of the arbitration clause, the court seized with a matter for which an arbitration agreement has been concluded will verify its own competence and will declare itself incompetent only if the parties or one of them requests this, invoking the arbitration agreement. In this case, the court will decline its competence in favor of the organization or institution under which institutionalized arbitration operates, which, based on the declination decision, will take necessary measures regarding the establishment of the arbitral tribunal. In the case of ad hoc arbitration, the court will reject the request as being outside the jurisdiction of the courts,[5] according to the provisions of art. 554 (1) of the Code of Civil Procedure.

Therefore, the arbitration procedure will apply to contractual[6] disputes to the extent that the parties have provided for an arbitration clause, thereby excluding

[2] DINU, M., *Drept procesual civil*, Ed. Hamangiu, Bucharest, 2020, p. 146.

[3] Procedural subject-matter jurisdiction means a delimitation between courts of different levels (vertical), answering the question which of the courts of different levels (magistrate's court, tribunal, court of appeal, High Court of Cassation and Justice) is competent to decide the case at first instance? Procedural subject-matter jurisdiction is established in relation to the subject-matter, nature or value of the dispute before the court; in addition to procedural subject-matter jurisdiction, there is also a functional subject-matter jurisdiction which delimits the type of court's powers in relation to the stage of the proceedings, namely to hear the case at first instance, on appeal or on appeal; it should be noted that in practice, functional jurisdiction also means delimiting the jurisdiction between specialized divisions or panels of the same court.

In Romanian civil proceedings, the ordinary court with jurisdiction to hear a case at first instance is the tribunal. Thus, under art. 95 (1) of the Code of Civil Procedure, the court tries, in the first instance, all claims which are not given by law to other courts; as such, the court is the competent court to settle a dispute whenever the law does not provide for another court to be competent.

[4] The territorial jurisdiction determines which of the courts of the same level has jurisdiction, which is divided in three parts; thus, the territorial jurisdiction is common law jurisdiction when the case is decided according to the provisions of common law, alternative (optional) jurisdiction in cases where the plaintiff has the choice between two or more courts having jurisdiction and exclusive (exceptional) jurisdiction when the claim must be brought before a particular court, the parties not being able, as a rule, to derogate from these rules.

[5] In practice, there is also the solution of dismissing the application as inadmissible.

[6] As regards contractual liability, for details see: TĂBĂRAȘ, M., *Daune-interese. Dobânzi. Penalități. Răspunderea contractuală*, C.H. Beck, Bucharest, 2009.

the competence of state courts. Nevertheless, although this is an aspect related to the general competence of the courts and could be invoked by the parties or the court ex officio at any stage of the case, including for the first time before the court of appeal (according to art. 130 (1) of the Code of Civil Procedure), in arbitration matters, the legislator has established a derogation, meaning that the court, seized with a case regarding which an arbitration agreement has been concluded, will verify its own competence and will declare itself incompetent only if the parties or one of them requests this, invoking the arbitration agreement. Consequently, the court will decline its competence in favor of the organization or institution under which institutionalized arbitration operates, which, based on the declination decision, will take necessary measures for forming the arbitral tribunal. Conversely, failing to invoke the arbitration clause by the interested party before the court renders the arbitration clause ineffective, and the court seized will become competent to resolve the dispute.

As such, arbitration is an alternative procedure to judicial (state) proceedings, which can take place in the cases and under the conditions regulated by the Civil Procedure Code and agreed upon by the parties. The decision rendered by the arbitral tribunal shall determine the rights and obligations[7] under its review, just as a judicial decision would.

2. General Aspects Regarding Jurisdiction to Resolve Disputes in Maritime Law: Advantages of Arbitration Over State Jurisdiction

Disputes in maritime law may be resolved either by state courts of general jurisdiction or by an arbitral tribunal chosen in accordance with the will of the parties. Arbitration offers several advantages over state courts. The arbitration clause is a contractual provision by which the parties agree to resolve potential disputes through an arbitrator or arbitral tribunal instead of addressing them in court. It provides a flexible and efficient framework for resolving disputes, allowing the parties to avoid traditional judicial procedures, which can be lengthy and costly.

First, arbitration is governed by the principle of party autonomy, which is enshrined in legislation and reflected throughout all phases of the arbitration pro-

[7] For details regarding the obligations of the parties, see, TĂBĂRAȘ, M., *Particular Aspects regarding the Meeting of the Obligations in the Light of the New Regulations of the Civil Code*, "Valahia" University of Targoviste, Faculty of Law and Social-Political Sciences, International Scientific Conference, "Tradition and Modernity in the New Romanian Codes", 8th ed., Targoviste, 31.05.2012-01.06.2012; available at: https://scholar.google.com/scholar?hl=ro&as_sdt=0%2C5&q=manuela+tabaras+Particular+Aspects+regarding+the+Meeting+of+the+Obligations+in+the+Light+of+the+New+Regulations+of+the+Civil+Code&btnG=

cess. The freedom of the parties is restricted only by the need to respect public order, good morals, and the mandatory provisions of the law (art. 544 of the Civil Procedure Code). Additionally, arbitration ensures a quicker, less formal, and sometimes less expensive resolution for the parties, the preservation of confidentiality (art. 565(c) of the Civil Procedure Code), the possibility of resolving disputes equitably (art. 601(2) of the Civil Procedure Code), and the quality of the adjudication is ensured by the appointment of arbitrators with specialized knowledge in the relevant field. Parties tend to have more trust in a "judge" they have chosen themselves than in a state judge.

However, disputes that are explicitly under the jurisdiction of state courts by law, such as payment order procedures, claims of reduced value, eviction procedures for premises occupied without right, registration of rights acquired through acquisitive prescription, enforcement appeals, and others, cannot be resolved through arbitration. Likewise, arbitration does not apply to disputes concerning civil status, legal capacity, inheritance proceedings, family relations, or rights over which the parties cannot dispose.

Another advantage of arbitration is the confidentiality it offers. Unlike proceedings in state courts, which are generally public[8], arbitration allows the details of the dispute and the adopted solution to remain confidential. The principle of confidentiality in arbitration proceedings is expressly provided in art. 4 of the Rules of Arbitration Procedure of the Court of Arbitration. According to this rule, unless the parties agree otherwise, the Court of Arbitration, its President, its Board, its Secretariat, the arbitral tribunal, arbitral assistants, and anyone involved in organizing the arbitration are required to maintain confidentiality regarding the entire arbitral procedure (para. 1). Furthermore, arbitral awards may only be published in full with the consent of the parties. They can, however, be published in part or summarized, or discussed in terms of the legal issues raised, in journals, publications, or compilations of arbitral practice, without mentioning the names or details of the parties that could harm their interests (para. 2). It is worth noting that confidentiality is a key element in maritime transport, where reputation and

[8] The principle of publicity is expressly established in art. 17 of the Civil Procedure Code, which states that "court hearings are public, except for cases provided by law", a rule also enshrined in art. 12 of Law no. 304/2004 regarding judicial organization. According to this principle, civil proceedings (except for deliberation) take place before the court in a public hearing. This principle of civil procedure is explicitly affirmed in the following:

- Art. 10 of the Universal Declaration of Human Rights, wahich provides that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal";

- Art. 6 of the European Convention on Human Rights, which states that "everyone is entitled to a fair and public hearing (…) by an independent and impartial tribunal";

- Art. 127 of the Constitution, which provides that "court hearings are public, except for cases provided by law".

commercial relationships are of great importance. Disputes resolved publicly in court could negatively impact partnerships or the image of a company.

Of course, civil proceedings in state courts may also be held in private.[9] If a public hearing could harm public order, public morals, minors' interests, the private lives of the parties, or the interests of justice, the court may, upon request or ex officio, order that proceedings be conducted entirely or partially without public access. In such cases, only the parties, their representatives, minors' assistants, the parties' legal counsel, witnesses, experts, translators, interpreters, and other persons authorized by the court to attend may be present in the courtroom, as provided by art. 213 of the Civil Procedure Code.

It is important to note that in court proceedings, failure to observe the principle of publicity (e.g., resolving a case in chambers[10] rather than in a public hearing) renders the decision void without the need to prove harm, under art. 176 (5) of the Civil Procedure Code. However, if the hearing is public, but under the law it should have been held in chambers, the invalidity of the decision is contingent upon proving harm,[11] as stipulated in art. 175 of the Civil Procedure Code.

Another advantage of the arbitration procedure is given by the flexibility of this procedure. Flexibility can be embodied in several aspects:

1) The parties may agree on the number of arbitrators, which must always be odd, either a single arbitrator or an arbitral tribunal consisting of three arbitrators, and in the event that the parties have not agreed on the number of arbitrators, the arbitral tribunal is constituted by three arbitrators, according to art. 18 (1) and (2) of the Arbitration Procedure Rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania.[12] Therefore, in the event of an arbitral dispute, the parties may appoint their own arbitrator to resolve the dispute. As such, arbitrators can be chosen based on their expertise in the area of the maritime or inland waterway transport dispute,[13] thus

[9] The trial of a case in a private session must not be confused with its resolution in the council chamber. In the latter scenario, there are explicit legal provisions, such as the adjudication of a motion for recusal [art. 51 (1) of the Civil Procedure Code], the adjudication of a motion for transfer of venue [art. 144 (1) of the Civil Procedure Code], divorce petitions based on the spouses' agreement [art. 930 (3) of the Civil Procedure Code], or the resolution of applications for the establishment of provisional seizure or garnishment [art 954 (2), art. 961 (2), art. 971 (1) of the Civil Procedure Code], among others.

[10] Cases where proceedings take place in the council chamber are specifically regulated and distinct from situations where private hearings are held.

[11] For more on this, see: CIOBANU, V.M., "Articles 1–526", in CIOBANU, V.M.; NICOLAE, M. (eds.), *Noul Cod de procedură civilă comentat și adnotat*, vol. I, 2nd revised and expanded edition, Universul Juridic Publishing, Bucharest, 2016, p. 73.

[12] Adopted by the College of the Court of International Commercial Arbitration in Romania, in force on January 1, 2018.

[13] For example, in the case of maritime law disputes, the parties have the opportunity to choose an arbitrator specialized in maritime and river transport contracts.

ensuring that the technical and commercial issues are understood and dealt with correctly. Thus, unlike the state court where the dispute is randomly assigned to a panel of judges, in the case of arbitration, the parties will choose their arbitrator from the list of arbitrators. The two arbitrators appointed by the parties by mutual agreement will designate the person of the chief arbitrator and the arbitral tribunal is constituted on the date of acceptance by the chief arbitrator or, as the case may be, by the sole arbitrator, of his election or designation (art. 20 (1) of the Rules).

2) The resolution of the case within an optimal and foreseeable time frame is of the essence of the arbitration procedure, meaning that, unless the parties have decided otherwise, the arbitral award will be rendered within a maximum period of six months from the date of the establishment of the arbitral tribunal (art. 43 (1) of the Rules). Thus, when at least one of the parties has declared in writing to the arbitral tribunal, by the first arbitration term, that it intends to invoke caducity, the arbitral tribunal, upon expiry of the term provided for in the paragraphs above, will render an award by which it will find that the arbitration has become caducity, except in the case where the parties expressly declare that they waive caducity [art. 43 (6) of the Rules]; in other words, at the first hearing in the arbitration proceedings to which they have been legally summoned, the parties are obliged to declare in writing, under penalty of forfeiture, whether they intend to invoke the caducity of the arbitration, and when at least one of the parties has made this declaration, the arbitral tribunal, upon expiry of the arbitration term, will find that the arbitration has become null, except in the case where the parties expressly declare that they waive the caducity in which case the trial will continue. The evidence administered in a caducity arbitration may be used, if appropriate, in a new arbitration, to the extent that it is deemed not necessary to re-take it (art. 567 of the Civil Procedure Code).

3) The parties have the possibility to choose the place of arbitration, in which case, in the absence of a contractual mention to this effect, the place of arbitration will be at the headquarters of the Court of Arbitration attached to the Chamber of Commerce and Industry of Romania [art. 28 (1) of the Rules];

4) As regards the language of the arbitral proceedings, the parties have the possibility to choose the language of the dispute, and in the absence of such a choice, the language of the arbitration will be Romanian; however, according to art. 29 (2) of the Rules, at the request of any party, the arbitral tribunal, taking into account the relevant circumstances and the position of the parties, may determine that the arbitral proceedings be conducted in a language other than Romanian.

5) At the same time, the parties have the possibility to waive the phase of filing the developing memoranda,[14] an aspect that does not exist before state courts

[14] According to the provisions of art. 31 (5) of the Rules, with the agreement of the parties, the arbitral tribunal will be able to eliminate the stage of submitting the developing memoranda,

where the parties cannot waive by agreement the filing of certain procedural documents that may attract sanctions such as forfeiture;

6) Also, at the end of the case management conference (at the first arbitration term) or immediately thereafter, the arbitral tribunal may establish, by conclusion, a provisional procedural calendar for the conduct of the arbitration proceedings, including, among other things, the term for filing pleadings, if applicable, and the estimated date of the debates and the issuance of the arbitral award, the arbitral tribunal having the possibility to organize other case management conferences, at the request of the parties or ex officio, as it deems necessary for the proper conduct of the arbitration, each conference being considered an arbitration term in accordance with art. 31 para. (8)-(9) of the Rules. Indeed, the state court also estimates[15] the duration of the trial pursuant to art. 238 para. (1) of the Code of Civil Procedure, a duration on which it may revise with justification if the specific circumstances of the case so require;

7) In the Romanian domestic arbitration procedure, the parties may modify their claims or formulate new claims with the prior approval of the arbitral tribunal, which may be given after taking into account the nature of the new claims, exceptions or requests, the stage of the arbitral procedure, the prejudice caused to the other party by the delay in the proceedings, as well as other relevant circumstances, according to art. 33 of the Rules; unlike the arbitration procedure, in the case of judicial proceedings, the court does not have such a possibility to assess the modification that occurred after the first trial date, the modification being possible only with the express agreement of the other parties (art. 204 (3) of the Civil Procedure Code).

Another advantage of the arbitration procedure is given by the legal nature of the arbitration award. Thus, this is final and binding, the decision being carried out voluntarily by the party against whom it was pronounced, immediately or within the term shown in the decision. If the party that lost the arbitral process does not execute voluntarily, the arbitral decision constitutes an enforceable title[16] and is forcibly executed exactly as a court decision, according to the provisions of art. 614-615 of the Civil Procedure Code. In maritime law disputes, arbitral awards benefit from a favorable recognition and enforcement regime in over 170 countries, according to the New York Convention (1958). This aspect is essential in maritime transport, where the parties involved usually operate in different states.

whenever the parties have submitted requests and answers that include their elements sufficiently developed relative to the specifics of the dispute.

[15] The estimate, as a rule, is made in the form of court terms that the court deems necessary for the resolution of the case.

[16] For details regarding enforced execution, see: TĂBĂRAȘ, M., *Contestația la executare. Culegere de practică judiciară*, Ed. C.H. Beck, Bucharest, 2005.

3. The Parties' Right of Option to Choose the Arbitration Clause in Maritime Transport Contracts

In the maritime and inland waterway transport contracts, the arbitration clause can be inserted in several places, either in the main contract or in the general conditions of carriage. It is essential that the parties are clear about the terms of the clause, including the place of arbitration, in the sense of choosing a neutral jurisdiction that is acceptable to both parties, the language of the arbitration, the applicable arbitration rules, in the sense that renowned international rules can be selected, such as those of the Arbitration Institution of the International Chamber of Commerce (ICC) or other specialized institutions, the number of arbitrators, which implies establishing the number of arbitrators who will resolve the dispute (sole arbitrator or three arbitrators).

Maritime contracts, such as charter parties or bills of lading, frequently include standardized arbitration clauses, which establish the arbitral jurisdiction and the applicable rules[17].

Although arbitration offers many benefits, there are also aspects that are less favorable to the parties, such as the costs associated with the arbitration process and the time required to complete it. The parties should also be careful in the wording of the clause, ensuring that it is clear and enforceable, in order to avoid any subsequent disputes regarding the validity of the clause.

As regards the forms in which arbitration is presented, the Provisions of Book IV of the Civil Procedure Code constitute the common law of any form of private arbitration. They regulate voluntary arbitration in its various forms: (a) domestic arbitration and international arbitration; (b) ad-hoc arbitration and institutionalized arbitration (which is that form of arbitral jurisdiction that is established and functions permanently within a domestic or international organization or institution or as an independent non-governmental organization of public interest,[18] under the conditions of the law, based on its own regulations applicable to all disputes submitted to it for resolution according to an arbitration convention. The activity of institutionalized arbitration is not economic in nature and does not seek to obtain profit); (c) arbitration in law and arbitration in equity, but does not

[17] For example, the BIMCO forms include predefined arbitration clauses.

[18] In this context, a relatively recent decision of the High Court of Cassation and Justice of Romania, issued on June 17, 2024, in a case regarding a legal interpretation, ruled that associations and foundations established under Government Ordinance no. 26/2000 of January 30, 2000 ("GO no. 26/2000") may organize institutionalized arbitration only when authorization is granted by the legislature. The need for legislative authorization is a distinct requirement, separate from obtaining the status of a public-interest organization. This decision of the High Court was published in the Official Gazette on August 27, 2024, which is the date it began producing its legal effects.

deal with compulsory arbitration, which remains subject to the law or the international agreement that establishes it.

In the art. 541 of the Civil Procedure Code it is established that arbitration is an alternative jurisdiction, of a private nature, in the administration of which the litigating parties and the competent arbitral tribunal may establish rules derogating from the common law, provided that the respective rules are not contrary to public order and the mandatory provisions of the law.

3.1. Arbitration Convention

The arbitration agreement can be presented in the form of a compromise clause inserted in the contract entered into between the parties, or of a separated from the contract between the parties, by way of compromise.

The arbitration agreement has the following specific features: (a) it is a bilateral legal act (civil law contract), procedural contract by which the parties renounce the state jurisdiction, by accepting a private justice, contract that gives the arbitral tribunal the power to judge a dispute; (b) it is concluded, under penalty of nullity, in writing, either in the form of a compromise clause included in the main contract, or in the form of an independent agreement, called a compromise; the written form is required *ad validitatem*; and (c) its written form must be understood as written under a private signature, except for the authentic form.

We mention that the tacit arbitration agreement cannot be conceived, being incompatible with the rule according to which the renunciation of a right is not assumed (art. 13 Civil Code), or the renunciation of the settlement of the case by the competent court represents a genuine renunciation of a right of the party, and such waiver cannot be tacit but only expressly assumed by the contracting parties.

3.2. What is the difference between arbitration clause and compromise?

A question of interest in practical work is the distinction between an arbitration clause and a compromise. We consider that on the merits, the distinction is not very important considering that essentially both the arbitration clause and the compromise represent ways by which the parties agree in the event of a dispute between them regarding the execution of obligations or concurrent causes of the conclusion of the contract (such as is the case of nullity of the contract), the dispute between them should be resolved by an arbitral tribunal and not by the competent state court.

Thus, through the arbitration clause, the parties agree that the disputes that will arise from the contract in which it is stipulated or in connection with it will be resolved through arbitration, showing, under the penalty of nullity, the method of

appointing the arbitrators (art. 550 of the Civil Procedure Code), while by compromise the parties agree that a dispute between them should be resolved through arbitration, appearing, under the penalty of nullity, the object of the litigation and the name of the arbitrators or the method of appointing them in the case of ad hoc arbitration (art. 551 of the Civil Procedure Code).

In other words, while the arbitration clause is inserted in the content of the contract between the parties (as a rule, under the disputes section), the compromise appears after the conclusion of the contract, after the emergence of the litigious situation between the parties. In the specialized literature, it has been appreciated that the arbitration clause is more "dangerous" than the compromise because, at the moment it is concluded, without knowing the nature and importance of a possible litigation, the consequences of renouncing the jurisdiction of the state cannot be assessed.[19]

3.3. When is an arbitration dispute qualified as maritime?

An arbitration is usually qualified as a "maritime arbitration" when it relates in one way or another to a ship, with most disputes arising from shipping contracts but also being encountered in sales, shipbuilding contracts, etc.

Maritime and inland waterway transport play an essential role in international trade, and the contracts governing these activities are particularly complex. In this context, the arbitration clause becomes an important tool for resolving disputes that may arise between the parties. Thus, the meaning, advantages and implications of the arbitration clause in maritime and river transport contracts are some of the aspects that will be analyzed through this study.

3.4. Express assumption of the arbitration clause by the parties. Applicability of Art. 1203 of the Romanian Civil Code

Both in specialized doctrine and in practice, the question of whether the arbitration clause is a non-ususal clause or not is raised. The consequences are particularly important, given that, depending on this characterization, the provisions of art. 1203 of the Civil Code become or not applicable.

As has been argued in the doctrine, non-ususal clauses are that kind of standard clauses[20] which represent significant derogations from the rules of common

[19] MIHAI, G.M., *Particularitățile clauzei arbitrale în arbitrajul maritim*, available at: www.juridice.ro; last accessed December 28, 2024.

[20] Standard clauses are provisions pre-established by one party for general and repeated use, included in the contract without being negotiated with the other party, as per art. 1202 (2) of the Civil Code.

law.[21] We consider that the arbitration clause is circumscribed by the notion of non-usual clause and as such, it must fulfill the legal requirements imposed for such a clause.

Ab initio, as mentioned above, the arbitration clause or the compromise (both forms of the arbitration agreement) must be expressly assumed by the parties, in written form.

According to art. 1203 Civil Code: "Standard clauses which provide for the benefit of the party proposing them the limitation of liability, the right to terminate the contract unilaterally, the right to suspend performance of the obligations or which provide to the detriment of the other party for forfeiture of rights or the benefit of the term, limitation of the right to raise defenses, restricting the freedom to contract with other persons, tacit renewal of the contract, the applicable law, arbitration clauses or clauses derogating from the rules on the jurisdiction of the courts shall have no effect unless they are expressly accepted in writing by the other party.

A first aspect that emerges from an analysis of the text of art. 1203 of the Civil Code is that the enumeration is not limitative, but illustrative.

Art. 1203 of the Civil Code provides that an arbitration clause must be accepted expressly, not just in writing, which means that the mere signing of a contract containing such a clause is not sufficient, since the express will of the party to whom the clause is proposed must be apparent from the contract, distinct from the rest of the content of the contract.

Thus, the legislator establishes the need for a double will agreement, one for contractual clauses that are not covered by the provisions of art. 1203 of the Civil Code (in practice, this refers to general contractual clauses relating to the subject matter of the contract, the effects generated by it, respectively the rights and obligations of the parties) and another for these standard non-useual clauses (such as arbitration clauses), for which the condition of proof of acceptance in writing, i.e. signature, is also mandatory.

This is also the reason why the High Court of Cassation and Justice, by Decision no. 2522/19.04.2021, established that the "acceptance" referred to in art. 1203 of the Civil Code refers to an express and individualized acceptance of this clause, which must be explicitly assumed, and not implicitly by signing the contract. Therefore, for the arbitration clause to be valid, the parties must sign both the contract and the arbitration clause, the latter being a contract within another contract.

[21] OGLINDĂ, B., *Clauze neuzuale în reglementarea Noului Cod Civil român – provocare pentru jurisprudență și doctrină*; available at: https://www.juridice.ro/376500/bazil-oglinda-clauze-neuzuale-in-reglementarea-noului-cod-civil-roman-provocare-pentru-jurisprudenta-si-doctrina.html-, last accessed December 28, 2024.

3.5. Practical Aspects of the Assumption of the Arbitration Clause in Maritime Contracts. Effects of the Arbitration Clause

The arbitration clause is a crucial element in maritime and inland waterway transport contracts, providing an efficient and flexible mechanism for dispute settlement. By understanding its advantages and formulating it appropriately, parties can benefit from a faster and more specialized resolution of disputes, thus contributing to the smooth conduct of transport business. It is essential that all parties involved are informed and clearly express their intentions when negotiating and concluding contracts. In a complex legal context such as international transport, the arbitration clause plays a key role in ensuring an efficient and predictable settlement of disputes. In the case of maritime transport, this arbitration clause is frequently used due to the international character of shipping activities, which often involve parties from different jurisdictions and different legal rules.

The arbitration clause is most often found in contracts such as charter parties, chartering contracts and contracts for the carriage of goods. It specifies the arbitral tribunal, the rules applicable to the arbitration, the location and sometimes even the language used in the proceedings.The arbitration clause ensures a high level of confidentiality, a particularly important feature in shipping, where disputes can involve sensitive commercial details. Arbitration procedures protect the commercial information of the parties, avoiding the public exposure associated with court litigation.

In shipping, disputes can be highly technical, involving specific knowledge about ships, cargo, loading and unloading, or international maritime regulations. Arbitration thus allows the parties involved in the dispute to appoint specialized arbitrators with shipping experience, which guarantees a thorough understanding of the issues at stake.

In the application of the arbitration clause in maritime contracts, problems arise in connection with the express acceptance of such a clause when the contract between the parties, which initially takes the form of a single order for the carriage of goods, is subsequently divided into several shipments. The question thus arises whether the arbitration clause will also apply in this case.

Thus, for example, the parties contractually agree on the carriage of goods by sea and, under the heading “disputes”, they have stipulated that in the event of a dispute, it will be settled by the Court of Arbitration of the Romanian Chamber of Commerce and Industry. However, transportation cannot be carried out at once, the parties having agreed by correspondence that the goods would be delivered by several shipments. As such, under the contract accepted by both parties in which the arbitration clause has been inserted and expressly accepted, separate shipments of goods are concluded, each quantity of goods forming part of the

goods provided for in the initial contract but being split up, they are the subject of separate further orders. In the correspondence between the parties, they make no mention of whether or not that arbitration clause applies in the event of a dispute. Subsequently, as a result of exceeding the period of time contractually agreed by the parties for loading-unloading a cargo shipment from a commercial vessel, the maximum period stipulated in the contract, in which the charterer must perform the loading and unloading operation, without any penalty from the shipowner (the specific name for these is that of laytime), the seller requests that the buyer be ordered to pay the sums of money representing the detention of the vessel for loading/unloading operations outside the agreed time, which are similar in legal nature to the penalty clause[22] and represent compensation distinct from the price of the transportation services (the specific name is demurrage).[23]

It is worth noting that demurrage, demurrage and demurrage are concepts specific to maritime transport. Thus, the time delay is an important component of maritime transport contracts, referring to the period of time allocated for loading and unloading goods from a ship. This concept plays an essential role in charter party contracts, as it regulates the rights and obligations of both the charterer (the person who charters the ship) and the shipowner (the owner of the ship). In other words, laydays are the contractual period, agreed between the parties,

[22] The penalty clause is a provision whereby the parties agree that the debtor undertakes a specific performance in case of non-fulfillment of the main obligation. In the event of non-performance, the creditor may either seek enforcement of the main obligation in kind or claim the penalty clause without needing to prove any damage, while the debtor cannot be released by offering the agreed compensation.

[23] However, demurrage and penalty clauses should not be confused, as they have significant distinctions. While demurrage is a financial compensation paid by the charterer to the shipowner when the laytime (the time allocated for loading and unloading) is exceeded, it is specific to maritime contracts and represents a pre-agreed amount for each day of delay. Conversely, the penalty clause is a general contractual provision in which a party commits to pay a sum of money or bear other consequences if it fails to fulfill its contractual obligations. The penalty clause can be applied in any type of contract, not just in the maritime domain. From an application perspective, demurrage is specific to maritime contracts, such as charter parties, maritime transport agreements, or related contracts, and is strictly linked to delays in loading and unloading. In contrast, the penalty clause applies to a wide range of contracts, including commercial, construction, service, or procurement agreements, addressing any type of contractual breach, such as failure to meet deadlines or properly perform obligations. Regarding their role, demurrage compensates the shipowner for losses caused by the ship's delay, aiming to cover additional costs incurred, such as lost business opportunities or extra operational expenses. Meanwhile, the penalty clause serves a punitive and preventive function, deterring contractual breaches and providing an automatic mechanism for damage recovery. In conclusion, although demurrage and penalty clauses may seem similar as both involve contractually agreed sums, they have distinct purposes and applications. Demurrage is a mechanism specific to maritime transport, with a compensatory role, while the penalty clause is a general sanction applicable across all contractual fields. In practice, the choice between the two depends on the nature of the contract and the specifics of the relationship between the parties.

during which loading and unloading operations must be completed, and are set to balance the needs of the charterer (to have sufficient time to handle the cargo) with the interests of the shipowner (to reduce the time during which the ship is unavailable for other operations). Often the term 'laytime' is used in shipping contracts, which is the actual time allocated for these operations.

If loading and unloading operations exceed the agreed laytime, the charterer may be obliged to pay compensation called demurrage. This is a contractually agreed daily financial penalty intended to cover the shipowner's losses caused by the delay.

In the reverse hypothesis, if operations are completed before the end of the laytime period, the shipowner may grant the charterer a financial compensation called despatch[24].

Returning to the issue raised earlier, concerning the applicability of the arbitration clause in successive maritime carriage under a contract in which the parties have assumed the arbitration clause at the time of conclusion. In this context, a number of questions arise:

1. Will the arbitration clause expressly contractually accepted by the parties, a contract which, however, comprised a single order and a single carriage, apply in the context of a subsequent order being carried out by several sea carriage (CBNs)?

2. Was it necessary for the parties to enter into a separate addendum to each part of the order incorporating the arbitration clause?

3. Does the execution of the inland freight and the payment of the offered freight evidencing acceptance by the buyer of all the terms of the inland freight contracts, including the arbitration clause?

We consider that, although the execution of the order was carried out by means of several ship transports and not just one, the arbitration clause inserted in the contract between the parties is operative and will produce specific effects. This is because, on the one hand, the condition provided for by art. 1202 Civil Code, of the existence of a standard clause, unilaterally imposed by the plaintiff, requiring individualized and express acceptance of the arbitration clause, is not met, on the other hand, the arbitration clause will fall within the scope of art. 1203 of the Civil Code, provided that they have been stipulated to the detriment of the party not proposing them, which means that, if such clauses are stipulated to the detriment of the other party proposing them, there will be no need for their express acceptance in writing. As has been pointed out in specialized doctrine, the mere presence of an arbitration clause, a clause relating to the tacit renewal

[24] Its amount is most often half of the value of the demurrage and aims to reward efficiency in the handling of goods.

of a contract or to the law applicable to a contract cannot lead to the idea that it is to the detriment of a particular person and, therefore, in the event of litigation, evidence will be needed to show that the clause is to the detriment of the party who did not propose it and merely accepted it.[25]

At the same time, given that a negotiation[26] procedure has been carried out between the parties for each shipment, this clause does not have to be expressly stipulated and accepted in writing in the context that each shipment is part of the performance of the main contract in which the arbitration clause was expressly provided for and accepted by both parties.

With regard to the effects of the arbitration agreement, the main effect of the arbitration agreement is to exclude the jurisdiction of the courts of law over the dispute which is the subject of the agreement (art. 553 of the Code of Civil Procedure), which has the force of law between the contracting parties (pacta sunt servanda). The Arbitral Tribunal verifies its own competence to settle a dispute and rules on the matter in a judgment which can only be set aside by an action for annulment brought against the arbitral award, pursuant to art. 608 of the Code of Civil Procedure. If the arbitral tribunal decides that it does not have jurisdiction to settle the dispute referred to it, it declines jurisdiction by a judgment against which no action for annulment under art. 608 of the Code of Civil Procedure (art. 579 of the Code of Civil Procedure) may be brought. The court also verifies its own jurisdiction if the parties to the proceedings have concluded an arbitration agreement, which one of them invokes before it (the procedural means of invocation is the plea of general lack of jurisdiction, which is a relative plea in this case). The case will be remitted to the court if: (a) the defendant has raised his defenses on the merits without any reservation based on the arbitration agreement; (b) the arbitration agreement is null and void or inoperative; and (c) the arbitral tribunal cannot be constituted for reasons clearly attributable to the respondent in arbitration.

In all other cases, the court, at the request of one of the parties and if it finds that there is an arbitration agreement, shall decline jurisdiction. In this case, the court shall decline jurisdiction in favour of the organization or institution before which the institutionalized arbitration is operating, which, on the basis of the declining decision, shall take the necessary steps to constitute the arbitral tribunal.

[25] BUCIUMAN, A., "Clauzele de atenuare a răspunderii contractuale, *Romanian Journal of Private Law*, nº 1, 2021; available at: https://sintact.ro/#/publication/151021538?keyword=1.203&cm=URELATIONS, last accessed 03.01.2025

[26] In the same sense is the jurisprudence of the Italian courts, which established that it is not necessary to expressly accept in writing a clause derogating from the rules regarding the jurisdiction of the courts, as long as it was inserted into the contract following negotiations between the parties, and in the same text of the contract, reference was made to "the conditions negotiated between the parties in BUCIUMAN, *op. cit.*

In the case of ad hoc arbitration, the court will reject the application as not being within the jurisdiction of the courts.[27]

If a conflict of jurisdiction arises between the arbitral tribunal and a court of law, it shall be resolved by the court of law hierarchically superior to the court in conflict (art. 554 of the Code of Civil Procedure).

As regards the effects of the arbitration agreement on third parties, being in the hypothesis of an agreement, it is binding on the contracting parties, but not on persons who have not signed such an agreement, joint and several co-debtors, guarantors, third parties who are beneficiaries of a contractual stipulation.

4. Brief Conclusions

Arbitration is an alternative form of dispute settlement which has the advantages of lower arbitration costs compared with the costs of a common law action, the freedom of the parties to choose independent and impartial arbitrators to settle the dispute, much shorter time to settle the case compared with a joint action, simplified procedure, final and enforceable nature of the arbitral award.

However, the manner in which the parties enter into the arbitration agreement continues to give rise to controversy over jurisdiction.

Therefore, the inclusion of an arbitration clause in inland waterway transport contracts is a common practice which can bring multiple benefits, including a speedy and specialized dispute resolution. However, parties should be aware of the costs and limitations associated with arbitration and draft the arbitration clause carefully to ensure that it is clear, fair and tailored to their specific needs.

We conclude that the arbitration clause is an essential component of shipping contracts, ensuring the speedy, confidential and specialized resolution of disputes. In a globalized field, this clause provides predictability and legal certainty, contributing to the efficiency and stability of the maritime industry. However, in order to avoid potential conflicts, it is essential that the parties draft the clause carefully, negotiate it fairly and take into account relevant jurisdictions and regulations.

[27] In practice, the solution of rejecting the request as inadmissible is also encountered.

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