

## INTRODUCTION

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

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

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

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

Art. 123 UNCLOS states “States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. (...)”.<sup>4</sup>

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

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

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

<sup>4</sup> The peculiarity of closed and semi-enclosed seas is also taken into account by the 1995 *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*. See Art. 15 (Enclosed and semi-enclosed seas): “In implementing this Agreement in an enclosed or semi-enclosed sea, States shall take into account the natural characteristics of that sea and shall also act in a manner consistent with Part IX of the Convention and other relevant provisions thereof”.

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>11</sup> *Annamaria Integrated Development and Operating Agreement*, 19 December 2006.

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

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

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

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

The US-Mexico Agreement “can potentially generate the same normative impact as the 1945 Truman proclamation on the continental shelf”;<sup>12</sup> and it can certainly be a model to apply in Adriatic and Ionian region.

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