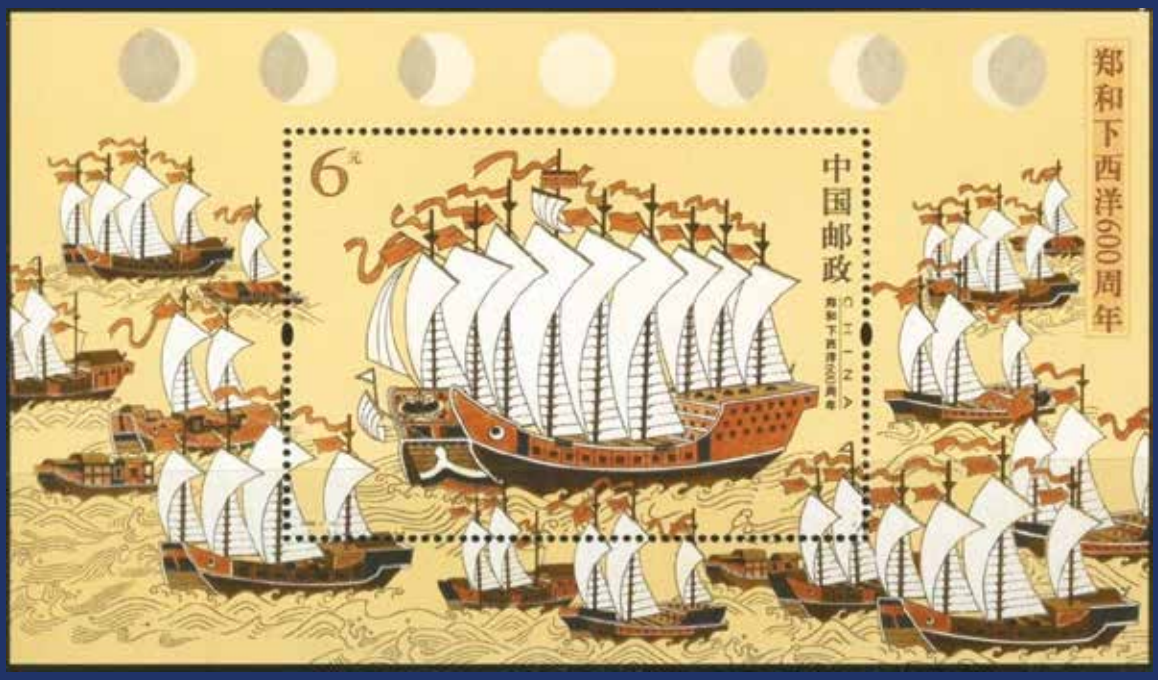
CAHIERS DE L'ASSOCIATION INTERNATIONALE DU DROIT DE LA MER
PAPERS OF THE INTERNATIONAL ASSOCIATION OF THE LAW OF THE SEA

LAW AND SECURITY ALONG THE 21ST CENTURY MARITIME SILK ROAD



Edited by
ANDREA CALIGIURI
STEFANO POLLASTRELLI

2021

EDITORIALE SCIENTIFICA

CAHIERS DE L'ASSOCIATION INTERNATIONALE DU DROIT DE LA MER

PAPERS OF THE INTERNATIONAL ASSOCIATION OF THE LAW OF THE SEA

10

CAHIERS DE L'ASSOCIATION INTERNATIONALE DU DROIT DE LA MER
PAPERS OF THE INTERNATIONAL ASSOCIATION OF THE LAW OF THE SEA

Law and Security
along the 21st Century Maritime Silk Road

Edited by

ANDREA CALIGIURI
STEFANO POLLASTRELLI

EDITORIALE SCIENTIFICA

2021

Via San Biagio dei Librai, 39 – 80138 Napoli
www.editorialescientifica.com – info@editorialescientifica.com

ISBN 979-12-5976-240-5

SCIENTIFIC COMMITTEE

https://giurisprudenza.unimc.it/cusmat

This book is realised with the financial support of CUSMAT – *Centro Universitario di Studi Marittimi Adriatico-ionici e dei Trasporti trans-europei*, University of Macerata (Italy).

CUSMAT was created in 2015 to give focus to an existing interest in maritime law and transport law as these subjects had always been an important feature of law at Macerata.

This Research Center aims to act as a promoter of interdisciplinary and comparative research and training activities through the interaction of policymakers, practitioners, academics, industry, and commerce and in partnership with other national and international bodies and institutions operating in its research area.

It also aims to promote and organise scientific events, to participate in research projects at national and European level, and to provide legal advice on maritime affairs and transport to national and local institutions, non-governmental organizations and private entities.

STEFANO POLLASTRELLI

Full Professor of Navigation Law and
Director of CUSMAT, University of Macerata

TABLE OF CONTENTS

Preface

The important, I would say epochal, initiative of the Chinese government that goes by the name of Belt and Road Initiative (BRI), and in particular, as far as we are concerned here its more intrinsically maritime aspect, that is the 21st Century Maritime Silk Road (MSR), raises a series of questions and interests in any scholar approaching the issue, to which the authors of this volume attempt to give some answers.

Among the many questions that will be addressed, it is worth highlighting here the ones that seem to us to be the most important, the ones that are at the root of every other problem.

1. The first issue, without any doubt, is the following question: is the MSR initiative functional to the establishment of Chinese hegemony in Asia and to Chinese desire to extend its reach into other regions of the world?

The MSR between China and Europe connects coastal countries, involving different religions, cultures and customs. It cannot be denied that the main concern, not only on at political level but also simply on the part of public opinion, especially (but not only) in Europe, is the fear that this ambitious project to open up borders and trade barriers, which is so fascinating from the point of view of “virtuous globalization”, may in fact prove to be just a 'Trojan horse' for China's political, cultural, commercial and military expansion. Concerning in particular MSR, one must consider the impressive and rapid development of the Chinese navy, together with the whole process of investments abroad in the port infrastructure sector put in place by Chinese government. The role of COSCO Shipping Corporation Limited also raises many concerns in Western business and trade circles. COSCO plays an essential role in the MSR, as it actively participates in the MSR to explore new shipping routes while deploying more than 260 container ships with the capacity of 1.7 million TEUs, covering nearly 200 main shipping routes along the MSR countries and region. At the same time, however, some strong guarantees can function for port State and coastal State in order to avoid dangers, as implementation of anti-monopoly law, or defense of welfare protection laws for employees assuring respect for specific ethnic, gender and other issues during employment in the host country. In general, the important issue is the respect of standards set by local law, concerning environment, labor conditions, and mainly cultural identity. As for the civil and commercial disputes, the implementation of the international conventions and maritime laws such as The Hague Rules, Hamburg Rules, and Rotterdam Rules is an efficient way to avoid and eliminate disputes. The challenge is to achieve a win-win situation, increasing development for all, and lowering costs at the same time. The potential is huge, the opportunity is great, but the burden of proof of shared benefits remains on the Chinese authorities.

2. Let's come to the second issue, which can be synthetized in the following question: which kind of international maritime order is envisaged by MSR?

The BRI was elevated by the Communist Party of China (CPC) to the constitutional level following its fourth anniversary in October 2017. It is significant that China's engagement to uphold existing international maritime order, mentioned in China's 2017 BRI White Paper, came only one year after Chinese rejection of the 2016 ruling by the International Court of Arbitration in The Hague in the case *The Philippines v. China* concerning the South China Sea (or Oriental Sea). The framework is further complicated by the fact that while China has ratified in 1996 the United Nations Convention on the Law of the Sea (UNCLOS), the United States, which constantly calls on China to observe the rules of international maritime law, has not yet ratified it. It is a fact that UNCLOS, the "Constitution for the Oceans", is widely recognized as largely reproductive of general international law, and therefore, in many cases, its provisions are also opposable to States that are not Contracting Parties to it. Therefore, in principle, all ocean-related activities generating from the MSR projects in the cooperation between China and other countries are subject to UNCLOS rules, and on whoever wants to deny its application lies the burden of proof of its incompatibility with customary law. It should be remembered, however, and this is no small matter, that all activities of a military nature remain outside the scope of UNCLOS, with the exception of exercises, in respect of which, as is well known, there is a very sharp difference of opinion between Western states and Asian and African states, since the latter would like to include in the powers of the coastal state in the areas of jurisdiction also the power to exclude such activities by foreign states. This is part of the wider dispute between Western states and China over the EEZ regime. In fact, there is no doubt that China, in this respect no differently from the majority of the coastal countries of Asia and Africa, tends to attribute to itself powers in its EEZ that are proper to sovereignty in the territorial sea. In particular, China rejects the idea of free navigation, claiming to subject the transit of warships to prior authorization. This is contrary to the relevant provisions of UNCLOS. On the other hand, in our opinion, the US operations of "showing the flag" in the Chinese EEZ, clearly intended to provoke a reaction, are not to be shared either. If there is a dispute, it should be addressed and resolved using the instruments available under international law.

Shipping is indispensable to the world, as 90 per cent of global trade is carried by maritime transport. All nations, and in particular, coastal and island states, have a strong reliance on seaborne trade. There is no doubt that the entire international legal regime of maritime navigation is subject to opposing interpretations between States, and this is a fact that should not be underestimated in the context of the MSR. This is true not only in the case of EEZ, as already mentioned, but also for international straits. In the last decades of the last century the generalized extension of territorial waters up to the twelve-mile limit led to a considerable multiplication in the number of straits falling within the territorial sea of coastal states. The complete subjection of about two thirds of international straits to coastal sovereignty clearly resulted in a progressive restriction of the

spaces subject to full freedom of navigation, replaced by the more limited right of innocent passage. Hence the reconsideration of the matter at the Third UN Conference on the Law of the Sea. Part III of UNCLOS is specifically devoted to straits, with a clear intention to differentiate its rules from Part II, which is devoted to the territorial sea. The regime of Part III therefore constitutes a compromise solution, since the new institution of "passage in transit", which is much more favorable to strait-using States than innocent passage that cannot be suspended (downgraded to a rule for straits of minor importance), can be considered as a "reward" demanded by maritime powers in exchange for accepting the twelve-mile rule as the maximum extent of the territorial sea. The regime of transit passage applies, under Article 37 UNCLOS, “to straits used for international navigation between one part of the high seas or EEZ and another part of the high seas or EEZ”. For other straits, in particular those linking the high seas or EEZ with the territorial sea of another State, the regime of innocent passage without suspension applies. How does transit passage differ from simple innocent passage? In contrast to the latter, transit passage also extends to overflight, and does not expressly require submarines to transit in surfacing, thus reducing the possibilities for the coastal State to restrict navigation. This explains the resistance of many coastal States to the regime of transit passage both during the Third UN Conference on the Law of the Sea and also after the entry into force of UNCLOS. In Europe, for example, Spain opposed the return of the Strait of Gibraltar to this regime, as did Russia with regard to the straits in the Arctic Sea, despite its policy of supporting the widest possible freedom of navigation, and although the Soviet Union was a great supporter of this new institution at the time of the Third UN Conference on the Law of the Sea. It is therefore still difficult to affirm (legal literature is also divided on this point) that the regime provided for by UNCLOS on this matter corresponds to customary law, also because some States with important straits (Iran - which has only signed it - Turkey, Venezuela) have not ratified the Convention. It certainly seems paradoxical that the fiercest defenders of the right of transit regime established by UNCLOS are the USA, which has not ratified the Convention, and which is instead a party to the 1958 Geneva Convention on the Territorial Sea, which does not provide for such an institution! In recent practice, there has been a growing tendency on the part of coastal States to regulate transit also with a view to protecting the marine environment and thus in the general interest of the international community. For example, the adoption of mandatory pilotage systems for certain categories of ships to prevent the risk of accidents is widespread. We do not share the objections expressed by certain States of ships in transit to these initiatives, which are certainly in line with a new concept of "freedom of the seas", to be understood in a broader sense than in the past. There are also a number of obligations and prohibitions that may appear, prima facie, to be unjustifiable from a legal point of view, because they are incompatible with the rule that passage through straits cannot be suspended, but which are reasonable in the light of the lack of appropriate provisions to protect the marine environment in such areas. The question is paramount for us as presently China is rapidly increasing its dependence upon oil from the Middle East, while the United States and others are gradually reducing such dependence.

Roughly 85 per cent of the oil that China imports passes through the Straits of Malacca. Having little control over the passage, any disruption – ranging from piracy to fears of a potential naval blockade by the United States and its allies – will have an adverse impact on China's long-term food and energy security.

Another contested matter is the regime of "Archipelagic States" and "Archipelagic waters". The problem is that Article 46 UNCLOS defines an "Archipelagic State" as "a State constituted wholly by one or more archipelagos and may include other islands" and thus, it is distinguished from an oceanic "archipelago" that is part of a continental State. The rules contained in the following articles refer only to "Archipelagic States", i.e. States made up exclusively of "one or more archipelagos and possibly other islands", with the exclusion from the special regime of States with a mainland mass but which also have archipelagos, whether close to the coast or not "coastal" (as in the case of Denmark for the Faroes, Ecuador for the Galapagos, Norway for Svalbard, Portugal for the Azores or Spain for Canary Islands). These States should therefore not be entitled to archipelagic status, nor be entitled to use the archipelagic baseline method ("straight archipelagic baselines" are the lines joining the outermost points of the outermost islands and reefs of an "Archipelagic State"). However, in practice, all the continental States mentioned above have used similar measures reflected in Part IV of UNCLOS in drawing the baselines for their oceanic archipelagos before and after the adoption of the Convention.

Undoubtedly, the regime of archipelagos "dependent" on a "prevailing" territory is a shortcoming of UNCLOS. At the time of the Third UN Conference on the Law of the Sea, the issue was deliberately omitted because the international community was not yet ready to resolve it. Thus, principles applicable to oceanic archipelagos of continental States are still in evolution. In the light of significant practice, however, it cannot be ruled out that a new rule of customary international law may be in the making, affirming the same rights and principles contained in Part IV of UNCLOS and applicable to oceanic archipelagos. What is certain is that the use of the regime provided for archipelagic States is not permissible in cases where sovereignty over the islands in question is contested, as in the case of the archipelagos of the South China Sea or East China Sea, as highlighted by the Arbitral Tribunal in its 2016 decision mentioned above, whose sovereignty is disputed between various States in the region, but in respect of which, nevertheless, there are attempts to submit them to the archipelagic baselines regime as in the case of the so-called China's "Nine-dash Line".

All the disputes relating to the interpretation of rules of the law of the sea mentioned so far, and also others, as well as issues related to territorial sovereignty, are present in the South China Sea disputes, and are entangled with one another, thus making this controversy the most complicated of all territorial and maritime disputes in the world. There is no doubt, moreover, that this dispute would be one of the most difficult obstacles for China to implement the MSR Initiative. Members of ASEAN countries have further increased their concerns with China's strategic advance, and even if without any maritime territorial claims in the area, the United States considers the freedom of navigation in the so-called

"international waters", including EEZs, to be an unalienable right of all countries and will continue to pursue national interests in the South China Sea based on this stance.

3. The third issue I want to very rapidly mention is the MSR's consistency with the institutional framework put in place at supranational level. First of all, as we know, it is necessary to understand the relationship between an initiative like BRI (and MSR) and the WTO. The first one is clearly an initiative that is economically and politically very strong and well-defined, but which lacks an institutional structure, based on flexible frameworks with potential bilateral agreements between the various participants. Institutional structure, on the contrary, is the main feature of the WTO, of which China is also a member, based on market economy with precise rules and jurisdictional guarantees. Secondly, and this relates to the European situation, we know that as many as 27 States have ceded large portions of sovereignty to the EU institutions in key areas for the MSR such as competition, maritime policy and fisheries. It is obvious that the EU as a whole will be supportive of OBOR and the MSR only if China renounces approaching individual Member States in search of bilateral agreements, but so far this does not seem to be the intention of the Chinese authorities.

In conclusion, it should never be forgotten that Western civilization, and modern Europe in particular, is largely the product of the ancient Silk Road. Ideas, goods, wars and epidemics travelled along this corridor. In short, life. The plan to reintroduce this route on land as well as at sea, free and flowing, can only be welcomed. Moreover, this project corresponds to the need for cooperation and coordination that underlies multilateral diplomacy and transnational trade, which has always been favored in the international arena, especially by the United Nations, as the only hypothesis to be pursued. The duty to cooperate also emerges as the only way to defeat threats such as transnational terrorism or piracy, as well as to counter threats to the marine environment. If in the Chinese plans, in addition to an understandable aspiration for economic expansion, there is also all this, it is possible that the project could take off, otherwise mutual distrust will win the day.

GIUSEPPE CATALDI

Professor of International Law, University of Napoli "L'Orientale"
President, Association International du Droit de la Mer (AssIDMer)

PART I

EXPLAINING THE NEW MARITIME SILK ROAD

An Introduction to the 21st Century Maritime Silk Road from the Perspective of the Law of the Sea

ANDREA CALIGIURI*

SUMMARY: 1. Introduction. – 2. An Overview of the Maritime Sovereignty Disputes in the South China Sea. – 3. Challenges to the Freedom of the Seas along the Maritime Silk Road. – 4. Some preliminary remarks on the new Chinese Coast Guard Law. – 5. Chinese concerns over the Straits of Malacca and Singapore. – 6. Final Remarks.

1. Introduction

The 21st Century Maritime Silk Road initiative was proposed by Chinese President Xi Jinping during a speech to the Indonesian Parliament in October 2013[1], but only in March 2015 did the National Development and Reform Commission of the People's Republic of China release a document titled "Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road",[2] which offers the framework of principles and values which form the foundation for developing the initiative. The Belt and Road Initiative (BRI) was completed by two other documents both released in 2017: "Vision and Actions on Energy Cooperation in Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road";[3] "Vision for Maritime Cooperation under the Belt and Road Initiative".[4]

This new Chinese global approach to oceans is an unprecedented development in its national history since the voyages of Admiral Zheng He to the coasts of East Africa and Arabia between 1405 and 1433, during the early Ming Dynasty. This maritime policy would not be repeated until 2008, when the People's Liberation Army Navy (PLAN) deployed a task force to participate in international antipiracy operations off the coast of Somalia.[5] Finally, in 2015, the Information Office of the State Council published a new white paper on "China's Military strategy" declaring "overseas interests [had become] an imminent issue".[6]

---

* Associate Professor of International Law and Director of the Interdepartmental Research Center on the Adriatic and the Mediterranean (CiRAM), University of Macerata.

[1] Speech by Chinese President Xi Jinping to Indonesian Parliament (2 October 2013, Jakarta, Indonesia), <http://www.asean-china-center.org/english/2013-10/03/c_133062675.htm>.

[2] See the full text on <https://eng.yidaiyilu.gov.cn/qwyw/qwfb/1084.htm>.

[3] See the full text on <https://eng.yidaiyilu.gov.cn/zchj/qwfb/13754.htm>.

[4] See the full text on <http://www.xinhuanet.com//english/2017-06/20/c_136380414.htm>.

[5] A. Sheldon-Duplaix, 'See Beyond the China Seas. Will China Become a Global "Sea Power"?' (2016) China Perspectives, <https://journals.openedition.org/chinaperspectives/7041#quotation>.

[6] State Council Information Office of the People's Republic of China, 'China's Military Strategy (May 2015)', China Daily, 26 May 2015, <www.chinadaily.com.cn/china/2015-05/26/content_20820628.htm>. The paper underlined that: "With the growth of China's national interests (*Zhongguo de guojia liyi* 中国的国家利益), its national security is more vulnerable to international and regional turmoil, terrorism, piracy, serious natural disasters, and epidemics, and

The new Chinese policy is justified by the impressive economic development this country has achieved in recent decades. Firstly, China's ocean economy has been growing rapidly, in line with its national GDP. Then, in 2013, China surpassed the U.S. becoming the world's foremost trading nation. Moreover, it is one of the leading shipbuilding countries in the world. Finally, over 90% of the nation's imported energy supplement currently relies on marine transportation. For all these reasons, China's maritime interests have become global.

The aim of this paper is to analyse the framework of the 21st Maritime Silk Road under the lens of the Law of the Sea.

According to the "Vision for Maritime Cooperation under the Belt and Road Initiative", the principal aim of this initiative is to encourage countries along the Road "to align their strategies, further all-around and pragmatic cooperation, and to jointly build unobstructed, safe and efficient maritime transport channels". This aim should be reached by deepening the cooperation in the following four areas: green development, ocean-based prosperity, maritime security, innovative growth and collaborative governance.

Despite the well-known fact that the Law of the Sea does not define a legal regime for establishing and governing the Sea Lines of Communication (SLC), but many of the customary and conventional international norms offers a legal regime to manage some fundamental aspects necessary to ensure the operation of a maritime route.

The new Maritime Silk Road is a sea line connecting Asia with Africa and, through the Bāb el-Mandeb Strait and Suez Canal, with Europe. The Indo-Pacific segment of the route is the longest and, due to several situations, also the most problematic, particularly in the South China Sea. The goal of this paper is to examine some of the most relevant issues concerning the South China Sea, offering a comparative analysis between the Chinese laws and regulations[7] and the relevant norms of the Law of the Sea, which provide guidance on various maritime matters.

2. An Overview of the Maritime Sovereignty Disputes in the South China Sea

the security of overseas interests concerning energy and resources, strategic sea lines of communication [SLOCs], as well as institutions, personnel, and assets abroad, has become an imminent issue".

[7] The relevant Chinese laws and regulations that are object of reference in this paper are: *Declaration of the Government of the People's Republic of China on China's territorial sea* of 4 September 1958, *Regulations Governing Non-Military Foreign Vessels Passing Through the Qiongzhou (Chiungchow) Strait*, *Coast Guard Law of the People's Republic of China* of 8 June 1964; *Law on the Territorial Sea and the Contiguous Zone* of 25 February 1992, *Declaration of the Government of the People's Republic of China on the baselines of the territorial sea* of 15 May 1996, *Exclusive Economic Zone and the Continental Shelf Act* of 26 June 1998, *Law on Maritime Traffic Safety* of 2 September 1983 (amended on 7 November 2016; revised on 29 April 2021), and *Coast Guard Law of the People's Republic of China* of 22 January 2021.

The main source of stress in the Indo-Pacific segment of the Maritime Silk Road is the China's "Nine-dash Line" claim in the South China Sea.[8]

The South China Sea, with an area of 648,000 nm^2, is surrounded by seven countries or territorial entities: Brunei, the People's Republic of China, Indonesia, Malaysia, the Philippines, Taiwan and Vietnam.

According to Article 1 of the Chinese *Law on the Territorial Sea and the Contiguous Zone*:

> "The territorial sea of the People's Republic of China is the sea belt adjacent to the land territory and the internal waters of the People's Republic of China.
> The land territory of the People's Republic of China includes the mainland of the People's Republic of China and its coastal islands; Taiwan and all islands appertaining thereto including the Diaoyu Islands; the Penghu Islands; the Dongsha Islands; the Xisha Islands; the Zhongsha Islands and the Nansha Islands; as well as all the other islands belonging to the People's Republic of China.
> The waters on the landward side of the baselines of the territorial sea of the People's Republic of China constitute the internal waters of the People's Republic of China".

China decided to use the method of straight baselines in drawing the baseline from which the breadth of the territorial sea is measured. Thus, the islands that have been claimed in the Taiwan Strait (Penghu/Pescadores islands), in the East China Sea (Diaoyu/Senkaku islands) and in the South China Sea (Dongsha/Pratas islands; Xisha/Paracel islands, Zhongsha Islands, including Macclesfield Bank and Scarborough Shoal, and Nansha/Spratly islands) inside the baseline are located within China's internal waters.

In 1998, China enacted an *Exclusive Economic Zone and Continental Shelf Act*, which described the extent of its EEZ "to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured"[9] and its continental shelf as "the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance".

Finally, China claims "historical rights" in the South China Sea as affirmed in Article 14 of 1998 Act[10] and on many occasions, such as the *South China Sea Arbitration*.[11]

---

[8] In this original form, the line featured 11 dashes. The two dashes in the Gulf of Tonkin were removed in 1953, rendering it a 'Nine-dash Line'. See C. P. C. Chung 'Drawing the U-Shaped Line: China's Claim in the South China Sea, 1946-1974' (2015) Modern China 1; Zhiguo Gao and Bing Bing Jia, 'The nine-dash line in the South China Sea: history, status, and implications' (2012) 107 American Journal of International Law 98.

[9] It should be noted that China has never publicized charts or lists of geographical coordinates of its EEZ as required by Article 75 UNCLOS.

[10] Article 14 of 1998 Act: "The provisions of this Act shall not affect the historical rights of the People's Republic of China".

[11] See also *Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea*, 12 July 2016, <https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/201607/t20160712_8527297.htm>.

A partial solution to some disputes between China and the Philippines concerning overlapping claims was defined by the award of 12 July 2016,[12] adopted by an Arbitral Tribunal constituted under Annex VII of UNCLOS.[13]

The Arbitral Tribunal ruled in favour of the Philippines' position, declaring several elements of China's claims in the South China Sea to be unlawful. Key highlights include:

- China's claims to historic rights and resources within its Nine-dash Line have no legal basis and exceed rights provided by UNCLOS;
- None of China's claimed land features in the Spratly Islands are "islands" under Article 121 UNCLOS and as such they cannot generate an EEZ and continental shelf;
- China breached the Philippines' sovereign rights regarding fishing, oil exploration, navigation, and the construction of artificial islands and installations, in its EEZ, in addition to violating its marine environmental protection obligations under UNCLOS by causing "severe harm to the coral reef environment" with its land reclamation activities and harvesting of endangered species;
- China had aggravated and extended the dispute including by engaging in actions such as large-scale land reclamation activities and the construction of artificial islands, during the arbitration process.

It is well-known that China rejected the arbitral tribunal's ruling declaring that it was "null and void and has no binding force" [14] and tried to come to some direct arrangements with the Philippines to circumvent the arbitral decision.[15]

Under Article 122 UNCLOS, the South China Sea is a semi-enclosed sea and, for this reason, under Article 123, coastal States "should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention". However, this cooperation is difficult to achieve because this area is the object of many disputes concerning sovereignty and territorial and maritime delimitation.

---

[12] *PCA Case No. 2013-19 in the Matter of the South China Sea Arbitration before an Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China,* Award of 12 July 2016.

[13] China rejected the jurisdiction of the arbitral tribunal over the case, see *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, 7 December 2014, <https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/201606/t20160602_8527277.htm>.

[14] See *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines*, 12 July 2016, <https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/201607/t20160712_8527294.htm>.

[15] See *Joint Statement of the People's Republic of China and the Republic of the Philippines*, 21 October 2016 <https://www.fmprc.gov.cn/nanhai/eng/zcfg_1/201610/t20161021_8523693.htm>; *Memorandum of Understanding on Cooperation on Oil and Gas Development between the Government of the People's Republic of China and the Government of the Republic of the Philippines*, 27 November 2018, <https://www.fmprc.gov.cn/nanhai/eng/zcfg_1/201811/t20181127_8523697.htm>.

In 2002, all the states bordering the South China Sea signed a "*Declaration on the Conduct of Parties in the South China Sea*" (DOC)[16] to promote trust in one another and affirmed three fundamental principles:

> "their respect for and commitment to the freedom of navigation in and overflight above the South China Sea as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea";
>
> "[their commitment to] undertake "to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea";
>
> "[their commitment to] undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner".

Although the DOC is not a binding instrument, it establishes principles for a process of conflict management in the South China Sea, but only after the award concerning the *South China Sea Arbitration* did negotiations between concerned States gain a new momentum. In 2016, ASEAN and China agreed to apply the *Code for Unplanned Encounters at Sea* to the South China Sea[17] and, in 2017, they adopted a framework for a code of conduct in the South China Sea (CoC) "to establish a rules-based framework containing a set of norms to guide the conduct of parties and promote maritime cooperation in the South China Sea".[18]

These codes do not seem to have reduced the tension between the States concerned and China is accused of using the PLAN, its Coast Guard[19] and also Maritime Militia[20] to assert and defend its maritime claims.

---

[16] *Declaration on the Conduct of Parties in the South China Sea*, 4 November 2002, <https://asean.org/declaration-on-the-conduct-of-parties-in-the-south-china-sea-2/>.

[17] *Joint Statement on the Application of the Code for Unplanned Encounters at Sea in the South China Sea*, 8 September 2016, <https://www.fmprc.gov.cn/nanhai/eng/zcfg_1/201704/P020210903716565178615.pdf>; *Guidelines for Hotline Communications among Senior Officials of the Ministries of Foreign Affairs of ASEAN Member States and China in Response to Maritime Emergencies in the Implementation of the Declaration on the Conduct of Parties in the South China Sea*, 8 September 2016, <https://www.fmprc.gov.cn/nanhai/eng/zcfg_1/201704/P020210903716568578083.pdf>.

[18] I. Storey, 'Anatomy of the Code of Conduct Framework for the South China Sea', The National Bureau of Asian Research (NBR), 24 August 2017, <https://www.nbr.org/publication/anatomy-of-the-code-of-conduct-framework-for-the-south-china-sea/>.

[19] See *infra* paragraph 4 of this paper.

[20] China's 2013 Defense White Paper, states that Militia serve "as an assistant and backup force of the PLA" (<http://www.andrewerickson.com/wp-content/uploads/2019/07/China-Defense-White-Paper_2013_English-Chinese_Annotated.pdf>). Militia has its of subset the Maritime Militia. See for more details C. M. Kennedy and A. S. Erickson, 'China Maritime Report No. 1: China's Third Sea Force, The People's Armed Forces Maritime Militia: Tethered to the PLA' (2017) CMSI China Maritime Reports 1, <https://digital-commons.usnwc.edu/cmsi-maritime-reports/1>.

3. Challenges to the Freedom of the Seas along the Maritime Silk Road

The legal situation regarding the navigational rights of foreign vessels within national jurisdiction is one of the most serious concerns for the world community. Many States have restricted the freedom of navigation in the waters under their jurisdiction (territorial waters, straits, EEZs).

a) Innocent Passage in territorial waters

The navigational rights of foreign vessels in the territorial sea of a coastal State are guaranteed by the right of innocent passage under Article 19 UNCLOS. However, many countries regard the obligation to allow foreign ships the right of innocent passage as a significant limitation on their sovereignty and a potential threat to their national security.[21]

In China's practice, foreign merchant vessels are allowed to enjoy the right of innocent passage in its territorial sea,[22] but foreign warships must obtain prior permission from the Chinese authorities before navigating through the Chinese

[21] At present, Algeria, Antigua and Barbuda, Bangladesh, Barbados, Burma, Cambodia, Cape Verde, Congo (Brazzaville), Grenada, Iran, Maldives, North Korea, Oman, Pakistan, the Philippines, Romania, St. Vincent and the Grenadines, Seychelles, Somalia, Sri Lanka, Sudan, Syria, United Arab Emirates, Vietnam, and Yemen all require prior permission or authorization for the passage of foreign warships in their territorial waters. Albania also requires special authorization for the innocent passage for warships, except in the circumstances of *force majeure*. Croatia, Egypt, Finland, Guyana, India, South Korea, Libya, Malta, Mauritius, and Montenegro all require a prior notification before a foreign warship can pass through their territorial waters. In addition, Montenegro restricts the number of foreign warships of the same nationality passing through its territorial sea to a maximum of three at a time. Denmark stipulates that simultaneous passage through the Great Belt or the Sound of more than three warships of the same nationality is subject to prior notification through diplomatic channels.

[22] However, it should be noted that a strict regime is imposed on certain categories of ships sailing in the Chinese territorial waters; indeed Article 54 of the *Maritime Traffic Safety Law*, revised in 2021, affirms as follow: "The following vessels of foreign nationality entering and leaving the territorial sea of the People's Republic of China shall report to the maritime safety authority: (1) submersibles; (2) nuclear-powered vessels; (3) vessels carrying radioactive substances or other poisonous and harmful substances; and (4) other vessels that may endanger the maritime traffic safety of the People's Republic of China as provided for by laws, administrative regulations or the provisions of the State Council. / Vessels mentioned in the preceding paragraph, when passing through the territorial sea of the People's Republic of China, shall hold relevant certificates, take special precautionary measures that conform to the laws, administrative regulations and rules of the People's Republic of China and accept instructions and supervision of the maritime safety authority". This national rule is inconsistent with the "right of innocent passage" because a coastal State is only authorized by UNCLOS to require tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials to use designated sea lanes and traffic separation schemes (Article 22) and check documents and observation of special precautionary measures established for such ships by international agreements (Article 23). Coastal State cannot prohibit transits by such ships that follow the UNCLOS provisions or require that they provide prior notification before entering its territorial waters. Moreover, UNCLOS does not limit innocent passage of submarines and other underwater vehicles except for the requirement to navigate on the surface and to show their flag (Article 20).

territorial sea.[23] China specifically stipulated this requirement on ratifying UNCLOS in a Declaration that included the following statement:

> "The People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal State to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal State for the passage of its warships through the territorial sea of the coastal State".[24]

This position on innocent passage for warships is not shared by most of the world community that expressly or implicitly allows it.

A particular problem arises if foreign warships are conducting the passage purely for the purpose of demonstrating the right of innocent passage without prior notification or authorization as required by the coastal State. This is the main aim of U.S. Freedom of Navigation Operations (FONOPs).[25]

It might be argued that U.S. military vessels under the U.S. FONOPs are in fact conducting non-innocent passage.[26] The vessels involved might be evident to the coastal State by virtue of an obvious diversion from the direct shipping route: the coastal State could well argue that that diversion was not part of "continuous and expeditious" passage as required by Article 18(2) UNCLOS and also that the diversion in itself signalled an activity that could be prejudicial to the security of the coastal State.[27] This interpretation concerning the diversion would be deduced

---

[23] See Article 6 of Law on the Territorial Sea and the Contiguous Zone: "Non-military foreign ships enjoy the right of innocent passage through the territorial sea of the People's Republic of China according to law". Note that, in compliance with international law, according of Article 55 of the *Maritime Traffic Safety Law*, revised in 2021, "No vessels of foreign nationality may enter the Chinese internal waters unless they have obtained permission to enter a port; but they may enter the internal waters due to urgent illness of personnel or malfunction of the engine or the wreck or seeking shelter from wind or other emergencies when they have no time to obtain permission".

[24] United Nations, *The Law of the Sea: Declarations and statements with respect to the United Nations Convention on the Law of the Sea and to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea* (United Nations publication, Sales No. E.97.V.3). See also, Yann-huei Song and Zou Keyuan, 'Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States' (2000) Ocean Development & International Law 329; and Zou Keyuan, "Innocent Passage for Warships: The Chinese Doctrine and Practice' (1998) Ocean Development and International Law 201.

[25] According to a definition of U.S. Department of State, "U.S. Naval forces engage in Freedom of Navigation operations to assert the principles of International Law and free passage in regions with unlawful maritime sovereignty claims. FON operations involve naval units transiting disputed areas to avoid setting the precedent that the international community has accepted these unlawful claims"; see <https://2001-2009.state.gov/t/pm/iso/c21539.htm>.

[26] W. J. Aceves, 'The Freedom of Navigation Program: A Case Study of the Relationship Between Law and Politics' (1996) Hastings International and Comparative Law Review 259.

[27] This example is presented by S. Bateman, 'Security and the Law of the Sea in East Asia: Navigational Regimes and Exclusive Economic Zones' in D. Freestone, R. Barnes and D. Ong (eds), *The Law of the Sea* (Oxford University Press 2006), 365 ff.

from the phrase "any other activity not having a direct bearing on passage" enclosed in Article 19(2)(l) UNCLOS.

b) Navigation through the Chinese straits

Straits are key passages along maritime routes and, as such, they require a particular regulation by the Law of the Sea, which has always sought to ensure freedom of navigation for foreign ships. In the maritime region in question, there are two straits that receive special attention: the Qiongzhou/Hainan Strait and the Taiwan Strait.

The Qiongzhou Strait, situated between Hainan Island and the Leizhou Peninsula, is located within Chinese internal waters. Yet, it was not until 1958 that China declared it to be an "internal strait" under the *Declaration on China's Territorial Sea*, what was unclear before that date.

The strait is deemed to be a convenient route between China and Southeast Asian countries, in particular Vietnam, but it is subject to a very stringent regime in terms of the passage of foreign vessels: while foreign merchant vessels may pass through it when they have obtained the permission and comply with the established vessel traffic service system (VTS), navigation of foreign warships is interdicted. The promulgation of these regulations raised protests among some countries, particularly the United States;[28] nevertheless, they are in line with international law which grants coastal States the full power to regulate passage in its internal straits.

The situation regarding the Taiwan Strait is closely linked to the issue of sovereignty over the island which China considers a rebel province after the Communist revolution in 1949 and, therefore, an internal affair. China claims the sovereignty over the island, despite having found a *modus vivendi* with the Taiwanese authorities for the time being, and it aspires to reunify the island to the motherland according to the principle of "One country, Two systems".

With the 1958 *Declaration on China's Territorial Sea*, China acknowledged an area of "high seas" in the Taiwan Strait but, after the adoption of 1982 UNCLOS with the introduction of new legal concepts like EEZ and continental shelf, the legal status of the Taiwan Strait has changed. Today, the water area in the Taiwan Strait has become part of China's EEZ and the navigation of foreign vessels is subject to the legal regime for the EEZ.

In practice, the sea area of this strait is affected by the divided situation of China with two separate legal systems in terms of governance over navigation, one from mainland China and the other from Taiwan. This complicated legal situation is a problem for the navigation of foreign vessels in the Taiwan Strait because there is not clear demarcation line separating the jurisdiction between the two coastal sides.

[28] The United States contests the illegal use of the method of straight baselines by China, as this method may only be used in limited circumstances. Thus, they qualify as illegal the prior permission requirement for navigation in Qiongzhou Strait, the waters of which are to be considered territorial sea under the regime of innocent passage. See Office of the Staff Judge Advocate, U.S. Indo-Pacific Command, 'China's Excessive Maritime Claims' (2021) International Law Studies, <https://digital-commons.usnwc.edu/ils/vol97/iss1/14>.

Finally, there are special rules adopted by each party to govern the navigation of vessels across the strait. Mainland China defines shipping between the two sides as "domestic transportation under special administration",[29] while the Taiwanese authorities have attempted to treat such navigation as international affair, rather than a domestic issue, since the Democratic Progressive Party came to power, rejecting the so-called "One China" principle fixed in the "1992 Consensus".[30]

Under international law, the Strait of Taiwan is recognised as used for international navigation, but the regime governing the straits used for international navigation should not apply to such strait according to Article 35(b) UNCLOS.[31] However, Taiwanese authorities affirm that in a part of the Taiwan Strait that is not part of their territorial sea the regime of "transit passage" is applied for foreign vessels.[32]

c) Navigation and military activities in EEZ

As to the navigation in the EEZ, Article 58 UNCLOS provides a legal regime similar to that concerning the high seas, i.e., freedom of navigation for foreign vessels (and freedom of overflight for foreign aircrafts); however, third States "shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State" in accordance with the Convention and other rules of international law.

Nevertheless, the freedom of navigation is subject to conflicting interpretations when it is invoked by warships for military activities in the EEZ of a third State. While from the Western States' point of view, navigation and military exercises should be based on the concept of "freedom of navigation", within non-Western contexts – East Asia, Latin America or Africa – a widely shared opinion is that foreign warships engaging in military operations in a country's EEZ may be a threat to the national security or the resource sovereignty of the coastal State and, as such, they must be prohibited. In Asia, in addition to China, other States have already expressed their growing concern over the issue, including Bangladesh, Cambodia, India, Indonesia, Iran, Malaysia, Maldives, North Korea, Pakistan, Thailand and Vietnam.[33]

---

[29] Provisions Governing the Administration of the Direct Shipping between the Two Sides of the Taiwan Strait under Decree No. 6 of the Ministry of Communications of the PRC of 1996.

[30] For history and content of the "1992 Consensus", see *Xu Shiquan,* 'The 1992 Consensus: A Review and Assessment of Consultations Between the Association for Relations Across the Taiwan Strait and the Straits Exchange Foundation' (2001) American Foreign Policy Interests 121, <https://www.ncafp.org/articles/01%20The%201992%20Consensus-%20A%20Review%20and%20Assessment.pdf>.

[31] Keyuan Zou, 'Navigation through the straits in East Asia' (2021) QIL 21, <http://www.qil-qdi.org/navigation-through-the-straits-in-east-asia/#_ftnref37>.

[32] Article 13 of 1998 (ROC) Law on the Territorial Sea and Contiguous Zone.

[33] See R. Pedrozo, 'A Response to Cartner's and Gold's Commentary on "Is it Time for the United States to Join the Law of the Sea Convention?' (2011) 42 Journal of Maritime Law & Commerce 487, 497. Other States that do not allow some foreign military activities in their EEZ without their consent are Brazil, Cap Verde, Kenya and Uruguay.

Concerning the navigation of foreign military vessels and military activities in the EEZ, in the absence of an express prohibition by UNCLOS, the right to navigate in the EEZ of another State must be granted to all the military vessels and it seems reasonable to state that military activities are lawful in the EEZ of another State without the need of its previous consent, provided that the foreign military vessels refrain from the threat or use of force or other provocative acts such as "stimulating or exciting the defensive systems of the coastal State; collecting information to support the use of force against the coastal State; or establishing a 'sea base' within another State's EEZ without its consent".[34]

Another relevant problem in the regime of EEZ is whether coastal State jurisdiction extends to activities in the EEZ such as hydrographic surveying and the collection of other marine environmental data that is not resource-related or is not done for scientific purposes.[35]

While it is the opinion of some States that hydrographic surveys can be conducted freely in the EEZ under Article 58 UNCLOS, many coastal States, including China, have specifically claimed that hydrographic surveys and military surveys may only be conducted in their EEZs with a previous consent.[36] In particular, States are concerned by military surveys, that are activities undertaken in the ocean and coastal waters involving marine data collection for military purposes. Such data is important for effective submarine operations, anti-submarine warfare (ASW), mine laying, Mine countermeasures (MCM) and amphibious operations, particularly in waters such as the South and East China Seas where oceanographic and underwater acoustic conditions vary widely between one area and another.

In China's view, as proclaimed during the Third UN Conference on the Law of the Sea, "the coastal States should have 'exclusive jurisdiction' in regard to marine scientific activities in their economic zones and that express consent should be obtained for such activities".[37]

---

[34] See Ocean Policy Research Foundation, *Guidelines for Navigation and Overflight in the Exclusive Economic Zone*, Tokyo, 26 September 2005, <https://nippon.zaidan.info/seikabutsu/2005/00816/pdf/0001.pdf>. The Guidelines are a set of non-binding principles based on UNCLOS, State practice, and emerging "soft law". The legal regime prescribed by the Guidelines is even more stringent since it is stated that "Warships or aircraft of a State intending to carry out a major military exercise in the EEZ of another State should inform the coastal State and others through a timely navigational warning of the time, date and areas involved in the exercise, and if possible, invite observers from the coastal State to witness the exercise".

[35] For a more extensive discussion on these issues see S. Bateman, 'Hydrographic surveying in the EEZ: differences and overlaps with marine scientific research' (2005) Marine Policy 163.

[36] Ship and Ocean Foundation (SOF) and East-West Center (EWC), *The Regime of the Exclusive Economic Zone: Issues and Responses,* A Report of the Tokyo Meeting, 19-20 February 2003, Honolulu, East-West Center, 2003, 7.

[37] See China's position announced by Lo Yu-Ju at the Third UN Conference on the Law of the Sea, 30th Meeting of the Third Commission, 14 September 1976, UN Doc. A/CONF.62/C.3/SR.30, 96, para 16.

Despite China joining UNCLOS, these positions have been implemented in domestic legal order, in 1996, with the *Provisions of the People's Republic of China on the Administration of Foreign-related Maritime Scientific Research*.[38]

In 1998, China also adopted the *Exclusive Economic Zone and Continental Shelf Act* with the aim, among other things, to control surveillance and research activities in waters under its jurisdiction. The most relevant articles of this law are Article 9, according to which foreign States carrying out marine scientific research within China's EEZ should comply first and foremost with the laws and regulations of China, and Article 12, which clarifies that if the Chinese government perceives that its laws and regulations concerning its EEZ are being violated, it has "the right to take the necessary investigative measures in accordance with the law and may exercise the right of hot pursuit".

For example, this law was directly implemented during the U.S. "spy plane" incident off Hainan in 2001 and a series of incidents involving U.S. "military survey" ships operating in South China Sea in 2002 (the *Bowditch* affair) and in 2009 (the *Impeccable* and the *Victorius* affairs).

Today, the provisions of the 1998 Act are complemented by the new China Coast Guard Law.[39]

Under the perspective of the Law of the Sea, while UNCLOS established a clear regime for marine scientific research, there is no specific provisions in UNCLOS for hydrographic surveying.

While marine scientific research activities require the prior authorization of the relevant coastal State in internal waters, the territorial sea and archipelagic waters,[40] the "freedom of scientific research" is ensured to all States on the high seas under Parts XIII of UNCLOS. Hydrographic surveying is listed along with marine scientific research, as an activity under the jurisdiction of the coastal State in the territorial sea,[41] and as a prohibited activity during innocent[42] and transit[43] passage, but there is no reference to hydrographic surveying elsewhere in UNCLOS. In particular, Part XIII of UNCLOS provides that coastal States have the exclusive right to regulate, authorize and conduct marine scientific research in their EEZ and on their continental shelf. It then establishes an implied consent regime[44] that allows other States and competent international organizations to

[38] *Provisions of the People's Republic of China on the Administration of Foreign-related Maritime Scientific Research* of 18 June 1996 (entered into force on 1 October 1996), <http://www.asianlii.org/cn/legis/cen/laws/potaofmsr735/>. Under this law, China has the right to take part in any scientific research carried out by other countries in the sea area under its national jurisdiction and to obtain the data and results thereof. Such data and results cannot be published or transferred without the prior consent of the coastal State. For more details on the marine scientific research in China's jurisdictional waters, see Keyuan Zu, 'Governing Marine Scientific Research in China' (2003) 34 Ocean Development & International Law 1; Nong Hong, 'China's Approach to Marine Scientific Research' (2021) The Korean Journal of International and Comparative Law 294.

[39] See *infra* paragraph 4 of this paper.

[40] Articles 19(2)(j), 21(1)9g), 40, 54 and 245 UNCLOS.

[41] Article 21(1)(g) UNCLOS.

[42] Article 19(2)(j) UNCLOS.

[43] Article 40 UNCLOS.

[44] Articles 246-252 UNCLOS.

proceed with a scientific research project in the EEZ or on the continental shelf under certain circumstances even though the consent of the coastal State may not have been forthcoming.

In 1992, China regulated hydrographic survey activities through the *Law on surveying and mapping*,[45] which subjects any such activity on its territory and in its maritime jurisdiction to the approval of the State Council, particularly those conducted by foreign organizations and individuals.[46].

This consent regime for such activities in an EEZ is controversial and knows different interpretations by the world community.[47] For example, the United States claims that while coastal State consent must be obtained in order to conduct marine scientific research in its EEZ, the coastal State cannot regulate hydrographic surveys or military surveys conducted beyond its territorial sea, nor can it require notification of such activities.[48] Similarly, the United Kingdom regards what it calls military data gathering (MDG) as a fundamental high seas freedom available in the EEZ.[49]

d) Freedom to lay submarine cables

The BRI is also regarded by China as a means for expanding its technology sphere of influence[50] across countries along the new Maritime Silk Road and for building the so-called "Digital Silk Road" (DSR).[51]

A vital component of this technological infrastructure is the submarine cable network for international communications (cables laid on the seabed of the oceans or buried under it). Thus, the importance of a solution for the maritime sovereignty disputes is also linked to the governance of the submarine

[45] Surveying and Mapping Law of the People's Republic of China of 28 December 1992 an revised on 29 August 2002, <http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383865.htm>.

[46] Ibid., Article 7.

[47] J. Ashley Roach, 'Marine Scientific Research and the New Law of the Sea' (1996) Ocean Development and International Law 59; G. Galdorisi and K. R. Vienna, *Beyond the Law of the Sea. New Directions for US Oceans Policy* (Praeger, 1997), 164.

[48] However, the United States does not assert the right of jurisdiction over marine scientific research within its EEZ but recognizes the right of other countries to assert that right. This was because of the U.S. interest in encouraging marine scientific research and avoiding any unnecessary burden. President's Ocean Policy Statement, 10 March 1983, as quoted in A.R. Thomas and James C. Duncan (eds), *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations,* International Law Studies Vol. 73, Naval War College, Newport, Rhode Island, 1999, p.44.

[49] Email dated 21 Nov 2003 from Mr. Chris Carleton, Head, Law of the Sea Division, United Kingdom Hydrographic Office.

[50] Through the DSR, "Chinese companies have quietly been eroding U.S., European and Japanese dominance over […] the undersea cable market" (M. Tobin, 'US-China tech war's new battleground: undersea internet cables', South China Morning Post, 14 December 2019, <https://www.scmp.com/week-asia/politics/article/3042058/us-china-tech-wars-new-battleground-undersea-internet-cables>.

[51] For example, in September 2018, the Forum on China-Africa Cooperation (FOCAC) included in the FOCAC Beijing Action Plan (2019-2021), among other issues, a call for greater cooperation between China and African countries on undersea cables; see <http://focacsummit.mfa.gov.cn/eng/hyqk_1/201809/t20180912_5858585.htm>.

communication cables. Of the 378 maritime cables currently operating worldwide, 23 are under the Pacific.[52] The quantity and closeness of many of these cables makes the South China Sea a network choke point and whoever exercises its sovereignty and jurisdiction over this maritime space has the control over a part of the global submarine cable network.

According to UNCLOS, in their territorial sea, coastal States exercise sovereignty and may establish conditions for cables entering these zones,[53] while the freedom to lay submarine cables is proclaimed over the continental shelf[54] and in EEZ.[55] Thus, coastal States could not request the coordination of a cable route in the EEZ or over the continental shelf from their competent authorities and they would not have the right to adopt laws and regulations on conditions for carrying out cable route surveys for laying a cable outside their territorial sea.

However, UNCLOS maintains a margin of ambiguity asserting that the freedom to lay cables was subject to the right of the coastal State to take "reasonable measures" for the exploration of the continental shelf and the exploitation of its natural resources[56] and some coastal States have profited from this margin of interpretation.[57]

Indeed, under Chinese law, it is significant to note that the lying of submarine cables is subject to the coastal State's permitting and regulation, not only in its territorial sea, but also over its continental shelf and in its EEZ.[58] This aptitude reflects China's position during negotiations of UNCLOS, which proposed to make laying of submarine cables and pipelines in EEZ and over continental shelf subject to the coastal States' consent.[59]

The different implementation of the pertinent international rules in the domestic legal order of the coastal States is a problem for the cable industry and the concerns increase when it obtains permits in waters with overlapping maritime boundaries, with additional delay and costs, conflicting requirements and the potential for conflicts with other countries asserting their claims over those waters.

---

[52] Tobin (n 50).
[53] Article 79(4) UNCLOS.
[54] Article 79 UNCLOS.
[55] Article 58 UNCLOS.
[56] Article 79(2) UNCLOS. However, this provision does not affirm the right of the coastal State to take reasonable measures for the prevention, reduction and control of pollution from cables; this is confined to only pipelines.
[57] See, for example, domestic legislation of India, Malaysia, Mauritius, Myanmar, Pakistan and several other States; see R. Churchill, 'The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention' in A. Elferink (ed.), *Stability and change in the law of the sea: the role of the LOS Convention* (Martinus Nijhoff Publishers 2005), 91 ff., at 140.
[58] See *Regulations on the Management of Laying Submarine Cables and Pipelines* of 1st March 1989 (for the laying of submarine cables in inland seas, territorial seas and continental shelves under the jurisdiction of China) and Article 11 of the Exclusive Economic Zone and Continental Shelf Act.
[59] 'Working paper submitted by the Chinese delegation: general, principles for the international sea area (A/AC.138/SC.II/L.34*)' in the *Report of the Committee on Peaceful uses of the Sea-Bed and the Ocean Floor beyond the limits of National Jurisdiction*, vol. III (General Assembly Official Records, Supplement No. 21 (A/9021), 1973), 71 ff, at 73 (para 2(4)) and 74 (para 3).

4. Some Preliminary Remarks on the New China Coast Guard Law

In January 2021, China adopted a new Coast Guard Law (CCG Law) to conduct "activities of maritime rights protection and law enforcement in the waters under the jurisdiction of the People's Republic of China".[60] This law received some criticism on a number of unclear points and due to its alleged incompatibility with the Law of the Sea.

First, the law does not define the concept of "waters under the jurisdiction" of China. A plausible definition could be found in a draft released on 4 November 2020 for public comment, where these waters were described as "the PRC's internal waters, territorial sea, contiguous zone, exclusive economic zone (EEZ), continental shelf and other sea areas under the jurisdiction of the PRC". This implies that CCG Law should apply over all the waters claimed by China in in the East and South China Seas surrounded by the Nine-dash Line. According to some Chinese experts, waters under the jurisdiction of China should cover 3 million Km^2, 50% of which is disputed among neighbouring countries.[61]

Most of the claimant countries in the China Seas have expressed their opposition to this law, as it has exacerbated tensions in regional disputes and affects the interests of other claimants, such as Japan in relation to the dispute over the Senkaku Islands, or such as Vietnam, the Philippines and Taiwan in relation to disputes over the Spratly Islands, or Indonesia in relation to the dispute over a portion of the Indonesian EEZ claimed by China under the Nine-dash Line.

In particular, Article 20 of this law may affect economic activities at sea in areas under dispute, because it states:

> "Where, without the approval of a competent authority of China, a foreign organization or individual constructs a building or structure, or lays a fixed or floating device of any kind in the waters or island under the jurisdiction of China, a coast guard agency shall have the power to order the foreign organization or individual to stop the said violation or order removal within a specified period; and if the foreign organization or individual refuses to do so, the coast guard agency shall have the power to effectuate stoppage or force the removal".

The clear aim of this norm is to protect the rights to natural resources in all the waters under China's jurisdiction, in particular in its EEZ. A very recent example of the risks of this law is highlighted by the case of the Indonesian drilling for oil and gas at the Tuna Block in the North Natuna Sea[62] followed by a formal protest

[60] Article 3 CCG Law. Note, in March 2018, the control of Chinese Coast Guard (CCG) was transferred from the State Oceanic Administration to the Central Military Commission, making CCG the hierarchical equivalent of the People's Liberation Army (PLA).

[61] Qi Lianming, Zhang Xiangguo and Li Xiaodong, *A Comparative Studies of Island Protection and Development Policies in China and Other Countries* (Chinese ed., Ocean Press 2013), 107.

[62] In July 2017, Indonesia renamed the northern reaches of its EEZ in the South China Sea as the "North Natuna Sea". It should be noted that Indonesia insists it's a non-claimant State in the South China Sea. See T. Allard and B. C. Munthe, 'Asserting sovereignty, Indonesia renames part of

of the Chinese government and a request to cease any activities in the area claimed as its sovereign territory.[63]

Two other provisions of the new law are a matter of concern; Article 21, which stipulates that if a foreign warship or government vessel violates China's domestic law in waters where China claims jurisdiction, the CCG will take enforcing measures, up to and including forced eviction and towing; and Article 22, which allows the CCG to use weapons against foreign organizations and individuals that infringe on China's national sovereignty, sovereign rights and jurisdiction at sea.

While it can be assumed that these provisions were designed to be applied to situations similar to those of the U.S. Freedom of Navigation operations (FONOPs) in the Chinese territorial sea, EEZ and others maritime areas under dispute, the norms lack a real legal basis in international law. Indeed, under Articles 32 and 95 UNCLOS warships and non-commercial government vessels are exempt from the exercise of jurisdiction by anyone other than the flag State (so-called "sovereign immunity") and UNCLOS does not have a provision for taking coercive measures against those types of vessels as law enforcement.[64]

5. Chinese Concerns over the Straits of Malacca and Singapore

The Straits of Malacca and Singapore serve as the major international route linking the South China Sea with the Indian Ocean and are of strategic interest to China for its increasing dependence on oil imported from the Middle East. That is why, in 2003, Chinese President Hu Jintao introduced the concept of the "Malacca Dilemma" to describe Beijing's concern that if the Malacca Straits or certain other Southeast Asian sea-lines were blocked, China would suffer severe trade and energy supply disruptions.

The Straits of Malacca and Singapore are regarded as a single strait according to the definition of a "strait used for international navigation" as specified in Articles 37 and 38(1) UNCLOS. The main problem of concern for the bordering States – Indonesia, Malaysia and Singapore – has always been the threat posed by the passage of oil tankers and other large tankers to the marine environment.

Article 43 UNCLOS (the so-called "burden sharing" clause) provides for cooperation among user States and States bordering a strait on the provision of navigational and safety aids, and the prevention of marine pollution in a strait, but its implementation remains problematic.

South China Sea', Reuters, 14 July 2017, <https://www.reuters.com/article/us-indonesia-politics-map-idUSKBN19Z0YQ>.

[63] Tom Allard, Kate Lamb, Agustinus Beo Da Costa, 'EXCLUSIVE China protested Indonesian drilling, military exercises', Reuters, 1 December 2021 <https://www.reuters.com/world/asia-pacific/exclusive-china-protested-indonesian-drilling-military-exercises-2021-12-01/>.

[64] Article 30 UNCLOS provides only that a warship in territorial waters that fails to comply with the coastal State's laws and regulations regarding navigation and ignores requests to comply with such laws may be asked to leave immediately. For a more detailed comment about the new CCG Law, see R. Pedrozo, 'Maritime Police Law of the People's Republic of China' (2021) 97 International Law Studies 465.

Among the user States, while Japan has a long history of cooperation with Indonesia, Malaysia and Singapore through the Malacca Strait Council (MSC) and the Revolving Fund [65], other user States such as the United States, China, South Korea and Taiwan have been reluctant to contribute to the costs. On the other side, while the interests of the littoral States frequently do not coincide, both Malaysia and Indonesia are sensitive to any attempt to "internationalize" management of the Malacca-Singapore Straits as was demonstrated by their negative reaction to the US proposal of the Regional Maritime Security Initiative (RMSI) in 2004.[66]

The issue of burden sharing in the management of the Straits of Malacca and Singapore was also debated in three meetings held between 2005 and 2007 and organised by the International Maritime Organization (IMO); the result was the establishment of the *Cooperative Mechanism between the Littoral States and User States*.[67]

Today, the ongoing incidence of piracy and armed attacks on ships in the straits and the threat of maritime terrorism have focussed attention on extending of cooperation to cover the security of shipping. Thus, the littoral States are now challenged to increase their patrol and surveillance activities in the straits against the threats to the security of navigation,[68] but they continue to avoid international cooperation as exemplified by the absence of Indonesia and Malaysia from the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP).[69]

China has a direct economic interest in the management of the Straits of Malacca and Singapore, them being the main gateway for its oil supply chain. Consequently, China has adopted two parallel strategies in this area.

---

[65] The Revolving Fund was established on 11 February 1981 through a Memorandum of Understanding (MOU) signed between Indonesia, Malaysia, Singapore and the Malacca Strait Council (MSC).

[66] The RMSI was launched by the United States in May 2004 with the intention of establishing a cooperative regime for maritime security in the Malacca Straits; major elements of the RMSI included increased situational awareness, information sharing, a decision-making architecture and interagency cooperation. For more details on the RMSI see ADM Tom Fargo USN, Commander, US Pacific Command, Address to MILOPS Conference in Victoria, British Columbia, 3 May 2004, <https://www.hsdl.org/?view&did=446531>).

[67] The Cooperative Mechanism Between the Littoral States and User States on Safety of Navigation and Environmental Protection in the Straits of Malacca and Singapore, IMO/SGP 2.1/1/Rev. 1, 4 September 2007.

[68] In 2004, Indonesia, Malaysia and Singapore launched the Malacca Straits Patrol (MSP), a set of practical co-operative measures to ensure the security of the SOMS; it comprises the Malacca Straits Sea Patrol (MSSP), the "Eyes-in-the-Sky" (EiS) Combined Maritime Air Patrols, as well as the Intelligence Exchange Group (IEG). In 2005, Thailand joined MSP as an observer and, in 2008, as a full member.

[69] The contracting Parties to ReCAAP are Bangladesh, Brunei, Cambodia, China, Denmark, Germany, India, Japan, South Korea, Laos, Myanmar, the Netherlands, Norway, the Philippines, Singapore, Sri Lanka, Thailand, the United Kingdom and Vietnam. For an analysis of ReCAAP, see M. Seta, 'The Asian Contribution to the Development of International Law: Focusing on the ReCAAP" (2019) 25 Asian Yerabook of International Law 65.

Above all, it has participated in the relevant initiatives regarding the international cooperation, in particular as full member of the Cooperative Mechanism and of ReCAAP, and it has strengthened the bilateral maritime cooperation with Indonesia (MoU of 25 April 2005), Malaysia (MoU of 25 August 2006) and Singapore (establishing a mechanism for exchange on the security of the Malacca Strait in 2006).

On the other side, it has tried to create an alternative shipping route to the navigation through the Straits of Malacca and Singapore, supporting the fascinating idea of building a canal across the Kra Isthmus in Southern Thailand. However, this project was definitely cancelled by the Thai government in September 2020 and substituted by the project of a railway and a pipeline across the isthmus.[70] Thus, the "Malacca Dilemma" remains a major source of concern for China and for navigation along the new Maritime silk Road.

6. Final Remarks

The ambitious project of building a new Maritime Silk Road was completed, in 2018, with the launch of the so-called "Polar Silk Road" by the Chinese government,[71] to develop the Arctic shipping routes, particularly the Northern Sea Route along the Russian coast in the Arctic Ocean.

Due to the melting of the ice, the Arctic region's vast natural wealth has been recognized as a new economic opportunity, leading to a rise in the claims of coastal States. Indeed, the region contains almost one-fourth of the world's unexplored oil and gas resources, in addition to other natural resources and the need to seize these resources has increased the claims of coastal States.[72]

China's proclamation of being a "near-Arctic State",[73] to strengthen its legal right to participate in the geopolitical developments, clearly advertises its ambitions to expand its energy supply chains and use the Polar Silk Road to link its enormous commercial and infrastructure projects in Asia and Europe to the Arctic region.

Although UNCLOS is applied in the Arctic region,[74] the challenge for the coming decades is to build a new governance that goes beyond Article 234

---

[70] See 'Thailand mulls replacing $28bn Kra canal idea with a railway', Global Construction Review, 3 September 2020, <https://www.globalconstructionreview.com/thailand-mulls-replacing-28bn-kra-canal-idea-railw/>.

[71] State Council Information Office of the People's Republic of China, 'China's Arctic Policy', January 2018, <https://english.www.gov.cn/archive/white_paper/2018/01/26/content_281476026660336.htm>.

[72] See A. Caligiuri, 'Les revendications des Etats côtiers de l'océan arctique sur le plateau continental au-delà de 200 milles marins'0 (2008) Annuaire du Droit de la Mer 273.

[73] Ministry of Foreign Affairs of the People's Republic of China, 'China's View on Arctic Cooperation', 30 July 2010, <https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/tyfls_665260/tfsxw_665262/201104/t20110402_599888.html>.

[74] See Arctic Council, Ilulissat Declaration of 28 May 2008, <https://arcticportal.org/images/stories/pdf/Ilulissat-declaration.pdf>.

UNCLOS,[75] and this goal seems to be materialising in the Arctic Council[76] where China is a permanent observer since 2013.

[75] Article 234 (Ice-covered areas) UNCLOS: "Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence".

[76] See F. Borgia, *Il regime giuridico dell'Artico: una nuova frontiera per il diritto internazionale* (Editoriale Scientifica 2012); C. Cinelli, *El Ártico ante el derecho del mar contemporáneo* (Tirant lo Blanch 2012).

China's Commitment to Maritime Affairs

GIANLUCA SAMPAOLO* – FRANCESCA SPIGARELLI**

SUMMARY: 1. The Reference Scenario. – 2. China's Initiatives in Maritime Affairs. – 2.1. The BRI in the Context of China's 14th Five-Year Plan. – 2.2. China' Special First Five-Year Plan for National Marine Ecological Environment Protection. – 2.3. UN Ocean Decade Actions's Transformative Programmes led by China. – 3. Final Remarks.

1. The Reference Scenario

In recent years, China has increasingly gained momentum with regards to maritime affairs. Announced in 2013, the "Belt and Road Initiative" (BRI)[1] stands as the Chinese footprint through which China will make a significant contribution to global development.[2] More recently, since the launch of the UN Decade of Ocean Science for Sustainable Development 2021-2030, various initiatives have been undertaken by China in order to uphold the cooperation-based commitment to the ecological protection of oceans and towards achieving common and shared objectives to benefit global community.

Chinese President Xi Jinping has attached great importance to the ecological protection of oceans. The ocean is considered of great significance by Chinese political leaders to the survival and development of human society. It gave birth to life, connects the world, facilitates development and, as such, we need to care for the ocean as we treasure our lives.[3] President Xi Jinping has, on various occasions, called for strengthening cooperation in protecting the oceans, and his proposal of building a maritime community with a shared future has gained worldwide resonance.[4] Oceans are of great significance to the survival and development of humanity as they breed life, connect the world and promote development, Xi said on 23 April 2019, during the meeting with the heads of foreign delegations invited to multinational naval events marking the 70th founding anniversary of the Chinese People's Liberation Army Navy.[5] As reported by Xinhua, Xi said that the blue planet humans inhabit is not divided into islands by the oceans, but is connected by the oceans to form a community with a shared future, where people of all countries

* Industrial PhD Candidate in Blue Economy, University of Macerata.
** Full Professor of Applied Economics and Director of China Center, University of Macerata.

[1] The BRI refers to the Silk Road Economic Belt and the 21st Century Maritime Silk Road.

[2] National Development and Reform Commission, Ministry of Foreign Affairs and Ministry of Commerce, People's Republic of China, *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road*, 28 March 2015, <http://english.www.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm>.

[3] 'Quotable Quotes: Xi Jinping on ecological protection of oceans', Xinhua, 8 June 2021, <http://www.xinhuanet.com/english/2021-06/08/c_139995460.htm>.

[4] 'Xiplomacy: Xi's proposal on building maritime community with shared future receives recognition', Xinhua, 8 June 2021, <http://www.xinhuanet.com/english/2021-06/08/c_139996031.htm>.

[5] Ibid.

share weal and woe.[6] Moreover, on the relationship between the oceans and humanity he once commented that the ocean does not separate our blue planet into isolated continents; instead, it links the peoples of all countries to form a global community of shared future that remains bound together through thick and thin.[7]

At present, ocean-based cooperation in market, technology, information, culture, and other areas is steadily deepening, Xi said, noting that the reason for China to propose jointly building the 21st Century Maritime Silk Road is to facilitate maritime connectivity, pragmatic cooperation in various fields, and the development of the blue economy, as well as to promote the integration of maritime cultures and to improve maritime wellbeing. President Xi bolstered this concept by quoting a Chinese saying which goes by: "the ocean is vast because it admits all rivers (*hǎinàbǎichuān* 海纳百川)". Whenever a problem crops up, countries concerned should always hold deliberations in good faith, rather than resort to the use or threat of force at will.[8] George Tzogopoulos, director of the EU-China programmes and senior research fellow at the International Center for European Studies, strengthened this argument by affirming that the Belt and Road Initiative contributes to organic interconnectivity across the world.[9] However, he furtherly argued that China's vision about maritime development goes beyond this kind of connectivity into issues of cardinal significance that require international cooperation under the UN framework, which include regional peace, biodiversity, environmental protection, preservation of natural resources and safe transportation (Xinhua 2021b).[10]

Accordingly, since the launch of the "Ocean Decade", various initiatives have been undertaken by China in order to uphold the abovementioned cooperation-based commitment and towards achieving common and shared objectives to benefit global community.

The year 2020 was an extremely challenging year for China and the world. The COVID-19 pandemic has posed a great threat to the lives, health, safety and wellbeing of people. It has disrupted global efforts to achieve the 2030 Agenda for Sustainable Development and threatened to reverse years of progress on the attainment of the Sustainable Development Goals (SDGs). It was critically important for China as it was the last year for the implementation of the 13th Five-Year Plan for Economic and Social Development and the foundation year for the preparation of the 14th Five-Year Plan. Therefore, the Chinese People's Political Consultative Conference and the National People's Congress of 2020, often dubbed as "Two Sessions", were extremely significant in the juncture of two FYPs and amid the COVID-19 crisis. Response to COVID-19 and accelerating the post-

[6] Ibid.
[7] 'Xi Focus: Building a maritime community with shared future for the blue plane', Xinhua, 7 June 2021, <http://www.xinhuanet.com/english/2021-06/07/c_139994197.htm>; 'Xi Focus-Quotable Quotes: Xi Jinping on building maritime community with shared future', Xinhua, 23 April 2021, <http://www.xinhuanet.com/english/2021-04/23/c_139900577.htm>.
[8] Ibid.
[9] See (n 4).
[10] Ibid.

pandemic recovery thus became a predominant topic during the "Two Sessions" of 2020.

At the end of 2020, China eradicated extreme poverty by lifting the remaining 5.51 million rural poor out of poverty.[11] Such a result cannot be achieved without sound economic development. In fact, China's economy grew by 2,3%, presenting itself as the only major economy with a positive economic growth last year. Moreover, in the pursuit of long-term sustainable development, China also worked towards turning the swift recovery to a green one, in line with its consistent efforts in prioritizing the protection of the environment. In the UN General Assembly of September 2020, China's President Xi Jinping announced that China would adopt more vigorous policies and measures and pledged to have CO2 emissions peak before 2030 and achieve carbon neutrality before 2060.[12]

Globally, China plays an increasingly significant role in international development and cooperation. South-South and Triangular Cooperation (SSTC), and the BRI remain major mechanisms supporting China's goal of helping other developing countries to implement the 2030 Agenda for Sustainable Development. China has also developed a strategy in international health cooperation to tackle the COVID-19 crisis, including making Chinese vaccines a global public good. These national development agendas, including COVID-19 response, poverty reduction, economic and social sector reform, green recovery and ecological restoration, and international development cooperation strategy are aligned with the three priority areas of the UN Development Assistance Framework (UNDAF) 2016-2020 for the People's Republic of China: 1) Reduction of Poverty and Equitable Development; 2) Improved and Sustainable Environment; and 3) Enhanced Global Engagement.[13]

2. China's Initiatives in Maritime Affairs

2.1. The BRI in the Context of China's 14th Five-Year Plan

Evidence on China's interest in maritime affairs are shown in the *Five-Year Plan for National Economic and Social Development* since 2011 (hereinafter referred as FYP or the Plan). As analyzed by Sampaolo et al., the 12th FYP (2011–2015) represents an unprecedented step for China to release a "Five-Year-Plan" in which "developing the ocean economy" is presented as a major national strategy for economic development and where scientific planning should be promoted for supporting the marine industries. Later, the 13th FYP restates the importance of ensuring the development of Blue Economy.[14]

---

[11] United Nations, *United Nations in China Annual Report 2020*, 14 May 2021, <http://www.un.org.cn/uploads/20210517/19f5a6408a897f32a22542c7b4a91eb6.pdf>.
[12] Ibid.
[13] United Nations, *United Nations in China*, 27 March 2018, <http://www.un.org.cn/uploads/20180326/ec417ff83a4c17070d7d6c893ceb75f3.pdf>.
[14] G. Sampaolo, D. Lepore and F. Spigarelli, 'Blue economy and the quadruple helix model: the case of Qingdao' (2021) 23 Environment, Development and Sustainability 16803.

2021 marks the beginning of China's 14th FYP covering the years 2021-2025 (中华人民共和国国民经济和社会发展第十四个五年规划和 2035 年远景目标纲要), as passed by the Two Sessions last March.[15] It is particularly noteworthy as it traces the first five years of the new Chinese development path towards achieving its first 100 years' goal as a Xiaokang Society (小康社会), generally translated as a moderately prosperous society, and towards the achievement of its second 100 years' goal: the 100-year period since the foundation of the People's Republic of China (PRC). The next five years also constitute a critical period of strategic opportunities for China to explore and test new development models amid significant changes both domestically and internationally. Although the 14th FYP contains relatively few quantitative targets, it details a vast array of near-term PRC economic, trade, S&T, defense, political, social, cultural, environmental, and other policy priorities. The 14th FYP differs from past plans in that it also includes a short section on "long-range objectives" for 2035.

With regard to the BRI, Article XLI of the 14th FYP specifically addresses the promotion of high-quality "Belt and Road" development. Section I is centered around the strengthening of the linkage of development strategies and policies. Amongst others, the Plan will promote the docking of strategies, plans, and mechanisms, and strengthen the linkage of policies, rules, and standards. It will strengthen cooperation in the areas of financing, trade, energy, digital information, agriculture, and other areas. It will promote effective dovetailing and synergy between the BRI and regional and international development agendas. Innovate financing cooperation frameworks, special loans for the construction of the "Belt and Road" and the Silk Road Fund will be brought into play. The Plan will also establish and improve the BRI financial cooperation network, promote the interconnection of financial infrastructure, and support the joint participation of multilateral and national financial institutions in investment and financing.

Section II focuses on the promotion of infrastructure interconnection. It is highlighted that the Plan will promote the four-in-one connectivity of land, sea and sky networks, take "six corridors, six roads, many countries and many ports" as the basic framework, build an interconnection network led by economic corridors such as the New Asia-Europe Continental Bridge, with major corridors such as the China-Europe freight trains, the new land and sea corridors and information highways as the backbone, and railroads, ports and pipeline networks as the backbone, and create a new international land and sea trade corridor. The new international land and sea trade corridor will be built with the support of railways, ports and pipeline networks. The Plan advocates to focus on key corridors and key cities, promote the construction of major cooperation projects in an orderly manner, and integrate the goals of high quality, sustainability, risk resistance, reasonable price and inclusiveness into the whole process of project construction. Critically, it will improve the quality of China-Europe freight trains and promote the

[15] The State Council of the People's Republic of China, *Outline of the People's Republic of China 14th Five-Year Plan for National Economic and Social Development and Long-Range Objectives for 2035*, 12 March 2021; see the following translation <https://cset.georgetown.edu/publication/china-14th-five-year-plan/>.

development of international land transport trade rules. Furthermore, it will expand the influence of the "Maritime Silk Road" as a brand and promote Fujian and Xinjiang provinces to build core areas of the BRI. Finally, it will promote the construction of Belt and Road spatial information corridor and the building of the "Air Silk Road".

Section III emphasizes the deepening of pragmatic cooperation in trade and investment. The Plan will promote the optimization and upgrading of trade and investment cooperation with the Belt and Road countries, and actively develop the Silk Road e-commerce. It will deepen international production capacity cooperation, develop third-party market cooperation, build a mutually beneficial and win-win supply chain cooperation system, and expand two-way trade and investment. It will adhere to enterprise-oriented and market-oriented, follow international practices and the principle of debt sustainability, and improve the diversified investment and financing system. It will develop an innovative financing cooperation framework and give full play to the role of special loans for the joint construction of the "Belt and Road", the Silk Road Fund, and other sources of funding. The Belt and Road financial cooperation network will be established and improved, the interconnection of financial infrastructure will be promoted, and the joint participation of multilateral and national financial institutions in investment and financing will be supported. Finally, the Plan will improve the Belt and Road risk prevention and control and security system, strengthen the safeguards of legal services, and effectively prevent and resolve various risks.

Lastly, Section IV highlights the building of bridges for mutual learning and appreciation of civilizations. The Plan will deepen humanistic cooperation in the fields of public health, digital economy, green development, S&T education, and culture and art, strengthen interchanges between parliaments, political parties, and private organizations, intensify exchanges between women, young people, the disabled, and other groups, and form a diversified and interactive humanistic exchange pattern. Moreover, it will promote the implementation of the "Belt and Road" S&T innovation action plan and build a Digital Silk Road and an Innovative Silk Road. The Plan will also strengthen exchanges and cooperation in climate change response, maritime cooperation, wildlife protection, and desertification prevention and control and promote the construction of a Green Silk Road. Finally, it will actively carry out cooperation with countries participating in "Belt and Road" construction in healthcare and infectious disease prevention and control and build a Health Silk Road.

2.2. China' Special First Five-Year Plan for National Marine Ecological Environment Protection

President Xi Jinping is now more focused than ever on turning China into a maritime power. He has repeatedly made instructions on this, and it has been included as part of the "two centennial goals".[16] Protecting the marine environment

[16] 邓志慧 (Deng Zhiyi) and 钟焯 (Zhong Chao). '世界海洋日，感受习近平建设海洋强国的"蓝色信念' (On World Ocean Day, Xi Jinping's "blue faith" in building a maritime power), People's

has been an integral part of this grand strategy. As a matter of fact, the above selected excerpts of the 14th FYP are consistent with a broader agenda that Chinese policymakers have set when it comes to the marine domain. On the occasion of the 19th National Congress of the Chinese Communist Party in 2017, creating a "Beautiful China" by 2035 has become a goal to achieve also including a dedicated plan for the environment.[17]

To this regard, on March 25, 2020, following President Xi Jinping's instructions regarding the relevance of carrying out solid investigations and research, finding out noteworthy problems as well as scientifically planning target indicators, main tasks, policies and measures, the Ministry of Ecology and Environment (MEE) held a working meeting on the selection of pilot plans useful to help with the preparation of the "*14th Five-Year Plan for National Marine Ecological and Environmental Protection*" (全国海洋生态环境保护"十四五"规划), which is expected this year.[18] To reveal it, the MEE has called upon Jinzhou, Lianyungang, Shanghai and Shenzhen to draft their own pilot plans.[19] The Bohai Sea, Yellow Sea, East China Sea and South China Sea are the seas where those four cities lie on, from north to south. According to The Paper's report, over 6,000 locations have been surveyed for the drafting of their own FYP, including 784 coastal bays.[20] The meeting's participants pointed out that the "*14th FYP for National Marine Ecological and Environmental Protection*" is the first FYP in the field of marine ecological environment protection after institutional reforms, and it is a key document to guide marine ecological environment protection in the coming period.[21] In fact, Shi explains that parts of China's coast have been damaged over the years by land reclamation, pollution and other factors.[22] Over the past 70 years, human activity has gradually chipped away at China's natural coastlines, with only about 33% of the coast remaining undamaged in 2014, according to research using satellite imagery.[23] That has reduced marine biodiversity and prevented people coming into close contact with the ocean. This means they have been "near, but disconnected, from the ocean, or having only low-quality experiences" of it, according to Guan Daoming, former director of the MEE's National Marine Environmental Monitoring Centre, which is in charge of technical aspects of drafting the FYP.[24]

Daily, 7 June 2020, <http://politics.people.com.cn/n1/2020/0607/c1001-31738010.html>; see also (n 3).

[17] Shi Yi, 'What to expect from China's big plan for the marine environment', China Dialogue Ocean, 10 August 2021, <https://chinadialogueocean.net/18133-chinas-five-year-plan-for-marine-environment/>.

[18] Ibid.

[19] Ministry of Ecology and Environment of the PRC, *The Pilot Plan for the 14th Five-Year Plan for Marine Ecological and Environmental Protection has been officially launched. The Four Cities Shanghai, Shenzhen, Jinzhou and Lianyungang took the lead in the pilot project* (2020).

[20] The Paper, 'How to draft the "14th Five-Year Plan" for the protection of rivers, lakes and bays with more than 7,000 people', 2020.

[21] Ministry of Ecology and Environment of the PRC (n 19).

[22] Shi Yi (n 17).

[23] Ibid.

[24] Ibid.

This is the reason why the "Beautiful Bay" campaign will allow people to enjoy the sea. This campaign will look at water quality, as well as the recovery of marine life and habitats and the protection and restoration of natural coastlines to ensure all 1,467 of China's bays are "beautiful" by 2035, in line with the overall 2035 Beautiful China goal.[25] In compliance with the MEE, the "Beautiful Bay" campaign will feature as a target in the special 14th FYP for National Marine Ecological and Environmental Protection – the first such document to be drafted – with all 1,467 of China's ocean bays to be certified by 2035. Improving the environment in Chinese waters is also of benefit to the global ocean (Jiang and Shi 2021).[26]

Even if they were not included in the survey, the city of Dalian and Zhejiang Province have released their own marine environment protection FYPs, both including types of indices for marine species based on rate of retention of natural coastline, length of restored coastline, and area of wetlands restored or protected.[27] In particular, Dalian's plan sets anticipatory targets for numbers of spotted seal and black-faced spoonbill, both of which are local "celebrity species" and breed in the Bohai Sea. The targets will mean ensuring the reefs and wetlands where the species breed are protected from human interference, and that they have better feeding grounds. The next five years will see China continue with ecological restoration projects designed to boost biodiversity. The upcoming marine environment FYP will set up restoration projects in 105 bays, improving 48 habitats for key species, as stated by Zhang Zhifeng, also deputy director of the MEE's Department of Marine Ecology and Environment.[28] Some wetland restoration projects have come in for criticism. In Panjin, Liaoning, migrating birds have long used the intertidal zone as a stopping place, but almost all of this has been taken over by aquaculture farms. A project is trying to turn these farms back into beaches. But when Zhou Haixiang, a member of the Chinese National Committee for Man and the Biosphere Programme, visited he found the restored areas tended to be further away from the coast and were still surrounded by the cofferdams used to enclose aquaculture farms, meaning tides did not rise and fall naturally. "And many restoration projects focus on improving the scenery, rather than the environment," said Zhou as reported by Shi.[29] As regards the Zhejiang Province, the 14th FYP for marine environment would research marine carbon sink ecosystems province-wide, looking at their distribution, condition and potential, with four cities to run blue carbon trial projects. Zhejiang, Dapeng New District and the Shandong city of Weihai are all preparing to develop "blue carbon" schemes. Wang Hong, vice minister at the Ministry of Natural Resources and director of the State Oceanic Administration, recently said that alongside the Intergovernmental Panel on Climate Change's identification of mangrove swamps, seagrass meadows and salt marshes, China plans to add other marine carbon sinks such as fisheries and marine microorganisms

[25] Ibid.
[26] Jiang Yifan and Shi Yi, 'The ocean in China's 14th Five Year Plan', China Dialogue Ocean, 8 April 2021, <https://chinadialogueocean.net/16944-ocean-china-14th-five-year-plan/>.
[27] The full texts of the FYPs of the city of Dalian and Zhejiang Province can be accessed at <https://www.dl.gov.cn/jsurvey/jsurvey/questionnaire/jsurvey_931.html>.
[28] Shi Yi (n 17).
[29] Ibid.

that function as "biological pumps", storing carbon in the deep sea.[30] Zhao Peng, associate researcher at Hainan University's State Key Laboratory of South China Sea Marine Resource Utilization, says that China has not yet done enough basic research and data-gathering on marine carbon. Carbon sequestration potential varies significantly across time and region, and depends on types of vegetation, climate and environmental impacts, so he thinks there isn't enough data yet to include marine carbon in China's work to comply with climate change treaties. "Carbon sequestration for climate change mitigation is only one small part of the ecological services provided by marine ecosystems," he says. "Marine carbon has an important role to play in our adaptation to the negative effects of climate change. We should develop a comprehensive understanding of it, and avoid exaggeration".[31]

These FYPs at both the city and province levels along with the expectations for the 14th FYP for National Marine Ecological and Environmental Protection are all clear signs of China's plans to become a "maritime power" also against the backdrop of stepping up as a major and global player in the fight against climate change. Therefore, great expectations are building up with China's increasing role in the protection of the marine environment.

2.3. UN Ocean Decade Actions's Transformative Programmes led by China

Against the backdrop of the "Decade Actions", the "Ocean Decade" has endorsed three transformative programmes developed by global partnerships of ocean scientists, governments and industry to enhance coastal resilience, for both humans and ecosystems.[32] The three programmes have been endorsed as part of the first set of flagship Decade Actions of the Decade that will contribute to achieving the vision of the Decade of the 'science we need for the ocean we want'. Specifically, they are based on the premises that over 40% of the global population lives within 100km of the coast, and this trend is on the rise. In the coming decades the majority of coastal dwellers will live in increasingly densely populated urban areas, which are already subject to rising sea levels, heightened storm intensity and frequency, and elevated temperatures. The results will be flood damage, erosion, infrastructure damage, and greater pressures on social and health services due to increased environmental hazards. Concentrating the population in such narrow coastal areas requires quick action to make coastal ecosystems and communities worldwide more resilient to the changes underway.

As such, being China particularly sensitive to these issue and, at the very same time, being such issues of particular interest and concern to China with regard to the huge migration flows and concentration of extensive amounts of population in narrow coastal areas – as a result of a the urbanization process and policy started in the early '80s –, Chinese universities stepped up in the lead of two out of the three

[30] For more insights on biological pumps please see <https://chinadialogueocean.net/17840-cold-fish-the-global-cooling-effect-of-ocean-life/>.
[31] Shi Yi (n 17).
[32] UNESCO, *Enhancing Coastal Resilience during the UN Ocean Decade*, 31 August 2021, <https://ioc.unesco.org/news/enhancing-coastal-resilience-during-un-ocean-decade>.

transformative programmes based on ocean knowledge to help current and future coastal communities cope with this massive challenge.

The first programme is "Mega-Delta Programme".[33] Many populated coastal areas include deltas and estuaries which provide critical habitat for many species of bird, mammal, fish and other wildlife. They are also important for tourism, fisheries and recreational activities and serve as natural filters against pollutants and can act as nature-based solutions in the fight against climate change. Delta environments are threatened by climate impacts such as erosion, flooding, and deteriorating habitats, but their health is crucial to the resilience of communities. Led by the State Key Laboratory of Estuarine and Coastal Research of East China Normal University, intends to build up a comprehensive picture of delta dynamics to inform human development, and conservation strategies. Two deltaic habitats of particular importance are salt marshes and mangrove forests. They stabilize sediment reducing the risk of flooding and preventing erosion; provide habitat for other marine species important for biodiversity, subsistence and commercial livelihoods; act as a carbon dioxide sink; and help counteract the effects of chemical pollution.

The second programme is the Global Estuaries Monitoring (GEM).[34] Urban coastal areas are major sources of these marine contaminants such as pharmaceuticals, but our understanding of pollutant distribution requires improved monitoring systems. The Global Estuaries Monitoring (GEM) Decade Programme, led by the City University of Hong Kong, will work closely with scientists, policy makers, and pharmaceutical companies around the world. By training a global network of scientists in sampling, processing, and analyzing estuary data for contaminants, and collaborating with relevant stakeholders, this programme will support better knowledge and management of polluting industries.

Together, these programmes constitute the first building blocks of the Decade. They are supposed to lead a global Community of Practice throughout the Decade that facilitates the co-design and co-delivery of initiatives to increase ocean knowledge-based solutions and contribute to the ten Ocean Decade Challenges. Future Calls for Decade Actions will be launched throughout the Decade to stimulate actors around the world to join forces to identify, implement and resource transformative and inclusive ocean science initiatives that contribute to sustainable development solutions from the global to local scales.

3. Final Remarks

President Xi Jinping has, on various occasions, called for strengthening cooperation in protecting the oceans, and has made great efforts to push forward ecological civilization construction and practice the concept of "maritime community with a shared future", which has gained worldwide resonance. Moreover, the Chinese government actively promoted exchanges and cooperation

[33] See 'Ocean Decade Action Factsheet: Mega-Delta Programme', 6 August 2021, <https://oceanexpert.org/document/28725>.
[34] See 'Ocean Decade Action Factsheet: Global Estuaries Monitoring (GEM)', 6 August 2021, <https://oceanexpert.org/document/28740>.

with other coastal countries through the establishment of the BRI. In particular, the reason for China to propose jointly building the 21st Century Maritime Silk Road is to facilitate maritime connectivity, pragmatic cooperation in various fields as well as to promote the integration of maritime cultures and to improve maritime wellbeing. As a matter of fact, Article XLI of the 14th FYP highlights China's willingness to promote high-quality "Belt and Road" development which is consistent with a broader agenda that Chinese policymakers have set when it comes to the marine domain. Protecting the marine environment has been an integral part of this grand strategy and it has materialized in the "14th FYP for National Marine Ecological and Environmental Protection", which is the first FYP in the field of marine ecological environment protection after institutional reforms, and it is a key document to guide marine ecological environment protection in the coming period. Finally, against the backdrop of the "Decade Actions", it is extremely impressive to witness about the China's proactive engagement in the UN Ocean Decade with reference to the policy, strategies and initiatives mentioned above. In addition to these, the Chinese government will establish a National Committee for the UN Ocean Decade and coordinate all marine scientists and stakeholders to draft the National Action Plan for the Decade.[35] Furthermore, many possible plans and actions for the Decade are emerging. A Chinese proposal will be submitted, including the planning to host an international Ocean Summit on the Decade in 2022.

[35] Zhao Weijie, 'A golden decade for ocean science (2021–2030): from knowledge to solutions and actions' (2021) 8 National Science Review, <https://academic.oup.com/nsr/article/8/5/nwab021/6129802>.

Threats to Sea-Lane Security: Maritime Piracy, Seizure of Ships and Persons

CARMEN TELESCA*

SUMMARY: 1. Security threats along the Maritime Silk Road. – 2. Outline of the regulatory framework. – 3. Piracy suppression procedure. – 4. International cooperation and law enforcement. – 5. Conclusions.

1. Security threats along the Maritime Silk Road

The phenomenon of maritime piracy, in its various aspects, has a profound impact on the safety of shipping. Considering the strategic importance of the commercial and energy maritime routes, China, over the years, has focused its attention on guaranteeing the protection and security of the Sea Lines of Communication that implement the "New Maritime Silk Road".

The development of alternative energy routes, both maritime and continental, to supply oil and gas from Middle Eastern and African suppliers by bypassing the Strait of Malacca, through which seventy-five per cent of China's oil imports pass, has become the pillar of its foreign and energy policy, where maritime security becomes energy-economic security.[1]

The Maritime Silk Road strategy, in fact, induces China to increase its naval presence to prevent terrorist and piracy threats along the maritime communication routes. For these reasons, China has implemented its participation in peacekeeping, anti-piracy, and civilian evacuation operations abroad in areas particularly affected by piracy, such as the Gulf of Aden.[2]

* Lawyer, Ph.D. in Navigation Law.

[1] The Maritime Silk Road, which includes the eastern coasts of Africa, is bringing further investment to a continent where China has succeeded, within a few years, in becoming the leading trading partner of most of the African countries involved.

[2] In this area, the interest in stability is supported by the energy-economic relations with the Gulf, the freedom of navigation and the relative fight against piracy, and the economic projections in East Africa. Units of the Chinese Navy, in fact, have been deployed since 2008 on anti-piracy missions, and the presence of numerous international operations (including Combined Task Force 151, NATO's Ocean Shield, and the European Union's EU NAVFOR Atalanta) has contributed to a significant reduction in incursions into Somali waters. On 22 December 2020, the Council of the European Union adopted the decision to extend the mandate of EU NAVFOR Atalanta in Somalia from 1 January 2021 until 31 December 2022, to contribute to the deterrence, prevention and suppression of acts of piracy and armed robbery off the coast of Somalia. In addition to the primary purpose of countering piracy and protecting the World Food Programme and other vulnerable vessels, the new mandate includes additional secondary tasks of monitoring drugs and weapons trafficking, human trafficking, unreported and unregulated (IUU) fishing and illicit trade in charcoal in Somalia's Exclusive Economic Zone, and new provisions have been introduced regarding the transfer of arrested and detained persons for their prosecution.

Piracy, especially in recent years, has become increasingly widespread in the Gulf of Guinea, and this is a major problem for all countries with major economic interests in the area, including China in relation to the Belt and Road Initiative.[3] Most of the attacks occur mainly in the eastern part of the Gulf of Guinea and not only in territorial waters and. As an element of further criticality, there is also the health emergency due to the spread of COVID-19 which, presumably, in the near future, will continue to have a considerable impact not only on the purely economic aspects of maritime traffic but also on security.

In fact, the exploitation of marine space has been considerably developed through cooperation and control procedures that allow States to enter into agreements with the main purpose of regulating common interests to promote the safety of the most important routes.

2. Outline of the regulatory framework

Almost all goods travel on forced shipping routes that take ships through straits and artificial canals: these are the places where most of the attacks by pirates take place, as they are geographically characterised by narrow passages where it is not easy to monitor the movement of international trade traffic that intersects with local traffic.

Consequently, any political unrest or upheaval, such as piracy, could lead to the closure of such areas, which would inexorably increase prices and undermine the foundations of the world economy and the balance of relations between States.[4]

The definition of piracy is contained in Article 101 1982 UN Convention on the Law of the Sea (UNCLOS) which states that "piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with

[3] According to the International Maritime Bureau's (IMB) latest global report, 68 incidents of piracy and armed robbery against ships were recorded in the first six months of 2021, down from ninety-eight incidents in the same period in 2020. The Gulf of Guinea continues to be particularly dangerous with thirty-two per cent of all incidents occurring in the region where pirates continue to target all types of ships. The IMB has reported that fishing vessels are captured and used as motherships to target other merchant vessels.

[4] This is, in fact, the risk run in the Gulf of Aden, due to the numerous attacks registered in that area, which, in fact, impeded a peaceful transit towards the Suez Canal, which has always been a fundamental passage from a strategic and commercial point of view. For an in-depth study in this respect, cf. M. Fólino, *La pirateria nel Corno d'Africa come minaccia alla sicurezza. Il ruolo della comunità internazionale* (Aracne 2015); C. Perrella, 'Le implicazioni nascenti dal ricorso a guardie armate in funzione antipirateria e recenti sviluppi della giurisprudenza' in P. Quercia, *Mercati insicuri. Il commercio internazionale tra conflitti, pirateria e sanzioni* (Aracne 2014), 71 ff.

knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)".[5]

According to this definition, in order for the offence of piracy to be committed, there must be two ships present (the "two ship rule"), a pirate ship, which must be a private ship or, exceptionally, a warship with a mutinous crew, and a ship that is the victim of the attack, which can be either private or State-owned. [6]

As regards the subjective element of the offence, in order for the offence to be classified as piracy, it is necessary for the perpetrator to commit seizure, violence or robbery exclusively for "private ends". The so-called *animus furandi*, therefore, is not an indispensable element for the establishment of the criminal offence, which, instead, may occur even in the presence of purposes other than plundering, such as revenge or hatred.

Article 101 of UNCLOS, with reference to the place of commission of the offence, establishes that the acts of piracy are those committed exclusively on the high seas or in a place not subject to the jurisdiction of any other State.[7] Therefore, acts committed in territorial and archipelagic waters, where the coastal State exercises its jurisdiction, which are commonly qualified as "armed robbery", are excluded.

The *locus commissi delicti* is the first and most obvious element that differentiates maritime piracy, as defined in UNCLOS, from armed robbery.

Specifically, the crime of piracy is committed within the territorial waters of a State and, therefore, only the rules of domestic law will be applicable for its repression. This has created many difficulties: in fact, there are States, among which Somalia and Nigeria, which, notwithstanding the high number of attacks by pirates, have not succeeded in facing the phenomenon with an adequate repression, both for political and technical reasons.[8]

---

[5] For more details cf. C. Telesca, *Gli effetti giuridici della pirateria marittima sul mercato assicurativo* (Aracne 2017); M. Brignardello, 'Nozione di pirateria marittima e sue implicazioni' in *Scritti in onore di Francesco Berlingieri* (2010) Il Diritto marittimo 227; F. Graziani, *Il contrasto alla pirateria marittima nel diritto internazionale* (Editoriale Scientifica 2010), 70 ff.; M. Rosella, 'Pirateria' (1995) IX Digesto discipline penalistiche 581; N. Ronzitti, 'Pirateria (diritto vigente)' (1983) XXXIII Enciclopedia del diritto 916; D. P. O'Connell, *The International Law of the Sea* (The Clarendon Press 1982), 969 ff.; A. P. Rubin, 'Is piracy illegal?' (1976) American Journal International Law 93.

[6] The principle that, in cases of piracy, highlights the possibility of assimilating a warship or State ship controlled by a mutinous crew to a private ship is also to be found in Article 16 of the 1958 Geneva Convention on the High Seas which, textually, provides that *"*The acts of piracy, as defined in article 15, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship".

[7] Article 86 UNCLOS defines high seas as "[…] all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or the internal waters of a State, or in the archipelagic waters of an archipelagic State".

[8] Somalia has been qualified, by a large part of the experts, as a "failed State", that is, falling into that particular category of Countries which, due to structural deficiencies and the inability of the governing authorities to exercise their power of control over the entire territory, are not able to cope with phenomena such as piracy or terrorism. Acts of piracy in the Gulf of Aden were usually carried out on the high seas and the attacked ships were taken to unsafe ports while awaiting the outcome of negotiations for the payment of a ransom demanded for the return of the ship and its cargo, and in most cases not for the release of the crew. They are inevitably involved but have never been of primary interest to the pirates. For example, until 2019, due to the absence of a dedicated law to prosecute the crime of piracy,

Equally important are the problems related to the exercise of jurisdiction within the piracy suppression procedure. In this regard, it is sufficient to consider that the conventional principles on this subject, for a concrete application, require a specific procedure of transposition into the individual national systems.

In fact, if there are no specific provisions for adaptation, it will be particularly complicated, if not impossible, for the judges to effectively exercise their powers to repress the phenomenon through the prosecution of those responsible for the crime of piracy or related offences.

In reality, in most cases there is a lack of political will to implement the defensive instruments identified by the rules of international law against pirates to protect the security and freedom of navigation, so much so that the principles contained in UNCLOS, although they have been incorporated into individual domestic laws, have not yet been effectively applied.[9]

3. Piracy suppression procedure

The problems that arise from the identification of a notion of piracy, different from that expressly governed by international law, concern, mainly, the repressive profiles of the phenomenon. This is because, in the presence of acts of armed robbery, the international principle of the legitimacy of third States to intervene is no longer valid, since, in the absence of specific agreements with the flag State, only the latter can exercise its jurisdiction over national ships on the high seas. Similarly, in territorial waters, third countries can intervene only with the specific consent of the coastal State, which is entitled to the broadest coercive powers against ships suspected of pirate acts, regardless of the flag and nationality of those directly responsible.

With this in mind, UNCLOS provides in Article 105 that on the high seas or in any other place outside the jurisdiction of any country, any State may seize a pirate ship or a ship taken by piracy and under control of pirates, arrest the persons on board and seize their property.[10] This is in fact an exception to the general

Nigerian subjects have been able to operate largely with impunity. In addition to the scarce capacity of the Nigerian Navy, which demonstrates a reduced capacity for an immediate and effective response in case of attack, the complete inactivity, at a political level, of the Nigerian Authorities is evident. For further information on the subject, cf., among others, R. Geiss, 'Failed States. Legal Aspects and Security Implications' (2004) German Yearbook of International Law 457; D. Thurer, 'The "Failed State" and International Law' (1999) International Review of the Red Cross 731.

[9] The reasons for the inertia of many States are to be found in economic difficulties, the lack of an adequate prison system, given the prolonged detention times on board ships that often follow the capture of pirates, human rights issues, the social alarm that the detention of pirates in the territory of the State could cause, etc. For further details, cf. I. R. Pavone, 'La giurisdizione penale sui pirati tra rispetto dei diritti umani ed esigenze di contrasto efficace alla pirateria moderna' (2013) Il Diritto marittimo 721; G. Tellarini, *La pirateria marittima. Regime di repressione e misure di contrasto* (Aracne 2012) 179 ff.; E. Kontorovich, S. Art, 'An Empirical Examination of Universal Jurisdiction for Piracy' (2010) 104 American Journal International Law 436.

[10] Article 105 UNCLOS (Seizure of a pirate ship or aircraft) expressly provides that "on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons

provisions of Article 84 UNCLOS, which provides for freedom of navigation on the high seas, and Article 92 of the same Convention, which provides that every State on the high seas may exercise, without interference, its jurisdiction and control over ships flying its flag. If, on the other hand, a ship falls within the definition of a pirate ship under Article 103 UNCLOS, the general rules concerning freedom of navigation and the exercise of exclusive jurisdiction on board by the flag State will no longer apply to it.[11]

In cases of coexistence of all the elements described by Article 101 UNCLOS, piracy can be qualified as *crimen juris gentium* and all States have the obligation to strive for its repression through effective cooperation. In particular, therefore, recalling the provisions of Article 105 UNCLOS, each State can intervene, on the high seas, against a pirate ship even if flying the flag of another State. The principle of the so-called "universal jurisdiction" is therefore enshrined in international law as an exception to the principle that only a flag State can exercise jurisdiction over ships flying its flag.[12]

The only limit to the exercise of universal jurisdiction over pirate ships by States other than the coastal State and the flag State is the territorial sea, where only the coastal State may take coercive and repressive measures against persons guilty of such offences without regard to their nationality or the flag of the ships suspected of committing acts of piracy.

If the pirate attack takes place on the high seas, each State, with its own warships and State vessels[13], will have various powers at its disposal, including the right of sight, of pursuit, of capture and seizure of the vessel, of arrest and of prosecution of

---

and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith". According to many authors, cf., among others, Tellarini (n 9) 169 ff.; U. La Torre, 'Sicurezza della nave e difesa dalla pirateria' (2011) Rivista di diritto della navigazione 617.

[11] Article 103 UNCLOS provides a definition of a pirate ship or aircraft by pointing out that "a ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act".

[12] For further information about this subject cf. M. Del Chicca, *La pirateria marittima. Evoluzione di un crimine antico* (Giappichelli 2016); G. Reale, 'La pirateria marittima: evoluzione del fenomeno criminale ed efficacia attuale degli strumenti di contrasto disponibili' in G. Reale (ed.), *Il contrasto alle attività illecite in mare* (Edizioni Scientifiche Italiane 2011), 48 ff.; La Torre (n 10), 618; E. Romagnoli, 'I delitti della navigazione: cenni introduttivi al diritto penale marittimo' (2009) Trasporti 197; U. Leanza, *Il nuovo diritto del mare e la sua applicazione nel Mediterraneo* (Giappichelli 1993), 246 ff.

[13] Articles 107 and 110 UNCLOS identify the types of ships and aircraft entitled to repress unlawful conduct resulting from the crime of piracy: these are warships, military ships or aircraft or other means authorised by the State authorities and clearly recognisable as being in the service of the State. For more details on the notion of military vessels and warships, cf. Tellarini (n 9) 161 ff.; E. Turco Bulgherini, 'Il traffico via mare di clandestini' in *Studi in onore di Umberto Leanza*, vol. III (Editoriale Scientifica 2008), 1842 ff.; R. Ferraro, 'La definizione giuridica di nave da guerra. Analisi della normativa internazionale e nazionale' (1995) Il Diritto marittimo 1183; U. Leanza, 'La condizione giuridica delle navi ed il diritto internazionale' in *Nuovi saggi di diritto del mare* (Giappichelli 1988), 211.

the perpetrators.[14] With reference to this last aspect, that is, in order to have certainty regarding the actual punishment of captured pirates, in practice, the SUA Convention of 10 March 1988 is also applied.[15] This Convention, actually, has a scope of application that, also considering its purpose and subsequent point of view, goes well beyond the cases of piracy, as it also includes the hypothesis of seizure and destruction of the ship and the fixed platforms located on the continental shelf, for which each flag State will be able to identify and apply the coercive measures considered most appropriate to the specific case. The SUA Convention, in fact, in the case of attacks by pirates, with respect to UNCLOS, obliges the State on whose territory the perpetrators are located to convict them or extradite them to another State with jurisdiction in order to guarantee their effective subjection to criminal sanctions.

According to the general principles of international law, in the absence of a specific convention, cases of seizure of a ship with the capture of its crew on the high seas are among those subject to the repressive power of the State whose flag the ship is flying.

As argued by authoritative principles of law, therefore, the capture by a different State remains subject to one of the following factors: consent of the flag State; title to jurisdiction represented by the right of hot pursuit; existence of a link between

[14] In the hypothesis of the seizure of the pirate ship and the arrest of the perpetrators, the rules of the domestic legal system of the State carrying out these operations are applied. In this regard, it is possible that pirates are given different legal treatment depending on the State that captured them. This is due to the fact that there is no uniformity of rules within the different national legal systems. Actually, this situation also poses other problems since the decision-making power conferred on States by UNCLOS on the possible penalties to be imposed on pirates does not exclude the possibility that there may also be cases in which they are released without being tried since Article 105 does not establish an obligation but merely an option for States that have captured pirates to bring them to trial. Cf. A. Blanco-Bazán, 'War Against Piracy? Some Misconception and Oversights in the Repression of Crimes Sea' (2009) Il Diritto marittimo 269.

[15] The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) and the SUA Protocol were ratified and made enforceable in Italy by Law No. 422 of 28 December 1989, in the Gazzetta Ufficiale -the official journal of the Italian government- No. 6 of 9 January 1990. Both the Convention and the Protocol entered into force on 1 March 1992 and, following the terrorist attacks of 11 September 2001, were amended by the London Protocol of 14 October 2005, which entered into force on 28 July 2010. Cf., in particular, I. Caracciolo, 'International Terrorism at Sea between Maritime Safety and National Security. From the 1988 SUA Convention to the 2005 SUA Protocol' in A. Del Vecchio (ed.), *International Law of the Sea. Current Trends and Controversial Issues* (Eleven International Publishing 2013), 109 ff.; N. Klein, 'Maritime Security and the Law of the Sea' (Oxford University Press 2011); R. Collins, D. Hassan, 'Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective' (2009) Journal of Maritime Law and Commerce 106; F. M. Torresi, 'La repressione degli atti illeciti contro la sicurezza della navigazione marittima: attualità e prospettive di sviluppo' (2006) Il Diritto marittimo 764; Z. O. Ozcayir, 'Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (SUA Convention)' (2005) Journal of International Maritime Law 433; T. Treves, 'The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation' (1999) Singapore Journal of International Comparative Law 541; F. Francioni, 'Maritime Terrorism and International Law: The Rome Convention of 1988' (1988) German Yearbook of International Law 262; D. Freestone, 'The 1988 International Convention for the Suppression of Unlawful Acts against the Safety of Marine Navigation' (1988) International Journal of Estuarine Coastal Law 311.

the ship and the territorial community to which the intervening State belongs, in the sense that the ship must have carried out an operation in an area subject to the jurisdiction of the latter State; presence on board of hostages of the intervening State or even of third States.[16]

From a substantive point of view, it cannot be ignored the fact that the SUA Convention, under Article 4, applies "if the ship is navigating of is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State or the lateral limits of its territorial sea with adjacent States" or, in the absence of such circumstances, when the perpetrator or alleged perpetrator is found in the territory of a Contracting State. The most interesting element is the applicability of this provision not only to offences committed on the high seas but also to acts committed against private vessels in territorial waters. This last hypothesis, however, may occur in practice provided that the ships under attack come from the high seas or head towards the high seas.[17]

Consequently, with regard to the repressive profile of the offence, it is generally left to the State of the flag so much so that, in this regard, Article 6 of the SUA Convention provides that the contracting States are obliged to exercise their jurisdiction in cases where the offence has been committed against or on board a ship flying the national flag or in its territory, including the territorial sea, or by one of its citizens. In other cases, the jurisdiction of the Contracting State is merely optional, as for example in the case of an offence committed by a stateless person with a habitual residence in that State, or if the offence took the form of the threat, abduction, injury or death of one of its citizens, or was committed in order to compel the State to perform or abstain from performing a particular act.

The legislation examined so far must be assessed in the light of the principle *"aut dedere aut judicare"*, accepted by the Convention in Article 10. According to this article, the State in whose territory the offender or alleged offender is discovered, if it does not extradite him, is obliged to bring him to trial irrespective of whether or not the offence was committed in its territory.[18]

This provision, unlike the provisions of UNCLOS, has sought to place greater attention on the profiles concerning the prosecution of those responsible for the

[16] Cf. M. C. Ciciriello, 'Pirateria (dir. int.)' in *Enciclopedia giuridica*, vol. XXXIII (Treccani 1990) 918 ff.

[17] According to the Law, U.S. Courts have provided some guidelines on the interpretation of Article 4(2) of the SUA Convention in United States v Shi, 525 F.3d 709 (9th Cir. 2008) (2009) Il Diritto marittimo 889, with a comment by M. Brignardello, 'Sull'impossessamento in alto mare di una nave con violenza e sulla giurisdizione delle Corti federali statunitensi', 890 ff., in which the expression "found in the territory of a State Party" indicates the hypothesis that the perpetrator of the offence or the person presumed to be guilty must be physically in the territory indicated even if he has been taken there by others.

[18] Cf. M. Brignardello, 'I problemi sollevati dalla pirateria: alcuni spunti di riflessione' (2012) Rivista di diritto della navigazione 11 where, on the basis of the principle *aut dedere aut judicare*, the author points out that a State, regardless of where the crime took place, is obliged to convict criminals who are found in its territory unless they are extradited to another State with jurisdiction to try them (Article 6(4)). However, if the State in which the pirates are found or the State to which they are extradited does not provide for sufficiently severe penalties, these criminals end up going unpunished because other States, which are not at issue with the crime, cannot exercise their jurisdiction.

facts that constitute a crime, even if the opinion of many experts is shared in noting that, actually, these international conventions are applied only in relation to the States that have ratified them and within them there is no identifiable sanctioning provision for behaviour that does not conform to what is established in them.[19]

The international community, in spite of the powers of intervention and repression of piracy provided by UNCLOS and the SUA Convention and the UN resolutions adopted in recent years, has not yet succeeded in definitively eradicating the phenomenon of maritime piracy and its negative consequences on trade and the insurance market worldwide.

The reasons for the difficulties in implementing these actions are certainly to be found in the need to balance the desire to secure certain areas where there is a particular concentration of commercial traffic with the need not to violate the principle of the sovereignty of the coastal State on its own territory and within its own territorial waters.[20]

In the light of the above considerations, it can be reasonably argued that the real victims of piracy are crews, shipping companies, ship owners, stakeholders in the goods transported and insurers.

The shipowner will certainly be the first party involved as he suffers human and material consequences as the party responsible for the safety of his crew and the ship and its cargo. For these reasons, in fact, he is called upon to sustain every possible effort, bearing the relative economic cost in terms of investment to guarantee the success of the maritime expedition and the increase in travel expenses to protect himself with adequate insurance coverage or to follow routes considered safer even if longer and more expensive.

4. International cooperation and law enforcement

Investment in security comes at a cost, which increases proportionally to the quality standard it is intended to achieve.[21]

---

[19] In this sense cf. M. Mejia Jr., P. K. Mukherjee, 'The SUA Convention 2005: a Critical Evaluation of its Effectiveness in Suppressing Maritime Criminal Acts' (2005) Journal of International Maritime Law 184; E. Barrios, 'Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia' (2005) 28 Boston College International and Comparative Law Review 158.

[20] About this, for further analysis, cf. Queen's Bench Division – Comm. Court 18-II-2010 (2011) Il Diritto marittimo 281 with a comment by A. Boglione, 'Pirateria in Somalia: la cattura della nave, col suo carico, perpetrate a scopo di riscatto di per sé sola non giustifica l'abbandono agli assicuratori e non costituisce Perdita nè attuale nè costruttiva dei beni assicurati', 282 ff., where the author, with reference to the problems linked to the respect of sovereignty in the repression of piracy, claims that the international community has so far been unable (or unwilling) to intervene effectively to eradicate the phenomenon, despite the limited offensive potential of pirates (who act almost undisturbed by attacking ships with spears equipped with a few crew members who have only light armament) and the extent of the power of intervention provided for by the Montego Bay Convention; Telesca (n 5) 87; A. Caligiuri, 'Le misure di contrasto della pirateria nel mare territoriale somalo: osservazioni a margine della Risoluzione 1816 (2008) del Consiglio di Sicurezza' (2008) Il Diritto marittimo 506.

[21] When referring to the term "security" in the context of maritime and aviation law, one distinguishes the concept of "security" from the traditional one of "safety" (the so-called safety of navigation in the

The fastest and most effective way to achieve a minimum standard of security at international level to deal more effectively with the phenomenon of maritime piracy is deduced from the analysis of the events of recent years and can be identified in the strengthening of cooperation between States.[22]

This principle is already highlighted, albeit in general terms, in Article 100 UNCLOS, which expressly provides for the obligation of all States to cooperate to the fullest extent possible in order to repress piracy on the high seas or in any other area beyond State jurisdiction. However, in order for this provision to be applied in practice, special international agreements must be concluded between all States wishing to adopt repressive measures to combat piracy.

The instrument of international cooperation has proved to be very useful in recent years because it has allowed many States, adhering to international agreements, to overcome the economic difficulties related to the considerable costs that anti-piracy actions involve, to fill the gaps in the interpretation of the notion of maritime piracy alongside the conventional so-called armed robbery and to adopt uniform behaviour in the repression of the phenomenon.[23]

The actions of cooperation between the States require an activity of monitoring and analysis of the phenomenon of piracy and, precisely for this purpose, at an international level, special bodies have been set up within two important organizations: the Maritime Safety Committee of the International Maritime Organization (IMO)[24] and the Piracy Reporting Center of the International Maritime Bureau (IMB).[25]

---

technical sense). See U. Leanza, 'International Security and Power of Enforcement at Sea' in Del Vecchio (ed.), *International Law of the Sea. Current Trends and Controversial Issues*, 103 ff.; E. Turco Bulgherini, 'Il diritto della navigazione e dei trasporti tra elaborazione scientifica ed insegnamento universitario nell'era della globalizzazione' (2007) Rivista del Diritto dei Trasporti 18; P. Viglietta and E. Papi, 'Safety e security: aspetti evolutivi della sicurezza marittima' (2005) Diritto dei trasporti 117; E. Turco Bulgherini, 'Sicurezza della navigazione' in *Enciclopedia del diritto*, vol. XLII (Giuffè 1990) 461; M. M. Comenale Pinto, 'I profili di security e le interrelazioni con le norme di safety' in G. Camarda, M. Cottone and M. Migliarotti (eds), *La sicurezza negli aeroporti. Problematiche giuridiche ed interdisciplinary. Atti del Convegno Milano 22 aprile 2004* (Giuffrè 2005) 58.

[22] For more details cf. T. H. Goodman, 'Leaving the Corsair's Name to Other Times: How to Enforce the Law of Sea Piracy in the 21st Century trough Regional International Agreements' (1999) Case Western Reserve Journal of International Law 139; B. H. Dubner, 'The Law of International Sea Piracy' (1979) New York Journal of International Law Policy 471.

[23] Cf. F. Graziani, 'Piracy and Somalia: The Few Advantages and the Many Drawbacks of International Cooperation' in Del Vecchio (ed.), *International Law of the Sea*. *Current Trends and Controversial Issues*, 127 ff.

[24] The structure and functions of the Maritime Safety Committee (MSC) can be summarised as follows: is a subsidiary body of the Council. MSC, which consists of all Member States, is the highest technical body of the Organization. The functions of the Maritime Safety Committee are to consider any matter within the scope of the Organization concerned with aids to navigation, construction and equipment of vessels, manning from a safety standpoint, rules for the prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirements, hydrographic information, log-books and navigational records, marine casualty investigations, salvage and rescue and any other matters directly affecting maritime safety. For further information about the IMO visit the following website: <http://www.imo.org>.

[25] The IMB Piracy Reporting Centre (IMB PRC) follows the definition of Piracy as laid down in Article 101 UNCLOS) and Armed Robbery as laid down in Resolution A.1025 (26) adopted on 2 December 2009 at the 26th Assembly Session of the International Maritime Organization (IMO). Before 1992,

Both bodies share the information gathered during the monitoring surveys carried out in piracy-prone areas and call for an ever-increasing involvement of maritime operators in the need to actively participate and cooperate with international organisations, providing all information and adopting all measures that can facilitate the latter in their actions against piracy, also in view of the fact that the main and direct beneficiaries and users of their monitoring and information-sharing activities are mainly maritime operators.

In recent years, international organisations have made efforts to raise awareness of cooperation at regional level, especially among coastal States most exposed to pirate attacks.

As part of the international cooperation system, the objectives of preventing and combating maritime piracy have also been extended to a regional level and to the areas where the phenomenon is most widespread, by strengthening naval patrols. This activity, actually, is quite complex to organise if we consider that we are dealing with areas of strategic interest that extend for hundreds of thousands of square miles where maritime traffic takes place continuously. Precisely because of the fundamental importance of the security of maritime traffic, the international bodies have invested their resources in various missions with the primary objective of repressing the phenomenon of piracy.

The South-East Asian area has been particularly dynamic in seeking, at a regional level, forms of cooperation to exercise a greater control over the attacks perpetrated by pirates, in order to more easily repress the phenomenon. To this end, already in the 90's, between the countries most at risk in the area, through the Association of South-East Asian Nations (ASEAN)[26], various agreements were

shipmasters and ship operators had nowhere to turn to when their ships were attacked, robbed or hijacked either in port or out at sea. Local law enforcement either turned a deaf ear, or chose to ignore that there was a serious problem in their waters. The International Maritime Bureau (IMB) aware of the escalating level of this criminal activity, wanted to provide a free service to the seafarer and established the 24 hours IMB Piracy Reporting Centre (PRC) in Kuala Lumpur, Malaysia. Being non-governmental the PRC is not restricted to working only within a particular region or country and hence is capable of being an initial point of contact for the shipmaster to report any incident of piracy, armed robbery or even stowaways – thus initiating the process of response. The main aim of the PRC is to raise awareness within the shipping industry, which includes the shipmaster, ship-owner, insurance companies, traders, etc., of the areas of high risk associated with piratical attacks or specific ports and anchorages associated with armed robberies on board ships. The main function of the PRC is twofold: 1) To be a single point of contact for ship Masters anywhere in the world who are under piratical or armed robbery attack. The information received from the Masters is immediately relayed to the local law enforcement agencies requesting assistance. 2) The information received from the ship Masters is immediately broadcast to all vessels in the Ocean region – thus providing vital information and increasing the Masters domain awareness. The PRC works and shares information with the IMO, various governmental, inter-governmental and law enforcement agencies including all industry bodies in an attempt to understand the nature of this crime and reduce its effects to crew, vessel and cargo. Being a trusted point of reporting for worldwide piracy and armed robbery incidents the PRC is able to immediately identify any shift in this criminal activity and alert all concerned parties. For further information about the IMB visit the following website: <http://www.icc-ccs.org>.

[26] ASEAN is an organisation established by the Bangkok Declaration of 8 August 1967, which aims to achieve political, economic and cultural cooperation within the Southeast Asian region. In particular, the principles set out in the Bangkok Declaration are mutual respect for the independence, sovereignty, equality, territorial integrity and identity of all nations; the right of every State to be free from interference, subversion or coercion; the absence of interference in the internal affairs of States; the peaceful settlement of disputes or controversies; the renunciation of threats and the use

signed. However, they could not lead to incisive results because their main objective was that of sharing information, which was not followed by concrete repressive action.[27] The first important example of joint cooperation and maritime vigilance was made in the context of the ASEAN Regional Forum (ARF), held on the 17 June, 2003, in Phnom Penh, through the adoption of the Statement on Cooperation against Piracy and Other Threats to Security.[28] With this Statement it was confirmed the commitment of the adhering Countries to stimulate regional cooperation on the basis of the recommendations supplied by the IMO, in order to try to guarantee the security of the maritime navigation, protecting the ships both from episodes of piracy in a narrow sense and from acts of armed robbery.[29]

In the wake of regional cooperation in the South-East Asian area, one of the most important agreements signed to prevent and repress piracy both as a *crimen iuris gentium* and as acts of armed robbery is the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP).[30] Specifically, in Article 3, on the subject of general obligations, this agreement provides that each of the contracting States, taking into account national laws and rules of international law on maritime piracy, undertake "(a) to prevent and suppress piracy and armed robbery against ships; (b) to arrest pirates or persons who have committed armed robbery against ships; (c) to seize ships or aircraft used for committing piracy or armed robbery against ships, to seize ships taken by and under the control of pirates or persons who have committed armed robbery against ships, and to seize the property on board such ships; and (d) to rescue victim ships and victims of piracy or armed robbery against ships".

The treaty also established the ReCAAP Information Sharing Centre (ReCAAP ISC), which has been operational in Singapore since 29 November 2006, with the primary function of sharing data on acts of piracy on the high seas or in territorial waters that have occurred in the region through the extrapolation of statistical data and periodic reports that are sent both to the IMO and to States Parties.

---

of force; and mutual cooperation. Cf. R. Emmers, 'ASEAN and the Securitization of Transnational Crime in Southeast Asia', in (2003) The Pacific Review 419. For further information on ASEAN's tasks and purposes see also the website <http://www.asean.org>.

[27] The States most involved were Indonesia, Malaysia, Singapore, Japan, the Philippines, Thailand and Vietnam: in fact, many agreements were signed in 1992 between Indonesia, Malaysia and Singapore; in 1994 between Japan and Malaysia and between the Philippines and Malaysia; in 1998 between Thailand and Vietnam. On the issue of cooperation in the Southeast Asian region cf. A. J. Young, 'Contemporary Maritime Piracy in Southeast Asia: History, Causes and Remedies' (2009) Asian Politics & Policy 800; R. C. Zara, 'Piracy and Armed Robbery in the Malacca Strait: A Problem Solved?' (2009) 62 Naval War College Review 65; J. H. Ho, 'The Security of Sea Lanes in the Southeast Asia' (2006) 46 Asian Survey 558; J. F. Bradford, 'Japanese Anti-Piracy Initiatives in Southeast Asia: Policy Formulation and the Coastal State Responses' (2004) Contemporary Southeast Asia 28.

[28] ARF is an organisation established in 1994 with the primary purpose of establishing opportunities and meetings on security and peace issues in the South-East Asian region. The text of the ARF Statement is available at <http://www.aseanregionalforum. asea.org>.

[29] An analysis of the types of attacks carried out by pirates in South-East Asia shows that most of them occurred close to the coasts, i.e., in territorial waters and not on the high seas.

[30] The ReCAAP was finalized in Tokyo on 11 November 2004 and entered into force on 4 September 2006. The full text of the Agreement is available at <http://www.recaap.org>. For further information, cf. Tellarini (n 9), 194 ff.

The functions of the ReCAAP ISC, as listed in Article 7 of the Agreement, are as follows: "(a) to manage and maintain the expeditious flow of information relating to incidents of piracy and armed robbery against ships among the Contracting Parties; (b) to collect, collate and analyze the information transmitted by the Contracting Parties concerning piracy and armed robbery against ships, including other relevant information, if any, relating to individuals and transnational organized criminal groups committing acts of piracy and armed robbery against ships; (c) to prepare statistics and reports on the basis of the information gathered and analyzed under subparagraph (b), and to disseminate them to the Contracting Parties; (d) to provide an appropriate alert, whenever possible, to the Contracting Parties if there is a reasonable ground to believe that a threat of incidents of piracy or armed robbery against ships is imminent; (e) to circulate requests referred to in Article 10 and relevant information on the measures taken referred to in Article 11 among the Contracting Parties; (f) to prepare non-classified statistics and reports based on information gathered and analysed under subparagraph (b) and to disseminate them to the shipping community and the International Maritime Organization; and (g) to perform such other functions as may be agreed upon by the Governing Council with a view to preventing and suppressing piracy and armed robbery against ships".

Although ReCAAP has objective limitations, mainly consisting in the fact that the States Parties have not accepted the possibility of derogating from the rules of international law on the right of hot pursuit to allow each of them to take action against pirates in their territorial waters[31], it has represented one of the first models of regional cooperation that has provided some positive results in the context of South-East Asia by recording an effective decrease in the number of attacks by pirates.[32]

[31] Cf. Article 2 of the ReCAAP Agreement (General Provisions) which expressly provides that "1. The Contracting Parties shall, in accordance with their respective national laws and regulations and subject to their available resources or capabilities, implement this Agreement, including preventing and suppressing piracy and armed robbery against ships, to the fullest extent possible. / 2. Nothing in this Agreement shall affect the rights and obligations of any Contracting Party under the international agreements to which that Contracting Party is party, including the UNCLOS, and the relevant rules of international law. / 3. Nothing in this Agreement shall affect the immunities of warships and other government ships operated for non-commercial purposes. / 4. Nothing in this Agreement, nor any act or activity carried out under this Agreement shall prejudice the position of any Contracting Party with regard to any dispute concerning territorial sovereignty or any issues related to the law of the sea. / 5. Nothing in this Agreement entitles a Contracting Party to undertake in the territory of another Contracting Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Contracting Party by its national law. 6. In applying paragraph 1 of Article 1, each Contracting Party shall give due regard to the relevant provisions of the UNCLOS without prejudice to the rights of the third Parties".

[32] In fact, with reference to this aspect, some experts have observed that the reduction of piracy in South-East Asia would be attributable, more than to the adoption of the instruments of regional cooperation mentioned, to the evolution of the internal politics of some States, as in the case of the successes achieved by the Indonesian government, starting from 2005, in the fight against the National Liberation Front for Aceh-Sumatra, to which were attributed – confirming the possible political implications of certain acts of piracy – some of the actions carried out by Indonesian pirates. A contribution to the reduction of piracy in Southeast Asia should also be attributed to natural phenomena: the 2004 tsunami would damage, with its tragic violence and at least for a certain period,

However, this agreement was the reference point for the development of other similar experiences also in the area of the Western Indian Ocean and the Gulf of Aden and, in particular, for the Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, also known as the Djibouti Code of Conduct, adopted after a Sub-Regional Meeting held in Djibouti on 29 January 2009 and organised by the IMO, and amended during the Meeting held in Jeddah on 12 January 2017.[33]

The adoption of the Code of Conduct has had positive effects on the entire international community since it contains provisions that promote cooperation between States in the fight against piracy through the improvement of the mechanism for sharing information on pirate attacks perpetrated in the area off the coast of Somalia.[34]

Articles 5 and 6 of the Code of Conduct, as amended by the Jeddah Amendment, set out the measures to be adopted to repress attacks by pirates on the high seas through the signatory States' commitment to intervene by arresting and detaining the perpetrators and seizing the vessels and goods captured by these criminals. All acts of armed robbery, on the other hand, are referred to the exclusive jurisdiction of the coastal State.[35]

---

the capabilities of the pirate fleet in the geographical area considered. L. Marini, *Pirateria marittima e diritto internazionale* (Giappichelli 2016) 94; cf. Zara (n 27), 67.

[33] The Djibouti Code of Conduct has been signed by twenty States belonging to the Western Indian Ocean, Gulf of Aden and Red Sea area defined as "the Participants" and has been amended and expanded in content by the Jeddah Amendment of 12 January 2017, which provides measures to suppress a number of illegal activities, such as piracy, arms and drug trafficking, illegal oil bunkering, and illegal wildlife trade. The full and updated text of the document can be found on the IMO website at <http://www.imo.org./en/OurWork/Security/PIU/Pages/DCoC.aspx>.

[34] Article 2 of the Djibouti Code of Conduct (Purpose and Scope) provides that "1. Consistent with their available resources and related priorities, their respective national laws and regulations, and applicable rules of international law, the Participants intend to cooperate to the fullest possible extent in the repression of transnational organized crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea with a view towards: (a) sharing and reporting relevant information; (b) interdicting ships and/or aircraft suspected of engaging in transnational organized crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea; (c) ensuring that persons committing or attempting to commit transnational organized crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea are apprehended and prosecuted; and (d) facilitating proper care, treatment, and repatriation for seafarers, fishermen, other shipboard personnel and passengers subject to transnational organized crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea, particularly those who have been subjected to violence. / 2. The Participants intend this Code of conduct to be applicable in relation to transnational organized crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea in the Western Indian Ocean and the Gulf of Aden area".

[35] Article 5 (Measures to Repress Piracy) states that "1. The provisions of this Article are intended to apply only to piracy. / 2. For purposes of this Article and of Article 12, pirate ship means a ship intended by the persons in dominant control to be used for the purpose of committing piracy, or if the ship has been used to commit any such act, so long as it remains under the control of those persons. / 3. Consistent with Article 2, each Participant to the fullest possible extent intends to cooperate in: (a) arresting, investigating, and prosecuting persons who have committed piracy or are reasonably suspected of committing piracy; (b) seizing pirate ships and/or aircraft and the property on board such ships and/or aircraft; and (c) rescuing ships, persons, and property subject to piracy. / 4. Any Participant may seize a pirate ship beyond the outer limit of any States territorial sea, and arrest the persons and seize the property on board. / 5. Any pursuit of a ship, where there are

The document also refers to another important aspect, namely the commitment made by States Parties to adapt their domestic legislation in order to ensure more effective actions against the illegal activities expressly referred to in Article 1 of the Code of Conduct amended in Jeddah in 2017, which also includes piracy.[36]

The code of conduct, similarly to the ReCAAP, as highlighted by authoritative experts, presents critical issues mainly related to the exclusion, for the contracting States, of the exercise of repressive powers within the territorial waters of another country in the absence of the latter's consent and to the lack of specific provisions to ensure the establishment of a specific patrolling system in areas considered to be at high risk.[37]

5. Conclusions

Maritime piracy, as already highlighted, is an illegal activity that has developed mainly in the Gulf of Aden, off the coast of Somalia, and in the Indian Ocean. In recent years, however, there has been an increase in the phenomenon in the western part of Africa, mainly in the Gulf of Guinea.[38]

Most of the pirates operating in the Gulf of Guinea come from Nigeria and Benin, even though the reasons for the increase in piracy are different, since some of them act exclusively for private and individual ends resulting from a mere state of

---

reasonable grounds to suspect that the ship is engaged in piracy, extending in and over the territorial sea of a Participant is subject to the authority of that Participant. No Participant should pursue such a ship in or over the territory or territorial sea of any coastal State without the permission of that State. / 6. Consistent with international law, the courts of the Participant which carries out a seizure pursuant to paragraph 4 may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ship or property, subject to the rights of third parties acting in good faith. / 7. The Participant which carried out the seizure pursuant to paragraph 4 may, subject to its national laws, and in consultation with other interested entities, waive its primary right to exercise jurisdiction and authorize any other Participant to enforce its laws against the ship and/or persons on board. / 8. Unless otherwise arranged by the affected Participants, any seizure made in the territorial sea of a Participant pursuant to paragraph 5 should be subject to the jurisdiction of that Participant". The following Article 6 (Measures to Repress Armed Robbery against Ships) also specifies that "1. The provisions of this Article are intended to apply only to armed robbery against ships. / 2. The Participants intend for operations to suppress armed robbery against ships in the territorial sea and airspace of a Participant to be subject to the authority of that Participant, including in the case of hot pursuit from that Participant's territorial sea or archipelagic waters in accordance with Article 111 of UNCLOS. 3. The Participants intend for their respective focal points and Centres (as designated pursuant to Article 11) to communicate expeditiously alerts, reports, and information related to armed robbery against ships to other Participants and interested parties".

[36] This principle is contained in Article 15 of the Djibouti Code of Conduct – which was amended by the Jeddah Amendment – (Review of National Legislation) which provides that "Participants are encouraged to incorporate in national legislation, transnational organized crime in the maritime domain, and other illegal activities as defined in Article 1 of this Code of conduct, in order to ensure, as appropriate, effective indictment, prosecution and conviction in the territory of the Participants; and to facilitate extradition or handing over when prosecution is not possible. Each Participant intends to develop adequate guidelines for the exercise of jurisdiction, conduct of investigations, and prosecution of alleged offenders". For further information on the subject, cf. Tellarini (n 9), 254.

[37] The need for enhanced regional patrol capabilities was, however, explicitly highlighted in UN Security Council Resolution 2020 (2011), 22 November 2011.

[38] The most affected States are Nigeria, Benin, Togo, Ivory Coast and Gabon.

poverty, while others, on the contrary, are well organised and close to the black market for oil.

Today, piracy in this area constitutes a real threat not only to Western economic interests in the region, as the danger of attacks also increases insurance premiums for ship owners sailing in these areas. The presence of pirates in maritime spaces potentially rich in raw materials can also discourage investments by companies operating in the hydrocarbon and fossil fuel sectors, creating obvious damage to the European economy and the development of West African States.

Maritime piracy, as developed in the Horn of Africa, is on the decline, but is still a very profitable business for criminal organisations operating in the area.

The States involved in the repression of all illegal acts covered by the notion of piracy, both those attributable to the qualification of *crimen juris gentium* and those referring to the so-called armed robbery, in fact, incur very high costs, linked to the payment of ransoms, insurance premiums, security measures and naval forces deployed, and incur a further financial loss in terms of trade, because piracy controls the most sensitive routes of maritime traffic, damaging sectors such as oil, and causing an increase in the price of products and raw materials.

For the international community, the dangers and costs of maritime piracy must be considered in several ways. First of all, there is the need to protect the human factor, since attacks by pirates are detrimental to the physical integrity and restrict the freedom of the crew members of seized ships. Equally important, from an economic point of view, is the damage caused to the entire shipping market, given that almost ninety per cent of world trade is carried out by sea and that large sums are paid by shipowners to release ships and goods, and crew members who are also, in some cases, seized by pirates. In addition to the direct damage to shipowners or, on their behalf, to insurance companies, there are also indirect damages, such as, for example, the increase in the cost of chartering ships and premiums to be paid to insurance companies, and the increase in journey times. Furthermore, due consideration must be given to the costs of all the operations, albeit limited to passive defence, sustained by individual States and the international community curing the various missions, which have involved ships and crews that were and still are involved in monitoring all the routes most at risk for the development of maritime traffic at world level and which involve both producer and consumer countries of raw materials.

However, piracy is still a problem with more complex origins, and often, as in the case of Somalia and the Gulf of Guinea, its roots lie in a very precarious political situation and extreme poverty. It is precisely in these contexts that a solution must be sought.

It is therefore essential for the international community to work towards restoring legality, order, governmental order and economic stability, which has never before been achieved in States torn apart by internal conflicts, including ethnic and religious conflicts. To this end, it will be useful to prepare and adopt all the necessary measures to stem the serious political, social and humanitarian crisis that affects the areas damaged by the phenomenon, in order to restore security on land and, consequently, in the maritime spaces adjacent to these States.

Solely military forms of counteraction do not guarantee a solution to the root of

the problem. Piracy and the other illegal activities connected to it find fertile ground in social marginalization and in the precariousness of economic development, so much so that it is not uncommon to see situations in which private objectives overlap with others of a political nature, and the same resources obtained by pirates can be used to finance other illegal activities connected also to terrorism. In practice, it often happens that criminal organisations, dedicated to money laundering that is paid as ransom by shipowners for the release of their ships and crews, invest these sums, through shell companies, in illegal activities linked to weapons, drugs, and human trafficking, earning profits with negative repercussions on the world economy.

A Law of the Sea Approach to the New Maritime Silk Road: Environmental Protection and Maritime Safety in Areas under National Jurisdiction

NATHALIE ROS*

1. Introduction

China's Maritime Silk Road is a very ambitious international project dedicated to maritime cooperation and economic development; emblematic of the 21st Century, it is also supposed to open a new era for navigation and security worldwide, from Asia to Europe via Africa, in the South China Sea, the Pacific, the Indian Ocean, the Mediterranean or the Arctic.[1] It is the maritime dimension of a broader strategic framework, the Belt and Road Initiative, i.e., "One Road, One Belt" (OBOR), that also encompasses a terrestrial axis, the Silk Road Economic Belt,[2] taking into consideration that China is the world's leading player in maritime trade.

Along the New Maritime Silk Road (NMSR), in the ports, on the high seas, as well as in areas under national jurisdiction, environmental protection and maritime safety are obviously key elements of the "Blue Partnership" proposed by China and mainly defined in terms of collaborative governance, blue economy, maritime security and sustainable development. In this context, and in a necessary prospective way, a Law of the Sea approach imposes to consider the New Maritime Silk Road according to a new dimension of Maritime Safety (2) and from Sustainable Development to the Blue Economy (3).

2. According to a New Dimension of Maritime Safety

The evolution to take into consideration is twofold, from Maritime Safety to Maritime Security (2.1.) and from Maritime Safety to Environmental Considerations (2.2.).

2.1. From Maritime Safety to Maritime Security

* Professor at the University of Tours (IRJI), Vice-President and Secretary General of the International Association of the Law of the Sea (AssIDMer).

[1] K. Zou, S. Wu and Q. Ye (ed.), *The 21st Century Maritime Silk Road Challenges and Opportunities for Asia and Europe* (Routledge 2020).

[2] <http://www.xinhuanet.com/silkroad/english/index.htm>.

International cooperation[3] is required in order to provide an enlarged Maritime Safety (a) including Maritime Security (b) along the NMSR.

a) An enlarged Maritime Safety

In its contemporary meaning, maritime safety extends from the safety of navigation (i) to the safety of the sea (ii).[4]

i) From the safety of navigation

Maritime safety is an historic concept, originally understood by reference to navigation and safety of life at sea, as evidenced by the adoption of the first SOLAS Convention in 1914, two years after the sinking of the Titanic. In the meaning of this classic definition, it refers actually to safety at sea, including the safety of the vessel and the safety of navigation. Given that 90% of world trade is dependent on international navigation and that the NMSR aims precisely to develop this activity, it is obvious that maritime safety is an important issue from a Law of the Sea perspective.

The objective is therefore the respect and even the strengthening of the applicable law, as derived from the 1982 Convention but also from the "competent international organization" as UNCLOS calls it, i.e., the International Maritime Organization (IMO). This includes the IMO dedicated conventions, such as the International Convention for the Safety of Life at Sea (SOLAS), the Convention on the International Regulations for Preventing Collisions at Sea (COLREG), or the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), but also the development of related soft law, as well as a close cooperation between the coastal States and the "competent international organization" in order to design, if necessary, sea lanes and traffic separation schemes in their areas under national jurisdiction.

ii) To the safety of the sea

Always primarily focused on incidental risks related to navigation, shipwrecks and other sea-related risks, maritime safety has progressively broadened its material scope in order to include also the safety of the sea, and *in fine* the protection and preservation of the marine (and terrestrial) environment, via pollution control in the traditional framework of navigation and maritime transport, but also in relation with activities involving not only ships but also platforms.

As regards this new dimension, the "competent international organization", in the meaning of UNCLOS, is also the IMO. Some IMO maritime safety standards are primarily aimed at preventing pollution, with stricter requirements for ships at risk, such as oil tankers, incorporated in specific conventions, first and foremost the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) complemented by its Annexes. Along the NMSR, participation

[3] N. Ros, 'La coopération en droit international de la mer' in E. Saunier (ed.), *Penser le Maritime* (Presse universitaire de Rouen et du Havre 2022), forthcoming.
[4] P. Boisson, *Politiques et droit de la sécurité maritime* (Bureau Veritas 1998).

in these conventions and compliance with the standards, including soft law recommendations, must be strengthened in order to favor the respect of the most global conception of maritime safety, including maritime security.

b) Including Maritime Security

Indeed, what is likely to be involved along the NMSR is also security as a condition of safety (i), especially by reference to international criminal acts at sea (ii).[5]

i) Security as a condition of safety

The evolution of the issues and their regulation now leads to the understanding of maritime safety in relation to maritime security. Security is perceived as a recent concept, post-September 11, 2001; at sea, maritime security thus appears to focus on the human origin of threats resulting from or directed against maritime navigation, which potentially includes acts of piracy and other illegal acts at sea, as well as terrorism.

Maritime security can be apprehended as a condition of safety, not only in relation with ships, on the high seas or in areas under national jurisdiction, but also without any reference to navigation, as regards platforms, or even in ports. Of course, such protean risks exist on several parts of the NMSR, in particular in the straits of South East Asia, or in the Gulf of Aden, and they must be taken into consideration because maritime security is a condition for the success of the maritimization project proposed by China.

Obviously, the effectiveness of the NMSR can also help to strengthen international cooperation in the fight against international criminal acts at sea.

ii) International criminal acts at sea

In addition to contemporary piracy, which cannot be apprehended under conventional or customary law, since it does not develop on the high seas but in areas under national jurisdiction, including the territorial sea, internal waters and seaports, new forms of violence at sea emerged at the end of the 20th Century. Such international criminal acts at sea are usually connected with terrorism, unstable internal situations, political-economic considerations; they are more or less purely based on profit, or even totally controlled by local or global mafias. The NMSR can be an incentive for their development.

In addition to the more political actions carried out by the UN, such as in Somalia, the IMO has worked in this field, and the first convention even predates September 11, since it is the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA), adopted in 1988 and covering forms of violence at sea that do not fall within the scope of conventional piracy, such as hijacking and hostage-taking. Supplemented by the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, the conventional system has also integrated the need to take

[5] J. M. Sobrino Heredia (ed.), *Sûreté maritime et violence en mer / Maritime Security and Violence at Sea* (Bruylant 2011); G. Andreone, G. Bevilacqua, G. Cataldi and C. Cinelli (eds), *Insecurity at Sea: Piracy and other Risks to Navigation* (Giannini Editore 2013).

into account the risks resulting of terrorist acts, which were the subject of two Protocols adopted in 2005.[6]

It is therefore necessary to strengthen participation in all these conventions in the perspective of the NMSR. China itself is involved in the fight against piracy and violence at sea, especially in the Aden Gulf, and this is an integral part of its strategy in order to become a great maritime power which is also one of the NMSR objectives.

2.2. From Maritime Safety to Environmental Considerations

According to UNCLOS (a) as well as regionally (b), maritime safety has progressively integrated environmental protection.[7]

a) According to UNCLOS

On these issues, the Law of the Sea Convention has recognized the predominant role of the flag State (i) but also the emerging role of the other States (ii).

i) The predominant role of the flag State

The interrelationship between maritime safety and environmental protection being established, international conventional law, especially Part XII of UNCLOS, has enshrined the predominant role of the flag State, at least beyond the territorial sea. Indeed, the flag State symbolizes the traditional principle of the freedom of the seas, as it applies on the high seas, and by extension in EEZs. It is therefore a key element in the perspective of the NMSR, all the more so given the importance of flags of convenience within the world fleet, of which they represent no less than 70%. Insofar as it allows vessels to be registered in the least stringent legal system in terms of compliance, with domestic legislation as well as international regulations, for example as regards IMO's standards, the system of flags of convenience has a very strong impact on maritime safety and environmental protection.

The flag State must ensure that ships flying its flag comply with international rules applicable to reduce, control and prevent pollution; in the event of an infringement, it must carry out the necessary investigations, including at the request of third States, which must then be kept informed; and when appropriate, the flag state must take any action or prosecution under its domestic law with penalties sufficiently severe to be deterrent. Obviously, this is not necessarily the

[6] F. G. Attard, 'IMO's Contribution to International Law Regulating Maritime Security' (2014) 45 Journal of Maritime Law and Commerce 479.

[7] N. Ros, 'Un demi-siècle de droit international de l'environnement marin' in *Droit, humanité et environnement Mélanges en l'honneur du Professeur Stéphane Doumbé-Billé* (Larcier 2020), 1025.

case, *a fortiori* in the hypothesis of a flag of convenience, which explains the emerging role of the other States.[8]

ii) The emerging role of the other States

As such, the coastal State is the first concerned, in the areas under its national jurisdiction; it may inspect a foreign vessel, take any legal action in accordance with the requirements of its domestic law; in case of prosecution, the measures taken must be notified to the flag State and if it initiates proceedings for the same infringement, the coastal State must suspend its action, unless it has taken place in a sovereign zone, or if serious harm has been caused to its marine environment, or if the flag State has repeatedly failed to fulfil its related obligations.[9]

However, the port State, i.e., the State in whose port a foreign ship voluntarily calls for any commercial or technical operation, is also recognized as having competence in the event of illegal discharge beyond its national jurisdiction, even though it has itself suffered no direct damage or serious threat to its environment, but only if the coastal State concerned so requests; it may also oppose the departure of a ship when it is likely to cause pollution.[10] But given the exorbitant nature of this potential extensive role, certain guarantees have naturally been provided for, such as the suspension of pursuit in favor of the flag State, or the prompt release of the vessel in case of payment of a reasonable bond.

All these elements are of special interest, from the perspective of the NMSR, universally as well as regionally.

b) Regionally

Environmental considerations are indeed of growing importance, both in the regional seas (i) and in the other forums (ii).

i) The regional seas

Originally developed at the initiative of UNEP, to which 14 of them are effectively connected, 7 of which are directly administered by UNEP, the 18 regional sea systems are all based on the need to organize cooperation to improve the protection of the marine environment, fight against all forms of pollution and, for the most advanced, preserve marine biodiversity.[11] They generally combine a political dimension embodied in action plans, and a real legal dimension with a convention supplemented by thematic protocols, open to its Contracting Parties according to a principle of separate participation. The idea is to set an objective and a framework for global governance under the umbrella convention, but to

[8] T. Zwinge, 'Duties of Flag States to Implement and Enforce International Standards and Regulations – And Measures to Counter Their Failure to Do So' (2011) 10 Journal of International Business and Law 297.

[9] E. Franckx, 'Coastal State Jurisdiction with Respect to Marine Pollution – Some Recent Developments and Future Challenges' (1995) 10 International Journal of Marine and Coastal Law 253.

[10] H.-S. Bang, 'Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea' (2009) 40 Journal of Maritime Law and Commerce 291.

[11] See the website of UNEP on the Regional seas programmes: <https://www.unep.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/regional-seas-programmes>.

allow States to modulate their commitment with the protocols. This is a very flexible form of cooperation, but it seems to have proved to be successful, in this particular area of the Law of the Sea.

Along the NMSR, there are several regional seas systems involved (especially East Asian Seas, East Africa and Mediterranean, for the UNEP's administered systems, but also Red Sea and Gulf of Aden); some of them are naturally more advanced than others, in relation to the level of development of the coastal States, but they should all be associated to the project as a forum for cooperation between member States in order to be able to develop a common approach of the key issues.

ii) The other forums

Insofar as the NMSR encompasses marine waters of the European Union, i.e., areas under the national jurisdiction of some of its Member States, in the Mediterranean, but also in the Baltic or the North Sea, the EU should be involved in the project, as regards maritime transport, port development, fleet attractiveness, monitoring and control, but also maritime safety and environmental protection, in particular under shared competencies and in the framework of its Maritime Integrated Policy.[12] By the fact, the EU develops a proactive strategy as regards the marine environment; maritime safety packages adopted after the *Erika* and *Prestige* shipwrecks, or the creation of the European Maritime Safety Agency (EMSA), are some examples of the comparatively high level of requirements under EU Law, hence the usefulness of its application.

Other forums must be associated, along the NMSR, i.e., the regional memorandums of understanding dedicated to port State control.[13] Indeed, they are key elements in order to enhance maritime safety, via the inspection of foreign ships in national ports, according to UNCLOS. Nine of these regional agreements on port State control have been signed in order to rationalize and harmonize the control at the appropriate level in the different regions, taking into consideration the logistical and human means of the coastal States. The objective is to prevent the development of ports of convenience in a region, and to adapt the level of requirements to the regional specificities. Some of these MoUs encompass waters or ports of the NMSR, such as the Tokyo MoU (Asia and the Pacific), the Indian Ocean MoU, the Mediterranean MoU, and potentially the Paris MoU (Europe and the North Atlantic) or the Riyadh MoU (Gulf Region). It is essential to associate these systems to the management of the relevant aspects of the NMSR, to better maritime cooperation and economic growth, from Sustainable Development to the Blue Economy.

3. From Sustainable Development to the Blue Economy

[12] N. Ros, 'L'Union européenne et le droit international de la mer' (2019) XXXVII Annuaire de Droit Maritime et Océanique 99.

[13] T. L. McDorman, 'Regional Port State Control Agreements: Some Issues of International Law' (2000) 5 Ocean and Coastal Law Journal 207.

The NMSR is obviously developed by reference to Sustainable Development (3.1.) but the project is also justified by China in the framework of the Blue Economy (3.2.).

3.1. By Reference to Sustainable Development

Following the logic of Rio (a) and in accordance with SDG 14 (b), the NMSR is supposed to be a vector of sustainable development for all the people and countries involved.

a) Following the logic of Rio

Along the NMSR, the Chinese Vision for Maritime Cooperation[14] is based on the concept of Sustainable Development (i) applied to the oceans and seas (ii).

i) The concept of Sustainable Development

The origins of sustainable development lie in International Law of Development in the 1960's, with an ideological dimension, linking development and decolonization. But a new dimension of the concept of development progressively emerges during the 1970's, integrating a comprehensive approach, ecological, economic and social. In International Law, sustainable development has to be understood according to these three essential dimensions, the so-called three pillars, but also to a two-fold approach, spatial and temporal. The first initially refers to development, in a world global context, but also as regards interstates cooperation encompassing North-South relations and South-South partnership; both dimensions are present along the NMSR. The latter approach refers to sustainability and imposes an intergenerational strategy along the NMSR, in order to prevent immediate needs compromising the future of forthcoming generations. In all the cases, conflicts of interests would have to be resolved and balanced, especially between economic development and environmental protection.

ii) Applied to the oceans and seas

This approach dedicated to the marine element appears in line with the logic of the Earth Summit, although the 1992 Declaration does not make any direct reference to the oceans and seas; indeed Chapter 17 of Agenda 21 contributed to define the relationship between sustainable development and Law of the Sea, in accordance with UNCLOS, in particular as regards the rights and obligations of States, and taking into account the special needs of Small Island Developing States (SIDS) *a fortiori* in the context of climate change.[15]

International cooperation sets forth the importance of an economic development respectful of the marine environment, both for developing and

[14] Xinhuanet, 'Vision for Maritime Cooperation under the Belt and Road Initiative', 20 June 2017, <http://www.xinhuanet.com/english/2017-06/20/c_136380414.htm>.

[15] N. Ros, 'Sustainable Development Approaches in the New Law of the Sea' (2017) 21 Spanish Yearbook of International Law 11, <http://www.sybil.es/documents/ARCHIVE/Vol21/2_Ros.pdf>.

developed countries, with social benefits for all the stakeholders involved. Oceans and seas are now considered as a promise of sustainable development, not only for coastal States but also in a broader approach including hinterlands; it is all the more interesting to underline that the China's Belt and Road Initiative encompasses a terrestrial dimension precisely involving landlocked States.

b) In accordance with SDG 14

In the framework of the "Blue Partnership" proposed by China, SDG 14 is apprehended in connection with other SDGs (i) and as a strategic guideline (ii).

i) In connection with other SDGs

The contemporary approach of sustainable development applied to oceans and seas was initiated in 2015, in the framework of the Sixteenth meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, held in April 2015, and precisely dedicated to *Oceans and sustainable development: integration of the three dimensions of sustainable development, namely, environmental, social and economic*. In the same context, the UN 2030 Agenda for Sustainable Development, adopted by the General Assembly on 25 September 2015, identified the Sustainable Development Goal 14 (SDG 14), dedicated to *Life below water* and named *Conserve and sustainably use the oceans, seas and marine resources for sustainable development*.[16] It is one of the 17 SDGs conceived as part of a highly inter-connected agenda including nine other SDGs presented as closely linked with oceans and seas. Poverty eradication (SDG 1), food security and sustainable agriculture (SDG 2), health (SDG 3), clean water and sanitation (SDG 6), modern energy (SDG 7), growth and employment (SDG 8), climate (SDG 13), ecosystems and biodiversity (SDG 15) and partnerships (SDG 17) are indeed of great interest, in connection with SDG 14; and they are likely to be practically involved along the NMSR.

ii) As a strategic guideline

The Chinese project expressly refers to a "*Blue Partnership to forge a "blue engine" for sustainable development*".[17] Even before the implementation of the NMSR, blue sustainable development can be considered a strategic guideline for actions.

The success of the "One Road, One Belt" supposes infrastructure and logistics developments, cooperation platforms and management initiatives, but also financial integration and monetary cooperation. The global approach emblematic of the sustainable development is a necessary driver in order to mobilize participation, facilitate investments, connect people, develop regional economic

[16] E. C. Díaz Galán, 'Las Normas del Derecho del Mar sobre la protección del medio marino y el objetivo 14 de la Agenda 2030: ¿Utopía o Realidad?' in P. Chaumette (ed.), *Transforming the ocean law by requirement of the marine environment conservation / Le droit des océans transformé par l'exigence de conservation de l'environnement marin* (Marcial Pons Ediciones Jurídicas y Sociales 2019), 57, <https://halshs.archives-ouvertes.fr/halshs-02398888/document>.
[17] See (n 14).

cooperation, boost networks, industry and trade, upgrade intermodal transport, and raise environmental awareness, with mutual benefits for all, along the Road.

At the maritime level, the strategy is to promote ocean cooperation, and develop all the uses of the sea and marine activities, in a synergic and holistic way. In areas under national jurisdiction, coastal States have to be very cautious and careful in order to balance positive and negative impacts, economic promises, environmental risks and social benefits for all, including women, youth, indigenous people, and other local communities. As usual, the objective is to eradicate poverty, better quality of life for all people, and propitiate economic growth without sacrificing the environment. Port infrastructure development, increase in maritime traffic, or offshore energy exploitation could have negative local impacts, but also transboundary consequences, for the marine environment and human community; this is essential to take into consideration adopting a Law of the Sea approach, especially in relation with the Blue Economy.[18]

3.2. In the Framework of the Blue Economy

As it is well known, the Blue Economy appears to be an avatar of Sustainable Development (a) and, especially along the NMSR, a new strategic power tool (b) for China.

a) An avatar of Sustainable Development

The Blue Economy extends from navigation to other uses of the sea (i), developing an economic approach to the environmental and social dimensions (ii) of sustainable development.[19]

i) From navigation to other uses of the sea

The Blue Economy considers oceans and seas as drivers of economic growth; it supposes to apprehend the marine and maritime sectors as a whole and to adopt a global approach of maritime activities. Beyond the traditional uses of the sea based on mobility such as navigation and fishing, including shipbuilding and container operators, the Blue Economy intends to valorize new maritime activities, with a higher economic potential, the blue growth industries such as renewable marine energies, marine mineral resources including offshore, blue biotechnologies, maritime, coastal and cruise tourism, and aquaculture; submarine cables and pipelines are also of crucial importance, both from an economic and

[18] N. Ros, 'Estrategia *Blue Growth* y retos de Privatización del mar' in J. Cabeza Pereiro and B. Fernández Docampo (ed.), *Estrategia Blue Growth y Derecho del Mar* (Editorial Bomarzo 2018), 227.

[19] The most important risk is the privatization of the oceans and seas; N. Ros, 'La privatisation des mers et des océans : du mythe à la réalité' in P. Chaumette (ed.), *Transforming the ocean law by requirement of the marine environment conservation / Le droit des océans transformé par l'exigence de conservation de l'environnement marin* (Marcial Pons Ediciones Jurídicas y Sociales 2019), 169, <https://halshs.archives-ouvertes.fr/halshs-02396208/document>.

strategic point of view, even if associated stakes tend to be often practically underestimated in Blue Economy traditional analyses.[20]

Even if Blue Economy postulates a multiple use of the sea, its development generates competition for maritime space, obviously between fixed and mobility-based activities, but also between fixed industries because most of them need vast marine areas free from any other activities and claim for exclusivity in the use they make of the sea. In this perspective, the challenge is the need to manage maritime areas, in order to conciliate the different activities or at least to ensure their efficient and sustainable management, reduce conflicts, create synergies and encourage private investment, via Maritime Spatial Planning (MSP). Indeed, this new approach of sustainable development entails an effective risk of privatization of marine spaces; when the coastal State grants private concession over the public domain, private actors legally receive exclusive rights over a part of the national maritime space, exclusivity meaning exclusion and *de facto* appropriation.[21]

From a Law of the Sea approach, this is a real challenge for the near future, in areas under national jurisdiction, along the NMSR. One more time, coastal States would have to be very cautious, especially, but not only, SIDS,[22] or more broadly developing States, because they are more at risk of blue colonialism.[23]

ii) An economic approach to the environmental and social dimensions

Actually, all the coastal States are under concern, because the Blue Economy figures an economic approach to the environmental and social dimensions of sustainable development. The risk is to prioritize economy to the detriment of environmental protection and social welfare or even human rights, apprehended in an individual or collective way.

The objective of the NMSR is primarily focused on economic development. The environmental and social dimensions are integrated in the project, but they obviously appear to be subsidiary compared to economic growth, taking into consideration that the precautionary principle should but cannot be the rule, in order not to prevent the due time implementation of the project and to secure investments. In areas under national jurisdiction, the challenge is great because, even shared, economic benefits could be unbalanced when all the negative impacts would primarily affect the coastal States, their marine and terrestrial environment, for example in case of pollution, but also the local and national communities. It is well known that blue growth does not mean blue justice, especially for the most vulnerable and ocean dependent people.[24]

---

[20] 'Submarine Cables and Pipelines' in United Nations (ed.), *The First Global Integrated Marine Assessment: World Ocean Assessment I* (Cambridge University Press 2017), 277.

[21] N. Ros, 'Modern Law of the Sea: From Governance to Privatization' (2019) 37 Waseda Bulletin of Comparative Law 11.

[22] N. Ros, 'Les Seychelles, laboratoire de la privatisation des mers' (2020) 26 Neptunus, <https://cdmo.univ-nantes.fr/fr/neptunus-e-revue/annee-2020>.

[23] N. Ros, 'Le continent africain face aux mirages de la croissance bleue' in J.-B. Harelimana (ed.), *Liber Amicorum Stéphane Doumbé-Billé Autour du droit international économique en Afrique* (African Academy of International Law Practice 2022), forthcoming.

[24] N. J. Bennett, J. Blythe, C. S. White and C. Campero, 'Blue growth and blue justice: Ten risks and solutions for the ocean economy' (2021) 125 Marine Policy 104387.

Even if China is the project leader, the NMSR develops a neoliberal vision of maritime cooperation, based on free trade, exchanges development and economic growth. The sea is the vector but not the object, and the NMSR appears a new strategic power tool for China.

b) A new strategic power tool

In the framework of the NMSR, the Blue Economy is a strategic lever for Chinese ambitions, both economically (i) and geopolitically (ii).

i) Economically

As well as the ancient historic Silk Road, the New Maritime Silk Road and the Belt and Road Initiative are dedicated to international trade development and are of course sinocentric. Based both on a bilateral and multilateral approach, the global project was conceived by China as a mean to strengthen its economic position, facilitate investments opportunities, secure its vital, and in particular energy, supplies, better commercial exchanges and connectivity with the rest of the world, especially with traditional or more new markets, i.e., provide more markets opportunities for its industry and economy, all along the Road.

To focus on the NMSR, and even if it is presented as a "win-win" strategy, it constitutes a prospective power tool for China, in terms of maritime transport, infrastructure investment, especially in ports along the Road, access to local markets and resources, in Africa or in Europe. If some States are reluctant, it is precisely because they have developed some legitimate fears in terms of independence and economic benefices, but also of negative impacts from an environmental point of view.

This is all the more so because the NMSR is closely interconnected with the Chinese Blue Economy development that enters into rivalry with the ambitions of other commercial powers, also eager to assert themselves as maritime powers, such as the European Union, one of the initiators of the Blue Economy and Blue Growth strategy, also looking for a spatial area of maritime influence.[25] In this context, the Declaration on the establishment of a *Blue Partnership for the Oceans: towards better ocean governance, sustainable fisheries and a thriving maritime economy between the European Union and the People's Republic of China*, signed on 16 July 2018, is supposed to be a benchmark for further cooperation.[26] But skepticism and mistrust obviously also exist as regards the geopolitical aspects of the project.

ii) Geopolitically

The Chinese conception of International Relations closely links Economics and Politics, and the NMSR is obviously also a geopolitical strategy developed by China in order to consolidate itself as a global superpower.[27] It is interrelated with

[25] N. Ros, 'Variations autour du concept d'espace maritime européen' (2020) Revue du droit de l'Union européenne 117.

[26] The text is available on <http://ec.europa.eu/newsroom/mare/document.cfm?doc_id=53843>.

[27] J.-M. F. Blanchard and C. Flint, 'The Geopolitics of China's Maritime Silk Road Initiative' (2017) 22 Geopolitics 223.

the global dynamics of the "Go West", but can also be analyzed from a more local point of view, with different motivations depending on the region concerned. The NMSR can even include naval power, via overseas logistical bases as in Djibouti, or naval presence worldwide, because Blue Economy is closely interrelated with maritime security.[28]

In the South China Sea, or in the Pacific, the NMSR can help to reinforce the regional leadership of China, developing the logic of the "string of pearls" or opposing the US Trans-Pacific Partnership influence. In the Indian Ocean, the project could precisely permit to advance China's military interests, versus India, and strengthen Chinese control of the strategic maritime roads in the region. In Africa, the NMSR would confirm and strengthen the Chinese presence, which is not free of political influence, notably for the purpose of securing some strategic supplies or controlling sectors considered vital. Along the Eastern coast, and in the Gulf of Aden, it could be a strategic tool in order to better maritime security, as well as on the access roads to the Middle East and East Mediterranean (Red Sea and Suez Canal), very strategic regions in particular from the energy point of view. A similar approach could be developed as regards the Arctic, as a communication route, but above all from the standpoint of natural resources, living and non-living.[29] At the end of the road, the NMSR aims to consolidate the geopolitical influence of China in Europe, a region where it is not traditionally so well established, in a context of economic and strategic rivalry, even if the EU and China have since finally concluded in principle negotiations on an investment agreement, after seven years of hard discussions, as announced on 30 December 2020.[30] This achievement is maybe not without relations with the NMSR, apprehended in the global framework of the OBOR.

[28] M. A. Voyer, C. H. Schofield, K. Azmi, R. M. Warner, A. McIlgorm, and G. Quirk, 'Maritime security and the Blue Economy: intersections and interdependencies in the Indian Ocean' (2018) Journal of the Indian Ocean Region 1.

[29] State Council Information Office of the People's Republic of China, 'China's Arctic Policy', January 2018, <http://www.scio.gov.cn/zfbps/32832/Document/1618243/1618243.htm>.

[30] For more details on the EU-China Comprehensive Agreement on Investment, see <https://ec.europa.eu/trade/policy/in-focus/eu-china-agreement/>, with reference to a "Polar Silk Road".

The Future Treaty on Marine Biological Diversity Beyond National Jurisdiction, Protected Areas and Freedom of Navigation in the Context of the "Maritime Silk Road"

TRPIMIR M. ŠOŠIĆ*

SUMMARY: 1. Introduction. – 2. Protected Areas in the Draft Text of the BBNJ Treaty. – 2.1. MPAs/ABMTs: Definitional Issues. – 2.2. Principles and objectives. – 2.3. Global/Regional Approach: Institutional and Procedural Aspects. – 3. The Freedom of Navigation in the High Seas and Protected Areas in ABNJ. – 4. Conclusion.

1. Introduction

In 2017 the Chinese government released a policy document entitled "Vision for Maritime Cooperation under the Belt and Road Initiative", which concerns the maritime part of China's Belt and Road Initiative (BRI), also referred to as the "21st Century Maritime Silk Road".[1] The document sets out the principles, framework, and priorities for the cooperation among States along the route of the Maritime Silk Road and promotes the idea of an "all-dimensional, multi-tiered and broad-scoped Blue Partnership" with a view to enhancing the coordination of activities. The Maritime Silk Road is, of course, primarily about securing shipping lanes from China to Europe.[2] Still, among the cooperation priorities in the 2017 Chinese government document, the first to be addressed relates to green development. Under this heading various alleys of cooperation regarding the protection of the marine environment are contemplated, and amongst others the importance of cooperation in safeguarding marine ecosystems and biodiversity is highlighted.

A year later China entered into such a blue partnership with the European Union (EU), on the basis of the "Declaration on the establishment of a Blue Partnership for the Oceans: towards better ocean governance, sustainable fisheries and a thriving maritime economy" (EU-China Declaration).[3] It should be kept in mind that the Declaration, quite expectedly, is of a political character and, thus, not binding under international law.[4] Nevertheless, it sets principles and defines areas of cooperation promoting better ocean governance and policy coordination in that respect.[5] In light of our topic, it is interesting to note that the Declaration underlines the work on an "international legally binding instrument under the United Nations

* Assistant Professor, Faculty of Law, University of Zagreb.

[1] Keyuan Zou, Shicun Wu and Qiang Ye, 'Introduction' in Keyuan Zou, Shicun Wu and Qiang Ye (eds), *The 21st Century Maritime Silk Road: Challenges and Opportunities for Asia and Europe* (Routledge 2020), 7. For the text of the document in English see <http://www.xinhuanet.com/english/2017-06/20/c_136380414.htm>.

[2] Keyuan Zou, Shicun Wu and Qiang Ye (n 1) 1.

[3] See the text of the Declaration at <https://sidigimare.wordpress.com/2018/02/03/ue-governance-mari-e-oceani/>.

[4] EU-China Declaration, s B(5).

[5] Ibid., preamble, recital 5.

Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction" (BBNJ treaty) as an area of EU-China cooperation to improve global ocean governance,[6] and it also points to the use of marine protected areas (MPAs) as tools for the conservation of marine living resources and marine ecosystems.[7]

Dealing with the protection and conservation of marine biological diversity in areas beyond national jurisdiction (ABNJs), one should recall that on a global level the significance of MPAs was given prominence when, in the framework of the Convention on Biological Diversity (CBD),[8] the so-called Aichi Targets were adopted, comprising the commitment by the international community to protect at least 10% of marine and coastal areas through the establishment of protected areas, thus forming a global network of MPAs.[9] In pursuance of that goal, and foremost with ABNJ in mind, criteria for identifying ecologically and biologically significant marine areas (EBSAs) were developed, in order to guide States in making out potential areas in need of protection but without prejudging the designation of such areas as MPAs.[10] Although MPAs in ABNJ could be indirectly based on certain provisions of the CBD,[11] and certain sectoral and regional instruments, notably the OSPAR Convention for the North-East Atlantic,[12] allow for the possibility that MPAs encompass ABNJs, the problem with achieving the goal of a coherent and connected network of MPAs has been, that we do not have a clear-cut general legal basis for establishing MPAs in ABNJ.

In December 2017 the time was finally ripe for the UN General Assembly to convene an intergovernmental conference with the task to elaborate the text of a

[6] Ibid., s C(1)(b).
[7] Ibid., s C(4)(a).
[8] (1993) 1760 UNTS 143.
[9] Aichi Biodiversity Targets, Target 11, <https://www.cbd.int/sp/targets/>. See also J. Harrison, *Saving the Oceans through Law: The International Legal Framework for the Protection of the Marine Environment* (Oxford University Press 2017) 49; A. G. Oude Elferink, 'Coastal States and MPAs in ABNJ: Ensuring Consistency with the LOSC' (2018) 33 International Journal of Marine and Coastal Law 437, 438. The draft of the 'Post-2020 Global Diversity Framework', currently under discussion, proposes the target to cover 30% of the planet with a system of connected protected areas by 2030; see 'Update of the zero draft of the post-2020 global biodiversity framework', CBD/POST2020/PREP/2/1, 17 August 2020, Annex, para 12(a), Target 2. But there are also proposals advocating the so-called "30 by 30" target, aiming to cover 30% of terrestrial and inland waters and 30% of oceans; see 'Updated synthesis of the proposals of Parties and observers on the structure of the post-2020 global biodiversity framework and its targets', CBD/POST2020/PREP/1/INF/3, 17 February 2020.
[10] Harrison (n 9), 50.
[11] Oude Elferink (n 9), 445-446.
[12] Ibid., 455-60. One should also note that specially protected areas of Mediterranean importance (SPAMIs) in the framework of the Barcelona Convention may encompass areas of high seas, and there is one such SPAMI, the Sanctuary for Marine Mammals in the north-western Mediterranean, that initially included high seas areas but since the proclamation of the ecological protection zones by France (2004) and Italy (2011) this has no longer been the case. In the meantime, France proclaimed a fully-fledged EEZ (2012) and the proclamation by Italy of its EEZ, if not yet accomplished, is imminent. Cf Y. Tanaka, *The International Law of the Sea* (Cambridge University Press 2012), 329-330.

BBNJ treaty under the UN Convention on the Law of the Sea (BBNJ IGC).[13] In the mandate for the BBNJ IGC the UN General Assembly confirmed the earlier defined package of topics to be addressed, including area-based management tools (ABMTs) and MPAs,[14] and underlined the requirement that the BBNJ treaty be consistent with the UN Convention on the Law of the Sea.[15] The mandate envisages four sessions of the BBNJ IGC,[16] with three having been held thus far.[17] The fourth session (IGC-4), initially planned for March/April 2020, had to be postponed twice due to the COVID-19 pandemic, and is currently set to take place in the first half of 2022.[18] At the end of IGC-2, the president of the BBNJ IGC was requested to prepare the draft text of a BBNJ treaty, the so-called "zero draft text" (ZDT),[19] reflecting the discussions and proposals made at the first two sessions, as a basis for further negotiations. Following IGC-3, a revised draft text (RDT) was released by the president of the BBNJ IGC.[20]

While contemplating measures for the conservation of marine biological diversity in ABNJ under the future BBNJ treaty, one should not ignore the fact that about 90% of the world trade is transacted by means of international shipping across the world's seas and oceans.[21] Thus, measures such as ABMTs and MPAs in ABNJ might well have an effect on the freedom of navigation enjoyed by ships of all flags in the high seas. Certainly, the freedom of navigation in the high seas is essential for the free trade and communication between the nations of the world, and safeguarding unimpeded trade is clearly at the heart of the BRI, including the Maritime Silk Road. Thus, in the context of the Maritime Silk Road it seems pertinent to consider the interplay between measures for the conservation of marine biological diversity in ABNJ and navigational rights in the high seas, as guaranteed according to the rules of international law codified in the UN Convention on the Law of the Sea (UNCLOS).[22]

---

[13] UN General Assembly Resolution 72/249, A/RES/72/249, 19 January 2018, para 1.
[14] Ibid., para 2. Apart from marine biological diversity in general, there are three other specific topics, i.e., marine genetic resources, environmental impact assessments, and capacity-building and the transfer of marine technology.
[15] UN General Assembly Resolution 72/249 (n 13), para 6.
[16] Ibid., para 3.
[17] The first session took place from 4 to 17 September 2018 (IGC-1), the second session from 25 March to 5 April 2019 (IGC-2) and the third session from 19 to 30 August 2019 (IGC-3), <https://www.un.org/bbnj/>.
[18] Ibid.
[19] BBNJ IGC, 'Draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction', Note by the President, A/CONF.232/2019/6, 17 May 2019.
[20] BBNJ IGC, 'Revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction', Note by the President, A/CONF.232/2020/3, 18 November 2019. In the draft texts of the BBNJ treaty square brackets are used where two or more different options have been supported or where there was support for a "no text" option. However, the absence of square brackets does not necessarily mean that agreement has been reached on the text of the provision at hand.
[21] See information regarding the international shipping industry on the website of the International Chamber of Shipping at <https://www.ics-shipping.org/explaining/>.
[22] (1994) 1833 UNTS 397.

We will now first review the current status of the future BBNJ treaty's draft text regarding ABMTs and MPAs. Thereafter we will look at the freedom of navigation in the high seas in relation to effects that the establishment of ABMTs and MPAs in ABNJ might have.

2. Protected Areas in the Draft Text of the BBNJ Treaty

2.1. MPAs/ABMTs: Definitional Issues

As concerns protected areas in ABNJ, in the negotiations for the BBNJ treaty two terms are employed, namely marine protected areas (MPAs) and area-based management tools (ABMTs). The two terms are typically mentioned together, but it is not always clear if those using the terms in fact imply that there is a substantive difference between them.

Since the protection of biological diversity in ABNJ was at an earlier stage approached in the framework of the CBD,[23] one should start with looking at the definitions contained in that treaty of a global character. In the CBD we will indeed find that a "protected area" means a "geographically defined area which is designated or regulated and managed to achieve specific conservation objectives".[24] In 2018 the CBD's Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) further adopted a definition for "other effective area-based conservation measure", i.e. an ABMT, which should denote "a geographically defined area other than a Protected Area, which is governed and managed in ways that achieve positive and sustained long-term outcomes for the in situ conservation of biodiversity, with associated ecosystem functions and services and, where applicable, cultural, spiritual, socioeconomic, and other locally relevant values".[25] As we can see, this definition of ABMTs, although not referring to the achievement of "specific conservation objectives", still mentions "positive and sustained long-term outcomes" in respect of biodiversity conservation, while also adding possible designation criteria.

Based on EU law, the EU and its member States advocated the position that an MPA, as a part of the sea with a higher level of protection than the surrounding maritime area, was to be understood as a defined area with comprehensive conservation and management measures in pursuance of a specific conservation and management objective. ABMTs, as established by competent organisations, would,

[23] A. G. Oude Elferink, 'Exploring the Future of the Institutional Landscape of the Oceans beyond National Jurisdiction' (2019) 28 Review of European, Comparative & International Environmental Law 236.

[24] CBD, Article 2(14); cf L. Eurén Höglund, 'Area-Based Management Tools, Including Marine Protected Areas – Reflections on the Status of Negotiations' in M. H. Nordquist and R. Long (eds), *Marine Biodiversity of Areas beyond National Jurisdiction* (Brill-Nijhoff 2021), 91.

[25] CBD SBSTTA, Recommendation 22/5. 'Protected areas and other effective area-based conservation measures', CBD/SBSTTA/REC/22/5, 7 July 2018, para 2. The definition was subsequently confirmed by the CBD's Conference of the Parties (COP) at its 14th meeting; CBD COP, Decision 14/8., CBD/COP/DEC/14/8, 30 November 2018, para 2.

on the other hand, address a specific sector or activity without a precise conservation or management objective having been set.[26]

In the RDT the definition for an MPA is worded as meaning "a geographically defined marine area that is designated and managed to achieve specific [long-term biodiversity] conservation and sustainable use objectives [and that affords higher protection than the surrounding areas]",[27] while an ABMT would be "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 [and affording higher protection than that provided in the surrounding areas]".[28] Compared to the ZDT,[29] only the wording of the ABMT definition has been changed. Although the difference between the two terms still somewhat lacks precision, the modified wording in the RDT suggests that ABMTs should be taken as the more general concept, encompassing also MPAs.[30] It seems that the issue of the difference between MPAs and ABMTs was not specifically discussed during the intersessional work of the BBNJ IGC,[31] but further elaboration and fine-tuning in the final text would indeed be desirable, if only for reasons of legal certainty.

2.2. Principles and Objectives

Cooperation among States is essential for the protection of the marine environment, and especially so in ABNJ. Thus, the duty of cooperation "in formulating and elaborating international rules, standards and recommended practices and procedures […] for the protection and preservation of the marine environment" was already enshrined in Part XII of the UNCLOS, encompassing both, cooperation on the global and regional level.[32] In the BBNJ draft treaty the duty of cooperation was not included in the list of general principles,[33] which by no means should lead to the conclusion that it has been disregarded in the negotiations.

---

[26] In that sense Particularly Sensitive Sea Areas (PSSAs), as developed in the practice of the International Maritime Organisation (IMO), would be ABMTs. Eurén Höglund (n 24) 91. See text to n 101-105.

[27] RDT, Article 1(10).

[28] RDT, Article 1(3); emphasis added.

[29] In the ZDT of the definition of ABMT was formulated as meaning "a tool for a geographically defined area, *other than a marine protected area*, through which one or several sectors or activities are managed with the aim of achieving particular conservation and sustainable use objectives [and affording higher protection than that provided in the surrounding areas]"; emphasis added.

[30] This follows also from the textual formulations used in the provisions of Part III RTD.

[31] BBNJ IGC, Intersessional work, Reports on the four thematic issues of the BBNJ Conference and cross-cutting issues, Note by the President (September 2020 - March 2021), <https://www.highseasalliance.org/treatytracker/wp-content/uploads/2021/09/BBNJ_IntersessionalReports-1.pdf>, Annex – Reports on the four thematic issues of the BBNJ Conference and cross-cutting issues, Part II.

[32] UNCLOS, Article 197. Tanaka (n 12) 265-66; Oude Elferink (n 9) 445. See also M. Seršić, *Međunarodnopravna zaštita morskog okoliša* [*International Legal Protection of the Marine Environment*] (Pravni fakultet Sveučilišta u Zagrebu 2003) 27, 55; Harrison (n 9) 35-36.

[33] RDT, Article 5. Considering the square brackets not only in the heading of that draft article ("General [principles] [and] [approaches]") but also in respect of several principles/approaches listed, it is quite clear that it will undergo further and probably significant streamlining.

Quite to the contrary, in Part I of the draft text containing general provisions, a special article is devoted to international cooperation, requiring States to cooperate in the achievement of the BBNJ treaty's objective. The draft provision also reflects the discussions concerning the relationship of the future treaty with sectoral and regional instruments and mechanisms, referring to the "strengthening and enhancing [of] cooperation with and among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and members thereof".[34] The duty of cooperation concerning the protection of the marine environment extends indeed to the use and establishment of protected areas as a tool for safeguarding the preservation of the marine environment. In the draft text this is reflected in the provision on specific objectives of Part III concerning ABMTs, including MPAs,[35] and in a special provision which puts focus on the relationship with sectoral and regional instruments and mechanisms.[36] Although many aspects still are under discussion, the need for coherence and complementarity in the establishment of ABMTs and MPAs is emphasised.[37] As concerns cooperation among States, the draft text also takes into account the rights and interests of coastal States with maritime zones under national jurisdiction that are adjacent to possible protected areas in ABNJ, and specifically refers to the principle of due regard, evidently a connotation to the same principle in the UNCLOS.[38]

One of the most controversial issues for the BBNJ treaty negotiations has been the applicability and relevance of the common heritage of mankind principle.[39] An extension of the principle primarily to the regime for the utilization of marine genetic resources in ABNJ is advocated by developing countries, while developed countries oppose such an approach. Although the views of delegations were far apart at IGC-3 and certainly much effort will be required to reconcile them,[40] a reference to the common heritage of mankind has been added to the list of general principles in the RDT, albeit in square brackets.[41] However, as noted, the debate concerning the common heritage of mankind first and foremost bears upon the use of marine genetic resources and is of less consequence for the treaty mechanisms in respect of ABMTs and MPAs.

---

[34] RDT, Article 6(1).
[35] RDT, Article 14(a). It should be noted though that the whole text of this draft article is in square brackets.
[36] RDT, Article 15. See further paragraph 2.3. of this paper.
[37] RDT, Article 15(1).
[38] RDT, Article 15(4). For more details on the principle of due regard in respect of rights and duties of coastal states with maritime zones adjacent to ABMTs/MPAs in ABNJ, see Oude Elferink (n 9). See also text to n 86-88.
[39] Oude Elferink (n 23) 237; C. Prip, 'Virtual Progress towards a New Global Treaty on Marine Biodiversity in Areas beyond National Jurisdiction', NCLOS Blog, 16 January 2021, <https://site.uit.no/nclos/2021/01/16/virtual-progress-towards-a-new-global-treaty-on-marine-biodiversity-in-areas-beyond-national-jurisdiction/>.
[40] J. A. Roach, 'BBNJ Treaty Negotiations 2019' in M. H. Nordquist and R. Long (eds), *Marine Biodiversity of Areas beyond National Jurisdiction* (Brill-Nijhoff 2021), 88-89.
[41] RDT, Article 5(c).

Further important principles included in the draft text are the precautionary principle[42] and the ecosystem approach.[43] Linked to the ecosystem approach the draft text additionally points to "[a]n approach that builds ecosystem resilience to the adverse effects of climate change and ocean acidification and restores ecosystem integrity".[44] Their application to ABMTs and MPAs seems undisputed.[45] These principles are elaborated in the specific objectives of Part III[46] and in other provisions, notably those concerning the identification of ABMTs, including MPAs.[47]

The BBNJ treaty should provide the opportunity of making progress towards a more integrated, cross-sectoral management of the ocean.[48] How much and what aspects will be included is still open. In the draft text, the integrated approach figures among the general principles but remains in square brackets.[49] As concerns ABMTs and MPAs, the draft article comprising specific objectives makes reference to "a holistic and cross-sectoral approach",[50] the establishment of "a comprehensive system of area-based management tools, including marine protected areas"[51] and "a system of ecologically representative marine protected areas that are connected".[52]

The general principles that States must be guided by in the fulfilment of their duty to protect the marine environment further include the use of the best available science and, as well, the use of "relevant traditional knowledge of indigenous peoples and local communities". While the former seems generally accepted, the scope of the latter is still being discussed disparately, especially in the context of access to traditional knowledge associated with marine genetic resources.[53] Concerning ABMTs and MPAs the reference to the use of traditional knowledge of indigenous peoples and local communities appears to be less controversial.[54]

2.3. Global/Regional Approach: Institutional and Procedural Aspects

In the resolution of the UN General Assembly setting out the mandate of the BBNJ IGC, an operative clause was included recognizing that "this process and its

[42] RDT, Article 5(e).
[43] RDT, Article 5(f).
[44] RDT, Article 5(h).
[45] Cf Roach (n 40) 59.
[46] RDT, Article 14.
[47] RDT, Article 16(1).
[48] Cf K. M. Gjerde, N. A. Clark and H. R. Harden-Davies 'Building a Platform for the Future: the Relationship of the Expected New Agreement for Marine Biodiversity in Areas beyond National Jurisdiction and the UN Convention on the Law of the Sea' (2019) 33 Ocean Yearbook 3, 42. On integrated ocean management see K. N. Scott 'Integrated Oceans Management: A New Frontier in Marine Environmental Protection' in D. R. Rothwell, A. G Oude Elferink, K. N. Scott and T. Stephens (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015), 463ff; Harrison (n 9), 275ff.
[49] RDT, Article 5(g).
[50] RDT, Article 14(a).
[51] RDT, Article 14(c).
[52] RDT, Article 14(d).
[53] BBNJ Intersessional Reports, Part I, paras 25-39.
[54] Ibid., Part II, para 27. Cf Roach (n 40) 59. See RDT, Articles 16(1), 18(2)(c) and 21(4).

result should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies".[55] This "not undermining" requirement from the UN General Assembly mandate has been especially invoked in the case of ABMTs, since in that field the existing regional mechanisms are rather further developed than concerning the other issues that are part of the package under the future BBNJ treaty.[56] Concerning the scope of this requirement, it should be noted that the wording of the clause is hortatory, using "should" not "shall".[57] In other words, the requirement is not of an absolute character,[58] and should be understood as flexible enough to leave room for different institutional approaches.[59] The discussions during the intersessional work of the BBNJ IGC also revealed a preference for a more extensive understanding of the "not undermining" requirement, in the sense that the BBNJ treaty should not compromise the effectiveness of existing regional and sectoral instruments and bodies, even if assuming some of their competencies. Emphasis was put on coordination, cooperation, and coherence between the BBNJ treaty and existing treaties and instruments on the regional and sectoral level.[60]

The States' views on the relationship between the institutional mechanisms of a future BBNJ treaty and sectoral and regional instruments and mechanisms are often categorised into three models: the global approach, advocating strong global institutional solutions with decision-making powers; the hybrid approach, emphasising coordination, collaboration and complementarity between global BBNJ institutions and existing regional and sectoral instruments, without implying a hierarchy between the two; and the regional approach, which accentuates implementation through existing regional and sectoral mechanisms.[61] These should not be understood as being clear-cut and separate from one another, but rather as categories in a spectrum of options proposed by States.[62] The discussions in the framework of the BBNJ treaty negotiations converge towards solutions that reflect

[55] UN General Assembly Resolution 72/249 (n 13), para 7.
[56] Oude Elferink (n 23) 239.
[57] Vito De Lucia, 'Reflecting on the meaning of "not undermining" ahead of IGC-2', NCLOS Blog, 21 March 2019), <https://site.uit.no/nclos/2019/03/21/reflecting-on-the-meaning-of-not-undermining-ahead-of-igc-2/>.
[58] Ibid.
[59] Oude Elferink (n 23) 239; cf T. L. McDorman, 'A Few Words on the "Cross-Cutting Issue" – The Relationship between a BBNJ Convention and Existing, Relevant Instruments and Frameworks and Relevant Global, Regional and Sectoral Bodies' in M. H. Nordquist and R. Long (eds), *Marine Biodiversity of Areas beyond National Jurisdiction* (Brill-Nijhoff 2021), 281-82. On the "not undermining requirement" see also Z. Scanlon, 'The Art of "not Undermining": Possibilities within Existing Architecture to Improve Environmental Protection in Areas Beyond National Jurisdiction' (2018) 75 ICES Journal of Marine Science 405; A. Friedman, 'Beyond "Not Undermining": Possibilities for Global Cooperation to Improve Environmental Protection in Areas Beyond National Jurisdiction: Comment' (2019) 76 ICES Journal of Marine Science 452.
[60] Prip (n 39); BBNJ Intersessional Reports, Part II, para 5.
[61] Oude Elferink (n 23) 240. See also Gjerde, Clark, Harden-Davies (n 48), 36-38. On general aspects of the global and regional approach in marine environment protection, see Seršić (n 32), 51 ff; N. Ros, 'Un demi-siècle de droit international de l'environnement marin' in M. A. Mekouar and M. Prieur (eds), *Droit, humanité et environnement: Mélanges en l'honneur de Stéphane Doumbé-Billé* (Bruylant 2020), 513ff.
[62] Gjerde, Clark, Harden-Davies (n 48), 36.

the hybrid approach, with the scope of the decision-making powers of BBNJ treaty bodies yet to be decided.[63]

That said, early on in the process leading up to the BBNJ IGC a consensus seemed present that, comparable to other treaties in the field and notably the CBD, there should be three core bodies under the BBNJ treaty: a decision-making body, a scientific and/or technical body, and a secretariat.[64] And, indeed, in the draft text the following bodies are envisaged: a conference of the parties (COP) as the body with potential decision-making powers,[65] a scientific and technical body (STB) with advisory functions and composed of experts,[66] and a secretariat, as the body providing the administrative and logistical support.[67]

Proposals for ABMTs and MPAs in ABNJ would primarily be submitted by States parties, individually or as joint proposals with other States.[68] In doing so States are to take account of the criteria for identifying areas that need protection,[69] as specified in the BBNJ treaty: special importance of the species found in the area, fragility, biological diversity, slow recovery and resilience, etc.[70]

According to the draft text the views of other stakeholders, such as indigenous peoples and local communities with relevant traditional knowledge, the scientific community and civil society, but also the views of relevant global, sectoral and regional bodies and mechanisms, and the views of other interested States, notably States with maritime zones adjacent to the proposed protected area, would be considered through a consultation and assessment process that is to take place prior to the decision on an ABMT or MPA. This process of preliminary review would be conducted by the STB.[71]

Finally, after completion of the preliminary review, the COP is to "take decisions on matters related to area-based management tools, including marine protected areas".[72] However, as mentioned, regarding the COP's decision-making powers States still differ significantly.[73] In the draft text, alternative drafting proposals can be found. According to the first alternative the decision-making powers of the COP are somewhat broader and more clearly defined and even include the possibility to adopt conservation measures complementary to those already put in place by sectoral or regional bodies and mechanisms where they exist.[74] The wording of the second alternative is more ambiguous, and in respect of measures adopted by sectoral and regional bodies and mechanisms allows only for

[63] Roach (n 40), 59; BBNJ Intersessional Reports, Part II, para 39.
[64] Gjerde, Clark, Harden-Davies (n 48), 36.
[65] RDT, Article 48.
[66] RDT, Article 49.
[67] RDT, Article 50.
[68] RDT, Article 17(1).
[69] RDT, Article 17(2).
[70] RDT, Article 16. At IGC-3 the proposal to compile the indicative list of criteria in the form of an annex instead of overburdening the text of Article 16 garnered strong support and was subsequently incorporated in the RDT. Cf Roach (n 40), 60.
[71] RDT, Article 18(2).
[72] RDT, Article 19(1).
[73] BBNJ Intersessional Reports, Part II, para 12.
[74] RDT, Article 19(1)[alt 1(c)(ii)].

the COP to give "[r]ecommendations relating to the implementation of related management measures, while recognizing the primary authority for the adoption of such measures within the respective mandates of relevant legal instruments and frameworks and relevant global, regional and sectoral bodies".[75]

As to the current draft text, the implementation of ABMTs and MPAs in ABNJ would mainly be monitored and reviewed through reports submitted to the COP.[76] In addition, the STB is to conduct a periodic monitoring and review process,[77] based on which the COP would decide on the amendment or revocation of ABMTs or MPAs and related conservation or management measures.[78]

3. The Freedom of Navigation in the High Seas and Protected Areas in ABNJ

According to the draft text, the future BBNJ treaty, including naturally the respective provisions on ABMTs and MPAs, will be applied to ABNJs,[79] which in turn are defined as encompassing the high seas and the International Seabed Area.[80] The legal regime of the high seas, as a maritime area beyond national jurisdiction, is often briefly denoted by the phrase "freedom of the high seas".[81] In the words of Article 87(1) UNCLOS, "[t]he high seas are open to all States, whether coastal or land-locked". An essential component of the high seas regime is the freedom navigation, and in the UNCLOS it is specifically stressed that "[e]very State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas".[82] This means that the high seas may, at least in principle, be freely used by any state and for all purposes. As a corollary of the freedom of the high seas, the UNCLOS expressly prohibits the acquisition of any part of the high seas by States, i.e. States must not subject parts of the high seas to their sovereignty.[83]Among the freedoms of the high seas expressly mentioned in the UNCLOS,[84] the freedom of overflight is closely related to freedom of navigation, as it likewise enables free traffic communications between States and is, thus, significant for the development of trade relations.

---

[75] RDT, Article 19(1)[alt 2(c)].
[76] RDT, Article 21(1).
[77] RDT, Article 21(2), (3).
[78] RDT, Article 21(4).
[79] RDT, Article 3(1).
[80] RDT, Article 1(4).
[81] UNCLOS, Article 87(1). According to Article 86 UNCLOS the Convention's high seas regime applies "to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State".
[82] UNCLOS, Article 90.
[83] UNCLOS, Article 89.
[84] Apart from the freedoms of navigation and overflight, the UNCLOS lists four more freedoms of the high seas: freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations, freedom of fishing and freedom of scientific research. But this, as clearly follows from the wording of Article 87(1) UNCLOS, is not an exhaustive list of high seas freedoms. Thus, other freedoms not mentioned in the UNCLOS might exist. Cf R. Wolfrum, 'Hohe See und Tiefseeboden (Gebiet)' in W. Vitzthum (ed.), *Handbuch des Seerechts* (C. H. Beck 2006), 296.

However, the freedom of navigation on the high seas is not boundless. Firstly, all freedom of the high seas is to be exercised in accordance with the provisions of the UNCLOS and other pertinent rules of international law.[85] Furthermore, in the exercise of the high seas freedoms States must have due regard for the interests of other States exercising their equal rights, and also for the rights and obligations under Part XI of the UNCLOS, i.e. with respect to activities in the International Seabed Area.[86] This principle of due or reasonable regard as enshrined in the UNCLOS has its origins in the general principle of law expressed by the Latin maxim *sic utere tuo ut alienum non laedas*.[87] As we have seen, the principle of due regard also comes into play in respect of ABMTs and MPAs in ABNJ.[88] And, of course, States have the duty to protect and preserve the marine environment,[89] which equally extends to the high seas and may affect the exercise of the high seas freedoms.[90]

Indeed, freedom of the high seas does not mean the absence of a legal order on the high seas.[91] The legal order is guaranteed by the flag State who, according to the UNCLOS, has exclusive jurisdiction over all ships flying its flag on the high seas. For this reason, the requirement that ships are allowed to navigate under the flag of only one State is of paramount importance.[92] As a consequence, it is the flag State's duty to ensure, for example, that ships sailing under its flag on the high seas adhere to regulations concerning the safety at sea,[93] and, quite clearly, this likewise relates to rules and regulations regarding the protection of the marine environment, as far as applicable in the high seas.[94] Exceptions from exclusive flag State jurisdiction, which in some way or other affect the freedom of navigation, are solely possible if expressly provided for in the UNCLOS itself[95] or in other treaties, be

[85] UNCLOS, Article 87(1).
[86] UNCLOS, Article 87(2).
[87] Cf D. Anderson, 'Freedom of the High Seas in the Modern Law of the Sea' in D. Freestone, R. Barnes and D. Ong (eds), *The Law of the Sea: Progress and Prospects* (Oxford University Press 2006), 331. On the principle (obligation) of due or reasonable regard see also R. R. Churchill and A. V. Lowe, *The Law of the Sea* (Manchester University Press 1999), 206-07; Wolfrum (n 84), 297-98.
[88] See, (n 38).
[89] UNCLOS, Article 192.
[90] Cf Tanaka (n 12), 152.
[91] J. Andrassy, B. Bakotić, M. Seršić and B. Vukas, *Međunarodno pravo* [*International Law*], vol. 1 (Školska knjiga 2010), 247.
[92] UNCLOS, Article 92(1). That the flag State has exclusive jurisdiction over ships bearing its flag on the high seas, except for special cases defined by international law, was confirmed by the Permanent Court of International Justice (PCIJ) in the famous *Lotus* case already in 1927; *The Case of the S.S. "Lotus"*, Judgment of 7 September 1927, PCIJ, Collection of Judgments, Series A, No. 10, 25.
[93] UNCLOS, Article 94(3).
[94] UNCLOS, Article 217.
[95] As for exceptions specified in the UNCLOS, a warship or other ship on government service may exercise jurisdiction over a ship not flying the flag of the warship's State only if there is reasonable ground for suspecting that the ship is a pirate ship, the ship transports slaves, the ship is involved in unauthorised broadcasting, the ship is without nationality, or the ship, although bearing a foreign flag or no flag at all, in fact belongs to the same State as the warship (UNCLOS, Article 110(1)). Another exception regulated by the UNCLOS is the right of hot pursuit (UNCLOS, Article 111).

they multilateral[96] or bilateral.[97] In the draft text of the future BBNJ treaty we do not find such an exception. As to the implementation of measures adopted for ABMTs and MPAs in ABNJ, according to the draft text "States Parties shall ensure that activities under their jurisdiction or control that take place in areas beyond national jurisdiction are conducted consistently with the decisions adopted" under the BBNJ treaty.[98] Although not expressly mentioned, such a wording would reflect the principle of flag State jurisdiction in the high seas, in line with the general rules of the law of the sea. In other words, an effective implementation and ultimately enforcement of conservation measures for ABMTs and MPAs in ABNJ will depend on an acceptance of the future BBNJ treaty that is as universal as possible.[99]

As concerns specific conservation measures that might be put in place for ABMTs and MPAs, these are not concretised in the current draft text of the BBNJ treaty. Of course, such measures must be appropriate to achieve the conservation objectives as would be defined for a protected area,[100] but would otherwise be determined in the process for the establishment of the protected area. However, conservation measures in ABMTs and MPAs will invariably have an impact on navigation, since the effects of navigational operations might be assessed as disrupting the achievement of set conservation objectives. Thus, international shipping in the high seas might be affected by such measures, possibly limiting the freedom of navigation. For examples of specific conservation measures limiting navigation, it seems appropriate to look at the kind of measures that are adopted for so-called Particularly Sensitive Sea Areas (PSSAs) in the framework of the IMO, the UN specialised agency competent for the safety and security of international shipping and the prevention of pollution from ships.[101] Within the concept of PSSAs the IMO can only prescribe such "associated protective measures" (APMs) that are already available under existing legal instruments, i.e. the SOLAS or MARPOL

[96] An often referred to example is the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ((1990) 1582 UNTS 165). Yet, that Convention does not contain a direct basis for jurisdiction concerning its implementation by States parties in respect of foreign ships. The flag State's authorisation for the exercise of jurisdiction must either be sought on a case-by-case basis or be given in advance through special agreements.

[97] Examples are the various agreements concluded in the framework of the "Proliferation Security Initiative" (PSI) which concerns the suppression of the carriage of weapons of mass destruction by sea. On the PSI see Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009), 232ff.

[98] RDT, Article 20(1).

[99] This is also reflected in Article 20(5) RTD, although the paragraph retains square brackets: "States Parties shall encourage those States that are entitled to become Parties to this Agreement, in particular those whose activities, vessels, or nationals operate in the area that is the subject of an established area-based management tool, including a marine protected area, to adopt measures supporting the conservation and management objectives of the measures adopted and area-based management tools established under this Part", i.e. Part III concerning ABMTs, including MPAs. Cf R. Lee, 'The Journey to Realisation' in M. H. Nordquist and R. Long (eds), *Marine Biodiversity of Areas beyond National Jurisdiction* (Brill-Nijhoff 2021), 5.

[100] RDT, Articles 17(4)(f) and 19(1)[alt 1(b)(ii)].

[101] On PSSAs see Harrison (n 9), 128-30; So Yeon Kim, 'Problems and Processes of Restricting Navigation in Particularly Sensitive Sea Areas' (2021) 36 International Journal of Marine and Coastal Law 438.

Conventions.[102] It might not be surprising then that the PSSAs which have so far been designated display a similar range of APMs. They include recommended pilotage, "areas to be avoided" (ATBAs), traffic separation schemes, no-anchoring areas, routeing and reporting systems, precautionary areas, and two-way routes.[103] Although PSSAs might in their application also be used to encompass areas of high seas, i.e. ABNJ, it would appear that the 17 PSSAs[104] adopted thus far have remained within the limits of the territorial seas and EEZs of applicant coastal States.[105]

4. Conclusion

ABMTs and MPAs are potentially a significant tool when it comes to safeguarding and conserving the marine biological diversity in ABNJ. With the negotiations on the elaboration of the text of a BBNJ treaty under the UNCLOS under way and a successful completion of that process in sight, it is to be hoped that this new global instrument will provide a clear legal basis for the establishment of ABMTs and MPAs in ABNJ taking account of existing sectoral and regional instruments and mechanisms.

On the other hand, the legal regime in the high seas guarantees navigational rights for ships of all flags in the form of the freedom of navigation, which undoubtedly is essential for the development of trade relations between the nations of the world. In that sense, the freedom of navigation in the high seas is an important element in the framework of China's initiative for a "21st Century Maritime Silk Road" since its primary goal is to secure barrier-free trade communications among the States along the route of the Maritime Silk Road.

However, the freedom of navigation, as any other freedom enjoyed either by States or individuals, cannot and must not be boundless. To be sure, the protection and preservation of the marine environment in ABNJ as an acute matter of common concern to humanity justifies certain limitations on navigational rights also in the high seas, which might be prescribed in connection with the establishment of ABMTs and MPAs. That this is accounted for by policymakers in respect of the Maritime Silk Road, can be concluded from the 2017 Chinese government document, taken as a starting point for our discussion, and equally from the 2018 Blue Partnership Declaration signed by the EU and China. How such policy documents will reflect on the actual practice is, of course, an entirely different issue. In any event, for limitations on the freedom of navigation in ABNJ to be effective it will be essential to include the IMO with its competence and expertise concerning

[102] IMO, Resolution A.982(24), A 24/Res.982, 6 February 2006, Annex 'Revised guidelines for the identification and designation of Particularly Sensitive Sea Areas', para 6.1. See Harrison (n 9), 128; Kim (n 101), 444.
[103] Kim (n 101) 460.
[104] For a list of PSSAs see IMO's website: <https://www.imo.org/en/OurWork/Environment/Pages/PSSAs.aspx>.
[105] Harrison (n 9), 129; cf Kim (n 101), 447-48.

the safety and security of international shipping and the prevention of pollution from ships.

The Maritime Silk Road Initiative and Energy Security

ANDREA PRONTERA*

1. Energy Security and International Politics: A Never-ending Story

The interactions between energy security and international politics have been manifest since the famous decision of Winston Churchill, as First Lord of the Admiralty, to power the British navy's ships with oil instead of coal.[1] This switch meant that the Royal Navy would rely, not on coal from Wales, but on insecure oil supplies from what was then Persia. The role of oil in modern warfare and international politics was confirmed by the events of World War I and World War II. However, it was the oil shocks of the 1970s that clearly demonstrated the implications of energy dependence for the practical functioning of the economies and societies of industrialised countries during times of peace. The oil shocks signalled the end of the so-called first oil regime.[2] This regime was based upon the political and strategic predominance of the hegemonic powers in the Middle East – first the United Kingdom and later the United States (US) – and on the control that a small group of Western energy companies – the so-called seven sisters – exercised over the production and commercialisation of oil products. When the political and economic foundations of this system began to shift, partly as a result of the actions of OPEC members, energy security became a top priority for consumer countries. In the following years, various strategies were developed to manage energy dependence and to prevent energy crises and supply disruptions. The strategic and military involvement of the hegemonic power, the US, in the Middle East and other producing regions has remained an important component of global energy security.[3] This strategic dimension of energy security, where energy resources and their flows may become the object of military competition among major powers, remains an important aspect of today's security dynamics. However, a set of additional measures have been developed since the oil shocks, becoming the standard toolkit that consumer countries use to manage their energy dependence on oil and natural gas. A simple distinction can be made between measures designed to ensure long-

* Associate Professor of Political Science, University of Macerata.

[1] D. Yergin, 'Ensuring energy security' (2006) 85 Foreign Affairs 69.

[2] L. P. Frank, 'The First Oil Regime' (1985) 37 World Politics 586.

[3] D. Stokes and S. Raphael, *Global energy security and American hegemony* (JHU Press 2010); J. S. Duffield, *Fuels paradise: Seeking energy security in Europe, Japan, and the United States* (JHU Press 2015).

term and short-term security of supply.[4] Short-term measures include tools used for rapid response to supply disruptions, such as strategic reserves, storage capacity, emergency plans, contingency plans and mechanisms ensuring solidarity amongst consumer countries. These measures can guarantee the continuation of a consumer country's economic and social activities for a limited time, giving the government time to solve the problems that led to the crisis. Long-term measures include interventions intended to prevent energy crises, such as supply disruptions. Long-term measures may include diversification of suppliers and supply routes and the promotion of those investments necessary to develop adequate resources and infrastructure to match energy demand. These measures aim to ensure adequate energy supplies to sustain the long-term economic development of consumer countries. Long-term security of supply also has an internal dimension; energy infrastructure and diversification, for example, have important effects on domestic politics. However, long-term measures are the privileged domain in which the international implications of energy dependence show their main structural effects.[5]

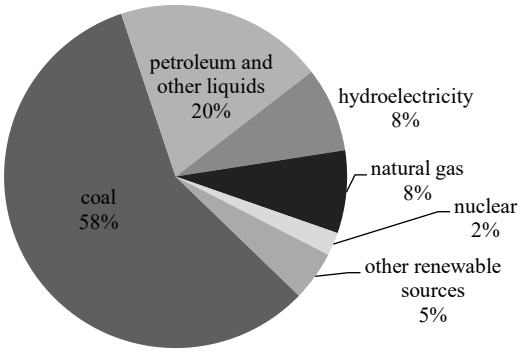
This chapter focuses on this important component of energy security, i.e. long-term security of supply, and on its connection to international politics in the areas of diversification, infrastructure, routes and investments. Adopting this perspective, the chapter analyses the energy security dimension of the Chinese Maritime Silk Road Initiative (MSR). First a brief overview of the Chinese energy security situation will be presented, focusing on key turning points and data. Secondly, the chapter illustrates in more details the Chinese approach to energy security within the context of the MSR. This approach revolves around two main issues: reducing potential vulnerabilities along those sea lines of communication (SLOCs) that are strategically important for China's seaborne oil and natural gas imports and increase diversification of supply routes through pipelines. Then, in the conclusions, the chapter discusses the regional and global implications of the Chinese moves. China is becoming the major importer and consumer of oil and natural gas. Its efforts to address energy security concerns reverberate in an internal system that is more and more characterised by the rivalry between Beijing and Washington.

2. China's Quest for Energy Security

For a long period after World War II, China was essentially self-sufficient, from an energy point of view. Coal, in particular, was the main resource that Chinese leaders developed to drive the country's economic development and to ensure the energy supply for its vast population. China has large coal reserves. Today, the country is the world's primary consumer and producer of coal, which maintains a prominent role in the country's energy mix (Figure 1).

[4] C. Van der Linde, 'The art of managing energy security risks' (2007) EIB Papers 50.
[5] A. Prontera, *The New Politics of Energy Security in the European Union and Beyond: States, Markets, Institutions* (Routledge 2017).

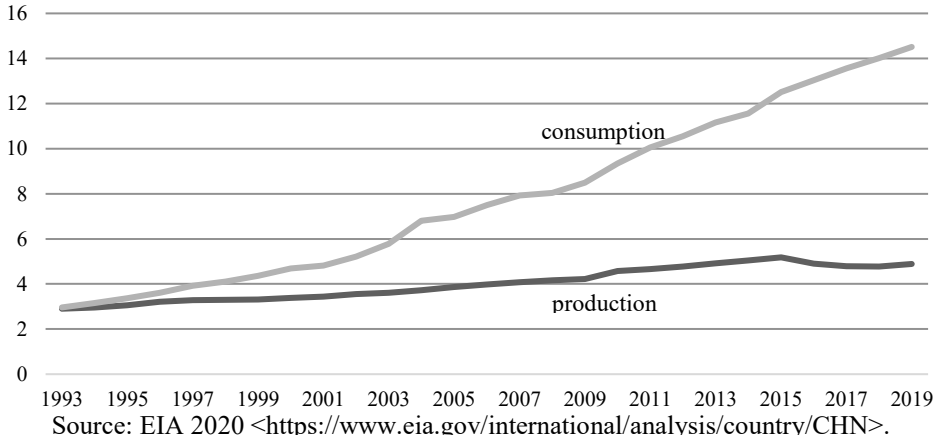
Figure 1. China total primary energy consumption by fuel type, 2019.



Source: BP Statistical Review of World Energy 2020.

As a result of this internal-looking energy strategy, China has been at the margin of the main events that have characterised global energy politics in the twentieth century, such as the oil shocks of the 1970s and the great powers' diplomatic and military involvement in the Middle East. The external economic, diplomatic and military projections that are usually associated with energy dependence are lacking in the case of Beijing. This began to change in the early 1990s as a result of China's dramatic economic development, which rendered the domestic energy supply greatly insufficient for meeting fast-growing energy demand. In 1993, China joined the club of the oil-importing countries and, for the first time, oil consumption outpaced domestic production. Since that time, oil imports have steadily grown to bridge the gap between growing consumption and stagnant domestic production (Figure 2). In 2014, China became the world's largest oil-importing country, taking the position that had long been occupied by the US.

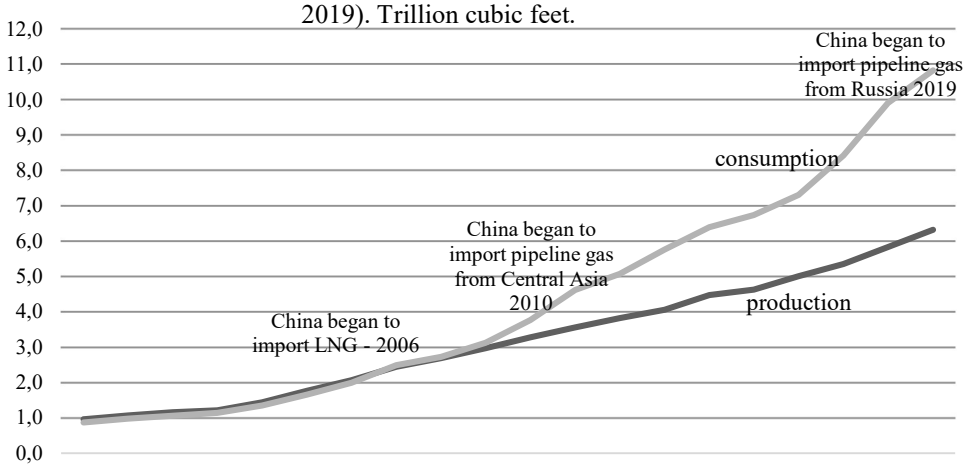
Figure 2. China's oil production and consumption (1993-2019).
Million barrels per day.



Source: EIA 2020 <https://www.eia.gov/international/analysis/country/CHN>.

In the natural gas sector, consumption surpassed domestic production in the early 2000s and has rapidly increased since then (Figure 3). Liquefied natural gas (LNG) facilities (first) and pipelines from Central Asia and Russia (later) were developed to meet China's natural gas needs (Figure 3).

Figure 3. China's natural gas production and consumption (2000-2019). Trillion cubic feet.



Source: EIA 2020 <https://www.eia.gov/international/analysis/country/CHN>.

This new reality of energy dependency from abroad was soon perceived as a potential weakness for a country used to self-sufficiency and that was a latecomer in international energy markets. The Chinese government promoted a reorganisation of the energy sector that resulted in the creation of three giant, vertically integrated, state-controlled oil companies: the China National Petroleum Corporation (CNPC), the China Petroleum and Chemical Corporation (Sinopec) and the China National Offshore Oil Company (CNOOC). Then, Beijing begun to support the internationalisation of these companies abroad with active energy diplomacy backed by the state, which firmly coordinated its energy objectives with other foreign policy goals. With this approach, the Chinese government aimed to secure supply contracts and energy imports from important producer states in the Middle East (like Saudi Arabia and Iraq), Africa, Latin America and Central Asia.[6]

In the natural gas sector, Beijing has worked in partnership with its national energy companies to develop LNG facilities and international pipelines to promote imports and diversification of supply. In the mid-2000s, China begun to import significant quantities of LNG, both from the Middle East and from Asian exporters. Then, in the 2010, it begun to import gas from Central Asia, mainly from Turkmenistan thanks to the Turkmenistan-China Pipeline (also known as the Central Asia–China Gas Pipeline). This pipeline resulted from the cooperation between CNPC and KazMunayGas, the Kazakh oil company. In 2014 and 2015, this approach was improved by the China-Russia deal for the construction of the Power of Siberia pipeline system. This infrastructure, started to supply northern China with Eastern Siberian gas at the end of 2019. Its construction was the result of Moscow-Beijing bilateral diplomacy, Chinese financial support and cooperation between the Russian Gazprom and CNPC.

Thanks to this strategy, China has gradually increased its posture in the international energy markets. It has also diversified the sources of its oil and gas

[6] S. A. Yetiv and Chunlong Lu, 'China, global energy, and the Middle East' (2007) 61 The Middle East Journal 199; Bo Kong, *China's international petroleum policy* (ABC-CLIO 2009).

supplies, in terms of supplier countries and regions (Tables 1 and 2). A large portion (62%) of its oil imports, however, come from the Middle East and Africa. This means that China's energy security relies on a few strategic sea lines of communication (SLOCs), which cross the Arabian Sea and the Indian Ocean. These areas, along with the South China Sea, are also important for LNG supplies, both from the Gulf and Asian producers (Table 2). The Strait of Hormuz, the Strait Bab-el-Mandeb and the Strait of Malacca are crucial chokepoints for the Chinese seaborne energy trade. About 80% of China's oil imports are shipped through the Malacca Strait, and more than 40% come through the Strait of Hormuz.[7] These SLOCs and chokepoints will remain crucial for China's energy security in the coming decades. Despite the recent decarbonisation and climate policies launched by the government, Chinese oil and gas consumption are expected to grow along with the country's energy dependency. Gas import dependency is expected to reach almost 50% in 2045, whereas oil import dependency is projected to surpass the 80% threshold by the same year.[8]

Table 1. China's oil imports by regions and countries (2019).
Percentage of total imports.

Region	% of total imports	Country	% of total imports
Middle East	44%	Saudi Arabia	16%
Africa	18%	Russia	15%
Former Soviet Union	16%	Iraq	10%
Other regions	21%	Angola	9%
		Brazil	8%
		Oman	7%
		Kuwait	4%
		Colombia	3%
		Other countries	28%

Source: EIA 2020 <https://www.eia.gov/international/analysis/country/CHN>.

Table 2. China's natural gas imports by mode of transport and countries (2019).
Percentage of total imports.

Mode of transport	% of total imports	Country	% of total imports
Pipeline	38%	Australia	29%
LNG	62%	Turkmenistan	25%
		Qatar	9%
		Malaysia	7%
		Indonesia	5%
		Kazakhstan	5%
		Uzbekistan	4%
		Russia	3%
		Other countries	13%

Source: EIA 2020 <https://www.eia.gov/international/analysis/country/CHN>.

[7] F. Umbach, 'China's belt and road initiative and its energy-security dimensions', RSIS Working Paper No. 320 (2019).
[8] Ibid.

3. Energy Security in the MSR Initiative

As illustrated above, Chinese energy dependency has grown in parallel to increasing levels of consumption that have not been matched by domestic production. Since the 1990s, the diversification of suppliers and supply routes has been a key goal for the Chinese government and state-owned companies. However, Beijing is highly dependent on the seaborne energy trade for energy security. This new reality has prompted Chinese decision-makers to attach more and more attention to the security of SLOCs, particularly across the Arabian Sea, the Indian Ocean region and the South China Sea.

This development precedes the launch of the MSR initiative. In 2003, Hu Jintao highlighted this concern following an increase in the US naval presence around the southeast Asian straits.[9] Soon, the Chinese media and scholars began referring to this issue as the 'Malacca Dilemma'. This dilemma is linked to the fear that the US Navy could interdict the transit of energy supplies to China. Such a scenario is highly unlikely, as a blockade of the Malacca Strait would harm not only the Chinese economy but also the economic interests of the US and its allies in the region; however, since then, the possibility has been perceived by the Chinese leadership as a source of vulnerability.

The inability of the country to protect its interests and assets along strategic SLOCs and straits has not only created anxiety in Beijing, it has also brought about a clash with China's traditional emphasis on self-reliance. This perception of vulnerability represented an important driver not only for diversifying China's energy import routes – for example, by building pipelines from Central Asia and Russia – but also for improving China's naval capabilities.

In the early 2010s, Beijing's leadership explicitly expressed the goal of developing the country's maritime power and increasing the role of the People's Liberation Army Navy (PLAN) in securing China's interests overseas, including those related to energy resources and assets and along strategic SLOCs.[10] Similar missions were not new for the PLAN. Since 2008, it has conducted several anti-piracy operations in the Gulf of Aden. During the war in Libya, in 2011, the PLAN has also been involved in the evacuation of Chinese citizens, including workers employed by the three major Chinese oil companies.

This move was improved under President Xi Jinping. The launch of the MSR has to be placed within this wider Chinese strategy, though the MSR has different geopolitical objectives.[11] It is an investment-driven strategy to engage several countries, mainly in Asia but also beyond the region, and to create more economic opportunities both in China and in the littoral states that are involved in its route.

---

[9] R. Ghiay, Fei Su and L. Saalman, *The 21st Century Maritime Silk Road. Security Implications and ways forward for the European Union*, (Sipri Publications 2018), <https://www.sipri.org/publications/2018/other-publications/21st-century-maritime-silk-road-security-implications-and-ways-forward-european-union>.

[10] C. Len, 'China's 21st Century Maritime Silk Road Initiative, Energy Security and SLOC Access' (2015) 11 Maritime Affairs 1.

[11] J.-M. F. Blanchard and C. Flint, 'The Geopolitics of China's Maritime Silk Road Initiative' (2017) 22 Geopolitics 223.

This should also contribute to contrasting with the US's manoeuvres to balance and contain China in the region. The MSR, however, has also a diplomatic component aimed at improving China's image, which has been damaged by the disputes in the South China Sea.

From the perspective of energy security, the Chinese efforts to expand their infrastructure and connectivity via the MSR initiative revolve around two major goals: reducing potential vulnerabilities along those SLOCs that are strategically important for China's seaborne energy imports and increasing the diversification of supply routes through pipelines.[12]

To achieve the first goal, it is crucial that China increase the PLAN's operational autonomy and strategic reach. This implies that China will need to secure better access to overseas port facilities. For this reason, Chinese decision-makers support, through the MSR, the development of port and logistical infrastructures. This dynamic is 'symbiotic': the PLAN needs reliable logistical chains to resupply fuel and armaments across the SLOCs and, in turn, its activities can be used to secure the SLOCs.[13] This dynamic requires the construction of strategic facilities in key states, such as Pakistan's Gwadar Port, which is 400 km from the Strait of Hormuz and could help the PLAN to monitor the SLOCs in the Arabian Sea and the Persian Gulf (although the port is currently only open for commercial use). Similarly, China's leasing of a port and military base in Djibouti (at Obock, which is close to the Bab-el-Mandeb Strait) will enable the PLAN to project power around the Horn of Africa. This base shows China's ambition to be seen as a maritime power not just in the Pacific, but also in the Indian Ocean. Chinese state-owned companies are heavily investing in deep-sea ports in other countries, too, including Sri Lanka (at Colombo) and Malaysia. These investments have a commercial component, but attention has grown concerning the 'dual use' of ports for commercial and naval/maritime power projection purposes.[14]

With regard to the second goal – the diversification of supply through pipelines – China is seeking to develop new land-based transit routes crossing friendly littoral states, such as Myanmar and Pakistan. This would help China to connect its oil and gas shipments from the Middle East and Africa by avoiding the Malacca Strait and allowing for an increase in supply from offshore fields in the Indian Ocean. The Myanmar–China gas pipeline entered into operation in 2013. With its capacity of about 12 bcm, it can cover about 4% of Chinese gas consumption. The pipeline was realised thanks to cooperation between the CNCP and Myanmar's state-owned energy companies. It draws from Myanmar's offshore gas fields and crosses the country from Ramree Island to Ruili, in China's Yunnan Province. The Myanmar–China oil pipeline runs in parallel to the Myanmar–China gas pipeline. It came into

[12] Len (n 10); Umbach (n 7); E. Downs, M. E. Herberg, M. Kugelman, C. Len and Kaho Yu, 'Asia's Energy Security and China's Belt and Road Initiative', in National Bureau of Asian Research Report No. 86 (2017), <https://www.nbr.org/publication/asias-energy-security-and-chinas-belt-and-road-initiative/>.

[13] Ghiay, Su and Saalman (n 9).

[14] C. Len, 'China's Maritime Silk Road and Energy Geopolitics in the Indian Ocean: Motivations and Implications for the Region', in E. Downs, M. E. Herberg, M. Kugelman, C. Len, and Kaho Yu, 'Asia's Energy Security and China's Belt and Road Initiative', in National Bureau of Asian Research Report No. 86 (2017), 41-54.

operation in 2017 and was also realised thanks to cooperation between the CNCP and Myanmar's state-owned energy companies. This oil route starts from Maday Island, on the west coast of Myanmar, continues to Ruili, in southwestern Yunnan province, and runs through Rakhine State, the Magwe Region, Mandalay Region and Shan State. It can carry up to 22 million tons of oil annually, which is about 4% of China's total oil imports.

With regard to Pakistan, the China–Pakistan Economic Corridor was launched in 2015 with the goal of linking the Gwadar Port, on the Arabian Sea, with the city of Kashgar, in Western Xinjiang.[15] This corridor includes plans for developing an oil pipeline to bypass the Strait of Malacca. When complete, the pipeline should carry about 1 million barrels of Middle Eastern oil to China per day; the original intent was to complete the project by 2021.

Chinese efforts to reduce its reliance on the Strait of Malacca by building new pipeline routes, however, is problematic. According to a 2016 assessment by the US Department of Defense, China's plans are unlikely to be effective. Indeed, given the growing Chinese demand for energy, new pipelines will only marginally alleviate the country's maritime dependency on the Straits of Malacca and Hormuz.[16]

In addition, long pipeline routes crossing transit countries have their own challenges. First, they are vulnerable to the 'obsolescing bargain'.[17] This, for example, was the case with the Myanmar–China oil pipeline that was completed in 2014 but only became operational in 2017, due to China's disagreement with Myanmar on transit tariffs. Second, the completed and proposed pipelines cross regions of potential instability, such Myanmar's Rakhine State and Baluchistan, in Pakistan. Finally, ambitious and complex infrastructure projects present several commercial and financial risks. This is the case of the Pakistan–China oil pipeline, which has come under pressure concerning its economic sustainability, especially following the Covid-19 pandemic, which has had a severely negative impact on Pakistan's economy.

4. Conclusions: Regional and Global Implications of the Chinese Energy Security strategy at Sea

Energy security concerns have played an important role in contributing to China's MSR and wider maritime strategy. Reducing vulnerabilities along strategic energy seaborne supply routes, and projecting China's naval power in crucial regions for the functioning of world's energy markets (e.g., the Middle East and the

[15] Kaho Yu, 'Energy cooperation and regional order in the Belt and Road Initiative: A case study of China's investment in the China-Pakistan Economic Corridor, London Asia Pacific Centre for Social Science', London Asia Pacific Centre for Social Science Working paper (October 2018), <https://www.kcl.ac.uk/eis/assets/lapc-wp-yu-revision.pdf>.

[16] US Department of Defense, 'Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2016', <https://dod.defense.gov/Portals/1/Documents/pubs/2016%20China%20Military%20Power%20Report.pdf>.

[17] Len (n 14).

Gulf), have become key goals for decision-makers in Beijing. Chinese efforts on the matter are still in their initial phase. Some of them present risks and problems, such as in the cases of the most complex infrastructural projects, many of which have also been hit by the Covid-19 crisis. China's activism can contribute to regional order by providing public goods and services thanks to the country's commercial, naval and infrastructure development plans. However, China's more assertive maritime strategy through the MSR has already caused concerns among regional powers and in Washington.

In particular, China's increasing engagement in the Indian Ocean has begun to worry the other Asian countries that depend on the same SLOCs for their seaborne energy trade, such as India, Japan and South Korea.[18] These regional actors fear that, if the PLAN's capabilities are improved by the network of facilities and ports developed in China-friendly littoral states, it would allow for 'dual use', thus enabling Beijing to develop a more assertive maritime policy. This would have a negative effect on their own security along the SLOCs and in the wider region. Increasingly, India perceives China as a strategic rival in the Indian Ocean. China's cooperation with Pakistan and Sri Lanka further increases this perception in New Delhi.[19] Japan is concerned that China's growing role in the Indian Ocean and the South China Sea could undermine its own maritime interests and increase Japanese energy vulnerabilities. South Korea, for its part, does not consider China to be a strategic competitor; however, Seoul is worried that growing competition among the great powers in the region could put at risk those SLOCs which are vital for its economic interests. Finally, both Japan and South Korea have limited possibilities for cooperating with China on maritime security, as doing so could undermine their relationships with Washington and the role of the US Navy in the region.

Traditionally, the US has been the security provider that has guaranteed, with its naval presence in key producing regions, freedom of navigation and uninterrupted flows of oil and gas supplies for the global energy markets. The US has also played this role with regard to Asia and those SLOCs that are vital for China's energy security. The growing Chinese activism in the South China Sea, the Indian Ocean and the Arabian Sea has worried the US. Although China's naval projections are still not comparable with those of the US, the declining role of Washington opens the possibilities of an increasing rivalry at sea between these major powers. During the Trump Administration, the rivalry between the US and China increased further, fuelled by Trump's 'America First' policy and rhetoric. However, this rivalry is also embedded in structural conditions, so it did not disappear with the ascendance of the Biden Administration, as exemplified by the 2021 US-UK-Australia security partnership, which is aimed at containing Chinese military and naval expansion in the Indo-Pacific region.

In the coming decades, China is set to become the world's largest oil and gas consumer. Energy security issues, including its dependency on critical seaborne oil and gas routes, will be increasingly factored into the country's foreign and defence

[18] Len (n 14); Ghiay, Su and Saalman (n 9); Kaho Yu (n 15).
[19] A. Palit, 'India's economic and strategic perceptions of China's maritime silk road initiative' (2017) 22 Geopolitics 292.

policies. While this will not automatically translate into more confrontations with Washington and other key regional actors, a more common approach to providing security for strategic SLOCs and chokepoints is required in order to avoid a similar outcome. As in the past, it is unlikely that energy security issues (alone) will trigger conflicts among the world's major powers. However, in a situation characterised by a growing rivalry (and declining trust) between China and the US, Beijing's energy vulnerabilities can be perceived as serious threats. This situation, in turn, could potentially further complicate the capacity of these two major powers to compromise and enter into cooperative deals.

PART II

SEAPORTS AND PORT-RELATED INFRASTRUCTURE MANAGEMENT ALONG THE NEW MARITIME SILK ROAD

Maritime routes, transport infrastructures and investment relationships between European Union and China: recent developments and evolutionary trends in a legal perspective

LORENZO SCHIANO DI PEPE*

1. Premise

The law of the sea and maritime law, on the one hand, and investment law, on the other hand, as it is well known, interact at many levels. It is, in addition, foreseeable that opportunities for reciprocal contacts will intensify significantly in the next future. This is so mainly because of the increasing importance of the so-called "blue economy" which is: inducing (*i*) public and private enterprises to engage more and more frequently and with higher intensity in forms of exploitation of the seas and the oceans that are additional to the more traditional ones (namely, maritime transport and fisheries) and, as a consequence, (*ii*) States to create the legal, administrative and technical conditions to make sure that the relevant activities can be performed in a context of certainty, security and predictability also with the objective of attracting investments from abroad.

The subject above can be studied from an economics standpoint as well as, as far as its legal implications are concerned, from the perspective of multilateral relations: the present contribution, however, will focus more modestly and exclusively on (present and possibly future) bilateral relations between the European Union and China with regard to investments in maritime transport infrastructures. Such a choice is the result of some considerations that may be briefly summarized as follows.

First, the European Union and China are two economic powers (also in maritime terms) for which the reciprocal collaboration in the investment sector is destined to be the source of benefits, provided that the respective relationships are framed in a system of rules that are clear, stable over time and fair. Every effort in such a direction should therefore be seen favourably.

In addition, commercial flows between the European Union and China are clearly influenced by the degree of efficiency of the relevant communication channels, a scenario in relation to which maritime transports play a prominent and potentially increasing role, also in light of a global tendency to abandon forms of

* Full Professor of European Union Law, University of Genoa.

transport that have a greater impact on the environment in favour of more sustainable ones.

In this context, one should not underestimate the role of those infrastructures through which maritime transport is conveyed and sorted. As a matter of fact, more specifically, the relevance of ports appears, in particular, two-sided, due to the fact that ports also constitute the subject of investment interests of the Chinese counterpart, thus causing, at least potentially, a short circuit, between control over infrastructures that exist in the territory of the European Union and economic concerns underlying the flows of merchandise that rely on such infrastructures.[1]

It is worth, finally, to briefly recall the so-called "new maritime silk road", a Chinese initiative aimed at consolidating links with Central Asian and European partners also through an improvement of infrastructural networks – a project also known as "Belt and Road Initiative" or "One Belt One Road", in order to stress the existence of a maritime as well as a terrestrial component of the strategy under discussion. The concept of a "Silk Road Economic Belt", firstly announced by President Xi on the occasion of a visit in Kazakhstan in September 2013, was further clarified by the same Chinese leader at another public event with a reference to a "21st Century Maritime Silk Road".[2]

In the years that have passed since its launch, the gradual realisation of the initiative under consideration has evidenced some peculiar characteristics thereof. First of all, its fundamentally informal character, that is to say the choice not to use traditional tools of multilateral cooperation (through the creation of a single normative framework of reference and the establishment, within it, of common principles and procedural rules) in favour of an approach that aims at the attainment of specific concrete results, self-standing albite coherent with overall and long-term policy objectives identified by China.

Secondly, the involvement of a high number of States and of an extremely vast geographic area that covers various regions of the continents of Asia, Africa and Europe, a choice that clearly indicates the existence of Chinese ambitions also of a strategic and *lato sensu* political nature. Thirdly, and finally, the mobilisation of substantive funds, as indicated, on the one hand, by the creation of a national investment fund under the name of Silk Road Fund and, on the other hand, by the successive establishment of the Asian Investment Bank for Infrastructures (as a multilateral development bank potentially in competition with the World Bank and the International Monetary Fund), which has been joined in the meantime by some European countries including Italy.[3]

---

[1] See, for example and as an anticipation of some considerations that will be developed further later on in this paper, V. Serafimov, O. Stets and A. Shkolyk, 'Seaports in the BRI: Challenges, Solutions and Emerging Regulations' (2021) Lex Portus 14; Wang Bo, P. Karpathiotaki, Dai Changzheng, 'The Central Role of the Mediterranean Sea in the BRI and the Importance of Piraeus Port' (2018) Journal of WTO and China 98.

[2] For a collection of reflections on the topic see G. Martinico and Xueyan Wu (eds), *A Legal Analysis of the Belt and Road Initiative – Towards a New Silk Road?* (Palgrave Macmillan 2020). Reference can be made in addition to Guiguo Wang, 'Legal Challenges to the Belt and Road Initiative' (2017) Journal of International and Comparative Law 309.

[3] For additional, up-to-date information see the internet website <https://eng.yidaiyilu.gov.cn>.

In this respect, from the point of view of the implementation of the "One Belt, One Road" initiative, it is worth recalling, as far as the European Union and Italy are concerned, two *memoranda* of understanding that have been concluded by China, the former with the European Commission, in 2015, on the "EU-China Connectivity Platform" and the latter with Italy in 2019 "on collaboration within the framework of the Silk Road Economic Belt and the 21st century Maritime Silk Road Initiative".

The subject of the *memorandum* signed between the European Union and China is the improvement of synergies between the "One Belt One Road" initiative and the connectivity policy of the European Union also known as "Trans-European Transport Network" or TEN-T.[4] As it was made clear by a representative of the European Commission in reply to a question by the European Parliament on 18 July 2017, however, the objective of the cooperation has never been only to attract funding for European projects, but also to share information on the relevant legal framework in the two parties.[5] The *memorandum* between Italy and China has an ampler scope of application but includes a section dedicated to transports, logistics and infrastructures as well as an explicit reference to the cooperation between Italy and China in the framework of the Asian Investment Bank for Infrastructures.[6]

2. The "oceans partnership" between European Union and China: a legal perspective

On 16 July 2018, in connection with the 20th summit between the European Union and China, two documents were made public that appear particularly relevant in the context of the present discussion. Reference is made, on the one hand, to the "Joint Statement of the 20th EU-China summit"[7] and, on the other hand, to the "Declaration on the establishment of a Blue Partnership for the Oceans: towards better ocean governance, sustainable fisheries and a thriving maritime economy between the European Union and the People's Republic of China"[8].

These are, in fact, among the most recent and in some way the most meaningful examples of the significant acceleration witnessed by the collaboration relationship

[4] On the relationship between the European Union and China reference can be made to the (critical) analysis of Liu Zuoki, 'Europe's Protectionist Position on the Belt and Road Initiative and Its Influence' (2018) China International Studies 145 and those (with a wider scope) of R. C. Brown, 'China's BRI in Central Eastern European Countries: "17+1" Connectivity, Divisiveness, or Pathway to EU-CHINA FTA?' (2020) San Diego Int'l Law Journal 1.

[5] The written reply to the question can be found at <https://www.europarl.europa.eu/doceo/document/E-8-2017-003701-ASW_EN.html>.

[6] On this topic, in general and with a focus on the legal implications, see (in Italian) M. R. Calamita, 'Dalla "Via della seta" alla Belt and Road Initiative: analisi dei contenuti e della vincolatività giuridica del MoU Italia-Cina' (2019) DPCE Online 1961. With specific regard to the reciprocity clause in international procurement see in addition (also in Italian) S. Francario, 'La clausola di reciprocità negli appalti pubblici internazionali: osservazioni a margine del Memorandum sulla via della seta' (2019) Foro amministrativo 1563.

[7] Available at the following internet address <https://www.consilium.europa.eu/en/press/press-releases/2018/07/16/joint-statement-of-the-20th-eu-china-summit>.

[8] Available at the following internet address <https://ec.europa.eu/newsroom/mare/items/631485>.

between the European Union and China as far as seas and oceans are concerned in the last few years. In the same vein, one can recall (also because these are referred to by the same Blue Partnership Declaration), the "Memorandum of Understanding on Establishing a High Level Dialogue on an Integrated Approach to Ocean Affairs", signed by the European Commission and by the Chinese government on 6 October 2010 as well as the high level dialogues that the parties have developed in more focused contexts such as polar affairs and fisheries and the joint working group on "Illegal, Unreported and Unregulated (IUU) fishing matters".

The "Joint Statement of the 20th EU-China Summit", that covers a variety of themes, reflects accordingly the amplitude of the discussions developed by the parties on the occasion of such meeting and contains several references to the prospective collaboration between the parties in investment matters. In paragraph 8, for example, the European Union and China define themselves "strongly committed to fostering an open world economy, improving trade and investment liberalisation and facilitation, resisting protectionism and unilateralism, and making globalisation more open, balanced, inclusive, and beneficial to all". In paragraph 9, in addition, the European Union acknowledges "China's recent commitments to improving market access and the investment environment, strengthening intellectual property rights and expanding imports, and looks forward to their full implementation as well as further measures". Both parties, finally, commit "to ensuring a level playing field and mutually beneficial cooperation in bilateral trade and investment" and to "work together to solve the market access issues facing businesses on both sides".

The "Declaration on the Establishment of a Blue Partnership for the Oceans" focuses on a series of topics that are *lato sensu* linked to the question of oceans governance – and, as a consequence, only indirectly concerned with investments – relating for example to maritime biodiversity conservation, Antarctica and fisheries, sectors that are of high economic and strategic interest for the two partners.

It is anyway self-evident that, when agreeing on its content, both the European Union and China had well clear in mind also the implications of such a declaration in terms of investments, as it emerges from two precise references, the former on the objective of "maintaining, strengthening and, as appropriate, creating ocean governance mechanisms and structures, including in the area of fisheries, that keep the oceans clean, healthy, productive and safe whilst creating the best possible investment climate"[9] and the latter on the need to stimulate "joint discussion and exchange on supporting policies for enabling sustainable growth of maritime sectors such as encouraging and strengthening investment, enlarging financing for innovative business, and promote knowledge transferring from research to innovation"[10].

Whilst these two are separate documents, they belong to the same context and must therefore be evaluated and interpreted in light of each other, always taking

[9] See item 2 of Section A ("Objectives") of the Declaration.
[10] See item 2 of Section E ("Areas for dialogue and cooperation") of the Declaration.

into account the fact they are both more relevant on the political and diplomatic level than on from a legal standpoint *stricto sensu*.

Such an approach has been confirmed by subsequent developments that have occurred in this area. One example is represented by the first Blue Partnership Forum for the Oceans, that took place on 5 September 2019 in the presence of the delegations of the European Union and China as well as of a number of stakeholders, also for the purpose of providing an opportunity to contribute to the realisation of the United Nations' Sustainable Development Goals and in particular of goal number 14 relating to "life underwater".[11]

Of the three topics that are dealt with therein, "Ocean Governance: Cooperation on Sustainable Fisheries at International Level", "Cross Cutting Tools to Implement the Ocean Partnership: Area-Based Management Tools, Including Maritime Spatial Planning and Marine Protected Areas" and "The Blue Economy and the Blue Economy Finance Principles", the last one appears the most relevant in an investment perspective and consequently in terms of investment governance in at least three separate perspectives: first, the interest of the business world to subscribe to increasing commitments as far as the sustainable use of oceans and the preservation of their ecosystems are concerned; second, the role played by the financial institutions in conveying financial flows; third, and finally, the existence of *ad hoc* technical instruments, first of all the "Blue Economy Financial Initiative" and the Principles relating thereto that have been elaborated in the context of the United Nations.[12]

3. The Comprehensive Investment Agreement between European Union and China

Reference must be made, at this point, to the Comprehensive Agreement on Investments concluded "in principle" between the European Union and China on 30 December 2020.[13] A provisional text of such an instrument, as it is well known, was published in March 2021, subject to modifications and for only informative purposes.[14]

The "in principle" nature of the agreement concerns not only, as it has just been said, its provisional character, but also its scope of application, since this, as it will be seen, appears all things considered limited and, in any event, incomplete, due to the fact that not every aspect of bilateral investment relationships is dealt with, as its primary objective appears to consist rather in the progressive opening of markets and in the creation of a level playing field in the two parties.

---

[11] In general, on the topic D. French and L. J. Kotzé (ed.), *Sustainable Development Goals. Law, Theory and Implementation* (Elgar 2018).

[12] Such Principles can be found at <https://www.unepfi.org/blue-finance/the-principles>.

[13] See the relevant materials at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2115>.

[14] On the subject of foreign direct investments reference can be made, *inter alia*, to the recent contributions (in Italian) of M. Rescigno, 'Il nuovo Regolamento UE 2019/452 sul controllo degli investimenti esteri diretti: integrazione dei mercati, sistemi nazionali e ruolo dell'Europa' (2020) Giurisprudenza commerciale 847 and G. Rojas Elgueta, 'Il rapporto fra discipline nazionali in materia di "foreign direct investment screening" e diritto internazionale degli investimenti' (2020) Rivista del commercio internazionale 325.

The agreement will become legally binding only once all internal procedures for its entry into force have been complied with. However, in this respect, it has to be recalled that on 20 May 2021, the European Parliament adopted a resolution " on Chinese countersanctions on EU entities and MEPs and MPs"[15] by which, after having observed that "the ability of the European Parliament to duly analyse the CAI is significantly hindered by the Chinese sanctions, which prevent, as a minimum, the Subcommittee on Human Rights from working with Chinese experts" and having stated that "it is not acceptable to deal with trade and investment relations outside the general context of human rights issues and the broader political relations", expressed the opinion that "any consideration of the EU-China Comprehensive Agreement on Investment (CAI), as well as any discussion on ratification by the European Parliament, has justifiably been frozen because of the Chinese sanctions in place" and demanded that "China lift the sanctions before Parliament can deal with the CAI, without prejudice to the final outcome of the CAI ratification process", hoping at the same time that the Commission would "consult with Parliament before taking any steps towards the conclusion and signature of the CAI" and invited the Commission "to use the debate around the CAI as leverage to improve the protection of human rights and support for civil society in China" reminding it that "Parliament will take the human rights situation in China, including in Hong Kong, into account when asked to endorse the CAI".

For the reasons that have just been set out, the fate of the EU-China Comprehensive Agreement on Investment is, to say the least, uncertain. Nonetheless, it is worth analysing its potential impact in the maritime transport and maritime transport infrastructure sectors in the hope that the general framework of the relationships between the European Union and China will evolve in a way that will make it possible to finalise the applicable internal procedures of approval of the agreement in question.

The two sections of the CAI that in this respect appear to be particularly relevant are those dedicated, respectively, to "Liberalisation of Investments" (Section II) and "Regulatory Framework" (Section III).

As far as the former aspect is concerned, the transport sector as such and the maritime transport sector in particular appear included beyond doubt. In fact, on the basis of rather wide description of the scope of application of the CAI provided for by Article 3(1)[16] a limited number of transport-related exclusions are mentioned in paragraph 2 of the same provision: "(b) air transport services and auxiliary air

[15] European Parliament resolution of 20 May 2021 on Chinese countersanctions on EU entities and MEPs and MPs (2021/2644(RSP)), <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0255_EN.html>. Notably, in the same resolution the European Parliament also stressed "the urgent need to re-balance EU-China relations through the adoption of a toolbox of autonomous measures including: legislation against distortive effects of foreign subsidies on the internal market", an aspect that will be dealt with later on in the present contribution.

[16] "This Section applies to measures or treatment adopted or maintained by a Party affecting the establishment of an enterprise or the operation of a covered enterprise by an investor of the other Party in its territory. For the purpose of Article 3 [Performance Requirements], it applies with respect to the establishment and operation of all enterprises in the territory of the Party which adopts or maintains the measure or treatment".

services other than: (i) aircraft repair and maintenance services; (ii) the selling and marketing of air transport services; (iii) computer reservation systems (CRS) services; (iv) ground handling services".

With regard to Section II and in relation to what will be said in the following pages of the present contribution, it is worth noting that in the Annex to Article 8 of the said Section III, Subsection II, entitled "Transparency of Subsidies", a list appears which includes "transport services" and namely "maritime transport services". This has to be seen in connection with the general principle stated in Article 8(5) of the CAI according to which the parties are required to ensure transparency as far as subsidies are concerned in the sectors indicated in the Annex with the additional condition that "[t]o this end, each Party shall promptly, and no later than on 31 December of the calendar year subsequent to the one in which the subsidy was granted, publish on a publicly accessible website the objective, legal basis, form, amount or amount budgeted for, and recipient of any subsidy subject to this paragraph".

Hence, it is not surprising, in light of the analysis that has just been conducted, that in a press release published by the European Commission on 30 December 2020 and entitled "Key elements of the EU-China Comprehensive Agreement on Investment", the same emphasised in the following terms the commitments subscribed by China in the international maritime transport sector: "China will allow investment in the relevant land-based auxiliary activities, enabling EU companies to invest without restriction in cargo-handling, container depots and stations, maritime agencies, etc. This will allow EU companies to organise a full range of multi-modal door-to-door transport, including the domestic leg of International maritime transport".[17]

Whilst its entry into force remains in doubt, the agreement between the European Union and China represents a development that in itself cannot be underestimated for two different although strictly connected reasons. On the one hand, the agreement could still, if the conditions will allow it, represent a fundamental contribution at the international level, in the perspective of a better regulation of investment activities between the two parties in general but also, in particular, in the specific sectors of transport and maritime transport infrastructures.

On the other hand, it could equally represent a starting point for the identification of mutually agreed solutions between the two parties on some aspects of the reciprocal relationships that have remained so far outside the scope of application of the agreement itself. One example is represented by the commitment to complete negotiations in the area of investment protection and dispute settlement "taking into account progress on structural reform of investment dispute settlement in the context of the United Nations Commission for International Trade Law (UNCITRAL)" and this also in the aim to replace bilateral accords that actually exists between China and the individual Member States.[18]

[17] See the document at <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2542>.
[18] Section VI, Subsection II, Article 3 ("Negotiations on Investment Protection and Investment Dispute Settlement").

4. The European Commission's regulation proposal to cope with foreign subsidies distorting the internal market

In the context that has just been described, in May of last year, the European Commission tabled a proposal for a regulation relating to foreign subsidies distortive of the internal market.[19] This move appears of great interest, also because of its perceived contrast with the trend apparently in favour of strengthening the attractiveness for foreign investments of the European Union.

This is clearly not the occasion to describe in detail such a proposal, on the one hand, because the legislative procedure is still in progress and at the initial stage and, on the other hand, due to the specific approach of the present study which aims at dealing with the legal implications of foreign investments in a well-defined sectoral context, that is to say the one relating to maritime transport infrastructures, and not with subsidies as such.

In this respect, it is crucial to recall the existence of a preceding and relatively recent contribution of the legislature of the European Union represented by regulation (EU) 2019/452 of the European Parliament and of the Council, of 19 March 2019, establishing a framework for the screening of foreign direct investments into the Union.[20]

The proposal of the Commission aims, in brief, to complement such regulation, adding to the already existing rules on the impact of investments on security and public order (in the light, among other things, of the effects on infrastructures, technologies and critically productive factors) a new legal framework that, as stated by the accompanying report, "specifically tackles the issue of distortions to the level playing field caused by foreign subsidised investments in the internal market, including strategic industries, critical assets and technologies".[21]

The starting point of the Commission's initiative is represented, as it is also made clear in its Explanatory Memorandum, by the absence, in the current applicable legislation of the European Union, of a system of control of State aids when such aides are granted by third countries and attribute an advantage which is distortive of competition, parallel to the one provided for by Articles 107 and 108 of the Treaty on the Functioning on of the European Union.

In this vein, the objective of the proposal is therefore to contrast "distortions on the internal market caused by foreign subsidies that fall outside the EU State aid, merger control and antitrust rules". Significantly, the proposal aims, in this perspective, to tackle "the detrimental effects of distortive foreign subsidies in the cases of concentrations and public procurement ex ante, without limiting the EU's ability to intervene ex post in other market situations, including in smaller concentrations and public procurement procedures".[22]

The text prepared by the European Commission identifies a subject and a scope of application which are at, a closer look, two-sided. On the one hand, in fact, it intends to regulate investigations on foreign subsidies altering internal market and

[19] Document COM(2021) 223 final of 5 May 2021.
[20] EU Official Journal L 791, 21 March 2019, 1.
[21] Page 6 of the Explanatory Memorandum accompanying the proposal.
[22] Page 4 of the Explanatory Memorandum accompanying the proposal.

to avoid such distortions, taking into account the fact that they can occur in relation to every economic activity but, in particular, in the case of concentrations and public tender procedures.[23]

On the other hand, it aims at regulating foreign subsidies granted to an undertaking carrying out an economic activity in the internal market on the assumption that "[a]n undertaking acquiring control or merging with an undertaking established in the Union or an undertaking participating in a public procurement procedure" shall be considered an undertaking carrying out an economic activity.[24]

Two provisions of the regulation proposal appear to be particularly relevant from a definitory perspective, Article 2 dealing with "foreign subsidies" and Article 3 dealing with "distortions on the internal market".

According to the Commission's proposal, a foreign subsidy shall be deemed to exist in case a financial contribution has been provided by a third country conferring a benefit to an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to an individual undertaking or industry or to several undertakings or industries.[25]

A rather ample definition is provided also of "financial contribution". This is in line with the tradition of the European Union law;[26] in fact, the following are included: "the transfer of funds or liabilities" (of various types), "the foregoing of revenue that is otherwise due", "the provision of goods or services or the purchase of goods and services". In addition, the provision by a third country can also result, unsurprisingly, from the central government as well as by expressions of the governmental power at levels other than the central one, by "public entities, whose actions can be attributed to the third country, taking into account elements such as the characteristics of the entity, the legal and economic environment prevailing in the State in which the entity operates including the government's role in the economy" or, finally, by "any private entity whose actions can be attributed to the third country, taking into account all relevant circumstances".[27]

In this vein, whilst the European Commission inserted in the draft regulation some provisions on concentrations and public tender procedures, the heart of the regulation under discussion is well represented by a definition of "Distortions on the internal market" that is based on a positive and a negative requirement. It is in fact provided that: (i) such a distortion shall exist where a foreign subsidy is liable to improve the competitive position of the undertaking concerned in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market; (ii) a foreign subsidy is unlikely to distort the internal market if its total amount is below Euro 5 million over any consecutive period of three fiscal years.

The regulation proposal also points to a number of indicators that may lead to the conclusion of the existence of a distortion on the internal market: (a) the amount

[23] Article 1(1) of the proposal.
[24] Article 1(2) of the proposal.
[25] Article 2(1) of the proposal.
[26] See, also for further references, L. Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective*, (Oxford University Press 2010).
[27] Article 2(2) of the proposal.

of the subsidy; (b) the nature of the subsidy; (c) the situation of the undertaking and the markets concerned; (d) the level of economic activity of the undertaking concerned on the internal market; (e) the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.[28]

Leaving aside the provisions especially dedicated to concentrations and public tenders and those of procedural nature, the present overview must be completed with some indications on the tools that the regulation proposal intends to equip with the Commission itself in the framework of the *ex officio* review of the foreign subsidies.

Of particular relevance appear to be the preliminary review that the Commission can conduct on the basis of the information collected, the in-depth investigation that may follow the finding of "sufficient indications that an undertaking has been granted a foreign subsidy that distorts the internal market", the requests for information that may be directed to the undertaking concerned or to associations of undertakings as well as finally, inspections that may occur within or outside the European Union.[29]

Conclusively, one has to point to the possibility to issue fines and penalties for a series of behaviours, intelligently or negligently, during the ex officio review of the subsidy.[30]

5. (Continued:) the potential application of the future regulation to the sector of maritime transport infrastructures

The question that must be asked at this point, after a necessarily brief overview of the Commission's regulation proposal on foreign subsidies distorting the internal market, is whether and to what extent maritime transport infrastructures are included, at least in principle, in the scope of application of the regulatory framework designed by the proposal.

The answer appears to be *prima facie* affirmative, if one considers the fact that within the wording of the proposal many references exist to legislation of the European Union in the field of transport in general and maritime transport in particular.

First and foremost, the Explanatory Memorandum that accompanies the proposal states, on the one hand, that the proposal itself is "fully coherent with the EU public procurement rules"[31] and, on the other hand, makes reference to directives that are relevant to the field, including directive 2014/25/EU of the European Parliament and of the Council, of 26 February 2014, on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC,[32] whose scope of application, pursuant to its Article 12, includes "activities relating to the exploitation of a geographical area for

[28] Article 3(1) of the proposal.
[29] Articles 7-13 of the proposal.
[30] Article 15 of the proposal.
[31] Page 5 of the Explanatory Memorandum accompanying the proposal.
[32] EU Official Journal L 94, 28 March 2014, 243.

the purpose of the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway".

Coherently with the outcome of the analysis that has been conducted so far, whereas no. 33 of the proposal highlights the "need to address distortive foreign subsidies" and defines such a need as "especially salient in public procurement, given its economic significance in the internal market and the fact that it is financed by taxpayer funds".

Furthermore, whereas No. 33 goes on stressing the need for a notification to the Commission prior to the award of a public contract of concession in order to examine information on foreign financial contributions to the participating undertakings in the context of a public procurement procedure. A duty to notify that, as it is specified, should apply to specific groups of economic operators including those referred to in Article 37(2), of the above-mentioned directive 2014/25/EU.

The reference to this directive is therefore repeated several times in the operative part of the regulation proposal and namely in Articles 27(1) and (4), with regard to definition of, and notification threshold in, public procurement procedures, and 28(2), with regard to prior notification of foreign financial contributions in the context of public procurement procedures.

Once again, the Explanatory Memorandum emphasizes the consistency of the proposal "with the targeted and tailor-made regulation of specific sectors, including the maritime technology and the aviation sectors", whilst excluding the application of regulation (EU) 2016/1035 of the European Parliament and of the Council, of 8 June 2016, on protection against injurious pricing of vessels,[33] due to the fact that its Article 18 makes the application of the regulation itself conditional upon the entry into force of the Agreement Respecting Normal Competitive Conditions in the Commercial Shipbuilding and Repair Industry, concluded on 21 December 1994 further to multilateral negotiations carried out in the context of the Organization for Economic Cooperation and Development.

As a consequence of the potential overlap, Article 4(4), of the proposal establishes the priority of the future regulation on the mentioned regulation 2016/1035 until the latter may have become applicable and the precedence of the latter over the former after such date (with the exception of the provisions relating to public tenders and concentrations).[34]

The last coordination provision contained in the regulation proposal is, so to speak, "anticipated" by whereas No. 45, which mentions among the relevant sectoral norms also Council regulation (EEC) No. 4057/86 of 22 December 1986 on unfair pricing practices in maritime transport,[35] and respectively set forth in Article 40(5), of the regulation proposal, which establishes, as far as the relationships between the two instruments are concerned, the precedence of the future regulation on regulation No. 4057/86.

[33] EU Official Journal L 176, 30 June 2016, 1.
[34] The Explanatory Memorandum, at p. 53, makes clear that "the OECD Shipbuilding Agreement never entered into force (and is not expected to do so) due to insufficient ratification".
[35] EC Official Journal L 378, 31 December 1986, 14.

6. Conclusive remarks

I would like to conclude these reflections by pointing out that, due to obvious space constraints, the present contribution was focused only on the implications of some recent and possibly future international and EU normative instruments in the fields of oceans governance, investments and foreign subsidies. This does not imply that the agreements of economic and commercial nature between the European Union and China (including those that have been briefly analysed above) can be seen in isolation from concerns of a different nature, including those of strategic and political character.

Some final considerations are in order.

What are the consequences of the potential application of the future foreign subsidies regulation to the sector that has been the subject of the present analysis? Should the Commission proposal, more or less modified, receive the approval of the European Parliament and the Council, the immediate aftermath could be represented by a lessened attraction, for Chinese economic quarters and more particularly investors, of maritime transport infrastructures located in the European Union.

The scope of application of the Commission proposal, as it appears from the text submitted to the European Parliament and the Council, should not be underestimated as far as its scale is concerned, especially in light of some of its definitory provisions that have been mentioned above (foreign subsidy, economic activity, etc.), but also of other aspects of the proposal: one should consider, for example, the fact that the investment in a port infrastructure will very rarely involve an amount of money lower than the limit under which the Commission proposal defines "unlikely" the possibility for a subsidy to alter the internal market.

In addition, the proposal attributes to the Commission itself the power of review and therefore of enforcement of the future regulation, in order to avoid the risk that national interests – in terms of greater attractiveness for foreign investments – may prevail over the correct application of European Union law thus causing a race to the bottom among Member States.

This recent development, still undergoing, of European Union law gives rise to some perplexities: the regulation proposal, as a matter of fact, may have the effect of discouraging foreign investments (or at least to reduce the attractiveness of European targets), including investments in transport infrastructures and in particular port infrastructures, rather than attracting them; this appears to contradict the trend that has been described in sections 2 and 3 of the present contribution. In general, all those who are as a matter of principle in favor of a strengthening of investment relationships, in particular in the field of transport and maritime transport infrastructures, and that fear for the consequences of the enactment of the regulation may determine, should not lose sight of the fact that the regulation proposal is still a work in progress and therefore the possibility exists that it may be modified in due course.

In this respect, a number of doubts exist in relation to the effectiveness of some of the solutions proposed therein: the possibility for European Union authorities to

monitor (and exercise their powers *vis-à-vis*) behaviors that take place outside the territory of the European Union in this particular context is still to be verified and may be the source of substantial practical problems.

Finally, and more in general, one should not forget the fact that the European Commission has no reason to create obstacles to foreign investments as a matter of policy. One should therefore not exclude that the real objective pursued may be the promotion of an international agreement between European Union and foreign partners (including Asian ones) on the subject of foreign subsidies or, alternatively, to send a signal able to trigger a modification in the approach of foreign economic operators when they act as investors in the European Union.

Financial Assistance for Waterways and Ports: The EU Rules on State Aid and Foreign Direct Investment and their Effects on the Development of Maritime Silk Road in Europe

GIANLUCA CONTALDI*

1. Introduction: The Modern Silk Road and the Reticent Attitude of European States

The Silk Road, as is well known, was a special, eminently land and river-based communication route between the Far East and the West, especially during the Middle Ages and the 13th century. Most of the trade between Europe and the major Asian countries passed through it for over five centuries. It was only with the Ming Dynasty that it experienced a phase of decline and subsequent abandonment, mainly due to the growth of maritime traffic which made overland traffic obsolete and uneconomic. Then it was definitively abandoned with the Qing Dynasty, which closed China to trade with the rest of the world.[1]

The project to create a channel through which trade between China and European countries could pass was recently relaunched by Chinese President Xi Jinping in 2013 and the project started to take concrete steps in 2015. In fact, it was then officially presented during 2017, during a conference held in Beijing. Geopolitically, the programme is a response to the US attempt to isolate China in the eastern Pacific. It is therefore an important element in the development of trade along the European route. Indeed, the programme provides for the creation and strengthening of existing structures along two trade routes between Europe and China. The first essentially involves an overland route which, via Pakistan and Iran, reaches Turkey and Russia and, only later, the countries of northern Europe. The second, on the other hand, develops an eminently maritime trade route, and envisages the passage of container ships through the Indian Ocean, then the passage through the Suez Canal and, subsequently, disembarkation in the Mediterranean; until reaching Northern Europe, either by circumnavigating the Strait of Gibraltar or by rail links from the ports of Venice and Trieste. China, on the other hand, has already begun to give concrete form to the maritime development project through the extension of Chinese companies to the major ports: in particular, it is commonly

* Full Professor of European Union Law, University of Macerata.

[1] See Deqiang Ji and Xuezhi Du, 'The Belt and Road Initiative and Its Implications for Communicating China-Europe Relations' (2018) Caucasus International 21, 22 ff.

believed that the major port operators are now of Chinese nationality and that they are scattered along the entire maritime arc.

So far, the reception by the main European countries and the European Union in general has been rather lukewarm. French President Macron, who said very clearly that "these roads cannot be those of a new hegemony, that would transform those that they cross into vassals",[2] the then British Prime Minister Theresa May and, finally, the German Foreign Minister, who openly criticised the Chinese model, which, unlike the European one, "is not based on freedom, democracy and individual human rights".[3]

In fact, only six European countries attended the 2017 Beijing Forum; and they refused to sign a statement on connectivity and trade, due to lack of transparency and clear respect of social standards. The political pressure clearly carried some weight, as the statement was not adopted.[4]

It is therefore not surprising that in EU law there are currently no regulatory provisions actually designed to facilitate the Chinese trade expansion project. Rather, we find provisions designed essentially as a means of defending against foreign investment, which – although they do not expressly refer to the Chinese development plan – were clearly adopted as a means of reacting to Chinese interference in essential infrastructure.

2. The Funds Provided by China for Financing the New Silk Road

Clearly, the implementation of such a large-scale project requires substantial funding.

In order to bear the financial burden, China decided in 2014 to set up a specific bank, the Asia Infrastructure Investment Bank (AIIB), with a capital of one hundred billion dollars. The founding act of the AIIB was initially signed by fifty-seven countries, including seventeen European countries, among which it is worth mentioning France, Germany and Italy.

In addition to the ABII, China has also instituted a special fund (the Silk Road Fund), with a capital of 40 billion dollars and the SCO (Shanghai Cooperative Organization) Development Bank, which was constituted with a capital of 80 billion. Furthermore, the Bank constituted by the BRICS countries (Brazil, Russia, India, China and South Africa) can also intervene in the construction of the infrastructures necessary for the operation of the New Silk Road: The New Development Bank. This bank was set up with an initial capital of one hundred billion dollars, forty-one of which was subscribed by China.

---

[2] 'China's New Silk Road cannot be one-way, France's Macron says', *Reuters*, 8 January 2018, <https://www.reuters.com/article/us-china-france-silk-road/chinas-new-silk-road-cannot-be-one-way-frances-macron-says-idUSKBN1EX0FS>.

[3] N. Miller, 'China undermining us "with sticks and carrots": Outgoing German Minister', *The Sidney Morning Herald*, 19 February 2018, <https://www.smh.com.au/world/europe/china-undermining-us-with-sticks-and-carrots-outgoing-german-minister-20180219-p4z0s6.html>.

[4] M. Duchâtel and A. Sheldon Duplaix, 'Blue China: Navigating the Maritime Silk Road to Europe', European Council on Foreing Relations, Policy Brief, <https://ecfr.eu/publication/blue_china_navigating_the_maritime_silk_road_to_europe/>.

This set of instruments clearly allows China to intervene predominantly in the construction of the infrastructure necessary for the operation of the New Silk Road. All the more so as Chinese companies have considerable manufacturing capacity, which appears to be under-utilised at present, mainly because of the saturation of the domestic market and the reduction in investment due to the COVID-19 pandemic.

Despite the large amount of capital made available for the implementation of the project, mainly from China, this will be largely insufficient to cover the huge costs involved. Of course, private capital can also be involved, according to the partnership model. The chosen model is the public-private partnership. It is expected that the initial investment will be borne by the public authorities, but that it will only be part of the cost of building the project. Chinese authorities think that the outlays will be repaid by the income that will be generated in the long term by the increase in commercial traffic and the activities induced by this increased traffic, such as tourism. It is however true that the profitability to the benefit of private individuals that will derive from the infrastructure that will be built will only be possible in the long term. As a consequence, without a massive public intervention plan, the New Silk Road project is likely to be unfeasible.[5]

Given that the large amount of capital made available by China will probably not be enough, it is worth focusing on what financial instruments can be used at EU level, where action is needed to complete the last stretch of the Silk Road.

As is evident, the instruments that can affect the establishment of the project, at European level, can be identified in the discipline of State aid, in the financing made available by the European Union and, finally, the regulation of foreign investment. Let us examine them in order.

3. The European Regulations on State Aid for Maritime Transport and the Poor Attitude to Take into Consideration a Specific Reference Framework Different from the Internal Market

The regulation of state aid, including for strategic sectors such as transport, is essentially contained in the founding treaty. In fact, the Treaty is rather laconic in this respect: it contains only two provisions that are immediately applicable.[6]

Article 107(1) states that "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market".

This provision lays down two conditions for the existence of State aid: that it be granted through a transfer of public resources and that the economic advantage be for certain beneficiaries only.

[5] J. Chaisse and M. Matsushita, 'China's 'Belt and Road' Initiative: Mapping the World Trade Normative and Strategic Implications' (2018) 52 Journal of World Trade 163, 171.

[6] These are Articles 107 and 108 TFEU. In fact, the other provision of the same section, Article 109, which as we know grants legislative power to the Council, has remained largely unimplemented.

The public origin of the financing means that it must come from public resources, i.e., from the collection of taxes. It may be granted directly by the State or by a public authority with imperative powers. This also includes aid granted through local authorities or public or predominantly State-controlled companies.[7]

It must correspond to a financial burden on the public authority but does not necessarily have to consist in a grant. Aid can also be in the form of a waiver. This is the case if an undertaking does not collect taxes or social security contributions for carrying out a commercial activity[8].

The second condition for the existence of aid is that it entails an economic advantage for certain operators only. This is clearly the case where there is a direct transfer of State resources. However, even where there is a direct transfer of resources, it is often not easy to determine whether it is an aid or an economic intervention. An economic intervention can in fact take various forms: the simplest is the injection of capital into a company with mixed public and private shareholdings in order to carry out a speculative operation or as economic support in a momentary state of difficulty[9]. It is also necessary for the intervention to be "selective", i.e., to favour only certain undertakings or certain commercial sectors.[10]

As regards the maritime transport sector in particular, the rules are essentially governed by the European Commission's Communication of 2004,[11] as last amended in 2017.[12]

According to these guidelines, State aid in the maritime sector may take various forms: it may consist of tax relief, investment aid (in this case for replacing the fleet with newer, more modern vessels) and aid for training personnel. The only prerequisite is that, under no circumstances, can the requirement that the

[7] European Court of Justice, Case 82/77, *Van Tiggele,* 24 January 1978, paras. 24 and 25; Case C-189/91, *Kirsammer-Hack,* 30 November 1993, para. 16; Joined Cases C-52/97-C-54/97, *Viscido*, 7 May 1998, point 13; Case C-200/97, *Ecotrade,* ibid. 1 December 1998, point 35; and Case C-295/97, *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA*, 17 June 1999, point 35.

[8] European Court of Justice, Joined Cases C-78/90 to C-83/90, *Compagnie commerciale de l'Ouest*, 11 March 1992, concerning a charge payable by petrol producers at the time of marketing. In Commission practice see, most recently, Commission Decision (EU) 2018/859 of 4 October 2017 on State aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg in favour of Amazon (notified under document number C(2017) 6740, in EU Official Journal L 153, 15 June 2018, 1.

[9] In order to distinguish interventions which give rise to aid from those which do not, case law has developed the criterion of the private investor*,* according to which the provision of public resources is allowed if, in similar circumstances, a private investor of a size comparable to that of the bodies administering the public sector would have made investments of such a size (European Court of Justice, Case C-305/89, *Italian Republic v. Commission*, 21 March 1991, para. 19).

[10] However, it may happen that certain interventions are general and abstract in the abstract, but that in practice the disbursement depends on discretionary choices: with the consequence that it cannot be excluded a priori that they are in fact aimed at helping only certain operators. See European Court of Justice, Case C-241/94, *France v. Commission,* 26 September 1996; Case C-200/97, *Ecotrade*, 1 December 1998, para. 35; Case C-295/97, *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA*, 17 June 1999, paras. 39-40.

[11] Commission communication C(2004) 43 - Community guidelines on State aid to maritime transport, in EU Official Journal C 13, 17 January 2004, 3.

[12] Communication from the Commission, Updating the Annex to Commission Communication C(2004) 43 - Community guidelines on State aid to maritime transport, in EU Official Journal C 120, 17 April 2004, 10.

beneficiaries of the aid must be vessels registered in and shipping the flag of a Member State be waived: and this condition has been maintained, albeit with some clarifications, even following the amendments introduced in 2017.

As can be easily understood, the flag link makes it basically impossible to provide aid to vessels registered or flying the flag of a third country. From this point of view, therefore, no specific conditions are laid down for the establishment of shipping corridors with third countries.

Another question is whether aid can be envisaged for the creation of port infrastructures; and whether this can be done taking due account of the specific situation that certain ports are located on international routes and that it is advantageous, also for member states, to develop these trade routes with certain third countries.

In principle, the practice seems to be negative. It seems to us that the Commission appears to be fundamentally insensitive to the requirements of the international market. When the European Commission is about to assess the compatibility of a given aid with the Treaty, it seems inclined to consider only the context of the internal market, without apparently taking into account the specific international context of reference.

This conclusion is apparently well illustrated by the case, currently pending on appeal before the Court of Justice, of aid to Italian port authorities. In this case, Italy has for a long time granted a tax exemption to the port authorities, in view of the public tasks which they are required to perform. It is well known in this respect that the Commission takes the view, endorsed by the courts, that economic public bodies are considered to be undertakings when they perform certain services for remuneration.[13] There is therefore no doubt that, from the point of view of the European Union, the grant of the use of State property (the portion of the port or the mooring point) in return for payment of a fee constitutes a commercial activity.

However, the Italian case is emblematic of the Commission's tendency to evaluate the internal market en bloc and to attach little importance to the European context of reference. The Italian position was based on the circumstance that the Italian port authorities were not so much in competition with the port authorities in the northern European countries, which were mainly intended to handle ocean traffic, possibly in competition with each other, as to operate in the Mediterranean market, which was characterised by competition with African Ports, which could obviously benefit from considerably lower staff costs. Despite the fact that this argument corresponds to a real need, the Commission has so far maintained its point of view. Of course, in order to have a definitive answer in this respect, we must await the judicial outcome of the dispute now pending before the Court,[14] even if the precedents do not favour the applicant's position.[15]

---

[13] See, albeit with reference to another public body, European Court of Justice, Joined Cases C-622/16 P, C-624/16 P, *Montessori Primary School v Commission*, 6 November 2018, para. 104.

[14] See General Court, Case T-166/21, *Autorità di sistema portuale del Mare Ligure occidentale and Others v Commission*. In doctrine see Lorenzo Botta, 'On alleged state aid to the Italian port system' (2021) Diritto dei trasporti 131.

[15] See the following judgments of the General Court: Case T-160/16, *Groningen Seaports NV and Others v European Commission*, 31 July 2018, on the port taxation system in the Netherlands;

4. The Financial Instruments set up by the EU for Financing the Trans-European Transport Networks

Given the general impossibility for Member States to grant state aid under preferential conditions in order to take into account the competitive situation on the global market, economic operators have no choice but to access EU funds for the creation of projects of common European interest. In this context, one of the preconditions for granting funds is also to facilitate maritime transport and promote motorways of the sea with third countries.

A great importance to the establishment of the so-called motorways of the sea, can be attributed to Regulation (EU) No. 1315/2013.[16] This regulation establishes a framework for the construction of the European transport network. It is structured on two levels. The first is the comprehensive level, which envisages extending the network of connections also to the islands and peripheral and outermost regions of the Union. The second is the core network, which serves to identify the main infrastructures to enable the connections considered to be of fundamental importance for the functioning of the internal market and the development of the European transport network.

The regulation provides for the financing of the trans-European transport network in accordance with the other instruments provided by the European Union, in particular the Connecting Europe Facility (CEF), which was created for this purpose by Regulation (EU) No. 1316/2013,[17] the Structural Funds, the Cohesion Funds and the Neighbourhood Policy Assistance Fund.

The CEF is undoubtedly the most important instrument for creating the European transport network. The total budget for the 2014-2020 period for this fund was 24 050 582 000 for the transport sector (maritime, air and land transport). In this context, the CEF fund is of particular note. This fund has been recently extended for the 2021-2027 multiannual financial period. The amounts allocated in this frame are 11.4 billion Euros, which can be incremented with the ten billion budget of the Cohesion Fund.

European funding may cover a maximum of 50% of the total expenditure, partly through grants, partly through loans.

However, this fund is designed – in the same way as the rules on State aid – solely for the needs of the internal market. Regulation 1316/2013 makes it clear that the only projects eligible for financing are those which meet the requirements laid

---

Case T-696/17, *Havenbedrijf Antwerpen NV and Maatschappij van de Brugse Zeehaven NV v European Commission*, 20 September 2019, on the port taxation system in Belgium; Case T-754/17, *Chambre de commerce et d'industrie métropolitaine Bretagne-Ouest (port de Brest) v European Commission*, 30 April 2019, on the port taxation system in France.

[16] Regulation (EU) No. 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No. 661/2010/EU, in EU Official Journal L 348, 20 December 2013, 1.

[17] Regulation (EU) No. 1316/2013 of the European Parliament and of The Council of 11 December 2013, establishing the Connecting Europe Facility, amending Regulation (EU) No. 913/2010 and repealing Regulations (EC) No. 680/2007 and (EC) No. 67/2010.

down by its sister regulation (Regulation (EU) No. 1315/2013 on the establishment of trans-European networks), which is very clear in that the s.c. motorways of the sea "promote maritime transport and motorways of the sea, excluding financial support to third-country ports"; and that the Union can also participate in projects intended to "facilitate maritime transport and promote motorways of the sea with third countries", but also in this case "without providing financial support".[18]

In other words, it seems clear that the regulation is designed for the strict needs of the internal market or, at most, of neighbouring countries with which the Union has concluded partnership or free trade agreements. This assumption is also confirmed by the maps annexed to Regulation (EU) No. 1315/2013, all of which concern the European geographical area. The annexes were amended in 2014, 2016 and 2019, but only in order to extend the creation of trans-European transport networks to the countries of the Eastern Partnership (Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine), the Western Balkans (Albania, Bosnia and Herzegovina, Macedonia and Serbia) and Iceland and Norway.[19]

In short, it is easy to conclude that the possibility of using European funding to develop the New Silk Road is extremely complex. It is not possible to introduce, in the perspective of the funding granted on the basis of the CEF, the possibility that it is used to develop a world-class transport network allowing trade with the countries of the Far East. At most, this could happen by chance, in the sense that funding is provided to build links with the countries of the Western or Eastern partnership and then the transport networks developed in this way become part of the global networks of world trade. But these are, of course, merely eventualities.

5. The Regulations on Chinese Foreign Investments in the European Area

In this context, in the absence of European instruments for assessing the development of a global transport network, most of the funding for the maritime canals that make up the New Silk Road must necessarily come from the funds provided by China, which will have to intervene both to support the creation of infrastructure and to facilitate the introduction of less polluting modes of transport.

In fact, it is clear that the increase in the number of ships passing through maritime canals, in some cases even very restricted ones (such as the Suez Canal), is likely to lead to an overall deterioration of maritime ecosystems. Nor can it realistically be hoped that these can only be made up of private funds, given that, as mentioned above, infrastructures will only allow a return to margins of profitability in the long term and it is difficult for private individuals, in the absence of public funds, to incur the necessary expenses for the introduction of less polluting engines, which, on large ships, imply a considerable increase in costs. China has been promoting green investments since 2016, with the issuing of "Guidelines for

[18] See, respectively, Article 8(1)(e) and Article 8(2)(d), Regulation (EU) No. 1315/2013.

[19] This was done by Commission Delegated Regulations (EU) Nos. 473/2014 of 17 January 2014 (EU Official Journal L 136, 9 May 2014, 10) and 2016/758 of 4 February 2016 (EU Official Journal L 126, 14 May 2016, 3) respectively.

Establishing the Green Financial System" by the People's Bank of China (PBoC) and six other government agencies.[20]

The European Union and China concluded an investment agreement on 30 December 2020. However, the ratification of the Agreement was suspended by the European Parliament, in May 2021, as a retaliatory measure against measures taken by the People's Republic of China against certain members of the European Parliament (and, in turn, the Chinese measures were in retaliation to sanctions taken by the European Union for the Chinese Government's repression of the Uighur minority).

In the absence of a specific agreement, Chinese direct investments in the European area are governed by the general regulation, i.e., Regulation (EU) No. 2019/452 on foreign direct investments.[21] On the other hand, it was adopted precisely to balance the needs of Member States to avoid hostile takeovers of their strategic companies with the need for European countries to receive urgently needed Chinese investment.[22]

This regulation only covers direct investments, i.e., investments involving a holding in an economic activity located in a third country, with a stable character.[23] Therefore, investments of a purely speculative nature, such as the purchase of government securities and all other forms often made by investment funds, which do not normally aim to take a leading role in the company being invested in and are therefore not intended to carry out a business activity, are excluded from that concept.

In practice, the regulation seeks to introduce a balance between the exclusive investment competence that, following the Lisbon Treaty, lies with the European institutions, and the exclusive competence of each Member State to assess its own security needs.[24] This is also due to the circumstance that it is now relatively common for military technologies to be used in the civilian field, as the distinction between the two fields has become clearly more blurred and evanescent than in the past.

In the present case, the regulation lays down the principle that each Member State is competent to assess whether any investment poses a risk to public security and public order; however, it is obliged to notify investments taking place on its territory to the Commission and to the other Member States, which may submit reasoned observations within 35 days. The Commission may, in any case of issue an opinion. These are, of course, non-binding acts, which the Member State receiving the investment must nevertheless take into account when adopting its final

[20] P. Rebelo, 'Vessel-Source Pollution in the Belt and Road Initiative: Green Finance as a Regulatory Tool for Environmental Sustainability' (2020) Maritime Law 639, 648.
[21] Regulation (EU) No. 2019/452 of the European Parliament and of the Council of 19 March 2019, establishing a framework for the screening of foreign direct investments into the Union, in EU Official Journal L 79/I, 21 March 2019, 1
[22] S. Hindelang and A. Moberg, 'The art of casting political dissent in law: The EU'S framework for the screening of foreign direct investment' (2020) Common Market Law Review 1427, 1433.
[23] European Court of Justice, Case C-446/04, *Test Claimants in the Fll Group Litigation*, 12 December 2006; Case C-326/07, *Commission v. Italy,* 26 March 2009, para. 35.
[24] G. Pitruzzella, 'Foreign direct investment screening in EU', in G. Napolitano (ed.), *Foreign Direct Investment Screening* (Il Mulino 2019), 63.

decision.

It is easy to see that the regulation, while establishing a mechanism for cooperation between Member States among themselves and vis-à-vis the European Commission, is far from introducing uniform rules on the treatment of foreign investment. As such, it certainly does not increase legal certainty as to the fate of Chinese investments on the territory of Member States for the construction of the New Silk Road.

6. Conclusions

In summary, all the instruments examined in this paper are far from establishing a firm regulatory framework for the fate of the investments needed to build the Belt and Road Initiative.

It would undoubtedly be beneficial for the development of the Adriatic regions if the European institutions were to conclude the bilateral investment agreement already negotiated with China, since the monitoring and coordination mechanism set up by the regulation does not seem to produce a climate of legal certainty.

Of course, we understand and agree with the European Parliament's decision not to ratify the Agreement, mainly because of China's failure to respect human rights to the detriment of the Uighur population. However, it is a choice that inevitably risks damaging the European economy as well. On the other hand, it is well known that economic sanctions usually pursue long-term political objectives, even if they sometimes harm the states that adopt them.[25]

[25] A. Davì, *European Communities and International Economic Sanctions* (Jovene 1993), 12 ff.

Special Economic Zones (SEZs): Innovative Models to Accelerate Economic Growth of Local Communities

GIUSEPPE RIVETTI* – FRANCESCA MORONI**

SUMMARY: 1. Special Economic Zones: Some International Experiences of Economic Development. – 2. Special Economic Zones in Italy: Specific Interventions for Territorial Cohesion and Constitutive Profiles. – 3. Business Communities Based on New Privileged Taxation Policies. – 3.1. Simplification of Administrative Procedures and New Models of Governance for the Development of the SEZs.

1. Special Economic Zones: Some International Experiences of Economic Development

The Special Economic Zones (SEZs) are delimited areas within a country's borders, characterized by advantageous taxation and a special system of simplified administrative procedures. The creation of such zones is constantly growing worldwide. According to the most recent estimates, "there are more than 4,000 special economic zones in over 130 countries, particularly concentrated in Asia[1] and in the Pacific area where 43% of the total are located".[2]

The economic dimension of this phenomenon has reached values of great significance for the global productive system. In total, according to the World Bank estimates, they employ "more than 68,4 million direct workers and their trade exchange activities generate an added value of over 850 billion dollars".[3]

The most mentioned example is that of Shenzhen, the Chinese city where the first Special Economic Area was established in 1980 and has become a model for all the Chinese special economic zones.[4] Originally (and until 1980) Shenzhen was

* Associate Professor of Tax Law, University of Macerata.
** Contract Lecturer of Customs Law, University of Macerata.

[1] See H.-G. Jeong and D. Zhihua Zeng, 'Promoting Dynamic & Innovative Growth in Asia: The Case of Special Economic Zones and Business Hub', *Korea Institute for International Economic Policy Research Paper Policy Analysis*, 2016; J. A. Brown, 'Territorial (In) Coherence: Labour and Special Economic Zones in Laos's Border Manufacturing' (2019) 51 Antipode 440.

[2] See A. F. Uricchio, 'Zone economiche speciali e fiscalità portuale tra incentivi fiscali e modelli di prelievo' in A. Berlinguer (ed.), *Porti, retroporti e zone economiche speciali* (Giappichelli 2018), 75 ff.; A. Panaro, 'Lo sviluppo delle Free Zones portuali: scenario e casi studio nel Mediterraneo' in Berlinguer (ed.), *Porti, retroporti e zone economiche speciali*, 345 ff.

[3] See Panaro (n 2), 347.

[4] In relation to the Chinese experience, see J. F. Fitzpatrick and J. Zhang, 'Using China's Experience to Speculate upon the Future Possibility of Special Economic Zones (SEZs) within the Planned Development of Northern Australia' (2016) 18 Flinders Law Journal 51; O. Boltenko, 'Investment Protection in China's SEZs: Lee Jong Baek Case Study' in J. Chaisse and J. Hu (eds.), *International Economic Law and the Challenges of the Free Zones – Global Regulatory Issues and Trends* (Kluwer Law International 2019), 335 ff.; X. Zhang, 'Further Disapplying Differentiated Treatment

a simple fishing village of 50,000 people close to Macao and Hong Kong. Twenty-five years later it is "a city of almost 20 million inhabitants and its GDP is 20% of Italy's. A world economic excellence that has become the third largest port in the world in a short period, with more than 23 million of goods handled".[5]

Another successful experience, the *Suez Canal Economic Zone* (SCZONE), established by Presidential Decree No. 330/2015, covers an area of 461 kilometres and 6 seaports. The goal that the government has aimed to achieve is to transform the area into a global logistics hub and industrial processing centre serving Europe, Asia, African and Gulf markets. To this end, a series of tax breaks and customs simplifications have been introduced for companies wishing to set up in the economic zone[6]. The results are evident, a new historical record of goods loaded on ships crossing the Canal was recently achieved: 908,6 tons, i.e., an increase of 10,9% compared to 2016. The SCZONE is also to be considered for its financial value. In fact, the revenues from transits are expected to be over 13,2 billion Dollars in 2023, compared to 6,7 billion in 2016.

Tanger Med is a port with its free zone set up by the Moroccan government for export business (the first terminal was inaugurated in 2007) that has allowed the settlement, in a vast area behind the port, of automobile factories and other firms giving the area a great added value in economic and, above all, employment terms.[7] Located about 40 km from Tanger, it is the largest port of Morocco and naval meeting point between the *Mare Nostrum* and the Atlantic Ocean; it enjoys an advantageous geographical position on the Strait of Gibraltar that allows ships to transit the port without the need for complex docking manoeuvres. In a short time, it has become a true model of governance given the results that it has achieved. From 2007 to 2017 it has registered a twentyfold increase in the handling of containers, reaching over 3.3 million TEUs, with extremely positive repercussions for the overall growth of the country. It is no coincidence that, reference made to the ranking of the *Liner Shipping Connectivity Index*, the country has raised "from the 77th place in 2004 to the 16th place in 2017, climbing more than 60 positions".[8]

---

of Foreign Investment in China: Is This the Only Way Out for the Shanghai Free Trade Zone?' (2016) International Business Law Journal 53; D. Yao and J. Whalley, 'The China (Shanghai) Pilot Free Trade Zone: Background, Developments and Preliminary Assessment of Initial Impacts' (2016) 39 The World Economy 2; T. Han, A.D. Mitchell, 'China's Free Trade Zones in Its Post-WTO Accession ERA: A Case Study of Shanghai FTZ' in Chaisse and Hu (eds.), *International Economic Law and the Challenges of the Free Zones – Global Regulatory Issues and Trends*, 236; S. Tiefenbrun, 'US Foreign Trade Zones and Chinese Free Trade Zones: A Comparative Analysis' (2015) 14 Journal of International Business and Law 212; X. Chen, 'The Evolution of Free Economic Zones and the Recent Development of Cross-national Growth Zones' (2009) 19 International Journal of Urban and Regional Research 593.

[5] See U. Masucci, 'ZES ed economia del mare: una sfida comune' in Berlinguer (ed.), *Porti, retroporti e Zone economiche speciali*, 69 ff.

[6] In relation to the African market, see Susanne A. Frick, A. Rodríguez-Pose and M. D. Wong, 'Toward Economically Dynamic Special Economic Zones in Emerging Countries, Economic Geography' (2019) 95 Economic Geography 30; Foreign Investment Advisory Service (FIAS), *Special Economic Zones,* 2008; T. Farole, *Special Economic Zones in Africa: Comparing Performance and Learning from Global Experiences,* World Bank, Washington, DC, 2011.

[7] See Massucci (n 5), 71.

[8] Panaro (n 2), 348.

The characteristic common to all free zones existing within the Tanger Med compound is the extensive tax exemption policies accompanied by special (simplified) customs and administrative procedures.

Another country that overlooks the Mediterranean Sea where twenty free zones have been established is Turkey. Such free zones were created in 1987 close to the major Turkish ports, in Aegean Sea and Black Sea, and work in close cooperation with the European and Middle Eastern markets. A distinctive feature is that in these free zones the infrastructure has been granted by the state, while the investing companies have built the superstructure. In particular, the Turkish state invested "approximately 10 million Euros in the infrastructure development, while national and foreign investors invested 24 million Euros in superstructure (buildings, machinery and equipment)".

One of the most important areas is the *Antalya Free Zone Operator Company* (ASBAS), 36% publicly owned and the remaining 64% of its share capital owned by the private sector. It has an open-air storage area of 200,000 square metres, with an annual storage capacity of 5 million tons. The prevailing advantages and facilities include incentives for investors, tax exemptions on income generated within the free zone and simplified bureaucratic procedures.

Finally, the Arab Emirates have set up 36 Special Economic Zones with different sectorial vocations and various forms of governance.[9] The Dubai Free Zone is worthy of particular attention, having encouraged prodigious economic development. In the city of Dubai there are several free trade zones dedicated to different economic sectors, such as media (*Dubai Media City*), manufacturing (*Jebel Ali Free Zone*), information and technology (*Dubai Internet City*) and financial services (*Dubai International Financial Centre*). Moreover, the *Dubai Airport Free Zone* has become home of international "blue chip" companies in the aviation, automotive, fashion and telecommunication sectors.

In Europe, the number of free zones and special economic zones has grown strongly, mostly in the Eastern European countries (Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Poland, Slovenia and Romania). In the Old continent, there are about 91 Free Zones (including Special Economic Zones) and Poland represents one of the most attractive models (also for Italian companies).

Poland's first special economic zone was created in 1995 in *Mielec*. To date, there are 14 special economic zones "capable of attracting 5 billion Euros of investments and creating 16,000 new jobs. Initially established to last 20 years, its duration has been recently extended until 2026".[10] Their significant attractiveness is based on the quality of infrastructure and on particular tax incentives such as exemptions on profits. However, in order to benefit from tax advantages, an investor must make a minimum investment of one hundred thousand Euros, at least

[9] See P. Spirito, 'Il piano strategico per la Zes nei porti di Napoli e Salerno' in Berlinguer (ed.), *Porti, retroporti e zone economiche speciali*, 139 ff., at 183. See also P. Ranjan, 'Free-Zone Company, Investment Standards and the Arab Spring: A Case Study of Ampal-American and Others v. Egypt' in Chaisse and Hu (eds), *International Economic Law and the Challenges of the Free Zones – Global Regulatory Issues and Trends*, 347.

[10] See A. Berlinguer, *Zone franche e zone economiche speciali al servizio di porti e aeroporti*, in Berlinguer (ed.), *Porti, retroporti e zone economiche speciali,* 28.

25% of which to be from his personal resources, for a minimum duration of five years (three years for SMEs) and, finally, employment contracts must be maintained for at least five years. Finally, in the 14 areas covering more than 15,000 hectares, most of which already occupied, settlement permits have been issued "in favour of approximately 1,500 companies in the manufactory and high technology sectors. Over 22,5 billion Euros were invested and over 200,000 jobs created".

Another successful example in Europe is the Shannon Free Zone, in Ireland. The Shannon Duty-Free Processing Zone (SPZ) was created in 1959, it is considered to be the first modern industrial free zone, taking inspiration from the pre-existing Panamanian and American customs free zones. It was conceived as an evolution of the Duty-Free regime reserved for the local airport within the frame of a programme of re-launch of the port area.

The initial area covered only three hectares, fully occupied as early as 1962. Subsequently it was extended to over 40 hectares, up to the current 250 hectares. A further extension is planned in the next few years. The operation was successful thanks to the driving force of the project as well as the efficient working team in charge for the different tasks.[11] In addition to the customs advantages, Shannon provides for a 25-year period of tax exemption on export profits. More than fifty years after its foundation, the SPZ still attracts investors. The Shannon Development Agency has launched a new master plan for the next twenty years. The purpose is that the area is to remain a "must see" place to visit and valuate by those who wish to invest in Europe. In this respect, two key concepts govern the new master plan: competitiveness and sustainability. Doing business in a competitive market that is at the leading edge of environmental sustainability solutions is certainly very attractive to companies.

Another successful example is the port of Malta, established in 1988 as the first transhipment hub in the Mediterranean region. The Maltese Law controls all activities within the Freeport and is constantly reviewed so as to provide for the regulatory provisions and fiscal instruments to regularly ensure the best business climate and efficient management of the port facilities.

On the other hand, Latvia, thanks to its strategic geographical position is the main gateway to other Baltic countries, above all to Western Europe. It has two free zones in Rezekne and Liepāja, and two free ports, one of which in its capital, Riga. The two free zones in Latvia are formally defined Special Economic Zones, and companies developing their business within these zones enjoy numerous advantages. In fact, either in the free ports and in the SEZs the companies benefit from a special fiscal regime whose main advantages are 80% reduction in tax on property, 80% reduction in withholding tax on dividends and corporate income tax. Finally, most goods and services supplied to (or exported from) businesses operating in the free zones are VAT exempted.[12] All in all, it is a particularly

[11] For more information about Shannon Free Zone, see B. Callanan, *Ireland's Shannon Story* (Irish Academic Press 1999).

[12] See D. Bagalà, 'Portualità, logistica e fiscalità di vantaggio nella nuova dimensione marittima mediterranea: la sfida di Gioia Tauro' in Berlinguer (ed.), *Porti, retroporti e zone economiche speciali*, 285 ff., at 307. Sul tema, v., inoltre, S. Finardi and E. Moroni, *Zone e Porti Franchi*

successful experience that has allowed the creation of export-oriented manufacturing and steel companies, thus determining a sensible increase of the global trade.[13]

A further positive example is the *Madeira Free Trade Zone*, created in 1980 in Portugal; more recently, Law No.64/2015 regulates in detail the regime applicable to entities authorized to operate in the Madeira free zone (the so-called IV Regime) officially entered into force the 1st of January 2015 and intended to operate until the 31 December 2027. The licences are managed by the International Business Centre of Madeira (IBCM) and in compliance with the terms of a new legal regime, already approved by the EU, the companies authorized to operate under the IBCM will benefit from the application of a tax rate of 5% on incomes, one of the lowest rates in the EU, until the end of 2027. These companies will also be able to benefit from the further advantage of the exemption from paying withholding tax on dividends distributed to non-resident Portuguese shareholders (corporate and private) provided that their residence is not within the jurisdiction of a blacklist country.

Finally, it is worth to mention the *Free Zone of Barcelona* (140 hectares), the Free Zone of Cadiz and the Port of Sagunto in the Autonomous Community of Valencia, and the new Port of Piraeus in Greece, acquired by the Chinese COSCO Shipping Group, that offers the ship-owners important tax concessions.

In all the Mediterranean countries there are special economic zones[14] that are directly involved in developing the competitive capacity of local businesses.[15] As seen above, there have been many successful experiences and they have all contributed to economic growth and development of their respective countries.

It is no surprising that from a historical point of view, the Free Zone is a legal institution that finds its roots in the ancient Mediterranean.

---

nell'economia-mondo (Franco Angeli 2001); M. L. Corbino, 'Porti e Punti Franchi' in *Digesto delle Discipline Privatistiche – sez. commerciale*, vol. XI (UTET 1995).

[13] Cfr. S. Zunarelli, *Introduzione*, in *Porti, retroporti e Zone economiche speciali,* cit., XXI.

[14] M. D'amico, 'Le zone economiche speciali: una straordinaria opportunità per il rilancio' (2017) Rivista di diritto comunitario e degli scambi internazionali 1.

[15] From an international point of view, S. Reuven, Avi-Yonah and M. Vallespinos, 'Special Tax Zones and the WTO' (2017) University of Michigan Public Law Research Paper No. 545, 2 March 2017, 3; M. Proksch, 'Success Factors and Required Policies for SEZs' in Chaisse and Hu (eds), *International Economic Law and the Challenges of the Free Zones – Global Regulatory Issues and Trends*, 17; T. W. Bell, 'Special Economic Zones in the United States: From Colonial Charters, to Foreign Trade Zones, toward USSEZs' (2016) 64 Buffalo Law Review 982; A. D. Rothenberg, S. Bazzi, S. Nataraj and A. V. Chari, 'When Regional Policies Fail: An Evaluation of Indonesia's Integrated Economic Development Zones', RAND Corporation, 2017, <https://www.rand.org/pubs/working_papers/WR1183.html>; T. J. Sigler, 'Panama's Special Economic Zones: Balancing Growth and Development' (2014) 33 Bulletin of Latin American Research 2; D. Ramizo, *Special Economic Zones (SEZs): A Tool for Investment, Trade, and Development*, Asia Regional Integration Center, 2014; L. Moberg, 'The Political Economy of Special Economic Zones: Lessons for the United States' (2018) 21 Chapman Law Review 408; K. C. Vadlamannati and H. Ali Khan, 'Race to the Top or Race to the Bottom? Competing for Investment Proposals, in Special Economic Zones? Evidence from Indian States, 1998–2009' in J. Miklian and Å. Kolås (eds), *Invisible India: Hidden Risks within an Emerging Superpower* (Routledge 2017), 19.

The archaeological excavations in Ostia have shown that the posts of the tax collectors were not at the entrance of the port but on the access routes to river Tiber. It was there that the cargo was inspected so to issue the bill of lading for the *datium* to be paid for the goods that, through the river barges, headed for Rome. That is to say that the city of Ostia two thousand years ago could today be defined as a "free port".[16] The Free Zones was also an example of the strategical geopolitical purpose of a country; indeed, in 166 B.C. the Romans, after defeating king Perseus, created the free port of Delos to undermine Rhodes' trade. It quickly became the greatest port of the Aegean Sea[17] and the exclusive reference point for the trade of the entire area (with the inevitable commercial decline of Rhodes).

In the Middle Ages, Galata – the historic trading Genoese colony created in the 13th century, survived all the turbulent events thanks to the commercial nature of its activities. Indeed, over time Galata remained an independent citadel in the heart of the Ottoman Empire, overlooking Constantinople, and administered by the Republic of Genoa. That is why for the Turks the inhabitants of the free zone of Galata – a city within a city – still in the 19th century were defined "franks", i.e., not subjected to laws and taxation of the Ottoman Empire.

The Italian experience bears distinctive elements that can be traced back to 1197, when Henry VI of Swabia, the King of Sicily, agreed to the creation of a free port in Messina. Wishing to increase its trade activities with the East, he allowed the goods to be imported and exported without the payment of duties (a decision that created great discontent in other cities like Palermo, which were commercially damaged by such measures). Furthermore, the free port of Livorno was established in 1547, and in 1608 the first temporary law regarding the free port of Genoa was enacted.[18] Later on, also Civitavecchia in 1696 and Ancona in 1732 became free ports.

2. Special Economic Zones in Italy: Specific interventions for territorial cohesion and Constitutive Profiles

The experimentation of the Special Economic Zones, in particular in Europe, characterized by a number of best practices and experiences of development has convinced the Italian lawmaker to intervene and put an end to the paradoxical situation in which Italy was still (almost) the only country not making use of the models under analysis (the economic consequences in terms of employment, consumption and investments were evident).

In Italy, the legal framework for the SEZs is drawn up by the Law Decree No. 91/2017 providing for *Urgent measures for the economic growth of the Mezzorgiorno (Southern Italy, n.d.T.)*, converted into Law No. 123 of 3 August

[16] F. Roccatagliata, 'Le zone franche e il diritto dell'Unione europea' in V. Uckmar (ed.), *Intrecci tra Mare e Fisco* (CEDAM 2015).

[17] L. Laurenzi and L. Guerrini, 'Delo' in *Enciclopedia dell'Arte Antica* (*Treccani* 1960), <https://www.treccani.it/enciclopedia/delo_(Enciclopedia-dell%27-Arte-Antica)/>.

[18] A. Quattrocchi, 'L'esperienza italiana delle zone franche dei punti franchi tra sviluppo portuale, prospettiva regionale e nuova dimensione locale' in Uckmar (ed.), *Intrecci tra Mare e Fisco*.

2017[19] that, *inter alia*, provides in Articles 4 and 5 of Chapter II for the possibility for the Regions to establish regional or inter-regional special economic zones.

These are geographically delimited areas clearly identified within the country, which may also be non-territorially adjacent areas as long as they have an economic-functional link and include at least one port having the characteristics set out in Regulation (EU) No.1315 of 11 December 2013 of the European Parliament and Council in relation to the Union guidelines for the development of the trans-European Transport Network (TEN-T).[20]

The acronym TEN-T defines in European legislation a global network intended as a structure capable of being connected within the European transport system on the ground of certain requirements that must be met in relation to the volume of passengers, merchandise and cargo handling.

The lawmaker has expressly ruled that "the functional economic link between non-territorially adjacent regions is established in the presence of economic productive activities already set up or in their potential development, as indicated in the Strategic Development Plan, or adequate infrastructure linking the concerned areas".[21]

A SEZ is normally composed of areas such as ports, retroport sites, which can also include productive areas, airports, logistic platforms and interports (thus excluding any and all residential areas).[22]

For each region the total area allocated to the SEZs cannot exceed the total surface as designated in Annex 1 to Ministerial Decree No. 12/2018 (through which the Regulation on the establishment of Special Economic Zones was adopted) indicating the maximum surface area values provided for each region.[23]

The area of a SEZ is therefore calculated on the basis of two parameters: population density and territorial extension of each region concerned, thus modifying the initial proposition according to which the sole population density had to be taken into account.

A.F. Uricchio defines as "suggestive and fascinating" the possibility of setting up SEZs in associated form for regions that do not dispose of port areas.

In fact, the regions that do not dispose of port areas can apply for the setting up of a SEZ only in associative form with a contiguous region or with a port area having the characteristics provided for by the regulations in force.

In this regard, the lawmaker expressly outlines the prerequisite conditions to the institution of SEZs,[24] including the inter-regional ones, with particular reference to the criteria for the identification of the suitable area, the access to it as well as the

---

[19] *Legge 3 agosto 2017, n. 123 - Conversione in legge, con modificazioni, del decreto-legge 20 giugno 2017, n. 91, recante disposizioni urgenti per la crescita economica nel Mezzogiorno*, <https://www.altalex.com/documents/leggi/2017/08/21/crescita-mezzogiorno-legge-di-conversione>.

[20] See Article 4(2) of Law Decree No. 91/2017.

[21] See *Decreto del Presidente del Consiglio dei Ministri 25 gennaio 2018, n. 12 – Regolamento recante Istituzione di Zone economiche speciali (ZES)* (hereafter "Ministerial Decree No. 12/2018"), <https://www.gazzettaufficiale.it/eli/id/2018/2/26/18G00033/sg>, Article 3(1).

[22] See Article 3(2) of Ministerial Decree No. 12/2018.

[23] See Article 3(3) of Ministerial Decree No. 12/2018.

[24] See Articles 3-6 of Ministerial Decree No. 12/2018.

good performance of the companies' business and, finally, the general coordination of the targets to be achieved.[25]

The application for the creation of a SEZ must be accompanied by a strategic Development Plan and submitted in compliance with the respective regional regulations to the Prime Minister by the regional governor after consultation with the mayors of the concerned areas.[26]

The Development Plan is essential to the constitution of a SEZ since it must contain the documentation relevant to criteria and development objectives pursued by the regional policy, as well as – where necessary – the coordination of the steps to be taken with respect to the port strategic planning.

Such documentation shall be preliminarily verified by the bureau of the Council of Ministers in order to issue the relevant decree.[27]

In this perspective, the Plan must outline the precise identification of the chosen areas and portions of territory involved, and the detail of the already existing infrastructure. Furthermore, it is necessary to provide for an analysis of the social and economic impact expected from the creation of the SEZ, as well as an illustrative report accompanied by data and elements that identify the types of activities that are intended to be promoted within the special economic zone. In addition, the Region will have to expressly specify the administrative simplifications it is ready to grant in relation to the investments to be undertaken and, finally, the clear and exhaustive indication of the tax concessions and incentives not weighing on the state budget.[28]

The objective is the economic revitalization of such territories thanks to administrative simplifications and tax benefits[29] in order to attract new (foreign) investments that are often held back by cumbersome administrative procedures and extremely anti-competitive tax systems.

The duration of a SEZ cannot be shorter than seven years and not longer than fourteen years but may be extended up to an additional seven-year period upon request by the concerned regions.[30]

Applications may be submitted by the "less developed" regions (whose per capita GDP is lower than 75% of the European average) and "transition" regions (whose per capita GDP is 75% to 90% of the European average) as defined by the EC regulation and entitled to the derogations of Article 107 of the Treaty on the Functioning of the European Union.

Another fundamental requirement is the opinion of the mayors of the concerned areas. Such opinion, which was not required initially, is now necessary because it integrates a direct effective view on the needs of the areas to be constituted as Special Economic Zones.

[25] See Article 2 of Ministerial Decree No. 12/2018.

[26] See Articles 4(4bis) and 5 of Law Decree No. 91/2017; Article 5 of Ministerial Decree No. 12/2018.

[27] See Article 7 of Ministerial Decree No. 12/2018,

[28] See Article 6(1) of Ministerial Decree No. 12/2018,

[29] See Article 5 of Ministerial Decree No. 12/2018.

[30] See Article 7(1) of Ministerial Decree No.12/2018.

The introduction of these extraordinary instruments of economic acceleration is undoubtedly functional in achieving a new role especially of disadvantaged or transition regions and, in a broader context, are likely to become the fulcrum and driving force of the Euro-Mediterranean Economy.

All in all, it is a new model of economic government of territories through which regions can become leading actors in the concrete achievement of a true growth for their territories. The recognition of the status of SEZ encourages the development of such territories through fiscal and administrative support to already existing firms and to the newly established ones.

However, addressing the issue of Special Economic Zones involves a serious exam of the opportunities, advantages and criticalities arising from their creation and operational continuity, upon detailed cognition of their geographical conformation as well as the past economic aspects of interest linked to their territory, also in order to foresee their potential and capacity to benefit from the opportunities deriving from these types of investments.

Within the frame of the special interventions for the social cohesion, the National Recovery and Resilience Plan (NRRP)[31] provides for the strengthening of the Special Economic Zones through a reform project aiming at simplifying the governance, favouring mechanisms able to ensure the rapid implementation of the interventions and the establishment of new firms.

The reform shall concern the competence of the Commissioner who is the only authority in charge to issue the authorization and main interlocutor for the economic actors wishing to invest in the concerned territory.

Moreover, in order to simplify the administrative procedures for the establishment of businesses in the SEZs, the implementation of the so-called "*Digital One-Stop Shop SEZs*" shall be encouraged; this will enhance the growth potential of the concerned territories and improve their attractiveness to enterprises (even foreign enterprises) with a consequent possible positive impact on employment.

Investments on infrastructure as recommended by the NRRP aim at ensuring an adequate development of the connections of SEZs to the national transport network, in particular to the Trans European Transport Network (TEN-T), essential for an effective support to the promotion of SEZs.

In this regard, it is envisaged the creation of adequate connections between the industrial areas and the SNIT (Integrated National Transport System) and TEN-T networks, mainly by rail, to guarantee productive districts reduced time and costs in logistics ("Last-Mile Connection"). Moreover, primary urbanisation plans are intended to be developed in some productive areas, taking into account that regions have signed agreements with economic operators willing to make investments, provided that the concerned areas are equipped with adequate infrastructure and dispose of other regulatory instruments (municipal and regional regulatory plans, etc.).

[31] See Law Decree No. 77 of 31 May 2021, Governance del Piano nazionale di ripresa e resilienza e prime misure di rafforzamento delle strutture amministrative e di accelerazione e snellimento delle procedure (PNRR). The Decree has been amended and converted into Law 29 July 2021, No. 108, <https://www.gazzettaufficiale.it/eli/id/2021/05/31/21G00087/sg>.

Last but not least, it is imperative to implement an incisive strong promotion of the Special Economic Zone also as territorial marketing activity. The international investor cannot be attracted by it if he ignores what a SEZ is, its functions and opportunities.

3. Business Communities based on new privileged taxation policies

Significant tax benefits have already proved to be an undeniable positive contribution to the economic development of the region where they have been granted.[32] Experiences abroad have shown the high attractiveness that a different (reduced) taxation produces on potential investors. The tax lever is the main attractive tool, since a region becomes competitive when it is able to offer tax reliefs, fiscal exemptions and simplifications (something like "everything that is lacking in our country").

The Special Economic Zone is the place, tax simplification is the tool, and the creation of employment together with the economic development are the expected results.

In this perspective, companies operating within a SEZ can benefit from significant tax reliefs,[33] such as customs exemptions, reductions in corporate income tax and substantial tax credit for investments made in those areas.

The lawmaker[34] has expressly provided for the possibility of creating interlocked Customs Free Zones (CFZ)[35] inside the SEZs (and inter-regional SEZs), where goods belonging to third parties may be stored and the payment of the relevant customs duties suspended.[36] Each concerned Steering Committee submits

[32] J. Chaisse and X. Ji, *The Pervasive Problem of Special Economic Zones for International Economic Law: Tax, Investment, and Trade Issues* (Cambridge University Press 2020). Special Economic Zones (SEZs) have been a huge success and brought a great number of benefits to the whole world. With different kinds of incentives, SEZs have created favorable conditions in order to attract foreign investors. On this topic, P. Pistone, J. de Goede and A. Laukkanen (eds), *Special Tax Zones in the Era of International Tax Coordination* (IBFD 2019), 5. A. Laukkanen, 'The Development Aspects of Special Tax Zones' (2016) 70 Bulletin for International Taxation 152; R. Biçer, 'An Assessment of Free Trade Zones from a Transfer Pricing Perspective' (2008) 15 International Transfer Pricing Journal 236; C. Azémar and A. Delios, 'Tax Competition and FDI: The Special Case of Developing Countries' (2008) 22 Journal of the Japanese and International Economies 89; H. H. Zee, J. G. Stotsky and E. Ley, 'Tax Incentives for Business Investment: A Primer for Policy Makers in Developing Countries' (2002) 30 World Investment 1497; Y. Margalioth, 'Tax Competition, Foreign Direct Investments and Growth: Using the Tax System to Promote Developing Countries' (2003) 23 Virginia Tax Review 189.

[33] See Article 5(2) of Law Decree No. 91/2017, replaced by Article 57(1)(b)(4) of Law Decree 31 May 2021, No. 77,

[34] See Article 5(a-sexies) of Law Decree No. 91/2017, replaced by Article 46(1)(b)(2) of Law Decree No. 76/2020 concerning urgent measures for digital simplification and innovation (converted under Law No. 120/2020).

[35] See Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R0952>.

[36] On this topic, M. Basilavecchia *Interventi finanziari e tributari per le aree colpite da calamità tra norme interne e principi europei* (Giappichelli 2016); A. Lo Nigro, 'Lo svolgimento del rapporto

an application for a CFZ, which is admitted by resolution of the Director of the Customs and Monopoly Agency.[37] This has speeded up the process of approval of the perimeter of the Customs Free Zones by leaving this ruling to a directorial determination rather than a regulatory provision, thus simplifying the current procedures and reducing the delays required to identify the suggested area.

Member States are enabled to establish Customs Free Zones within their territories, must compulsorily identify the precise concerned areas and, in particular, their points of access and exits (with consequent exemption from customs fees in relation to goods in transit). This allows the storage of goods without customs charges, to the aim of attracting foreign investments and boosting the local economy[38].

The Free Zone is therefore a useful tool for the EU import/export of goods, thus expanding international trade and encouraging an increasing number of companies to set up in the free territory.

Nevertheless, the (possible) use of Customs Free Zones must not lead us to mix up the two legal institutions, because they respond to different needs and are subject to their respective regulation.

Customs Free Zones respond to a merely sectorial logic while the Special Economic Zones represent a much more dynamic model whose elements are sometimes unknown to the Free Zones and aimed at attracting foreign or non-regional investments. However, while maintaining structural and functional differences, both tend to contribute to the development of territories.

The lawmaker has also provided for a 50% reduction in corporate income tax for companies undertaking new economic initiatives in Special Economic Zones[39].

The relief applies from the tax period in which the new activity is started up to the end of the six following fiscal years[40] (also in agricultural, fishing and aquaculture sectors).[41]

In order to qualify, the benefiting firms must continue their activities for at least 10 years, thus safeguarding the jobs created in the concerned SEZ[42] (excluding firms in liquidation or being wound up).[43] Failure to comply with these conditions will result in forfeiture of the benefit and imply repayment of the aid already received[44]. This condition is well known by the concerned companies and

doganale' in M. Scuffi, G. Albenzio and M. Miccinesi (ed.), *Diritto doganale delle accise e dei tributi ambientali* (Ipsoa 2014), 269 ff.; C. Buccico, 'I benefici fiscali per le aree colpite da calamità naturali' (2013) Diritto e Pratica Tributaria 1095; L. Del Federico, 'Costituzione di una zona franca fiscale e doganale come logica di sviluppo del territorio' (2006) Fiscalità internazionale 263; G. Fransoni, 'I dazi doganali' in A. Fantozzi (ed.), *Il diritto tributario* (UTET 2004), 1075.

[37] See Article 5(a-sexies), Law Decree No. 91/2017, replaced by Article 46(1)(b)(2) of Law Decree No. 76/2020.

[38] See Article 243 (Designation of free zones) of Union Customs Code.

[39] See Article 1 (173-176) of Law No. 178/2020.

[40] See Article 1(173) of Law No. 178/2020.

[41] See Article 1(176) of Law No. 178/2020.

[42] See Article 1(174) of Law No. 178/2020.

[43] See Article 1(175) of Law No. 178/2020.

[44] See Article 1(174) of Law No. 178/2020.

constitutes a strong deterrent for those economic players motivated by exclusively speculative intentions.

Finally, the recent Law Decree No. 77/2021 has considerably increased (only for investments within the SEZs) the spending limits eligible for tax credit benefit[45] that, in my opinion, is the most important measure taken in favour of companies interested in operating within the SEZs.[46] In particular, the tax credit is proportional to "the share of the total cost of the assets acquired not later than on December 31st, 2022, up to a maximum limit of EUR 100 million for each investment project, and can be extended to the purchase of immovable properties provided that such purchase is instrumental to the investments".

Following the above-mentioned legislative amendment, the investment support facility has doubled to the evident purpose of exerting greater appeal on investors. In terms of its structure, it is modelled on the structure of the tax credit for investments in the *Mezzogiorno* (Article 1(98 et seq.) of Law 28 December 2015, No. 208) granted to companies that start entrepreneurial economic activities or incremental investments within the SEZ (granted in compliance with all conditions provided for by Commission Regulation (UE) No. 651/2014 of 17 June 2014).

Therefore, from a subjective point of view the tax credit is reserved for small, medium and large enterprises located within the territories indicated by the legislation. In this regard, "subjects that wish to obtain tax credit must submit a specific application to the Revenue Office". Should it be ascertained an even partial illegitimate enjoyment of the tax credit facility, the Revenue Office will proceed to the recovery of the undue amount plus interest and penalties as provided by law.[47]

Companies operating in the SEZs may still be eligible to obtain all other incentives provided for by the EU legislation. Moreover, in the Strategic Development Plans, the Regions may consider the introduction of additional measures and new tax incentives so as to make the entire region more attractive and business friendly.

Therefore, from a fiscal point of view, the SEZs do not introduce radically new instruments but use those that are already available increasing tax credit facilities, halving the corporate income tax or providing for possible modifications of the regional taxation.

In all cases and more generally, the rules regarding the incentives offered to companies established in the *Mezzogiorno* (currently very detailed in terms and prerequisites) should be simplified also in view of the ongoing negotiations of the Guidelines to Regional State Aid and must be limited to general provisions whose detailed aspects should be defined through decrees to be issued by the Ministry for the South and Territorial Cohesion. Such simplification – and consequent speeding up of the facilitation procedures – will ensure considerable advantages especially for the small and medium-sized enterprises in less developed disadvantaged areas. This reform needs to be connected to the reform of the regulatory reorganization of the incentives granted to companies, which require specific legislative measures.

[45] See Article 57(1)(b)(4) of Law Decree No. 77/2021.
[46] Facilitation provided for by Article 5(2) of Law Decree No. 91/2017.
[47] See *Circolare dell'Agenzia delle Entrate No. 34/E*, 3 August 2016.

3.1. Administrative Simplifications and New Models of Governance for the Development of the SEZs

Lastly, it is important to mention those administrative simplifications envisaged to speed up and streamline the relevant administrative procedures.

The pursuit of the system's objectives (support to the recovery plan, growth of the country and significant contribution to the achievement of a social and territorial cohesion) requires a simplification of the procedures ruling investments and territorial interventions. The SEZ involves different territories having different administrative bodies. It is therefore necessary to provide for an organic managing system aimed at guaranteeing simplified procedural uniformity and a certain timeframe of implementation.

Ensuring a favorable environment to the establishment and development of businesses and an increase in employment must be a fundamental objective to be achieved also in consideration of the right of businesses to operate within a simplified framework through transparent and rapid procedures.

In the Special Economic Zones companies can benefit from significant tax breaks as well as administrative bureaucratic simplifications.

Administrative simplifications are in fact the second major incentive for businesses willing to operate within a SEZ.

Firms launching a programme of economic business can benefit from simplified procedures: these are special procedural regimes having shortened deadlines and simplified formalities compared to the procedures and regimes provided for by the ordinary applicable regulations; in particular, the reduction (by one third) of the delays in several administrative procedures[48] and the definition of the simplified procedures in force in the SEZs.

Regions are also granted the right to propose to the competent Ministry possible different protocols or submit new conventions for the identification of further simplified procedures and special procedural regimes.[49] Such proposals will then be discussed and approved by the SEZ's Steering Committee whose main task is to verify and follow any intervention operated in the SEZs.

The lawmaker's intention to simplify and speed up the activities within the SEZs is clear, given the difficulties encountered in implementing this model in some Regions.

In this perspective, administrative simplifications represent a strong encouragement for those companies that decide to develop their business within a Special Economic Zone.

[48] See Article 5(1)(a) of Law Decree No. 91/2017.
[49] Ibid.

Croatian Legal Framework for Port Security: Case Study of the Port of Rijeka

IGOR VIO*

1. Introduction

The Adriatic Sea is a basin between the Italian Peninsula and the Balkans surrounded by several coastal States: Italy, Slovenia, Croatia, Bosnia-Herzegovina, Montenegro, and Albania (whereas Greece has several islands in the southern part of the Strait of Otranto). It is a typical enclosed or semi-enclosed sea as defined in Article 122 of the UN Convention on the Law of the Sea (1982). With its rather modest dimensions (the surface of 138,595 km^2) combined with slow marine currents, which cause a relatively long exchange periods of its water mass with the Mediterranean Sea through the Strait of Otranto, it is particularly vulnerable to marine pollution.

Having in mind that marine transport to and from the ports of the Adriatic coastal States, makes transport of the goods to the European markets shorter for approximately two thousand miles when compared to the northern European seaports, which makes them competitive, there is a high possibility for the Adriatic to become one of the end points of the "21st Century Maritime Silk Road".

That is why in the context of the Belt and Road Initiative there is the group of ports in the Northern Adriatic, gathered in the so-called NAPA (North Adriatic Ports Association), which have been recognized by the European Commission as "European core ports", while Northern Adriatic was recognized as "the key EU entrance".[1]

Today in the Republic of Croatia there are 5 ports of special international importance (Rijeka, Zadar, Split, Ploče and Dubrovnik), 40 ports of county importance and 274 ports of local importance. The Port of Rijeka is a member of the North Adriatic Ports Association (with Koper, Trieste, Venice and Ravenna)[2]

* Senior Lecturer, Faculty of Maritime Studies, University of Rijeka, Croatia.

[1] Chen Xin (ed.), *The Role of North Adriatic Ports* (China-CEE Institute Nonprofit Ltd 2021), <https://china-cee.eu/wp-content/uploads/2021/07/2021Book13PDF_The-Role-of-North-Adriatic-Ports.pdf>.

[2] G. Stanković and D. Bolanča, 'The legal status of the Croatian seaports of Rijeka and Split with particular reference to the ports of Koper and Trieste' (2000) 47 Naše more 201.

and with its recent project of enlargement of the container terminal will constitute an important gateway of the products from China and other countries from East Asian region to the markets of the EU Member States.[3]

2. Legal Regime of Seaports in Croatia

The legal regime of ports in Croatia is currently defined mainly by the Maritime Domain and Seaports Act, 2003, as amended.[4] This Act merged the provisions on maritime domain from two earlier legislative acts, which had been adopted after Croatia gained its independence in 1991 (the Maritime Code, 1994,[5] and the Seaports Act, 1995),[6] with scope to regulate management and ownership of seaports as part of maritime domain while excluding all provisions not applicable to navigation from the new Maritime Code, 2004.[7] Apart from the mentioned legislation, port regulation is defined by several governmental regulations[8] and ministerial ordinances and numerous bylaws made by port authorities under the delegated powers by primary legislation.[9]

By adopting the Concessions Act, 2008, and latter Concessions Act, 2012, a new legal framework for the concession award procedures applicable also to ports was established, without the harmonization with the existing provisions for the concession award procedure in the Maritime Domain and Seaports Act, 2003, as amended, creating antinomy of law, which has been lasting for a decade.[10] Governments (previous and current) have been aware of the problem but new Maritime Domain and Seaports Act still has not been adopted although various drafts were completed, mainly because of the confronted interests of the various stakeholders. However, the Ministry of Maritime Affairs has set the 2022 as the final limit for passing the new Act in the Parliament. According to the current law the port authorities do not have the appropriate administrative instruments to fulfil

[3] See information about *Rijeka Gateway Project* at <https://www.portauthority.hr/en/rijeka-gateway-project/>.

[4] Maritime Domain and Seaports Act, Official Gazette Nos. 158/2003, 100/2004, 141/2006, 38/2009, 123/2011, 56/2016, 98/2019.

[5] The first Maritime Code (MC 1994) entered into force on 22 March 1994 and was published in Official Gazette, No. 17/1994, while subsequent amendments were published in Official Gazette Nos. 74/1994 and 43/1996.

[6] Maritime domain had been regulated by the provisions of the 1994 Code but during the preparations for the new legislation it was decided to have it regulated separately in the Maritime Domain and Seaports Act (Official Gazette No.158/2003).

[7] The second Maritime Code was published in Official Gazette No. 181/2004.

[8] Government Regulation on the Conditions for Seaports, 2004, and Government Regulation on Classification of Ports Open to Public Traffic and Special Purposes, 2004.

[9] Ordinance on the Conditions and Methods of Maintaining Order in Ports and other parts of Internal Waters and Territorial Sea of the Republic of Croatia, 2005, or Ordinance on the Criteria for Determining the Allocation of Individual Parts of Ports Open to Public Traffic of County and Local Importance, Methods of Payment Bond, Terms of Use and Calculation of the Maximum Amount of Compensation and the Distribution of Income, 2007.

[10] See more in: L. Rak and I. Vio, 'Port Regulation in Croatia de lege ferenda' (2015) 1 Il Diritto Marittimo – Quaderni "New Challenges in Maritime Law" 434.

their objectives since most of the regulator functions are divided between port authorities and harbourmaster's offices. Unlike in some other EU countries, harbourmaster's offices are not part of port authorities, but rather separate administrative bodies under direct control of the Ministry of Maritime Affaires.[11] The cooperation between both bodies is present, but since the harbourmaster's offices are part of the central government, the balance of power of regulatory function is in favour of harbourmaster's offices.[12]

In May 2018 the Ministry of Maritime Affairs prepared the amendments of the Harbourmaster's Offices Act,[13] which should help resolving this problem with adoption of provisions that would give more balanced legal framework for this important issue. Recent important sources of maritime law include amended Ordinance on Pilotage of 14 May 2018, the new Harbourmaster's Offices Act on 19 December 2018, the Amendments of the Maritime Code of 20 February 2019,[14] and Amendments of the Croatian Ships Register Act of 22 May 2020.[15] There is also the new Ships and Ports Security Act of 27 October 2017 (with its amendments in March 2021), adopted as a final step in Croatian process of creating a legal framework for ships and seaports security, which was initiated after the inclusion of Chapter XI-2 of the SOLAS Convention and the adoption of the new ISPS Code in 2002.[16]

As a member state of the IMO, Croatia was obliged to implement appropriate security measures for its ships and port facilities and thus the Croatian Government passed the Decree on the Security Protection of Merchant Ships and Ports Open to International Traffic on 13 November 2003, which was later transformed into the Act of the same name by the Croatian Parliament. A year leter, Croatia was a candidate for membership in the European Union and negotiations on the conditions for the adoption, implementation and enforcement of the *acquis communautaire*, resulted in a new obligation to incorporate relevant European legal acts in the field

[11] The Ministry has changed its name several times and currently its full official name is "Ministry of Maritime Affairs, Transport and Infrastructure". For details of its structure and functions see: Ordinance on Internal Organisation of Ministry of Maritime Affairs, Transport and Infrastructure, Official Gazette No. 76/2017.

[12] See more in: A. Luttenberger, 'Pomorsko upravno pravo' (Maritime Administrative Law) Faculty of Maritime Studies, University of Rijeka, Rijeka, 2005.

[13] The first Harbour Master's Offices Act (Official Gazette 124/1997) has been in force since 28 November 1997. This Act regulated the basic issues of the organization of maritime harbour master's offices within the Ministry for Maritime Affairs, the scope of their tasks and powers in the control of navigation. The new Act was adopted in 2018 (Official Gazette 118/2018).

[14] The Act of Amendments of the Maritime Code, Official Gazette No. 17/2019.

[15] The Act of Amendments of the Croatian Ships Register Act, Official Gazette No. 62/2020.

[16] The International Convention for the Safety of Life at Sea (SOLAS) was adopted by the International Maritime Organisation in 1974, and the SOLAS Protocol was subsequently adopted in 1978. The Republic of Croatia is a party to the Convention and the Protocol of 1978 on the basis of notification of succession and for our country the Convention and Protocol are in force since 8 October 1991 (Decision on the publication of multilateral international agreements to which the Republic of Croatia is a party on the basis of notification of succession, Official Gazette – International Treaties No. 1/1992). The Second SOLAS Protocol, adopted by the IMO in 1988, entered into force for the Republic of Croatia on 30 April 2000 (Decree on Accession to the Protocol of 1988, Official Gazette – International Treaties No. 13/1999 and Decision on Entry into Force of the Protocol, Official Gazette – International Treaties No. 4/2000).

of maritime security in the Croatian legal system: namely, Regulation (EC) No. 725/2004 on enhancing ship and port facility security[17] and Directive 2005/65/EC on Enhancing Port Security.[18]

Therefore, in 2009 the first Ships and Ports Security Act (hereinafter "SPSA") was adopted with subsequent amendments from 2012 introducing modern international solutions for increasing the security protection of seaports into the Croatian legal system, taking into account the appropriate modifications contained in the legal acts of the European Union.[19] It was replaced by the new Act in 2017 with the recent amendments adopted in March 2021.[20]

3. Ships and Ports Security Act

3.1. Scope and Purpose of the Act

Various aspects of the security of maritime ships and ports open to international traffic in the Republic of Croatia are regulated by the Ships and Ports Security Act (SPSA). The introductory provisions of the SPSA define the scope of the Act and provide for its application to those ports and port operational facilities to which the following categories of merchant ships intended for maritime navigation dock or anchor: a) passenger ships in international navigation, including high-speed passenger ships, b) cargo ships in international navigation of 500 gross registered tons or more, including fast cargo ships, c) passenger ships engaged in national navigation engaged on voyages of more than 20 nautical miles from the coast.

The main purpose of the SPSA is to ensure the security of ships and ports in cases of security threat or security-threatening event, i.e. in cases of events, actions or circumstances that threaten or may threaten the security of a ship or port or any permitted activity in the port area. The term security protection means a system of preventive measures intended to protect ships and ports from the threat of intentional illegal acts.[21] These legal definitions emphasize primarily the preventive character of security measures, the task of which is to provide conditions for the normal performance of port activities and to prevent the occurrence of situations that could result in endangering people and property located in the port.

[17] Regulation (EC) No 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004R0725>.

[18] Directive 2005/65/EC of the European Parliament and of the Council of 26 October 2005 on enhancing port security, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0065>.

[19] See more in: M. Mudrić and H. Jović, 'Sigurnosna i privatna zaštita morskih luka u Republici Hrvatskoj' (2018) 57 Poredbeno pomorsko pravo 205.

[20] The Ships and Ports Security Act, Official Gazette Nos. 108/2017 and 30/2021.

[21] "Safety" and "security" do not have the two separate terms in the Croatian language so that single term "*sigurnost*" which is used for both of them in national legislation sometimes causes confusion.

3.2. Port Security Service

In accordance with provisions of the Article 6(3) of the SPSA, depending on the type of port, its security is the responsibility of the port authority, or of the concessionaire of the special purpose port.[22] This responsibility primarily implies the obligation to establish a service in charge of port security as a special organizational unit responsible for implementing security measures, which must be operational 24 hours a day. The relevant service is managed by a person responsible for port security appointed by the Director of the Port Authority or the responsible person of the special purpose port concessionaire, for a period of five years.

The Port Authority or the concessionaire of a special purpose port shall be responsible for the security protection of the port to which SPSA applies, including the preparation of a security protection assessment, preparation of a security protection plan and application of all measures determined by the security protection plan and the SPSA. The director of the port administration or the responsible person of the authorized concessionaire of the special purpose port shall appoint a person responsible for the security protection of the port operational area and a person responsible for the security protection of the port.

The Port Authority or the Director of the Port Authority or the responsible person of the Special Purpose Port Concession Authority shall notify the Ministry of the appointment and change of data of the appointed person within 15 days of the appointment or change. The Port Authority or the holder of the special purpose port concession shall be obliged to establish a service in charge of port security, which must be active 24 hours a day. The service referred to in paragraph 3 of this Article shall be managed by the person responsible for port security.

All legal and natural persons residing or performing activities in the port or in the port operational area are obliged to apply security protection measures according to the order of the port administration or the holder of the special purpose port concession. All concession holders in ports managed by port authorities must appoint an employee in charge of security protection, for the purpose of communication and cooperation with the competent person responsible for security protection of the port operational area.

3.3. Port Security Plan

Each port or port operational area to which SPSA applies must have a valid and maintained port security plan. The plan must take into account the specificities of different parts of the port, the environment of the port when it has or in certain circumstances may have an impact on port security, as well as plans for port operational areas.[23]

[22] A special purpose port is a seaport that serves the special needs of a company, other legal or natural person (nautical tourism port, industrial port, shipyard, fishing port, sports port) or a state body (military port, police port).

[23] If there are several port operational areas in the area of one port, the port security plan must contain plans of all port operational areas within that port prepared in accordance with the provisions of Regulation (EC) No. 725/2004.

The Port Authority or the concessionaire of the special purpose port shall be obliged to ensure the preparation of a port security plan, which shall be prepared by a recognized port security organization on the basis of an approved port security assessment. The port security plan shall determine the procedures, measures and activities for each level of security protection.[24]

If ships in international liner shipping dock in the port, the Minister may, in cooperation with other Member States whose ports concern those ships, agree on additional measures or reduction of the scope of application of existing security measures determined by the plan. The Ministry shall decide on the request for approval of the port security plan or for approval of changes or amendments to the port security plan within 60 days from the day of submitting a proper request, and at the proposal of the Commission of the Ministry by this Law and Regulation (EC) No. 725/2004.[25]

The Port Authority or the concession holder in a special purpose port may, without the prior consent of the Ministry, amend the parts of the port or port operational area security plan relating to the description and characteristics of the port and port operational area, persons responsible for port security and communication system. The security protection service shall notify the Ministry of changes in parts of the within 15 days from the day of changes in those parts of the plan.

3.4. Assessment of Port Security

Each port or port operational area to which this Act applies must have an assessment of port security which must take into account the specifics of different parts of the port and the port environment when it has or in certain circumstances may have an impact on port security. In the event that there are several port operational areas in the area of one port, the port security assessment must include assessments of all port operational areas within that port made in accordance with the provisions of Regulation (EC) No. 725/2004. The Port Authority or the concessionaire of a special purpose port shall ensure the preparation of the port security protection assessment and timely submit to the Ministry a request for approval of the assessment or amendment to the assessment, attached to which the assessment or amendment must be submitted.

Port security protection assessments shall be prepared by a recognized port security organization.[26] The Ministry shall decide on the request for approval of the port security assessment or for approval of changes or amendments to the port security assessment by a decision within 60 days from the day of submitting the proper request according to the provisions of SPSA and Regulation (EC) No. 725/2004. Each port or port operational area to which this Act applies and for which

[24] The obligatory content of the port security plan is determined by Annex II, and the obligatory communication and other procedures of the security plan in case of threat are determined by Annex VI of this Act.

[25] No appeal shall be allowed against the decision referred to in para. 8 of this Article, but an administrative dispute may be initiated.

[26] The mandatory content of the port security assessment is determined by Annex I to the SPSA.

the obligation to prepare an assessment and security protection plan is prescribed must have an assigned UN port number. The port security assessment must be renewed at least every five years or in the case of: increase or decrease of the area of the port area by more than 5%, major changes in the structure, mode of operation or prevailing loads, and any requests of the Ministry. The port security plan shall be renewed in accordance with the renewed port security assessment.[27]

A recognized port security organization that has prepared an assessment of the security of a port or port operational area may not draw up a security plan for the same area. Assessments and plans must be protected from unauthorized access or disclosure of data in accordance with the provisions of special regulations related to information security of classified information, and according to a certain level of secrecy that the document carries. The level of secrecy shall be determined by the Minister, in accordance with special regulations. The Commission of the Ministry shall submit a report to the Minister on the state of port security protection once a year and, when necessary, propose measures to improve the security protection system.

3.5. Levels of Port Security

The Port Security Plan defines the procedures, measures and activities for each security level. The level of security protection for ports in the Republic of Croatia and ships of Croatian nationality shall be determined by the ministry competent for internal affairs according to basic and special security indicators. The notification on the change of the level of security protection must contain at least: date of change, time of entry into force and period of application, newly established level of security protection, a brief description of the reasons for the change in the level of security protection, port or ports or ships to which the level of security protection applies, and additional protection measures that must be implemented in addition to the measures determined by the security protection plans of the port or ship, if any.

The Ministry in charge of the Interior shall immediately inform the Ministry of Maritime Affairs, the Ministry in charge of Defense and the National Center for Coordination of Search and Rescue at Sea (MRCC) about the determined level of security protection and all its changes.

3.6. Exercise of Security Protection

The Port Authority or the concessionaire of a special purpose port is obliged to carry out a certain security protection exercise plan, to the extent and frequency prescribed by the security protection plan. To this purpose, the Port Authority or the Special Purpose Port Concessionaire must at least once every six months conduct an exercise to verify the effective application of the port security plan and the ability, training and security awareness of staff in the port area and port

[27] Renewals of assessments and plans must be in accordance with Articles 7 and 8 of the SPSA, depending on whether it is an assessment or a port security plan.

operational area. Successive verification exercises must cover all measures and procedures determined by the security plan of the port or port operational area, except for measures and procedures whose verification is not appropriate.[28]

In order to verify the effective application of the port security plan and the ability, training and security awareness of the staff, the port authority or the concessionaire of the special purpose port must conduct a general exercise at least once a year covering all or most measures determined by the port security plan. all or most persons and services with port security responsibilities.[29] Exceptionally, the period of one year between two general exercises may be extended, but no more than 18 months may elapse between two general exercises. At least once in three years, employees of the security protection service of at least one neighbouring port and port operational area must also participate in the general exercise.[30]

3.7. Person Responsible for Port Security

Each port must have a designated person responsible for port security, who may also perform the function of the person responsible for security of the port operational area if one or more port operational areas are located nearby and are managed by the same legal entity.[31] Persons responsible for port security shall be obliged to coordinate all tasks related to port security and cooperation and communication between persons responsible for port security.

The person responsible for the security of the port or the person responsible for the security of the port operational area shall ensure that notification of the level of security or its change is received by all ships in the port area or who have announced their intention to enter the port area. within 30 minutes of receiving notification from the MRCC of a change in the level of port security. The person responsible for the security of the port must ensure adequate storage of concluded Security Declarations and other notes made on the basis of the provisions of this Act for a period of at least three years.

Contact person shall be appointed by a decision of the Minister. This liaison officer shall submit to the European Commission the list of Croatian ports to which this SPSA applies and shall report on all amendments to the list of ports and other information important for the security protection of ports.

[28] As an exception to para. 2 of this Article, the port authority or the concessionaire in a special purpose port may, with the consent of the Ministry, determine a different frequency of exercises, taking into account the assessment of security, traffic and port capacity and other relevant circumstances for security protection.

[29] The general exercise shall be conducted in accordance with the criteria set out in Annex III. of the SPSA and must include at least one vessel located in the port area or port operational area.

[30] The person responsible for the security protection of the port operational area shall keep records in Croatian and Latin script on the conducted verification exercises and general exercises.

[31] One person may exceptionally be appointed for a person responsible for the security of a port for several ports if those ports are close and for similar purposes or are managed by the same legal entity, Ship and Port Security Act, Article 12(3).

3.8. Recognized Port Security Organization

A recognized port security organization is a legal entity that meets the requirements set out in Annex IV of the SPSA and is authorized as a public authority to perform the following tasks related to port security: preparation of the port security assessment, development of a port security plan, preparation of amendments to the port security assessment, drafting amendments to the port security plan, development of procedures for the implementation of periodic and general exercises to verify the ability to timely apply the measures and procedures set out in the port security plan and processing and analysis of data and information of security importance for the security of the port with the development of an intelligence product – reports to maintain security vigilance and readiness of staff residing in the port area and to take the necessary security measures.

The verification of compliance with the conditions shall be carried out by the Commission of the Ministry. Upon previously obtained opinion of the Commission of the Ministry, the Ministry shall issue a decision on the request for authorization of a legal entity to perform port security protection activities.[32] A decision authorizing a legal entity to perform port security operations may be issued for a maximum period of five years, containing the scope of activities that the recognized organization is authorized to perform. On the basis of the adopted decision on authorization, the Ministry and the recognized organization for port security shall enter into an agreement regulating mutual rights and obligations. The validity of the contract is harmonized with the deadline for which the decision on authorization is issued.[33]

The Ministry may reject an application for authorization or limit the number of recognized organizations for port security for security reasons, ie if it assesses that the existing number is sufficient in relation to the number of ports and traffic in ports in the Republic of Croatia. A recognized port security organization may not have a business or other interest in relation to the entities for which it performs the activities of a recognized organization and may not perform physical security activities or provide other services arising from the application of the security plan. The recognized organization for port security shall be obliged to inform the Ministry without delay of any change of importance for its work in the capacity of a recognized organization.

If the supervision over the work of a recognized port security organization determines that it does not meet the conditions under which it is authorized or performs activities contrary to the provisions of this Act and regulations adopted on the basis thereof, the inspector or authorized employee of the Ministry shall order the correction of deficiencies, temporarily prohibit the performance of the activities of a recognized organization for port security and inform the Ministry thereof, and

[32] No appeal shall be allowed against this decision, but an administrative dispute may be initiated before the Administrative Court.

[33] Inspectors or authorized employees of the Ministry shall carry out annual regular and, if necessary, extraordinary inspections of the work of recognized organizations for port security in the scope of activities determined by the contract (Article 13(5) of the SPSA).

propose revocation of authorization. The inspector or authorized employee of the Ministry may apply one or more of these measures.[34]

The Ministry shall maintain a list of recognized port security organizations, which shall be published on the official website of the Ministry and the official website of the International Maritime Organization.

3.9. Supervision of Implementation and Compliance

The Ministry is obliged to establish a system for monitoring the compliance of the plan in relation to the actual situation in ports and the application of measures determined by the security protection plan.[35] Supervision of the application of measures determined by the security protection plan shall be performed by security protection inspectors in cooperation with authorized officials of the ministry competent for internal affairs. The security protection inspector is obliged to conduct an inspection at least once a year and check the application and effectiveness of the measures from the security protection plan.[36]

Supervision of the application of measures determined by the security protection plan may be performed by security protection inspectors at the same time as they perform other inspections in the port. If the inspection determines that the port does not comply with the provisions of the SPSA, by-laws adopted on the basis of the SPSA or other regulations governing inspection, the security protection inspector may: order the correction of deficiencies, temporarily prohibit the entry of ships into the port or into a particular port operational area and take another measure provided by a special regulation.

3.10. Port Conformity with Security Measures

Every port open to international traffic as defined by the SPSA must have a declaration of conformity of the port.[37] The Ministry shall issue a statement on the compliance of the port within 30 days after the approval of the security protection plan. The declaration of conformity of the port shall be issued for a period of five years, counting from the date of approval of the security protection plan. The declaration of conformity of a port shall be valid provided that a regular annual inspection is performed every year on the date of issuance of the declaration of conformity of the port or in the period of 60 days before or 60 days after that date.[38]

---

[34] The Ministry may revoke the authorization of a recognized port security organization even before the expiry of the validity period if it finds that the recognized port security organization no longer meets the conditions for authorization or if it performs activities contrary to the provisions of this Act, Regulation (EC) No. 725/2004, the SOLAS Convention or the ISPS Ordinance.

[35] Supervision of the compliance of the port security plan shall be performed by its approval as prescribed in Article 8 of the SPSA.

[36] An inspection report shall be drawn up on the performed supervision in accordance with the form set out in Annex V to this Regulation.

[37] Ports open to public traffic are ports in which every natural and legal person, under equal conditions, is enabled to use operational shores, breakwaters and other facilities in the port according to their purpose and within the available capacity.

[38] The form of the declaration of conformity of the port is prescribed in Annex VII of the SPSA.

The regular annual inspection shall be performed jointly by inspectors for security protection and officials of the ministry competent for internal affairs. Security protection inspectors in the competent harbor master's office shall prohibit entry into a port or port operational area to which the SPSA applies by a foreign ship that does not have a valid declaration of conformity or a concluded security protection declaration.

3.11. Control of Persons and Vehicles in the Port

All persons, as well as road and railway vehicles that permanently or occasionally perform a certain activity or stay permanently or occasionally in the port area or port operational area must have a permit allowing movement in the port area or port operational area whose issuance and use must be provided by the port authority or the concessionaire of the special purpose port. As an exception to this rule, passengers and vehicles embarking on or disembarking from a ship, ship's crew members, navigation safety inspectors and their official vehicles when performing inspection supervision, police officers and authorized customs officers need not have a license and their official vehicles in the performance of official duties in the port and in the port operational area, as well as employees of the intervention services of fire brigades and medical first aid when they come to the intervention.[39]

The Minister, with the prior opinion of the Minister responsible for internal affairs, shall prescribe by an ordinance the conditions of issuance and the procedure of issuance, types, mandatory content and validity of permits allowing movement in the port area or port operational area. In order to have the permit issued, persons must meet the general and special conditions, except for visitors who must meet only the general conditions.[40]

The Port Authority or the concessionaire of a special purpose port may, by its ordinance, regulate the preparation and procedures related to the permits in accordance with the provisions valid for ports opened for international traffic. The verification of compliance with the general conditions, which includes verification of the identity and reasons for entry, shall be performed by the port security service.

Verification of compliance with special conditions, which includes processing of data on criminal and misdemeanor activities, including those recorded in the databases of the ministry responsible for the interior, shall be performed by the competent police administration or police station in accordance with regulations governing personal data protection. All persons staying in the port operational area are obliged to act on the instructions of the persons responsible for port security in accordance with the port security plan of the port or port operational area and the level of security protection applied in the port.

[39] The license shall be issued in the form of a card or other form of license issued by the port authority or special purpose port concessionaire and must be displayed in a visible place during the stay in the port or port operational area (Article 17(3) of SPSA).

[40] The Security Protection Service shall keep records of issued, lost, returned and destroyed permits.

3.12. Reporting Obligations

Since the collection and exchange of information between EU Member States and signatories to the SOLAS Convention contributes to strengthening the system of protection of seaports, the Ministry is obliged to report to the International Maritime Organization, the European Commission and other EU Member States on measures taken in accordance with Chapter XI.-2 SOLAS Convention and ISPS Code.

The Ministry is also obliged to establish a special body in charge of security protection, and to submit to the European Commission information on that body as well as on the person in charge of security protection in the Ministry. The Directorate for Safety of Navigation has been designated as the body responsible for security protection, which is responsible for reporting and coordinating activities with the European Commission and Member States regarding the application of the relevant regulations of the European Union. The Navigation Safety Directorate is also obliged to report to the European Commission on ports and port operational areas to which the SPSA applies.

4. Port of Rijeka

4.1. Port of Rijeka Security Plan

The plan was prepared in accordance with the SPSA, the Directive 2005/65/EC.[41] Obligations arising from this Plan are performed by the person in charge of security of Rijeka Port Authority (Port Facility Security Officer – PFSO LU Rijeka), responsible persons of the concessionaire companies in charge of security, coast supervisors and security guards, in coordination with state bodies (Harbor Master's Office, Police, Customs and other security services).[42]

The security protection plan is approved by the Ministry of the Sea, Transport and Infrastructure with the prior opinion of the Ministry of the Interior. The aim of the Security Protection Plan is to enable security personnel to implement security measures in port operational areas through clear and unambiguous procedures and procedures. At the same time, the plan aims to raise the awareness of employees and concessionaires about the existence of a terrorist threat and the possibility of using port operational areas for illegal and unauthorized action against passengers, ships or crew.

The plan also aims to reduce exposure to security threats through the implementation of preventive activities, both in the regular level of security protection and in the increased levels.

[41] The content of the Plan is harmonized with the Instruction for the preparation of the security protection plan for the port and port operational area, which has been in force since 15 September 2020.

[42] The Port Authority of Rijeka was established by the Decision of the Government of the Republic of Croatia (Official Gazette No. 42/1996) for the management, construction and use of the Port of Rijeka, which is open to international public transport for the Republic of Croatia.

Security threats, in the context of this Plan, are primarily those threats that are the initiators, creators and bearers of people – individuals, groups, organizations or other entities - who for any, very different motives, motives, reasons and goals intend to inflict or cause damage to port operational areas and ships. Security threats can be local, regional and global.[43]

When we analyze security threats in Croatian ports, in this case the port operational areas under the jurisdiction of the Rijeka Port Authority, then we are considering the following threats: terrorism, use of a ship as a weapon (bomb), attack on a port operational area (hereinafter "POA") or a ship in a POA, attack on passengers in a POA, hijacking or taking hostages on a ship, sinking a ship in port waters, smuggling terrorists or weapons to the destination, smuggling of biological, chemical and radiological prohibited substances, concealment of explosives, weapons and other dangerous goods in cargo, hijacking and hostage-taking, causing human, economic and environmental damage in the port state, cyber terrorism, diversion, sabotage, other forms of terrorist activity, organized crime, human trafficking, contraband or smuggling of arms and explosives, narcotic substances, cigarettes and alcohol, exotic (rare) animals and plants, all other forms of organized crime, cybercrime, illegal migration, vandalism and classic crime (burglary, cargo and luggage theft). The task of the Plan is to adopt adequate procedures and measures so that security personnel can implement specific security measures in order to prevent the realization of these security threats in port operational areas.

4.2. Port Operational Areas

The entity of the Port of Rijeka consists of various port operational areas under the jurisdiction of the Port of Rijeka.[44] The Port Authority within the Port of Rijeka has five port operational areas in which international ship traffic takes place: POA Rijeka - City, POA Breakwater and part of the Passenger Port, POA Sušak, POA Brajdica and POA Bakar, plus four special purpose ports managed by concessionaires (POA INA Bakar and Sršćica, POA Shipyard Viktor Lenac and POA Shipyard Kraljevica). All these port areas within the port of Rijeka are located along the coastline of the Bay of Rijeka and Bakar.[45]

The Port of Rijeka Authority has two other port operational areas under its jurisdiction, the Omišalj Terminal POA and the Raša - Bršica POA. These two areas, primarily due to their geographical position, are not part of the Port of Rijeka and special security plans will be prepared for them.

---

[43] Security is defined as a state of protection from damage or loss, which could occur due to (un) intentional and / or unauthorized actions of others. This is a condition that is achieved by preventing the bearer of the threat with the intention of realizing a harmful event, i.e., by eliminating or reducing the consequences of a possible harmful event. Such a definition of security implies the existence of a security threat, where the security threat implies the bearer of the threat and the motive for which the bearer of the threat intends to achieve a harmful event. The bearer of the threat is a person, individual, group, formal or informal organization or some other entity.

[44] The Port of Rijeka is a collective name for port operational areas located in the Gulf of Rijeka and Bakar Bay.

[45] The new deep sea container terminal is currently under construction, see more details at <https://www.portauthority.hr/en/rgp-zagreb-deep-sea-container-terminal/>.

4.3. Port Facility Security Officer

According to the Security Plan, there are numerous tasks and duties of the port facility security officer (PFSO) who is a designated person responsible for port security. He conducts an initial comprehensive analysis of the security situation in the port operational area, taking into account the relevant findings of the assessment of its security protection, and subsequently based on this analysis provides the necessary guidance to the recognized security organization (RSO) in drafting the security protection plan (SPP) in accordance with security trends and challenges in the POAs.

He is in charge of timely preparation of the Security Protection Assessment (SPA) of the LOP, implements measures and procedures from the POA Security Protection Plan and ensures and monitors their implementation at all levels, supervises security personnel in the implementation of security measures and procedures, identifies omissions and provides instructions and guidelines to correct omissions, conducts regular security monitoring in the POA, analyses the current situation and ensures the continuity of appropriate security measures, recommends changes if necessary in the Plan and modifications of the Plan, in order to correct the identified shortcomings and to update the Plan to take into account all relevant changes in the POA and the processes that take place in it, continuously takes care of strengthening and developing security awareness and vigilance security staff and other employees in the POA, provides adequate training and education of security staff in charge of POA protection, reports to the competent authorities and keeps records and records of events that endangered or threaten the safety of the POA.

PFSO also coordinates the implementation of the POA Security Plan with the ship or company security officer, coordinates security activities with concessionaires and their persons in charge of security, if such persons are appointed, coordinates security activities with the PSO of the Port of Rijeka and participates in the work of the Security Coordination Committee at the level of the Port of Rijeka, coordinates security activities in the POA with relevant state institutions (Harbor Master's Office, Police, Customs, Civil Protection) and other relevant institutions at the level of regional and local self-government, ensures compliance with the necessary professional standards of security personnel, ensures that safety equipment and security systems are properly handled, that they are regularly certified, calibrated, serviced and maintained in functional state.[46]

He also signs the Declaration on Security Protection when necessary or requested, together with the ship security officer establishes the identity of persons seeking access to the ship, when required, he is responsible for security of fuel supply and handling of hazardous substances, conducts identification procedures cards and passes for persons and vehicles and keeps records of issued, lost and cancelled cards and passes, he is in charge of drafting internal regulations and instructions related to security at the level of POA, plans and conducts exercises to

[46] See more on Harbourmaster's Office, Customs Administration, Border Inspection Point and Marine Police Station at the Port of Rijeka at <https://www.portauthority.hr/en/port-community/>.

verify the ability to timely apply a measure or procedure specified in the Security Plan, and once a year organizes a general exercise.

PFSO also receives, accepts and confirms the announcement of the ship's arrival through the electronic ship announcement system - CIMIS, cooperates with agents regarding the announcement of the ship's arrival, refueling and supplies, in case of declared increased security threats, he strengthens security and protection measures, and according to security situation may submit report to the PSO and the competent state services and seek their assistance in the event of a security incident, and after its resolution, may conduct an inspection and review of security protection, security procedures and measures applied in the POA, to determine whether there is a need for changes and modifications in the Security Protection Plan, all with the aim of preventing recurrence of security incidents, Finally, he reports on deficiencies in security protection of POAs, as well as proposed measures to eliminate them to the PSO police and the Port Authority. Once a year before annual audit of the The Harbor Master's Office and the Police, PFSO will analyse the security situation in the POA. He will also perform all other tasks that are directly or indirectly related to the safety of ships in port operational areas.

5. Concluding Remarks

As for the legal framework for its maritime security, by adoption of the Ships and Ports Security Act, Croatia has undertaken to give full and complete effect to the special measures to enhance maritime security as defined in the Chapter XI-2 of the SOLAS Convention, in the ISPS Code and in the Regulation (EC) No. 725/2004 on enhancing ship and port facility security. In view of the potential future role within the concept of Maritime Silk Road and having in mind the possible volume of the cargo traffic on the future container terminal, all these security measures should be further developed. In order to improve passenger and cargo traffic between the Adriatic ports, the Ministry should propose implementation of alternative security agreements or equivalent security arrangements to the neighbouring countries, in line with the provisions of the Regulation (EC) No 725/2004 on enhancing ship and port facility security.

The Port of Rijeka Security Plan, on the other hand, represents a valid example as to optimal methods to prescribe clear procedures, functions and measures for the implementation of security protection as regulated by the international and national legal regulations, in this case at the port level, in order to make it be clear, concise and concise. Hopefully, it will represent a significant asset to the future contribution of the port of Rijeka as one of the core ports in the Northern Adriatic that will play its role as the gateway of the Maritime Silk Road.

The Management, Safety and Security of the Port of Koper (Slovenia) and the New Maritime Silk Road

MITJA GRBEC* – BORIS JERMAN**

1. Introduction

The Port of Koper (cargo port of Koper) is an important port in the Northern Adriatic which will exceed in 2021 one million TEU's of transhipment. It is strategically located at the crossroad of the Baltic Adriatic and Mediterranean corridors and qualifies as a core EU port. It is a multipurpose port including containers and ro-ro, breakbulk, liquid bulk, project cargos and passenger's terminal, perishables, cars, alumina and other materials, coal and iron ore, cereals and fodder, timber, livestock (12 specialised terminals, 3,4 km of operative quays, 26 berths, 30 km of railway tracks serving and connecting all terminals). Noteworthy is the fact that the Port of Koper ranks 80th for its connectivity in the world, according to UNCTAD.[1]

Its location makes it a major hub for accessing the main markets of Central Europe. Regular rail lines connect the port of Koper to Munich, Salzburg, Bratislava, Budapest, Belgrade, etc. For Central European countries such as Slovakia, Austria or Hungary, the Adriatic ports of Koper, Rijeka and Trieste are of exceptional importance, as the distance from Koper, Rijeka or Trieste to the said capitals is only 570 kilometres, while from Hamburg it is as much as 1.200 kilometres. Thus, goods from Adriatic ports should reach their destination much faster (up to 7 days shorter transit times).

One of Koper's assets for Chinese companies is the importance of its connections to Central Europe. Trade between China and the EU averages over €1bn a day. In 2018, the EU's imports from China alone amounted to €394.8bn. Based on data provided by EUROSTAT in the period between January 2019 and

* Legal practitioner in the port town of Koper/Capodistria, Slovenia, and Visiting Fellow at the IMO International Maritime Law Institute (IMO IMLI, Malta).
** Chief Compliance officer, Port of Koper d.d., and President of the Maritime Law Association of Slovenia.

[1] See <https://www.luka-kp.si/en/news/port-of-koper-ranked-80th-out-of-900-assessed-ports/>.

December 2020, exports to China increased by 10.0 % while exports to other non-EU countries decreased by 3.9 %. Imports from China increased by 14.2 % while imports from other non-EU countries decreased by 15.2 %. In 2020, China was the third largest partner for EU exports of goods (10.5 %) and the largest partner for EU imports of goods (22.4 %).[2] This makes the ports in the region interesting for China as part of the Belt and Road Initiative (BRI), Beijing's ambitious strategy to connect Asia with Europe and Africa by facilitating trade along land and maritime corridors.

An important step in that direction occurred in June 2018, when the Port of Koper and the Ningbo Zhoushan Port Group, in the framework of the international conference "Maritime Silk Road Port International Cooperation Forum" signed a Memorandum of understanding. The aim of the latter was to strengthen trade between China and the Central and Eastern Europe countries, which carry substantial part of their overseas trade through Koper port. An argument can be thus put forward that the Port of Koper has at that time become a formal part of the economic belt initiative (Silk Road Initiative).[3]

Based on the said Memorandum, the signatories should seek to increase the number of shipping lines between the two ports, thereby increasing the trade volume which exceeded 2 million tons of cargo in 2018. The agreement highlights in this regard, inter alia, cooperation in the establishment of intermodal connections. The chairman of the Port of Koper recalled on that occasion:

> The Chinese partners recognized the strategic position of the Port of Koper and its excellent connections with the hinterland. On average, as many as 70 freight trains daily connect Koper and the largest economic centers in Central and Eastern Europe. Luka Koper is interesting for Chinese partners because two thirds of the goods in Koper are handled for hinterland markets needs and we have a dominant market share on some destinations.[4]

Reference should be made to the fact that Ningbo Zhoushan Port Group is the largest operator of ports in Zhejiang province on the East China Sea coast. Last year the group exceeded 1 billion tons of cargo, including 26,3 million TEUs.[5]

A further important landmark occurred in 2019 when the at that time Chairman of the Port of Koper d.d., Dimitrij Zadel, met the executives of COSCO in Beijing (14.6.2019). The Chairman of the company Luka Koper d.d., accompanied Alenka Bratušek, at that time Minister of Infrastructure on her work visit to China, where they met the executives of COSCO, the largest Chinese shipping company and an important client of the Port of Koper. The Minister for infrastructure seized the opportunity to introduce Slovenia's infrastructure plans in terms of transport connections between the Port of Koper and its hinterland.

---

[2] EUROSTAT, 'China-EU - International trade in goods statistics', March 2021, <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=China-EU_-_international_trade_in_goods_statistics>.

[3] RSBClub, 'Koper port joins Silk Road initiative', 14 June 2014.

[4] Ibid.

[5] See <https://www.aivp.org/en/aivp/our-members/directory/ningbo-zhoushan-port-group-co-ltd>.

The Minister presented in that regard the construction project of the second railway track between Koper and Divača which should significantly increase the Port's competitive position and the overall modernisation of the Slovenian railway network by 2026. The entire 27-kilometer Divača-Koper railway section allows speeds of up to 160 kilometres per hour, comparable to the speeds of modern European railways. The railway will rise from the sea level to 430 meters in Divača, and three quarters of the railway route will run in tunnels.[6] Slovenia will thus provide conditions for a further increase in container throughput in the Port of Koper where in 2021 the number of handled TEUs is about to exceed the historical limit of one million.

2. The management of the Port of Koper

There is no special legislation governing the maritime domain and/or ports in the Republic of Slovenia. Different sets of legislation need to be applied including the Maritime Code of the Republic of Slovenia,[7] Water Act,[8] Law on Public-Private Partnership,[9] governmental regulations and bylaws[10] and local community ordinances. Noteworthy is the fact that based on the concluded concession contract (2008) the legal manager of the Port of Koper is the Republic of Slovenia (Ministry of Transport, Maritime Administration of the Republic of Slovenia), while the commercial management of the port has been transferred to the concessionaire, the stock company Luka Koper d.d. (Port of Koper d.d.). That transfer includes the management, administration and development of port infrastructure (both for public transport and not). Noteworthy is the fact that the Port of Koper is not managed by a "classic" port authority.[11]

2.1. Port management in the Republic of Slovenia (Legal sources)

There are no special laws governing ports in the Republic of Slovenia. Reference should be accordingly made to different sources, including the Water Act, Maritime Code, Law on public-private partnership and inter alia on the governmental Decree on the administration of the freight port of Koper, port operations, and on granting concession for the administration, management, development and regular maintenance of its infrastructure, in addition to applicable EU legislation.[12] With regard to marinas and local ports, reference should be

[6] See <http://www.drugitir.si/trasa-drugega-tira/video>.
[7] Maritime Code, OG RS, št. 62/16 – consilidated text, 41/17, 21/18 – ZNOrg, 31/18 – ZPVZRZECEP, 18/21 in 21/21 – amended.
[8] Water Act, OG RS, št. 67/02, 2/04 – ZZdrI-A, 41/04 – ZVO-1, 57/08, 57/12, 100/13, 40/14, 56/15 in 65/20.
[9] Public-Private Partnership Act, OG RS No.127/06.
[10] See <https://www.gov.si/drzavni-organi/organi-v-sestavi/uprava-za-pomorstvo/zakonodaja/>.
[11] See discussion in Section 2.4.
[12] See for example Regulation (EU) 2017/352 of the European Parliament and of the Council of 15 February 2017 establishing a framework for the provision of port services and common rules on the financial transparency of ports, OJ L 57, 3 March 2017, 1-18.

furthermore made to Ordinances of the local communities of Koper, Izola, Piran and Ankaran.

The (unitary) concession for the exploitation of the (freight) port of Koper was granted by the Government of the Republic of Slovenia to the stock company Luka Koper d.d. in 2008

on the basis of a concession deed based on the "Decree on the administration of the freight port of Koper, port operations, and on granting concession for the administration, management, development and regular maintenance of its infrastructure".[13]

2.1.1. Maritime Code of the Republic of Slovenia

A definition and general provisions on ports are included within the Maritime Code of the Republic of Slovenia.[14] Based on the provisions of Article 32(1) of the Maritime Code a port is:

> […] the water and adjacent dry land which comprises the anchorage, the constructed or natural embankments, breakwaters, facilities and structures for mooring, anchoring and protecting ships, for ship building and maintenance, for passenger embarkation and disembarkation, for goods loading and unloading, for goods storage and other goods handling operations, for the manufacture, processing, inspection and post-processing of goods and for other commercial activities related in commercial, transport or technological terms. The constructed embankments for the mooring of ships, embarkation and disembarkation of passengers and cargo shall constitute the operational shores.

The Maritime Code of Slovenia distinguishes between different types of ports among which: (1) ports open for public traffic; (2) special-purpose ports; (3) naval ports.[15] Based on the provisions of Article 37 of the Maritime Code of the Republic of Slovenia, special purpose ports should be further classified as recreational ports; tourists ports (marinas), local ports and other ports. Noteworthy is the fact, that the Port of Koper (cargo port of Koper) is the only port in the Republic of Slovenia open for the international transport of goods. The importance of its position is emphasized by the Maritime Code, which in Article 43 defines some activities that shall be carried out in the public interest within the Port, such as the provision of public services, including:

- regular maintenance and development of port infrastructure open to public traffic;
- regular collection of ship-generated waste;
- maintenance of sea lanes and navigation safety facilities;
- maritime pilotage;
- compulsory towing of vessels.

[13] Official Gazette of the Republic of Slovenia No. 71/2008.
[14] See (n 11).
[15] Article 32 Maritime Code.

The commercial public service referred to in indents one, two and three of the preceding paragraphs shall be an obligatory commercial public service. The commercial public service referred to in indents four and five of the preceding paragraph shall be an optional commercial public service and shall only be provided in the cargo port of Koper.[16]

2.1.2. Water Act

Another important legal source related to ports in the Republic of Slovenia is represented by the Water Act.[17] The latter provides among other a distinction between natural and artificial water public goods and conditions for its use, depending on whether it is a "general" or "special" use. Art. 21 of the said Law provides in this regard:

> 1) Natural and artificial water public goods (hereinafter: water public goods) may be used by anyone in the manner and under the conditions determined by this Act, provided such use does not have an adverse impact on the waters, the water regime and the natural balance of aquatic and semi-aquatic ecosystems, and provided this does not limit the same right of other people (hereinafter: general use).
> 2) Special use of a water public good shall only be possible on the basis of a water permit or a concession, provided all the conditions referred to in the preceding paragraph are met, and provided that such use does not substantially restrict the general use. […]

Accordingly, in order to use a maritime public good that exceeds the limits of general use it is necessary to obtain: (1) A water right based on a concession, in the case that a used is not a person governed by public law; (2) water right based on water permit, if the use is a person established in accordance with public law.

2.2. Decree on the administration and management of the Port of Koper

Among governmental decrees the most important legal source is represented by the *Decree on the administration of the freight port of Koper, port operations, and on granting concession for the administration, management, development and regular maintenance of its infrastructure*.[18] The latter regulates the methods for the management of the cargo port of Koper, the conditions and methods of carrying out port operations in the port area and issues related to the determination of port charges in the freight port of Koper.

The said decree is also a concession deed for the conclusion of a public-private concession partnership within the Port of Koper in the following areas: (i) port administration; (ii) loading and unloading of cargo and storage of such goods; (iii) port activities in relation to the carriage of passengers by sea; (iv) administration, management, development and regular maintenance of its infrastructure not used

[16] Art. 43 Maritime Code.
[17] See (n 7).
[18] OG RS 71 / 2008.

for public transport; (v) Public service in relation to the maintenance of port infrastructure intended for public use.[19]

2.2.1. Division of competences

The division of competences on the basis of the 2008 Decree is based on an innovative distinction between administrative *(upravljanje)* and operational *(vodenje)* management of the port. According to Article 4 of the Decree, the legal manager of the Port of Koper is the Republic of Slovenia whereby express reference is made to the fact that administrative tasks related to the management and administration of the Port of Koper shall be carried out by the Ministry responsible for transport. Within the competent Ministry, certain administrative tasks relating to the management and administration of the port determined by the said decree and other regulations shall be, on the other hand, carried out by the Maritime Administration of the Republic of Slovenia. Noteworthy is the fact that the grantor may delegate to the concessionaire, by means of a concession contract, individual tasks relating to the administration of the port determined by this decree.[20]

Based on the provisions of Article 5 of the 2008 Decree, the manager of the Port, therefore the Republic of Slovenia through its designated bodies, shall undertake necessary activities for the proper functioning of the port and in particular it shall carry out the following tasks: (i) to guarantee safety od navigation , (ii) to take care of the uninterrupted operation of the port; (iii) to ensure that port activity is carried out permanently in the area; (iv) to acquire water rights necessary for the functioning of the port; (vi) to conclude public private partnership concessions for the provision of the services that make up port activity; (v) to take care of the provision of public utility services in the manner established by the law on public utility services and the law on public-private partnership. The port manager shall furthermore (vi) lease the land in the port area owned by the Republic of Slovenia for the implementation of the public-private partnerships referred to in the two previous points and establish real rights (superficies) on that land (vii) and shall also take care of the management of the port infrastructures (viii) and manage the port infrastructures intended for public transport (ix). It should also take care of meeting the needs of defence and (national) security and the needs in the field of protection and rescue in accordance with the concession contract (x) and provide the moorings and the use of the necessary operational port infrastructures for the mooring of dedicated vessels and the storage or installation of intervention equipment in the event of sudden marine pollution pursuant to the concession contract (xi). The port manager should ensure the development of the port (xii), monitor the implementation of the concessions granted pursuant to this decree (xiii) and in general it should prescribe the conditions for the use of the port in carrying out transport, port or other economic activities (xiv). The mentioned tasks are, based on the provisions of the said decree, expressly divided between the competent Ministry itself and the Maritime Administration of the Republic of Slovenia. Based

[19] Article 1(2) of the Decree.
[20] Article 4(4) of the Decree.

on Article 5(2), the administrative task in relation to points i-iv, viii and xii should be undertaken by the Maritime Administration of the Republic of Slovenia (URSP), while other tasks should be performed by the Ministry itself.

On the other hand, based on the provisions of Article 8(1) of the Decree, the main function of the operational management, or putting it differently by the (operational) port manager (concessionaire) is to organize the operation of the port in order to achieve the operational objectives with regard to the carrying out of port activities in accordance with the purpose of the port. It includes among other coordination of activities related to the regular provision of transhipment services, storage and internal movements of goods and coordination of activities for the proper functioning of maritime transport of passengers. Additionally, it includes the taking care for the provision and management of systems and equipment for carrying out the activities necessary for the proper functioning of the port (forklifts, cranes and other similar equipment) and for taking care for the maintenance of order in the port (safety, traffic, fire safety, safety at work). An interesting area which is on the basis of a Decree included in the "operational management of the port" is environmental protection of the port area, which shall include the provision of all safety measures required to prevent pollution of the sea and the spread of spills into the sea, in addition to the planning and implementation of measures in carrying out port activities in order to minimize the environmental impact. Furthermore, operational management of the port it shall include the performance of defence and security rescue tasks and related support to such tasks in relation to the response of the State to catastrophes or crisis situations or for the fulfilment of international obligations of the State adopted in international organizations or on the basis of international treaties. Finally, operational management shall include the cleaning of the land and the aquatic area of the port including coordination of activities for the easy implementation of the prescribed waste management measures and activities for the implementation of the economic public service for the collection of waste from ships. All mentioned task related to operational port management are, based on the provisions of Article 8(2), pursuant to Article 28 of the 2008 Decree, transferred to the concessionaire, the company Luka Koper d.d.

The rights and obligations relating to operational port management have been regulated with a concluded concession contract between the port manager (Republic of Slovenia) and the concessionaire (Luka Koper d.d.).

2.2.2. Concession Agreement

On 8 September 2008, on the basis of the Decree on the administration of the freight port of Koper, port operations, and on granting concession for the administration, management, development and regular maintenance of its infrastructure, representing the Concession Act, a Concession Agreement for the performance of port activities, management, development and regular maintenance of the port infrastructures within the freight port of Koper area was concluded between the contracting parties Republic of Slovenia and the stock company Luka Koper d.d. (Port of Koper d.d.).

The said agreement is characterized by the fact that the first concession for the (operational) management of the port of Koper was awarded to the stock company Luka Koper d.d. in accordance with the provisions of Article 997 of the Maritime Code of the Republic of Slovenia. The latter article provides that: "The first concession contract for the operation, management, development and regular maintenance of port infrastructure in the cargo port of Koper shall be concluded by the Republic of Slovenia with the private-law legal person who performs these activities on the date when this act enters into force". The company Luka Koper d.d. was thus granted the (unitary) concession for the exploitation (commercial management) of the cargo port of Koper for a period of 35 years.

The concluded concession agreement is based on the underlying principle that the concession agreement legally represents the continuation (novation) of a pre-existing legal relationship between the grantor and the concessionaire which had been previously based on various legal basis, including bilateral agreements on lease of immovable property within the port area, and various governmental decrees. [21]The mentioned legal basis spanned from the establishment of the Port of Koper in 1957 till the conclusion of the concession agreement in 2008.

2.3. Security of the Port of Koper

Reference should be made to the fact that the Port of Koper is in accordance with Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection,[22] designated as "critical infrastructure" requiring the adoption of appropriate measures.

At the national levels there are basically two laws aimed at protecting ports from emergencies, the already mentioned Critical Infrastructure Act[23] and the Information Security Act.[24] The Critical Infrastructure Act regulates the identification and determination of critical infrastructure in the Republic of Slovenia and covers the following economic sectors: (i) energy; (ii) transport; (iii) food industry; (iv) drinking water supply; (v) healthcare; (vi) environmental protection and (vi) information and communication networks and systems sector.[25]

Ports are forming part of the transport sector. In accordance with the above, the cargo port of Koper has been defined as critical infrastructure on the basis of governmental decision. Noteworthy is the fact, that in order to define a single infrastructure as critical, the following criteria must be met according to the predefined criteria: (i) the number of victims, estimating the possible number of deaths or injuries; (ii) the economic consequences, evaluating the potential economic loss; (iii) the impact on the public, evaluating the possible consequences for public trust.

[21] Both authors participated in the negotiations of the 2008 Concession contract as part of the Luka Koper d.d. negotiating team.
[22] EU Official Journal L 345, 23 December 2008, 75.
[23] Official Gazette of the Republic of Slovenia No. 75/17.
[24] Official Gazette of the Republic of Slovenia Nos. 30/18 and 95/21.
[25] Art. 4 of the Information Security Act.

Once the government defines a single infrastructure as critical, its operator has certain tasks, which are divided into the following areas and shall include: (i) adoption of documents for the protection of critical infrastructures, which include risk assessment and protection of critical infrastructures: (ii) implementation of critical infrastructure protection measures. These are permanent and are carried out in case of increased hazards; (iii) updating of critical infrastructure protection documents at least once a year.

With regard to personal data protection, the Information Security Act refers to the legislation governing this sector, including Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR)[26] and furthermore to the Slovenian Personal Data Protection Act.[27] In the field of protection of classified information, the national Law on Classified Information[28] provides that the Government of the Republic of Slovenia prescribes, in accordance with Article 39 of the said law, measures and physical and organizational procedures for the protection of the said information.

Finally, based on the provisions of the Concession Agreement, the concessionaire is obliged to ensure security in the port area. Security measures have been accordingly undertaken primarily by the concessionaire-terminal(s) operator, namely the stock company Luka Koper d.d. These measures are based on the Port of Koper Security Plan, which complies with the requirements established by the SOLAS Convention, the ISPS Code and relevant EU legislation.[29]

3. Safety and security of navigation to and from the Port of Koper

An important aspect of the inclusion of the Port of Koper and other (Northern) Adriatic ports within the new Maritime Silk Road is that the said process it is likely to increase cargo flows along the Adriatic route with increased dangers also the field of safety of navigation and pollution of the marine environment. It would seem accordingly paramount to strengthen the international legislative framework related to the Adriatic route, including in the field of safety and security at sea and prevention of marine pollution

In relation to general cooperation among Adriatic States reference should be made to the fact, that both the Mediterranean and the Adriatic Seas are classified on the basis of Part IX of UNCLOS as juridical enclosed or semi-enclosed seas. Both seas are surrounded by more than one State, are linked to another sea or ocean through a narrow outlet (or outlets) and, in case of proclamation of EEZs or other

[26] EU Official Journal L 119, 4 May 2016, 1.
[27] Official Gazette of the Republic of Slovenia Nos. 94/07 and 177/20 (consolidated version).
[28] Official Gazette of the Republic of Slovenia Nos. 50/06 – consolidated version and 9/10, 60/11 in 8/20.
[29] See <https://www.luka-kp.si/en/port-guide/port-security/>.

zones of jurisdiction, their surface would not just primarily, but most likely entirely be made up of EEZs and/or other jurisdictional zones of the surrounding States.[30]

Article 123 UNCLOS entitled "Cooperation of States bordering enclosed or semi-enclosed seas" provides as follows:

> "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.
> *(a) to coordinate* the management, conservation, exploration and exploitation of the living resources of the sea;
> *(b) to coordinate* the implementation of their rights and duties with respect to the protection and preservation of the marine environment (…) (emphasis added).

Reference should be made to the fact, that particularly based on the introductory statement of Article 123 UNCLOS, States are at least under a *bonae fidae* obligation to cooperate in the exercise of their rights and performance of their duties under the Convention, including in the field of safety and security at sea.[31]

3.1. Cooperation in the field of safety and security in the Adriatic and Ionian Seas

The four main existing forums for sub-regional cooperation within the Adriatic and Ionian seas, which are of particular relevance also with regard to safety and security of navigation may be summarized as follows:

a) Sub-regional cooperation within the institutional framework of the Barcelona Convention and its protocols;
b) Cooperation within the Joint Commission for the Protection of the Adriatic Sea and its Coastal Zones (Trilateral Commission) having its legal basis in the 1974 Belgrade Agreement between Italy and former Yugoslavia;
c) Cooperation within the framework of the intergovernmental Adriatic-Ionian Initiative (AII);
d) Cooperation within the framework of the European Union Strategy for the Adriatic Ionian macro region (EUSAIR).

Reference should be made to the fact that enhanced sub-regional cooperation requires also cooperation among various cooperative networks, as for example the Trilateral Commission and AII/EUSAIR".[32]

3.1.1. Concluded agreements in the field of safety at sea

[30] Article 122 UNCLOS.
[31] See discussion in M. Grbec, *Extension of Coastal State Jurisdiction in Enclosed or Semi- enclosed seas: An Adriatic and Mediterranean Perspective* (Routledge, Taylor Francis Group 2014) Chapter 2.
[32] See discussion in M. Grbec, T. Scovazzi and I. Tani, 'The Legal basis for the Establishment and Further Development of Marine Protected Areas in the "European Union Strategy for the Adriatic and Ionian Region" (EUSAUR) with Particular Emphasis on Transboundary Marine Protected Areas', Chapter 2.3 (Mare Nostrum d.o.o. 2021). To be published on EUSAIR website <https://www.adriatic-ionian.eu/library/>.

It is important to emphasize that the vast majority of the maritime agreements concluded within the framework of the AII, and particularly those from the field of safety of navigation in the Adriatic Sea, were prepared by the Trilateral Commission (Joint Commission for the Protection of the Adriatic Sea and its Coastal Areas), despite the fact that some were signed on the occasion of the launching of the AII in Ancona in 2000.

Noteworthy is the fact that agreements in the field of safety of navigation in the Adriatic, concluded within the framework of the AII in 2000 and as a general rule prepared by the Trilateral Commission through its sub commission on safety of navigation, may be broadly divided in three groups.

The first group relates to cooperation in the field of search and rescue at sea in the (Northern) Adriatic Sea, where two (separate) bilateral agreements were concluded between Italy and Slovenia and Italy and Croatia.[33]

A second group of agreements related to the establishment of a mandatory ship reporting system in the Adriatic (ADRIAREP). A trilateral Memorandum of Understanding was concluded between Italy, Slovenia and Croatia,[34] supplemented by two bilateral agreements concluded between Italy and Albania, and Italy and (Serbia) Montenegro. In December 2002 the IMO, upon a joint proposal by all Adriatic States, also formally confirmed the 'Adriatic Traffic' with its entry into force as of 1 July 2003.[35] Since then, all oil tankers of 150 gross tonnage and above and all ships exceeding 300 gross tonnage and carrying dangerous or polluting goods as cargo, need to report to the designated Adriatic coastal authorities their entry into the Adriatic, their position at certain points and their departure from the Adriatic Sea.

The same approach has been followed with the third group of agreements which relate to the establishment of a common routeing system and traffic separation schemes in the Adriatic (ADRIATIC TRAFFIC). A Memorandum of Understanding has been concluded between Italy, Croatia and Slovenia relating to the Northern Adriatic;[36] coupled with bilateral agreements between Italy and (Serbia) Montenegro and Albania regarding routeing measures in parts of the

[33] Memorandum of Understanding between the Government of the Republic of Slovenia and the Government of the Italian Republic on Cooperation in Search and Rescue Operations at the North Adriatic Sea (Ancona, 19 May 2000), in force since 11 July 2007; Memorandum of Understanding between the Government of the Republic of Croatia and the Government of the Italian Republic on Cooperation in Search and Rescue Operations in the Adriatic Sea (Ancona, 19 May 2000, entered into force on 16 May 2001).

[34] See Memorandum of Understanding between the Government of the Republic of Slovenia, the Government of the Republic of Croatia and the Government of the Italian Republic on Mandatory Ship Reporting System in the Adriatic Sea, OGRS 96/2000, 19 October 2000.

[35] Resolution MSC.139(76), Mandatory Ship Reporting Systems, 5 December 2002. See also 'Establishment of a Mandatory Ship Reporting System in the Adriatic Sea known as "ADRIATIC TRAFFIC": Submitted by Albania, Croatia, Italy, Slovenia and Yugoslavia, NAV 47/3/4, 30 March 2001.

[36] Memorandum of Understanding between the Government of the Republic of Slovenia, the Government of the Republic of Croatia and the Government of the Italian Republic on the Establishment of a Common Routeing System and Traffic Separation Scheme in the Northern Part of the Northern Adriatic, OGRS No. 96/2000, 19 October 2000.

central and southern Adriatic. Although the agreed 'traffic separations schemes' did not cover the entire Adriatic, in 2003 the Adriatic States concerned jointly proposed to the IMO the adoption (confirmation) of the agreed measures.[37] These measures were then confirmed on 28 May 2004.[38]

3.1.2 Existing measures in the field of safety at sea applicable to the Adriatic Sea

As previously mentioned, there are currently several protective measures in the field of safety at sea and protection of the marine environment applicable either specifically to the Adriatic Sea or to the Adriatic Sea as part of the wider Mediterranean Sea. These include: a) mandatory ship reporting systems; b) routeing systems; and c) 'Special Area' status under the relevant Annexes to MARPOL. The first two sets of measures are applicable specifically to the Adriatic Sea and were adopted by the IMO upon joint proposals submitted by Adriatic Sea countries: Albania, Croatia, Italy, Slovenia, and Serbia and Montenegro.[39]

3.1.2.1. Mandatory ship reporting

The Maritime Safety Committee of the IMO, at its 76th session (December 2002) adopted the mandatory ship reporting system in the Adriatic Sea (ADRIREP), which entered into force on 1 July 2003. The operational area of the mandatory ship reporting system covers the whole Adriatic Sea, north from latitude 40°25'00" N. Ships of the following categories are required to participate in the system: all oil tanker ships of 150 gross tonnage and above; and all ships of 300 gross tonnage and above, carrying on board, as cargo, dangerous or polluting goods, in bulk or packages. The primary objective of the system is to support safe navigation and the protection of the marine environment through the exchange of information between the ship and the shore.[40]

3.1.2.2. Routening

The Maritime Safety Committee of the IMO, at its 78th session (May 2004) adopted new traffic separation schemes and associated routeing measures in the Adriatic Sea, with implementation as of 1 December 2004. Accordingly, routeing system in the Adriatic Sea currently consists of the following:

- Traffic separation scheme North Adriatic Sea - Eastern Part;
- Traffic separation scheme North Adriatic Sea - Western Part;

[37] See Albania, Croatia, Italy, Slovenia, (Serbia) Montenegro, 'Establishment of new recommended Traffic Separations Schemes and other new Routeing Measures in the Adriatic Sea', IMO Doc. NAV 49/3/07, 23 March 2003.

[38] See IMO, 'Report of the Maritime Safety Committee on its Seventy-Eight Session', MSC 78/26 of 28 May 2004, 86 and Annex 21 and 'New and Amended Traffic Separation Schemes', COLREG.2/Circ. 54 of 28 May 2004.

[39] See (n 31-33).

[40] Joint Expert Group on PSSA, *Designation of the Adriatic Sea as a Particularly Sensitive Sea Area*, Second draft (internal document), Zagreb, 28 Jube 2007. On file with the author. See also Grbec, Scovazzi and Tani (n 32).

- Precautionary area at the southern limits of the traffic separation scheme;
- Traffic separation scheme Approaches to Gulf of Trieste;
- Traffic separation scheme Approaches to Gulf of Venice;
- Traffic separation scheme in the Gulf of Trieste;
- Traffic separation scheme Approaches to/from Koper;
- Traffic separation scheme Approaches to/from Monfalcone;
- Precautionary area in the Gulf of Trieste;
- Area to be avoided (ATBA) in the North Adriatic Sea.

In addition, there are recommended directions of traffic flow in the Channel of Otranto, Southern and Central Adriatic Sea.[41]

3.1.2.3. MARPOL Special Area

The entire Mediterranean Sea, including the Adriatic Sea, was declared as a 'Special Area' under MARPOL Annex I (Regulations for the Prevention of Pollution by Oil; Regulation 10) and Annex V (Regulations for the Prevention of Pollution by Garbage; Regulation 5) with the aim to protecting these sensitive sea areas against the discharge of oil or oily mixtures and garbage. Subject to the provisions of Annex I, *inter alia*, any discharge into the sea of oil or oily mixtures from any oil tanker, and any ship of 400 gross tonnage and above other than an oil tanker, is prohibited in the 'Special Area'. As pointed out, recent evidence indicates that this prohibition is frequently violated by ships involved in international traffic in the Adriatic Sea. Both annexes require reception facilities within "Special Areas".[42]

3.1.2.4. 2005 Sub-Regional Contingency Plan

When it comes to the Barcelona Convention, a prime example of a sub-regional Adriatic cooperation in the implementation of a protocol to the Barcelona Convention is represented by the *2005 Agreement on the Sub-Regional Contingency Plan for Prevention of, Preparedness for, and Response to Major Marine Pollution Incidents in the Adriatic Sea,* concluded by Croatia, Italy and Slovenia.[43] This Sub-Regional Contingency Plan was adopted within the institutional framework of the Barcelona Convention and in conformity with Art. 17 of the Prevention and Emergency Protocol.

The reasoning for the adoption of an Adriatic contingency plan is clearly explained in the Preamble to the 2005 Agreement, which provides:

> "[…] Mediterranean Sea in general and the Adriatic Sea in particular, is the major route for transporting of oil and that there is a permanent risk of pollution, which imposes on

[41] Ibid.
[42] Ibid.
[43] The Agreement was concluded on 9 November 2005 in Portorož, Slovenia, <https://mmpi.gov.hr/UserDocsImages/arhiva/SUB-REGIONAL%20PLAN%20PPRMMPIAS%20%28OG%20IA%207-08%20%29.pdf>; see also OG RS, No. 61/2008, 16 June 2008. See also discussion in Grbec, Scovazzi and Tani (n 32).

> the Mediterranean coastal States in the Adriatic sub-region an obligation to constantly develop measures for preventing pollution from ships and to organize and prepare response to marine pollution incidents, and that such permanent efforts have to be made at national, sub-regional and regional levels".[44]

The approach adopted by the 2005 Agreement is indeed noteworthy. This sub-regional Agreement was initially concluded only by the three Adriatic European Union member States (Croatia, Italy and Slovenia), which were, at the time, already parties to the Prevention and Emergency Protocol and, supposedly, capable of implementing it. The Agreement, however, left the door open and envisaged the successive accession by the remaining Adriatic States.[45] Such geographical 'build-up' approach may represent a useful precedent also for the Adriatic and Ionian implementation of some other Protocols to the Barcelona Convention and cooperation in other fields. It is to a certain extent unfortunate that the said sub-regional agreement, although being ratified by Croatia and Slovenia,[46] has not been so far ratified by Italy.

4. Recent developments

According to the Joint Declaration on the Trilateral Cooperation in the North Adriatic, Ljubljana, 21.4.2021, signed by the Ministers of Foreign Affairs of Slovenia, Croatia and Italy:

> [Ministers of Foreign Affairs] recalled the IMO Traffic Separation Scheme in the North Adriatic, and the arrangements reached within the framework of the Joint Commission for the Protection of the Adriatic Sea and coastal areas against pollution […].

Furthermore, the Ministers reaffirmed their commitment to unimpeded maritime trade and respect for the freedom of navigation and other freedoms in the EEZ, including the right to conduct military exercises in accordance with international law, in particular with the UNCLOS. In that regard they recognized the importance of maritime safety

Furthermore, the previously mentioned Joint Declaration on the Trilateral Cooperation in the North Adriatic makes reference to the fact that "bearing in mind the need for integrated and coordinated action in cases of pollution accidents and their prevention, the sides will consider the need to review the Agreement on the Sub-Regional Contingency Plan".[47] Noteworthy is the fact that the Development and Implementation of the Adriatic-Ionian sub-regional oil spill contingency plan, has been included in June 2021 also as one of the main objectives (flagships) within

---

[44] Ibid.

[45] Art. 4 provides: "Other parties to the Barcelona Convention and its Prevention and Emergency Protocol, in the Adriatic sub-region, may join this Agreement subject to the consent of the Signatories of the Agreement".

[46] See (43). See also discussion in Grbec, Scovazzi and Tani (n 32).

[47] See <http://www.mvep.hr/files/file/2021/Joint-Declaration-on-the-Trilateral-Cooperation-in-the-North-Adriatic.pdf>.

Pillar 3 (Environmental Quality) of the European Union Strategy for the Adriatic and Ionian Region (EUSAIR) for the period 2021-2027.[48] Recently, the ADRION NAMIRIS project, involving stakeholders from all Adriatic States has been approved in this regard.[49] There seems accordingly to be good perspectives, that the previously discussed 2005 Subregional Agreement will be, in the near future, upgraded and extended to other States in the Adriatic and Ionian region.[50]

Apart from the previously mentioned NAMIRIS project, an extremely interesting ADRIAON project in the field of safety and marine environmental protection involving primarily stakeholders from all relevant Adriatic States is represented by the EUREKA project. The project with the formal title "Adriatic-Ionian joint approach for development and harmonization of procedures and regulations in the field of navigation safety", involves primarily maritime authorities from States bordering the Adriatic Ionian microregion, therefore Italy, Slovenia, Croatia, Bosnia and Herzegovina, Montenegro, Albania and Greece. The overall objective of the project is to increase the level of maritime safety in AI region by introducing systematic cooperation and coordination of maritime administrations of all countries of the region.[51]

The project is based on the recognition that maritime accidents leave catastrophic effects on the environment and economy, most of all on tourism, so their prevention is crucial for countries in AI region. Each of the national maritime administrations in the region has the responsibility of surveilling the maritime transport on their own territory and watch over its safety. Thus, it is of utmost importance to coordinate maritime safety at the regional level. Even today, ADRIREP functions as a mandatory ship reporting system, but its procedures do not meet the current requirements and technical achievements. Maritime administrations mutually cooperate, but not in a sufficiently systematic and coordinated way.

Noteworthy is the fact, that project results should include the establishment of the Maritime Safety Permanent Transnational Network that will continuously improve all the areas of regional maritime safety, coordination, and cooperation through the activity of its thematic working groups. The main contribution of the project should on the other hand include: (a) the modernization of ADRIREP, the system which will, through the proposal of new IMO Resolution, analyse different possibilities, develop new procedures, test and legally regulate; (b) harmonization and standardization of VTSs in AI region; (c) analysis, development and piloting of

[48] See <https://www.adriatic-ionian.eu/2020/06/12/eusair-flagships-all-summed-up/>.

[49] See <https://www.adriatic-ionian.eu/2021/06/11/project-namiris-successfully-submitted/>. The project was finally endorsed in November October 2021. The main output of the project will be the Guidelines for the revision and update of the Sub-Regional Oil Spill Contingency Plan, which shall encompass an assessment of the environmental risks related to incidents and consequent oil-spills in North Adriatic with particular attention to sensitive sea areas.

[50] In the Ancona Declaration, adopted at the 12th Adriatic and Ionian Council of 5 May 2010, the members of the Adriatic and Ionian Council "encourage the application of the criteria foreseen by the 'Sub-Regional Contingency Plan for Prevention of, Preparedness for, and Response to Major Marine Pollution Incidents in the Adriatic Sea' by all AII Participating States" (para. 17).

[51] See <https://www.adrioninterreg.eu/index.php/2020/07/31/3rd-calls-for-proposals-5-strategic-projects-approved-for-funding/>.

the harmonized training for VTS operators, including the standard of competences; and (d) introduction of the Sea Traffic Management Service system, which is innovative in AI region and which definitely contributes to the optimization of logistical processes in maritime transport and ports.

5. Conclusions

There seems to be an agreement among users and policymakers alike that the (Northern) Adriatic is particularly with regard to maritime safety and prevention of marine pollution, a "high risk area". This is not only due to the extremely dense traffic of cargo ships and tankers, but also to the increasing number of yachts and pleasure boats in the area.[52] It may be asserted, as pointed out also on some previous occasions, that further (Northern) Adriatic cooperation in this field should focus on the upgrading and further integration of the already existing measures (i.e. Northern Adriatic search and rescue agreement, ADRIAREP, Adriatic Traffic). The need for further standardisation and exchange of maritime traffic information between national maritime authorities, ensuring consistency with the applicable EU systems (e.g. SafeSeaNet), has been perceived by stakeholders and policymakers as the next area where Adriatic (Ionian) cooperation is needed.[53] Proposals have been also echoed for the extension of existing (compulsory) routeing measures applicable to the Northern Adriatic to other parts of the Adriatic Sea.[54] It is suggested furthermore that the designation of an "Adriatic PSSA", endorsed by IMO, would represent an appropriate framework for such upgrading and/or further integration of existing measures relating to ship safety and ship source pollution in the Adriatic Sea.[55]

As pointed out in a recent EUSAIR study,[56] the first possibility in that regard would be that an eventual Adriatic PSSA mirrors (only) already existing measures. The advantage of such approach could be the internationally raised awareness about the area's vulnerability to damage by international shipping. The second preferred option could be the strengthening and upgrading of existing associated protective measures, coupled with eventual proposals for new associated protective measures. Such new associated protective measures could be applicable to the entire Adriatic Sea, or only to part of it.

---

[52] Round Table organized by the European Commission on Competitive and Sustainable Transport and a Safer and More Secure Marine Space (Conclusions), Third Stakeholders Workshop on Maritime Affairs: Towards a strategy for the Adriatic Ionian Macro Region (Roundtable on Healthier Marine Environment and Sustainable Fisheries), Portorož-Slovenia, 17 September 2012.

[53] See also European Commission; High level stakeholders conference "Setting an Agenda for Smart, Sustainable and Inclusive Growth from the Adriatic and Ionian Seas", Zagreb Conclusions, Zagreb, 6 December 2012.

[54] Hrvoje Kačić, 'Traffic Separation Schemes in the Adriatic Sea', paper delivered at the round-table 'EU Maritime Policy and the (Northern) Adriatic, (Maritime Law Association of Slovenia, 2011).

[55] M. Grbec, 'The Adriatic-Ionian Marine Region as a Space of Connectivity: Transport and protection of the Marine Environment', in A. Caligiuri (ed.), *Governance of the Adriatic and Ionian Marine Space* (Editoriale Scientifica 2016) 105-106.

[56] Grbec, Scovazzi and Tani (n 32) Chapter 10 and Conclusions.

Existing routeing measures could be, for example, strengthened through the upgrade of the existing proposed traffic flows (in the central Adriatic area and within the Otranto Channel), from proposed traffic flows to compulsory traffic separation schemes. A possibility could also be the proposal for new compulsory traffic separation schemes or proposed traffic flows in other areas of the Adriatic Sea, including within the Central and Southern Adriatic.[57] The ADRIREP reporting system could be in turn upgraded with regard to the types of ships which are bound to report and with regard the information which needs to be reported, including in the field of ballast water management. Harmonization and standardization of VTS in the region should be pursued.

Regarding the status of the Adriatic as a "Special Area" under MARPOL, a further associated protective measure could be the designation of the Adriatic Sea, either alone or as part of the wider Mediterranean, as a "Special Area" under, firstly, Annex IV of MARPOL in relation sewage discharges and, secondly, based on the provisions of Annex VI to MARPOL, related to air pollution.[58] An example in this regard is represented by the Baltic Sea PSSA, which includes among its protective measures a "Special Area" status based on the provisions of Annex I, IV and V, as well as a SECA (as per 19 May 2006) and NECA "Special Area" (as per 1st January 2021) based on the relevant provisions of Annex VI to the MARPOL Convention.[59]

The inclusion of the (Northern) Adriatic ports within the new Maritime Silk Road will require in new investment port and transport infrastructure and due to increased cargo flows an even enhanced cooperation of all States in the region in the field of safety and security of navigation and prevention of marine pollution within the Adriatic and Ionian region.

[57] Ibid. Reference was made in this regard to the Sazani Strait and the Bay of Boka Kotorska as potential areas, in Mediterranean Seminar on PSSAs, 12 December 2019, Tirana, Albania, 'Report of the Seminar', <https://www.rempec.org/en/knowledge-centre/online-catalogue/2019/pssa-mediterranean-seminar-report-tirana-albania-dec-2019.pdf>.

[58] See in this regard UNEP, 'Road Map for a Proposal for the Possible Designation of the Mediterranean Sea, as a whole, as an Emission Control Area for Sulphur Oxides Pursuant to MARPOL Annex VI, within the Framework of the Barcelona Convention', UNEP/MED IG.24/22, <https://www.rempec.org/en/knowledge-centre/online-catalogue/decision-ig-24-8-road-map-for-the-med-sox-eca.pdf>'.

[59] See (n 56).

PART III

MANAGING THE RISKS ALONG THE NEW MARITIME SILK ROAD: SELECTED LEGAL ISSUES

Maritime Contracts and Private International Law: Between Party Autonomy and Uniform Law

FABRIZIO MARONGIU BUONAIUTI*

SUMMARY: 1. Introduction: Contracts for carriage of goods by sea as a domain traditionally governed by usages of the community of traders. – 2. The role of private international law rules, with particular regard, on a European level, to the Rome I Regulation (EC Regulation No. 593/2008), and their coordination with uniform law conventions. – 3. The importance of party autonomy within the said rules and the limits to the possibility of designating a uniform law convention as the law applicable to a contract of carriage of goods by sea. – 4. Party autonomy and the balancing of the contractual positions of the parties: differences between contracts for carriage on liner terms and charter parties. – 5. Concluding remarks.

1. Introduction: Contracts for carriage of goods by sea as a domain traditionally governed by usages of the community of traders

Maritime law, with particular regard to the law governing transport of goods by sea, stands as a particularly significant component of the legal framework within which the 21st Century Maritime Silk Road shall develop. As a matter of fact, this area of the law has traditionally evolved based on the practice of the operators involved in the domain of trade concerned. This being international in nature, involving in the great part of cases the carriage of goods between ports falling under the jurisdiction of different sovereigns, its regulation by rules of national, or, rather, at a time preceding the establishment of modern States, local law, appeared as unsatisfactory, despite a general assumption whereby as a matter of principle carriers ought to have been considered as subject to the law of the home port. It is in a period pre-dating the creation of national States that the substance of the rules governing contracts for the carriage of goods by sea evolved from the concrete practice of the operators concerned, giving rise to a body of rules of a customary nature, following a path substantially analogous to that of the *lex mercatoria*, as developed in respect of other segments of international trade. Eventually, the said usages developed from the practice of carriage of goods by sea have undergone a process of codification, giving rise to famous collections of such usages, of which the *Livre du consulat de la mer* of the second half of the XIIIth Century and the *Raccolta anonima di costumi marittimi del Mediterraneo integrati dalla giurisprudenza consolare*, dating from mid-XVth Century, stand out as the most famous examples.[1]

It is in more modern times, between the end of the XIXth and the beginning of the XXth Centuries, that the usages developed from the practice of international carriage of goods by sea have made their way into internationally binding rules of

* Full Professor of International Law, University of Macerata.

[1] See generally S. M. Carbone, 'Conflits de lois en droit maritime' (2009) 340 Recueil des cours de l'Académie de droit international de la Haye 65, 73 ff.

law, as a consequence of a new privately led process of codification. This has been heralded most notably, after some first attempts by the International Law Association as an international scientific association, by the *Comité maritime international* (CMI), a body which might be qualified as a non-governmental organization, consisting in fact of an international association featuring as its members the largest operators from different countries in the field of shipping, which undertook the responsibility of drafting the texts of the earliest maritime law conventions, introducing uniform rules of a substantive nature governing carriage of goods by sea, of which the Hague Rules of 1924 represent the most notable example.[2]

It has then been upon the advent of a new political and economic climate within the domain of international relations following the vague of decolonization in the 1960s and 1970s that the movement towards an international codification of the rules of maritime law took a different, more institutionalized pattern, with an increased role being granted to inter-governmental organizations and their specialized agencies, considered as better suited to sort out a suitable balance between the interests involved, which appeared to extend beyond those of the largest carriers which were conveyed by the efforts of the CMI. This later phase of the activity of international codification of the rules of maritime law found its most notable, but, at the same time, not totally successful, expression in the Hamburg Rules of 1978,[3] as well as, more recently, in the Rotterdam Rules of 2009.[4]

2. The role of private international law rules, with particular regard, on a European level, to the Rome I Regulation ((EC Regulation No. 593/2008), and their coordination with uniform law conventions

[2] International Convention for the Unification of certain Rules relating to Bills of Lading, Brussels, 25 August 1924 (Hague Rules), 120 LNTS 155, later amended by the Protocol of 23 February 1968 to amend the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on 25 August 1924 (Visby Protocol), 1412 UNTS 128, and by the Protocol of 21 December 1979 to amend the International Convention for the unification of certain rules relating to bills of lading (Hague Rules) as modified by the Amending Protocol of 23 February 1968 (Visby Protocol), 1412 UNTS 146 (Brussels Protocol). See Carbone (n 1), 83 ff.; P. Ivaldi, 'Carriage of Goods by Sea', in J. Basedow, G. Rühl, F. Ferrari and P. de Miguel Asensio (eds), *Encyclopedia of Private International Law*, Vol. 1 (Edward Elgar 2017), 261 ff.

[3] United Nations Convention on the Carriage of Goods by Sea, Hamburg, 31 March 1978, 1695 UNTS 3. The Convention has to date 34 Contracting Parties, among which the major shipping countries are not included, since these have preferred to remain bound by the Hague-Visby Rules. See Carbone (n 1), 90 ff.; Ivaldi (n 2), 262.

[4] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, New York, 11 December 2008, A/RES/63/112. The Convention, opened for signature in Rotterdam on 23 September 2009 and intended to provide an updated legal framework reflecting modern transport practices where carriage by sea is frequently combined with transport by road or rail from the premises of the consignor to those of the consignee, is not yet in force, having so far received just five ratifications or accessions. See Ivaldi (n 2), 262.

As experienced in other segments of international trade law, such as, most notably, that of international sales of goods, the adoption, thanks to the driving force of the private parties concerned rather than of inter-governmental bodies, of international conventions bearing uniform rules of a substantive nature in respect of contracts for carriage of goods by sea could not entirely dispose of the conflict-of-laws problem in respect of a field which, being, as noted, international in nature, inherently implies legal relationships connected to more than one legal system. It is in fact trite to observe that rules contained in international conventions bearing uniform rules of a substantive nature, such as, on the one side, the Hague Rules of 1924 and their subsequent amending protocols, and, on the other side, the Hamburg Rules of 1978, or, subsequently, the Rotterdam Rules of 2008, may not be considered as likely to provide an entirely exhaustive regulation of all legal issues likely to arise in the practice of the field concerned, so that the need for conflict-of-laws rules identifying the legal system to be resorted to for the purposes of regulating unsettled issues might not be ruled out altogether.[5]

Furthermore, international conventions bearing uniform rules of a substantive nature normally contain rules determining their scope of application, establishing the prerequisites either of a personal or of a territorial nature triggering their application, thereby clearly presupposing the existence of legal relationships, albeit potentially amenable to their substantive scope of application, which nonetheless are not going to be regulated by them. In turn, the rules contained in a uniform law convention for the purposes of setting out the scope of application of its rules tend to operate in a mode which is strongly resembling that of conflict-of-laws rules, most notably those of a unilateral nature, since they fix the connecting factors, normally to one or more contracting parties to the convention concerned, based on which the rules it contains shall apply.[6]

The question has frequently been discussed in the relevant legal literature as to whether the rules contained in a uniform law convention shall directly apply in those cases falling under their respective scope of application independently of the operation of private international law rules, or whether, instead, their application shall be made dependant from the fact of those rules designating the law of a contracting State to such a convention, in such terms as to make its rules applicable *in lieu* of the otherwise applicable rules contained in that State's domestic law. In respect of such a question, while it is generally assumed that the priority the rules contained in a uniform law convention enjoy over domestic law applies also in respect of conflict-of-laws rules, the grounds justifying such a

[5] See generally concerning the relationships between uniform law conventions and conflict-of-laws rules, among others, A. Malintoppi, 'Les rapports entre droit uniforme et droit international privé' (1965) 116 Recueil des cours de l'Académie de droit international de la Haye 1, 17 ff.; E. Vitta, 'International Conventions and National Conflict System' (1969) 126 Recueil des cours de l'Académie de droit international de la Haye 111, 187 ff.; C. Pamboukis, 'Droit international privé holistique: droit uniforme et droit international privé' (2007) 330 Recueil des cours de l'Académie de droit international de la Haye 9, 176 ff.

[6] See, concerning the nature and function of the rules establishing the scope of application of uniform law conventions as compared to private international law rules, among others, Malintoppi (n 5), 22 ff.; Vitta (n 5), 192 ff., 187 ff.; Pamboukis (n 5), 180 ff.

result have nonetheless appeared as controversial. On the one side, the assumption has been defended that the rules contained in a uniform law convention should have priority over private international law rules which might lead to the application of the law of a third country not going to apply its rules. This in consideration of the overridingly mandatory nature which, in respect of Contracting States, the uniform set of rules contained in a uniform law convention would possess.[7] This assumption, based on the rigid nature of the regime embodied in most uniform law conventions namely in the field of contracts of carriage, cannot be considered as entirely persuasive, due regard being had to the difficulty of identifying a genuinely general interest in upholding the option in favour of a given legal regime as concerns the relationships between the parties to an international transport contract, such as to justify a derogation to the normal operation of private international law rules.[8]

On the other side, the probably more persuasive justification of the priority to be granted to the application of uniform law conventions in respect of situations falling within their scope of application vis-à-vis the private international law rules of their contracting States lies in their speciality. The argument based on the speciality of the rules contained in a uniform law convention relates not only to that sort of *sui generis* speciality which has been pointed to for the purposes of justifying in general terms their priority over potentially conflicting domestic law rules, something which would be of little avail as concerns the relationships with private international law rules contained in turn in an international convention – or, as it is currently the case, in a legal act of the European Union such as the Rome I Regulation on the law applicable to contractual obligations – but also, and more decisively, to speciality *ratione materiae*. In fact, uniform law conventions in the field of transport law generally provide a specific regulation of a substantive nature addressing particular types of contract, likely to achieve an apposite balance between the interests at stake in those special types of contracts, which cannot be considered as equally targeted by private international law rules, including those contained in international conventions or in EU legal acts such as the Rome I Regulation, which might contain rules identifying the law applicable to contracts in general, or, at most, to contracts of transport of either goods or persons taken as a whole.[9]

The logic of speciality appears nonetheless inherent also in the rules embodied, namely, at first in the Rome Convention on the law applicable to contractual obligations of 1980 and, currently, in the Rome I Regulation No. 593/2008 as concerns their coordination with other international conventions. In this respect, it shall be noted that the change supervened in the legal nature of the

[7] See P. Ivaldi, *Diritto uniforme dei trasporti e diritto internazionale privato* (Giuffrè 1990), 25 ff.

[8] See, with particular regard to the rather narrow definition of overridingly mandatory rules adopted under Article 9(1) of the EC Regulation No. 593/2008 on the law applicable to contractual obligations (Rome I), G. Biagioni, 'Art. 5 (Contratti di trasporto)', in F. Salerno and P. Franzina (eds), *Regolamento CE n. 593/2008 sulla legge applicabile alle obbligazioni contrattuali. Commentario* (2009) Le nuove leggi civili commentate 717, 719.

[9] See G. Contaldi, 'Il contratto internazionale di trasporto di persone', in N. Boschiero (ed.), *La nuova disciplina comunitaria della legge applicabile ai contratti* (Giappichelli 2009) 359, 367 ff.

instrument, from an international convention, though strictly linked with the achievement of the objectives of the EC Treaty, to an EU legal act, has inevitably had an impact also on the coordination with other relevant international instruments. In fact, while Article 21 of the Rome Convention contained an unfettered subordination clause, declaring in general terms that it would not affect other international conventions of which contracting States were or would become parties, without distinguishing between conventions containing private international law rather than uniform law rules, the corresponding rule embodied under Article 25 of the Rome I Regulation is conceived in more stringent terms, in a twofold direction. First, coherently with the lines set by the CJEU case law concerning the principle of parallelism between internal and external competences of the EU, the rule states that the Regulation shall not affect international conventions of which Member States are parties at the time of the adoption of the Regulation itself, assuming that as concerns the conclusion of new conventions the external competence of the EU would be called into play. Secondly, and more significantly for the purposes of the point under consideration, Article 25(1) of the Rome I Regulation specifies that the Regulation itself shall not affect those international conventions which lay down conflict-of-laws rules relating to contractual obligations. The rule, in its concrete terms, would therefore not exclude that the private international law rules contained in the Regulation might affect the application of international conventions containing uniform law rules of a substantive nature, since these conventions, even though naturally deemed to apply in respect of cases likely to raise conflict-of-laws issues, do not themselves lay down conflict-of-laws rules, unless, as noted, the rules contained in a uniform law convention for the purposes of determining its scope of application may be considered as functionally equivalent to private international law rules. In this respect, even if an extensive interpretation of the expression used in the relevant part of Article 25(1) of the Rome I Regulation has been proposed, in such terms as to allow its application vis-à-vis any international convention concerning contractual obligations in cases posing conflict-of-laws issues,[10] probably the most persuasive solution lies in arguing that uniform law conventions for the very fact of introducing uniform rules of a substantive nature operate on a different plan as compared to an instrument containing uniform private international law rules such as the Rome I Regulation, so that the relationships between the two types of instruments shall be construed in terms of complementarity rather than of conflict.[11]

Ultimately, no conflict is likely to arise between, on the one side, the international conventions bearing uniform rules concerning contracts of carriage of goods by sea and, on the other side, the conflict-of-laws rules contained in the Rome I Regulation, insofar as the uniform law conventions are deemed to apply of their own force in their contracting States whenever the circumstances triggering their application, as specified in the relevant provisions of the

[10] See A. Bonfanti, 'Le relazioni intercorrenti tra il regolamento Roma I e le convenzioni internazionali (in vigore e non)', in Boschiero (n 9), 383, 395 ff.

[11] See P. Franzina, 'Art. 25 (Relazioni con convenzioni internazionali in vigore)', in Salerno and Franzina (n 8), 935, 937 ff.

convention concerned, are met. Accordingly, the conflict-of-laws rules contained in the Rome I Regulation would come for consideration only insofar as the relevant uniform law convention would not apply, or, rather, as concerns the regulation of issues not settled under such a convention.[12]

Coming to the specific terms in which the main uniform law conventions concerning carriage of goods by sea determine their scope of application, the Hague Rules of 1924, as amended pursuant to the Visby Protocol of 1968 (so-called Hague-Visby Rules), provide under Article 10 for their application to bills of lading contemplating carriage of goods between ports located in different States, irrespective of the nationality of the ship or of the parties, in three alternative sets of circumstances. Precisely, whenever the bill of lading is issued in a contracting State, or the carriage takes place from a port in a Contracting State, or the parties have opted for the application of the uniform law convention, either directly, or indirectly, by means of a choice in favour of the law of a State that would give effect to them. Similar options are contemplated under the Hamburg Rules of 1978, whose Article 2 adds to the same alternative grounds for the application of the Rules in question, as respectively contemplated by Article 10 of the Hague-Visby Rules, the location of the port of discharge in a Contracting State. Differently, the more recent Rotterdam Rules of 2009, not yet in force, further extend, coherently with their broader substantive scope, encompassing also carriage of goods taking place just partly by sea, the grounds triggering their application, with reference to the location in a Contracting State also of the place of receipt or delivery of the goods. Conversely, Article 5 of the latter Rules do not refer to the issuance of the bill of lading or other document embodying the contract of carriage in a Contracting State as a ground for application of the rules in question, such a ground appearing largely obsolete, nor to the choice by the parties of either the rules in question or the law of a State giving effect to them as grounds likely to trigger their application.[13]

3. The importance of party autonomy within the said rules and the limits to the possibility of designating a uniform law convention as the law applicable to a contract of carriage of goods by sea

As the examples provided by Article 10 of the Hague-Visby Rules as well as by Article 2 of the Hamburg Rules aptly demonstrate, the role of party autonomy is particularly significant in the domain of maritime contracts, with particular regard to contracts for the international carriage of goods, as inherently commercial contracts. This is reflected also in the conflict-of-laws rules embodied under Article 5(1) of the Rome I Regulation, which contemplates the choice by the parties pursuant to Article 3 of the Regulation as the general rule, while

[12] See, pointing to an express indication in this sense, as contained under Article 10, Appendix B of the Berne Convention of 9 May 1980 concerning international carriage by rail, Ivaldi (n 7), 136 ff.

[13] See generally Ivaldi (n 2), 262 ff.

providing for objective connecting factors for finding the law applicable to such contracts which are to be resorted to only in the absence of choice.[14]

As it is well known, Article 3 of the Rome I Regulation contemplates in very broad terms the freedom of the parties to choose the law applicable to the contract, including the possibility to choose the law applicable to one or more specific issues within the contract, so-called *dépeçage*, and the possibility to subsequently change the choice initially made.[15] It appears noteworthy that, as concerns contracts of carriage of goods, as contracts normally concluded between traders, the plain reference made under Article 5(1) of the Rome I Regulation to the general rule on choice of the applicable law by the parties contained in Article 3 of the same Regulation confers an unfettered discretion on the parties to choose virtually the law of any country, even unconnected, in principle, with the substance of the contract. A comparable breadth is not contemplated, instead, as concerns contracts of carriage of persons, where passengers normally enjoy a weaker bargaining position as compared to carriers.[16] Actually, as we shall note, this situation of imbalance between the bargaining powers of the parties may not be a peculiarity just of contracts of carriage of persons, being instead likely to be traced also within the context of contracts of carriage of goods on liner terms, where the shipper of the goods is substantially called to accept the content of the clauses, including the choice-of-law one, set out by the carrier[17]. Conversely, passengers in a contract of carriage of persons are not necessarily to be identified with consumers, since persons might embark on a journey out of professional purposes. Nonetheless, Article 5(2) of the Rome I Regulation limits the choice by the parties in respect of a contract of carriage of persons to a limited array of laws presenting a close link to the substance of the contract, even if, ultimately, these are not prevailingly closer to the legal sphere of the passenger rather than that of the carrier.[18]

A controversial issue concerning the choice of the applicable law by the parties having a special relevance in the domain concerned, in consideration of the option contemplated namely under Article 10 of the Hague-Visby Rules as well as under Article 2 of the Hamburg Rules for the parties directly to stipulate that the rules of a uniform law convention shall apply to their contract of carriage, relates to whether for the purposes of the rule as laid down under Article 3 of the Rome I Regulation the law to be chosen by the parties shall necessarily be the law of a given State – be it a Member State or a third country according to the universal or

[14] See generally Biagioni (n 8), 723 ff.; K. Thorn, 'Art 5 Rom-I VO', in T. Rauscher (ed.), *Europäisches Zivilprozess- und Kollisionsrecht – EuZPR/EuIPR. Kommentar*, Vol. 3 (4th ed., Otto Schmidt 2016) 262, 273 ff.

[15] See generally, among others, F. Marrella, 'Funzione e oggetto dell'autonomia della volontà nell'era della globalizzazione del contratto', in Boschiero (n 9), 15 ff.; A. Gardella, 'Art. 3 – Libertà di scelta – I', in Salerno and Franzina (n 8), 611 ff.

[16] See Biagioni (n 8), 725 ff.; Contaldi (n 9), 362 ff.; Thorn (n 14), 273.

[17] See Carbone (n 1), 124 ff.

[18] See, critically noting the scarce likelyhood of the broad range of alternative laws available for choice by the parties pursuant to Article 5(2), Rome I Regulation, to adequately serve the purpose of protecting the interests of the passenger as allegedly weaker party to the contract, Biagioni (n 8), 726; Contaldi (n 9), 363 ff.

erga omnes approach of the conflict of laws rules contained in the Regulation. It has in fact been debated whether the parties' choice might also address other bodies of law, such as, on the one side, an international convention containing uniform rules of substantive law, such as the Hague-Visby Rules or the Hamburg Rules, or, on the other side, non-binding sets of rules, such as the UNIDROIT Principles on international commercial contracts, or the Principles of European contract law (PECL), or, more braoadly, the *lex mercatoria* or other unwritten bodies of law.

In this respect, it might be appropriate to recall that the final text of Article 3 of the Rome I Regulation as adopted omits a specification included in the rule as conceived in the proposal tabled by the European Commission in 2005, whereby the parties would have been entitled to choose as the law applicable to their contract principles and rules of substantive contract law, recognized internationally or within the European Community, as it then was.[19] As generally acknowledged, the said specification would have allowed a *kollisionsrechtliche Verweisung*, i.e., a choice as the applicable law, addressed not just to substantive rules of contract law as would have been included in a uniform law convention, but also to non-binding sets of principles, provided these could be considered as recognized either at an international level or at least on an EU scale. Allegedly, the wording used suggested the admissibility of a choice as the law applicable to a contract of sets of principles such as the UNIDROIT Principles or the PECL, or the prospective Common European sales law (CELS), to the exclusion of unwritten bodies of law such as the *lex mercatoria*. The nature of such a choice as a *kollisionsrechtliche Verweisung* was further confirmed by the second part of the rule as contained in Article 3(2) of the Commission's proposal. The rule made provision as to how to fill-in gaps revealed by the selected rules or principles of law, in terms which appeared substantially inspired by the solution embodied for the same purposes under Article 7(2) of the 1980 UN Convention on Contracts for the International Sales of Goods (CISG),[20] providing that reference ought to have been made for that purpose to the general principles inherent in the rules or principles concerned, or, failing this, to the law applicable in the absence of choice pursuant to the other rules of the Regulation.[21]

The said specification having been dropped from the final text of Article 3 of the Rome I Regulation as adopted, with the rule remaining totally silent in this

[19] See the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM (2005) 650 final, Article 3(2).

[20] See generally, as concerns the solution proposed in this respect under Article 7(2), CISG, among others, M. J. Bonell, 'Article 7', in C. M. Bianca and Michael J. Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffré 1987), 65, 75 ff.; Franco Ferrari, 'Interprétation uniforme de la Convention de Vienne de 1980 sur la vente internationale' (1996) 48 Revue internationale de droit comparé 813, 841 ff.

[21] See, concerning the solution contemplated under Article 3(2) of the European Commission's proposal, P. Lagarde, 'Remarques sur la proposition de règlement de la Commission européenne sur la loi applicabile aux obligations contractuelles' (2006) 95 Revue critique de droit international privé 331, 335 ff.; F. Marrella, 'Prime note circa la scelta del diritto applicabile alle obbligazioni contrattuali nella proposta di regolamento «Roma I»', in P. Franzina (ed.), *La legge applicabile ai contratti nella proposta di regolamento «Roma I»* (Cedam 2006), 28, 35 ff.

respect, guidance may still be sought from the preamble to the Regulation, whose Recital No. 13 actually points to the opposite, and more traditional, avenue of a *materiellrechtliche Verweisung*. Accordingly, the parties might incorporate into their contract by reference a non-State body of law or an international convention, thereby meaning not as the law governing the contract, but, rather, as part of their contractual stipulations, likely to apply only insofar as not precluded by mandatory rules of the law applicable in the absence of choice.[22]

In this respect, and returning to the specific hypothesis contemplated under Article 10 of the Hague-Visby Rules or Article 2 of the Hamburg Rules, of an express reference by the parties to either uniform law convention, it seems worth considering that the effects of such a reference are not likely to be the same in that case, where an international convention bearing binding uniform rules of substantive law is being referred to, as compared to cases where non-binding sets of principles are being referred to. In fact, uniform law conventions, differently from non-binding principles, are likely to apply as part of the law governing the contract, insofar as such law is the law of a Contracting State and the contract would be likely to fall under the scope of application of the convention concerned, pursuant to its own rules concerning its application. In substance, a choice by the parties, as would be included in a so-called *paramount clause*, whereby their contract of carriage of goods would be governed by the Hague-Visby Rules pursuant to Article 10 of those rules, or by the Hamburg Rules as contemplated under Article 2 of the latter, would be tantamount to a choice of law in terms of a *kollisionsrechtliche Verweisung*, insofar as the question arises before the courts of a Contracting State to either convention, expected to give way to the application of the rules contained in that convention within their own scope of application, that is, provided the conditions autonomously posed by the relevant convention for the purposes of its application are met. The situation would obviously be different, and more likely to correspond to a pure *materiellrechtliche Verweisung* in cases where the question arises before the courts of a non-contracting State, not expected to give way to the application of the rules contained in the convention referred to by the parties, or where the conditions for the application of the uniform law convention concerned are not met. Plainly as a *kollisionsrechtliche Verweisung* would instead operate a choice made in favour of the law of a Contacting State, as alternatively contemplated under Article 10 of the Hague-Visby Rules or under Article 2 of the Hamburg Rules, since in such a case either set of Rules would apply *in lieu* of the otherwise applicable rules of domestic law of that Contacting State in matters of carriage of goods by sea.[23]

The rules of domestic law of either the law chosen by the parties, or of the law applicable in the absence of choice, will in any event be deemed to apply in

[22] See, concerning the situation obtaining following the deletion of the proposed Article 3(2) of the Commission's proposal and the introduction of Recital No. 13 into the Preamble of the Rome I Regulation, among others, Marrella (n 15), 36 ff.; Gardella (n 15), 619 ff.

[23] See, for a particularly clear distinction between the said different figures of a *materiellrechtliche Verweisung* and of a *kollisionsrechtliche Verweisung* likely to lie behind a choice by the parties in favour of the application of a uniform law convention such as the Hague-Visby Rules or the Rotterdam Rules, Thorn (n 14), 273.

respect of those issues not governed by the rules contained in the uniform law convention concerned, since the above-mentioned solution consisting of having regard to the principles inherent in the convention concerned for the purposes of addressing unsettled issues may well apply concerning so-called internal gaps in the convention, that is, questions falling within the material scope of the convention but left unsettled by it, and not as concerns external gaps, that is, for the purposes of settling issues non intended to be governed by the convention concerned.[24]

4. Party autonomy and the balancing of the contractual positions of the parties: differences between contracts for carriage on liner terms and charter parties

As mentioned, whereas contracts for the international carriage of goods by sea are normally envisaged as quintessentially commercial contracts, that is, as contracts concluded between traders, in respect of which, unlike contracts for the carriage of passengers, as a matter of principle no question in terms of protection of weaker parties should arise, nonetheless the balancing between the bargaining powers of the parties might not necessarily be the same throughout different types of contracts available in the practice for organizing the carriage of goods by sea. This has inevitable consequences in terms of the need for a more stringent and rigid regulation concerning the liability of the carrier towards the shipper for loss of or damage to the goods, or for delay in arrival or discharge at the port of destination, the extent of such a liability lying at the core of the substantive legal issues likely to arise from a contract of carriage of goods by sea. The situation in this respect is quite different as concerns contracts of charter party, where, in substance, a ship is being rented, either for an agreed period of time (so-called time charter), or for a specified journey (so-called voyage charter) for the purposes of carrying goods from one port to another, normally located, in the practice of international trade, in different countries, realizing a form of carriage conventionally named as transport on tramp terms, as compared to transport on liner terms, documented by a bill of lading or by a sea waybill. In the latter set of circumstances, the shipper entrusts the carriage of the goods with a carrier for a pre-determined journey performed by the latter as part of a regular service, implying the carriage of goods dispatched by several shippers. Accordingly, whereas the clauses of a charter party are more likely to be negotiated on a basis of substantial equality of bargaining power, within the context of transport on liner terms generally the shipper is bound to accept the standard terms practiced by the carrier in respect of the service required.[25]

[24] See, with regard to the distinction between internal and external gaps in respect of a uniform law convention, Ferrari (n 20), 842 ff. and 'CISG and Private International Law', in F. Ferrari (ed), *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences* (Giuffré 2003) 19, 39 ff.; see also Pamboukis (n 5), 141 ff., and, with specific regard to the domain concerned, Ivaldi (n 7), 135 ff.

[25] See generally Carbone (n 1), 123 ff.

This may contribute to justify the fact that uniform law conventions in the field of carriage of goods by sea have primarily addressed contracts of carriage on liner terms, in respect of which the imbalance as concerns bargaining power between shippers and carriers is more sensible and, accordingly, the need to fix internationally agreed standards appeared as particularly pressing, as a remedy to the variety among the legislative solutions prevailing in the countries more extensively concerned with maritime traffic. In fact, the Hague Rules of 1924, in presupposing for the purposes of their application the circumstance of a bill of lading having been issued in a Contracting State, were clearly drafted with liner transport in mind, and such an inherent feature of the Rules has remained unaffected by the later Visby Protocol, irrespective of the fact that the latter, as mentioned, introduced further prerequisites for the application of the Rules, since, anyway, the rules as amended still presuppose the issuing of a bill of lading.[26] Nonetheless, in the practice the possibility has been clearly envisaged for the parties to a charter party to submit their contract to the Hague, or Hague-Visby, Rules, by means of a paramount clause, thus showing that the rules in question, though essentially conceived for liner transport, could nonetheless apply also to carriage of goods based on a charter party. However, the choice in such a case would present the nature of a simple *materiellrechtliche Verweisung* in the sense pointed out above.[27]

Incidentally, it is worth noting that as concerns the Hamburg Rules of 1978, these expressly exclude under Article 2(3) their application to charter parties, though clarifying that the exclusion does not extend to a bill of lading issued by a carrier who operates the ship based on a charter party, in which case the Rules might well apply to the contractual relationship between the carrier and the holder of the bill of lading, when this is not the charterer. Conversely, the Hamburg Rules, displaying in this greater flexibility as compared to the Hague or Hague-Visby Rules, might apply to contracts of carriage of goods by sea documented other than by a bill of lading, such as contracts documented by a sea waybill, as a non-negotiable transport document.[28] The same line set out by the Hamburg Rules appears to be followed by the more recent, but not yet in force, Rotterdam Rules of 2009. These also expressly exclude, under Article 6(1) charter parties or other contracts concerning the use of a ship or of a space thereon, adding, under Article 6(2) a more general exclusion in respect of all contracts for the carriage of goods on non-liner terms, with the exception of cases where no charter party or other contract for the use of a ship or space thereon has been concluded and a transport document, or an electronic transport record as defined in the Rules themselves, has been issued.

[26] See, concerning the difficulties this is causing as concerns the applicability of the Hague-Visby Rules in respect of contracts of carriage of goods by sea documented by a sea waybill, as a document which, differently from a bill of lading, is non-negotiable in nature, G. M. Boi, 'Sea waybills and other transport documents', in J. Basedow, G. Rühl, F. Ferrari and P. de Miguel Asensio (eds), *Encyclopedia of Private International Law*, Vol. 2 (Edward Elgar 2017), 1615, 1617 ff.

[27] See, pointing to such a practice, Carbone (n 1), 145.

[28] See Boi (n 26), 1619.

The option developed in the practice for the parties to make the Hague-Visby Rules applicable also in respect of contracts of carriage of goods by sea based on a charter party, to which of themselves they would not apply, shows that while within their own scope of application uniform law conventions may be considered as likely to apply directly and independently of a choice by the parties or of the interplay of private international law rules, this does not rule out the possibility for the rules contained in a uniform law convention to be made applicable also to a contract of carriage of goods by sea not falling within their scope of application, as a consequence of a choice by the parties. Nonetheless, coherently with the distinction made out above concerning the effects that a choice by the parties in favour of the application of a uniform law convention might have in those cases where, failing other prerequisites for its application, such a choice would not automatically trigger its application, within the legal framework of the Rome I Regulation such a choice would be rather likely to be construed as a *materiellrechtliche Verweisung*. That is, the parties' choice in this case would appear as the result of an exercise of party autonomy operating on the level of substantive law, in terms of determining the material content of the contract of carriage to be concluded by the parties, and not as a *kollisionsrechtliche Verweisung*, that is, as a choice of the applicable law in terms of private international law. Indeed, an international convention is strictly speaking not binding law beyond its scope of application. Accordingly, the rules contained in a uniform law convention when made applicable outside their scope of application purely as a consequence of a choice by the parties would not prevail over the mandatory rules of the law applicable pursuant to the relevant rules of private international law.[29]

As concerns the rules of private international law to be relied upon for the said purpose, it has been noted already that, as far as EU Member States subject to its application are concerned,[30] the Rome I Regulation contains a special provision devoted to contracts of carriage, subdivided in two separate rules concerning, respectively, contracts of carriage of goods and of persons. With regard to the former, which form essentially the subject of our enquiry, Article 5(1) of the Regulation, while finding in the law chosen by the parties pursuant to the general rule under Article 3 of the Regulation the law applicable to the contract of carriage, sets out a series of objective criteria to be relied upon for the purposes of establishing the law to be applied in the absence of a choice by the parties. The latter criteria shall be relied upon in those cases where, as mentioned above, a

[29] See Thorn (n 14), 273.

[30] Incidentally, it is worth noting that the Rome I Regulation applies in all of the EU Member States except Denmark, which, as it is well known, does not participate in the adoption of EU legal acts concerning the space of freedom, security and justice. Conversely, the Regulation, or, rather, the domestic rules incorporating it with non-substantial adaptations, continue to apply in the UK after its withdrawal from the EU, as provided for under the Law Applicable to Contractual and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019, SI 2019/834. See P. Beaumont, 'Some reflections for the way ahead for UK private international law after Brexit' (2021) 17 Journal of Private International Law 1, 2; A. Dickinson, 'Realignment of the planets – Brexit and European Private International Law' (2021) IPRax – Praxis des internationalen Privat- und Verfahrensrechts 213, 218.

choice by the parties in favour of the application of a uniform law convention is not likely to fulfil the requirements set out by the convention itself for it to be made applicable of its own force. Furthermore, even in those cases where, in the circumstances contemplated, for example, under Article 10 of the Hague-Visby Rules, a choice by the parties in favour of the Rules would suffice for that purpose, the objective criteria provided for under Article 5(1) of the Rome I Regulation would be called into question for the purposes of finding the law deemed to apply to issues not governed by the convention concerned.[31]

With regard to the domain covered by the special conflict of laws rule contained under Article 5 of the Rome I Regulation concerning contracts of carriage of goods, it shall be noted incidentally that a preliminary question was submitted to the European Court of Justice concerning the substantive scope of application of the rule, as previously contained under Article 4(4) of the Rome Convention of 1980 on the law applicable to contractual obligations. The answer the Court provided in its *ICF* judgment properly reflected the sensible variety of types of contracts for the carriage of goods by sea, clarifying that a flexible and essentially teleological interpretation of the notion of contract of carriage shall be relied upon also for the purposes of the said rule, the same, in principle, applying in respect of the rule as now contained in the Rome I Regulation. Accordingly, also contracts based on a charter party, implying the renting of a ship for a certain period of time (so-called *time charter*) or for a pre-determined journey (so-called *voyage charter*), shall be considered as falling within the scope of the said notion, insofar as the renting of the ship is instrumental to the carriage of goods.[32]

In the event of the absence of a choice by the parties, contracts of carriage of goods by sea in respect of which the existing uniform law conventions would not apply shall be subject, pursuant to the objective connecting factors contemplated under Article 5(1) of the Rome I Regulation, to the law of the country where the carrier has his habitual residence. The application of this rule, which of itself would appear consistent with the other conflict-of-laws rules set out under Article 4(1) of the Regulation for the purposes of establishing the law applicable to a series of specific types of contract in the absence of a choice by the parties, and which appear inspired by the underlying logic that the law of the country where the party owing the performance characterizing the contract has his or her habitual residence[33], is nonetheless made subject to further conditions. These are clearly meant to safeguard a sufficient balance between the respective positions of the parties, by requiring that the place of receipt, or, alternatively, the place of delivery of the goods, or the habitual residence of the consignor as the other party to the contract, shall be situated in the same country.

---

[31] See, concerning the interplay between uniform law conventions concerning contracts of carriage of goods and the rule under Article 5(1) of the Rome I Regulation, Biagioni (n 8), 718 ff.

[32] European Court of Justice, Case C-133/08 *Intercontainer Interfrigo SC (ICF) v. Balkenende Oosthuizen BV, MIC Operations BV* [2009] ECR I-9710, para. 33 ff.

[33] See generally, concerning the principles inspiring the determination of the applicable law in the absence of choice by the parties pursuant to the general rule under Article 4 of the Rome I Regulation, among others, Ugo Villani, "La legge applicabile in mancanza di scelta dei contraenti", in Boschiero (n 9), 149, 150 ff.; A. Leandro, 'Art. 4 (Legge applicabile in mancanza di scelta)', in Salerno and Franzina (n 8), 637, 638 ff.

As a fall-back rule to be resorted to in case none of those alternative conditions is met, Article 5(1) of the Rome I Regulation refers to the rather blunt rule whereby the contract shall be governed by the law of the country where the place of delivery stipulated by the parties is located. This may amount to a specification of the rather traditional rule of the *lex loci destinatae solutionis*, being the place of delivery of the goods to be carried under the contract virtually the place where the essence of the obligations undertaken by the carrier shall be fulfilled. The rule, taken as a whole, reflects a rather unconvincing ambiguity between the pursuit of the objective of striking a balance, in terms of familiarity with the applicable law, among the positions of the parties, the need to ensure clarity and predictability as concerns the establishment of the applicable law absent a choice by the parties – as revealed particularly by the fact of having recourse to a set of hierarchically ordered conflict-of-laws rules – and that of ensuring an effective connection between the contract and the law called to regulate it. The latter objective is revealed by a general exception clause, set out under Article 5(3) of the Regulation, in substantially the same terms as that contained under the general rule of Article 4, and deemed to apply both as concerns the law applicable to contracts for the carriage of goods and to contracts for the carriage of persons. According to the rather standard drafting of the said clause, the rules providing for the determination of the law applicable to either type of contract of carriage in the absence of choice by the parties, as set out, respectively, under paragraphs 1 and 2 of the rule, shall be set aside whenever the contract is manifestly more closely connected with the law of a country other than that to which those rules are pointing.[34]

5. Concluding remarks

Contracts for carriage of goods by sea may be considered as a field of election for a confrontation between uniformity of regulation and party autonomy. As concerns the pursuit of uniformity, this particular field reveals the criticality of achieving a suitable coordination between different means of ensuring, though the adoption of binding rules, the substantive objective of uniformity. These consist, on the one hand, of international conventions bearing uniform rules of substantive law, deemed in principle to provide an autonomous set of rules applicable to all contracts falling under their scope of application irrespective of the applicable law, and, on the other hand, of conventions – or, within the special framework of a regional economic integration organization such as the European Union, of legal acts – setting out common rules of private international law. As we have noted, as a general rule the latter sort of rules shall come into account in respect of those cases where the former shall not apply of their own force.

As concerns the role of party autonomy, this shall inevitably be larger where uniform law conventions either so allow, by enabling, when certain prerequisites

[34] See, concerning the objective criteria set out under Article 5(1) of the Rome I Regulation for the purposes of finding the law applicable to a contract of carriage of goods by sea in the absence of choice by the parties, Biagioni (n 8), 723 ff.; Thorn (n 14), 274 ff.

are met, the parties' choice to trigger their application, or do not apply altogether. This the case, as concerns uniform law conventions on carriage of goods by sea, with contracts embodied in a charter party, in respect of which the need for binding uniform rules of substantive law has traditionally been less perceived, presuming a substantial balance between the bargaining powers of the parties, and where, in the practice, uniformity has to some extent been attained by the widespread use of standard terms.[35] As we have pointed out, the role of party autonomy in terms of choice in favour of the application of a uniform law convention shall also be different depending on whether such a choice relates to a contract capable of falling within the scope of application of the convention whose rules are chosen, triggering therefore its application as binding in respect of the contract (with an effect amounting to that of a *kollisionsrechtliche Verweisung*) and likely to prevail on the otherwise applicable rules of domestic law, or to a contract not falling within the scope of application of the convention whose rules are being chosen. As mentioned, in the latter case the choice by the parties in favour of the rules contained in a uniform law convention will amount to a simple reception of those rules as part of the contractual stipulations of the parties (so-called *materiellrechtliches Verweisung*), and therefore subject to the mandatory rules of the law applicable to the contract.

In this respect, as noted, party autonomy may also take the form, in those cases where uniform law conventions do not apply, or, where they may apply, in respect of issues not governed by them, of the choice in favour of the law of a given country as applicable to the contract. Apart from those cases where – as contemplated namely under the Hague-Visby Rules as well as under the Hamburg Rules – a choice by the parties of the law of a Contracting State to a uniform law convention is contemplated by the convention concerned as a ground capable, provided certain prerequisites are met, to trigger its application, the freedom by the parties to choose the law applicable to a contract of carriage of goods is left unfettered by the conflict of laws rules applicable throughout the EU Member States bound by the Rome I Regulation, and embodied in its Article 5. As mentioned, the latter provision, in fact, refers to the parties' choice as the main connecting factor in respect of contracts of carriage of goods, providing just as a fall-back option for objective connecting factors, to be resorted to for establishing the applicable law in the absence of choice.

[35] See, concerning the limits inherent in the achievement of uniformity by means of standard forms of contract, as developed by the shipping industry, in consideration both of their being subject to the mandatory rules of the applicable law, and of their style of drafting, frequently leaving different options open for the parties' choice, Carbone (n 1), 120 ff.

The Security of the Intellectual Property Rights: The Effectiveness of Greater China Customs Enforcement

FEDERICA MONTI*

SUMMARY: 1. The History of Chinese Customs: A Brief Overview on the Origin of Chinese Control over Intellectual Property Rights (IPRs). – 2. The Role of Chinese Customs in IPRs Protection: A Perspective in the light of the Current Economic and Juridical Context. – 3. China's Effort in Strengthen IPRs Protection: The Protection Campaign toward a Renovated Legal Framework. – 3.1. Chinese Customs' Active and Passive Methods of Action. – 3.2. Governance of Online Infringements. – 4. Conclusive Remarks.

1. The History of Chinese Customs: A Brief Overview on the Origin of Chinese Control over Intellectual Property Rights (IPRs)

Often perceived as imposition or as an inconvenient institution for trading, inhibiting China and West, customs in China have played an important role in society since the era of ancient China. Retracing, even in brief, the history of Chinese customs and of their first expression in the *Maritime Customs* service during the imperial age, can provide a foundation for a full understanding of the institution.

In the millennia of Chinese history, there are traces of economic relations between Eastern and Western countries, starting from the 2nd Century B.C., though it was during the Tang (618-907) and Song (960-1279) dynasties that trade considerably increased, relying on a network of coastal cities, capable of accepting goods and acting as terminals to diffuse them in the hinterland.

It was during Tang dynasty that the closest *ancestor* structure of the modern customs system emerged in the country.

Land trade along the *Silk Road* and maritime trade by sail at sea and on the rivers[1] allowed the Tang court to gain precious and rare goods, make contact with new cultural practices and gain access to new technologies as well. There are two famous proverbial expressions: "Go by boat in the South, take a horse in the North" and "Use a boat in the South, a tent in the North".

At that time, maritime trade was under the control of the local government which more often was supported by different figures, for the daily administrative business of seaborne trade. Their functions could vary from maintaining order in the marketplace, up to inspecting weights and measures of goods once they arrived at ports. Their powers were also directed at preventing unfair price fixing and administrating foreign settlers, never in full autonomy, but rather fulfilling local governments' instructions.

* Research Fellow in Business Law, University of Macerata.

[1] M. Elvin, *The pattern of the Chinese Past: A Social and Economic Interpretation* (Stanford University Press 2007), chapter 'The Revolution in Water Transport', 131 ff.

In 714 an important *authority*, identified as an *official* known as the *Commissioner for Trading with Foreign Ships* (市舶使, *shibo shi*) was created.

The Commissioner was in fact an *empty title*,[2] without any designated office or actual administrative powers, although the official was entitled to manage overseas trade and act as intermediary between foreign merchants and the court, invited often to visit coastal cities to buy foreign goods and satisfy the court's needs.

Indeed, only local governments maintained full control over the administration of trading activities and arranging the purchase of goods within their respective jurisdictions and throughout the *annual tribute system*,[3] which for many years remained the means for the courts to acquire foreign goods and control trade.

Commissioners, on the other hand, acted as supervisors of purchases for the courts, not performing the active administration of seaborne trade.

As some authors observe,[4] those officials had themselves been merchants in their past and went "[…] to live as aliens in another town, usually not a fringe town, but a town important in the life of the host community. There, the stranger merchants could settle down and learn the language, the customs, and the commercial ways of their host. They could then serve as cross-cultural brokers, helping and encouraging trade between the host society and people of their own origin who moved along the trade routes. At this stage, a distinction appeared between the merchants who moved and settled and those who continued to move back and forth".

The Chinese economy, quite rural, was continually becoming, little by little, more linked with the market mechanism, and one consequence of this was the creation of a national internal and military-based customs system including the creation of *Bureaus Maritime Commerce*, which was intended to replace the system of market regulation as the means by which the state controlled and taxed commerce.

Up to the Qing dynasty (1644-1911, the last Chinese dynasty) the structure remained essentially unvaried.

After the Song dynasty, in fact, the Yuan and the Ming governments continued to administer foreign trade through *Bureaus of Maritime Commerce*.

Around 1685, during first years of Qing dynasty, the *Bureaus* were renamed as *Maritime Customs* (海关), the name which still remains in use today as a general term for 'customs' (as an example, consider the current Chinese title of the *General Administration of Customs of People's Republic of China*, GACC,[5] 中华人民共和国海关总署, which includes those characters).

---

[2] Tansen Sen, 'Administration of Maritime Trade during Tang and Song Dynasties' (1996) 32 China Report 251.

[3] Wang Zhenping, 'T'ang Maritime Trade Administration' (1991) 4 Asia Major 7.

[4] W. G. Solheim II, 'The Southeast Asian Maritime Culture: 3000 B.C. to A.D. 1000' (Twelfth Conference of the International Association of Historians of Asia, Hong Kong, June 1991), 7.

[5] The GACC, which, starting from 2018, incorporated most of the former *General Administration of Quality Supervision, Inspection and Quarantine* (AQSIQ), is a Ministry-level agency and the key border agency of the People's Republic of China, under the control of the State Council. It has the authority and the main responsibility over all the customs districts and offices throughout the entire territory of mainland China (Hong Kong, Macao and Taiwan are excluded). All imports and exports from the territory of the People's Republic of China must be inspected and controlled by the GACC.

With the aggression of Western imperialist powers, starting with the Opium War, China started to lose its control over customs and all existing bureaus were transformed into semi-colonial customs, led by foreigners appointed to collect taxes.

From that age up to modern China, with the foundation of the People's Republic of China in 1949, Chinese customs were under the control of the semi-colonialists.

Among all of these, one of the most famous is the first *Imperial Maritime Customs Service* remained famous, founded through cooperation with Horatio Nelson Lay (a former British consular official and interpreter) who then became the first General Inspector of that organisation,[6] as well as the subsequent customs administration under the leadership of Sir Robert Hart.[7]

Immediately after the proclamation of People's Republic of China (1st October 1949), on 25 October of the same year, the *General Administration of Customs* was founded in Peking, breaking with the past of the semi-colonial customs, declaring the birth of socialist customs and marking the new development of China's customs.

One common feature, since the first customs organisation structures, was the fight against smuggling. At the very beginning, this was mainly directed at the prevention of general smuggling and illegal trade practices, but with the maturation of a concept of intellectual property, "smuggling" started to assume a wider meaning. Charles Alfred Speed Williams (1884) a *Customs Commissioner* during the semi-colonialist period of China, devoted a chapter in his memories to the *Art of smuggling*.[8]

Identifying the emergence of an Intellectual Property (IP) regime in the history of China, is not easy.

Some authors state that certain forms of IP were already recognised and protected in imperial China[9] but the first comprehensive IP law emerged in the Eighties, with the issuance of the first *Trademark law of People's Republic of China* (中华人民共和国商标法, issued in 1982, came into force on 1st March 1983, then revised many times, most recently in 2019).[10]

Although a formalisation of the protection came relatively late, in as early as the 1730s, the literature[11] reports smuggling cases, in a modern sense (infringement of IPRs), during the Qing dynasty when local authorities forbade cloth merchants to

---

For more information on its organizational structure see <http://english.customs.gov.cn/about/organizationalstructure>.

[6] R. S. Horowitz, 'CFER Horowitz Chinese Maritime Customs Serv Essay – Gale', Gale Primary Sources, <https://www.gale.com/binaries/content/assets/gale-us-en/primary-sources/china-from-empire-to-republic/cfer-horowitz-chinese-maritime-customs-serv-essay.pdf>.

[7] For a deep analysis of China Maritime Customs origin and features, see D. M. Brunero, *Through Turbulent Waters: Foreign Administration of the Chinese Maritime Customs Service, 1923-1937* (Thesis (Ph.D.), University of Adelaide, Centre for Asian Studies and the Department of History 2000).

[8] C. A. S. Williams, *Chinese Tribute* (Literary Services and Production 1969), 46.

[9] Chengsi Zheng, *Chinese Intellectual Property and Technology Transfer Law* (Sweet & Maxwell 1987). For a different point of view see also W. P. Alford WP, 'Don't Stop Thinking About ...Yesterday – Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China' (1997) 7 Columbia Journal of Asian Law 9.

[10] See the lastly amended version of the *Trademark Law of People's Republic of China*, <https://wipolex.wipo.int/en/text/579988>.

[11] Zheng (n 9) 21.

sell wares under other merchants' trademarks. Nevertheless, although local authorities were in somehow involved in cases like these (sometimes issuing decisions in solving cases), it was more usual to take private measures to protect trademarks during the entire imperial era.

Even though the *Great Qing Code* (大清律例) did not contain any provisions granting protection for trademarks, Qing governments resorted to representative treaties to regulate specific situations against infringement events. For example, the Mackay Treaty of 1902 between the Chinese government and Britain provided the establishment of an office directly "under the control of the Imperial Maritime Customs Service where trade-mark may be registered on payment of a reasonable fee"[12]. In spite of good intentions, treaties were not actually so keen on granting concrete protection of trademarks. Slightly different were treaties relating forms of IP, rather than trademarks, though vagueness remained their main feature overall, and not without consequences.

Given that, the Qing government ordered the *Maritime Customs Service* to attempt to draft a trademark law, working in close cooperation with British consular officials and merchants.

It should not be a surprise that the resulting draft was very similar to British trademark law, in force at that time in Britain and extremely favorable to British merchants. The draft provided that they could trade goods in China, using trademarks already registered in Britain, without any kind of registration process in China other than the exhibition of certificates of prior foreign registration.

Since, as seen at that time, customs were under the control of semi-colonialists, having a colonialist influence on them, the Chinese customs acquired the role of the authority in charge of administering IP registration and control.

The resulting draft of trademark law never came in effect, since it did not receive approval from the Ministry of Foreign Affairs, founded in 1903.

Although events and the historical shift of China, especially in the transitional moment from imperial dynasty to a modernised nation, have further characterised the growing role of customs in protecting IPRs, it was in that period that we can place the birth of Chinese customs power of surveillance over IPRs, then incorporated into the functions of socialist customs.

2. The Role of Chinese Customs in IPRs Protection: A Perspective in light of the Current Economic and Juridical Context

Known since the Eighties as the *World's Factory*, then later labelled as the *World's Market*, the People's Republic of China has gone back to its origins but in a contemporary gown, now once more being considered the *World's Factory, Upgraded*.

Thanks to its enormous trade surplus over the past few years, China remains the world's largest export powerhouse and ranks second among largest importers.

[12] D. B. Kay, 'The Patent Law of the People's Republic of China in Perspective' (1985) 33 UCLA Law Review 331.

Data related to China's trend of the total value of import-export in last years[13] suggest the growing role of Chinese customs in contributing to the protection of Intellectual Property Rights (IPRs).

On 26 June 2021, the Xinhua (New China News Agency, the most important press agency in the People's Republic of China) reported on the increasing crackdown of Chinese customs on goods that infringe on IPRs.

During the first five months of 2021 (Jan-May), goods seized by Chinese customs amounted to 31 million,[14] as officially released by the GACC; a result which must be read as the consequence of the IPRs protection campaign launched at the beginning of the 2021.

Indeed, a comprehensive strengthening of Intellectual Property (IP) protection has been in the agenda of China's top leaders and policymakers for years. As proof, recently the *State Administration for Market Regulation*[15] (国家市场监督管理总局, SAMR), together with China customs, has intensified its role in fighting IP infringements, growing from intercepting nearly 24 million items of trademark infringement in 2018, up to just less than 56 million in 2020.

We see several important changes in this period, thanks to keen policies aimed at an overall enhancement of IP protection, which kicked off back in 2019.

Before this turning point, all levels of IP enforcement – civil, criminal, and administrative – were affected by several inefficiencies. Civil courts, involved in IP civil lawsuits, tended to be quite restrained in awarding damages which, when provided, were generally very low, often neither compensating for losses nor discouraging future infringements. There was also the considerable length of the legal procedures. Moreover, the treatment before countries' courts and administrations were, and sometimes remain, significantly different from provinces and cities.

In Beijing, Shanghai, and Shenzhen, courts seemed to reserve more satisfying standards than elsewhere to right holders in a lawsuit or in a proceeding. The same can be said in terms of expertise granted by judges to stakeholders who decided to take action in the courtroom, especially in less developed provinces.[16]

---

[13] Ministry of Commerce of the People's Republic of China, 'Briefing on China's Import & Export in December 2019' 18 January 2020, <http://english.mofcom.gov.cn/article/statistic/BriefStatistics/202002/20200202935349.shtml>.

[14] 'Chinese customs up crackdown on IPR-infringing goods', Xinhua, 27 June 2021, <http://www.xinhuanet.com/english/2021-06/27/c_1310029716.htm>.

[15] In March 2018 the National People's Congress of People's Republic of China launched a structural reform of Party and State Institutions. Within this scheme, on April 2018 the SAMR was established, which sits under the State Council and which is in charge for the supervision and the administration of the market. The SAMR in in charge of enforcement of IP infringements and of reporting on its activity to the State Council. For more information on the new structure see: the National Copyright Administration of China (NCAC) which remains responsible for copyright, and the Ministry of Agriculture and Rural Affairs which deals with agriculture *geographic indications*. All other assets of IP belong to the newly set-up Chinese National Intellectual Property Administration (CNIPA), a vice-ministerial-level State agency under the State Administration for Market Regulation of China, which replaces the State Intellectual Property Office of China (SIPO).

[16] European Commission, 'Commission staff working document - Report on the protection and enforcement of intellectual property rights in third countries', SWD(2021) 97 final, 27 April 2021, 21, <https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159553.pdf >.

Inevitably, this defective framework represented a great level of concern for the country itself and, moreover, for potential investors, causing the most economic harm to European (and global) interests, and having the double effect of deterring market players who were prevented from pursuing actions against IP infringements or, in other circumstances, from contributing to IP assets,[17] from doing business in the country.

Conversely, it should not be forgotten that from the very beginning of the Opening-up reform launched by Deng Xiaoping in 1979, China has been highly interested in attracting new foreign technology (to be read in its wide meaning, as the attraction of know-how, patents, etc.). The ratio behind the *Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures* (hereafter "EJV Law", 中华人民共和国中外合资经营企业法, issued for the first time in 1979 as the first expression of the Open-Door Policy, 改革开放) currently no longer in force, was clearly encompassed by the Article 1 of the EJV Law, which stated:

> "With a view to expanding international economic cooperation and technological exchange, the People's Republic of China shall permit […] to establish equity joint ventures […] within the territory of the People's Republic of China, on the principle of equality and mutual benefit and subject to approval by the Chinese Government".

Besides which, and even more importantly, one should recall Article 5 as well, which states "The parties to an equity joint venture may make their investment in cash, in kind or in industrial property rights, etc. The technology and equipment contributed by a foreign joint venture as its investment in kind must be advanced technology and equipment that really suit China's needs. […]".

Today one can say things haven't changed. Not at all; indeed, in the midst of the China's "new round of opening to the word"[18] (新一 轮对外开放) the interest in attracting new technology still remain on the top of the State's list of aims.

The special legal framework, previously in force to assist foreign investors in their investment activities in PRC within the EJV Law, has been replaced by the *Foreign Investment Law of the People's Republic of China* (hereafter "FIL", 中华人民共和国外商投资法, issued in 2019 and in force since the January 1, 2020). Article 22 of the FIL is meaningful:

> "The state protects the intellectual property rights of foreign investors and foreign-funded enterprises, and protects the lawful rights and interests of owners of intellectual property rights and relevant right holders; and for infringements of intellectual property rights, strictly holds the infringers legally liable according to the law".

[17] This text seems quite interesting: '*Survey Data About Foreign and Chinese Firms' Perceptions of China's Current IP Regime*', in D. Prud'homme, T. *Zhang, China's Intellectual Property Regime for Innovation* (Springer 2019), 6-8.

[18] This expression was used by Xi Jinping in a Politburo study, in describing his economic strategy. The reference to this new stage of China's Opening-up has been used as a constant very often by President Xi, recently again on 4 November 2021 during the Keynote Speech at the *Opening Ceremony of the Fourth China International Import Expo*, suitably titled "*Let the Breeze of Openness Bring Warmth to the World*", where it was even further cemented as the 'hallmark of contemporary China'.

This is the engine which has been pushing China in seeking to grant a growing and better protection of IP, culminating lately with the provision (introduction into the Chinese legal system) of "punitive damages"[19] (or also called "exemplary damages") in Article 1185[20] of the new Civil Code of the PRC (hereafter "CCC", 中华人民共和国民法典, issued in 2020 and effective, starting from 1st January 2021) states:

> "Where any harm caused intentionally by a tort to the intellectual property rights of another person has serious circumstances, the victim of the tort shall have the right to require corresponding punitive damages."

3. China's Effort to Strengthen IPRs Protection: The Protection Campaign toward a Renovated Legal Framework

The milestone of the aforementioned IP protection campaign was represented by the issuance of the *Opinions of the General Office of the CPC Central Committee and the General Office of the State Council on Strengthening the Protection of Intellectual Property Rights* (中共中央办公厅、国务院办公厅印发 "关于强化知识产权保护的意见"), released on and in force since 24 November 2019.

Looking back, there are several traces of mechanisms deployed to support China's effort to enhance IP protection, such as the *Regional Comprehensive Economic Partnership* (RCEP)[21] or with particular attention to EU-China relations,

---

[19] "Punitive damages" were introduced in China after the amendment of Trademark Law of People's Republic of China occurred in 2013. It has been incorporated in Article 63 and provides a guidance to the People's Courts on the assessment of damages, in cases of trademark infringement. The law was amended for the fourth time in 2019, increasing the amount (in money) of punitive damages from treble to quintupled damages, in all events where the infringement is "malicious" (恶意) and in presence of "serious circumstances" (情节严重). Furthermore, the amended law provides an increase in the amount of statutory damages of up to RMB 5,000,000 in events where actual damages are difficult to be determined or uncertain. With the entrance in force of the Civil Code of the PRC the "punitive damages" juridical institution has been elevated to a general principle, where infringements are "intentional" (故意) and there are the already stated "serious circumstances". Regarding other IP assets, 'punitive damages' provisions are also contained in Article 17 of the Anti-Unfair Competition Law of People's Republic of China, for malicious and serious trade secret infringements, Article 71 of the Patent Law of People's Republic of China and in Article 54 of the Copyright Law of People's Republic of China. Pertinently, we can cite the *Six Typical Intellectual Property Infringement Civil Cases Published by the Supreme People's Court to Which Punitive Damages Apply* (最高人民法院发布 6 起侵害知识产权民事案件适用惩罚性赔偿典型案例).

[20] Article 1185 CCC states: "In case of an intentional infringement of another person's intellectual property rights, where the circumstances are serious, the infringed person has the right to request for corresponding punitive damages". The full text of the CCC can be found here <http://www.npc.gov.cn/englishnpc/c23934/202012/f627aa3a4651475db936899d69419d1e/files/47c16489e186437eab3244495cb47d66.pdf>.

[21] This involves, besides China, 14 other Indo-Pacific countries, ranking as one of the largest trade partnerships in history. In fact, it includes the Association of Southeast Asian Nations (ASEAN) and ASEAN's free trade agreement partners (among them, the People's Republic of China) and it

the *EU-China Comprehensive Agreement on Investment* (CAI),[22] the *EU-China IP Dialogue Mechanism*, and *the Ip Key China*,[23] just to mention a few.[24]

Certainly, at least on paper, IPRs protection in China has been aligned with relevant international rules, primarily with the TRIPs agreement, with China being part of the WTO since 2001.

For what specifically concerns the protection provided at the administrative level (organically linked to the civil and criminal judicial remedies), besides the legal aid granted by the People's Courts on IPRs[25] and by the administrative departments,[26] there is the crucial surveillance activity on IPRs conducted by China customs.

They can adopt legal measures or remedies, prohibiting and preventing the flow of commodities which would infringe IPRs within or outside the territory of Greater China.

Therefore, a deep knowledge of Chinese laws, regulations (at all levels) and procedures in front of Chinese customs contributes to guaranteeing the protection of an individual or an organization's[27] legal rights and interests, but also aims to prevent losses both in terms of money and, specifically regarding trademarks, of the image of the *violated product* and of the brand.[28]

The reference to trademarks is not certainly fortuitous. Statistics on IPRs recorded with the GACC reveal that until 18th November 2021 there were 68,323

concerns goods, services, investment, economic and technical cooperation, also creating new rules for several aspects including intellectual property. It will come into force on 1st January 2022.

[22] For more information see <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2233>.

[23] IP Key China consists of an EU-China cooperation for ensuring easier market access to international investors, taking into account the main EU concerns about doing business activities in the Chinese market. In reaching the goal, great effort has been made to individuate mechanisms for assuring increased transparency and improved implementation of the IP and IP enforcement system. It also plays a considerable role in the *EU-China IP Dialogue Mechanism* and works to raise awareness on the importance of IP in the region, see more here: for more information see <https://ipkey.eu/en/china>.

[24] European Commission (n 16), 23.

[25] On 22 April 2021, China's Supreme People's Court issued *The People's Court Intellectual Property Judicial Protection Plan (2021-2025)* (人民法院知识产权司法保护规划 (2021-2025 年)) for the implementation by lower courts throughout China. This *Plan* in composed by 5 critical points: 1. General Requirements; 2. Giving full play to the functions of intellectual property trials; 3. Deepening the reform and innovation in the field of intellectual property trials; 4. Optimizing the working mechanism of intellectual property protection; and 5. Strengthening the safeguards of intellectual property trials. The full text is available here <http://www.court.gov.cn/fabu-xiangqing-297981.html>.

[26] The CNIPA has, among its functions, the power to handle and to mediate local intellectual property disputes. Its local branches (local IP offices such as the Chinese Trademark) are administrative enforcement bodies. In handling and mediating IPRs infringements related disputes, they can order to cease the infringement activity, imposing administrative punishment. In case of dissatisfaction of parties, they can file an action with the court.

[27] Empowered to request the protection to Chinese customs are legal owners of an IPR and authorized licensees (based on the legal owner's proxy as his representative). In the case of protection requested of Chinese customs from a foreign rights holder who is not located in China, the intermediation is requested of an agency in administrating the request with the GACC.

[28] Where a "brand", differently to a trademark, incorporated the reputation and business in the public eye, as well, being not limited to legal aspects.

valid IPRs recorded in total,[29] where among them 60,896 were trademarks, 5,169 copyrights and only 2,258 patents. So more than 89% of the IPRs recorded were trademarks and this is not surprising: trademark infringements are much easier to detect, being visually perceptible in most cases, and in most cases the action is initiated *ex-officio* through an *active protection*.[30]

For what specifically regards the customs' legal framework, on one hand and as briefly mentioned above, at international level the customs IPRs protection activity belongs to what TRIPs agreement calls *Border Measures*, where Article 51 states:

> "Members shall […] adopt procedures to enable a right holder […] to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods".

On the other hand, at a domestic level, one can say the legal framework on customs is part of a restoration project, like what is happening in several fields of the Chinese legal system and, even more pertinently, considering the launched IP protection campaign, cited above.

The domestic legal framework is mainly composed by:

- the *Custom Law of People's Republic of China* (中华人民共和国海关法) adopted for the first time in 1987 (amended respectively in 2000, 2013, 2016 and 2017) lastly amended on 29 April 2021 (hereafter "Custom Law of PRC");
- the *Regulation of the People's Republic of China on the Customs Protection of Intellectual Property Rights* (中华人民共和国知识产权海关保护条例) promulgated on 2 December 2003 and amended in 2013 and 2018 (hereafter "Regulations");
- the *Measures of the General Administration of Customs of the People's Republic of China for the Implementation of the Regulation of the People's Republic of China on the Customs Protection of Intellectual Property Rights* (中华人民共和国海关关于《中华人民共和国知识产权海关保护条例》的实施办法) promulgated on 3 March 2009 and amended in 2018 (hereafter "Measures");
- the *Provisions of the People's Republic of China on the Administration of Recordation of Customs Declaration Entities* (中华人民共和国海关报关单位备案管理规定) issued on 19 November 2021 and in force from 1st January 2022.

Coming to the analysis of the Chinese customs' role in protecting IPRs, first and foremost, it must be remembered what is provided by Article 5 of the Custom Law of PRC, which fixes the "unified system principle":

> "The State adopts a unified, joint, and comprehensive system for the suppression of the crime of smuggling. […]".

[29] Data shown querying the *System for the registration of IPR* (知识产权备案) provided by the GACC.

[30] See *infra* paragraph 3.1.

Customs' control and examination of all imported and exported goods (as what emerges from the conjunction reading of Articles 23 and 28 of the Customs Law of PRC)[31] will be equally carried out in the entire territory of China Mainland, while a partially different system will be in force for so called *Special Economic Zones* (SEZs) and in Hong Kong, Macao, and Taiwan.

The afore listed laws represent, among others, the legal references for the protection of IPRs provided in PRC by customs where, in particular, the Regulations and the Measures offer a detailed and practical framework for the protection of "[…] the rights to exclusive use of trademarks, copyrights and copyright-related rights, patent rights, which are related to imported and exported goods and protected by the laws and administrative regulations of the People's Republic of China" (Article 2 Regulations).

In implementing this, customs will prohibit any activity of import-export of goods infringing upon the IPRs (Article 3(1) Regulations states "The State prohibits the import and export of goods infringing upon intellectual property rights").

The provision of the Article 2 of the Regulations includes trademarks registered at the domestic level in China with the Chinese trademark department within the *Chinese National Intellectual Property Administration* (CNIPA) [32] excluding service trademarks; trademarks registered at an international level, whose protection has been extended to China through WIPO excluding service trademarks; inventions, utility models (if in case) designs conferred by the Chinese patent department within CNIPA, and copyrights from any party to the Berne Convention for the Protection of Literary and Artistic Works.

Moreover, after the stipulations of the *Regulations on the Protection of Olympic Symbols and the Regulation on the Protection of World Expo Logo Marks* in 2002, China's customs also protect the Olympic symbols and World Expo logo marks.

Comparing the Chinese customs' management and administration system of control over IPRs to other customs system, one can see that while most of them limit their control of IPRs infringements over imported commodities (consider those of Italy[33] or the European Union), China's systems examine both imported

[31] Article 23 states "All import goods, throughout the period from the time of arrival in the territory to the time of customs clearance; all export goods, throughout the period from the time of declaration to the time of departure from the territory; and all transit, transshipment and through goods, throughout the period from the time of arrival in the territory to the time of departure from the territory, shall be subject to customs control", while Article 28 states: "All import and export goods shall be subject to customs examination. While the examination is being carried out, the consignee for the import goods or the consignor for the export goods shall be present and be responsible for moving the goods and opening and restoring the package. The Customs shall be entitled to examine or re-examine the goods or take samples from them without the presence of the consignee or the consignor whenever it considers this necessary. The Customs, under particular circumstances, can grant that the import and export commodities be exempted from inspection. The specific measures therefore shall be formulated by the General Administration of Customs".

[32] See (n. 15 and 26).

[33] Article 2(1) of the Statute of the Italian Customs and Monopolies Agency ("*Agenzia delle Accise, Dogane e Monopoli*" – ADM): "L'Agenzia […] Concorre alla sicurezza e alla tutela dei cittadini, controllando le merci in ingresso nell'Unione Europea e contrastando fenomeni criminali come

and exported cargo that cross borders (as stated by Article 44 Customs Law of PRC, "The Customs shall protect the intellectual property rights related to imported or exported goods in accordance with law and administrative regulations").

The last paragraph of the Article 51 TRIPs, referenced in part above, states that in fact "Members may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories". From this point of view, one can see that China's customs system is a step forward, considering that basic surveillance (again, in terms of IPRs protection) is considered a mechanism for imported commodities and consequently as a protection of WTO members' domestic markets.

Considering that, in case of violation of IPRs and in the light of what is provided by the Customs Law of PRC (Article 91)[34] customs will be able to exercise a wide range of powers which may vary from seizure to confiscation and the imposition of a fine, or even proceeding with criminal charges in particular situations.

In any case, the detention of IPRs-infringing goods must continue via judgment rendered by the People's court, or via customs making a decision on the right punishment. Some exceptions can be applied in the case of dangerous or short shelf-life detained goods for which customs can order the sale (as long as the rights holder has previously given permission), as compensation to the legal owner for the IPRs violation.

The monitoring activity of customs come after the registration of IPRs at GACC. That stage is, in fact, the juridical precondition for an *active protection* of customs.[35]

In general terms, the rights holder informs the customs authority about the legal status of a trademark, conditions of products for which that trademark is used and for which the owner asks customs for surveillance activity, the legal use of the trademark (for example in case of licenses), and valid grounds for suspecting the import or the export of counterfeit trademarks (or plagiarism in the case of copyright). Where registered, if customs have even a suspicion of IPRs violations, they have discretion to stop or seize goods, and launch deeper investigations, for example collecting information about the genuineness of goods.

Therefore, for foreign import-export companies established in China, or those which simply have business relationships in the PRC, the Chinese customs' control over all imported or exported goods represents a crucial mechanism in protecting their IP assets, especially trademarks (considering most of time IPRs infringements, as seen more often in terms of trademark counterfeit, are related to exported goods).

3.1. Chinese Customs' Active and Passive Methods of Action

contrabbando, contraffazione, riciclaggio e traffico illecito di armi, droga, rifiuti, alimenti e farmaci non rispondenti alla normativa sanitaria vigente".

[34] Article 91 Customs Law: "The importation of goods in violation of intellectual rights protected by the law and administrative regulations of the People's Republic of China shall be sanctioned by the Customs by confiscating the goods and imposing a fine; Criminal liabilities shall be taken in case of a crime".

[35] See *infra* paragraph 3.1.

The Chinese customs system provides two different methods of action: the *ex-officio customs actions* (commonly called as *active protection*) and the *customs action pursuant to application* (which consists in a *passive action*).

Going beyond merely practical aspects but limiting the analysis to a brief description of the actions, you can see that they are conceptually different:

- in case of an *ex-officio customs actions*, Chinese customs, during the routine and/or daily check and in presence of suspects of an IP infringement, will suspend commodities. For this action the juridical precondition is always the registration of IPRs with the GACC. In a such a situation, customs will promptly notify the rights holder (or the person entitled by law) about the suspension. On the other hand, the rights holder can then confirm the infringement theory and, if interested in going forward, file an application to detain the detained goods and deposit an amount of money as a guarantee (proportional to the value of the blocked commodities). Consequently, in detaining goods, Chinese customs make further investigations to determine whether the infringement can be deemed as confirmed or not. In cases where infringement is proven, seized commodities will be confiscated[36] and a penalty will be imposed on the transgressor. Contrarily, in cases where customs do not find any evidence of infringement or valid confirmation, the goods will be released. In judging the case, Chinese customs can assist courts; this step is more usual in controversial cases, where a deeper investigation can resolve the issue. In any case, the courts will only be involved at the request of the rights holder.
- in case of a *customs action pursuant to application*, the rights holder, who has suspicions of an IP infringement with regard of imported and/or exported goods, based on solid evidence, may apply for detainment of the goods by customs (Article 12 Regulations). The deposit of a monetary guarantee is requested. In this case, the guarantee is not less than the value of the equivalent value of goods (Article 14 Regulations). While the *active action* is possible only with registered IPRs, the *passive action* is adopted, and more suitable, for unregistered IPRs (this won't exclude the appeal for registered IPRs). Given that, the right holder is requested to provide detailed information relating to the suspected IPRs-infringing commodities (such as, among others, the contents of IPRs, consignee generalities or location and timing of suspected commodities flow in terms of the scheduled import-export). Within this *action* the rights holder must be precise, since they are not entitled to ask for a general obligation to the Chinese customs, but an action limited and focused on a specific batch of goods. In case of a seizure, customs will promptly send the relevant notification to the IPRs owner, informing the consignee and/or the consigner, as well (depending on the actual situation).

[36] Types of confiscated commodities might be different: they can be donated, purchased by the right holder or as the *extrema ratio*, when first two purposes cannot be realized, they can be auctioned after they are deprived of the infringing features, in the light of Article 27 Regulations. Gains obtained are collected by the State treasury.

Summarizing and comparing Chinese customs enforcement to other juridical tools for the protection of IPRs, one can see it is cost and time effective, easily administrated by the rights holder (the entire process can be activated and followed), the rights holder can benefit, especially from the active protection, in discovering IPRs infringement cases, and by way of registration can publicly declare the interest and intention to protect IPRs across boundaries as well.

3.2. Governance of Online Infringements

The rapid grow of e-commerce in China has overthrown the concept of countries' physical borders. In the new trade context, Chinese customs are putting effort toward new protection measures through collaborative solutions to existing problems, using the Memorandum of Cooperation approach, which has been already used or implemented, for example at the European level, to address counterfeit online.

A further confirmation of the China's commitment toward the strengthening of IPRs protection is given by the growing cooperation between China customs and big e-commerce platforms, especially those with a high level of commodity flow, above all the largest e-commerce platforms Alibaba and JD.com, together taking up 80% of the online market[37].

From this point of view, it must be underlined how the first *E-commerce law of People's Republic of China* (hereafter "E-commerce Law", 中华人民共和国电子商务法，issued in 2018 and in force since 1st January 2019) introduces the *notice-and-takedown* tool, in Articles 41 and 42 E-commerce Law, [38] then incorporated into the CCC, in Articles 1195-1197.[39]

In light of what is stated by Article 42 E-commerce Law, the *notice and takedown* tool can be seen as a creative way to cope with the overwhelming level of infringement on the internet. Firstly, there is the right of an IPRs owner (registered in China) to *notify* the information service provider (ISP), the search engine service provider and/or the link service provider, informing them and providing evidence about IPRs-infringing activities online; secondly, there is the possibility of the provider (whatever it is and upon the notice) to actively remove

[37] *Study on online counterfeit in China - Could the EU Memoranda of Understanding approach help, and if so – how?* (IPKey 2019) <https://ipkey.eu/sites/default/files/ipkey-docs/2020/IPKeyChina_nov2019_Lessons-from-the-EU-experience-with-memoranda-of-understanding-in-tackling-the-online-sale-of-counterfeit-goods.pdf >.

[38] Article 41 E-commerce Law states "An e-commerce platform business shall develop rules for protection of intellectual property rights and strengthen cooperation with owners of intellectual property rights, so as to protect intellectual property rights according to the law.", while the article 42 states "Where the owner of an intellectual property right considers that his or her intellectual property right has been infringed upon, he/she shall have the right to notify the e-commerce platform business of taking necessary measures, such as deletion, blocking or disconnection of links and termination of transactions and services. […]. The e-commerce platform business shall, after having received the notice, take timely and necessary measures and forward the notice to the in-platform business […]".

[39] Article 1185 CCC (n 20).

the alleged infringing contents or *takedown* the links to the infringing websites[40] in a timely manner. The legal liabilities of the platform can be restrained, except in case of evidence against the providers that they had previous knowledge of the infringing activities. It is new for the Chinese legal system, confirmed in the case of IPRs infringement, that an e-commerce platform might be deemed liable, if it does not takedown the links, after been notified of the infringement.

The *notice and takedown*[41] tool represents a new[42] tool in the Chinese juridical system, introduced and transplanted from the United States Digital Millennium Copyright Act of 1998 (DMCA)[43] into the *Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks*[44] (hereafter "Regulation over Information Network", 信息网络传播权保护条例, issued and in force since 2013), Articles 14 and 15.[45] Even though that tool was principally "[…] in order to protect the right to network dissemination of information of copyright owners, performers, and producers of audiovisual products […]" (Article 1 Regulation over Information Network) for copyrights and rights related to copyrights, it was then extended, as a *key principle* granted by the Chinese legal system for all IPRs. Despite a great leap forward in further protecting IPRs, the Regulation over Information Network has not escaped criticisms on its actual effectiveness, due to the fluffy terminology used by the Chinese lawmaker.

For example, with reference to the last part of Article 14, one can find "*prima facie evidence*" which is quite confusing.[46] Linguistically, the ambiguity, vagueness

[40] The provider normally requires evidence of the ownership status of the infringed IPR, the linkage to the infringing commodities and information of the claimant (business license in case of a juridical person or ID Card and personal generalities in case of an individual).

[41] J. Wang, 'Notice-and-Takedown Procedures in the US, the EU and China' (2018) Regulating Hosting ISPs' Responsibilities for Copyright Infringement 141.

[42] A new which has to be intended in terms of formal law-making activity, since the reference to the *notice-and-takedown* was already present in an Interpretation of the Supreme People's Court of 2000, Interpretation of the Supreme People's Court on Certain Issues Related to the Application of Law in the Trial of Cases Involving Computer Network Copyright Disputes (最高人民法院关于审理涉及计算机网络著作权纠纷案件适用法 律若干问题的解释), Fa Shi [2000] No. 48 (法释[2000] 48 号), 22 November 2000, Article 5.

[43] Digital Millennium Copyright Act, Public Law 105-304, 28 October 1998, <https://www.copyright.gov/legislation/dmca.pdf>.

[44] 'Regulations on the Protection of the Right to Network Dissemination of Information' (2015) 48 Chinese Law & Government 43.

[45] Ibid.

[46] Article 14 Regulation over Information Network: "In regard to network service providers who supply information storage space or network connection services, if an owner believes that the works, performances, and audiovisual products involved in these services violate his or her rights to network dissemination of information, or that his or her electronic information on rights management has been deleted or altered, he or she may submit a written notification to the said network service provider requiring that the network service provider delete the said works, performances, or audiovisual works or sever connections with the said works, performances, or audiovisual products. The written notification shall contain the following elements: […] 3. preliminary evidence of facts that constitute a violation of rights. […]". For a deeper analysis of critics on the establishment of the *notice-and-takedown* principle in China, see Jie Wang, *Regulating Hosting ISPs' Responsibilities for Copyright Infringement the Freedom to Operate in the US, EU and China* (Springer Singapore 2018).

and generality are probably the main characteristics of Chinese laws and, even if they are often criticized features, they should contrarily be considered pervasive as well as important.[47] This is even more true in a context like the Chinese one, where legal linguistic uncertainty can contribute to overcoming communicative and governance obstacles, to achieve effective and successful political goals.

4. Conclusive Remarks

On 30 November 2020, President Xi Jinping made some remarks in a public speech, saying "Innovation is the primary driving force behind development, and protecting IPR is equal to protecting innovation".

China is paying much attention to the protection of IPRs and the customs legislation has been growing stronger as well, with consideration of the growing role of the Chinese customs service in surveilling the validity of commodities flows.

The legislative transplant of important principles, already adopted in other economic realities (i.e., punitive damages, notice-and-takedown) is a great signal, at least on paper, of the serious effort Chinese lawmakers are making to provide better protection for IPRs.

Nevertheless, on one hand, behind the several amendments toward a renovated system of protection, which also takes into consideration the new areas for infringement events (internet and e-commerce), the fact remains that law-making activity is not fully efficient, too often inspired by other legal systems, and not always well-performing in the Chinese context. This is aside from the deliberate vagueness of legal text.

However, on the other hand, the vivid interest of Greater China for attracting foreign capital should not be forgotten. This could ensure the future success of a renovated and strengthened IPRs protection system by middle of the century, that allows investors to trust in a stronger IP-based fortification for their businesses, and that is friendly to the IP right holders in a competitive environment.

All former Presidents of the Peoples' Republic of China can be remembered for their own descriptive mantras of policy. Today, we are living in the era of Xi's "common prosperity" (共同富裕, *gongtong fuyu*), referring not only to material wealth, but also to cultural wealth, toward the high-quality development of society.

Will a more sensitive perception of IP assets and better protections for related rights, including through the cooperation of Chinese customs, one of the keys to unlocking this "common prosperity"? The near future will provide answers.

[47] J. G. Kooij, *Ambiguity in Natural Language: An Investigation of Certain Problems in Its Linguistic Description* (North-Holland Publishing Company 1971).

Insurance Risks and New Maritime Silk Road: A Historical Perspective

MONICA STRONATI*

SUMMARY: 1. The Challenges of the New Maritime Silk Road. – 2. Risk and Safety for Seafarers: From Corporations to Premium Insurance. – 3. The Way of Solidarity and the Rediscovery of Mutualism. – 4. Final Suggestions.

1. The Challenges of the New Maritime Silk Road

The New Silk Road is an organic plan announced in 2013 by the Chinese President Xi Jinping, with which the People's Republic of China intends to rebuild the ancient trade links between East and West. The land routes will connect China to London, while the sea route, also known as the 21st Century Maritime Silk Road, will connect Asia to Europe by sea. The Maritime Silk Road will pass through the Suez Canal to the Mediterranean Sea, where Italy should be the point of arrival in the EU territory, together with Greece.

The new Maritime Silk Road will connect three continents with extraordinary economic repercussions, but also significant geopolitical and military implications.[1] More than trade routes, China looking to the sea evokes, especially in the United States,[2] the threat of a dangerous political trajectory. On the other hand, geography is not a neutral "place", the geography of the world represents the power over space. China's maritime policy is consistent with the need to expand commercial capacity but also with the need to diversify the capacity for energy supply. The new routes of communication will transit essential goods and energy supplies; it will certainly be in China's interest to protect the communication routes and create a peaceful and collaborative environment.[3] Indeed, China claims to follow an idea of balanced and sustainable development that is convenient for all partners.

The "New Silk Road" formula deliberately recalls a millenary past that does not coincide, however, with the Western narrative. It is no coincidence that today, like then, the Silk Road has its start and end point in today's Xi'an. The spirit of the Silk Road evoked by the Chinese government is that represented by the diplomat Zhang Qian who, back in 318 B.C., opened China to international trade. It is the spirit represented by the Han dynasty with which the importance of the Xinjiang strategic

* Associate Professor of History of Medieval and Modern Law, University of Macerata.

[1] For more details, see 'Cina: il nuovo protagonista mondiale' (2020) IRIAD Review, <https://www.archiviodisarmo.it/view/N0B6RNiI1R7b5u_L6BW8_Qtd3SonKWU6EbwRvCrnbps/iriad-review-03-04-2020-1.pdf>.

[2] For example, see the research activity on China's development as a maritime power carried out by the China Maritime Studies Institute (CMSI), within the U.S. Naval War College (NWC), <https://usnwc.edu/Research-and-Wargaming/Research-Centers/China-Maritime-Studies-Institute>.

[3] D. A. Bertozzi, *La nuova via della seta. Il mondo che cambia e il ruolo dell'Italia nella Belt & Road Initiative* (Diarkos 2019), 15.

area was born, as a hub of transcontinental trade, in a "climate of tolerance and coexistence".[4]

The expression "Silk Road" (*Seidenstraße*) was first used in 1877 by the German geographer and geologist, Baron Ferdinand von Richthofen. The context was that of the colonial interests of Germany, a period characterized by foreign missions to the "rediscovery of artistic and architectural treasures along the commercial routes that connected Central Asia to Western China". The world powers of the time had been able to take advantage of "the progressive decline of the Chinese imperial power, the erosion of its capacity to control the territory and widespread corruption, under the blows of the expansionist (and among them competitive) ambitions of the cartel that united the major world powers". And China suffered the humiliation of its artistic and cultural heritage being grabbed by the "British, German, Russian, French, Japanese and American expeditions, whose discoveries enriched over thirty museums and cultural institutions in Paris, London, Berlin, New Delhi and even in Kansas".[5] The vast network of routes that linked China to the Middle East was intended to facilitate trade. Silk was the symbol of wealth, but paper, spices and much more goods were also traded. The Silk Road was the occasion for exchange of cultures, religions and men "who conveyed values, political ideas, technologies".[6]

Speaking of major changes and technological innovation, President Xi Jinping said that by 2030 China intends to become a world leader in the field of Artificial Intelligence. In the maritime sector this means, among other things, achieving autonomous navigation. A fascinating frontier that promises to make navigation more efficient and safer. However, navigation at the highest level of autonomy opens new legal problems and also creates new risks. In the last decade, the maritime industry has already introduced new technologies that have led to rapid development and increased profits. Systems increase in complexity and, with them, threats also increase in danger. The greater connectivity and the convergence of Information Technology and Operation Technology systems have already produced important results, but also new risks, mainly due to the vulnerability of IT systems. In this context, risk management becomes increasingly difficult. In addition, the risks tend to increase because the policy makers tend to expand the range of responsibilities, especially for the protection of third parties.

In the maritime sector, accidents seem to happen rarely, but the problem is that their impact is tremendous. The data are difficult to find and are often insufficient because of the scarce number of events from which to draw elements of assessment and it is difficult to assess the nature of the risks. From the history of law point of view, this is not an unusual condition. The periods of great technological innovations are characterized by profound changes and by the search for innovative solutions. Something similar, for instance, happened with the industrial revolution. At that time, important technological innovations were introduced, but also new risks arose, together with the questions about their nature and the price to cover them. The technical improvements on the ships and the creation of naval registers

[4] Ibid., 10.
[5] Ibid., 3.
[6] Ibid., 6.

have contributed to reduce maritime disasters and "the rates for insurance of bodies and goods". The diffusion of insurance itself has contributed to technical innovation and favoured virtuous practices: "the use of appraisals encourages the best practices and the most modern techniques". In that context, claims fell significantly and with them also the insurance instalments for ships and cargoes.[7]

What could be the consequences for the marine insurance sector? First, risk management can become excessively expensive for individual maritime organizations. Secondly, without sufficient information, insurers do not have adequate tools to establish the insurability of risks, the price for their coverage, the actuarial relationship between accidents, safety measures, etc. Greater safety in navigation can cause an apparently paradoxical consequence, as to say a decrease in premium payments, thus undermining the traditional insurance system. Thus, the whole system may crash, as the insurance system is fundamental to manage the risks linked to technological development.

2. Risk and Safety for Seafarers: From Corporations to Premium Insurance

The complexity and uncertainty that characterize the present and the future of maritime navigation lead to questioning the notions of risk and uncertainty. Risk, in Frank Knight's[8] well-known distinction, concerns situations in which the probability of an event can be mathematically estimated and for which one can protect oneself by taking out insurance. Uncertainty concerns situations in which the event cannot be estimated, for instance, when we are faced with rapid changes. Not every future event is predictable and attributable to mathematical and statistical models, at least until the insurance industry transforms uncertainty into predictable risk. In some respects, maritime navigation has always been exposed to uncertain risks and the need to find solutions to new problems. Before the probabilistic definition, which prevailed among insurers, seafarers developed techniques and solutions to cope with the new risks often induced by technological innovation. In the Middle Ages, the guilds of merchants managed the first forms of contracts on the risk of maritime trade. The economic context gave shape to the various contracts: the "*accomenda*", the pledge contract at sea risk, the loan for the needs of the ship, etc. The custom of maritime insurance was shaped as last, through the mercantile practice and the dogmatic construction of legal doctrine. The peculiarity of the risks of sea going has encouraged solidarity among seafarers. For instance, the "*viaggio di conserva*", that is, navigation in a convoy. This was a preventive practice for mutual defence from pirate attacks. The communion in danger strengthened corporate solidarity, for example in the event of damage to one of the

[7] See G. Cingolani, *Le assicurazioni private in Italia. Gestione del rischio e sicurezza sociale dall'Unità ad oggi* (Il Mulino 2019), 24: "Uno studio inglese relativo al mercato italiano nel periodo 1880-1900 rivela una diminuzione del 57% delle rate di assicurazioni per le navi e del 36% per i carichi, con un andamento dei tassi che sostanzialmente ricalca quello inglese".

[8] F. H. Knight, *Risk, Uncertainty and Profit* (Houghton Mifflin Company 1921), <https://archive.org/details/riskuncertaintyp00knig/page/n5/mode/2up>.

ships, "the others would have contributed in part to the related compensation".[9] An expression of the legal solidarity of seafarers is the institution of the contribution to common failures. The casting of a part of the cargo is needed to avoid shipwreck, for the benefit of all the participants in the shipping, but the loss is borne by all, each in proportion to the value of the things saved.[10]

The first specific monograph on insurance, by the Portuguese Pietro Santerna, appears only in the 16th century. In the 17th century, the insurance contract was still included in the scheme of the sale, but its specific features began to emerge. The judge and lawyer Giuseppe Lorenzo Maria Casaregi affirms that: "in insurance matters we must strictly adhere to the words of the document that must be adopted by law, as they faithfully express the will of the parties; it is in fact a contract in which good faith is requested, avoiding malice and fraud, in which it is necessary to use that balance, that is the soul and life of commerce; ample space must be left to the commercial uses".[11] The picture changes in the 18th century, when large capital companies manage the insurance sector, often under a monopoly regime. The modern insurance industry splits risk on a large scale[12] and can rely on increasingly accurate calculations of the magnitude of risks. Only in this context can the insurance be configured by Emerigon and Baldasseroni as an independent contract. In the 19th century, for the first time, merchants and seafarers can no longer rely on corporations, and a new phenomenon appears, a new form of organization: mutual insurance companies. The first and most famous is the "Mutua assicurazione marittima Camogliese", founded in 1851, with a statute, issued two years later, which became a model for the following ones.

The culture of insurance is by no means taken for granted, as Giovanni Verga recounts in 1881. In his novel, "I Malavoglia", he tells the story of a family of fishermen, set between 1863 and 1878. The head of the family undertakes a commercial "bet": the transport by sea of a load of lupins with the family boat "La Provvidenza". The sinking of the boat leads to the ruin of the family, who will not be able to pay the great debt to Uncle Cristoforo, the usurer of the town, because "neither the hull nor the load had been insured".[13] Trust in the insurance system has been built over the years, going through mistakes and failures. Private insurers, associations and companies had to build their skills before extending insurance beyond the risks of navigation: for agriculture, fires, crop hail and then life, until being used in the public dimension with the creation of compulsory social security.

In Italy, the mutual insurance of ships experienced a period of prosperity in the mid-nineteenth century. The Italian legislator, in the Commercial Code of 1865 inspired by the Napoleonic "*Code de commerce*", only regulated maritime insurance. The subsequent Commercial Code of 1882 governed the insurance

[9] A. La Torre, 'Assicurazione (genesi ed evoluzione)', in *Enciclopedia del Diritto*, Annali I, 2007, 83.
[10] Ibid., 84.
[11] V. Piergiovanni, *Norme, scienza e pratica giuridica tra Genova e l'Occidente medievale e moderno* (Società ligure di storia patria 2012), 1248.
[12] See G. Ceccarelli, 'Stime senza probabilità: assicurazione e rischio nella Firenze rinascimentale' (2010) 45 Quaderni storici (Nuova Serie) 651.
[13] Cingolani (n 7), 15.

contract in general, land insurance and maritime insurance, but without cancelling the traditional relationship between sea, insurance and mutuality.

Doctrine has long debated on the legal configuration of insurance mutuality, particularly on the advisability of imposing the corporate form. Mutual insurance is defined in Article 239 of the Commercial Code as an association "having the purpose of sharing between the members the damage caused by the risks that are the subject of the insurance". In essence, the mutual insurance association is "the gathering of several owners who, in order to mitigate damage from common risks, undertake to contribute to the losses in proportion to the value of the objects subjected by each of them to the above insurance". The contract consists of two elements, as to say insurance and mutuality: "insurance is the purpose; mutuality is the means. One member is the insurer of the other and is therefore required to contribute to the losses of the associates, at the same time the member is insured"; therefore, if he is hit by the accident, each of the members of the association participates for his part in the payment. The association is non-profit, has the function of dividing and distributing among all the damage that has affected only one.[14] Article 243 of the Commercial Code, inspired by the Genoese maritime mutual insurances in perfect harmony with the nature of the mutual associations, states that the associates are only obliged to the contributions determined by the contract and in no case are they obliged toward third parties, if not each in proportion to the value of the thing, for which they were admitted to the association. In 1875, a bill was presented to the Senate to introduce the joint and several obligations towards third parties, within the obligations assumed by the representatives of the association. The proposal was rejected, and the reason was that it contradicted the system of maritime mutual associations in which "the members assume at common risk the dangers that threaten their ships, and contribute, in proportion to the value of their respective ships, to the damage and losses that the ship of each associate might suffer. The owner of a ship worth 200,000 Italian lire is part of the association, as well as the owner or co-owner of a ship that is not worth more than 20,000. When a vessel is lost, all the other members contribute to the loss, in proportion to the value of the vessel or vessels for which they entered the association […]. Everyone pays his share, and the administration, having collected all the shares, reimburses the loss to the injured party. Apart from the obligation of this mutual contribution, no other obligation is contracted by the policyholders; and their contract has no other purpose than to contribute to the compensation of such losses. Therefore, no solidarity of obligation between the shareholders can be provided; but even less so of the shareholders towards a third party unrelated to the company. The latter has no other right than to be reimbursed by the individual members for the respective fees they are required to pay. With the system of joint and several liability, each member could be exposed to losing all of his fortune, whenever, having entered the association for ten thousand lire (value of his ship), he could be jointly obliged to pay a value of two hundred thousand lire. There would be no one willing to join a mutual insurance, if it were not quite certain,

[14] T. Capoquadri, 'Assicurazioni marittime' in *Digesto Italiano*, vol. IV, Part I (Unione Tipografico Editrice Torinese 1896), 1035.

that with this he is not contracting any other obligation, except that of his proportional contribution to the losses, and above all that no joint obligation can be imposed on him towards third parties".[15]

Mutual solidarity responds to a shared need for security: "several people put together the common risk in order to share the burden of the harmful event that affects some of them among all. It is therefore a plurilateral agreement based on an 'associative' cause". It is no coincidence, as La Torre observes, that modern insurance is referred to as a "*premium*". A word that having a "double semantic value, at the same time means both what is 'taken first' (from the Latin *praemere*) and what is given as a reward for the guarantee obtained, as if to recognize the 'merit' of those who, without being responsible, take the risk of the damage of others".[16] Premium insurance, therefore, is not the evolution of mutualistic solidarity, but rather constitutes a different model.

The differences with commercial premium insurance are therefore substantial. Mutual insurance associations have the purpose of dividing the obligation to assist the damage suffered by individual associates. In premium insurance "the insured is completely unrelated to the other insured persons and to the insurance company, to which he does not take on any other obligation than to pay the premium, nor does he acquire any rights other than that of the full agreed compensation, without being affected by the advantages or the losses of the company itself; on the other hand, the insured person in a mutual contract assumes obligations towards all his other insured companions, participates in the ownership of the social fund, in the benefits and losses, has all the other rights and duties related to his quality of shareholder; and he may not find the full payment of the damage, if, for example, the share of the contribution agreed between the shareholders was pre-established in a fixed portion, and where the company's fund was not enough to fully indemnify him".[17]

The operational potential of mutual risk sharing seems to run out with the need to raise large capital. From the "communion" of risks, in the logic of direct mutuality, we move on to "bargaining" on risk from the business point of view. At the beginning of the 20th century, in Italy, maritime mutual insurance associations gave way to commercial fixed-premium insurance companies. Mutual insurance companies, linked to sailing, did not intercept the new organization of the company on an industrial basis connected to the development of steamships and increase in tonnage. In a short time, the few mutual insurance companies were transformed into premium companies: the "Mutua Marittima Nazionale", founded in 1907 and transformed into a joint stock company in 1924 ("Mutuamar"), the Mutua for non-life insurance coverage, founded in 1919 in Trieste and transformed into a joint stock company in 1923 ("SASA Assicurazioni Riassicurazioni S.p.A.", now merged by incorporation into "Milano Assicurazioni S.p.A."), the "Unione Italiana di Sicurtà", founded in Genoa in 1917 (formerly the "Unione Mediterranea di Sicurtà", then "UMS Generali Marine", today "Generali S.p.A."), as well as, finally, the International Union of Shipowners, established in Genoa in 1907.[18]

[15] Ibid., 1104.
[16] La Torre (n 9), 87.
[17] Capoquadri, (n 14), 1035.
[18] D. Casciano, *L'assicurazione P&I* (Giuffrè 2013), 18.

As early as 1896, Capoquadri affirmed that the maritime mutual insurance was outdated: "they had in other times in Italy a long period of prosperity, that they no longer have. They were formed spontaneously among the owners of the same stretch of shore, and constituted for the shareholders a greater guarantee than the insurance provided by isolated speculators; but they were won by the fixed-premium companies".[19] It is said that it was an evolution of insurance driven by the rationality of actuarial calculations, but it should be said that it was a choice made to favour the capitalist market and to the detriment of the free market. Mutual aid associations have always been criticized for their poor organizational skills; in particular during the seventies and eighties of the 20th century, many studies have highlighted the inefficiency of mutual aid companies.[20] Certainly there have been government shortcomings, but behind the strategies of mutualism there is also the conscious choice of solidarity between members, it is an informed selection and not an adverse selection[21]. "The choice between these two options", says Battilani, "seems to be more a matter of ideology than of efficiency".[22] It is no coincidence that demutualization first spread to the United States and the Anglo-Saxon world: "Here the concept of Americanization may help: Demutualization fitted very well into the basic concept of American competitive capitalism".[23]

3. The Way of Solidarity and the Rediscovery of Mutualism

How should the marine insurance industry respond to new sources of risk?

The EU legislator with Directive 2009/20/EC on the insurance of shipowners for maritime claims[24] has indicated a path that is both ancient and modern at the same time. The directive provides for the obligation to take out insurance or take out an alternative guarantee to ships of 300 gross tonnage or more. Article 3 of the directive defines the shipowner[25] and insurance,[26] the latter including the "Protection and Indemnity Clubs" (P&I Clubs) which provide insurance for undetermined risks and third party risks. As known, the directive was implemented

[19] Capoquadri (n 14), 1102.

[20] See P. Battilani and H. G. Schröter, 'Demutualization and its Problems', Quaderni – Working Paper DSE 762 (17 June 2011), <https://ideas.repec.org/p/bol/bodewp/wp762.html#download>, 10.

[21] See the research of L. F. Andersson, L. Eriksson an P. Nystedt, 'Workplace accidents and workers' solidarity: mutual health insurance in early twentieth-century Sweden' (2021) Economic History Review 1, <https://onlinelibrary.wiley.com/doi/full/10.1111/ehr.13088>.

[22] Battilani and Schröter (n 20), 11.

[23] Ibid., 6.

[24] Directive 2009/20/EC of the European Parliament and of the Council of 23 April 2009 on the insurance of shipowners for maritime claims, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0020&from=en>.

[25] 'Shipowner' means the registered owner of a seagoing ship, or any other person such as the bareboat charterer who is responsible for the operation of the ship.

[26] 'Insurance' means insurance with or without deductibles, and comprises, for example, indemnity insurance of the type currently provided by members of the International Group of P&I Clubs, and other effective forms of insurance (including proved self-insurance) and financial security offering similar conditions of cover.

in Italy with Legislative Decree No. 111 of 28 June 2012,[27] therefore the Italian legal system also opened to insurance guarantees issued by the P&I Clubs, and indeed has extended their scope of operation, because it provides for the obligation to contract the insurance of shipowner liability for all ships flying the flag of a foreign State that plie the territorial waters, regardless of whether or not they enter a national port.[28]

A P&I Club is a mutual association that provides not only insurance against a variety of risk, but also information and representation services for its members. While the marine insurance company is accountable to its shareholders, the P&I Club is accountable only to its members. These do not pay a premium, for coverage lasting a set period of time; the P&I Club members pay a "call". The idea is simple and ancient: shipowners unite in an association, the "club", to share the risk of common dangers. As members of the club, the shipowners insure each other against third party liabilities caused by maritime risks. To be part of the association, it is necessary to meet the requirements and comply with the conventionally established rules. A characteristic provision of P&I Clubs is the "pay-to-be-paid rule" whereby each member must first pay his or her liabilities, meet any claims for their liability, and only then can they approach the club. The clubs are non-profit associations that reassure themselves together through a larger association: the International Group of P&I Clubs.

In our opinion, the shipowners' mutual organizations can effectively respond unitedly to the challenges of modernity that also the maritime sector must bear. The instrument of co-insurance is certainly ancient, but still functional: "in the past, co-insurance was usual, as the risk of a single insurance operation was not reasonably bearable by a single insurer. Besides, it must be added that not even the advent of new techniques has taken away the vitality of the co-insurance system, as it was conceived and started by medieval merchants".[29] The mutual associations of shipowners, in fact, were introduced in England by Italian insurers who moved to Lombard Street in London in the 14th century: "*im Archiv in Florenz wurde ein Dokument gefunden, nach dem 1464 in London ein italienischer Versicherer mit*

[27] See Legislative Decree No. 111 of 28 June 2012, Article 4 (Crediti ai quali si riferisce l'assicurazione della responsabilità): "I crediti ai quali si riferisce l'assicurazione della responsabilità armatoriale sono i seguenti: a) crediti relativi a morte, lesioni personali, perdita o danni a beni, ivi inclusi danni ad opere portuali, bacini e canali navigabili ed agli ausili alla navigazione, che si verifichino a bordo o in connessione diretta con l'esercizio della nave o con le operazioni di salvataggio ed i conseguenti danni che ne derivino; b) crediti relativi a danni derivanti da ritardi nel trasporto marittimo di carico, passeggeri o del loro bagaglio; c) crediti relativi ad altri danni derivanti dalla violazione di diritti diversi dai diritti contrattuali, che si verifichino in connessione diretta con l'esercizio della nave o con le operazioni di salvataggio; d) crediti relativi al recupero, rimozione, demolizione o volti a rendere inoffensiva una nave che sia affondata, naufragata, incagliata o abbandonata, compresa ogni cosa che sia o sia stata a bordo di tale nave; e) crediti relativi alla rimozione, distruzione o volti a rendere inoffensivo il carico di una nave; f) crediti fatti valere da una persona diversa da quella responsabile, relativamente a provvedimenti presi al fine di prevenire o ridurre le conseguenze dannose degli eventi di cui alle lettere da a) ad e) e gli ulteriori danni causati da tali provvedimenti". The full text of this Legislative Decree is available at <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2012;111>.

[28] Casciano (n 18), 22.

[29] La Torre (n 9), 125.

einem italienischen Versicherten im Streit um die Versicherungsleistun"[30]. Beyond the translation from Italian into English, the assimilation was total, both in form and in phraseology. The Lloyd's of London policy, annexed to the Marine Insurance Act of 1906 which regulates P&I Clubs in the United Kingdom, basically reproduces the Tuscan insurance contracts of the late 14th century.[31] According to Kimura, even the maritime insurance policies used in Japan are in their essence the Tuscan insurance contracts of the end of the 14th century preserved in the Datini's Archive in Prato.

Mutual insurance, in the 18th century, was the answer to the crisis of the traditional market. This "had a number of deficiencies and it was a reaction to these drawbacks that eighteenth-century shipowners decided to club together in mutual hull insurance associations".[32]

The expansion of traffic and business triggered a series of problems in the management of insurance, as well as attracting real scammers. The traditional market became less secure, there was no lack of bankruptcies, but the main problem was the monopoly situation. The Bubble Act of 1720 recognized the monopoly on the insurance market for two insurance companies in the form of a public limited company,[33] the Royal Exchange Assurance and the London Assurance. The Bubble Act preserved the "ability of 'private or particular persons' to transact marine insurance", strengthening "individual underwriters in a more protected position and led to the pre-eminence of the private market at Lloyd's but prevented any form of marine insurance on to combined security". The statutory prohibition, revoked in 1824, did not however prevent the "mutual insurance associations, or clubs, as they were sometimes called, mutually insuring ships belonging to their members". Indeed, probably the monopoly situation was "one of the reasons which led to the establishment of such mutual associations".[34]

Friendly associations, known as Hull Clubs, could offer economic insurance, also because "profits were not part of the calculations in underwriting". The small size of the friendly associations made the organization agile and their local roots allowed direct knowledge of the members, and therefore not only greater control but also greater trust by the members. The friendly associations did not only deal with insurance matters, "they were place where 'men of the sea pooled their difficulties and where help (both financial and otherwise) was given in sorting things out'".[35] The expansion in size of the friendly associations led to a series of problems, for example "the owners of the better ships found that they were having to pay for the losses of inferior vessels [...]. Another problem arose from the failure of some clubs to demand sufficiently adequate advance calls. The apparent luxury of low advance calls is a speculative venture both for members and for the club

[30] E. Kimura, 'Die entstehung der Lloyd's Seeversicherungspolice' (1972) 7 Hitotsubashi Journal of Commerce and Management 1.
[31] La Torre (n 9), 110.
[32] S. J. Hazelwood, *P&I Clubs. Law and practice* (3rd edn, LLoyd's of London Press 2000), 2.
[33] Casciano (n 18), 6.
[34] Hazelwood (n 32), 2-3.
[35] Ibid., 5.

itself. For the members high supplementary calls could come as an unexpected shock whereas the traditional system of a 'once and for all' payment avoids this".

Paradoxically, the abolition of the monopoly in 1824 led to the crisis of the friendly associations "which opened the way for the formation of new insurance companies which, together with Lloyd's, competed with the clubs and eventually came to offer more competitive rates. The owners of better class ships found they could obtain better service at cheaper prices from the newly invigorated proprietary market and the clubs were left with the older badly-maintained vessels that no other underwriter would insure; the hull clubs developed into the notorious 'rust-bucket clubs' where poor hulls presented more claims on ever decreasing funds. Many hull clubs closed in the period of the early- and mid- nineteenth century".[36] But that was only the beginning of the history of the P&I Clubs: new changes put the traditional market in crisis again. Mutual insurance has found new ground precisely in technological innovation to best express the ability to respond promptly and solidly to new risks. Technological innovation led to the construction of increasingly high-performance ships and to the increase in maritime traffic, however it had also increased the responsibilities of shipowners.

The Marine Insurance Act of 1745 "had already prohibited shipowners from insuring against their liabilities for sums in excess of the value of their vessels and there then followed a rapid increase in the size and variety of such liabilities". Other measures contributed to aggravate the insurance framework, "The response from the traditional market was to provide cover for only three-fourths of such expenses up to the insured value of the vessel and to leave the shipowner uncovered in respect of one-fourth of the expenses together with any excess liability above the value of the vessel, and liabilities in respect of death, personal injury and damage to fixed and floating objects falling outside the definition of a vessel".[37] In 1846, the Fatal Accidents Act, commonly known as Lord Campbell's Act, for the first time allowed to sue for damages for the death of relatives caused by the negligence of shipowners. In 1847, the "power to harbour authorities to recover for damage to port works regardless of whether or not the damage arose from the negligence of the shipowner" was introduced. From 1880, with the Employers' Liability Act, further responsibilities were introduced: "providing for payment by employers, including shipowners, to workmen, which included crew members, injured in the course of their employment". The exponential growth of the risks for shipowners leads to the rediscovery of old hull clubs. These "were converted into 'protecting' or 'protection' clubs and new associations were formed to alleviate the new burdens". The Clubs expanded the protection to cover the new risks, but the real turning point came with the case of the *Westernhope* ship, which was lost off the coast of South Africa in 1870. Due to a diversion of the ship, "the court decided that the shipowners were not protected by the exceptions in the contract of carriage and held that they were liable for the full value of the cargo". The owner was only able to obtain a small compensation, because the loss was not covered by the regulations of the North of England Protecting Club, of which he was a member.

[36] Ibid.
[37] Ibid., 6.

The case of the Emily ship, shortly after, was resolved differently. The Emily ran aground and the cargo was lost, however "the cargo owners recovered their full losses from the shipowner on the grounds that this had not been a loss by 'perils of the sea' but was a loss by negligent navigation".[38] The policies did not cover the negligent navigation, "Shocked by the implications of these events and the potential liabilities to cargo interests because of loss consequent on deviation or negligent navigation, shipowners entered in the North of England Protection Association suggested the creation of a class designed to indemnify members against these forms of risk. The new class of cover was created and the word 'Indemnity' was added to the title of the club".[39]

Today's P&I Clubs retain many of the characteristics of the spirit of mutuality of the origins. The shipowners-members share the condition of danger and have the same interest in selecting only members worthy of belonging. The shipowners who do not meet the ethical requirements or who carry excessive risks do not access the club. The solidity of the P&I Clubs is also guaranteed through reinsurance, or the Pooling Agreement, through which the Clubs help each other mutualistically. The practice of the pooling agreement dates back to 1899[40] when the six Clubs of the so-called London Group of P&I Clubs entered into a claims sharing agreement called the "Pool", giving birth to the International Group of P&I Clubs. Maritime mutual insurance companies have a significant presence all over the world, from the United States to Canada and Japan, where the Japan Ship Owners Mutual Protection & Indemnity essentially has a monopoly position on the market. The P&I Clubs also operate in China, one of the main ones being the "China Shipowners Mutual Assurance Association", a social organization run by the Ministry of Transportation.

4. Final Suggestions

The New Silk Road poses challenges for which new or renewed approaches are needed to guarantee an economically and socially sustainable development.

Economic sustainability must deal with an increasing attention to the protection of third parties damaged by shipowners' activities and the tendency to presume the causal link between activity and damage. The reasons that support a greater attention to damaged third parties are acceptable, because they respond to the need to protect the right to compensation for damage, especially when the action of the most technologically advanced companies, often operating on a large scale, do not comply with the principles of market ethics. The use of insurance coverage may not be sufficient and, above all, it could discourage the highest risk activities. In our opinion, the insurance market, indispensable for technological development, can strengthen itself by creating a diversified insurance system by encouraging the

[38] Hazelwood (n 32), 7.
[39] Ibid.
[40] Casciano (n 18), 172.

mutual insurance sector.[41] These, if updated, would bring to the insurance market solutions that are economically sound and safe, as well as flexible and ethical. As we have seen, P&I Clubs have the ability to influence sailing standards because each insured member is also an insurer and the scope of their call is determined by the management, maintenance and operating standards that Club members adopt. Mutual insurance companies adopt rules that encourage diligent, deontological conduct, and enhance control and risk management systems that are not only in the interests of shipowners, but which can contribute to general interests. Mutualism is a formula that goes beyond the mere solution to an economic-insurance problem because it promises an idea of socially sustainable development.

The New Silk Road evoked by Beijing must also pose a question about the social sustainability of the indispensable technological development. China declares that it wants to achieve fair trade in a context of cooperation and peace. Beijing warns the "Western" world to take into account the levels of development, the political and institutional context of each State and abandon the presumption of standardizing the world with the same set of rules and values. From this point of view, China also stands as a political-institutional model that attracts, above all, the developing countries. Though, China's global significance is challenged by the dark side of human rights. Will it be possible to work on a common ground between Europe and China, for a common definition of rights?

An important part of the European identity is based on the culture of the welfare state, a form of universal solidarity that ultimately pursues the same objectives as China: a decent standard of living, adequate food, clothing, drinking water, the right to housing, to safety, work, education, health and social security. The European welfare state has found its legitimacy in the ability to provide services and create security through the social sharing of burdens and risks. However, globalization has weakened the ability of national States to dominate change and guarantee the security of their citizens. The promises of the welfare State have become precarious, undermining both confidence in the protective power of the State and "the meaning and value of internal solidarity within the national society".[42] The States of Europe, during the 20th century, lost sight of the relational and community dimension of people's lives. The great achievement of universal solidarity ended up resting on an individualistic relationship between citizen and State. The question is that the relationship between State and citizen is «one of the crisis points of the welfare state»; it is necessary to review «the conviction that the only means of social solidarity is the State, as if there were no intermediate entities between State and citizen»[43]. Beveridge wrote in 1948: "It is clear that the State must in future do more things than it has attempted in the past. But it is equally clear, or should be equally

[41] See N. de Luca, *Delle mutue assicuratrici. Art. 2546-2548* (Zanichelli and Roma Società Editrice del Foro Italiano 2006), 3: Mutual insurance, «as well as mutual aid, naturally establish a community (Gefahrengemeinschaft) among the risk bearers, in order to divide among all, according to certain proportions, the economic burden of some normally harmful events (Ausgleichgemeinschaft)"; see also T. Martello, 'Mutue (società assicuratrici)' in *Enciclopedia del diritto*, vol. XXVII (Giuffrè 1977), 394.

[42] P. Costa, 'Cittadinanza sociale e diritto del lavoro nell'Italia repubblicana' in G. G. Balandi and G. Cazzetta (eds), *Diritti e lavoro nell'Italia repubblicana* (Giuffrè 2009), 51.

[43] Ibid., 61.

clear, that room, opportunity, and encouragement must be kept for Voluntary Action in seeking new ways of social advance. There is need for political invention to find new ways of fruitful co-operation between public authorities and voluntary agencies".[44] The roots of a solidarity based on shared values of belonging, of responsible participation in the life of the community have been lost. The universal solidarity created by the State is abstract, "Unlike the qualitative mutualities of the family, union, corporation and commune, to which one belongs, adhering to their duties, rules and orderings, 'insurance provides a form of association which combines a maximum of socialisation with a maximum of individualization".[45]

In some respects, we should become "more Chinese". Chinese culture is characterized by a strong sense of belonging to the community and of responsibility towards the others. Without renouncing dignity, freedom and protection of individuals, we can receive the suggestion from China to give importance to that sense of belonging both to the economic and social spheres[46]. These values are not foreign to Europe, and the history of mutualism is proof of this. Mutual associations are a form of solidarity that puts the individual at the centre and is based on the trust and responsibility of individuals who act as part of a community. Mutualism is an interesting "model" of relationships, which, regardless of political, institutional and economic transformations, has maintained "*certains invariants de nature éthique que l'on appellera 'valeurs' (solidarité, responsabilité individuelle, égalité) et d'autres de nature fonctionnelle ou 'principes' (fonctionnement démocratique, liberté d'adhésion, absence de but lucratif)*" [47].

Indeed, mutualism is not just a movement of the past: the International Cooperative and Mutual Insurance Federation (ICMIF) is a global organization representing cooperative and mutual insurers from all over the world, with more than 200 members, representing over 2,700 organizations. In Europe, mutual aid insurances are a consistent presence and are united in the Association of Mutual Insurers and Insurance Cooperatives in Europe (AMICE).[48] In Italy, the non-profit sector code of regulations has renewed the interest in mutualism. According to the new regulations, mutual aid companies too can carry out their non-profit business activities and can participate in limited liability social enterprises as non-profit organizations. The European Parliament has more than once tried to introduce EU statutes for associations, foundations and mutual societies. The most significant result was the resolution "A statute for social and solidarity enterprises", of July 2018 which, however, was not successful. The objective of strengthening mutual associations collides with the objective problems related to the different national legal systems. However, the project has not been abandoned, as shown by a recent study commissioned by the European Parliament's Policy Department for Citizens'

[44] W. H. Beveridge, *Voluntary Action. A. Report on Methods of Social Advance* (published in 1948, new edition by Routledge 2015).
[45] P. Bennett, 'Governing environmental risk: regulation, insurance and moral economy' (1999) 23 Progress in Human Geography 189, 200-201.
[46] Bertozzi (n 3), 43.
[47] P. Toucas, 'La vertueuse mutualité: des valeurs aux pratiques' (2008) Vie Sociale 27 and *Histoire de la Mutualité et des assurances. L'actualité d'un choix* (Mutualité Française/Syros 1998).
[48] See 2020 Annual Report, <https://amice-eu.org/app/uploads/2021/06/AMICE-Annual-Report-2020-2.pdf>.

Rights and Constitutional Affairs at the request of the JURI Committee.[49] The proposal is to adopt an EU directive in order to identify the minimum common requirements for the assignment of the legal status of "European non-profit, third sector and social economy organization". The formula of mutualism has therefore come back to be of interest in the 21st century and is, in our opinion, an important step to reconcile development and sustainability, inclusion and dignity of people.

[49] A. Fici, 'A statute for European cross-border associations and non-profit organizations. Potential benefits in the current situation', 2021, <https://www.europarl.europa.eu/RegData/etudes/STUD/2021/693439/IPOL_STU(2021)693439_EN.pdf>.

Maritime Insurance against acts of terrorism

ALEXANDRE DE SOVERAL MARTINS*

SUMMARY: 1. Introduction. – 2. Shipping, Cruising, and the terrorist shadow. On and around a definition. – 3. Marine Insurance and terrorism. Some peculiarities. – 4. Terrorism and Insurance. Availability. – 5. Preliminary conclusions.

1. Introduction

Terrorist acts are difficult to predict, and information is scarce.[1] Recent events showed that massive damages may occur after terrorist attacks, with consequences spreading across borders. The use of massive destruction weapons (nuclear, chemical, biological and radiological – NCBR – or others) is a real menace, and with it many lives will probably be lost. Attacks involving tankers or cruising ships may have terrible results.

Cyber-attacks are on the line, too. The latter may become more frequent with the use of autonomous ships[2] and electronic documents.[3] Ransomware attacks, like the one Maersk suffered in 2017, hacking of port's cargo handling systems to divert cargo, as it happened on the Port of Antwerp a few years ago, malware introduction, location of containers with interesting cargo, theft of data, spoofing of GPS or other GNSS (Global Navigation Satellite Systems),[4] and so on, are all possible now,[5] and terrorists may use them also. Internet of Things (IoT) also increases the risk. AIS (*Automated Identification System*) and AIS-ATON (*AIS radio-based Aid to Navigation*) are vulnerable too.[6]

* Associate Professor, Univ Coimbra, IJ, FDUC, ORCID ID 0000-0001-6480-3492.

[1] J. Thomas, 'Terrorism Insurance: Issues of Policy, Regulation and Coverage', *New Appleman on Insurance* (Lexis Nexis April 2008) 348. See, on the importance of intelligence activities and not just surveillance, M. Murphy, 'Lifeline or Pipedream? Origins, Purposes, and Benefits of Automatic Identification System, Long-Range Identification and Tracking, and Maritime Domain Awareness' in R. Herbert-Burns, S. Bateman and P. Lehr (eds), *Lloyd's MIU Handbook of Maritime Security* (CRC Press 2009) 14.

[2] See S. Cooper, 'Cyber Risk, Liabilities and Insurance in the Marine Sector' in B. Soyer and A. Tettenborn (eds), *Maritime Liabilities in a Global and Regional Context* (Routledge 2019) 115, referring to the use of the ship as a 'weapon of war'. See, on the differences between MASS (Maritime Autonomous Surface Ships) and ROVs (Remote Operated Vehicles), P. Dean and H. Clack, 'Autonomous shipping and maritime law' in B. Soyer and A. Tettenborn (eds), *New technologies, artificial intelligence and shipping law in the 21st Century* (Routledge 2020) 67. For a global analysis of MASS, G. Wright, *Unmanned and Autonomous Ships. An Overview of MASS* (Routledge 2020).

[3] See, on Bolero, ess-DOCS Cargo Docs DocEx Platform, edoxOnline and Wave BL, Miriam Goldby, *Electronic Documents in Maritime Trade: Law and Practice* (2nd. ed., OUP 2019), 327 ff.

[4] Like Galileo, Glonass or BeiDou.

[5] See Cooper (n 2), 104 ff.

[6] See Wright (n 2), 135.

Terrorist groups are already targeting the shipping industry (container shipping, chemical and gas tankers, shipments of fertilizers),[7] cruising companies[8] and passenger ferries. Terrorist attacks involving tankers or cruising boats may have catastrophic consequences. There are also many ways to use ships and conveyances for other terrorist attacks.[9] Dirty bombs may be used,[10] namely, against major ports or channels. A recent event in the Suez Canal showed that interrupting maritime traffic through narrow sea lines of communication[11] may have disruptive economic effects around the World. Terrorists may own shipping companies to transport material and/or personnel,[12] or buy companies exporting goods to where they want to attack, using containers to hide weapons and explosives.[13] Crew members may have been seduced, making reliable identification issues even more important.[14]

The ship *Achille Lauro* was seized by Palestinian terrorists in 1985.[15] Meanwhile, many other attacks and menaces occurred, showing the importance of security measures concerning access to ports and ships. Some areas are usually seen as more dangerous than others (the Horn of Africa, Southeast Asia[16] and the Straits of Malacca, the Gulf of Guinea), and insurance premiums should increase in "high-risk zones" or "Areas of Perceived Enhanced Risk". In some cases, one may find "Navigation Warranty" or "Navigation Limits" Clauses in insurance contracts, "limiting the operation of the vessel within certain geographic boundaries".[17] Ships and Ports compliance with the International Ship and Port Facility Code (ISPS

[7] See C. Foster, 'Counter-Terrorism and the Security of Shipping in Southeast Asia' in N. Klein, J. Mossop and D. Rothwell (eds), *Maritime Security. International Law and Policy. Perspectives from Australia and New Zealand* (Routledge 2010), 138.
[8] See M. McNicholas, *Maritime Security: An Introduction* (Elsevier 2016), 261 ff.
[9] See, on the Houthi rebels' attacks against the Saudi frigate Al Madinah with remote-controlled boats, A. Petrig, 'Autonomous offender ships and international maritime security law', in H. Ringbom, E. Røsaeg and T. Solvang (eds), *Autonomous ships and the law* (Routledge 2021), 23, 26.
[10] See J. Dunt, *Marine Cargo Insurance* (2nd ed., Routledge 2016), 252.
[11] P. Chalk, 'Maritime Terrorism: Threat to Container Ships, Cruise Liners, and Passenger Ferries' in Herbert-Burns, Bateman and Lehr (eds), *Lloyd's MIU Handbook of Maritime Security*, 120.
[12] McNicholas (n 8), 265. See also C. Zara Raymond and A. Morriën, 'Security in the Maritime Domain and Its Evolution Since 9/11' in Herbert-Burns, Bateman and Lehr (eds), *Lloyd's MIU Handbook of Maritime Security*, 3.
[13] See, on the use of 'legal' companies by terrorist groups, L. B. Sohn, J. Noyes, E. Franckx and K. Juras (eds), *Cases and Materials on the Law of the Sea* (2nd ed., Brill 2014) 726, McNicholas (n 8), 265.
[14] See the Seafarers' Identity Documents Convention (Revised) of the International Labour Organization (SID Convention), and M. Tsamenyi, M. A. Palma and C. Schofield, 'International Legal Regulatory Framework for Seafarers and Maritime Security Post-9/11', in Herbert-Burns, Bateman and Lehr (eds), *Lloyd's MIU Handbook of Maritime Security*, 233-249.
[15] 'The Dawn of modern-day maritime terrorism': Sohn, Noyes, Franckx and Juras (n 13), 705.
[16] See D. Calley, K. Hulme and D. Ong, 'New Marine Security Threats', in D. J. Attard (gen. ed.), *The IMLI Manual on International Maritime Law*, vol. III (Oxford University Press 2016), 519.
[17] See M. Davey, J. Davey and O. Caplin, *Miller's Marine War Risks* (4th ed., Routledge 2020), 212, recalling the Navigation Limitations for Hull War, Strikes, Terrorism and Related Perils Endorsement (JW2005/001A). See also, on insurance implications of entering a port of concern, S. Jones, 'Implications and Effects of Maritime Security on the Operation and Management of Merchant Vessels' in Herbert-Burns, Bateman and Lehr (eds), *Lloyd's MIU Handbook of Maritime Security*, 97.

Code), now included in the SOLAS Convention,[18] will also be helpful to keep (some) vessels and cargo out of danger.[19]

Usage based insurance (UBI) will certainly look to the location of the ship or container,[20] and the insurance contract will be applied accordingly. But globalization makes it easier to plan and execute terrorist attacks in every Sea and Ocean.

Insurance companies are reluctant to cover risks related with terrorism. Insurance activity relies on data collection, and big numbers help insurers to identify what is at stake. Fortunately, terrorist attacks do not happen frequently, but that also makes it difficult to have calculations helping to define how much the client must pay for the coverage he applied for. Without reliable information, actuarially correct premiums are hard to find. Baird Webel made it very clear:[21] "For the insurer to operate successfully and avoid bankruptcy, it is critical to accurately estimate the probability of a loss and the severity of that loss so that a sufficient premium can be charged". Insurers argue that they are not able to "calculate the probable risk"[22] and the capital reserves that should be maintained.[23]

2. Shipping, Cruising, and the terrorist shadow. On and around a definition

The Convention for the Prevention and Punishment of Terrorism (1937) used the expression "acts of terrorism" meaning "acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public". It seems short nowadays.

Directive (EU) 2017/541 of 15 March 2017 on combating terrorism considers terrorist offences a list of acts (Article 3(1))[24] committed with one of the following

---

[18] See Chapter XI-2.

[19] See, on the ISPS Code, Z. Oya Özçayir, *Port State Control* (2nd Ed., Routledge 2015), 96 ff.

[20] See, on UBI, S. Cooper, 'Insurance and artificial intelligence' in B. Soyer and A. Tettenborn (eds), *New Technologies, Artificial Intelligence and Shipping Law in the 21st Century* (Routledge 2020), 179 ff. On 'smart containers', see F. Stevens, 'Smart Containers: The Smarter, the More Scope for Liability?' in B. Soyer and A. Tettenborn (eds), *Maritime Liabilities in a Global and Regional Context* (Routledge 2019), 72-83.

[21] B. Webel, Terrorism Risk Insurance: Issue Analysis and Legislation' in M. Palacios (ed.), *Terrorism Insurance* (Nova Science Publishers 2007), 21.

[22] J. Thomas (n 1), 39.

[23] Ibid., 49.

[24] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32017L0541>. Article 3(1): "Member States shall take the necessary measures to ensure that the following intentional acts, as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation, are defined as terrorist offences where committed with one of the aims listed in paragraph 2: (a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage-taking; (d) causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships

aims: "(a) seriously intimidating a population; (b) unduly compelling a government or an international organisation to perform or abstain from performing any act; (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation" (Article 3(2)). One might now add environmental dangers.

Terrorism is more than "ordinary" criminal activity. In my opinion, it will have the goal of causing fear and/or coerce persons or institutions, and/or political and/or ideological and/or religious motives. Private aims are usually connected with piracy[25] and armed robbery. However, different laws define terrorism in different ways,[26] and the distinction between terrorism and war risk may also be difficult to establish.

One of the most important International Cargo Clauses of the Joint Cargo Committee of the Lloyd's Market Association is the Termination of Transit Clause (Terrorism) 2009. This Clause defines terrorism as "an act of any person acting on behalf or, or in connection with, any organisation which carries out activities directed towards the overthrowing of influencing, by force or violence, of any government whether or not legally constituted or any person acting from a political, ideological or religious motive". This includes individuals acting alone.[27]

The definition of terrorism sets the coverage perimeter. When the applicable law has its own definition, conflicts may arise between statutory provisions and the policy definition.

3. Marine Insurance and terrorism. Some peculiarities

The economic importance of maritime transport for the world trade makes it a desirable target. Containers and bulk cargo (liquid or solid) may hide many things,

---

or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of explosives or weapons, including chemical, biological, radiological or nuclear weapons, as well as research into, and development of, chemical, biological, radiological or nuclear weapons; (g) release of dangerous substances, or causing fires, floods or explosions, the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life; (i) illegal system interference, as referred to in Article 4 of Directive 2013/40/EU of the European Parliament and of the Council (1) in cases where Article 9(3) or point (b) or (c) of Article 9(4) of that Directive applies, and illegal data interference, as referred to in Article 5 of that Directive in cases where point (c) of Article 9(4) of that Directive applies; (j) threatening to commit any of the acts listed in points (a) to (i)".

[25] See Article 101 of UNCLOS. See, on the distinction between piracy, terrorism, insurgency, and organized crime, H. Hansen, 'Distinctions in the Finer Shades of Gray: The "Four Circles Model" for Maritime Security Threat Assessment' in Herbert-Burns, Bateman and Lehr (eds), *Lloyd's MIU Handbook of Maritime Security*, 75 ff.

[26] See OECD, 'Definition of Terrorism by Country in OECD Countries', <https://www.oecd.org/daf/fin/insurance/terrorism-risk-insurance-programmes.htm>.

[27] See J. Dunt, 'English Law and Practice' in J. Dunt (ed.), *International Cargo Insurance* (Routledge 2012), 83.

and the logistics chain involved in maritime transport[28] is not inviolable.[29] Containers will travel by "rail, road and sea, via terminals, rail yards and road stops".[30] The vast number of persons[31] and property usually involved increase the complexity of the scenario when terrorist attacks take place somewhere along that chain. The supply chain has already been considered a network and a common enterprise.[32] Internet of Things (IoT) may be helpful in controlling cargo movements. Location based sensors and geographical information systems will become usual and useful for insurers.[33]

Many injured people (including crew members), owners of goods and owners of all kinds of property will probably ask for compensation when an attack occurs. The assured may be the owner of the ship, goods or freight, another insurer, the mortgagor and the mortgagee, shareholders, agents…[34] Terrorist attacks against Port facilities and warehouses may raise questions on coverage by marine insurance policies of goods that are not in transit.[35]

It will probably be extremely difficult to seek compensation from terrorists involved or from their organisations. Terrorists will not give good prospects on recovery.[36] Some of those affected by the attacks may, at the same time, be also wearing the defendant's shoes if others think that prevention or mitigation efforts did not take place or have been negligent.[37] Ship owners or operators[38] and their employees, port operators, port authorities and so on may be sued in search for compensation. Cyber Attacks may show that security measures where not adopted.

---

[28] For a brief description, see Sohn, Noyes, Franckx and Juras (n 13), 725.

[29] Regulation (EC) 725/2004 of the European Parliament and of the Council of 31 March 2004 has provisions on important measures concerning ship and port facility security.

[30] C. Foster (n 7), 140.

[31] 'For even a standard consignment, numerous agents and parties would be involved, including the exporter, the importer, the freight forwarder, a customs broker, excise inspectors, commercial trucking firms, railroad, dockworkers, and possibly harbour feeder craft and the ocean carrier itself': see P. Chalk, 'Maritime Terrorism: Threat to Container Ships, Cruise Liners, and Passenger Ferries', in Herbert-Burns, Bateman and Lehr (eds), *Lloyd's MIU Handbook of Maritime Security*, 119.

[32] C. Corcione, *Third Party Protection in Shipping* (Routledge 2020), 3.

[33] Cooper (n 20), 182.

[34] See S. Hodges, *Cases and Materials on Marine Insurance Law* (Cavendish 1999), 46 ff. On the types of insurable interests, see R. Thomas, 'Insurable interest – accelerating the liberal spirit' in Rhidian Thomas (ed.), *Marine Insurance: The Law in* Transition (Routledge 2014), 15-47, and Özlem Gürses, *Marine Insurance Law* (Routledge 2017) 37 ff.

[35] Dunt (n 10), 250.

[36] M. Greenberg, P. Chalk, H. Willis, I. Khiko and D. Ortiz, *Maritime Terrorism. Risk and Liability* (Rand 2006), xxii.

[37] Ibid., 68.

[38] Article 5bis(1), of the SUA Convention (Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, or Suppression of Unlawful Acts Convention), added by its 2005 Protocol, rules as follows: 'Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for management or control of that legal entity has, in that capacity, committed an offence set forth in this Convention. Such liability may be criminal, civil or administrative'. See, on the SUA Convention, R. Beckman, 'The 1988 SUA Convention and 2005 SUA Protocol: Tools to Combat Piracy, Armed Robbery, and Maritime Terrorism' in Herbert-Burns, Bateman and Lehr (eds), *Lloyd's MIU Handbook of Maritime Security*, 187-200.

Some of those measures may also reveal that security advisors failed in identifying the risks and how to prevent occurrences.

The risk to be sued must be faced with security measures evidencing reasonable care. The carrier may be held liable for not adequately controlling those who climb aboard, or for not adopting security measures against cyber-attacks. IMO, for instance, issued Guidelines on Maritime Cyber Risk Management, and the International Safety Management Code (ISM Code)[39] is beginning to be read accordingly,[40] as well as the duty to disclose all information about the risk.[41] Similar problems will arise concerning the ISPS Code when dealing with security issues,[42] because the latter "was initially conceived and implemented to address terrorist threats in the maritime domain".[43]

BIMCO (Baltic and International Maritime Council), Chamber of Shipping of America, Digital Containership Association, INTERCARGO (International Association of Dry Cargo Shipowners), InterManager, INTERTANKO (International Association of Independent Tanker Owners), ICS (International Chamber of Shipping), IUMI (International Union of Maritime Insurance), OCIMF (Oil Companies International Marine Forum), Sybass (Superyacht Builders Association) and WSC (World Shipping Council) produced and supported Guidelines on Cyber Security Onboard Ships, and USA also have the NIST Framework (NIST – National Institute of Standards and Technology's Framework for Improving Critical Infrastructure Cybersecurity). ISO and the International Electrotechnical Commission adopted the 27001 Standard on Information technologies. Port State controls will probably give attention to Cyber Risk Management when verifying how the ship is complying with requirements concerning Safety Management Systems.[44] The same may be said in what concerns SSPs.[45] Transposition of Directive (EU) 2016/1148 of 6 July 2016 concerning

[39] Now included in the SOLAS Convention.

[40] See Simon Cooper (n 2), 108. Cyber Security has been achieving increasing importance in Ship Security Plans (SSPs).

[41] See Cooper (n 2), 113 ff. See, on the importance of the ISM Code for liability issues, ANDERSON, Phil, *ISM Code. A Practical Guide to the Legal and Insurance Implications* (3rd Ed., Routledge 2015), 11.

[42] See, on the responsibilities of the shipowner/operator and master, Steven Jones (n 17), 89; at p. 108, the author compares the ISM Code and the ISPS Code and writes that 'security is concerned with the risks associated with protection against intentional acts of disturbance, damage or destruction. Safety, however, concerns the risks associated with protection against accidental disturbance, damage, or destruction'. SOLAS includes other Codes: v.g., the International Maritime Dangerous Goods Code (IMDG Code) and the Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident (Casualty Investigation Code). See, on the IMO legal framework, D. Lost-Siemińska, 'Implementation of IMO treaties not domestic legislaton' in J. Nawrot and Z. Pepłowska-Dabrowska (eds), *Maretime Safety in Europe. A Comparative Approach* (Routledge 2021), 4 ff.

[43] R. Herbert-Burns, 'Tankers, Specialized Production Vessels, and Offshore Terminals: Vulnerability and Security in the International Maritime Oil Sector' in Herbert-Burns, Bateman and Lehr (eds), *Lloyd's MIU Handbook of Maritime Security*, 139.

[44] Cooper (n 2), 108. Port State control is considered to be the 'last "safety net", in which other five main elements may be found: international IMO Conventions, ILO Conventions, flag State control, classification societies and the marine insurance industry: see 91 ff. See also Jones (n 17), 99 ff.

[45] See, on the issues addressed by SSPs, Jones (n 17), 95.

measures for a high common level of security of network and information systems across the Union will also have to be taken to consideration.[46] Maritime transport is on the list of essential services of the Directive perimeter. At the end of the day, the discussion about negligence itself will have to take place.[47]

Difficulties in determining causation are expectable. Those who suffered losses will be tempted to identify very remote events as consequences of terrorist attacks. For instance, in what concerns business losses or business interruption if an oil tanker is attacked near the coast and beaches become contaminated.

Sometimes, the environment where everything takes place will not allow to obtain evidence. If the ship sunk, it may not be easy to know what caused the explosion or the fire on board.[48]

4. Terrorism and Insurance. Availability

It has been written that, before 9.11, "insurance covering terrorism losses was normally included in general insurance policies without a specific premium",[49] and that "insurers paid little attention to terrorism risk".[50]

After those terrible events, exclusion clauses prevailed.[51] Reinsurers had a major role on that, generating a snow-ball effect.[52] P&I Clubs "excluded acts of terrorism as part of their war risks policy".[53] Understandably, one should add, because 9.11 attacks caused huge losses[54] to property insurance, casualty insurance, workers compensation insurance, life insurance, liability insurance…[55] Until then, the "industry did not even conceive of an attack that could generate such astronomical losses".[56]

Knowing exactly when an occurrence takes place according to the policy may be a difficult but important task due to per occurrence limits of liability included in

[46] Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, <https://eur-lex.europa.eu/eli/dir/2016/1148/oj>. Meanwhile, a Proposal for a new Directive is already available. See Proposal for a Directive of the European Parliament and of the Council on measures for a high common level of cybersecurity across the Union, repealing Directive (EU) 2016/1148, Brussels, 16.12.2020 COM(2020) 823 final 2020/0359 (COD).
[47] Greenberg, Chalk, Willis, Khilko and Ortiz (n 36), 72.
[48] See Davey, Davey and Caplin (n 17), 251.
[49] B. Webel, 'Terrorism Risk Insurance Legislation in 2007: Issue Summary and Side-By-Side' in M. Palacios (ed.), *Terrorism Insurance* (Nova Science Publishers 2007), 2.
[50] Thomas (n 1), 37.
[51] In many cases, regulators did not object to policy changes: see Webel (n 49), 20. The Portuguese Law on Insurance Contract (Regime Jurídico do Contrato de Seguro) allows that kind of exclusion clauses: see Article 45(2).
[52] See ibid., 1.
[53] M. Jacobsson, 'Liability and Compensation for Ship-Source Pollution' in D. Attard (gen. ed.), *The IMLI Manual on International Maritime Law*, Vol. III (Oxford University Press 2016), 305.
[54] More than 30 billion USD, according to B. Webel, 'Terrorism Risk Insurance Legislation in 2007: Issue Summary and Side-By-Side', 2.
[55] Thomas (n 1), 38, V. Afferni, 'Le coperture antiterrorism: problematiche e possibili soluzioni' (2001) Assicurazioni 267, 270.
[56] Thomas (n 1), 39.

many clauses[57]. After the 9.11 attacks, discussions emerged about terms used in insurance policies. In many cases, it was not clear if what happened with the Twin Towers should be considered one or two "occurrences".[58] The lines in exclusion clauses should not allow doubts about their meaning.

Meanwhile, some steps were taken to put the market back on tracks. Terrorism Risk Insurance Act of 2002 (TRIA), in the USA,[59] and, in the UK, Pool Re, helped to reduce the use of exclusion clauses concerning terrorism attacks.[60]

TRIA established the Terrorism Risk Insurance Program (TRIP), extended through December 31, 2027. TRIP allow reimbursements to participating insurers if certain conditions are fulfilled. On the other hand, insurers must pay a deductible. In some cases, recoup may or must take place, depending on circumstances. TRIP covers Ocean and Inland marine lines.

Pool Re was created to respond to the IRA attacks, but expanded after the 9.11 tragedy.[61] Pool Re is a mutual reinsurance company that covers losses from acts of terrorism. Marine policies are not covered. Members pay a premium to Pool Re, The Treasury will provide back-up funding if Pool Re needs it, but a premium must be paid, and payments received will have to be repaid. Computer hacking, virus, and denial of service attack seem to be excluded.

In Russia, insurers and reinsurers created the Russian Anti-Terrorism Insurance POOL (RATIP) acting as reinsurer. Cargo insurance is covered, but ships are not.

In Germany, terrorism insurance policies were made available by a private insurer, but with government support.[62] The insurer is called Extremus Versicherungs-AG, and only covers sums above 25 M. Euro.

In France, the GAREAT (Gestion de l'Assurance et de la Réassurance des Risques Attentats et Actes de Terrorisme) works as a co-insurance pool, providing their members with co-reinsurance. The CCR (Caisse Centrale de Réassurance) provides cover to GAREAT. CCR is a state-owned reinsurance company. Liability of sea transporter when travelling by sea is not covered.

In Spain, the Consorcio de Compensación de Seguros (CCS) is a public institution that covers terrorism risks, acting both as direct insurer and as guarantee fund for private insurers. However, marine and cargo lines of business are excluded.

---

[57] See, on problems related with 9.11 events, M. Lathrop, 'Insurance Coverage Issues That Emerged from the World Trade Center Attacks' in *New Appleman on Insurance Law Library Edition* (LexisNexis 2009) 70.

[58] Greenberg, Chalk, Willis, Khilko and Ortiz (n 36), 70.

[59] See the AIMU (American Institute of Marine Underwriters) Endorsement for Open Policies (Cargo) Strikes, Riots & Civil Commotions (Form 12A): 'The insurance also covers: […] (3) Physical loss or damage to the property insured directly caused by the act or acts of one or more persons, whether or not agents of a sovereign power, carried out for political, terroristic or ideological purposes […]', and S. Rible, 'United States Law and Practice', in Dunt (ed.), *International Cargo Insurance*, 230.

[60] In Spain, ETA's terrorism caused the inclusion of terrorism in a government-owned reinsurer since 1954: see Baird Webel, 'Terrorism Risk Insurance: Issue Analysis and Legislation', 21.

[61] See Baird Webel, 'Terrorism Risk Insurance: Issue Analysis and Legislation', 21. Pool Re was a reinsurance company in which the UK Government was also involved.

[62] Baird Webel, 'Terrorism Risk Insurance: Issue Analysis and Legislation', 21.

Australia created the ARPC (Australian Reinsurance Pool Corporation), a public entity providing reinsurance for insurers covering terrorism risk. Unfortunately, marine insurance is excluded.

Institute Cargo Clauses (A) still excludes cover for loss, damage or expense "caused by any act of terrorism" (Clause 7.3.) or "caused by any person acting from a political, ideological or religious motive" (Clause 7.4). The latter will probably apply to "lone wolfs".[63] Overlapping definitions should be avoided if they lead to different results.[64]

However, the Institute Strikes Clauses (Cargo) already provides cover for loss or damage caused by "any act of terrorism" (Clause 1.2),[65] and by "any person acting from a political, ideological or religious motive", although limited by the Transit Clause (Clause 5).[66] Cover of loss or damage to the Vessel caused by any terrorist is also provided by Institute War and Strikes Clauses (1.5 and 1.6).

Coverage for NCBR attacks is rare.[67] One of the exclusions of the Institute Cargo Clauses (A) (Clause 4.7) rules as follows: "[In no case shall this insurance cover] loss damage or expense directly or indirectly caused by or arising from the use of any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter". Similar exclusions appear in the Institutes Strikes Clauses (Cargo) (Clause 3.9) and in Institute War and Strikes Clauses (Clause 3.8). In fact, exclusions in maritime insurance usually include chemical, biological or electromagnetic weapons.[68]

Also, cyber-attacks will probably not be covered if the Joint Cargo Committee Cyber Exclusion and Write-Back Clause (CL437), with paramount nature, has been adopted.

Concerning liability for oil pollution damage, P&I Clubs have been certifying that "cover is in place under the Civil Liability Conventions for damage resulting

---

[63] Davey, Davey and Caplin (n 17), 144.

[64] Ibid., 144; at 150, the author writes: 'The potential overlap between war and terror needs only to be resolved where either the recoverability for losses between each differs, or where one is insured and the other excluded'.

[65] For an analysis of Clause 1.2. as it was at the time they wrote, see, N. Geoffrey Hudson/Tim Madge/Keith Sturges, *Marine Insurance* Clauses (5th Ed., Routledge 2012), 351, and F. D. Rose, *Marine Insurance: Law and* Practice (2nd Ed., Routledge 2013) 372 ff.

[66] See Dunt (n 10), 246. Davey, Davey and Caplin (n 17), 264, considered that the Institute Strikes Clause (Cargo) does not cover 'pure economic loss to which an industrial dispute may give rise' nor 'physical loss or damage to the cargo due to delays'.

[67] Thomas (n 1), 54.

[68] Dunt (n 27), 84, recalling the 2003 Institute Radioactive Contamination, Chemical, Biological, Biochemical and Electromagnetic Weapons Exclusion Clause (CL 370); Rible (n 59), 230-231, recalling the AIMU (American Institute of Marine Underwriters) Endorsement for Open Policies (Cargo) Strikes, Riots & Civil Commotions (Form 12A), and the AIMU Cargo Clauses 2004 All Risks (A/R), Clause 4A(2), F. Siccardi, 'Italian Law and Practice' in Dunt (ed.) *International Cargo Insurance*, 292, recalling the Institute Extended Radioactive Contamination Exclusion Clause 01/11/2002, and J. Bartels, 'German Law and Practice' in Dunt (ed.) *International Cargo Insurance*, 346, recalls Clauses 2.4.1.4. and 2.4.1.5. of the Deutscher Transportversicherer Verband (DTV, or cargo insurer's association) Cargo Conditions. The origins of the Institute Radioactive Contamination, Chemical, Biological, Biochemical and Electromagnetic Weapons Exclusion Clause (CL 370), also known as 'RACE' Clause, may be found in Dunt, *Marine Cargo Insurance*, 251 ff.

from acts of terrorism […] subject to the requirement that the shipowner has war risks cover on standard terms with a separate limit for P&I liabilities".[69] However, in most cases, terrorism risks become excluded in what concerned hull insurance and property and indemnity insurance[70]. In fact, one must consider that ships, cargo, lives and so on may have been treated differently in the contract.

The unavailability (or reduced/too expensive availability) of voluntary insurance coverage may be dealt with in many ways:

a) By imposing insurance coverage through mandatory legal provisions (with or without limits on the amounts covered, and with or without ruling on premiums)[71];

b) By providing public support (reimbursements) to insurance companies offering terrorism coverage[72] (with or without a deductable, with or without recoupment, with or without liability caps), the Government becoming the "insurer of last resort";[73]

c) By providing other kinds of economic incentives to make coverage available (tax incentives;[74] etc.);

d) By creating insurance pools/funds,[75] funded by industry contributions and/or tax-payer's money;

e) By risk securitization, using terrorism catastrophe bonds (cat bonds);[76]

f) Using co-insurance, eventually with Economic Interest Grouping.

Of course, two or more of these solutions may be coordinated. However, it has been already said that excessive Government intervention could be counterproductive, as it would not stimulate private sector alternatives.[77]

If coverage is available, additional decisions may be taken. Should premium amounts be limited? What about other exclusions (nuclear incidents exclusions, for example)? And who will have the right to reimbursement, if that is the case?

Compulsory insurance may increase demand for insurance and help the market to work. In what concerns passenger liability, the 2002 Athens Convention[78] has

---

[69] Jacobsson (n 53), 305.

[70] Michael Greenberg/Peter Chalk/Henry Willis/Ivan Khilko/David Ortiz, *Maritime Terrorism: Risk and Liability*, 70.

[71] In Belgium, some fire insurance policies, among others, must cover terrorist attacks: see M. Fontaine, *Droit des Assurances* (5e éd., Larcier 2016), 347 and 351.

[72] See the Terrorism Risk Insurance Act (USA, 2002).

[73] Greenberg, Chalk, Willis, Khilko and Ortiz (n 36), 71.

[74] See A. Gerrish, 'Terror CaTs: TRIA's Failure to Encourage a Private Market for Terrorism Insurance and How General Securitization of Terrorism Risk May Be a Viable Alternative' (2011) Washington and Lee Law Review 1825, 1852 ff.

[75] After 9.11 attacks, the USA Congress passed the Air Transportation Safety and System Stabilization Act (ATSSA), creating a Victim Compensation Fund. Damages recoverable were limited (§ 408(a)(1)). In France, Article L 422-1 of the *Code des Assurances* rules on a *fonds de garantie des victimes des actes de terrorisme et d'autres infractions*.

[76] Gerrish (n 74), 1856. Cat bonds are used by insurers and reinsurers 'to hedge the risk of very large losses' and 'are the largest part of the insurance-linked securities market': A. Alvarez, *Hedging Hurricanes. A Concise Guide to Reinsurance, Catastrophe Bonds, and Insurance-Linked Funds* (2nd Ed., Alvarez & Associates 2017), 28.

[77] Afferni (n 55), 272.

[78] In fact, the Athens Convention 1974 as amended by 2002 Protocol.

provisions on compulsory insurance that include terrorism risk. But the liability of the carrier under the Athens convention is related with "failures to protect the passengers".[79] The 1992 CLC Convention, also requires shipowners to cover liability by insurance.[80] However, under Article III(2),[81] the shipowner is exempt from liability for pollution damage caused by oil spilled from the ship as a result of an incident if he proves that "the damage was wholly caused intentionally by a third party", and that "appears to cover acts of terrorism".[82]

5. Preliminary conclusions

If the market does not work, pools involving insurance and reinsurance companies, and eventually other interested parties and States, are one of the most efficient ways of dealing with mass litigation that may occur after a terrorist attack. Several countries have adopted that kind of approach. Payments will be done after the attack according to some criteria. When and how the State will be called to pay its share may change from one country to another.

However, limiting coverage to national risks or excluding it in what concerns maritime risks[83] makes those kinds of alternatives quite useless when we talk about terrorism at sea.

Probably, the best available solution for those cases would be to reach an international agreement or convention to create a Fund that might be filed for compensation when insurance is not available.

Choices will have to deal with market inefficiency. Some alternatives may create incentives to stay still and not to spend money on risk prevention or risk mitigation. The conflict between a Security Culture and a Compliance Culture[84] may also have consequences in courts. Anticipating and planning is crucial. As Steven Jones wrote, "[i]t is likely that after an event, insurers may start to ask some rather searching questions – especially if the P&I Association is facing damages or compensation claims".[85]

[79] E. Røsæg, 'Passenger liabilities and insurance: Terrorism and war risks' in R. Thomas (ed.), *Liability regimes in contemporary maritime law* (Routledge 2014), 218.
[80] Article VII(1).
[81] 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 Civil Liability Convention, or 1992 CLC). It is supplemented by the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the 1992 Fund Convention). There is also a 2003 Supplementary Fund Protocol.
[82] See Jacobsson (n 53), 300.
[83] It seems to be the case in Belgium: see Marcel Fontaine, *Droit des Assurances*, 349.
[84] See Wayne Talley, *Maritime Safety, Security and Piracy* (Informa Law 2008), 84.
[85] Jones (n 17), 112.

Unmanned Vessels and Civil Liability in the Field of Maritime Traffic

Enrico Antonio Emiliozzi*

1. Introduction

The increasing intensification of maritime trade, the definition of new trade routes such as the new Maritime Silk Road and the growing technological development also applied to maritime transport[1] have increased maritime security risks.

In this context, the aim of this paper is to analyze one of the most important problems arising, that of the "liability of unmanned vessels" with a specific focus on the Italian legislation.

Technological progress has influenced and changed not only admiralty law, but also shipping. Indeed, there is a particular focus on autonomous vessels in terms of civil liability and compensation for loss or damage during transport. Hence the on-going debate about the use of artificial intelligence (AI) within the maritime sector, on unmanned vessels and unmanned ships.[2]

Before we talk about civil liability concerning autonomous ships, it is important to determinate which vessels belong to this category.

Unmanned ships are broad category that includes both remote controlled ships and autonomous ones. Both can be identified by the fact that there are no personnel on board. However, the former is remotely controlled by an operator in a shore-based control station; while the latter has been programmed by an operator before sailing.[3]

---

* Associate Professor of Private Law, University of Macerata.

[1] The growing importance of the technology has also been affirmed by the Chinese government in the launch of the "Vision for Maritime Cooperation under the Belt and Road Initiative" calling States to intensify cooperation in the field of unmanned vessels, <http://www.xinhuanet.com/english/2017-06/20/c_136380414.htm>.

[2] P. Zampella, 'Navi autonome e navi pilotate da remoto: spunti per una riflessione' (2019) Diritto dei trasporti 584; A. Caligiuri, 'A New International Legal Framework for Unmanned Maritime Veichles?' in A. Caligiuri, *Legal Technology Transformation a Practical Assessment* (Editoriale Scientifica 2020), 99.

[3] The IMO Maritime Safety Committee (MSC) considered varying degrees of autonomy defining four categories: 1) crewed ships with automated processes and decision support, in which there is seafarers on aboard ready to operate and control the system and functions that could be automatized; 2) a remotely controlled ship with seafarers on board in which the ship is controlled remotely; 3) a remotely controlled ship without seafarers on board in which the ship is controlled remotely but without seafarers on board; 4) fully autonomous ships, in which the ship operative system is

European Parliament Resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics,[4] at para. 24, stresses "that autonomous transport encompasses all forms of remotely piloted, automated, connected and autonomous ways of road, rail, waterborne and air transport, including vehicles, trains, vessels, ferries, aircrafts, drones, as well as all future forms of developments and innovations in this sector".

The use of autonomous vehicles is rapidly increasing, especially in the maritime sector, more specifically autonomous cargo ships rather than the carrying passengers.

Autonomous cargo ships have obvious advantages in the field of maritime transport.[5] The use of autonomous ships is expected to significantly reduce incidents at sea that would otherwise be caused by human error, reduce pollution as there are no seafarers on board, and reduce costs. In the event of piracy at sea, the absence of seafarers on board can be an added benefit, as it prevents hostage-taking. In addition, unmanned ships are suitable for use in dangerous and complex situations, as their use increases emergency response eliminates any danger for the crew.[6]

Some scholars believe that vehicles with advance technology systems can also be used extensively on cruise ships as seafarers can limit their activities to checking the operation of machinery and other on-board equipment, verifying the absence of alarm signals, and monitoring the correct functioning of automatic control systems.[7]

On the other hand, there are others[8] who express concern about the possibility of using unmanned ships, particularly remotely controlled ships for transportation. Article 1679 Italian Civil Code states that when passengers are transported, there is a duty to take them from one place to another and to supervise their safety.[9] These duties are the sole responsibility of the ship's captain and cannot be transferred to the operator, who controls the ship remotely[10].

programmed to be completely autonomous with every single decision or action to take thanks to the software (<https://www.imo.org/en/MediaCentre/PressBriefings/Pages/08-MSC-99-MASS-scoping.aspx>).

[4] European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017IP0051&from=IT>.

[5] Zampella (n 2) 588; V. Corona, 'Le obbligazioni del vettore nel trasporto di cose con navi autonome o pilotate da remoto)' (2019) Diritto dei trasporti 520

[6] L. Ancis, 'Navi pilotate da remoto e profili di sicurezza della navigazione nel trasporto di passeggeri' (2019) Diritto dei trasporti 435.

[7] Ibid 428.

[8] R. Tranquilli Leali, 'La tutela della sicurezza dei passeggeri nel trasporto marittimo tra comandante della nave e pilota da remoto' (2019) Diritto dei trasporti 467.

[9] S. Pollastrelli, 'La sicurezza delle navi passeggeri' in M.P. Rizzo and C. Ingratoci (eds), *Sicurezza e libertà nell'esercizio della navigazione* (Giuffrè 2014), 113.

[10] Tranquilli Leali (n 8) 468, that sates: "It is difficult to qualify someone as captain, when is not able to acquire all the obligations because is not physically present in the who are assigned to the captain, in his dual capacity as head of the traveling community and head of the expedition and resides in his ability and capacity to command".

2. Defining an "unmanned vessel"

The question of liability for loss or damage caused by unmanned vessels cannot be analysed before until it is established that the so-called unmanned vessels or unmanned ships can be define as vessels.

Art. 136(1) Italian Navigation Code states: "a ship is any seagoing vessel and seaborne craft built or adapted for use of means of transport, for towing, fishing, for recreation or for any other purpose".

The MARPOL Convention has a definition for ship as "a vessel of any type whatsoever operating in the marine environment".[11] International Collision Regulations (COLREGs) defines a "vessel" as "every description of watercraft, including non-displacement craft, wing-in-ground (WIG) craft and seaplanes, used or capable of being used as a means of transportation on water".[12] Also in the UN Convention on Conditions for Registration of Ships, a "ship" is defined as "any self-propelled sea going vessel used in international seaborne trade for the transport of goods, passengers, or both".[13] In the Hague Rules, "ship" is defined as "any vessel used for the carriage of goods by sea".[14] In the SUA Convention a ship is "a vessel of any type whatsoever not permanently attached to the sea-bed".[15] Also in the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention), the definition of "vessel" is "any waterborne or airborne craft of any type whatsoever and that includes air cushioned craft and floating craft, whether self-propelled or not".[16]

With all these definitions, it can be said that the national legislation, as well as the international one, offers a rather broad definition of the term ship, which includes unmanned vessels as well.[17]

3. Liability of unmanned vessels and compensation for collision damage

One of the complex issues related to unmanned vessels is civil liability for loss or damage[18].

[11] International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), Article 2(4).

[12] Convention on the International Regulations for Preventing Collisions at Sea of 1972 and following amendments, Rule 3(a).

[13] UN Convention on Conditions for Registration of Ships, 7 February 1986, Article 1.

[14] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("Hague Rules"), 25 August 1924, Article 1(d).

[15] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988, Article 1.

[16] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention), 13 November 1972, Article III(2).

[17] R. Lobianco, 'Navi senza equipaggio e profili di responsabilità*' Responsabilità civile e previdenza* (2021) 759; Zampella (n 2) 597; Corona (n 5) 525.

[18] A. Xerri, 'Riflessioni in tema di responsabilità nel contesto dell'automazione navale' (2019) Diritto dei trasporti 554.

The subject of collisions between vessels[19] is an international one and is described in the Brussels Collision Convention of 1910, which was implemented by Italian Law No. 606 of 12 June 1913, which come into forced on 2 July 1913.[20] The national legislation, through the Navigation Rules, has transposed the international rules of Law on Collisions between Vessels in Articles 482-488 Italian Navigation Code.[21]

In any case the rules of the Brussels Convention can be applied to collision between vessels and inland waterway vessels as long as they are from different countries regardless of the place where the collision happened.[22]

Proportional liability in maritime collisions at sea is found in Italian Navigation Code as follows[23]:

> Art. 482: "If the collision is accidental, if it is caused by force majeure, or if the cause of the collision is left in doubt, the damages are borne by those who have suffered them."
>
> Article 483: "If the collision is caused by the fault of one of the vessels, liability to make good the damages attaches to the one which has committed the fault". Lastly, Article 484 Italian Navigation Code states "If two or more vessels are in fault the liability of each vessel is in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability is apportioned equally. In respect of damage caused by death or personal injury, the vessels in fault are jointly liable as well as severally liable to third parties."

As mentioned before, the national legislation is guided by the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels of 1910.[24]

---

[19] See S. Pollastrelli, 'L'urto di navi' in A. Antonini (ed.) *Trattato breve di diritto marittimo*, vol. III (Giuffrè Editore 2010) 233; G. Romanelli-G. Silingardi, 'Urto di navi o aeromobili' in *Enciclopedia del diritto*, vol. XLV (Giuffrè Editore 1992) 906; G. Righetti, 'Urto di navi' in *Digesto delle discipline privatistiche – Sezione commerciale*, vol. XVI (UTET 1999) 324; G. Righetti, 'Urto di nave e di aeromobile' in *Novissimo digesto italiano*, vol. XX (UTET 1975) 190; E. Spasiano, 'Urto di navi e di aeromobili' in *Enciclopedia giuridica*, vol. XXXII (Istituto della Enciclopedia Italiana 1994) 1; F. Berlingieri, *Le convenzioni internazionali di diritto marittimo e il codice della navigazione* (Giuffrè Editore 2009) 391.

[20] S. Pollastrelli, 'La Convenzione di Bruxelles del 1910 in material di urto di navi. Legge applicabile e competenza giurisdizionale' in *Scritti in onore di Francesco Berlingieri*, (2010) Il Diritto marittimo 799.

[21] Ibid.

[22] Ibid 802, in accordance with the following provisions, in whatever waters the collision takes place.

[23] Pollastrelli (n 20) 234.

[24] Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels (Brussels Collision Convention), 23 September 1910; see Articles 2 ("If the collision is accidental, if it is caused by *force majeure*, or if the cause of the collision is left in doubt, the damages are borne by those who have suffered them. / This provision is applicable notwithstanding the fact that the vessels, or any one of them, may be at anchor (or otherwise made fast) at the time of the casualty.") 3 ("If the collision is caused by the fault of one of the vessels, liability to make good the damages attaches to the one which has committed the fault") and 4 ("If two or more vessels are in fault the liability of each vessel is in proportion to the degree of the faults respectively committed. Provided

In other words, the presumption of liability for damages caused by collision between vessels is based on subjective elements, intent or negligence which is the main point in which the non-contractual liability is based.

Having examined the elements that constitute the liability for damage caused by collisions between vessels, it is necessary to examine whether they can be also applied to unmanned ships. It is important to distinguish between two possible categories for unmanned ships: a remotely controlled ship without seafarers on board and fully autonomous vessels, in which the vessel's operating system is programmed so that thanks to the software, it takes each decision or action fully autonomously.[25]

4. Liability of remotely operated vessels

Remote controlled ships are the ones without seafarers on board where the control of said ship is carried out by a third party that is not on board but keeps the ship in check by means of modern remote transmission systems.

The doctrine argues that unmanned ships without seafarers on bard, but which are remotely controlled, are equivalent to ships with a crew on board.[26] Therefore, it can be said that the ship remote operator differs from regular ships only in that the person commanding the ships is not on board, but at a control station on shore. Due to constant human activity present during the voyage, the international and national legislation on liability in case of accidents at sea can be applied to remotely controlled ships.

In this sense, strict liability cannot be applied to remotely controlled vessels, since the person piloting the vessel, to whom harmful events must also be attributed, can be clearly identified. The captain of the ship is the person who remotely controls it and is therefore responsible for the accidents that occurred during the voyage.

There are other opinions that argue that the remote operator cannot be consider the captain of the ship.[27] Precisely because he is not physically on the ship, he is not able to assume all the duties as a captain; for instance, the ship organization and its passengers.

5. Liability for autonomous vessels

---

that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability is apportioned equally. […]").

[25] R. Veal and M. Tsimplis, 'The integration of unmanned ships into the lex maritima' (2017) Lloyd's Maritime and Commercial Law Quarterly 313.

[26] Lobianco (n 17) 763; C. Severoni, 'Prime osservazioni in tema di responsabilità derivante da urto con navi senza equipaggio' (2018) Diritto dei trasporti 95.

[27] Tranquilli Leali (n 7) 468; Corona (n 5) 532; U. La Torre, *Comando e comandante nell'esercizio della navigazione*, Napoli, 1997; U. La Torre, 'Navi senza equipaggio e shore control *operator*' (2019) Diritto dei trasporti 487.

Reference has been made[28] to the variety of accidents that can happened on autonomous vessels (fully autonomous vessels with an operational system programmed by a human operator from the beginning of the voyage). In this case, the collision could be caused by software or hardware malfunction. A software malfunction is when the program gives the wrong instructions despite the correct data, resulting into a collision. While malfunction in the ship's structure, e.g. sensors or mechanical parts, are caused by the hardware.

Any time an accident is caused by an autonomous vessel, the question is whether or how a person can be held responsible for the loss or damage.

One could impose strict liability on the ship owner for the damage caused by the ship, i.e., provide for liability of the ships themselves by attributing responsibility to those who developed the software or hardware.

Some authors[29] claim that even in the case of completely autonomous ships, where there is no remote operator to take over the duties of a captain and the ship is therefore entirely controlled by software, it is possible to hold the ship owner responsible for the damage caused by the ship.

Others argue that even attempting to name the ship owner as the responsible is difficult because the ship's malfunctions are beyond his control.[30] But the current legislation does not allow the ship to be given a legal status.

It seems that liability must be borne by the manufacturer and/or the software programmer, although the doctrine[31] does not hesitate to point out that it is difficult to apply civil liability in the case of accidents involving autonomous vessels. The International Convention for the Safety of Life at Sea, in particular Rule 2 of COLREGs mentions the rules for a good maritime practice, and it seems that these cannot be applied to autonomous vessels controlled by artificial intelligence; "ship manoeuvring and directional control cannot not be understood as a purely technical fact that can also be performed by a remote operator in the face of danger or challenge at sea. Ship manoeuvring and directional control require a symbiosis between man and ship, i.e. an actual human presence on board, with the appropriate technical-professional competence, able to evaluate with their own eyes each and every element with a complete vision, and to asses on the spot the security measures to be taken in order to protect everyone on board as well as the cargo".[32] It is still believed that all these activities can be only carried out by the captain and certainly not by a remote operator or a software. Article 295(1) Italian Navigation Code[33] only gives the captain of the vessel the ability to manoeuvre the vessels and determine its direction.

[28] Lobianco (n 17) 763
[29] Severoni (n 26) 97.
[30] Lobianco (n 17) 764.
[31] Lobianco (n 17) 765; Tranquilli Leali (n 7) 474.
[32] Tranquilli Leali (n 7) 475.
[33] Tranquilli Leali (n 7) 475.

The software manufacturer/programmer can only be held liable for damage caused by a defective product on the basis of legislation, and this was first introduced by Directive 85/374/EEC (Product Liability Directive).[34]

However, doctrine has established that the legislation on liability for defective products is not capable of protecting the plaintiff, since it is up to him to prove the existence of a defect in the product, the damage cause by it and the connection between the two.[35] It is clear that it is difficult for the person affected by an accident caused by autonomous vessels to prove a fault, given the high technology behind the product.[36]

EU law has warned about the difficulty of proving civil liability in the case of use of artificial intelligence. For this reason, on 2 October 2020, the European Parliament adopted a Resolution with recommendations to the Commission on a civil liability regime for artificial intelligence,[37] where its para. 8 refers to the Product Liability Directive by name as damage caused by a defective product. Nevertheless, it should be revised to adapt it to the digital world and to address the challenges posed by emerging digital technologies, so as to ensure a high level of effective consumer protection as well as legal certainty for consumers. The compensation protection service of anyone who is affected by the use of AI should take place in accordance with said Resolution through the modification of existing Civil liability regimes. As far as the damages caused by high-risk AI-system[38] such as autonomous ships driven by software, in the European Parliament and the Commission Rules, Article 4 on civil liability regime for artificial intelligence, it is intended the introduction of strict liability. In Article 4(1) the operator of a high-risk AI-system shall be strictly liable for any harm or damage that was caused by a physical or virtual activity, device or process driven by that AI-system. Additionally, Article 4(3) establishes: "Operators of high-risk AI-systems shall not be able to exonerate themselves from liability by arguing that they acted with due diligence or that the harm or damage was caused by an autonomous activity, device or process driven by their AI-system. Operators shall not be held liable if the harm or damage was caused by force majeure".

The starting point for compensation for damages caused by autonomous vessels should be the Product Liability Directive, as this act has proven to be an effective means of getting compensation for harm triggered by a defective product for over 30 years. This directive should, in the view of the European Parliament, continue

[34] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31985L0374>.

[35] Lobianco (n 18) 764.

[36] S. Bevilacqua, 'Porti e automazione: spunti in materia di responsabilità delle imprese di sbarco' (2019) Diritto dei trasporti 557.

[37] European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)), <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html>.

[38] For the purpose of the Regulation. Article 3(a) AI-system' means a system that is either software-based or embedded in hardware devices, and that displays behaviour simulating intelligence by, inter alia, collecting and processing data, analysing and interpreting its environment, and by taking action, with some degree of autonomy, to achieve specific goals.

to be used for civil liability claims against the manufacturer of a defective AI-system.

Pending the envisaged civil liability regime for AI, it must be considered that hardware or software malfunctioning in an autonomous vessel constitutes a case of fault with liability of the manufacturer.

In order to ensure compensation for damage caused by collision with software controlled autonomous vessels, we believe it would be desirable to introduce a liability system similar to that provided for by Article 2054(4) Italian Civil Code, which may lead to a liability to compensate the ship owner and the driver for damage caused by design or production defects of the vehicle, including defects and any possible malfunctions of the software, with the possibility for them to seek recourse against the ship and/or software manufacturer if they prove that the manufacturing defect was the actual direct cause of the damage.

AssIDMer – Cahiers de l'Association Internationale du Droit de la Mer
Papers of the International Association of the Law of the Sea

1. G. Andreone, A. Caligiuri, G. Cataldi (dir.), *Droit de la mer et émergences environnementales / Law of the Sea and Environmental Emergencies*, 2012

2. José Manuel Sobrino Heredia (dir.), *La contribution de la Convention des Nations Unis sur le droit de la mer à la bonne gouvernance des mers et des océans / La contribución de la Convención de las Naciones Unidas sobre el Derecho del Mar, a la buena gobernanza de los mares y océanos / The contribution of the United Nations Convention on the Law of the Sea to good governance of seas and oceans*, 2014

3. Angela Del Vecchio, Fabbrizio Marrella (ed.), *International Law and Maritime Governance. Current Issues and Challenges for Regional Economic Integration Organizations / Droit international et gouvernance maritime défis actuels pour les organisations internationales d'intégration économique / Diritto internazionale e governance marittima. Problemi attuali e sfide per le organizzazioni di integrazione economica regionale*, 2016

4. Andrea Caligiuri (ed.), *Governance of the Adriatic and Ionian Marine Space*, 2016

5. N. Ros, F. Galletti (dir.), *Le droit de la mer face aux "Méditerranées". Quelle contribution de la Méditerranée et des mers semi-fermées au droit international de la mer?*, 2016

6. Andrea Caligiuri, *L'arbitrato nella convenzione delle Nazioni Unite sul diritto del mare*, 2018

7. Gabriela A. Oanta (ed.), *Law of the Sea and Vulnerable Persons and Groups*, 2019

8. Simone Carrea, *I rapporti tra Stati e imprese nel diritto del mare tra attribuzione della bandiera delega di funzioni e sponsorship*, 2020

9. Giorgia Bevilacqua (ed.), *Sicurezza umana negli spazi navigabili: sfide comuni e nuove tendenze / Human Security in Navigable Spaces: Common Challenges and New Trends*, 2021

AssIDMer Members have a right to 50% reduction in the price of the volumes published in the "*Cahiers de l'Association Internationale du Droit de la Mer / Papers of the International Association of the Law of the Sea*" by Editoriale Scientifica.

Finito di stampare nel mese di dicembre 2021
presso la *Grafica Elettronica* - Napoli

On the cover: *Fleet of Zheng He* (stamp from the People's Republic of China 2005)

ISBN 979-12-5976-240-5