

## The Italian exclusive economic zone

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‘Che vi sia, ciascun lo dice;  
dove sia, nessun lo sa’  
(Metastasio, *Demetrio*, act II, scene III, 1731)

### 1. *A step forward?*

It seems that, as a consequence of Law No 91 of 14 July 2021,<sup>1</sup> the process towards the establishment of an Italian exclusive economic zone<sup>2</sup> has taken a step forward. If it were really so, it would be in total contradiction with the policy adopted by the Italian government in the last forty years, that is, to *de facto* passively oppose any attempt to establish exclusive economic zones in the Mediterranean Sea (so-called eez-phobia<sup>3</sup> or, as the Roman jurists said, *horror oeconomicae exclusivae zonae*).<sup>4</sup>

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<sup>1</sup> Gazzetta Ufficiale della Repubblica Italiana No 148 (23 June 2021). On the law see A Leandro (ed), *La zona economica esclusiva italiana: ragioni, ambito, delimitazioni e sfide* (Cacucci 2021) with contributions by A Leandro, I Di Stasio, L Schiano di Pepe, F Caffio and D Bosio.

<sup>2</sup> On such a zone see, in the Italian legal literature, B Conforti (ed), *La zona economica esclusiva* (Giuffrè 1983); A Del Vecchio, *Zona economica esclusiva e Stati costieri* (Le Monnier 1984); G Camarda, *Traffici marittimi, zona economica esclusiva e cooperazione transfrontaliera nei mari chiusi e semichiusi* (Lega Navale Italiana 1988); U Leanza, L Sico (eds), *Zona economica esclusiva e Mare Mediterraneo*, (ESI 1989); and, with special regard for the Italian position, T Treves, *Il diritto del mare e l'Italia* (Giuffrè 1995); T Treves, ‘Italy and the Law of the Sea’ in T Treves, L Pineschi (eds), *The Law of the Sea – The European Union and its Member States* (Martinus Nijhoff 1997) 341.

<sup>3</sup> The expression ‘zone économique exclusive-phobie’ has been used by T Scovazzi, ‘La zone de protection écologique italienne dans le contexte confus des zones côtières Méditerranéennes’ (2005) 10 *Annuaire du Droit de la Mer* 218.

<sup>4</sup> *Corpus iuris civilis* (I cannot find where).



However, there are several reasons to doubt that any substantive change in this consolidated policy has taken place so far. This paper will try to explain why.

## 2. *Much hesitation*

Several States have already established their exclusive economic zones in the Mediterranean Sea, namely Morocco in 1981, Egypt in 1983, Syria in 2003, Cyprus in 2004, Israel and Lebanon in 2011, France in 2012, Spain in 2013, Algeria in 2018 and Croatia in 2021, or have adopted legislation for the future establishment of such a zone, namely Tunisia in 2005,<sup>5</sup> Montenegro in 2007 and Libya in 2009.<sup>6</sup>

It is clear that the different attitude of Italy was (is?) strictly related to the special geographical situation of the Mediterranean Sea and the position of Italy inside it. As there is no point in the Mediterranean Sea that is located at a distance of more than 200 NM from the nearest land or island, if all the coastal States established their own exclusive economic zones, the high seas would completely disappear in the Mediterranean. One possible explanation of the Italian position could be the concern for freedom of navigation<sup>7</sup> and freedom of military exercises<sup>8</sup> in view

<sup>5</sup> Tunisia has established in 1951 a fishing zone, delimited according to the 50-meter depth criterion (Decree of 26 July 1951, as modified by Law No 63-49 of 30 December 1963).

<sup>6</sup> Libya has established in 2005 a 62-mile fisheries protection zone (General People's Committee Decision No 37 of 24 February 2005).

<sup>7</sup> 'The possible establishment of exclusive economic zones within the Mediterranean Sea would result in a sea consisting solely of the exclusive economic zones of the coastal states. But this is completely at odds with the geographical position of the Mediterranean, which lies at the centre of at least three very important international waterways: ... which, of course, is absolutely at odds with the risk of territorialisation, a risk inherent in the rampant evolution that the institution of the exclusive economic zone is undergoing within customary law' (U Leanza, 'Zona economica esclusiva e cooperazione marittima nel Mediterraneo', in U Leanza, L Sico (n 2) 6, translation by QIL editors).

<sup>8</sup> 'At that time [= the early eighties of the last century], within NATO, the danger had been highlighted that the proclamation of the EEZs [= exclusive economic zones] would authorise certain countries to limit foreign naval activities by making them subject to authorisation in order to protect the marine environment and fishing resources. Hence, Italy's opposition to the establishment of EEZs in the Mediterranean' (F Caffio, 'Quali confini per la nostra zona economica esclusiva' in Leandro (n 1) 77, translation by QIL editors).



of a trend towards the ‘territorialization’ of enclosed or semi-enclosed seas through coastal States’ ‘creeping jurisdiction’. In addition, Italy could possibly fear that the establishment of exclusive economic zones (or fishing zones) by some other Mediterranean States would determine heavy social repercussions on certain fishing activities that are carried out by vessels flying the Italian flag in waters closer to the coasts of such other States.<sup>9</sup> However, it is not important to elaborate here on the reasons why Italy was (is?) basically against the 200-mile exclusive economic zone and whether they are persuasive.<sup>10</sup> The point is whether this attitude has now changed.

### 3. *Immobility and reaction*

After the adoption of the United Nations Convention on the Law of the Sea (Montego Bay, 1982),<sup>11</sup> it became evident that its provisions on the exclusive economic zone were generally accepted by both developing and developed States as customary international law. Italy ratified the UNCLOS on 13 January 1995 (Law No 689 of 2 December 1994).<sup>12</sup> The report attached by the Italian government to the bill for the UNCLOS ratification acknowledged the customary character of the exclusive

<sup>9</sup> ‘This being the case, in terms of cost-benefit, the proclamation of an Italian EEZ, which would inevitably lead to the establishment of similar zones by neighbouring and bordering states, is to be viewed negatively. The proclamation of our EEZ should therefore be seen only as a last resort, ie as a measure to be undertaken should neighbouring states proclaim an EEZ, following the failure of any diplomatic attempt to discourage such a course of action’ (N Ronzitti, *Le zone di pesca nel Mediterraneo e la tutela degli interessi italiani* (Rivista marittima 1999) 67, translation by QIL editors).

<sup>10</sup> For general reasons, I personally believe that they are not. In the second half of the XX century, the successful outcome of innovative legal concepts, such as the continental shelf, the exclusive economic zone and the common heritage of mankind, witnessed how a high seas ‘first come, first served’ regime, based on exclusive flag State jurisdiction, was inadequate to ensure the general objectives of sustainable exploitation of marine resources and protection of the marine environment (see T Scovazzi, ‘The Evolution of International Law of the Sea: New Issues, New Challenges’ (2001) 286 *Recueil des Cours de l’Académie de Droit International* 39).

<sup>11</sup> Hereinafter: UNCLOS. During the negotiations for the UNCLOS, ‘the Italian position moved from opposition during the U.N. General Assembly’s Seabed Committee to cautious and later full acceptance’ (Treves, ‘Italy and the Law of the Sea’ (n 2) 341).

<sup>12</sup> *Gazzetta Ufficiale della Repubblica Italiana*, Supplement to No 164 (19 December 1994).

economic zone and prefigured, although in a hypothetical way, a future ‘expansion’ of Italian rights by the creation of an exclusive economic zone:

‘Nelle sue grandi linee la normativa contenuta nella Convenzione già corrisponde oggi al diritto consuetudinario: ciò è vero in particolare, secondo quanto affermato tra l’altro dalla Corte Internazionale di Giustizia, per l’istituzione della zona economica esclusiva. ...

Infine, non si può trascurare che la Convenzione consente anche all’Italia espansioni dei suoi poteri sulle zone marittime adiacenti alle sue coste. ... Si potrà, inoltre – salvo il tracciare i necessari confini con i nostri vicini – pensare all’istituzione di una zona economica esclusiva, o eventualmente di una zona in cui si eserciterebbero solo alcuni dei poteri previsti per tale zona’.<sup>13</sup>

Against a scenario of being practically forced to accept something that seemed not desirable, two strategies could be envisaged.

The first option was to take the lead in a process of establishment of exclusive economic zones by Mediterranean coastal States, trying to maximize the advantages and to minimize the disadvantages of the new situation. After all, the UNCLOS grants rights to other States<sup>14</sup> in the exclusive economic zone, in particular the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, as well as the (rather mysterious) ‘other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines’ (Article 58, para 1). The UNCLOS also binds the coastal State to give other States access to the surplus of the allowable catch of living resources in its exclusive economic zone, taking into account some relevant factors, including ‘the

<sup>13</sup> Senato della Repubblica, *Atti parlamentari, XII legislatura, Disegno di legge n. 810*, 8 September 1994, also reproduced in Treves, *Il diritto del mare e l’Italia* (n 2) 133 (‘In its essentials, the legislation contained in the Convention already corresponds today to customary law: this is particularly true, according to the International Court of Justice, for the establishment of the exclusive economic zone. ... Finally, it cannot be overlooked that the Convention also allows Italy to expand its powers over maritime areas adjacent to its coasts. ... It will also be possible – without prejudice to the drawing of the necessary boundaries with our neighbours – to consider the establishment of an exclusive economic zone, or possibly of a zone in which only some of the powers provided for such a zone would be exercised’, translation by QIL editors).

<sup>14</sup> Meaning States different from the coastal State.



need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks' (Article 62, para 3). In this case, the establishment of exclusive economic zones would be considered as an opportunity to open new channels of cooperation, especially on the regional level, involving the competent international organizations (for example, the General Fisheries Commission for the Mediterranean).<sup>15</sup> Far from being the manifestation of excessive unilateralism, the establishment of a coherent jurisdictional framework in the form of exclusive economic zones could lead to the strengthening of regional co-operation in the Mediterranean Sea with the aim of managing living resources and addressing environmental concerns. It is difficult to see how future Mediterranean governance could be built on the vacuum determined by the persistence of high seas areas or on the confusion created by different kinds of coastal zones.<sup>16</sup>

The second option was to keep still and wait, hoping that the worst would come as late as possible, and reserving the right to react whenever it would be impossible to avoid a reaction. The latter option seems to have been the choice of Italy, either consciously or unconsciously.

This being said, it is not here assumed that Italy chose a bad option and disregarded a good one. The good option could simply have not been feasible, at least as regards fisheries. Since long time, Italy, as well as the other member States, have transferred competences in certain matters to the European Union. In particular, the European Union is entitled to an exclusive competence with regard to the conservation and management of sea fishing resources and shares competences with its member States with regard to the prevention of marine pollution.<sup>17</sup> The European Union's competence relates also to the negotiation and conclusion of

<sup>15</sup> The GFCM was established in 1949 as an institution within the framework of the Food and Agriculture Organization of the United Nations (FAO). According to the 2014 amendments, the objective of the GFCM Agreement is to ensure the conservation and sustainable use, at biological, social, economic and environmental level, of living marine resources, as well as the sustainable development of aquaculture in the area of application (all marine waters of the Mediterranean and Black Seas).

<sup>16</sup> See T Scovazzi, *Harlequin and the Mediterranean*, in R Wolfrum, M Seršić, T Šošić (eds), *Contemporary Developments in International Law – Essays in Honour of Budislav Vukas* (Brill Nijhoff 2016) 291.

<sup>17</sup> See the declaration made on 1 April 1998 by the European Community (now European Union) upon formal confirmation of the UNCLOS.

international treaties. It could have been extremely difficult for Italy to embark on two successive and difficult negotiations: the first of a quasi-domestic character inside the European Union to define a commonly agreed position and the second with the non-member States concerned (for example, Tunisia or Libya) in order to determine the conditions of access in their coastal waters of fishing vessels flying the flag of European Union member States. Considering that the second set of negotiations were to be carried out exclusively by the European Union, Italy would have almost completely lost its control over the matter.<sup>18</sup>

However in principle motionless, the first situation where there was a need for Italy to react occurred in 2004, when France created an ecological protection zone in the Mediterranean<sup>19</sup> (Decree No 2004-33 of 8 January 2004,<sup>20</sup> adopted on the basis of Law No 2003-346 of 15 April 2003).<sup>21</sup> Fearing the risk of pollution due to the passage of foreign ships avoiding the waters falling under the French ecological protection zone and willingly entering into the high seas waters located between the external limit of this zone and the external limit of the 12-mile Italian territorial sea, Italy was practically forced to provide for the establishment of a corresponding ecological protection zone. This was a consequence of the exclusive jurisdiction of the flag State on the high seas, including the exclusive jurisdiction of the flag State of convenience. Moreover, as at that time bilateral negotiations with France had already started for an all-purpose delimitation of the respective coastal zones, inaction by Italy could have been understood as a lack of interest for the waters in question.

<sup>18</sup> In fact, a number of 'programmes of cooperation' in fisheries have been agreed by the Fisheries Production District (*Distretto Produttivo della Pesca*) of Mazara del Vallo and some public or private entities of Mediterranean coastal States. See V Fazio, A Ricciardi (eds), *Il Distretto della pesca di Mazara del Vallo – Una buona pratica di cooperazione tra aziende internazionali* (Franco Angeli 2008). Fishing vessels registered in Mazara del Vallo, the main Italian fishing port, carry out their activities mostly in the Channel of Sicily.

<sup>19</sup> *Sui generis* zones, such as the fishing zone or the ecological protection zone, are not mentioned in the UNCLOS. But they are not prohibited either. They encompass only some of the rights that can be exercised in the exclusive economic zone. The right to do less is implied in the right to do more (*in maiore stat minus*).

<sup>20</sup> Journal officiel de la République française (10 January 2004).

<sup>21</sup> Journal officiel de la République française (16 April 2003).



According to Italian Law No 61 of 8 February 2006,<sup>22</sup> the Council of Ministers, on proposal submitted by the Minister of environment, in concert with the Minister of foreign affairs and after having heard the Minister for cultural properties and activities, has the power to establish ecological protection zones (in the plural) (Article 1, para 2). Within such zones, Italy applies the relevant rules of Italian law, European Union law and international treaties in force, as regards the prevention and sanction of all kinds of marine pollution, as well as the protection of marine mammals, biodiversity and archaeological and historical heritage (Article 2, para 2). It was further provided that the law did not apply to fishing activities (Article 2, para 3), probably to make it clear that the Italian ecological protection zone had nothing to do with an exclusive economic zone.

The first (and, for the time being, only) Italian ecological protection zone was established under Presidential Decree No 209 of 27 October 2011.<sup>23</sup> It covers the waters of the Ligurian Sea, Tyrrhenian Sea and West Sardinian Sea.<sup>24</sup> The waters of the Channel of Sicily, the Ionian Sea and the Adriatic Sea are not included in it.

It is important to notice that, according to Article 2-bis of Decree-Law No 91 of 24 June 2014, converted into Law No 116 of 11 August 2014,<sup>25</sup> the already mentioned Article 2, para 3, of Law No 61 of 8 February 2006<sup>26</sup> was replaced by a new one, providing that European Union Regulation No 1380/2013 on the common fisheries policy was applicable

<sup>22</sup> Gazzetta Ufficiale della Repubblica Italiana No 52 (3 March 2006). See U Leanza, 'L'Italia e la scelta di rafforzare la tutela dell'ambiente marino: l'istituzione di zone di protezione ecologica' (2006) 89 *Rivista di diritto internazionale* 309; G Andreone, 'La zona ecologica italiana' (2007) *Il diritto marittimo* 3; A Del Vecchio, 'In maiore stat minus: A Note on the EEZ and the Zone of Ecological Protection in the Mediterranean Sea' (2008) *Ocean Development and International Law* 287.

<sup>23</sup> Gazzetta Ufficiale della Repubblica Italiana No 293 (17 December 2011).

<sup>24</sup> See the map attached to this article, which is taken from I Tani, S Ferrero, NM Pizzeghello (eds), *Atlas of Maritime Limits and Boundaries in Central Mediterranean: Legal Texts and Illustrative Maps* (Istituto idrografico della Marina 2020) 106 (where also many other maps relevant for this article may be found). The author thanks the Hydrographical Institute of the Italian Navy (*Istituto Idrografico della Marina*) for having authorized the reproduction of the map.

<sup>25</sup> Gazzetta Ufficiale della Repubblica Italiana No 192 (20 August 2014) Supplement No 72.

<sup>26</sup> That is the paragraph according to which the law does not apply to fishing activities.



to fishing activities. The consequences of such an amendment are not completely clear. However, in view of the fact that Regulation 1380/2013 covers activities carried out ‘in Union waters, including by fishing vessels flying the flag of, and registered in, third countries’ (Article 1, para 2(b)) and that ‘Union waters’ means ‘the waters under the sovereignty and jurisdiction of Member States’ (Article 4, para 1(1)), it should be understood in the sense that the Italian ecological protection zones are to be considered today also as fishing zones. The result is something that is very close to an exclusive economic zone, but not yet tantamount to it.<sup>27</sup>

The second situation where there was a need to react occurred in 2018, when Algeria (Presidential Decree No 18-96 of 20 March 2018)<sup>28</sup> established an exclusive economic zone that goes as far as almost 12 NM from the coast of the Italian island of Sardinia, determining an overlapping of about 39,604 km<sup>2</sup> with the Italian ecological protection zone.<sup>29</sup> On 28 November 2018, the Permanent Mission of Italy to the United Nations sent a note to the United Nations Secretariat as regards the Algerian Presidential Decree, stating that:

‘the Italian Government expresses its opposition to the definition of the Algerian EEZ, as indicated by the abovementioned Decree, since it unduly overlaps on zones of legitimate and exclusive national Italian interests.

The Italian Government reiterates that, in accordance with Article 74 of the United Nations Convention on the Law of the Sea, the delimitation of the exclusive economic zone shall be effected by agreement to achieve an equitable solution. Pending Agreement, the concerned States shall make every effort to enter into provisional arrangements of practical nature and, during the transitional period, not jeopardize or hamper the reaching of final agreement.

<sup>27</sup> A precedent in this regard is the ecological and fisheries protection zone established by Croatia under Parliamentary Decision of 3 October 2003, as amended by Parliamentary Decision of 3 June 2004 (text in Tani, Ferrero, Pizzeghello (eds) (n 24) 119). It was subsequently repealed by Parliamentary Decision of 5 February 2021, proclaiming an exclusive economic zone.

<sup>28</sup> Journal Officiel de la République algérienne démocratique et populaire No 18 (21 March 2018).

<sup>29</sup> See map attached to this article. The Algerian exclusive economic zone also determines an even bigger overlapping with the Spanish exclusive economic zone off the coasts of the Balearic Islands (Spain).





Therefore, the Italian Government expresses its readiness to enter into negotiations to reach such an agreement of mutual satisfaction on the matter, according to Article 74 of the United Nations Convention on the Law of the Sea, as recalled by Article 2 of the said Decree'.<sup>30</sup>

The reaction is appropriate, in the sense that it avoids that, in the lack of an Italian position, Algeria could assume that it was entitled to englobe in its exclusive economic zone all the waters up to the external limit of the Italian territorial sea in the area south-west of Sardinia. However, strangely enough, the Italian note does not state the simple truth, that is that the Algerian exclusive economic zone overlaps with the Italian ecological protection zone. It vaguely recalls 'zones of legitimate and exclusive national Italian interests', as if the Italian ecological protection zone did not exist,<sup>31</sup> without pointing out how a delimitation should be effected.

The note of reply by Algeria of 20 June 2019 is equally vague on this point:

'The Government of Algeria wishes to point out that the establishment of the exclusive economic zone of Algeria is set against the background of national law and the exercise by Algeria of its sovereign rights in that zone, as recognized under the United Nations Convention on the Law of the Sea and international law.

As a result, the delimitation of the exclusive economic zone of Algeria took into consideration the objective rules and relevant principles of international law, thus ensuring the just and equitable delimitation of maritime spaces between Algeria and Italy, in accordance with article 74 of the United Nations Convention on the Law of the Sea.

<sup>30</sup> Text in United Nations, Division for Ocean Affairs and the Law of the Sea (2019) 98 L of the Sea Bulletin 21.

<sup>31</sup> The Spanish note of 12 July 2018 (ibid 18) is clearer: 'The Government of Spain, in the spirit of friendship and understanding which characterize its relations with Algeria, wishes to register its opposition to the delimitation of that exclusive economic zone, some sections of which are clearly disproportionate in relation to the equidistant median line between the territory of Algeria and the mainland and insular territory of Spain. ... The Spanish Government considers that the equidistant line between the baselines from which the breadth of the territorial sea is measured is the most equitable solution for delimiting, by mutual agreement, the exclusive economic zones between States with opposite or adjacent coasts, as established in article 74 of the United Nations Convention on the Law of the Sea'.

The Government of Algeria, bearing in mind the bonds of friendship and cooperative relations between our two countries, assures the Government of Italy of its complete readiness to participate in joint efforts to find, through dialogue, an equitable and mutually-acceptable solution regarding the outer limits of the exclusive economic zone of Algeria and the maritime space of Italy, in accordance with article 74 of the United Nations Convention on the Law of the Sea'.<sup>32</sup>

The perspective that fishermen or enterprises that wanted to exploit the waters or the seabed just 13 NM off the coasts of south-west Sardinia were required to ask licences to the authorities of a foreign State (Algeria) prompted Italy to adopt Law No 91 of 2021.

#### 4. *The headache of delimitations*

In fact, the Italian exclusive economic zone does not exist so far. By Law No 91 of 2021 the Parliament only authorized the Government, on proposal by the Minister of foreign affairs,<sup>33</sup> to establish such a zone, if and when the Government deems it appropriate. The Government can also choose if the future exclusive economic zone should include the waters adjacent to the whole Italian territory or only those adjacent to some parts of it.<sup>34</sup>

Probably, granting the Government such a broad margin of discretion<sup>35</sup> was deemed necessary to enable it to effectively carry out negotiations with several States with which Italy needs to delimit its exclusive economic zone (Albania, Algeria, Croatia, France, Greece, Malta, Libya, Montenegro, Spain and Tunisia).<sup>36</sup> More than the regulation of fishing activities or the protection of the marine environment, it seems that the

<sup>32</sup> Text in United Nations, Division for Ocean Affairs and the Law of the Sea (2020) 101 L of the Sea Bulletin 49.

<sup>33</sup> Unlike what is provided in Law No 61 of 2006 for the ecological protection zones (n 22) para 3, no other Ministers are involved in the decision to establish an exclusive economic zone.

<sup>34</sup> According to art 1, para 2, of Law No 91 of 2021, the exclusive economic zone 'covers all or part of the waters surrounding the Italian territorial sea'.

<sup>35</sup> This is indeed a great restriction to the sovereign powers of the Parliament.

<sup>36</sup> With Slovenia Italy has only a territorial sea boundary. The territorial sea of Bosnia and Herzegovina is enclosed inside the internal waters of Croatia.



boundary of the exclusive economic zone is the first and foremost Italian concern. The present situation is the following.

a) Greece is the only State with which Italy has already settled the problem of the delimitation of future and hypothetical exclusive economic zones by an agreement concluded in Athens on 9 June 2020<sup>37</sup> and entered into force on 8 November 2021.<sup>38</sup> According to Article 1, para 1, ‘the boundary line of the maritime zones to which the two countries are entitled to exercise, respectively, their sovereign rights or jurisdiction under international law shall be the continental shelf boundary established under’ the previous agreement on the delimitation of the continental shelf (Athens, 24 May 1977).<sup>39</sup>

b) An agreement between France and Italy for the delimitation of the territorial seas and the zones under national jurisdiction was signed in Caen on 21 March 2015. However, it has not entered into force.<sup>40</sup>

c) Agreements for the delimitation of the continental shelf are in force between Italy and, respectively, Croatia (Rome, 8 January 1968),<sup>41</sup> Tunisia (Tunis, 20 August 1971),<sup>42</sup> Spain (Madrid, 19 February 1974)<sup>43</sup> and Albania (Tirana, 18 December 1992).<sup>44</sup> However, they do not delimit the superjacent waters. It is questionable whether a future boundary of the

<sup>37</sup> Text in Gazzetta Ufficiale della Repubblica Italiana No 149 (24 June 2021). See I Papanicolopulu, ‘Greece – Italy’ in Lathrop (ed), *International Maritime Boundaries*, (Martinus Nijhoff 2021) Report No 8-4(2) in electronic format.

<sup>38</sup> Information provided in Gazzetta Ufficiale della Repubblica Italiana No 281 (25 November 2021).

<sup>39</sup> According to art 2, ‘once a Party has taken the initiative to proclaim a maritime zone extending up to the boundary line of article 1 of this Agreement, it shall inform the other Party as early as possible’.

<sup>40</sup> See U Leanza, ‘Il confine marittimo tra Italia e Francia: il negoziato dell’accordo di Caen’ (2017) 72 *La Comunità Internazionale* 5.

<sup>41</sup> The agreement was concluded by the former Yugoslavia. On the agreement see T Scovazzi, G Francalanci, ‘Italy - Yugoslavia (Continental Shelf)’ in JI Charney, LM Alexander (eds), *International Maritime Boundaries* (Martinus Nijhoff 1993) 1627. According to art 43, para 2, of the Maritime Code of Croatia of 27 January 1994, ‘the boundary line of the continental shelf between the Republic of Croatia and the Republic of Italy has been established by the agreement between Italy and the former Federative Socialist Republic of Yugoslavia in 1968’.

<sup>42</sup> On the agreement see T Scovazzi, G Francalanci, ‘Italy – Tunisia’, in Charney, Alexander (n 41) 1611.

<sup>43</sup> On the agreement see T Scovazzi, G Francalanci, ‘Italy – Spain’, in Charney, Alexander (n 41) 1601.

<sup>44</sup> On the agreement see T Scovazzi, G Francalanci, ‘Albania – Italy’, in Charney, Alexander (n 41) 2447.



exclusive economic zones should necessarily follow the same line that was agreed for the seabed.<sup>45</sup> For instance, Croatia and Italy disagree on whether the delimitation of the superjacent waters should follow the same line set in the already mentioned 1968 agreement of continental shelf delimitation or should depart from it.<sup>46</sup>

d) No agreements have been concluded between Italy and, respectively, Algeria, Malta,<sup>47</sup> Libya and Montenegro.<sup>48</sup>

Some of the pending delimitations seem particularly difficult because of the geographical context and because more than two States could be involved in the matter. In particular:

a) In the area located west of Sardinia, the 1974 delimitation of the continental shelf between Italy and Spain has been effected through the application of the equidistance criterion.<sup>49</sup> The equidistance line is drawn between the islands of Sardinia (Italy) and Menorca (Spain), despite the fact that the former is much bigger than the latter. The already

<sup>45</sup> On the question see I Papanicolopulu, *Il confine marino: unità o pluralità?* (Giuffrè 2005).

<sup>46</sup> See the notes by Italy of 16 April 2004 and 2 September 2005 and the note by Croatia of 31 May 2007, respectively in United Nations, Division for Ocean Affairs and the Law of the Sea (2004) 54 L of the Sea Bulletin 129, (2006) 60 L of the Sea Bulletin 127 and (2007) 64 L of the Sea Bulletin 39.

<sup>47</sup> A provisional understanding on the continental shelf delimitation was concluded by Italy and Malta by exchange of notes of 31 December 1965 and 29 April 1970. It relates only to a partial boundary in the Malta Channel. Malta has established a 25-mile fishing protection zone (Act XXXII of 1971, as amended by Act XXIX of 2014).

<sup>48</sup> The memorandum between Italy and Montenegro on the succession of Montenegro to the bilateral treaties concluded before the proclamation of independence (Podgorica, 19 October 2012) does not list the 1968 agreement on continental shelf delimitation between Italy and the former Yugoslavia among the treaties that remain in force between Italy and Montenegro.

<sup>49</sup> According to art 1, para 1, 'la linea di delimitazione della piattaforma continentale tra l'Italia e la Spagna viene stabilita con il criterio della equidistanza dalle linee di base rispettive'. On the contrary, the already mentioned 2015 agreement between France and Italy, which has not entered into force, follows 'le principe d'équidistance dans la délimitation de leurs mers territoriales et le principe d'équité dans la délimitation de leurs espaces maritimes sous juridiction' (preamble). On the question, which is still open today, whether a delimitation in this area should be based on the equidistance criterion or on the determination of a quadruple point France-Italy-Algeria-Spain see T Scovazzi, 'La delimitazione dei confini marittimi tra Francia e Italia' and G Francalanci, 'La delimitazione della piattaforma continentale tra Italia e Francia: storia, considerazioni e prospettive' both published in A De Guttry, N Ronzitti (eds), *I rapporti di vicinato tra Italia e Francia* (CEDAM 1994) 63 and 85.



mentioned Algerian exclusive economic zone<sup>50</sup> overlaps with the Italian and Spanish maritime zones because Algeria does not grant any effect to islands for the delimitation of exclusive economic zones.<sup>51</sup> It is understandably difficult for Italy, which has already agreed to give to Menorca a full weight against Sardinia (to the benefit of Spain), to agree now that Sardinia has no weight at all (to the benefit of Algeria).

b) In the area located south-west of Sicily (another Italian big island), a complete delimitation of exclusive economic zones would involve four States, namely Italy, Libya, Malta and Tunisia. The already mentioned 1971 agreement for the delimitation of the continental shelf between Italy and Tunisia follows the equidistance criterion with the exception of the almost null effect attributed to four Italian small islands (Pantelleria, Linosa, Lampedusa and Lampedusa). Malta, a small island-State located between Italy, Tunisia and Libya, claims that a corresponding null effect should be attributed to Lampedusa in a future delimitation between Italy and itself. Italy disagrees and claims maritime zones in both the areas south-west and south-east of Malta,<sup>52</sup> as defined in a map reproduced in the judgment of the International Court of Justice of 3 June 1985 on the *Continental shelf* case between Malta and Libya.<sup>53</sup> The decision on this case, to which Italy was not a party, delimited only partially the continental shelf between Malta and Libya, as the Court decided that its judgment was to be 'limited in geographical scope so as to leave the claims unaffected, that is to say that the decision of the Court must be confined to the area in which, as the Court has been informed by Italy, that State has no claims to continental shelf rights'.<sup>54</sup> In fact, due to the position of Malta, a maritime boundary line between Libya and Italy could be longer or shorter, depending on whether or not the criterion of equidistance is used in a delimitation between Italy and Malta. Moreover, the acceptance or rejection of the closing line of the Libyan Gulf of Sidra, claimed by

<sup>50</sup> (n 28) para 3.

<sup>51</sup> To tell the truth, to equalize Sardinia (24,100 km<sup>2</sup> and 1,592,730 inhabitants) to a rock that cannot sustain human habitation or economic life of its own (see art 121, para 3, UNCLOS) seems somehow exaggerated.

<sup>52</sup> For consistency reasons, it is however difficult to assume that Lampedusa should be given a full effect vis-à-vis Malta, while Malta should not be given a full effect vis-à-vis Sicily.

<sup>53</sup> International Court of Justice, *Continental Shelf (Libya/Malta)* (Judgment) [1985] ICJ Rep 18.

<sup>54</sup> *ibid* para 21.



Libya as historic waters,<sup>55</sup> has also an effect on a future maritime delimitation between Italy and Libya.<sup>56</sup>

Given this global picture, the best that can be said is that the geographical and political headache of delimitations between Italy, Malta, Libya and Tunisia is worse than the geographical and political headache of delimitations between Algeria, Italy, Spain.<sup>57</sup> But, even if one is worse than the other, both delimitations fall into the category of headaches. Will they be finally settled by the present or by the future generations of negotiators, also considering the normally slow pace of diplomacy?<sup>58</sup>

In the meantime, Law No 91 provides that, until the date of entry into force of agreements between Italy and the other States concerned, the external limits of the Italian exclusive economic zone are established in order not to jeopardize or hamper the final agreement (Article 1, para 3). Such wording recalls Article 74, para 3, of the UNCLOS,<sup>59</sup> even though the UNCLOS provision refers to ‘provisional arrangements of a practical nature’ between the States concerned, while the Italian law envisages something of a generic nature that could be either an international provisional arrangement or an Italian unilateral enactment. However, with or without provisional measures, the difficulties behind the delimitations remain the same and any kind of measures, especially if they are unilateral, is likely to determine objections by one or more other States.

<sup>55</sup> General People’s Committee Decision No 104 of 20 June 2005 (United Nations, Division for Ocean Affairs and the Law of the Sea (2005) 59 L of the Sea Bulletin 15). On the question of historic waters see I Tani, *Le baie storiche – Un’anomalia nel rapporto tra terra e mare* (Giappichelli 2020).

<sup>56</sup> And between Greece and Libya as well.

<sup>57</sup> France could also be added, at least until the 2015 agreement with Italy enters into force.

<sup>58</sup> Judicial settlement is another option. But it is also unlikely, given the plurality of States involved.

<sup>59</sup> ‘Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation’.



### 5. *Other aspects of Law No 91 of 2021*

A few comments may be added on other aspects of Law No 91 of 2021.

The law points out that ratification of delimitation agreements with the other States concerned is subject to the parliamentary authorization provided by Article 80 of the Italian Constitution.<sup>60</sup> This may be seen as a confirmation of the assumption that maritime delimitation treaties fall into the category of treaties ‘entailing changes in the territory’ that need scrutiny by the Parliament.<sup>61</sup> In other words, even if the Government has a broad margin of discretion in establishing an exclusive economic zone, the agreements for its delimitation remain subject to approval by the Parliament.

The law specifies that, inside the exclusive economic zone, Italy exercises the sovereign rights provided for by international rules in force (Article 2) and that, in conformity with international customary and treaty law, the freedoms of navigation, overflight, laying of submarine pipelines and cables and the other rights provided for by international rules in force are not jeopardized (Article 3). The identification of the ‘other rights’ in question remains unclear, considering that Article 58, para 1, of UNCLOS is unclear in this regard as well.<sup>62</sup> However, the content of some of these rights may perhaps be inferred from the declaration made by Italy on 13 January 1995, when ratifying the UNCLOS:

‘According to the Convention, the coastal State does not enjoy residual rights in the exclusive economic zone. In particular, the rights and jurisdiction of the coastal State in such zone do not include the right to

<sup>60</sup> ‘The Houses shall authorise by law the ratification of international treaties which are of a political nature, or which provide for arbitration or judicial settlement, or which impose changes in territory or burdens on finances or amendments to laws’, translation by QIL editors.

<sup>61</sup> This assumption was not followed only in the case of the already mentioned 1968 agreement with the former Yugoslavia, whose ratification was authorized by presidential Decree No 830 of 22 May 1969 (*Gazzetta Ufficiale della Repubblica Italiana* No 302 (29 November 1969)).

<sup>62</sup> It mysteriously refers to ‘other internationally lawful uses of the sea related to these freedoms [= freedoms of navigation, and overflight and of the laying of submarine cables and pipelines], such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention’.

obtain notification of military exercises or manoeuvres or to authorize them.

Moreover, the rights of the coastal State to build and to authorize the construction, operation and the use of installations and structures in the exclusive economic zone and on the continental shelf is limited only to the categories of such installations and structures as listed in art. 60 of the Convention’.

It thus appears that Italy welcomes unnoticed military exercises or manoeuvres by foreign powers in its own future exclusive economic zone.<sup>63</sup> It also appears, looking at Article 60 of UNCLOS,<sup>64</sup> that no authorization is needed for the construction, operation and use of installations and structures on the seabed of the future Italian exclusive economic zone, if they are not used for the purposes provided for in Article 56 UNCLOS<sup>65</sup> and other economic purposes and if they do not interfere with the exercise of the rights of Italy in this zone. What purposes are this kind of installations and structures used for?<sup>66</sup>

Law No 91 of 2021 makes no reference to the coordination between its provisions and the already mentioned Law No 61 of 8 February 2006 on the ecological protection zones,<sup>67</sup> as if the latter did not exist. In

<sup>63</sup> It is open to question how this could be reconciled with the coastal State’s right to grant licences to fishermen for the exploitation of the living resources of its own exclusive economic zone. In fact, the fishermen could discover that they are fishing in troubled waters where unexpected military exercises or manoeuvres are taking place.

<sup>64</sup> ‘In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of: (a) artificial islands; (b) installations and structures for the purposes provided for in article 56 and other economic purposes; (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone’ (art 60, para 1).

<sup>65</sup> ‘In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment; (c) other rights and duties provided for in this Convention” (art 56, para 1).

<sup>66</sup> See T Treves, ‘Military, Installations, Structures, and Devices on the Seabed’ (1980) *AJIL* 808.

<sup>67</sup> (n 22) para 3.





particular, it is not clear whether the future establishment of one or more exclusive economic zones will supersede the previous ecological protection zones, wherever established. The question is not a trivial one, considering that within the scope of the jurisdiction that Italy can exercise in its ecological protection zones also the protection and preservation of archaeological and historical heritage is included, which is not listed in Article 56, para 1, of the UNCLOS among the sovereign rights and jurisdiction that the coastal States has in the exclusive economic zone. In any case, as Law No 61 of 2006 has not been abrogated, a patchwork of ecological protection zones, exclusive economic zones and extents of high seas could become another option open to the discretion of the Italian Government, as regards the legal condition of the waters beyond 12 NM from the baselines of the Italian territorial sea.

## 6. *Conclusion*

The Italian exclusive economic zone exists only on paper. The Italian traditional attitude of immobility and reaction in this field has not changed so far.

To properly implement Law No 91 of 2021 would require a change in the Italian traditional attitude and an innovating effort to which the European Union should also contribute as regards the subjects of fisheries and protection of the marine environment. In particular, it would require the rejection of an approach confined to national interests and the awareness that the disappearance of the high seas in the Mediterranean is an opportunity to build new ways of cooperation for the common interest of bordering countries. The crucial issue of boundary delimitation is a prerequisite for establishing a regime of cooperation oriented towards the sustainable exploitation of marine resources and the protection of the marine environment.<sup>68</sup> Time will tell whether such a change is feasible.

<sup>68</sup> See F Caffio, 'La certezza dei confini marittimi del Mediterraneo – Fattore di sicurezza, stabilità e sviluppo' (2021) *Rivista Marittima* 3.

