



European Union' Accession to the Bucharest Convention: Legal Aspects and Challenges in Transboundary Context <i>(Irina Makarenko)</i>	"Cercetari Marine" Issue no. 44 Pages 136-146	2014
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EUROPEAN UNION' ACCESSION TO THE BUCHAREST CONVENTION: LEGAL ASPECTS AND CHALLENGES IN TRANSBoundary CONTEXT

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ABSTRACT

The Convention on the Protection of the Black Sea Against Pollution (Bucharest Convention) which entered into force in 1994 has never foreseen the possibility to take on board the Regional Economic Integration Organizations (REIOs) such as the European Union (EU). In 2001 the EU and the Black Sea Commission agreed on granting each other observer status, and after the EU' enlargement in 2007, the EU reached the Black Sea through its new members, Romania and Bulgaria. The proposal to consider the accession of EU as an equal Contracting Party came from Romania and Bulgaria and was presented at the 13th Regular Meeting of the Commission on the Protection of the Black Sea Against Pollution (Black Sea Commission) followed by the submission to the Depository of the Bucharest Convention during the Ministerial Meeting/Diplomatic Conference held in Sofia back to April, 2009. The special *ad hoc* group was created to investigate modalities of possible EU accession. Despite these actions, as well as recent developments related to possible accession of Georgia, Turkey and Ukraine to the EU, the issue of accession of the EU as party to Bucharest Convention is still on the agenda of the Black Sea Commission.

KEY-WORDS: Bucharest Convention, European Union, accession, Black Sea, Contracting Party

AIMS AND BACKGROUND

The aim of this paper is to summarize the legal basis for amending the text of Bucharest Convention focused on the issues of bridging the Danube River and Black Sea regimes through the process of EU application to become the Contracting Party of the Bucharest Convention, also to present some recommendations and comparative analysis of EU's membership in the regional freshwater and sea Conventions covering the Danube River, Baltic Sea, the Mediterranean and the North East Atlantic Seas.

The European Union has specific policies and commitments in all river and sea regions bordering Europe, and the Danube-Black Sea region is not an exception. There is no doubt that "*greater involvement by the European Union can increase the potential of Black Sea regional cooperation*" (Joint Statement of the Ministers of Foreign Affairs of the countries of the European Union and of the wider Black Sea area). It was also stated in the Black Sea Synergy Declaration of EU Ministers that "*the seas and their basins are part of our immediate neighbourhood, where the EU and its member States have strong interests*" (Black Sea Synergy, 2010).

Meanwhile the Black Sea ecosystem continues to be threatened by input of certain pollutants and harmful substances (i.e. nutrients, oil etc.) as a result of accidental and operational discharges from vessels, as well as through land based sources and, in particular via the Danube River (BSC, 2009). The long practice of the overfishing has also depleted many fish stocks (Natura 2000 in the Black Sea Region, European Communities, 2009). To help to overcome these problems, the Convention on the Protection of the Black Sea Against Pollution was signed in Bucharest in April 1992, and ratified by all six legislative assemblies of the Black Sea countries in the beginning of 1994 (www.blacksea-commission.org).

Since the environmental issues are subject to EU's shared competence with its member states, according to a number of precedents of EU's participation in the international environmental treaties (UN, i.e. UNEP, UNECE etc., Danube, Rhine Commissions and Regional Seas Conventions such as OSPAR, HELCOM and Barcelona Convention) the EU also expressed its willingness to become a party to the Bucharest Convention.

Since then, the Black Sea countries which are the Contracting Parties to the Bucharest Convention understand the need to update the text of the Bucharest Convention to enable EU to join it as a full-fledged member, but the debates continue...

Despite some obvious benefits from the EU's accession to the Bucharest Convention, these amendments are still on the agenda of each and every meeting of the Black Sea Commission, an executive body to the Bucharest Convention, as requires Article 17 of the Bucharest Convention. The *ad hoc* Expert Group created on the implementation of Item 8 of the Sofia Declaration, 2009 after its three meetings came to the conclusion that "*the Black Sea countries could not reach a common position on this*

issue” (Conclusions of the 3rd Meeting of the ad hoc Expert Group on item #8 of the Ministerial Declaration, Sofia 2009 - BSC internal documents).

At the same time, EU could assist the riparian countries to strengthen their individual and shared capacity to tackle the Black Sea environmental problems and also help to link and to improve the environmental governance in this transboundary sensitive Danube-Black Sea region.

RESULTS AND DISCUSSION

The European Community has been supporting the development of the Danube and the Black Sea region for already a couple of decades. Here one can mention PHARE and TACIS programmes, Black Sea Environment Programme (BSERP) with the support of GEF and the UN; DABLAS (the Task Force for the Danube and the Black Sea chaired by the European Commission) which was created in 2001 to “*provide a platform for co-operation for the protection of water and water-related ecosystems in the Danube and Black Sea Region*” (DABLAS fact sheet). This instrument reflected the provisions of an EC Communication adopted in 2001 (COM, 2001), highlighting priority actions required to improve the environmental status of the Danube-Black Sea region. The DABLAS Task Force includes a number of representatives from the countries in the region, the International Commission for the Protection of the River Danube (ICPDR), the Black Sea Commission, IFIs, EC and some particularly interested Member States, other donors and civil society representatives.

The overall objective of EU in this regard has been to participate in and to implement the Bucharest Convention and the Black Sea Strategic Action Plan (BS SAP), increasing the public awareness and participation in the region.

In April 2007 the European Commission put forward a Communication from the Commission to the Council and the European Parliament on the Black Sea Synergy (COM, 2001). This new regional cooperation initiative was set up to complement existing policy and is intended as a flexible framework to ensure greater coherence and policy guidance. Environment is highlighted as one of the sectors where increased regional co-operation will be of added value (COM, 2007).

These initiatives and many other statements of EU demonstrate clearly the importance attached to the Black Sea by the EU and reflect the recognition of the need for joining the Bucharest Convention as a perfect vehicle for conceiving and undertaking necessary actions for the Black Sea environment. Moreover, with the implementation of EU Marine Strategy (Council Directive 2008/56/EC) and EU Danube Strategy (EU Danube Strategy Background paper, 2009), it could be really important to link the freshwater and marine regimes for the Danube and Black Sea, since Danube is one of the main contributors to the Black Sea land-based pollution. Danube Strategy aims at “*more strategic approach to co-operation in the Danube region*”, “*improving*

navigability of the river, protecting its environment and fight pollution; promotion of economic development as well as culture and tourism activities, improvement of disaster management (eg. flooding)" etc.

The benefits of EU's joining the Bucharest Convention could be described as follows (Minutes of the 3rd Meeting of the ad hoc Expert Group on item #8 of the Ministerial Declaration, Sofia 2009 - BSC internal documents):

- Enforcement benefits: provisions would become the part of EU law, certain provisions would have direct effect and EU Member States could be condemned by the European Court of Justice (ECJ) for non-compliance with their obligations under the Convention; legislative and technical know-how of the EU and its Member States will become directly accessible and available to the Black Sea Commission; EU participation as a Contracting Party would not only increase the contribution of Bulgaria and Rumania, but also enhance their technical participation and make it more effective; further implementation and enforcement of Water Framework Directive (WFD) and the Marine Strategy Framework Directive (MSFD) in the Danube-Black Sea region could contribute to better governance covering the whole water cycle (freshwater and marine), ensuring a combined protection level for coastal waters (both the WFD and the MSFD require the Member States "*to cooperate with each other and with other countries in the same region to fulfill their objectives* (Council Directive 2008/56/EC)"; several MSFD provisions "*require Member States to cooperate specifically within regional sea conventions*" (Council Directive 2000/60/EC), such as, *inter alia*, the Bucharest Convention); for example, with EU assistance and in order to provide to Mediterranean EU Member States a coordination forum, Barcelona Convention started to apply the Ecosystem Approach in the Mediterranean, in line with the specific needs of this region, as reflected in the Decisions of the Parties of the Barcelona Convention (adopted by Contracting Parties to the Barcelona Convention in January 2008 in Almeria); EU membership would contribute to raising the profile and visibility of the Black Sea and its environmental challenges and give a more prominent role both in Europe and internationally;
- Financial benefits: equivalent presence and negotiating power for the Black Sea region and facilitation of better coherence between regulatory and financial action at European level; it will also ensure a more direct contact with the relevant programming circuits of existing Community financial instruments and therefore stimulate higher consideration of and increased supportive action to the protection and the recovery of the Black Sea; maintaining the existing financial assistance and creating new financing sources for the Black Sea Commission; the EU already contributes financially through a number of projects and mechanisms, which cumulated contribution amounts to several

millions of Euro; indirect funding used to be also available in the framework of EU's Seventh Framework Programme (FP7) (PEGASO, SESAME, Envirogrids, UP-GRADE BS-SCENE and other related projects); ENPI-related projects etc.; in the international environmental agreements where the European Community is a Contracting Party, it is an established international practice that it provides a fixed contribution of 2.5% of the budget; the possibility of providing on a voluntary basis an additional annual contribution, as it is in the case of Barcelona Convention.

Apart from the immediate enforcement and financial benefits that EU membership to the Black Sea Commission would bring to the Black Sea, there will be advantages of an institutional and political nature which are sometimes not so clearly and quickly visible or quantifiable, but are nonetheless strategically important.

Precedents of EU' participation in regional freshwater and sea Conventions (Danube River; Baltic, Mediterranean, North East Atlantic Seas).

The EU takes an active part in the majority of the regional Multilateral Environmental Agreements (MEAs) related to fresh and marine waters in Europe in general and in the Danube and Black Sea basin, in particular. Among them:

Danube Convention:

The International Commission for the Protection of the Danube River (ICPDR) is a transnational body, which has been established to implement the Danube River Protection Convention (www.icpdr.org). The EC signed the Danube Convention in 1994. In 2000, the ICPDR contracting parties nominated the ICPDR as the platform for the implementation of all transboundary aspects of the EU Water Framework Directive (WFD) (Council Directive 2000/60/EC).

Barcelona Convention:

The Barcelona Convention of 1976, amended in 1995, and the Protocols drawn up in line with this Convention aim to protect and improve the marine and coastal environment in the Mediterranean, whilst promoting regional and national plans contributing to sustainable development (<http://europa.eu/legislation>). The EC Decision 77/585/EEC enabled the Community to accede to the Barcelona Convention and its Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft. The purpose of these two instruments, together with the protocols to which the Community has subsequently acceded (by Decisions 81/420/EEC, 83/101/EEC, 84/132/EEC 2004/575/EC and 2010/631/EU), is to limit pollution in the Mediterranean region (<http://europa.eu/legislation>).

Helsinki Convention:

The 1974 Helsinki Convention which was signed in March 1974 by all the States bordering the Baltic Sea (Denmark, Germany, Sweden, Estonia, Finland, Latvia,



Lithuania, Poland and Russia) aims to help reduce pollution in the area around the Baltic Sea. The European Community acceded the Convention by its Council Decision 94/156/EC of 21st February, 1994 (The Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, Finland, 1992).

OSPAR Convention:

The aim of the Convention for the protection of the marine environment of the North-East Atlantic (OSPAR) which was signed in Paris on 22nd September, 1992 is to prevent and eliminate pollution and to protect the maritime area against the adverse effects of human activities.

The European Community became a Contracting Party to OSPAR by its Council Decision 98/249/EC of 7th October, 1997 on the conclusion of the Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris Convention) (The Convention for the Protection of the marine Environment of the North-East Atlantic - OSPAR Convention - signed in Paris on 22 September 1992).

Thus, since the accession of EU was mostly taking place at the negotiation stage, almost all the abovementioned regional conventions include the provisions enabling the REIOs to be parties to these regional fresh water and sea Conventions.

The provisions allowing EU to join the regional Conventions as a REIO, differ and are to a certain extent flexible (i.e. rights to vote, budget contributions etc.). This allows to incorporate the best practices taken from the abovementioned Conventions and to amend the Bucharest Convention the way it will be beneficial for all the parties.

Legal aspects of application of European Union to join the Bucharest Convention: transboundary benefits and interaction with freshwater regional MEAs.

In May, 2001 the European Union received its observer status in the Bucharest Convention and since then is being represented by its Environment Directorate General of the European Commission (DG Environment). Such status was granted at 7th Regular Black Sea Commission Meeting held on 29th-31st May, 2001 (http://www.blacksea-commission.org/_projects_observers_partners.asp).

As the Black Sea coastal states and Contracting Parties to the Bucharest Convention, Bulgaria and Romania submitted a proposal for an amendment to the Convention at its Ministerial Meeting held on 17th April 2007 in Sofia, Bulgaria. This amendment related to possibility to entitle the Regional Economic Integration Organizations (REIOs), such as the European Community, to accede to the Convention.

As it was already mentioned, the European Community (EC) is a Party to the regional water and sea conventions relating to the Danube River, Baltic Sea, the Mediterranean and the North East Atlantic, by virtue of certain procedural provisions contained in such conventions. Since the accession of Romania and Bulgaria to the EU

in 2007, EC took the necessary actions to join the Bucharest Convention by introducing provisions comparable to those contained in such conventions.

Since there are a number of precedents on provisions in MEAs which allow EC to be a Party, Romania and Bulgaria in principle foresaw certain flexibility on the language of the provisions to be considered for the amendment of the Bucharest Convention.

The reason for the proposed amendments is that, by virtue of the Treaty of Rome and Treaty of Lisbon, the European Union is competent in the area of environmental policy, which includes, *inter alia*, the competence of adopting legislation binding to its Member States, such as the Water Framework Directive (Council Directive 2000/60/EC) (which regulates land-base pollution and even applies to coastal waters), Nitrates and Urban Waste Water Treatment Directives (Directive 2000/60/EC of the European Parliament and of the Council) (both being essential to control nutrients), legislation on chemicals and on waste and, recently, the Marine Strategy Framework Directive (Council Directive 2008/56/EC), which requires Member States to adopt a series of measures to ensure that the seas around Europe are in good environmental status by 2020 at the latest. For the sake of regulatory and policy coherence, the Member States have empowered the EU to enter into international agreements on matters under its competence. This applies to areas where the EU has exclusive competence (i.e. fisheries, trade or agriculture) and where EU has shared competence with EU Member States (i.e. environment). As a consequence of shared competence, it became an established practice in international fora that the EU enters into international environmental agreements together with its Member States, so that it can take an active role on issues of common policy and to ensure the elaboration of an appropriate legislation.

This common practice applies to all major international environmental treaties in the context of the United Nations (UN Convention on the Law of the Sea, UNCLOS), UNEP (climate, biodiversity, ozone, waste, and chemicals), UNECE regional environmental treaties (Espoo, Aarhus Conventions etc). It also applies to several transboundary river agreements (Danube, Rhine, Oder, Elbe etc.) and to Regional Sea Conventions (RSCs), such as OSPAR, HELCOM (to which Russia is also a Party) and Barcelona Convention (to which Turkey is also a Party).

Such agreements generally recognise the specific situation of regional economic integration organizations (such as the EC), generally defined as organizations constituted by sovereign states, to which their member states have transferred competence in respect of matters governed by Convention, including the competence to enter into international agreements in respect of these matters.

In international environmental agreements, the participation of the EC is designed in such a way that it does not lead to an increase of powers and privileges (i.e. for Conventions which include a right to vote, it is either the Community which votes with a number of votes equivalent to its Member States being Parties, or it is otherwise the Member States which vote, but not both). So in case of the Bucharest Convention, it won't be a subject of increasing the votes from six to seven (Conclusions of the 3rd Meeting of the ad hoc Expert Group on item #8 of the Ministerial Declaration, Sofia 2009 - BSC internal documents).

The participation of the European Community in international environmental agreements has been ensured by introducing language in such conventions, usually during their negotiation (as it is not in the Bucharest Convention's case). Where this has not been done from the beginning, it is possible to introduce an amendment to entitle Regional Economic Integration Organisations (REIO) or sometimes explicitly the EC to accede.

In the case of the Bucharest Convention, the participation of the EC was not considered when the Convention was elaborated and adopted (1992), because none of the EU member states at that time bordered the Black Sea basin. After EU's enlargement in 2007 which took Romania and Bulgaria on board, the EU reached the Black Sea.

Thus, after the proposal for amendment to the Bucharest Convention submitted at the Diplomatic Conference of the Parties in 2009, the Parties adopted Sofia Ministerial Declaration. Its Item 8 calls for the "*initiation of a joint process within the Black Sea Commission to elaborate further on the proposal for the amendment of the Convention submitted by Bulgaria and Romania on the accession of regional economic integration organizations with a view to develop a recommendation on such amendments as may be required*" (Ministerial Declaration, Sofia 2009. Convention on the Protection of the Black Sea Against Pollution. Legal Documents. Original Texts).

The Commission on the Protection of the Black Sea Against Pollution further set up the *ad hoc* Expert Group on item 8 of the Ministerial Declaration, Sofia 2009 and approved its Terms of Reference. The activity of the Group was supposed to "*focus on the proposed amendments and further clarification with a view to develop a recommendation on such amendments as may be required before the next 23rd meeting of the Commission*" (Conclusions of the 3rd Meeting of the ad hoc Expert Group on item #8 of the Ministerial Declaration, Sofia 2009 - BSC internal documents). Activities should include the review of the proposed text for amendments; express the countries' positions on such proposed amendments; consolidate the proposed text for consideration by the Black Sea Commission and further acceptance and approval by all Contracting Parties to the Bucharest Convention.

In 2010-2011 the three meetings of the Expert Group were organized. Eventually three countries supported the EU accession to the Bucharest Convention

(Bulgaria, Georgia and Romania). The Russian Federation kept its abstention until receiving clarifications to the articles concerning the distribution of authority, rights and obligations between the EU and EU Member States - Contracting Parties to the Convention (Romania and Bulgaria). The position of Turkey is that the existing text of the Convention only permits the membership of states and that the common proposal of Bulgaria and Romania is not legally sufficient if regional organizations are to become a member to the Convention. Ukraine appreciated the assistance rendered to the Bucharest Convention by EU, however, mentioned that “*amendments will require the full revision of the Bucharest Convention and internal documents of the Black Sea Commission*” (Conclusions of the 2nd Meeting of the ad hoc Expert Group on item #8 of the Ministerial Declaration, Sofia 2009 - BSC internal documents of the Black Sea Commission).

The Expert Group concluded that “*the group could not reach a common position regarding the proposal for amendment to the Convention submitted by Bulgaria and Romania in 2009 and the Expert Group considers that within its defined timeframe of work it has fulfilled its Terms of Reference*” (Conclusions of the 3rd Meeting of the ad hoc Expert Group on item #8 of the Ministerial Declaration, Sofia 2009 - BSC internal documents). Thus, for the moment, the efforts related to amending the Bucharest Convention, have been, unfortunately, suspended.

CONCLUSIONS

The following conclusions and recommendations could be made:

1. Recognizing the growing regional and transboundary character of water resources management and the related environmental problems occurred, the Danube-Black Sea Region became the hot spot on the map of diplomatic and political relations between riparian countries. Thus, the problem of comparative analysis and adherence to the regional environmental conventions ratified by these countries and the EU legislation, let alone the improvement of the synergy between them, are on the agenda today.
2. More active participation of the European Union in these regional conventions would, no doubt, bring benefits for other partners as it ensures the active involvement of the European institutions. In its turn, this may facilitate the direct dialogue on environmental matters and bring some better coherence between regulatory and financial action at the European level.
3. Compliance to such legislative instruments as Environmental Conventions in this region, considering the process of integration of Georgia, Turkey and Ukraine to the European Union and Bulgaria and Romania’s membership in the EU, will facilitate the unification of environmental legislation and implementation of EU legislation in the region (i.e. Danube Strategy, Water Framework Directive (WFD) for the Danube River and EU Marine Strategy for the Black Sea). From the other hand, the EU could contribute to the introduction

of integrated management approach (as in WFD) and Environmental Impact Assessment (EIA) procedure (as in EIA Directive and related provisions of Espoo Convention) for the Black Sea countries. At the moment only two countries from six Black Sea countries implement the EU legislation and only four from six are Parties to the UNECE Espoo Convention.

4. The experience of EU's participation in different regional fresh and marine waters conventions shows that different legal forms of its participation in such MEAs are possible (i.e. right to vote, budget contributions, distribution of rights and obligations between the EU and its Member States etc.). Therefore, no political discussions or further slowing down of EU's accession to the Bucharest Convention should take place. As the environmental situation in the region is extremely critical, all the riparian countries should concentrate their efforts on further development of regional cooperation in the Danube-Black Sea area where EU already for a long time is one of the key players.
5. Further involvement of the EU in the activity of two regional Commissions (the ICPDR and Black Sea Commission) could assist them to unify the approaches related to the technical indicators of the pollution and to refresh the activities under the Memorandum of Understanding (MoU) between the Commissions signed in 2001, since the level of their current interaction is not very well coordinated and active. This activity is extremely important in the view of further necessity to link the transboundary aspects of the freshwater and marine water regimes in the Danube-Black Sea region.

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