CHAPTER 3 Regional Seas Conventions and Decommissioning

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§3.01 Introduction

The previous chapter examined the key multilateral instruments of international law relevant to decommissioning, namely the United Nations Convention on the Law of the Sea (UNCLOS) and the London Convention on Dumping. As foreshadowed in that chapter, States across the globe are also party to a number of regional seas conventions and programmes, which impose obligations on the parties to protect and preserve the marine environment, and to promote the sustainable management and use of the marine and coastal environment.

The Regional Seas Programme was launched in 1974, by the United Nations Environment Programme (UNEP), now known as 'UN Environment'. Since that time, over 143 countries have joined 18 Regional Seas Conventions plus their various Protocols, and/or Regional Seas Action Plans.[1] The primary Conventions for various seas, oceans or regions are listed below in Table 3.1. As can be seen from Table 3.1, not all regional seas conventions were negotiated and/or are administered through the Regional Seas Programme.

Table 3.1 Regional Seas Programmes and Conventions

UN Environment-Administered Regional Seas Programmes	
Caribbean Region	Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (1983)
East Asian Seas	Action Plan for the Protection and Development of the Marine and Coastal Areas of the East Asian Region (1981) (No convention)
Eastern Africa Region	Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern Africa Region (1985)
Mediterranean Region	Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (1976, revised 1995)

[1] UN Environment, *Working With Regional Seas*, https://www.unenvironment.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/why-does-working-regional-seas-matter (accessed 2 December 2019).

North-West Pacific Region	North-West Pacific Action Plan/NOWPAP (1994) (No convention)
Western Africa Region	Abidjan Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (1981)
Caspian Sea	Tehran Framework Convention for the Protection of the Marine Environment of the Caspian Sea (2003)
Non-UN Environment-administered Regional Seas Programmes	
Black Sea Region	Bucharest Convention on the Protection of the Black Sea Against Pollution (1992)
North-East Pacific Region	Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific (2002)
Red Sea and Gulf of Aden	Jeddah Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment (1982)
ROPME Sea Area	Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, 1978
South Asian Seas	South Asian Seas Action Plan (1995) (No convention)
South-East Pacific Region	Lima Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific (1981)
South Pacific Region	Noumea Convention for the Protection of Natural Resources and Environment of the South Pacific Region (1986)
Independent Regional Seas Programmes	
Arctic Region	Arctic Council for the Protection of the Arctic Marine Environment (1992)
Antarctic Region	Convention for the Conservation of Antarctic Marine Living Resources (1982) and Madrid Protocol on the Protection of the Antarctic Environment (1991)
Baltic Sea	Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area (1992)

North-East Atlantic Region	OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic (Oslo and Paris conventions, adopted 1974, revised and combined 1992)

Source: UN Environment, *Working With Regional Seas*, https://www.unenvironment.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/why-does-working-regional-seas-matter (accessed 9 December 2019).

The various regional seas Conventions, and their Protocols and Action Plans, reflect a broadly similar approach to protection and preservation of the marine environment, although as is to be expected, the Conventions differ in terms of the precise nature of the principles and the obligations contained therein. The regional seas conventions are generally framework conventions, setting out key general principles and obligations. More detailed obligations in relation to the marine environment are contained in protocols to the conventions. The treaties commonly provide for the establishment of a regional body to coordinate the implementation of the particular convention and undertake a range of other functions. The conventions also deal with a number of matters common to international and regional treaty regimes, such as the establishment and operations of the conference of the parties, compliance, monitoring and reporting obligations, and dispute resolution.

The types of provisions that are common to regional seas treaties (if not present in all the regional seas treaties) are listed below:

– General obligations to individually or jointly take all appropriate measures to prevent, reduce, eliminate, abate, combat and/or control pollution of the regional sea, and/or protect, preserve and restore the environment of the regional sea.
– An obligation to protect the marine living resources of the regional sea.
– Fundamental general principles of environmental law that states agree to apply, such as the precautionary principle; the polluter pays principle; the duty to prevent transboundary pollution; the principle of accessibility of information; and/or the use of best available practice and best available technology.
– Obligations to cooperate with other state parties, for example, cooperation in the exchange of information; scientific and technological cooperation, and cooperation in relation to research and development.
– Obligations to require prior environmental impact assessment (EIA) in national laws, and transboundary EIA, where proposed activities may have a significant impact on the marine environment, or the resources of the marine environment.
– Principles and obligations concerning the prevention and regulation of pollution of the regional sea from land-based sources; from ships; from the transboundary movement of hazardous wastes; and from the exploration and exploitation of the seabed and its subsoil.
– A prohibition on dumping in the regional sea, and/or the obligation to establish a licensing system in relation to the disposal of wastes.
– Obligations to cooperate in combating pollution in emergency situations, and in particular, regional preparedness, response and cooperation in combating oil pollution incidents.
– Obligations and principles pertaining to the conservation of biological diversity.

– The obligation to cooperate to establish principles, rules and procedures to determine civil liability and compensation for damage from pollution of the regional sea.

Some, but not all, regional seas Conventions and Protocols contain specific provisions regarding decommissioning of offshore oil and gas infrastructure, or at least, the requirement to remove disused or abandoned offshore oil and gas installations. The comprehensiveness and stringency of these obligations vary between treaties. Even where there are no specific obligations pertaining to decommissioning, general obligations, such as the obligation to protection the marine environment, and to conduct EIA, will inform the existence and content of national environmental and petroleum laws, and therefore the regulation of decommissioning.

It is beyond the scope of this book to examine all the regional seas Conventions and Protocols and the obligations contained within them. Therefore, this chapter will focus on only six regional treaties, all of which contain specific obligations in relation to 'decommissioning', 'abandonment' or 'removal' of offshore oil infrastructure, facilities or installations, or detailed provisions prohibiting dumping. These are as follows:

– 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic ('OSPAR Convention');[2]
– 1995 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean ('Barcelona Convention');[3]
– 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area ('Helsinki Convention');[4]
– 1978 Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution ('Kuwait Convention');[5]
– 1981 Convention for Cooperation in the Protection, Management and Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central and Southern Africa Region ('Abidjan Convention');[6] and the

[2] Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris) 22 September 1992 (in force 25 March 1998), 2354 U.N.T.S. 67 [hereinafter 'OSPAR Convention'].
[3] Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona), 10 June 1995 (in force 9 July 2004), UNEP(OCA)/MED IG.6/7 [hereinafter 'Barcelona Convention'], revising the Convention for the Protection of the Mediterranean Sea Against Pollution (Barcelona), 16 February 1976 (in force on 12 February 1978) 1102 U.N.T.S. 27.
[4] Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki), 4 April 1992 (in force 17 January 2000), [hereinafter 'Helsinki Convention'], revising the Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki) 22 March 1974 (in force 3 May 1980), 1507 U.N.T.S. 166.
[5] Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (Kuwait), 24 April 1978 (in force 30 June 1979), IUCN TRE-000537 [hereinafter 'Kuwait Convention'].
[6] For a consolidated version of the Convention, *see* United Nations Environment Programme, *Eleventh Meeting of the Contracting Parties to the Convention for Cooperation in the Protection, Management and Development of the Marine and Coastal Environment of the*

– 1986 Convention for the Protection of Natural Resources and Environment of the South Pacific Region ('Noumea Convention').[7]

The more specific, detailed and non-binding *Decommissioning Guideline* of the Petroleum Council of the Southeast Asian Nations (ASEAN)[8] will be examined in Chapter 4.

§3.02 Regional Laws and Guidelines

[A] The Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992 ('OSPAR Convention')

The OSPAR maritime area, and in particular the North Sea, is a region with numerous offshore infrastructures used for the exploration and exploitation of non-living resources. According to the OSPAR Oil and Gas Offshore Inventory, a database monitored by OSPAR, there are more than 1,350 operational offshore installations in the OSPAR region.[9] Most of them are sub-sea steel installations and fixed steel installations.[10] To date, 170 installations have been decommissioned in this region.[11]

The OSPAR Convention is a regional treaty between 15 contracting parties and the European Commission.[12] It was signed on 22 September 1992 by all of the Contracting Parties to the original 1972 Oslo Convention on dumping waste at sea,[13] or the Paris Convention of 1974 on land-based sources of marine pollution,[14] and by Luxembourg and

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Atlantic Coast of the West, Central and Southern Africa Region (Abidjan Convention), Capetown, 17–21 March 2014, UNEP (DEPI)/WACAF/COP.11/Ref.2. (hereinafter 'Abidjan Convention').

[7] Convention for the Protection of Natural Resources and Environment of the South Pacific Region (Nouméa, New Caledonia) 24 November 1986, 26 ILM 38 (1987) (hereinafter 'Noumea Convention').

[8] *ASCOPE Decommissioning Guideline (ADG) for Oil and Gas Facilities* (ASEAN Council on Petroleum, 2012).

[9] OSPAR Contracting Parties with oil and gas industry offshore installations are: Denmark, Germany, Ireland, the Netherlands, Norway, Spain and the United Kingdom.

[10] Contracting Parties with oil and gas industry offshore installations are: Denmark, Germany, Ireland, the Netherlands, Norway, Spain and the United Kingdom. The OSPAR Inventory of Offshore Installations can be accessed on the OSPAR-ODIMS website at: https://odims.ospar.org/.

[11] OSPAR Commission, *Special consultative meeting* (Press Release, online, 18 October 2019), https://www.ospar.org/news/special-consultative-meeting (accessed 12 December 2019).

[12] Website of the OSPAR Convention: https://www.ospar.org.

[13] 1972 Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (Oslo) 15 February 1972, 932 U.N.T.S. 3, 11 I.L.M. 262 (1972).

[14] Convention for the Prevention of Marine Pollution from Land-Based Sources (Paris) 4 June 1974, 1546 U.N.T.S. 119; 13 I.L.M. 352 (1974).

Switzerland. After ratification, it entered into force on 25 March 1998. OSPAR covers five maritime regions: (I) Arctic Waters, (II) Greater North Sea, (III) Celtic Seas, (IV) Bay of Biscay and Iberian Coast, and (V) Wider Atlantic.

The OSPAR Convention was developed from the provisions of the 1972 Oslo Convention, which was itself broadened to cover land-based sources and the offshore industry by the Paris Convention of 1974. These two conventions were unified, updated and extended in scope by the 1992 OSPAR Convention.[15] An example of this extension is the adoption, at the first Ministerial Meeting of the OSPAR Commission at Sintra, Portugal, in 1998, of a new annex on biodiversity and ecosystems which covers all human activities that might adversely affect the marine environment of the North East Atlantic (Annex V to the Convention). Another example of this extension is the scope of application of the OSPAR Convention which now expressly applies to internal waters and the exclusive economic zone (EEZ). Besides those clear extensions, the current regime for decommissioning under the OSPAR Convention can be seen as the result of a long and progressive evolution under the Oslo and Paris Conventions, from notably the OSCOM Decision 95/1 concerning the disposal of offshore installations, to the current regime.

The OSPAR Convention aims to ensure cooperation between its parties to prevent and eliminate pollution, with a view to protecting the marine environment of the North-East Atlantic against the adverse effects of human activities.[16] Furthermore, the Convention aims to ensure sustainable management of the area concerned. 'Sustainable management' is defined in the Convention Preamble as the 'management of human activities in such a manner that the marine ecosystem will continue to sustain the legitimate uses of the sea, and will continue to meet the needs of present and future generations'.

To achieve this, the Contracting Parties shall, individually and jointly, adopt programs and measures and shall harmonise their policies and strategies.[17] To support and coordinate their efforts, the Convention has a dedicated strategy for the environment – the North-East Atlantic

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[15] For a historic review of the evolution of the OSPAR Convention regime over time, *see*: Luisa Rodriguez-Lucas, 'OSPAR's decommissioning policy' in Marc Hammerson and Nicholas Antonas (eds), *Oil and Gas Decommissioning: Law, Policy and Comparative Practice* (Globe Law and Business 2nd ed. 2016) 33–43.
[16] OSPAR Convention, Art. 2(1)(a).
[17] *Id.*, Art. 2(1)(b).

Environment Strategy ('NEAE Strategy')[18] – which aims to implement the ecosystem approach and which is itself organised under sixthematic strategies:

(1) Protection and Conservation of Marine Biodiversity and Ecosystems
(2) Eutrophication
(3) Hazardous Substances
(4) Offshore Oil and Gas Industry
(5) Radioactive Substances
(6) Joint Assessment and Monitoring Programme (JAMP)

For each of the strategies a committee is formed, which supports the Commission. Some of the committees are in turn supported by working groups. All committees participate in the Joint Monitoring and Assessment Programme. All OSPAR Strategies are relevant for offshore petroleum activities, with the exception of the Radioactive Substances one. However, one strategy deals more directly than others with the 'Offshore Oil and Gas Industry'.[19] This strategy aims to prevent and eliminate pollution and take the necessary measures to protect the OSPAR maritime area against the adverse effects of offshore oil and gas activities by setting environmental goals and improving management mechanisms, so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been adversely affected.

Directly relevant for the question of decommissioning is Annex III to the OSPAR Convention which deals with the prevention and elimination of pollution from offshore sources. It defines an absolute prohibition on any dumping of wastes or other matter from offshore installations.[20] In addition, it forbids the dumping of any disused offshore installation or disused offshore pipeline, or leaving wholly or partly in place disused offshore installation.[21] Dumping is defined by the Convention as 'any deliberate disposal in the maritime area of offshore installations and offshore pipelines and wastes or other matter from offshore installations'.[22] Dumping does not include situations where a matter is placed for a different purpose than the mere disposal,[23] or if the disused offshore installation or pipeline is left wholly or partly in place in accordance with the provisions of the OSPAR Convention or any relevant international law.

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[18] *Strategy of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic 2010–2020* (OSPAR Agreement 2010-3), https://www.ospar.org/site/assets/files/1200/ospar_strategy.pdf#page=19 (accessed 29 January 2020).
[19] *Id.*, at 19–21.
[20] OSPAR Convention, Art. 3.1, Annex III.
[21] *Id.*, Art. 5.1, Annex III.
[22] *Id.*, Art. 1(f)(ii)(2), Art. 1(f)(i)(2).
[23] *Id.*, Art. 1(g)(ii).

Indeed, the OSPAR Convention provides for one exception to the dumping prohibition of disused offshore installations and pipelines – when a permit has been issued by the competent authority of the relevant Contracting Party, which acts on a case-by-case basis.[24] When granting such permits, the Contracting Parties shall ensure that their authorities implement the relevant applicable decisions, recommendations and all other agreements adopted under the OSPAR Convention. The Convention sets additional conditions to the deliverance of the permits:

– No permit shall be issued for the dumping of the disused offshore installations if it results in the relief of substances which may cause hazards to human health, harm to living resources and marine ecosystems, damage to amenities or interference with other legitimate uses of the sea.[25]
– If a Contracting Party plans to issue a permit for the dumping of a disused offshore installation or pipeline placed after 1 January 1998, it has the duty to inform the other Contracting Parties, via the Commission, in the view of enabling consultation, stating the reason for accepting such dumping.[26]
– Contracting Parties are required to keep, and report to the Commission, records of the dumped disused offshore installations and pipelines, including the dates, places and methods of dumping.[27]

This system of prohibition and exemption based on permit is reiterated and given more detail in Decision 98/3 for the Disposal of Disused Offshore Installation by the OSPAR Convention of July 1998.[28] The approach defined thereof establishes, as pointed out by other authors, 'a presumption in favour of an obligation to remove a disused structure'.[29] The adoption of the Decision was the direct consequence of a protest organised by environmental organisations against the announced decision by UK Department of Trade and Industry in 1995 to grant permission to Shell UK to dump the remaining parts of the Brent Spar Shell platform, originally commissioned in 1991.[30] As the Oslo Convention already required Contracting Parties to inform the Oslo Commission – predecessor of the OSPAR Commission – of their intention to grant dumping permission, the issue was debated by

[24] *Id.*, Art. 5.1, Annex III.
[25] *Id.*, Art. 5.2, Annex III.
[26] *Id.*, Art. 5.3, Annex III.
[27] *Id.*, Art. 5.4, Annex III.
[28] 1998 OSPAR Decision 98/3 On the Disposal of Disused Offshore Installations (Sintra, Portugal) 22–23 July 1998, http://www.ospar.org/documents?d=32703 (accessed 27 January 2020).
[29] S. Trevisanut, 'Decommissioning of Offshore Installations: A Fragmented and Ineffective International Regulatory Framework,' in Catherine Banet (ed.), *Law of the Seabed: Access, Uses, and Protection of Seabed Resources* (Brill, 2020) 451.
[30] *Ibid.*, 450–451. For more information on the Brent Spar protests, *see* Chapter 10 of this book, below.

Parties in 1995, and resulted in the adoption of Decision 98/3, which came into force on 9 February 1999.

OSPAR Decision 98/3 lays down guidelines for the different disposal alternatives for various types of offshore installations. The Decision starts by affirming that the disposal of offshore installations should be governed by the precautionary principle, which takes account of potential effects on the environment. It also recognises that 'reuse, recycling or final disposal on land will generally be the preferred option for the decommissioning of offshore installations in the maritime area'.[31] Next, the Decision defines a prohibition against dumping and leaving wholly or partly in place disused offshore installations within the maritime area.[32] By way of derogation, a Contracting Party may decide, after the satisfactory completion of an assessment in accordance with Annex 2 of the Decision, to choose one of the following alternative disposal solutions to the reuse or recycling or final disposal on land, and to issue a permit in that sense. The permit can alternatively provide that:

a. All or part of the footings of a steel installation (category listed in Annex 1), placed before 9 February 1999, can be left in place.

b. A concrete installation in a category listed in Annex 1 or constituting a concrete anchor base, can be dumped or left wholly or partly in place.

c. A disused offshore installation can be dumped or left wholly or partly in place, provided that exceptional and unforeseen circumstances resulting from structural damage or deterioration, or from some other cause presenting equivalent difficulties, are present.[33]

If a Contracting Party decides to derogate from the prohibition and issue a permit, a consultative process must be carried out within the OSPAR system.[34] The final decision to grant permission for exemption is adopted by the Contracting Party. Since 2001 and under OSPAR Decision 98/3, nine derogations have been granted by the United Kingdom and Norway.[35] In all these cases, the consultation process held in accordance to Annex 3 of OSPAR Decision 98/3 has enabled the resolution of comments and objections raised.

Finally, it should be noted that the IMO Guidelines and the OSPAR regime overlap in the OSPAR maritime area of the North-East Atlantic, notably in terms of removal requirements. However, the more detailed and stringent regime defined in the OSPAR Convention makes the latter the main legal regime applied.

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[31] OSPAR Decision 98/3, Chapeau.
[32] *Id.*, ¶ 2.
[33] *Id.*, ¶ 2.
[34] *Id.*, ¶ 4 and Annex 3.
[35] OSPAR Commission, *supra* n. 11.

[B] Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, 1995 ('Barcelona Convention')

The 1995 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean ('Barcelona Convention') was originally adopted on 16 February 1976, as the Convention for Protection of the Mediterranean Sea against Pollution.[36] It was signed by 13 Mediterranean countries[37] and the European Community. On the same day, the 1976 Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft[38] the 1976 Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea[39] were adopted. These three legal instruments all came into force on 12 February 1978.

The Barcelona Convention forms the legal framework of the 1975 Mediterranean Action Plan, developed under the UNEP Regional Seas Programme. It was adopted as a regional convention aimed at prevention and abatement of pollution from ships, aircraft and land-based sources in the Mediterranean Sea. The Parties to the Barcelona Convention are all countries with a Mediterranean shoreline: Albania, Algeria, Bosnia and Herzegovina, Croatia, Cyprus, Egypt, France, Greece, Israel, Italy, Lebanon, Libya, Malta, Monaco, Montenegro, Morocco, Slovenia, Spain, Syrian Arab Republic, Tunisia, Turkey and the European Union.[40] On 10 June 1995, the Convention was substantively amended and renamed the 'Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean'. These amendments entered into force on 9 July 2004, and only Bosnia and Herzegovina have not ratified the amendments.[41]

In addition to the two 1976 Protocols, five more protocols to the Convention were later adopted, of which the Protocol for the Protection of the Mediterranean Sea against Pollution

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[36] Barcelona Convention, *supra* n. 3.
[37] Cyprus, Egypt, France, Greece, Israel, Italy, Libya, Malta, Monaco, Morocco, Spain, Tunisia and Turkey.
[38] The Protocol was amended in 1995, but the amendments are not yet in force.
[39] Replaced by the version adopted on 25 January 2002 (entered into force on 17 March 2004).
[40] UN Environment, Coordinating Unit for the Mediterranean Action Plan Secretariat to the Barcelona Convention and its Protocols, *Signatures and Ratifications of the Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols as at 24 April 2019 (last notification received)*, https://web.unep.org/unepmap/who-we-are/legal-framework/status-signatures-and-ratifications (accessed 12 December 2019).
[41] *Id*.

Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil ('the Offshore Protocol') has most relevance for the purposes of this chapter.[42] The Offshore Protocol entered into force on 24 March 2011. As of April 2019, the Contracting Parties were Albania, Croatia, Cyprus, Libya, Morocco, Syrian Arab Republic, Tunisia and the European Union. Greece, Israel, Italy, Malta, Monaco, Slovenia and Spain had signed but not ratified the Offshore Protocol, while Algeria, Bosnia and Herzegovina, Egypt, France, Lebanon, Montenegro and Turkey had neither signed nor ratified the Offshore Protocol.[43]

Article 4 of the Barcelona Convention establishes the Parties' general obligations. According to Article 4.1 of the Convention, the Contracting Parties shall:

individually or jointly take all appropriate measures in accordance with the provisions of this Convention and those Protocols in force to which they are party to prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area and to protect and enhance the marine environment in that Area so as to contribute towards its sustainable development.

Separate commitments of the parties are also contained in the Convention, for example, to prevent, abate, combat and, 'to the fullest extent eliminate' pollution by dumping, pollution from ships and pollution from land-based sources,[44] and more detailed obligations are established in the various protocols to the Convention. Furthermore, Article 7 of the Barcelona Convention imposes an obligation upon the parties to 'take all appropriate measures to prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area resulting from exploration and exploitation of the continental shelf

[42] Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil (adopted 14 October 1994, entered into force 24 March 2011). The other four protocols are: Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities (adopted 17 May 1980, entered into force 17 June 1983), amended by the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities (adopted 7 March 1996, entered into force 11 May 2008); Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (adopted 10 June 1995, replacing the related protocol of 1982, entered into force 12 December 1999) and Annexes; Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal (adopted 1 October 1996, entered into force 18 January 2008); and Protocol on Integrated Coastal Zone Management in the Mediterranean (adopted 21 January 2008, entered into force 24 March 2011).

[43] UN Environment, *supra* n. 40.

[44] Barcelona Convention, Arts 5, 6 and 8.

and the seabed and its subsoil'. More detailed obligations, including those specific to the removal of offshore oil installations, are set out in the Offshore Protocol.

The Offshore Protocol has six sections. Section II requires the Contracting Parties to establish a system of authorisations, issued by a competent national authority, for the construction and operation of installations for exploration and exploitation of the Mediterranean seabed and its subsoil. 'Installation' is defined in Article 1(f) to mean

any fixed or floating structure and integral part thereof, that is engaged in activities, including, in particular:

(i) Fixed or mobile offshore drilling units;
(ii) Fixed or floating production units including dynamically-positioned units;
(iii) Offshore storage facilities including ships used for this purpose;
(iv) Offshore loading terminals and transport systems for the extracted products, such as submarine pipelines; [and]
(v) Apparatus attached to it and equipment for the reloading, processing, storage and disposal of substances removed from the seabed or its subsoil.

Article 5(1)(g) requires Contracting Party to ensure that applications for authorisation or the renewal of an authorisation include 'the plans for removal of installations as specified in Article 20'. Article 20 sets out the obligations of the Parties in relation to the removal of installations, as follows:

Article 20
Removal of Installations

1. The operator shall be required by the competent authority to remove any installation which is abandoned or disused, in order to ensure safety of navigation, taking into account the guidelines and standards adopted by the competent international organisation. Such removal shall also have due regard to other legitimate uses of the sea, in particular fishing, the protection of the marine environment and the rights and duties of other Contracting Parties. Prior to such removal, the operator under its responsibility shall take all necessary measures to prevent spillage or leakage from the site of the activities.
2. The competent authority shall require the operator to remove abandoned or disused pipelines in accordance with paragraph 1 of this Article or to clean them inside and abandon them or to clean them inside and bury them so that they neither cause pollution, endanger navigation, hinder fishing, threaten the marine environment, nor interfere with other legitimate uses of the sea or with the rights and duties of other Contracting Parties. The competent authority shall ensure that appropriate publicity is given to the depth, position and dimensions of any buried pipeline and that such information is indicated on charts and notified to the Organisation and other competent international organisations and the Parties.
3. The provisions of this Article apply also to installations disused or abandoned by any operator whose authorisation may have been withdrawn or suspended in compliance with Article 7.
4. The competent authority may indicate eventual modifications to be made to the level of activities and to the measures for the protection of the marine environment which had initially been provided for.
5. The competent authority may regulate the cession or transfer of authorised activities to other persons.

6. Where the operator fails to comply with the provisions of this Article, the competent authority shall undertake, at the operator's expense, such action or actions as may be necessary to remedy the operator's failure to act.

Furthermore, Article 28(i) requires each Contracting Party to appoint one or more competent authorities to 'supervise the removal of the installations as provided in Article 20 of this Protocol'.

There are several points worth highlighting in relation to Article 20, as this is the main provision dealing with decommissioning across the entire Convention and Offshore Protocol. First, the requirement in Article 20(1), to remove abandoned and disused installations, is essentially similar to Article 60 of UNCLOS. Article 20(1) of the Offshore Protocol does not expressly require total removal of the installations, but rather requires their removal 'in order to ensure safety of navigation', taking into account 'the guidelines and standards adopted by the competent international organization', and giving 'due regard to other legitimate uses of the sea, in particular fishing, the protection of the marine environment and the rights and duties of other Contracting Parties'. It therefore appears that the partial removal is allowed.

Second, and unlike UNCLOS, the decommissioning of pipelines is specifically addressed in the Offshore Protocol. Under Article 2, States may clearly permit pipelines to be removed, or cleaned and abandoned in situ, or cleaned and buried. However, pipelines may only be abandoned in situ, or buried, if they do not 'cause pollution, endanger navigation, hinder fishing, threaten the marine environment, nor interfere with other legitimate uses of the sea or with the rights and duties of other Contracting Parties'. Thus, as with the removal of installations, the safety of navigation, fishing and other uses of the sea, including protection of the marine environment, remain paramount considerations.

Third, Article 20 of the Offshore Protocol clearly requires States to impose the duty to decommission abandoned or disused installations and pipelines upon the 'Operator'. Article 1(g) of the Convention defines the 'Operator' to be 'any natural of juridical person who is authorised to carry out the activities concerning exploration and exploitation of the resources, who carries out such activities, or who is de facto in control of such activities'. UNCLOS does not make such specific reference to the entity(ies) responsible to conduct such process. Moreover, where the operator fails to comply with the Offshore Protocol and undertake decommissioning as per the provisions of Article 20, Article 20(6) places a mandatory obligation on the States to ensure that their competent authority undertakes decommissioning to remedy the operator's failure to act.

Finally, the Protocol clearly identifies a number of issues which should be addressed by the relevant competent authority from each signatory party, namely assignment, withdrawal and remedies.

In short, this Protocol addresses some of the key issues relevant to decommissioning. Despite some differences in Article 20 of the Offshore Protocol and Article 60 of UNCLOS, it is arguable that a similar approach is taken by both regimes, in the sense that their provisions must be implemented and monitored by the relevant states, who signed and ratified the Conventions. As with other Conventions and Protocols, more comprehensive or detailed obligations in relation to decommissioning could be included in Offshore Protocol, instead of leaving the relevant competent authority to deal with them.

[C] Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992 ('1992 Helsinki Convention')

In 1974, the then seven Baltic coastal states adopted the Convention on the Protection of the Marine Environment of the Baltic Sea Area, which made all the sources of pollution around the Baltic Sea subject to a single convention. Following political changes, and developments in international environmental and maritime law, all the states bordering on the Baltic Sea adopted the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area ('1992 Helsinki Convention') at a Diplomatic Conference in Helsinki on 9 April 1992.[45]

The 1992 Helsinki Convention entered into force on 17 January 2000. It applies to the Baltic Sea Area, as defined in Article 1 of the Convention, which is the Baltic Sea and the entrance to the Baltic Sea bounded by the parallel of the Skaw in the Skagerrak at 57° 44.43'N, and includes the internal waters of the Contracting Parties. The Contracting Parties are Denmark, Estonia, the European Union, Finland, Germany, Latvia, Lithuania, Poland, Russia and Sweden. The Baltic Marine Environment Protection Commission (the Helsinki Commission, or HELCOM) is the governing body of the Convention.

Article 3(1) of the Helsinki Convention places an obligation on the Contracting Parties to 'individually or jointly take all appropriate legislative, administrative or other relevant measures to prevent and eliminate pollution in order to promote the ecological restoration of

[45] European Commission, *The HELCOM Convention*, https://ec.europa.eu/environment/marine/international-cooperation/regional-sea-conventions/helcom/index_en.htm (accessed 4 December 2019).

the Baltic Sea Area and the preservation of its ecological balance'. Contracting Parties are bound to apply the precautionary principle, that is,

to take preventive measures when there is reason to assume that substances or energy introduced, directly or indirectly, into the marine environment may create hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea even when there is no conclusive evidence of a causal relationship between inputs and their alleged effects'.[46]

Furthermore, measures taken to implement the Convention 'shall not lead … to unacceptable environmental strains on … waters …, to unacceptably harmful or increasing waste disposal, or to increased risks to human health'.[47] Parties must also promote the use of Best Environmental Practice and Best Available Technology, in order to prevent and eliminate pollution of the Baltic Sea Area, and apply the polluter pays principle.[48]

Among other things, the Convention and various Protocols to the Convention require the Contracting Parties to undertake a range of actions to protect the marine environment, including: to prevent and eliminate pollution of the marine environment of the Baltic Sea Area caused by harmful substances from all sources (Article 5); to prevent and eliminate pollution of the Baltic Sea Area from land-based sources (Article 6); to take measures to prevent pollution from ships (Article 5); 8); to prevent dumping in the Baltic Sea area (Article 11); to notify and consult in relation to pollution incidents in the Baltic Sea area (Article 13); to co-operate in combatting marine pollution (Article 14); and, individually and jointly, to take all appropriate measures with respect to the Baltic Sea Area and its coastal ecosystems influenced by the Baltic Sea to conserve natural habitats and biological diversity and to protect ecological processes (Article 15).

Article 12 of the 1992 Helsinki Convention requires each Contracting Party to 'take all measures in order to prevent pollution of the marine environment of the Baltic Sea Area resulting from exploration or exploitation of its part of the seabed and the subsoil thereof or from any associated activities thereon', and, in order to 'prevent and eliminate pollution from such activities, to undertake to implement the procedures and measures set out in Annex VI' to the Convention, as far as they are applicable. Annex VI, which sets out

[46] Helsinki Convention, Art. 3(2).
[47] *Id.*, Art. 3(6).
[48] *Id.*, Arts 3(3), (4).

regulations/obligations in relation to the 'Prevention of Pollution from Offshore Activities' is directly relevant to decommissioning of offshore oil and gas infrastructure.

Regulation 8 of Annex VI, entitled 'Disused Offshore Units', requires Contracting Parties to ensure that 'abandoned, disused offshore units and accidentally wrecked offshore units are entirely removed and brought ashore under the responsibility of the owner and that disused drilling wells are plugged'. 'Offshore unit' is defined to mean 'any fixed or floating offshore installation or structure engaged in gas or oil exploration, exploitation or production activities, or loading or unloading of oil'.[49] This is thus a clear and unambiguous textual requirement for the total removal of disused offshore oil and gas installations.

The inclusion of Regulation 8 in Annex VI was a new regulation or obligation that did not exist under the 1974 Convention.[50] In recognition of the potential delay between the time that the new requirements in Annex VI of the 1992 Convention were adopted, and (as yet then unknown) date of entry into force of the 1992 Convention, in 1993, HELCOM's Maritime Committee approved a draft HELCOM Recommendation on the removal of abandoned and disused offshore units at its 18th meeting in Gdansk, Poland, from 28 September to 2 October 1992. The Maritime Committee, being 'conscious that while awaiting the entry into force of the 1992 Helsinki Convention, the issue of disposing of abandoned and disused offshore units may become actual', recommended that the Governments of the Contracting Parties to the Helsinki Convention 'ensure that abandoned, disused offshore units and accidentally wrecked offshore units are entirely removed and brought ashore under the responsibility of the owner and that disused drilling wells are plugged'. This Recommendation was approved by the Commission at its 14th Meeting in 1993.[51]

In addition to Article 12, Article 11 of the 1992 Convention requires the Contracting Parties to prohibit dumping in the Baltic Sea Area. Dumping, as defined in Article 4 of the Convention, includes 'any deliberate disposal at sea or into the seabed of wastes or other matter from ships [and] other man-made structures at sea and also 'any deliberate disposal of sea of ships and other man-made structures'. However, dumping does not include 'placement

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[49] *Id.*, Annex VI, Regulation 1.
[50] The text of the 1974 Convention is available at http://www.helcom.fi/about-us/convention/1974-helsinki-convention/ (accessed 4 December 2019).
[51] HELCOM Recommendation 14/9, adopted 3 February 1993, 'Removal of Abandoned and Disused Offshore Units', *Activities of the Commission 1992 Including the 14th Meeting of the Commission held in Helsinki 2–5 February 1993*, Baltic Sea Environmental Proceedings No. 52 (HELCOM 1993), http://www.helcom.fi/Recommendations/Rec%2014-9.pdf#search=offshore (accessed 4 December 2019).

of matter for a purpose other than the mere disposal thereof, provided that such placement is not contrary to the aims of the present Convention'.[52] Therefore, it is arguable that the placement of a disused oil installation, or part thereof, to create an artificial reef for the protection of the environment and enhancement of living resources is not dumping under the Convention. However, this would presumably be subject to the precautionary principle, as outlined in Article 1.

[D] Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, 1978 ('Kuwait Convention')

The Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution was adopted at a Regional Conference on 23 April 1978[53] and entered into force on 1 July 1979.[54] On the same day, the Conference also adopted the Action Plan for the Protection and Development of the Marine Environment and the Coastal Areas; and the Protocol Concerning regional Co-operation in Combating Pollution by Oil and Other Harmful Substances in Cases of Emergency.[55]

The Kuwait Convention is the first Convention developed as part of UNEP's Regional Seas Programme. The Parties to the Convention are Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates. The Regional Organisation for the Protection of the Marine Environment (ROPME) was established on 1 July 1979, pursuant to Article XVI of the Kuwait Convention.[56] The Convention applies to the ROPME Sea Area, which is defined in the Convention according to certain geographic latitudes and longitudes.[57] Essentially, the ROPME Sea Area is the sea area surrounded by the eight member States to the Kuwait Convention. It does not include the internal waters of the member States.

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[52] Helsinki Convention, Art. 2.
[53] The Regional Conference of Plenipotentiaries on the Protection and Development of the Marine Environment and the Coastal Areas of Bahrain, I.R. Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates, held in Kuwait, 15–23 April 1978.
[54] Regional Organisation for the Protection of the Marine Environment, *ROPME SEA AREA (RSA)* http://ropme.org/1_Sea_Area_EN.clx (accessed 2 December 2019).
[55] *Id*.
[56] ROPME provides technical coordination to the Kuwait Action Plan and to its member States, in the implementation of the Kuwait Convention and its Protocols, as well as assistance in relation to projects, covering environmental assessment and environmental management.
[57] Kuwait Convention, *supra* n. 5, Art. II.

The Kuwait Convention does not contain any specific obligations pertaining to decommissioning of oil and gas infrastructure. The Convention itself contains comparatively few obligations. Article III of the Convention sets out five 'General Obligations' of the Parties. Pursuant to Article III(a), the Parties are obliged to take all appropriate measures, in accordance with Convention and any protocols in force to which they are a party, to 'prevent, abate and combat marine pollution' in the ROPME Sea Area. Article XI requires each Party to 'endeavour' to include an environmental assessment of the potential environmental effects in any planning activity entailing projects within its territory, particularly in the coastal areas, which may cause 'significant risks of pollution' in the ROPME Sea Area.[58]

States must establish national standards, laws and regulations as required for the effective discharge of the obligation in Article III to prevent, abate and combat marine pollution, and must endeavour to harmonise their national policies in this regard.[59] They are also obliged to 'co-operate with the competent international, regional and subregional organizations to establish and adopt regional standards, recommended practices and procedures to prevent, abate and combat pollution from all sources in conformity with the objectives of the present Convention, and to assist each other in fulfilling their obligations under the present Convention'.[60]

The Parties to the Convention are also required to 'co-operate in the formulation of other protocols prescribing agreed measures, procedures and standards for implementation of the Convention'.[61] The majority of substantive, detailed obligations in relation to protection of the marine environment are contained in the five Protocols to the Convention, the most relevant of which for the purpose of this chapter on decommissioning is the 1989 Protocol Concerning Marine Pollution from Exploration and Exploitation of the Continental Shelf.

The 1989 Protocol was intended to provide for measures to prevent and control pollution of the marine environment resulting from activities for the exploration and exploitation of petroleum.[62] One way in which it does this is by requiring that offshore operations are only conducted through a national licensing system and by requiring prior environmental assessment of proposed offshore operations before granting an authority, where there are

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[58] *Id.*, Art. XI(a).
[59] *Id.*, Art. III(c).
[60] *Id.*, Art. III(d).
[61] *Id.*, Art. III(b).
[62] Mark Osa Igiehon and Patricia Park, *Evolution of international law on the decommissioning of oil and gas installations*, 9 International Energy Law and Taxation Review 199, 207 (2001).

significant risks of pollution.[63] 'Offshore operations' means any operation conducted in the ROPME Sea Area 'for the purposes of exploring for oil or natural gas or for the purposes of exploiting those resources, including any treatment before transport to shore and any transport of the same by pipeline to shore'.

Article XIII of the 1989 Protocol sets out specific obligations in relation to the decommissioning of offshore installations. Article 1 of the 1989 Protocol defines 'offshore installations' to mean 'any structure, plant or vessel, whether floating or fixed to or under the seabed', placed in a location on the Continental Shelf which fall within the ROPME Sea Area, 'for the purpose of offshore operations, including any tanker for the time being moored and use for the temporary storage of oil, and including any plant for treating, storing or regaining control of the flow of crude oil'. The obligations contained in Article XIII are as follows:

ARTICLE XIII

1. Each Contracting State shall ensure that the Competent State Authority has the power to require the operator of an offshore installation:

a) In the case of a pipeline (i) To flush and remove any residual pollutants from the pipeline, and (ii) To bury the pipeline, or remove part and bury the remaining parts thereof, so as to eliminate for the foreseeable future any risk of hindrance to navigation or fishing, taking all circumstances into account.

b) In the case of platforms and other seabed apparatus and structures, to remove the installation in whole or in part to ensure the safety of navigation and in the interests of fishing.

Each Contracting State shall also take all practicable measures to ensure that the operator has sufficient resources to guarantee that any such requirements can be met.

2. Where Contracting States have a common interest in fishing grounds in the Protocol Area, they shall endeavour to adopt a common policy on the removal of installations.

In determining any case whether or not installations must be removed, Contracting States shall have regard to any guidelines issued by the Organisation. Whether pipelines are removed or not, they shall be flushed to remove residual pollutants.

3. Contracting States shall pass, and take all practicable steps to enforce, measures to ensure that no offshore installation which in use has floated at or near the sea surface, and no equipment from an offshore installation, shall be deposited on the seabed of the continental shelf when it is no longer needed.

There are at least four notable features about this provision. First, Article XIII(1)(b) clearly envisages that either partial or total removal may be permitted by the State Parties to the Convention. This suggests at least part of a structure could be left *in situ*, assuming that leaving part of the installation in place would not adversely affect fishing or safety of navigation. However, Article XIII(3) clearly prohibits the placement of floating units, and equipment from an offshore installation, being placed on the seabed. It has been argued that it

[63] Kuwait Convention, Art. IV; *see also* Igiehon and Park, *ibid*.

is somewhat incongruous that parts of the larger installation can be left in place, but equipment cannot.[64] However, it is not necessarily inconsistent that a fixed installation itself is permitted to be left partially in place, where the justified by the size, weight and environment and safety issues, but that equipment, which may be more mobile and moveable, are banned from being removed and then deposited on the ocean floor.

Second, unlike UNCLOS and the Geneva Convention, the 1989 Protocol specifically refers to pipelines in Article XIII(1)(a), placing an obligation on State Parties to ensure that operators flush and remove any residual pollutants from pipelines, and bury the pipeline, or remove part and bury the remaining parts of the pipeline.

Third, there is also a strong emphasis on the need to take into account the interests of fishing and navigation when a State Party is considering whether to require complete or partial removal.[65] The Protocol has been criticised for its emphasis on ensuring the safety of fishing and navigation, and its lack of 'clear environmental commitments to the removal and decommissioning process', which it has been stated is 'surprising in light of the fact that environmental concerns had become an important issue at the time the 1989 Protocol was negotiated'.[66]

Fourth, it is notable that pursuant to Article XIII(1), each State Party must take all practicable measures to ensure that the operator has sufficient resources to guarantee that any requirements in relation to the partial or total removal of offshore installations, and to clean and/or bury pipelines, can be met. This suggests the Parties must pass legislation to ensure financial assurance is available to meet decommissioning obligations.

The 1989 Protocol also contains specific obligations in Article V, in relation to the removal of debris from operations. Article V provides as follows:

ARTICLE V

1. Each Contracting State shall endeavour to ensure that offshore operations within its jurisdiction shall not cause unjustifiable interference with lawful navigation, fishing or any other activity carried on under a bilateral or multilateral agreement or on the basis of international law, and that in siting an installation, due regard shall be had to existing pipelines and cables. Regard shall also be had to the need for protecting sites of special ecological and cultural interests.

2. Each Contracting State shall take steps to ensure that, within the area of its jurisdiction, operators of offshore installations survey the seabed in the vicinity of their installations, and remove any debris resulting from their operations which might interfere with lawful fishing:

(a) in the case of a pipeline, or other sub-sea apparatus immediately following completion of the work of installation;

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[64] Igiehon and Park, *ibid*., 208.

[65] *Id*.

[66] Morakinyo Ayoade, *Disused Offshore Installations and Pipelines: Towards Sustainable Decommissioning* (Kluwer Law International, 2002) 71.

(b) in the case of production platform, immediately following its removal; and
(c) in any case when the Competent State Authority might reasonably require survey and clean-up.

This appears to impose an obligation on State Parties to ensure that all debris resulting from the operation of an offshore petroleum platform, including materials such as drill cuttings, are removed from the seabed once production activities have ceased.[67]

Overall, although partial removal is clearly contemplated by the 1989 Protocol, it has been argued that the 'tone' of the law suggests that there is a 'greater and stronger emphasis on complete removal of disused platforms than partial removal of any kind', and that the Protocol appears to 'create a regime which, while reserving the option of partial removal, would generally prefer complete removal of disused structures'.[68] Given the emphasis on the safety of fishing and navigation; that it would be comparatively less expensive to remove disused off-shore structures in the Middle East Gulf, in comparison with other regions in the world; and 'the busy nature of the international maritime lanes of the Gulf', it has been suggested the laws of the State Parties will, in most cases, require complete removal of disused off-shore structures, and partial removal will be the exception.[69]

[E] Convention for Cooperation in the Protection, Management and Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central and Southern Africa Region, 1981 ('Abidjan Convention')

The Convention for Cooperation in the Protection, Management and Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central and Southern Africa Region ('Abidjan Convention')[70] covers a marine area which stretches from Mauritania to South Africa, encompassing a coastline of just over 14,000 km.[71] It is part of the UN Environment Regional Seas Programme. The Convention represents the overarching legal framework for all marine-related programmes in West, Central and Southern Africa.

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[67] Igiehon and Park, *supra* n. 62 at 208.
[68] *Ibid*.
[69] *Id.*, at 208–209.
[70] Abidjan Convention, *supra* n. 6.
[71] UN Environment, *Welcome to the Abidjan Convention Secretariat*, http://abidjanconvention.org/ (accessed 11 December 2019).

First adopted in 1981, the Convention came into force in 1984. The geographical scope of the Convention, as defined in Article 1, covers the marine environment, coastal zones and related inland waters that fall within the jurisdiction of the States of the West and Central Africa Region from Mauritania to Namibia (inclusive). This was expanded in 2005 to include South Africa. As of December 2019, the Contracting Parties of the Abidjan Convention that have ratified the Convention are: Angola, Benin, Cameroon, Congo, Côte d'Ivoire, Democratic Republic of Congo, Gabon, Gambia, Ghana, Republic of Guinea, Guinea-Bissau, Liberia, Mauritania, Namibia, Nigeria, Senegal, Sierra Leone, South Africa and Togo. Other countries in the Convention area who are yet to ratify the Convention are: Cape Verde, Equatorial Guinea and Sao Tome e Principe.

Among other things, Contracting Parties are obliged to 'individually or jointly … take all appropriate measures … to prevent, reduce combat and control pollution of the Convention area and to ensure sound environmental management of natural resources, using for this purpose the best practicable means at their disposal, and in accordance with their capabilities'.[72] In particular, they must take all appropriate measures to prevent, reduce combat and control pollution of the Convention area caused by dumping from ships and aircraft, land-based sources, air pollution, and pollution resulting 'from or in connection with activities relating to the exploration and exploitation of the seabed and its subsoil subject to their jurisdiction and from artificial islands, installations, and structures under their jurisdiction'.[73] Parties must also, individually or jointly, take all appropriate measures to 'protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other marine life', including an obligation to endeavour to 'prohibit or control any activities likely to have adverse effects of the species, ecosystems or biological processes in such areas'.[74]

The Abidjan Convention does not directly address the decommissioning of disused offshore installations. However, in 2014, the Meeting of Parties to the Abidjan Convention announced their intention to develop a Protocol to the Convention, covering environmental standards for offshore oil and gas development. A draft *Additional Protocol to the Abidjan Convention on Environmental Norms and Standards For Offshore Oil and Gas Exploration*

[72] Abidjan Convention, Art. 4.
[73] *Id.,* Arts 5–9.
[74] *Id.,* Art. 11. The Convention also contains various other obligations, such as obligations in relation to cooperation in the cases pollution emergencies; environmental impact assessment; and scientific and technological cooperation: Arts 12–14.

and Exploitation Activities was presented at the 12th Meeting of the Parties to the Convention, held at Ibadan, from 27 to 31 March 2017.[75] The *Malabo Protocol on Environmental Standards and Guidelines for Offshore Oil and Gas Activities* ('Malabo Protocol') was adopted at the Convention's Second Conference of Plenipotentiaries of Parties to the Convention, held in Abidjan from 2 to 3 July 2019.[76]

The Malabo Protocol also applies to the Convention area.[77] Its objective is to 'prevent, reduce or eliminate pollution or damage to the marine and coastal environment resulting from offshore oil and gas exploration and exploitation'.[78] It contains a number of general commitments in Article 4, including the obligation to 'individually or as part of bilateral or regional cooperation, take all appropriate measures to prevent, mitigate, combat and control pollution in the Protocol Area resulting from offshore exploration and exploitation, and ensure, in particular, that the best available techniques and environmentally effective and economically appropriate techniques are implemented'.[79] The Contracting Parties must apply the precautionary principle, the polluter pays principle, and the principle of public participation.[80]

The Malabo Protocol specifically addresses decommissioning. Article 1(vii) of the Protocol defines 'decommissioning' to mean 'the closure and sealing of wells in line with international best practices, the removal of facilities, the cleaning of the dangerous substances from the facilities, as well as the restoration of the site in accordance with national laws and oil industry international standards on the environment'. 'Facility' is defined in Article 1(x) to mean 'any man-made structure, plant or vessel or parts thereof, fixed or floating, and placed in the maritime area for the purpose of offshore exploration or exploitation'.

The obligations of the Contracting Parties in relation to decommissioning, pursuant to Article 22, are as follows:

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[75] Draft Additional Protocol to the Abidjan Convention on Environmental Norms and Standards for Offshore Oil and Gas Exploration and Exploitation Activities, UN Environment (Ecosystems Division)/ABC-WACAF/COP.12/10.
[76] *Final Act of the Plenipotentiary Conference for the Signing of the Protocol on Environmental Norms and Standards for Offshore Oil and Gas Exploration and Exploitation Activities*, UN Environment (Ecosystems Division)/ABC-WACAF/Conf.Plenip.2/10 (14 May 2019) Annex I, Additional Protocol to the Abidjan Convention on Environmental Norms and Standards for Offshore Oil and Gas Exploration and Exploitation Activities [hereinafter 'Malabo Protocol'].
[77] Malabo Protocol, Art. 3.
[78] *Id.*, Art. 2.
[79] *Id.*, Art. 4(1).
[80] *Id.*, Art. 4(2).

1. The Contracting Parties shall ensure that at the end of the life of oil and gas fields, installations are decommissioned in accordance with international guidelines and standards, such as International Maritime Organization guidelines. Such decommissioning shall also consider other legitimate uses of the sea, particularly for fishing, safety of navigation, the protection of the marine and coastal environment as well as the rights and obligations of the other Contracting Parties.

2. The provisions of this article shall also apply to facilities disused or abandoned by any operator whose permit has been withdrawn or suspended under Article 33.

Part II of the Malabo Protocol deals with authorisations for oil and gas exploration and exploitation activities. All activities in the Protocol Area must be subject to a prior duly issued licence from the relevant (national) competent authority.[81] According to Article 7, applicant operators must apply for a permit to the competent authority, and provide certain information on the proposed project, including 'measures provided for the decommissioning of facilities' and 'insurance or other financial guarantee' to cover 'dismantling', as per Article 22. Article 6(1) provides that before granting a license, the competent authority:

shall ensure that the proposed facilities are in compliance with international standards and practices and that the operator has the technical and financial capacity to undertake the proposed activities. It shall also ensure effective public participation at an early stage and consider the possible effects on the environment of the offshore oil and gas operations planned.

Article 8(3) contains a requirement for permits to impose conditions regarding 'measures, techniques or methods designed to reduce to a minimum the risk of pollution and related damage resulting from the activities', following the outcomes of EIA of the activity at issue. Applications for licenses must be refused if the proposed activities are likely to cause 'significant adverse environmental effects that cannot be avoided, despite complying with the requirements for the granting of permits' provided for in Article 8(3) of the Malabo Protocol.[82]

Finally, the Contracting Parties are obliged to designate one or more national competent authorities to monitor the decommissioning of facilities.[83]

There are a number of key points to highlight in relation to the Malabo Protocol. First, there is no textual requirement for total removal of oil and gas facilities. Rather, Article 22 suggests partial removal is permissible, provided the facilities are decommissioned 'in

[81] *Id.*, Art. 6(1).
[82] *Id.*, Art. 6(3).
[83] *Id.*, Art. 29.

accordance with international guidelines and standards', and that consideration has been given to 'other legitimate uses of the sea, particularly for fishing, safety of navigation, the protection of the marine and coastal environment as well as the rights and obligations of the other Contracting Parties'. This is very similar to the Barcelona Convention's Offshore Protocol, and indeed, the regime under UNCLOS. However, overall, the specific decommissioning provisions are relatively sparse and appear to add little to the regime in place under UNCLOS, although Malabo Protocol does place an obligation on Contracting Parties to ensure the operator provides 'insurance or other financial guarantee' to cover 'dismantling' of offshore facilities.

[F] Convention for the Protection of Natural Resources and Environment of the South Pacific Region, 1986 ('Noumea Convention')

The Noumea Convention for the Protection of Natural Resources and Environment of the South Pacific Region ('Noumea Convention')[84] is part of the UN Environment Regional Seas Programme. Adopted in 1986, the Convention entered into force in 1990. The Secretariat of the Pacific Regional Environment Program (SPREP) is the governing body of the Convention.

The Convention applies to the region of the South Pacific Ocean, described as the 'Convention Area', as defined in Article 2 of the Convention. The Convention Area is comprised of the 200 nautical mile zones established in accordance with international law off: American Samoa; Australia (East coast and Islands to eastward including Macquarie Island); Cook Islands; Federated States of Micronesia; French Polynesia; Guam; Kiribati; Marshall Islands; Nauru; New Caledonia and Dependencies; New Zealand; Niue; Northern Mariana Islands; Palau; Papua New Guinea; Pitcairn Islands; Solomon Islands; Tokelau; Tonga; Tuvalu; Vanuatu; Wallis and Futuna; and Western Samoa. It also includes the areas of high seas which are enclosed from all sides by the 200 nautical mile zones of the countries listed above.

With a complex history of colonialism and de-colonisation in the South Pacific region, the Parties to the Noumea Convention are Australia, Cook Islands, FSM, Fiji, France, Marshall

[84] Noumea Convention, *supra* n. 7.

Islands, Nauru, New Zealand, Papua New Guinea, Samoa, Solomon Islands and the USA.[85] Article 5(1) of the Convention requires the Parties to:

endeavour, either individually or jointly, to take all appropriate measures in conformity with international law and in accordance with this Convention and those Protocols in force to which they are party to prevent, reduce and control pollution of the Convention Area, from any source, and to ensure sound environmental management and development of natural resources, using for this purpose the best practicable means at their disposal, and in accordance with their capabilities. In doing so the Parties shall endeavour to harmonise their policies at the regional level.

Among other things, the Convention and various Protocols to the Convention require the Contracting Parties to undertake a range of actions to protect the marine environment, including taking all 'appropriate measures' to prevent, reduce and control pollution in the Convention Area from vessels,[86] from land-based sources,[87] from the storage of toxic and hazardous wastes,[88] and pollution resulting directly or indirectly from exploration or exploitation of the seabed and its subsoil.[89] The Convention contains obligations in relation to cooperation in combating pollution in cases of emergency, and on scientific and technical cooperation and technical and other assistance.[90] It also requires each Party, 'within its capabilities', to conduct environmental impacts assessment and to assess the potential effects of projects on the marine environment, 'so that appropriate measures can be taken to prevent any substantial pollution of, or significant and harmful changes within, the Convention Area'.[91]

The Convention does not make any specific reference to decommissioning or the removal of disused oil and gas infrastructure or pipelines. As well as the obligations to conduct EIA and to prevent and control pollution as mentioned above, the primary relevance of the

[85] Secretariat of the Pacific Regional Environment Program (SPREP), *Noumea Convention*, https://www.sprep.org/convention-secretariat/noumea-convention (accessed 19 January 2020).
[86] Noumea Convention, Art. 6.
[87] *Id.*, Art. 7.
[88] *Id.*, Art. 11.
[89] *Id.*, Art. 8.
[90] *Id.*, Arts 15, 17 and 18.
[91] *Id.*, Art. 16(2).

Convention to the issue of decommissioning is the prohibition on dumping. Article 10 provides as follows:

> 1. The parties shall take all appropriate measures to prevent, reduce and control pollution in the Convention Area caused by dumping from vessels, aircraft or man-made structures at sea, including the effective application of the relevant internationally recognised rules and procedures relating to the control of dumping of wastes and other matter. The Parties agree to prohibit the dumping of radioactive wastes or other radioactive matter in the Convention Area. Without prejudice to whether or not disposal into the seabed and subsoil of wastes or other matter is 'dumping', the Parties agree to prohibit the disposal into the seabed and subsoil of the Convention Area of radioactive wastes or other radioactive matter.
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> 2. This article shall also apply to the continental shelf of a Party where it extends, in accordance with international law, outward beyond the Convention Area.

Article 10 is expressed such that parties are obliged to take measures to prevent, reduce and control pollution in the Convention Area caused by dumping *from* vessels or man-made structures at sea, rather than dumping *of* vessels or man-made structures at sea. Although 'dumping' is defined in Article 2 of the Noumea Convention to mean 'any deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures' and 'any deliberate disposal at sea of vessels, aircraft, platforms or other man-made structures at sea', the obligation in Article 10 is not expressed to cover the latter.

The very general obligation in the Noumea Convention to prevent, control and reduce pollution from dumping is given further substance in the 1986 *Protocol for the Prevention of Pollution of the South Pacific Region by Dumping* ('Noumea Dumping Protocol') which entered into force in 1990.[92] The Parties to the Noumea Dumping Protocol are: Cook Islands, FSM, Fiji, France, Marshall Islands, Nauru, New Zealand, Papua New Guinea, Samoa, Solomon Islands and the USA.[93] Australia is not a party to the 1990 Dumping Protocol.

The primary objective of the Noumea Dumping Protocol is to prevent, reduce and control pollution by dumping of wastes and other matter in the South Pacific. The Protocol constitutes not only the key instrument for the Parties to meet the obligations of the Noumea Convention but also to meet their obligations under the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter.[94]

The Noumea Dumping Protocol applies to the Convention area as defined in Article 2 of the Noumea Convention. There is no definition of dumping in the Noumea Dumping

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[92] Protocol for the Prevention of Pollution of the South Pacific Region by Dumping (Nouméa, New Caledonia) 25 November 1986 (IUCN TRE-000892) (hereinafter 'Noumea Dumping Protocol'). A second Protocol, the Protocol Concerning Co-Operation in Combating Pollution Emergencies in the South Pacific Region Dumping (Nouméa, New Caledonia) 25 November 1986 (IUCN TRE-000894), also entered into force in 1990.

[93] SPREP, *supra* n. 85.

[94] *Ibid*.

Protocol, but the definition of dumping in Article 2 of the Noumea Convention applies to the Protocol.[95] Thus, the obligations in relation to dumping under the Noumea Dumping Protocol will apply to 'any deliberate disposal at sea of vessels, aircraft, platforms or other man-made structures at sea'.

The Noumea Dumping Protocol is intended to be consistent with the London Dumping Convention. Article 3(1) of the Protocol requires the Parties to the Protocol to 'take all appropriate measures to prevent, reduce and control pollution in the Protocol Area by dumping'. Article 3(2) provides that 'National laws, regulations and measures adopted by the Parties 'shall be no less effective in preventing, reducing and controlling pollution by dumping than the relevant internationally recognised rules and procedures relating to the control of dumping established within the framework of the [London Convention]'. Article 3(2) prohibits dumping within the territorial sea and the EEZ or onto the continental shelf of a Party without the express prior approval of that Party, which has the right to permit, regulate and control such dumping. Consistently with the London Dumping Convention, the Protocol establishes a system whereby the dumping of certain wastes that are listed in Annex I of the Protocol is prohibited, the dumping of wastes listed in Article II is prohibited unless a special permit is obtained, and for the dumping of wastes not listed in Annex I or II, a general prior permit is required.[96]

As with the London Convention, the question arises whether offshore oil and gas infrastructure may be reused as an artificial reef under the terms of the Noumea Convention and the Noumea Dumping Protocol. Consistently with the London Dumping Convention, Article 2(b) of the Noumea Convention states that dumping does not include 'placement of matter for a purpose other than the mere disposal thereof, provided that such placement is not contrary to the aims of this Convention'. Furthermore, Article 4(3) of the Noumea Convention provides that 'nothing in this Convention and its Protocols shall be construed to prejudice or affect the interpretation and application of any provision or term in the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972', while Article 4(4) provides that the Noumea Convention and its Protocols shall be construed in accordance with international law relating to their subject matter. Therefore, it is arguable that the placement of a disused oil installation, or part thereof, to reuse the material

[95] Noumea Dumping Protocol, Art. 17(1); Noumea Convention, Art. 2.
[96] Noumea Convention, Arts 4–6.

to create an artificial reef for the protection of the environment and enhancement of living resources is not dumping under the Noumea Convention and Dumping Protocol.

Finally, an *Amendment to the Protocol for the Prevention of Pollution of the South Pacific Region by Dumping* ('Dumping Protocol Amendment') was adopted in 2006.[97] The Amendments do not add substantive provisions concerning decommissioning or removal of offshore oil and gas facilities, although one of the proposed amendments is to update the definition of dumping to also include 'any abandonment or toppling at the site of platforms or other man-made structures at sea, done for the sole purpose of deliberate disposal', provided that dumping shall not include 'the placement in the sea of matter such as cables, pipelines and marine research devices for any purpose other than their disposal, and if the placement is consistent with the Annexes to this Protocol'. As of 31 December 2019, the Amendment had no signatories or ratifications and had not entered into force.[98]

§3.03 Conclusion

Of all the regional seas treaties (and their associated protocols), only five contain provisions that specifically refer to the removal, abandonment and/or decommissioning of offshore oil and gas infrastructure. The Noumea Convention and Protocol do not expressly mention decommissioning or removal of offshore oil and gas infrastructure, but together contain detailed provisions regarding dumping; and as discussed in the next chapter, ASEAN has developed a detailed, non-binding guideline on decommissioning. The remaining regional seas instruments do not contain provisions imposing obligations specifically addressed to decommissioning offshore infrastructure. With variations in the level of detail, content and stringency of obligations in those conventions that do impose express obligations in relation to decommissioning, it is difficult, if not impossible, to derive any consistent rules or requirements in regional conventions.

This is perhaps not surprising. The regional seas conventions were developed and negotiated to reflect the environmental challenges affecting each relevant marine area. These in turn depend on the types of industries in the nations in each region, and the environmental impacts that are particularly pressing in each regional sea. The more detailed and stringent regime in the OSPAR Convention reflects the political and social controversy in relation to

[97] Text available from SPREP, *Noumea Convention*, https://www.sprep.org/convention-secretariat/noumea-convention (accessed 19 January 2020).
[98] SPREP, *supra* n. 85.

the decommissioning of the Brent Spar in the North Sea (*see* Chapter 10), where the offshore oil and gas industry is a major and mature industry, where the impacts of decommissioning are perceived to affect neighbouring countries closely, and where various European environmental Non-governmental Organisations (NGOs) are relevantly strong and exert political pressure on democratic governments. Other regions have different industries that affect the marine environment, levels of development, experiences with offshore oil and gas development, and political relationships.

Depending on the needs of the regions, negotiating detailed provisions regarding decommissioning may not be seen as a pressing issue. Certain areas in the Pacific Ocean, for example, have not seen extensive offshore oil and/or gas development, and States may not feel an imperative to develop detailed regional obligations pertaining to decommissioning. Of course, where countries have ratified UNCLOS (or absent this, the 1958 Geneva Convention on the Continental Shelf),[99] and/or the London Dumping Convention,[100] the obligations in these treaties will apply in any event. Furthermore, nations may also prefer to enter bilateral agreements that contain obligations in relation to decommissioning, particularly in relation to transboundary fields (*see*, for example, the country chapters in this book on Russia and Kazakhstan, and Mexico and the USA, and Venezuela and the USA, and Venezuela and Trinidad and Tobago).

To States that have ratified them, the obligations in UNCLOS (or the Geneva Convention), and/or the London Convention, provide a minimum standard of obligations in relation to decommissioning. As explained in Chapter 2, the IMO Guidelines are not strictly binding, but there is a very strong expectation that these will be followed by States that are members of the IMO, or indeed, by States that have ratified UNCLOS, as these are generally accepted to be the relevant norms of intentional law referred to in UNCLOS. However, adopting regional seas conventions can provide advantages to the contracting parties. First, they offer an opportunity to fill gaps in the legal regime established by UNCLOS/the IMO Guidelines, for example, by imposing obligations in relations to decommissioning pipelines (the OSPAR Convention Barcelona Convention and Kuwait Convention), or requiring States to ensure the

[99] United Nations Convention on the Law of the Sea (Montego Bay), 10 December 1982 (in force 16 November 1994) 1833 U.N.T.S. 397, 21 I.L.M. 1261 (1982); United Nations Convention on the Continental Shelf (Geneva), 29 April 1958, (in force 10 June 1964), 15 U.S.T. 471, 499 U.N.T.S. 311.

[100] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London), 29 December 1972 (in force 30 August 1975), 1046 U.N.T.S. 120, 11 I.L.M. 1294 (1972).

relevant party upon whom the obligation to decommission is placed, provides financial assurance or can demonstrate they have adequate resources to meet their obligations (the Kuwait Convention and the Malabo Protocol to the Abidjan Convention).

Furthermore, as in the case of the OSPAR and Helsinki Conventions, some regional conventions allow the parties to put in place more stringent requirements in relation to removal than UNCLOS, where this is seen as desirable. In contrast, other regional conventions adopt a more relaxed approach to total removal and clarify that partial removal is acceptable in the relevant marine region, provided the interests of other users of the sea, and the marine environment, are taken into account. Through the OSPAR Convention and its subordinate instruments, the parties have introduced an effective regime for regional consultation where a State proposes to grant a derogation to the rule of total removal. In contrast, the other regional agreements place decommissioning/removal obligations on the contracting parties but without establishing a regional system or a regional authority with a role in relation to that is comparable to the OSPAR Commission.

Generally speaking, in all regional conventions, ensuring the safety of navigation, of fishing interests, and protection of the marine environment are of paramount concern. In all regimes, dumping is not permitted, but even in the strictest regimes (such as the OSPAR Convention and Helsinki Convention) the reuse and repurpose of offshore oil and gas infrastructure are allowed, although the conditions or rules under which this might be permitted differ across regions. Furthermore, all regional conventions require EIA where decommissioning is proposed, and the establishment of a competent national authority to ensure environment assessment is performed. In today's world, it would be an expectation that the impacts of decommissioning proposals are assessed, and options are selected to ensure that impacts are avoided where possible, minimised, mitigated and managed.

While regional treaties do spell out broad obligations, as with the regime under UNCLOS, they are of limited help in resolving some of the more difficult policy issues. For example, while States are generally obliged to ensure liability for marine pollution is dealt with through national law, the treaties leave it to the State parties to determine whether residual liability for partially removed structures, or reused or repurposed structures such as artificial reefs, lies with companies or governments. The conventions provide no guidance in this respect; it is an internal matter for States. Similarly, treaties may impose an obligation on governments to ensure operators have sufficient resources to cover decommissioning costs, but leave it to States to determine the extent of the liability of oil companies, for example, whether and to what extent the citizens should bear the costs of decommissioning through tax deductions and

the type of financial assurance that is appropriate, such as bonds or decommissioning fund. Treaties also offer little assistance for addressing the vexed question of retrospectivity, particularly where legislative regimes and international petroleum agreements such as production-sharing agreements have historically not addressed issues of decommissioning. These difficult questions are generally internal matters for States, and while this gives States flexibility, there is no universally accepted practice that can be derived from the conventions themselves.

Most regional seas conventions are now decades old. It will be interesting to observe whether and to what extent there will be further development in existing regional regimes in relation to decommissioning, given recent developments in the ASEAN countries through ASCOPE's decommissioning guideline in 2012 and the adoption by West African countries of the Abidjan Protocol. Whether or not decommissioning treaties or obligations will be adopted on other 'hot spots', such as the South China Sea, or can or should be adopted, are certainly developments to watch.