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Agenda item 5: Specific Matters for Consideration and Action by the Meeting

Legal Issues Associated with the MAP II Assessment

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Background

1. The meeting of the Open-Ended Working Group on the MAP II Assessment (Athens, Greece on 16 and 17 May 2017) concluded on the need “to seek legal advice on the nature of the document and mandate of the Working Group”.
2. This paper addresses these two questions by analysing, first, the legal status of the Action Plan for the Protection of the Marine Environment and the Sustainable Development of the Coastal Areas in the Mediterranean (MAP Phase II) and, second, the scope of the mandate given to the open-ended working group by the 83rd Meeting of the Bureau in October 2016, following the conclusion of the 19th Ordinary Meeting of the Contracting Parties to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols (Athens, Greece, 9-12 February 2016).

Legal status of MAP Phase II

Putting discussion in context

3. The Conference of Plenipotentiaries on the Convention for the Protection of the Mediterranean Sea against Pollution and its Protocols (Barcelona, 9-10 June 1995), adopted the Barcelona Resolution on the Environment and Sustainable Development in the Mediterranean Basin (UNEP (OCA)/MED IG.6/6).
4. In the Barcelona Resolution, the Ministers in charge of the Environment in the Mediterranean countries representing the Governments and the member of the European Commission in charge of the Environment, having met in Barcelona, Spain, 10 June 1995, within the framework of the Mediterranean Action Plan: “Adopt the Mediterranean Action Plan Phase II as contained in Annex I to this Resolution (...)”, and “Commit themselves to the full implementation of the Mediterranean Action Plan Phase II, the Barcelona Convention and its Protocols, and to this end adopt the Priority Fields of Activities for the Environment and Development in the Mediterranean Basin (1996-2005) contained in Annex II to this Resolution”.
5. In that context, the question that arises is whether placing MAP Phase II within the hard or the soft law debate.

Can MAP Phase II be hard law?

6. The term hard law is used to describe the legally binding nature of various agreements or provisions which leave no or little room for discretion. Often opposed to soft law (2007 UNEP Glossary of Terms for Negotiators of Multilateral Environmental Agreements).
7. The two traditional sources of international law are treaties and international custom. Article 2.1(a) of the Vienna Convention of the Law of the Treaties, adopted at Vienna on 23 May 1969 (Vienna Convention) defines “treaty” as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”. It seems difficult to characterize MAP Phase II as falling within the treaty definition of the Vienna Convention.
8. It may be argued that MAP Phase II amounts to a subsequent agreement between the parties. Under Article 33.3(a) of the Vienna Convention, such agreements are recognized as relevant to the interpretation of a treaty or the application of its provisions. However, as a counter argument, it may be further argued that this would not mean that MAP Phase II should automatically be regarded as hard international law.

9. Article 38.1(b) of the International Court of Justice Treaty defines “international custom” as “evidence of a general practice accepted as law”. It appears difficult to include MAP Phase II under the category of international custom, even if all Contracting Parties of the Barcelona Convention have adopted MAP Phase II. In short, MAP Phase II does not fit easily into either the category of treaty or the category of international custom as hard international law.

Can MAP Phase II be soft law?

10. In the field of the international law, soft law consists of non-treaty obligations which are therefore non-enforceable and may include certain types of declarations, guidelines, communications and resolutions of international bodies (2007 UNEP Glossary of Terms for Negotiators of Multilateral Environmental Agreements).

11. Soft law is classified as such on the basis of its form and content. Focusing first on form, soft law is used to describe non-treaty obligations, which is a very broad category ranging from declarations to resolutions. All these instruments do not meet the formal requirements of a treaty, because, it may be argued, the parties did not intend them to be legally binding.

12. MAP Phase II was adopted by a resolution (“Barcelona Resolution”), which is one of the means, together with decisions and recommendations, for the Meetings of the Contracting Parties to take action, as stated in Rule 43.1 of the Rules of Procedure for Meetings and Conferences of the Contracting Parties to the Convention for the Protection of the Mediterranean Sea against Pollution and its related Protocols.

13. The term resolution is not defined either by the Barcelona Convention or the Rules of Procedure and is not a term of art. Generally, resolutions are understood as the formal expression of the opinion or will of the governing body of an International Organization or Agreement. Usually resolutions are non-binding (2007 UNEP Glossary of Terms for Negotiators of Multilateral Environmental Agreements).

14. To complement the above considerations based on the legal form, the content of MAP Phase II should be also considered. Terminology here plays a key role as evidence of intent. The language throughout MAP Phase II is non-mandatory. Terms such as “will” or “should” are used instead of “shall” or “must”. On that grounds, MAP Phase II could be regarded as soft law reflecting political rather than legal commitments.

15. More mandatory language is reserved for the Barcelona Convention and its Protocols, which provide the legal framework for MAP Phase II, by expressing the legal commitment of the parties to implement the comprehensive strategy of MAP Phase II.

Circumstances in which MAP Phase II was concluded

16. In addition, the circumstances in which the MAP Phase II was concluded offer evidence of the intention of the parties as to its status as soft law. It is worth noting that MAP Phase II was adopted by means of a resolution (Barcelona Resolution) by a Plenipotentiary Conference, as part of a broader package of measures which encompassed the amendments to the 1976 Barcelona Convention and to the 1976 Dumping Protocol as well as a new Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (SPA and BD Protocol).

17. The Conference was preceded by the Ninth Ordinary Meeting of the Contracting Parties (COP) (Barcelona, Spain, 5-8 June 1995), which considered the text of the amendments and the SPA and BD Protocol and concluded as follows:

- (a) proposed amendments to 1976 Barcelona Convention: “The Meeting approved the text of the amendments submitted by the working group as they appear in Annex VI to this report and *recommended their adoption by the Conference of Plenipotentiaries to be*

convened in Barcelona on 9 and 10 June 1995 for this purpose” (emphasis supplied) (UNEP(OCA)/MED IG. 5/16, §24);

- (b) proposed amendments to the 1976 Dumping Protocol: “The Meeting approved the text of the amendments submitted by the working group as they appear in Annex VII to this report and recommended their adoption by the *Conference of Plenipotentiaries to be convened in Barcelona on 9 and 10 June 1995 for this purpose*” (emphasis supplied) (UNEP(OCA)/MED IG. 5/16, §26);
- (c) The SPA and BD Protocol: “The Meeting approved the text submitted by the working group as it appears in Annex VIII to this report and recommended its adoption by the *Conference of Plenipotentiaries to be convened in Barcelona on 9 and 10 June 1995 for this purpose*” (emphasis supplied) (UNEP(OCA)/MED IG. 5/16, §28).

18. As already pointed out, the 1995 Conference of Plenipotentiaries further adopted the MAP Phase II through the Barcelona Resolution. However, the wording used by COP 09 when concluding on the MAP Phase II was the following: “The Meeting adopted the revised MAP Phase II as contained in Annex IX to this report, and *recommended its endorsement by the Conference of Plenipotentiaries*” (emphasis supplied) (UNEP(OCA)/MED IG. 5/16, §31).

19. For the amendments to the 1976 Barcelona Convention and the 1976 Dumping Protocol as well as for the SPA Protocol, the COP 09 approved the texts and recommended their adoption by the Conference of Plenipotentiaries to be convened for that purpose, thus following Articles 21 and 22 of the Barcelona Convention. In contrast, when referring to the MAP Phase II, COP 09 adopted it and recommended its endorsement by the Conference of the Plenipotentiaries, which as indicated in paragraph 4, adopted MAP Phase II through the Barcelona Resolution.

Closing remarks

20. In concluding this section and guiding discussion on the legal status of MAP Phase II the following points should be highlighted:

- (1) can MAP Phase II be hard law? MAP Phase II does not fit into either the category of treaty or the category of international custom as hard international law;
- (2) can MAP Phase II be soft law? MAP Phase II fits easily within the category of soft law. Both its form (resolution) and language (non-mandatory) reflect the intent of parties to conclude an instrument of soft law containing political and diplomatic commitments rather than legally-binding obligations;
- (3) circumstances in which MAP Phase II was concluded, as a differentiated part of a broader package including legally-binding instruments, also reflect the intention of the parties as to the status of MAP Phase II as a high-level policy instrument.

Scope of the mandate of the Open-Ended Working Group on the MAP II Assessment

Setting the scene

21. At their Meeting in October 2015, MAP Focal Points examined a proposal from the Secretariat putting forward the following three options for the implementation of Decision IG.21/16: “i. MAP Phase II document remains unchanged, ii. MAP Phase II is updated, and iii. The MAP document is revised as MAP Phase III” (UNEP(DEPI)/MED WG.421/23). MAP Focal Points agreed to defer the discussion on this matter to COP 19 (UNEP(DEPI)/MED WG. 421/26, §170).

22. The 19th Ordinary Meeting of the Contracting Parties, considered the above options and agreed: “to proceed as proposed in option ii. [MAP Phase II is updated] and that an open-ended

working group of MAP Focal Points, under the guidance of the Bureau, should be assigned to update the document for submission to the Contracting Parties at their twentieth meeting” (UNEP(DEPI)/MED IG.22/28, §124).

23. As presented in document UNEP(DEPI)/MED IG.22/23, option ii. entails: “The document of MAP is adjusted in order to reflect the key developments made in the MAP system with regard to thematic issues”. Options (i) and (iii) were discarded. The latter implied: “The MAP document is revised as MAP Phase III to fully integrate the outcome of the Post-2015 Sustainable Development Agenda and the Sustainable Development Goals, based on the Mediterranean specificity and the MAP mandate”.

24. At its 82nd Meeting in April 2016, the Bureau requested the Secretariat: “to prepare ToRs for the assignment [updating of MAP II] taking also into account the MSSD [Mediterranean Strategy for Sustainable Development] (...)” (UNEP/(DEPI)/MED BUR.82/7, §34(a)).

25. As instructed, the Secretariat submitted to the 83rd Meeting of the Bureau in October 2016 for adoption ToRs for the assessment of MAP II, instructing the open-ended working group “to factually update MAP II in order to reflect the evolution of sustainable development and of the MAP system itself”.

26. To that end, a three-step process was laid down, comprising the following steps: (1) “Identify the main evolutions since the adoption of MAP II and the relevant COP decisions and other documents that reflect them”, (2) “Identify the main parts/sections of MAP II that are outdated and require factual updates” and (3) “Recommend an update the MAP II text based on the evolutions since its adoption, and especially the parts mostly in need of update, and agree on the updated text for submission at the MAP Focal Points and COP 20” (UNEP(DEPI)/MED BUR.83/7, Annex III).

Scope of the mandate

27. The general rule of interpretation is set in Article 31 of the Vienna Convention. According to this Article, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The text, its context and the object and purpose of the treaty are the three elements to consider when interpreting a treaty. These three elements should be the ones guiding the interpretation of the ToRs of the open-ended working group on the MAP II Assessment.

28. As explained above, COP 19 agreed on option (ii), i.e. “MAP Phase II is *updated*” (emphasis supplied), meaning “The document of MAP is *adjusted* in order to reflect the key developments made in the MAP system with regard to thematic issues” (emphasis supplied). All terms must be used in their ordinary sense. However, the determination of the ordinary meaning cannot be done in the abstract. Any term can be fully understood only by considering the context in which it is employed.

29. The verbs “update” and “adjust” should be given their meaning in everyday language. Update means “to bring up to date” and adjust means “to alter slightly to achieve accuracy” (Collins English Dictionary, 2003). It is reasonable to assume that this ordinary meaning is the one most likely to reflect what COP 19 intended.

30. Looking at the context and purpose of the MAP II Assessment (UNEP(DEPI)/MED IG.22/23), the fact that option (ii) stands out against option (iii), which entailed “The MAP document is revised as MAP Phase III”, i.e. a substantial amendment of MAP Phase II, confirms this interpretation. It also reaffirms the main findings as presented in the same document and reproduced below:

“In conclusion, it is evident that there is deep matching of the thematic areas of MAP II (including the above developments) with effectively addressing the challenge of sustainable development and the irreversible nature of impacts on the environment and resources.

There may be a need, nevertheless, for certain updates in the text of MAP II to reflect the evolution of the reality of sustainable development and of the MAP system itself. The context of MAP II, its objectives, thematic priorities and activities are still relevant as described in the text. The text is flexible enough to accommodate new global developments and it is fully complemented by the new tools and instruments, comprehensive protocols and amendments that the MAP system has adopted and implemented”.

31. The ToRs adopted by the Bureau reinforce this conclusion, by instructing the open-ended working group “to factually update MAP II in order to reflect the evolution of sustainable development and of the MAP system itself”.

Closing remarks

32. In closing this section and feeding into the discussion on the scope of the mandate of the open-ended working group on the MAP II Assessment, the following points should be pointed out:

- (1) having regard to the ordinary meaning, context and purpose of the COP 19 conclusion that “MAP Phase II is updated”, it is reasonable to assume that the parties intended to change MAP Phase II slightly to achieve accuracy, rather than undertaking a substantial amendment of MAP Phase II. Otherwise, the option to revise MAP Phase II as MAP Phase III would not have been ruled out;
- (2) the ToRs adopted by the Bureau, clearly reflect the letter and spirit of the COP 19 conclusion by tasking the open-ended working group with factually updating MAP II.