



UNITED NATIONS ENVIRONMENT PROGRAMME
MEDITERRANEAN ACTION PLAN



The Revision of MAP Legal Framework: The Barcelona Convention and its Protocols



TOWARDS SUSTAINABLE DEVELOPMENT IN THE MEDITERRANEAN REGION

The **Mediterranean Action Plan (MAP)**, born in 1975, is the spearhead of the UNEP Regional Seas Programme. It is an effort involving 20 countries bordering the Mediterranean sea as well as the European Community. Through the MAP, they are determined to meet the challenges of environmental degradation in the sea, coastal areas and inland and to link sustainable resource management with development, in order to protect the Mediterranean region and contribute to an improved quality of life. To that end, a coherent and evolving legal framework has been built up.

The text of this publication was prepared by Mr Tullio Scovazzi, Professor of International Law at the University of Milano-Bicocca, Milan, Italy, under MAP Co-ordination. It does not have a systematic purpose, but aims at highlighting the main legal developments which have occurred within the Barcelona system in terms of their relationship to the rules of general international law and other relevant instruments.



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> FROM BARCELONA (1995) TO MALTA (2002) OR
THE PROCESS OF REVISING THE BARCELONA CONVENTION

This brochure reviews the history and significance of the process of revising the Barcelona Convention as embarked upon and brought to a successful conclusion by the Mediterranean countries and the European Community following the Rio Conference:

From the outset the objectives were ambitious:

- to modernise the Convention to bring it into line with the principles of the Rio Declaration, the philosophy of the new Convention on the Law of the Sea and the progress achieved in international environmental law in order to make it an instrument of sustainable development;*
- to progress from an essentially proclamatory form of law to a much more prescriptive law setting out obligations;*
- to ensure the effectiveness of the new provisions through the development of the necessary capacities, public participation, access to information and the adoption of a reporting procedure; and*
- to extend the scope of the protocols, particularly to offshore activities, waste transportation, the prevention of pollution from maritime sources and the protection of threatened species.*

On the whole, these objectives have been achieved thanks to an enormous effort on the part of the Contracting Parties, the experts and the Secretariat, including the respective Regional Activities Centres: five conferences of plenipotentiaries were held –in Barcelona (1995), Syracuse (1996), Monaco (1996), Izmir (1996), and Malta (2002).

The amended Barcelona Convention and its Protocols now constitute a set of legal instruments that are undoubtedly ambitious. They are a credit to the Mediterranean region and are commensurate with the environmental protection issues that are at stake.

There remain, however, two controversial areas which require the attention of the Parties. These are, firstly, the opportunity of defining legal provisions for the integrated management of coastal areas and, secondly, the progress that has to be made to cover liability and compensation in the event of acts prejudicial to the Mediterranean environment.

It is also necessary for the ratification processes, which are already well advanced, to be accelerated so that the whole series of legal instruments can enter into force as soon as possible, as called for by the 12th Meeting of the Contracting Parties.

The forthcoming stages in the application of the new texts are important: adoption in national law, their implementation, the development of the necessary capacities for their practical application, the setting in place of corresponding funding arrangements and finally, the development of the reporting system.

This is the effort that will have to be made if the Mediterranean is to safeguard its natural heritage, as an essential pillar of the sustainable development of this region.



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1. THE REGIONAL IMPLEMENTATION OF A GENERAL OBLIGATION

Under the United Nations Convention on the Law of the Sea (Montego Bay, 1982; hereinafter UNCLOS) “States have the obligation to protect and preserve the marine environment” (Art. 192). This general obligation must be fulfilled through

the adoption, individually or jointly, of measures addressing pollution from all sources, such as vessels, land-based sources, sea-bed activities subject to national jurisdiction and dumping. The UNCLOS also provides that States shall take measures “necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life” (Art. 194, para. 5).

BOX 1

WHAT DOES AN OBLIGATION TO CO-OPERATE MEAN?

How can States, which are sovereign entities, be bound to co-operate? This question is by no means a trivial question. In general terms, and in addition to its various facets such as information, consultation, negotiation, engaging in joint procedures (environmental impact assessments, emergency plans, monitoring programmes), an obligation to co-operate implies a duty to act in good faith in pursuing a common objective and in taking into account the requirements of the other interested States.

As noted by the International Court of Justice, “the Parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation (...); they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it” (para. 85 of the judgment of 20 February 1969 on the *North Sea Continental Shelf* case).

In a recent decision, the International Tribunal for the Law of the Sea found that the Parties were bound, as a provisional measure, to enter into consultations with regard to possible consequences arising out of the commissioning of a nuclear plant (para. 89 of the order of 3 December 2001 on the *MOX Plant* case). The Tribunal confirmed that the duty to co-operate is a fundamental principle in the prevention of pollution of the marine environment under the UNCLOS and general international law (*ibid.*, para. 82).



The obligation to co-operate applies on both a global and a regional basis. While general concerns need to be faced on a world scale, regional or sub-regional treaties are the best tool for taking into account the characteristics of a specific marine area. The UNCLOS serves as a unifying framework for more detailed international instruments on marine environmental protection.

Arts. 122 and 123 of UNCLOS, relating to enclosed or semi-enclosed seas, confirm

BOX 2

THE CO-ORDINATION AMONG DIFFERENT TREATIES ON THE ENVIRONMENT

There is an ever increasing number of treaties that have been concluded to protect the marine environment. In many regional seas, treaties with a worldwide scope and those with a regional (or sub-regional) scope are applicable at one and the same time, and it often happens that the same subject matter (for example, pollution from dumping) is regulated by two or more instruments.

The legal tools for tackling the problem of potentially overlapping treaties are quite complex and derive from the combination of different criteria (*ratione temporis*, *ratione personae* and *ratione materiae*). Indeed, a true conflict between treaties arises only if two successive treaties have been concluded by the same Parties and regulate the same subject/matter in a different way. From a logical point of view and assuming, for the sake of simplicity, that all the Parties to the earlier treaty have also concluded the later one, the following questions need to be addressed: **a)** whether the provisions of two different treaties relate to the same subject/matter; **b)** if so, whether one of the two treaties specifies that it is subject to the other; **c)** if not, whether the two provisions in question are really incompatible, considering that the special rules (with respect to their subject matter or their territorial application)

that international co-operation in several fields, including the protection of the environment, is particularly suitable in the case of countries surrounding the same regional area. The Mediterranean fully fits the definition of an enclosed or semi-enclosed sea, namely “a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States”.



prevail over the general ones; and **d**) if the provisions in question remain incompatible, those of the later treaty prevail.

Luckily, the UNCLOS, the only world treaty on the law of the sea from the point of view of both its subject matter and its territorial application, states that its provisions on the protection of the environment are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in the UNCLOS itself (Art. 237, para. 1). However, specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of the UNCLOS (Art. 237, para. 2).

While they have a number of innovative aspects, all the legal instruments of the Barcelona system are consistent with the general principles and objectives of UNCLOS. They are also consistent with other treaties relating to the environmental protection of the Mediterranean and applying either on a sub-regional basis, such as the Agreement between France, Italy and Monaco on the protection of the waters of the Mediterranean shore (Monaco, 1976; the so-called RAMOGE), or to specific endangered species, such as the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (Monaco, 1996; the so-called ACCOBAMS).

The “Barcelona system” is a notable instance of fulfilment of the obligation to co-operate. On 4 February 1975 a policy instrument, the Mediterranean Action Plan (MAP), was adopted by an inter-governmental meeting convened in Barcelona by the United Nations Environment Programme (UNEP). The MAP, which was the first regional seas action plan adopted under the auspices of UNEP, has been followed by 13 other instruments based on a similar approach but tailored to specific environmental needs (relating respectively, to

the Red Sea and the Gulf of Aden; the Gulf; West and Central Africa; the Caribbean; the East Asian Seas; the South-East Pacific; the South Pacific; Eastern Africa; the Black Sea; the North-West Pacific; the South Asian Seas; the North-East Pacific; the upper South-West Atlantic).

One of the main objectives of the MAP was to promote the conclusion of a framework convention and related protocols with technical annexes for the protection of the Mediterranean environment. This was done on 16 February 1976 when the Convention on the Protection of the Mediterranean Sea against Pollution and two protocols were opened for signature in Barcelona. The Convention,

BOX 3 A SUCCESSFUL NETWORK

Since its beginnings with the Mediterranean, the UNEP regional seas programme, which is currently undergoing revitalization, has remained the central UNEP initiative, providing today a major legal, administrative, substantive and financial framework for implementation of Agenda 21 and its Chapter 17 on oceans.

Regional seas secretariats from around the world hold periodic meetings. At the most recent one, which took place in Montreal in 2001, it was decided that the regional seas programmes should consider the necessary steps to be taken towards the adoption of an ecosystem-based management of the marine and coastal environment. The Montreal meeting further agreed that oceans governance would be strengthened, *inter alia*, through the provision by the regional seas programmes of complementary regional frameworks for the implementation of global environmental agreements and through horizontal co-operation among regional seas conventions and action plans on issues of common concern, including the provision by the more developed regional seas programmes of technical co-operation to those that are less developed.

which entered into force on 12 February 1978, is chronologically the first of the so-called regional seas agreements concluded under the auspices of UNEP.

Since 1994, several components of the Barcelona system undergone important changes. In 1995, the MAP was replaced by the “Action Plan for the Protection of the Marine Environment and the Sustainable Development of the Coastal Areas of the Mediterranean (MAP Phase II)”. Some of the legal instruments were amended. New protocols were adopted either to replace the protocols which had not been amended or to cover new fields of co-operation.



The structure of the present Barcelona legal system includes the following instruments:

a) the Convention which, as amended in Barcelona on 10 June 1995, changes its name to the *Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean*, hereinafter “the Convention” (the amendments are not yet in force);

b) the Protocol for the Prevention of the Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft (Barcelona, 16 February 1976; in force since 12 February 1978), which, as amended in Barcelona on 10 June 1995, changes its name to the *Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea*, hereinafter “the Dumping Protocol” (the amendments are not yet in force);

c) the Protocol Concerning Co-operation in Combating Pollution of the Mediterranean Sea by Oil and Other Harmful Substances in Cases of Emergency (Barcelona, 16 February 1976; in force since 12 February 1978), which is intended to be replaced by the *Protocol Concerning Co-operation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea*, signed in Valletta on 25 January 2002, hereinafter “the Emergency Protocol” (not yet in force);

d) the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources (Athens, 17 May 1980; in force since 17 June 1983), which, as amended in Syracuse on 7 March 1996, changes its name to the *Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources*

and Activities, hereinafter the LBS Protocol (the amendments are not yet in force);

e) the Protocol Concerning Mediterranean Specially Protected Areas (Geneva, 1 April 1982; in force since 23 March 1986), which has been replaced by the *Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean*, signed in Barcelona on 10 June 1995, hereinafter “the SPA and Biodiversity Protocol” (in force since 12 December 1999);

f) the *Protocol Concerning Pollution Resulting from Exploration and Exploitation of the Continental Shelf, the Seabed and its Subsoil*, signed in Madrid on 14 October 1994, hereinafter the Offshore Protocol (not yet in force); and

g) the *Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal*, signed in Izmir on 1 October 1996, hereinafter “the Hazardous Wastes Protocol” (not yet in force).

The recent updating of the Barcelona legal framework shows that the Parties consider it as a dynamic system capable of being subject to re-examination and improvement, if appropriate. The main objective of the updating is to adapt the Barcelona system, including its legal instruments, to the evolution of international law in the field of the protection of the environment, as embodied, on the world scale, in the principles and documents adopted at the United Nations Conference on Environment and Development (Rio de Janeiro, 1992), such as the Rio Declaration and the Action Programme “Agenda 21” (for an example, relating to marine protected areas, see para. 6), below. The Rio instruments have a general scope and provide guidance for any international action aiming at the protection of the environment, wherever it takes place. But, as well as including a number of the general principles in the Convention, the Parties to the Barcelona Convention seized the opportu-



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nity to strengthen the substantive and procedural provisions of the protocols in order to make them more effective tools.

Each of the instruments of the updated Barcelona legal system contains important innovations, which will

be reviewed below. Some of the protocols even display a degree of legal imagination in finding new solutions to problems. They could anticipate possible legal developments on the world scale and be an example of trends of co-operation in the regional seas sector.

BOX 4

THE TIME REQUIRED FOR ENTRY INTO FORCE

In negotiating and evaluating a treaty a great deal of attention should be devoted to the technicalities hidden in the so-called final provisions of the instrument. It may be something of a disappointment to note that the amendments to the Barcelona Convention adopted in 1995 and 1996 and three of its Protocols have not yet entered into force. But this is not necessarily due to a lack of political will by the States which are called upon to become Parties to the updated instruments.

In fact, under Art. 16, para. 4, of the 1976 Convention (corresponding to Art. 22 of the 1995 Convention), amendments to the Convention or its Protocols shall enter into force between Contracting Parties having accepted such amendments on the thirtieth day following the receipt by the depositary of notification of their acceptance by at least three fourths of the Contracting Parties to the Convention or the Protocol concerned. As the present number of Parties to the Convention and the three above-mentioned protocols is 21, the required number of acceptances of the amendments should be 16 ($21 \times \frac{3}{4} = 15.725$). This is a rather high threshold, taking into account the inevitably time-consuming procedures required by national constitutional systems for the implementation of obligations arising from treaties.

On the other hand, the 1995 SPA and Biodiversity Protocol, which was intended to replace, and not to amend, the previous 1982 Protocol, had already entered into force in 1999. But in this case the threshold of ratifications required by the protocol itself was considerably lower (six). It should also be noted that the relationships between the Parties to the 1995 SPA and Biodiversity Protocol and the States which are Parties to the 1982 Protocol, but have not yet ratified the 1995 SPA and Biodiversity Protocol, are still regulated by the 1982 Protocol.

3. THE CONVENTION

The updated Convention retains its nature as a framework treaty which has to be implemented through specific protocols.

It also retains what in 1976 was a major innovation, that is the possibility of participation by regional economic groupings at least one member of which is a coastal State of the Mediterranean Sea Area and which exercise competence in fields covered by the Conven-

BOX 5

A SHARED COMPETENCE

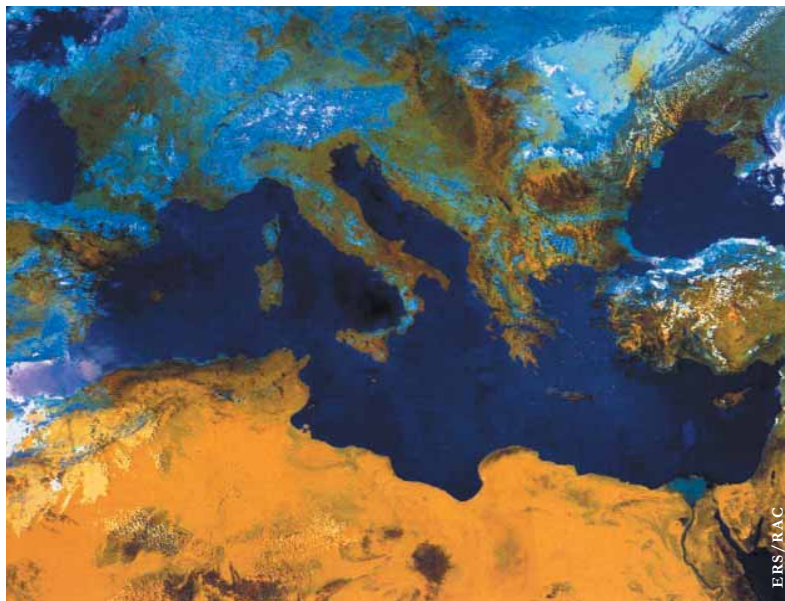
It may be difficult, especially for non-member States, to assess the extent to which an international organization exercises competence in matters falling under a treaty to which its member States are also Parties. In 1998, when depositing its instrument of formal confirmation of UNCLOS, the European Community made a detailed declaration specifying the matters falling within its exclusive competence (such as conservation and management of marine fishing resources) and the matters for which the Community shared competence with its fifteen member States.

Prevention of the marine pollution is a matter belonging to the field of shared competence. More precisely, as regards the provisions of the UNCLOS (although the same could be said for the provisions of Barcelona legal instruments as well), “the Community has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof affect common rules established by the Community. When Community rules exist but are not affected, in particular in cases of Community provisions establishing only minimum standards, the Member States have competence, without prejudice to the competence of the Community to act in this field. Otherwise competence rests with the Member States”.

A list of relevant Community acts (regulations, directives and decisions) is annexed to the 1998 declaration. But “the extent of Community competence ensuing from these acts must be assessed by reference to the precise provisions of each measure, and, in particular, the extent to which these provisions establish common rules”. Moreover, the scope and exercise of Community competence “are, by their nature, subject to continuous development”. This explains why the Community reserved its right to complete or amend the 1998 declaration, if necessary.

tion. In fact, the European Community is a Contracting Party to the Convention and some of its protocols, together with four States which are today members of the Community (France, Greece, Italy and Spain), and provides a significant contribution to the functioning of the Barcelona system. Other Mediterranean countries are expected to join the Community in the near future.

In 1995 the geographical coverage of the Convention was extended to include all maritime waters of the Mediterranean Sea Area irrespective of their legal condition (be they maritime internal waters, territorial seas, fishing zones, exclusive economic zones, high seas). However, the sphere of territorial application of the Barcelona legal system is also flexible, in the sense that any protocol may extend (but not restrict) the geographical coverage to which it applies. For example, and for obvious reasons, the Offshore Protocol applies also to the continental shelf, the seabed and its subsoil. The LBS Protocol applies to the “hydrologic basin” of the Mediterranean Sea Area, this being “the entire watershed area within the territories of the Contracting Parties, draining into the Mediterranean Sea Area”. The application of the Convention



may also be extended to “coastal areas as defined by each Contracting Party within its own territory”.

The amended text of the Convention recalls and applies to a regional scale the main principles arising from the 1992 Rio Conference: sustainable development; the precautionary principle; the integrated management of coastal zones; resort to best available techniques and best environmental practices and the promotion of environmentally sound technology, including clean production technologies. For the purpose of implementing the objectives of sustainable development, the Parties shall take fully into account the recommendations of the Mediterranean Commission on Sustainable Development, a new body established within the framework of the Mediterranean Action Plan, Phase II.

A new provision (Art. 15) relates to the right of the public to have access to information on the state of the environment and to participate in the decision-making processes relevant to the field of application of the Convention and the Protocols. Nothing, however, is said with regards to the delicate question of access of the public to justice.

Compliance with the Convention and the Protocols, as well as with the decisions and recommendations adopted during the meetings of the Parties, is assessed on the basis of the periodic reports that the Contracting Parties are bound to transmit to the UNEP at regular intervals. Such reports, which are examined by the biannual meetings of the Parties, relate to the legal, adminis-

trative or other measures taken by the Parties, their effectiveness and the problems encountered in their implementation. The meeting of the Parties can recommend, when appropriate, the necessary steps to bring about full compliance with the Convention and the Protocols and promote the implementation of decisions and recommendations (Arts. 26 and 27). Specific reporting obliga-

BOX 6
RIO AND BARCELONA

In the preamble to the Convention the Parties declare themselves “fully aware of their responsibility to preserve and sustainably develop this common heritage for the benefit and enjoyment of present and future generations”. But mention of future generations, which is a well-known aspect of the new way to construe environmental law (so-called intergenerational equity), was already present in the preamble of the 1976 text of the Barcelona Convention.

Under Principle 15 of the Rio Declaration, “in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”. This approach (or “principle”, as it is called in the Convention) has a significant legal meaning at both the substantive and the procedural levels, leading to a reversal of the burden of proof. It is reflected in many legal instruments adopted after the Rio Declaration and covering different fields: for example, and apart from the updated Barcelona Convention, it is in the Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, opened for signature in 1995 and recently entered into force, and in the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (the so-called Mining Code), adopted in 2000 by the Assembly of the International Sea-Bed Authority and applying to the sea bed and ocean floor beyond the limits of national jurisdiction.

tions are found in the Protocols (see, for example, Art. 23 of the SPA and Biodiversity Protocol).

The secretariat functions are carried out by UNEP (Art. 17). Besides the responsibilities ordinarily attributed to international secretariats (such as convening meetings of the Parties, transmitting to them notifications, reports and information, replying to their enquiries, regularly reporting on implementation, etc.), the Secretariat of the Barcelona legal instruments performs other important functions. It may reply to enquiries from non-governmental organizations and the public when they relate to subjects of common interest or to activities carried out at the regional level. It may also ensure the necessary co-

ordination with other international bodies which the Parties consider competent.



BOX 7

TRANSPARENCY WITHIN THE SYSTEM

The call for transparency resulting from Art. 15 of the Convention is applied also within the Barcelona system itself. Under an amendment adopted in 1988 to the rules of procedure for meetings and conferences of the Contracting Parties, “the Executive Director shall, with the tacit consent of the Contracting Parties, invite to send representatives, to observe any public sitting of any meeting or conference, including the meetings of technical committees, any international non-governmental organization which has a direct concern in the protection of the Mediterranean Sea against pollution”.

Yet, non-governmental organizations, representing both environmentalist and other interests, such as those of the industrial sector, participated as observers in the meetings to update the Barcelona legal system and were granted the right to take the floor. They made a substantial contribution to the negotiation of several instruments, in particular the amendments to the LBS Protocol. This has strengthened the atmosphere of friendship and co-operation among States and between States and non-State actors which characterized the whole negotiation.

The Dumping Protocol applies to any deliberate disposal of wastes or other matter from ships or aircraft, with the exception of wastes or other matters deriving from the normal operations of vessels or aircraft and their equipment (which fall under the label of pollution from ships). The Protocol, as amended in 1995, presents two major changes with respect to the previous text.

First, the Protocol applies also to incineration at sea, which is prohibited (Art. 7). It is defined as “the deliberate combustion of wastes or other matter in the maritime waters of the Mediterranean Sea, with the aim of

thermal destruction and does not include activities incidental to the normal operations of ships and aircraft”.

Second, the Protocol is based on the idea that the dumping of wastes or other matter is in principle prohibited, with the exception of five categories of matters specifically listed (such as dredged materials, fish waste, inert uncontaminated geological materials). On the contrary, the previous text of the Protocol was based on the idea that dumping was in principle permitted, with the exception of the prohibited matters listed in annex I (the so-called black list) and the matters listed in annex II (the so-called grey list) which required a prior special permit. The logic of the previous text is thus fully reversed in order to ensure better protection of the environment.

BOX 8

THE REVERSAL OF A PREVIOUS LOGIC

On the world level, the 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Wastes and Other Matter introduces a similar reversal of the logic followed in the parent convention. It is also based on the assumption that the Parties shall prohibit the dumping of any wastes or other matter with the exception of those listed in an annex. In the 2000 report of the Secretary-General of the United Nations on oceans and the law of the sea, the 1996 Protocol was seen as a “milestone in the international regulations on the prevention of marine pollution by dumping of wastes” and “a major change of approach to the question of how to regulate the use of the sea as a depository for waste materials” (United Nations General Assembly document A/55/61 of 20 March 2000, para. 159). The same could be said of the Mediterranean Dumping Protocol.

5. THE LBS PROTOCOL

The LBS Protocol applies to discharges originating from land-based point and diffuse sources and activities. Such discharges reach the sea through coastal disposals, rivers, outfalls, canals or other water-courses, including ground water flow, or through run-off and disposal under the seabed with access from land.

The Protocol, as amended in 1996, takes into account the objectives laid down in the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities, adopted in Washington on 3 November 1995 by a UNEP intergovernmental conference. The Programme is designed to assist States in taking individual or joint actions leading to the prevention,



BOX 9

THE MERITS OF REGIONAL CO-OPERATION

The Global Programme of Action strongly encourages action on a regional level as being crucial for successful protection of the marine environment from pollution from land-based activities: “This is particularly so where a number of countries have coasts in the same marine and coastal area, most notably in enclosed or semi-enclosed seas. Such co-operation allows for more accurate identification and assessment of the problems in particular geographic areas and more appropriate establishment of priorities for action in these areas. Such co-operation also strengthens regional and national capacity-building and offers an important avenue for harmonizing and adjusting measures to fit the particular environmental and socio-economic circumstances. It, moreover, supports a more efficient and cost-effective implementation of the programmes of action” (para. 29).

reduction and elimination of what is commonly regarded as the major source (about 80%) of pollution of the marine environment.

As already mentioned (para. 3, above), the amended protocol enlarges its application to the “hydrologic basin of the Mediterranean Sea Area”. To face this kind of pollution of the sea, action must primarily be taken where the polluting sources are located, that is on the land territory of the Parties. In this regard, the LBS Protocol provides that Parties shall invite States that are not Parties to it and have in their territories parts of the hydrological basin of the Mediterranean Area to co-operate in the implementation of the Protocol. It also provides that a Party cannot be held responsible for any pollution originating on the territory of a non-contracting State.

With the aim of eliminating pollution deriving from land-based sources, the Parties “shall elaborate and implement, individually or jointly, as appropriate, national and regional action plans and programmes, containing measures and timetables for their implementation” (Art. 5, para. 2). The Parties shall give priority to the phasing out of inputs of substances that are toxic, persistent and liable to bioaccumulate (Art. 1). These kinds of substances were not mentioned in the old text of the Protocol.

The amended Protocol was the object of extensive negotiations —not only among the Parties but also between the environmentalist non-governmental organizations and those representing the chemical industry— as regards the crucial issue concerning how to implement



the obligation “to prevent, abate, combat and eliminate to the fullest possible extent pollution”. Finally, a satisfactory solution was found on the following terms. On the one hand, the environmentalists accepted that an absolute ban by the year 2005 on any kind of discharge and emission of substances which are toxic, persistent and liable to bioaccumulate (this being what they had initially requested) would be impossible to achieve because of its serious economic and social repercussions. On the other hand, the chemical industry agreed to be bound by measures and timetables having a legally obligatory nature, provided that they related to specific groups of substances and were adapted to the specific requirements of the different instances. The result is an amended Protocol which aims to be neither absolute (but unrealistic) nor hortatory (but toothless).

The procedural machinery to achieve what was agreed upon is embodied in Art. 15, which is the key provision of the whole Protocol. It provides that the meeting of the Parties adopt, by a two-thirds majority, the short and medium-term regional plans and programmes, containing measures and timetables for their implementation, in order to eliminate pollution deriving from land-based sources and activities, in particular to phase out inputs of substances that are toxic, persistent and liable to bioaccumulate. These measures and timetables become binding on the 180th day following the date of their notification for the Parties which have not notified an objection.

Major changes were also made with respect to the annexes. Annex I relates to the “Elements to be taken

into account in the preparation of action plans, programmes and measures for the elimination of pollution from land-based sources and activities”. It provides that in preparing action plans, programmes and measures, the Parties, in conformity with the Washington Global Programme, “will give priority to substances that are toxic, persistent and liable to bioaccumulate, in particular



to persistent organic pollutants (POPs), as well as to wastewater treatment and management”. It lists nineteen categories of substances and sources of pollution which will serve as guidance in the preparation of action plans, programmes and measures, including, as first entry, the organohalogen compounds and substances which may form such compounds in the marine environment, with priority given to Aldrin, Chlordane, DDT, Dieldrin, Dioxins and Furans, Endrin, Hexachlorobenzene, Mirex, PCBs and Toxaphene. Annex II relates to the “Elements to be taken into account in the issue of the authorizations for discharges of wastes” and Annex III to the “Conditions of application to pollution transported through the atmosphere”. Finally, Annex IV gives the “Criteria for the definition of best available techniques and best environmental practice”.



BOX 10

WHEN COPYING IS ACCEPTABLE

The criteria listed in Annex IV of the LBS Protocol are literally taken from the Convention for the Protection of the Marine Environment of the North-East Atlantic, signed on 22 September 1992 (so-called OSPAR Convention). To be more precise, the State which proposed the criteria in question simply presented a photocopy of the relevant OSPAR annex.

Unlike the case of literary work, copying is by no means prohibited in the process of drafting a treaty. In the case in question, copying was tantamount to paying tribute to the wisdom of the drafters of another regional sea treaty.

6. THE SPA AND BIODIVERSITY PROTOCOL

The 1995 SPA and Biodiversity Protocol is very different from the previous instrument, and formally distinct from it.

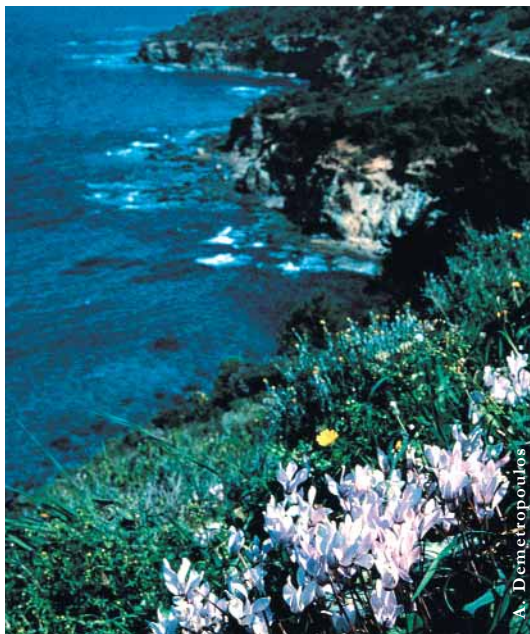
According to Agenda 21, States, acting individually, bilaterally, regionally or multilaterally and within the framework of IMO and other relevant international organizations, should assess the need for additional measures to address degradation of the marine environment. This should be done, *inter alia*, by taking action to ensure respect of areas which are specially designated, consistent with international law, in order to protect and preserve rare or fragile ecosystems (see para. 17.30). Agenda 21 stresses the importance of protecting and restoring endangered marine species, as well as preserving habitats and other ecologically sensitive areas, both on the high seas (para. 17.46, e, f) and in the zones under national jurisdiction (para. 17.75, e, f). In particular, “States should identify marine ecosystems exhibiting high levels of biodiversity and productivity and other critical habitat areas and provide necessary limitations on use in these areas, through, *inter alia*, designation of protected areas” (para. 17.86).

The new protocol, which implements the objectives of Agenda 21, is applicable to all

the marine waters of the Mediterranean, irrespective of their legal condition, as well as to the seabed, its subsoil and to the terrestrial coastal areas designated by each party, including wetlands. On the contrary, the application of the 1982 Protocol was limited to the territorial sea of the Parties and did not cover the high seas. Extension of the geographical coverage of the protocol was necessary to protect also those highly migratory marine species (such as marine mammals) which, because of their natural behaviour, do not respect the artificial boundaries which man has drawn on the sea.

The reference to “enter into the high seas” gave rise to some difficult legal problems which are peculiar to the present political and legal condition of the Mediterranean. Most Mediterranean States have not yet established

exclusive economic zones. In the Mediterranean, there are large extents of waters located beyond the 12-mile limit of the territorial sea which still have the status of high seas. Moreover no point in the Mediterranean is located more than 200 nautical miles from the nearest land or island and many maritime boundaries have yet to be agreed upon by the interested countries, including several cases where delimitation is particularly complex because of the local geographical characteristics.



In order to overcome these difficulties, the new protocol includes two very elaborate disclaimer provisions (Art. 2, paras. 2 and 3) which have a simple aim. On the one hand, the establishment of intergovernmental co-operation in the field of the marine environment cannot pre-

clude all the legal questions which are of a different nature. On the other hand though, the very existence of such legal questions should not jeopardize or delay the adoption of measures necessary for the preservation of the ecological balance of the Mediterranean basin.

BOX 11
THE SANCTUARY

On 25 November 1999 France, Italy and Monaco signed an Agreement in Rome on the creation of a sanctuary for marine mammals in the Mediterranean sea. This is the first international agreement to be adopted with the specific objective of establishing a sanctuary for marine mammals.

The area covered by the sanctuary, which extends over 96,000 sq. km., includes waters which have the legal status of maritime internal waters, territorial sea and high seas. It is inhabited by the eight cetacean species regularly found in the Mediterranean, namely the fin whale (*Balaenoptera physalus*), the sperm whale (*Physeter catodon*), Cuvier's beaked whale (*Ziphius cavirostris*), the long-finned pilot whale (*Globicephala melas*), the striped dolphin (*Stenella coeruleoalba*), the common dolphin (*Delphinus delphis*), the bottlenose dolphin (*Tursiops truncatus*) and Risso's dolphin (*Grampus griseus*). In this area, the water currents create conditions favouring phytoplankton growth and an abundance of krill (*Meganyctiphanes norvegica*), a small shrimp that is preyed upon by pelagic vertebrates.

The Parties undertake to adopt measures to ensure a favourable state of conservation for every species of marine mammal and to protect them and their habitat from negative impacts, both direct and indirect. They prohibit any deliberate "taking" (defined as "hunting, catching, killing or harassing of marine mammals, as well as the attempting of such actions") or disturbance of mammals in the sanctuary. Non-lethal catches may be authorized in emergency situations or for *in situ* scientific research purposes.

There is a direct connection between the Sanctuary Agreement and the SPA and Biodiversity Protocol. As provided for in the former, as soon as the SPA and Biodiversity Protocol "enters into force for them, the Parties will present a joint proposal for inclusion of the sanctuary in the list of specially protected areas of Mediterranean importance". This was actually done in November 2001 by France, Italy and Monaco (even before the entry into force of the Sanctuary Agreement which took place on 21 February 2002).

The SPA and Biodiversity Protocol provides for the establishment of a List of specially protected areas of Mediterranean interest (the SPAMI List). The SPAMI List may include sites which “are of importance for conserving the components of biological diversity in the

Mediterranean; contain ecosystems specific to the Mediterranean area or the habitats of endangered species; are of special interest at the scientific, aesthetic, cultural or educational levels”. The procedures for the establishment and listing of SPAMIs are specified in



detail in the Protocol. For instance, as regards the areas located partly or wholly on the high seas, the proposal must be made “by two or more neighbouring Parties concerned” and the decision to include the area in the SPAMI List is taken by consensus by the Contracting Parties during their periodic meetings.

Once the areas are included in the SPAMI List, all the Parties agree “to recognize the particular importance of these areas for the Mediterranean” and –this is also important– “to comply with the measures applicable to the SPAMIs and not to authorize nor undertake any activities that might be contrary to the objectives for which the SPAMIs were established”. This gives to the SPAMIs and to the measures adopted for their protection an *erga omnes partes* effect. The existence of the SPAMI List does not exclude the right of each party to create and manage protected areas which are not intended to be listed as SPAMIs but are nevertheless protected under the domestic legislation.

With respect to the relationship with third countries, the Parties shall “invite States that are not Parties to the Protocol and international organizations to co-operate in the implementation” of the Protocol. They also “undertake to adopt appropriate measures, consistent with international law, to ensure that no one engages in any activity contrary to the principles and purposes” of the Protocol. This provision aims at facing the potential problems arising from the fact that treaties, including the SPA and Biodiversity Protocol, can produce rights and obligations only among Parties.

The new protocol is completed by three annexes, which were adopted in 1996 in Monaco. They are the Common criteria for the choice of protected marine and coastal areas

that could be included in the SPAMI List (Annex I), the List of endangered or threatened species (Annex II) and the List of species whose exploitation is regulated (Annex III).

Important tasks for the implementation of the Protocol, such as assisting the Parties in establishing and managing specially protected areas, conducting programmes of technical and scientific research, preparing management plans for protected areas and species, formulating recommendations and guidelines and common criteria, are entrusted with the Regional Activity Centre for Specially Protected Areas, located in Tunis.

It was a remarkable achievement for the XIIth Meeting of the Contracting Parties (Monaco, 2001) when the first twelve SPAMIs were inscribed in the List. They were the island of Alborán, the sea bottom of the Levante de Almería, the cape of Gata-Níjar, Mar Menor and the oriental coast of Murcia, the cape of Cresus, the Medas islands, the Coulembretes islands (all proposed by Spain), Port-Cros (proposed by France), the Kneiss islands, La Galite, Zembra and Zembretta (all proposed by Tunisia), and the French-Italian-Monegasque Sanctuary (jointly proposed by the three States concerned). The last SPAMI covers also areas of high seas.



The Offshore Protocol relates to pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil. Several provisions of the Protocol establish obligations on the part of the Parties with respect to activities carried out by operators, who can also be private persons, either natural or juridical. This kind of obligation is to be understood in the sense that each Party is bound to exercise the appropriate legislative, executive or judicial activities in

order to ensure that the operators comply with the provisions of the Protocol. The definition of “operator” is broad. It includes not only persons authorized to carry out activities (for example, the holder of a licence) or who carry out activities (for example, a sub-contractor of the holder), but also any person who does not hold an authorization but is *de facto* in control of activities. The Parties are thus under an obligation to exercise due diligence in order to make sure, within the seabed under their jurisdiction, that no one engages in activities which have not been previously authorized or which are exercised illegally.

BOX 12

A RARE PROVISION ON LIABILITY AND COMPENSATION

One article which is of particular interest, also considering what will be said later about “dead letters in the seas” (see Box 16, below), is Art. 27 of the Offshore Protocol, which relates to liability and compensation, a topic which usually raises difficult obstacles during the negotiation of environmental treaties.

The first paragraph is a mere repetition of the traditional formula of deferment, by which the Parties “undertake to co-operate as soon as possible in formulating and adopting appropriate rules and procedures for the determination of liability and compensation for damage resulting from the activities dealt with in this Protocol”.

However, the second paragraph of Art. 27 provides for some substantial obligations. Pending the development of such procedures, the Parties shall take all measures necessary to ensure that liability for damage caused by activities is imposed on operators who shall be required to pay prompt and adequate compensation; the Parties shall also take all measures necessary to ensure that operators shall have and maintain insurance cover or other financial security of such type and under such terms as the Parties shall specify in order to ensure compensation for damages caused by the activities covered by the Protocol.



All activities in the Offshore Protocol area, including the erection of installations on site, are subject to the prior written authorization of the competent authority of a party. Before granting authorization, the authority must be satisfied that the installation has been constructed according to international standards and practice and that the operator has the technical competence and financial capacity to carry out the activities.

Authorization shall be refused if there are indications that the proposed activities are likely to cause significant adverse effects on the environment that could not be avoided by compliance with specific technical conditions. This obligation can be seen as an application of the precautionary principle. Special restrictions or conditions may be established for the granting of authorizations for activities in specially protected areas.



The Hazardous Wastes Protocol is applicable to a subject matter already covered, on the global scale, by the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 1989). The Basel Convention allows its Parties to enter into regional agreements, provided that they stipulate provisions which are not less environmentally sound than those of the Basel Convention itself. In other words, in order to have some purpose, the Hazardous Wastes Protocol must bring some “added value” to the rights and obligations already established under the Basel Convention. In the specific case, this occurs in three instances at least.

First, while the Basel Convention does not apply to radioactive wastes, the Hazardous Wastes Protocol covers also “all wastes containing or contaminated by radionuclides, the radionuclide concentration or properties of which result from human activity”.

Second, unlike the Basel Convention, the Hazardous Wastes Protocol applies also to a particular kind of substances which are to be considered products instead of wastes, as they are not intended for disposal. These are the “hazardous substances that have been banned or are expired, or whose registration has been cancelled or refused through government regulatory action in the country of manufacture or export for human health or environmental reasons, or have been voluntarily withdrawn or omitted from the government registration required for use in the country of manufacture or export”.

Third, the Hazardous Wastes Protocol tries to clarify an important question that was not settled in precise terms by the Basel Convention: what are the rights of the coastal State if a foreign ship carrying hazardous wastes is transiting through its territorial sea? The Basel Convention, which is applicable to both land and marine transboundary movements of hazardous wastes, provides in general that the transboundary movements may take place only with the prior written notification by the State of export to both the State of import and the State of transit and their prior written consent. However, as far as the sea is concerned, it contains a disclaimer provision which protects both the sovereign rights and jurisdiction of coastal States, on the one hand, and the exercise of navigational rights and freedoms, on the other. Because of its wording, this provision is open to different interpretations and, indeed, has been interpreted in opposite ways by States inclined to give priority to one or the other solution. Doubt remains as to whether the export State has any obligation to notify the transit State or to obtain its prior consent. The alternative is reflected in two opposite schemes, namely “notification and authorization” on the one hand, and “no notification and no authorization” on the other.

The Hazardous Wastes Protocol gives a definite answer to the question by providing for an intermediate solution, consisting of a “notification without authorization” scheme. The transboundary movement of hazardous wastes through the territorial sea of a State of transit may take place only with the prior notification by the State of export to the State of transit. The approach adopted by the Hazardous Wastes Protocol strikes a fair balance between the interests

of maritime traffic and those of the protection of the coastal environment. On the one side, ships carrying hazardous wastes keep the right to pass, as their passage is not subject to authorization by the coastal State. On the other, the

coastal State has a right to be notified, in order to know what occurs in its territorial sea and to be prepared to intervene in cases of casualties or accidents during passage which could endanger human health or the environment.

BOX 13

“NOTIFICATION WITHOUT AUTHORIZATION” AND THE LAW OF THE SEA

The “notification without authorization” scheme of the Hazardous Wastes Protocol is fully compatible with the international law of the sea, as embodied in the UNCLOS. Under the UNCLOS section on innocent passage in the territorial sea, passage must be innocent, i.e. “not prejudicial to the peace, good order or security of the coastal State” (Art. 19, para. 1). Any act of wilful and serious pollution contrary to the UNCLOS is incompatible with the right of innocent passage (Art. 19, para. 2 h). Foreign ships have the right to pass (Art. 17), but nowhere in UNCLOS is it said that they have the right to pass secretly or covertly.

Moreover, under Art. 22, paras. 1 and 2, of the UNCLOS some particularly dangerous ships, namely “tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances may be required to confine their passage” to sea lanes designated or prescribed by the coastal State. An obvious question can be asked in this respect: how could a coastal State exercise its right to prescribe sea lanes for ships carrying noxious substances if it was not even entitled to know that a foreign ship was carrying these substances? Nowadays there is a constant trend in the international regulation of the movements of hazardous wastes: such movements, where they are permitted, must be made openly.

It could be added that in a memorandum on the strengthening of safety in international shipping submitted to the International Maritime Organization (IMO Circular letter No. 2208 of 29 February 2000), France announced a series of initiatives following the *Erika* tanker accident (1999), which greatly affected the French coast. One of the proposals was fully in line with the Hazardous Wastes Protocol: “In accordance with the spirit of the Montego Bay Convention, France will propose to its EU partners that a system be established for reporting, at entry into the territorial waters of the Union, ships transporting oil, dangerous bulk cargo or certain particularly dangerous substances and passing through the territorial waters of the Union without stopping in a port of the European Union”.

9. THE LATEST ENTRY: THE 2002 EMERGENCY PROTOCOL

The 2002 Emergency Protocol, which is intended to replace the 1976 Protocol, is the latest entry into the Barcelona legal system. As in the case of the SPA and Biodiversity Protocol, the changes with respect to the previous instrument were so extensive and substantive that the Parties decided to draft a new protocol, instead of merely amending the old text.

The 1976 Emergency Protocol already provided a legal and institutional framework for actions of regional co-operation in combating accidental marine pollution. The Parties decided to set up a Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea (REMPEC), which is administered by IMO (International Maritime Organization) and UNEP and located in Malta.

The new Emergency Protocol aims at introducing the provisions necessary to implement the Regional Strategy on Prevention of Marine Pollution of the Marine Environment by Ships, adopted by the Parties in 1997. The lessons learned from the *Erika* accident, which occurred during the negotiations, contributed to the drafting of some of the provisions in the Protocol. The adoption of an expanded new legal framework for combating pollution from ships is particularly important in view of the growing risk of operational and accidental pollution due to increased maritime traffic and transports of hazardous cargo within and through the Mediterranean.

It is commonly believed that a regional approach is less appropriate with regards to pollution from ships than with

regards to other kinds of pollution (such as from land-based sources). It would be unrealistic to alter the allocation of enforcement powers among the flag State, the port State and the coastal State, as set forth in Arts. 217, 218 and 220 of the UNCLOS, which was the outcome of difficult negotiations. All the technical rules, such as those relating to requirements in respect of the design, construction, equipment and manning of ships, need to be adopted at a uniform and global level. Navigation, which is the traditional cornerstone of the regime of oceans and seas, would be impossible if different and conflicting provisions on the technical characteristics of ships were adopted at the domestic or regional level. Art. 211 of UNCLOS, relating to pollution from vessels, explicitly refers to “generally accepted international rules and standards established through the competent international organization or general diplomatic conference”. Here regionally established rules and standards are not mentioned. But they are not excluded either.

While it can hardly be denied that pollution from ships is a typical area where global regulation is most appropriate, it should also be added that, for certain aspects of the matter, regional co-operation also has a role to play. For instance, it is evident that prompt and effective action in taking emergency measures to fight against pollution arising from maritime accidents needs to be organized at the national, sub-regional and regional levels.

But the Emergency Protocol is not limited (as the former instrument was) to dealing with emergency situations. It also covers the aspect of the prevention of pollution from ships with the purpose of striking a fair ba-

lance between action at the global and action at the regional level. The Emergency Protocol acknowledges in the preamble the role of IMO, which is generally considered the competent international organization in the field, and the importance of co-operating in promoting the adoption and the development of international rules and standards on pollution from ships within the framework of IMO. This is a clear reference to the various conventions which are already in force at the global level, such as the International Convention for the Prevention of Pollution from Ships as Amended by the Protocol (London, 1973-1978; the so-called MARPOL) or the International Convention on Oil Pollution Preparedness, Response and Co-operation (London, 1990), and the more recent instruments which are expected to enter into force in the future, such as the International Convention on the Control of Harmful Anti-fouling

Systems on Ships (London, 2001). It is also a reference to the competences that IMO already exercises as regards the safety of shipping (such as decisions on traffic separation schemes, ships' reporting systems, areas to be avoided, etc.). All such instruments and competences are in no way prejudiced by the Emergency Protocol.

The Emergency Protocol also recognizes that regional co-operation is important in promoting the effective implementation of international regulations in this field. A notable instance of such a spirit of harmonization of the global and regional levels of regulation and action is Art. 15, dealing with the environmental risk of maritime traffic. It provides that "in conformity with generally accepted international rules and standards and the global mandate of the International Maritime Organization, the Parties shall individually, bilaterally or multilaterally take the necessary steps to assess the environmental risks of the re-

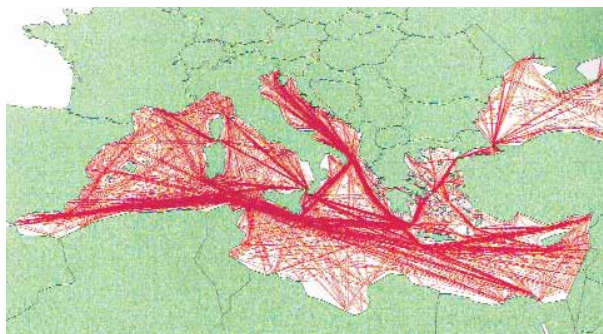
BOX 14
MARPOL

MARPOL contains many of the international rules and standards for the prevention, reduction and control of pollution from vessels. Its annexes relate respectively to oil (annex I), noxious liquid substances (chemicals) carried in bulk (annex II); harmful substances carried by sea in packaged form (annex III); sewage (annex IV); garbage (annex V); and air pollution (annex VI).

The record of MARPOL is impressive. As at 31 December 2000, it was binding on 113 States the combined merchant fleets of which constituted approximately 94% of the gross tonnage of the world's merchant fleet.

cognized routes used in maritime traffic and shall take the appropriate measures aimed at reducing the risks of accidents or the environmental consequences thereof’.

The Emergency Protocol also acknowledges “the contribution of the European Community to the implementation of international standards as regards maritime safety and the prevention of pollution from ships”. In fact, the Community has enacted a number of legal instruments relating to the control and prevention of marine pollution from ships which apply in addition to rules adopted under the aegis of IMO. The most recent ones are Directive 2001/106 of 19 December 2001 concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port State control); Directive 2002/6 of 18 February 2002 on reporting formalities for ships arriving in and/or departing from ports of the Member States of the Community; and Regulation 417/2002 of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers. Other Community legislation is in the process of elaboration. The European Commission, the institution of the Community mandated to negotiate treaties, played an active role during the negotiations for the Emergency Protocol.



Shipping routes in the Mediterranean (Lavender, 2001).

REMPEC

The “added value” brought by the new Protocol may be found in several of its provisions. It covers not only ships but also places where shipping accidents can occur, such as ports and offshore installations. The definition of the “related interests” of a coastal State has been enlarged to include also “the cultural, aesthetic, scientific and educational value of the area” and “the conservation of biological diversity and the sustainable use of marine and coastal biological resources”. A detailed provision on reimbursement of the costs of assistance has been elaborated.

The Emergency Protocol sets forth some obligations directed to the masters of every ship sailing in the territorial sea of the Parties (including ships flying a foreign flag), namely, to report incidents and the presence,

characteristics and extent of spillages of oil or hazardous and noxious substances; to provide the proper authorities, in the case of a pollution accident and at their request, with detailed information about the ship and its cargo, and to co-operate with these authorities. The obligations in question, which have a reasonable purpose and do not overburden ships, do not conflict with the right of innocent passage provided for in the UNCLOS.

Where the Parties cannot agree on the organization of an operation to combat pollution, REMPEC may, with the approval of all the Parties involved, co-ordinate the activity of the facilities put into operation by these

Parties. The issue of port reception facilities, which has considerable economic implications, is already the subject of provisions set forth in the MARPOL and a recent European Community directive. Under the Emergency Protocol, Parties shall ensure that such facilities are available and are used efficiently without causing undue delay to ships. The lessons arising from the Erika accident are particularly evident in the provision according to which the Parties shall define strategies concerning reception in places of refuge, including ports, of ships in distress presenting a threat to the marine environment.

Finally, the Emergency Protocol does not affect the right of Parties to adopt stricter domestic measures or other measures in conformity with international law in

the matters covered by the Protocol. This provision may apply also to rules adopted by the European Community and binding on its member States.



BOX 15
RAMOGEPOL

The Emergency Protocol allows for the conclusion of bilateral or subregional agreements to facilitate the implementation of it. In fact, at least one subregional arrangement of this kind is already in place in the Mediterranean. This is the plan of intervention in the case of accidental marine pollution in the RAMOGE area, known as the Plan RAMOGEPOL, signed on 7 October 1993 by the French, Italian and Monegasque authorities in charge of interventions in the event of emergency. The incident of the Cypriot tanker *Haven*, which exploded on 11 April 1991 while at anchor seven nautical miles from Genoa, was a factor that stimulated the drawing up of RAMOGEPOL. The tanker, which was carrying about 144,000 tonnes of crude oil, broke into three parts and sank in the Italian territorial sea. Claims for compensation of damage were presented to the International Oil Pollution Compensation Fund by Italian nationals and by the governments of Italy, France and Monaco.

10. THE DISCUSSION OF A PROCEDURE FOR LIABILITY AND COMPENSATION

New instruments, although not necessarily protocols, may be elaborated in the future, and will confirm the dynamic character of the Barcelona legal system. This could occur also as regards the field of liability for environmental harm which is commonly considered to be a complex issue because of its substantive, procedural and even terminological intricacies.

A meeting of experts was held in Brijuni in 1997 to discuss the appropriate procedure for the determination of liability and compensation for damage resulting from the pollution of the Mediterranean marine environment. The experts reviewed a draft prepared by the Secretariat of the UNEP Mediterranean Action Plan which provided, inter alia, for a three-tier regime of liability, based on: **a)** the strict liability of the operator together with a narrowly defined number of exemptions; **b)** the establishment of a Mediterranean Inter-State Compensation Fund playing a supplementary role if the operator was



M. Seltsanos

not able to meet the entire cost of the required compensation or there was a need for preventive measures in an emergency situation; and **c)** the residual liability of the State which had jurisdiction and control over the activity, if the civil liability regime and the inter-state fund were inadequate. The draft proposed no fixed financial limitations for any of the three-tier levels of liability.

On some matters the discussion held at Brijuni showed that there was a general understanding among the majority, if not the totality, of governmental experts. On other matters, such as unlimited liability, the creation of a fund and the residual liability of States, the positions taken by the governmental experts diverged.

BOX 16

DEAD LETTERS IN THE SEAS?

Under Art. 12 of the 1976 text of the Convention the Parties undertook “to co-operate as soon as possible in the formulation and adoption of appropriate procedures for the determination of liability and compensation for damage resulting from the pollution of the marine environment deriving from violations of the provisions” of the convention and its protocols. While analogous *pactum de contrabendo* provisions exist in several other treaties aiming at the protection of the marine environment in regional seas, none of them has been implemented through the adoption of a specific protocol. Because of this rather poor record, liability provisions in regional sea conventions have been described by some scholars as “dead letters in the sea” or “Greek calends provisions”.

During the negotiations for the updating of the Barcelona Convention a delegate proposed the deletion of the words “as soon as possible” from Art. 12, remarking that almost twenty years had not proved to be sufficient to start doing what the Parties in 1976 had undertaken to do urgently. The suggestion was followed and the Convention was amended accordingly (Art. 16). But the starting of discussions on liability and compensation among the Parties to the Convention might suggest that the attitude of the delegate in question was too pessimistic.

11. CONCLUDING REMARKS

The Mediterranean is a regional sea surrounded by the territories of 21 States. Littoral countries, all of which have ancient historical and cultural traditions, differ as far as their internal political systems and levels of economic development are concerned. Highly populated cities, ports of worldwide significance, extended industrial areas, and renowned holiday resorts are located along its shores. Important routes of international navigation pass through the Mediterranean Sea, which is also an area of major strategic importance. The protection of the Mediterranean environmental balance, which is particularly fragile because of the very slow exchange of waters through the strait of Gibraltar, is a common concern of all the bordering countries.

When it was originally drafted, the Barcelona system served as an example for the development of the other UNEP regional seas systems and legal instruments created within their framework. A similar role can be played by the updated legal instruments of the Barcelona system, which have been adapted to the evolution of international law in the field of the protection of the marine environment. They all present a rather advanced content and constitute an effective tool to preserve the common heritage and face the common concerns of the bordering States. They confirm “the importance and unique nature of the Mediterranean as an eco-region and an arena for solidarity, as well as its vocation for bringing different cultures closer to each other”, as stated in the preamble of the Mediterranean Declaration for the Johannesburg Summit adopted in 2001 by the XIIth Meeting of the Parties to the Barcelona system.



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COVER PHOTO

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PHOTOGRAPHY

Andreas Demetropoulos
Mimis Selitsanos
REMPEC, ERS/RAC, MAP

OFFSET PRINTING

Kontourous Bros. Graphic Arts

ISBN 92-807-2242-5



**United Nations Environment Programme
Coordinating Unit for the Mediterranean Action Plan
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Tel: 0030 10 72 73 100 - Fax: 0030 10 72 53 196/7
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Athens/Greece, 2002