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## Ideas behind the new or updated Mediterranean legal instruments

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Fondazione Eni Enrico Mattei

## **Ideas Behind the New or Updated Mediterranean Legal Instruments**

Tullio Scovazzi

**NOTA DI LAVORO 39.2000**

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IDEAS BEHIND THE NEW OR UPDATED MEDITERRANEAN  
LEGAL INSTRUMENTS \*\*

1. The recent developments in the Barcelona system: A) the framework convention; B) the dumping protocol; C) the land-based protocol; D) the specially protected areas protocol; E) the waste protocol; F) the negotiations for a liability protocol.
2. Other present and future developments.
3. A special responsibility of Mediterranean States?

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## 1. The Recent Developments in the Barcelona System

Cooperation in the field of the Mediterranean environment has its roots in a regional treaty, the Convention on the Protection of the Mediterranean Sea against Pollution, and its relevant protocols. All these instruments constitute the so-called "Barcelona system".

The Barcelona Convention, which was opened to signature in Barcelona on 16 February 1976, entered into force on 12 February 1978. It is one of the main aspects of the Mediterranean Action Plan (MAP), adopted on 4 February 1975 by an intergovernmental meeting convened by the United Nations Environment Programme. The Convention is an "umbrella treaty" which has to be supplemented by implementing protocols relating to specific aspects of environmental protection.

In 1995 and 1996 the MAP and the Barcelona system underwent important changes in several of their components<sup>1</sup>. The main objective of the negotiations was to adapt the Barcelona system to the evolution of international law in the field of the protection of the environment, as embodied, on the world scale, in the instruments adopted by the United Nations Conference on Environment and Development (Rio de Janeiro,

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<sup>1</sup> The MAP adopted in 1975 was in 1995 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)". It was designed taking into account the achievements and shortcomings of MAP's first twenty years of existence. For the relevant texts see UNEP, Mediterranean Action Plan and Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols, Informal Document (Revised), Athens, 1997.

1992)<sup>2</sup>. The structure of the present Barcelona system has become rather complex and includes the following instruments:

- the Convention which, as amended in Barcelona on 10 June 1995, changes its name into Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean<sup>3</sup>;

- the Protocol for the Prevention of the Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft (Barcelona, 16 February 1976)<sup>4</sup>, which, as amended in Barcelona on 10 June 1995, changes its name into Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea<sup>5</sup>;

- 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)<sup>6</sup>;

- the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources (Athens, 17 May

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<sup>2</sup> On the recent developments of the so called "Barcelona system" see JUSTE RUIZ, Le plan d'action pour la Méditerranée vingt ans après: la révision des instruments de Barcelone, in Collection Espaces et Ressources Maritimes, 1995, p. 249; SCOVAZZI, The Recent Developments in the 'Barcelona System' for the Protection of the Mediterranean Sea against Pollution, in International Journal of Marine and Coastal Law, 1996, p. 95; RAFTOPOULOS, Studies on the Implementation of the Barcelona Convention: The Development of an International Trust Regime, Athens, 1999; SCOVAZZI (ed.), Marine Specially Protected Areas -The General Aspects and the Mediterranean Regional System, The Hague, 1999.

<sup>3</sup> The amendments are not yet in force.

<sup>4</sup> In force from 12 February 1978.

<sup>5</sup> The amendments are not yet in force.

<sup>6</sup> In force from 12 February 1978.

1980)<sup>7</sup>, which, as amended in Syracuse on 7 March 1996, changes its name into Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources and Activities<sup>8</sup>;

- the Protocol Concerning Mediterranean Specially Protected Areas (Geneva, 1 April 1982)<sup>9</sup>, which is intended to be replaced by the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean (Barcelona, 10 June 1995)<sup>10</sup>;

- the Protocol Concerning Pollution Resulting from Exploration and Exploitation of the Continental Shelf, the Seabed and its Subsoil (Madrid, 14 October 1994)<sup>11</sup>;

- the Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal (Izmir, 1 October 1996)<sup>12</sup>.

Each of the texts of the updated Barcelona system contains important innovations. Some of the protocols even show a certain degree of legal imagination in finding new solutions to old problems, as the review hereunder may show<sup>13</sup>.

A) The framework convention, as amended in 1995, reflects

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<sup>7</sup> In force from 17 June 1983.

<sup>8</sup> The amendments are not yet in force.

<sup>9</sup> In force from 23 March 1986.

<sup>10</sup> The 1995 Protocol, which is a new treaty and not an amended text of the 1982 Protocol, entered in force on 12 December 1999 between Italy, Malta, Monaco, Spain, Tunisia, and the European Community.

<sup>11</sup> Not yet in force.

<sup>12</sup> Not yet in force.

<sup>13</sup>

and applies to a regional scale the main ideas arising from the 1992 Rio Declaration: the precautionary principle; the integrated management of the coastal zones; the 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 take fully into account the recommendations of the Mediterranean Commission on Sustainable Development, a new body which is established within the framework of the Mediterranean Action Plan, Phase II. A new article provides for 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.

B) The dumping protocol, as amended in 1995, presents two major changes with respect to the previous text. It applies also to incineration at sea, which is prohibited. It is based on the idea that the dumping of wastes or other matters is in principle prohibited, with the exception of five categories of matters specifically listed. The logic of the previous text is reversed, as it assumed that dumping was in principle permitted, unless a different regime was specifically provided (prohibition of dumping for the matters mentioned in the so-called black list or special permits required for the matters mentioned in the so-called grey list).

C) The land-based protocol, as amended in 1996, extends its area of application to the hydrologic basin, which is



defined as the entire watershed area within the territories of the parties, draining into the Mediterranean. In order to achieve the objective to protect marine waters, action must in most cases be taken where the polluting sources are located, that is on the land territory of the parties. Priority is given to the phasing out of inputs of substances that are toxic, persistent and liable to bioaccumulate. 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 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 one side, the environmentalists accepted that an absolute ban by the year 2005 of any kind of discharge and emission of substances which are toxic, persistent and liable to bioaccumulate (as they initially requested) would have been impossible to achieve because of its serious economic and social repercussions. On the other side, the chemical industry agreed to be bound by measures and timetables having a legally mandatory nature, provided that they related to specific groups of substances and were adapted to the specific requirements of the different instances.

D) Very different from the previous instrument is the specially protected areas protocol opened to signature in 1995. The new protocol 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. The extension to the high seas of the geographical coverage of the protocol was necessary in order to protect also those highly migratory marine species (such as marine mammals) which, by definition, do not respect the artificial boundaries drawn by man on the sea. The new protocol provides for the establishment of a List of Specially Protected Areas of Mediterranean Interest (SPAMI List), which 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 or are of special interest at the scientific, aesthetic, cultural or educational levels. The decision to include an area in the SPAMI List is taken by consensus by the contracting parties during their periodical meetings. Once an area is included in the SPAMI List, all the parties agree to comply with the applicable measures and not to authorize nor undertake any activities that might be contrary to the objectives for which the SPAMI was established<sup>14</sup>.

E) The waste protocol opened to signature in 1996 includes some provisions that are more protective than the general regime established by the 1989 Basel Convention on the control of the transboundary movements of hazardous wastes and their disposal. Besides other hazardous wastes, the protocol also

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<sup>14</sup> On 25 November 1999 an agreement on the creation in the Mediterranean of a sanctuary for marine mammals was signed in Rome by France, Italy and Monaco. It provides inter alia that the parties will submit a proposal for the inclusion of the sanctuary on the SPAMI List (Art. 16).

applies to radioactive wastes and to hazardous substances that have been banned in the country of manufacture or export for human health or environmental reasons. Moreover, the protocol introduces an innovative "notification without authorization" approach as regards the passage of ships carrying hazardous wastes through the territorial sea of a foreign State. This approach tries to strike 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 have a right to pass, as their passage is not made conditional on a previous authorization by the coastal State. On the other side, the coastal State has the right to be notified, in order to know what occurs in its territorial sea and be prepared to intervene in cases of casualties or accidents during passage which could endanger its environment.

F) New legal instruments within the Barcelona system may follow. A meeting of government-designated experts on the preparation of appropriate rules and procedures for the determination of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area was held in Brijuni in 1997. Lawyers well know that this topic presents major obstacles to be overcome, due to the different domestic principles on tort law and environmental damage, as well as all the juridical complications, technicalities and subtleties involved therein. The economic consequences arising from the the matter as a whole do not facilitate the task. Nevertheless, this kind of obstacles is not peculiar to the Mediterranean and relates to

every field of international environmental law where liability instruments are today being discussed. Any attempt to find reasonable and generally acceptable solutions deserves to be fully explored<sup>15</sup>. A second meeting is expected to be held in 2001.

## 2. Other Present and Future Developments

The new legal picture of the Mediterranean is not limited to the Barcelona system.

As regards marine mammals, an Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (so called ACCOBAMS) was opened to signature in Monaco<sup>16</sup> in 1996 within the framework of the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals. It prohibits any deliberate "taking" of cetaceans, with the exception of non-lethal "taking" for the purpose of in-situ research. This goes far beyond the protection granted to marine mammals by the 1946 Convention for the Regulation of Whaling.

As regards, fisheries, the amendments adopted in 1997 to the 1949 Agreement establishing the General Fisheries Council

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<sup>15</sup> For the report of the meeting see doc. UNEP(OCA)/MED WG.117/4 of 7 October 1997. On the meeting see BOU FRANCH, Towards a Liability Protocol for Environmental Harm in the Mediterranean Sea Area, in KOKASOY (ed.), The Kriton Curi International Symposium on Environmental Management in the Mediterranean Region - Proceedings, I, Istanbul, 1998, p. 207; SCHIANO DI PEPE, Introducing an International Civil Liability Regime for Damage to the Marine Environment in the Mediterranean Sea Area, in Environmental Liability, 1999, p. 8.

<sup>16</sup> The Agreement has not yet entered into force.

(now Commission) for the Mediterranean (GFCM)<sup>17</sup> could lead to new prospects towards the achievement of a comprehensive regime for the sound exploitation of Mediterranean living resources<sup>18</sup>. This has always been a crucial matter, due to cases of illegal or non-selective fishing practices, instances of difficult delimitation of maritime boundaries, the persisting absence of exclusive economic zones (but some Mediterranean countries have established fishing zones), and other problems.

Another field of future cooperation among the Mediterranean countries could be the preservation of a common underwater archaeological and cultural heritage.

### 3. A Special Responsibility of Mediterranean States?

Many of the new or updated instruments mentioned above have not entered into force yet. But this seems to be due more to the time-consuming domestic procedures to implement treaties than to lack of political will.

It seems more important to remark that the Mediterranean instruments in question go beyond a wishful recollection of principles and a statement of good intentions. Perhaps an underlying idea may be found in all of the innovations

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<sup>17</sup> For the text of the Agreement, as amended in 1997, see GFCM, Report of the Twenty-Second Session, Rome, 1997, p. 23. On the GFCM in general see TAVARES DE PINHO, La réforme de la Commission Générale des Pêches pour la Méditerranée, in Annuaire du Droit de la Mer, 1997, p. 65.

<sup>18</sup> Today the members of the GFCM are 23, namely Albania, Algeria, Bulgaria, Croatia, Cyprus, Egypt, the European Community, France, Greece, Israel, Italy, Japan, Lebanon, Libya, Malta, Monaco, Morocco, Romania, Spain, Syria, Tunisia, Turkey, Yugoslavia.

envisaged. The Mediterranean could be considered a primary heritage and concern for the bordering States (and for the European Community, which is a Mediterranean entity as well), which are better placed than the others to assess its relevant peculiarities. For geographical reasons, this regional and semi-enclosed sea would be entirely covered by exclusive economic zones, if such coastal zones were to be established by the bordering States. Without unduly encroaching on third States rights, the regime governing this kind of seas could be particularly oriented towards the protection of the marine environment, the sound management of living resources, the preservation of the common cultural heritage. Could the idea of the "special responsibility" (or "prime responsibility") of certain States, which has been developed for spaces very different from the Mediterranean (as it happens in the case of Antarctica), present some purpose also in the Mediterranean?