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The Mediterranean Response to Global Challenges: Environmental Governance and the Barcelona Convention System

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CONVENTIONAL ENVIRONMENTAL GOVERNANCE AND THE MEDITERRANEAN

The Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, and its seven Protocols, known as the Barcelona Convention system (BCS),[1] constitute a highly complex system of conventional environmental governance inextricably interwoven with the Mediterranean Action Plan (MAP). The 1976 Barcelona Convention[2] is a framework convention implemented, thus far, by the following seven protocols:

- the Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea (the Dumping Protocol);[3]
- the Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea (the Prevention and Emergency Protocol);[4]

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[1] On the concept of the BCS see E. Raftopoulos, *The Barcelona Convention and Protocols – The Mediterranean Action Plan Regime* (London: Simmonds & Hill, 1993). Also, T. Scovazzi, 'The Recent Developments in the 'Barcelona System' for the Protection of the Mediterranean Sea Against Pollution', IJMCL, Vol. 11, 1996, p. 95.

[2] The Barcelona Convention was amended 10 June 1995; amendment entered into force 9 July 2004.

[3] The Dumping Protocol was adopted 16 February 1976, entered into force 12 February 1978, and amended 10 June 1995; amendment not yet in force.

- the Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-based Sources and Activities (the LBS Protocol);[5]
- the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean (the SPA and Biodiversity Protocol);[6]
- the Protocol for the Protection of the Mediterranean Sea Against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil (the Offshore Protocol);[7]
- the Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal (the Hazardous Wastes Protocol);[8]
- the Protocol on Integrated Coastal Zone Management (the ICZM Protocol).[9]

In order to understand the nature and the quality of responses of this system of environmental governance to global challenges to the Mediterranean Sea area, and its evolving consistency linkages and synergies with the LOS Convention and related conventional environmental regimes, we begin with some brief theoretical insights and reflections.

The BCS is constituted and implemented as an aspect of the process of polycentric environmental governance which has its own morphology, laws and mechanics. It is related to the multiplicity of conventional regimes managing the protection of the environment and sustainable development at interacting regional and global levels. This polycentricity in international environmental governance is inherent in the international system. It is associated with the continuously negotiated inter-state conventional environmental regimes which are generated and developed consensually and relationally, by constant reference to their context, internal and external, and

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[4] The Prevention and Emergency Protocol was adopted 25 January 2002, and entered into force 17 March 2004. The Prevention and Emergency Protocol replaced the Emergency Protocol of 1976.

[5] LSB Protocol was adopted 17 May 1980, entered into force 17 June 1983, and amended 7 March 1996; amendment entered into force 11 May 2008.

[6] The SPA and Biodiversity Protocol was adopted 10 June 1995, and entered into force 12 December 1999. The 1995 SPA and Biodiversity Protocol replaced the SPA Protocol of 1982.

[7] The Offshore Protocol was adopted 14 October 1994. After the latest ratification by Syria (November 2010), added to those of Tunisia (1998), Morocco (1999), Albania (2001), Cyprus (2001) and Libya (2005), the Protocol will enter into force on the thirtieth day following the date of the deposit of the sixth instrument of ratification (Art. 32(4) of the Protocol).

[8] The Hazardous Wastes Protocol was adopted 1 October 1996, and entered into force 28 December 2007.

[9] The ICZM Protocol was adopted 21 January 2008. After the latest ratification by Syria (November 2010), added to those of EU (2010), Spain (2010), Albania (2010), France (2009) and Slovenia (2009), the Protocol will enter into force on the thirtieth day following the date of the deposit of the sixth instrument of ratification (Art. 39 of the Protocol).

with the increasing participation of the relevant non-state actors. Further, it is related to the evolution of a horizontal order-in-process, requiring the legitimating consensus among states and presupposing their national, vertical order.

International environmental governance cannot be fully understood if it is not approached simultaneously as a multiplicity of conventional regimes governance and as a process of continuous and structured negotiation. Negotiation is, in fact, a structured internal process in international environmental governance. It needs to be understood in relation to the process of formation and operation of conventional environmental regimes within a horizontally developing international order.

In all the three negotiation phases – *pre-negotiation*, which formally prepares the possibility of a prospective conventional environmental regime; *regime-constituting negotiation*, which is focused on the establishment of a conventional environmental regime; and *re-negotiation*, which aims to effectuate the continuous adaptation of the established conventional environmental regime to its context – states consistently resort to a structured negotiating process which is textual and contextual. It has links to conventional environmental regimes not only as distinct conventional regimes but also as relations to the continuously evolving international environmental order. Conventional environmental regimes are not simply institutionalised frameworks of cooperation: more importantly, they are aspects of a dynamic international environmental order. As a result, in all these *negotiation phases* the management of conventional environmental regimes is guided by three relational criteria: contextual reference, contextual consistency, and an 'added value' approach, all of which are deliberately employed to protect and promote international environmental interests.[10]

At the same time, conventional environmental regimes are shaped as distinct patterns of multilateral environmental governance. As such they present a certain relational morphology. They are normally established as a dynamic, open-ended relationship between a framework convention and the implementing protocols that specify the convention, armed with an autonomous institutional structure[11] which is self-governing, establishes hierarch-

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[10] See generally E. Raftopoulos, 'International Environmental Negotiation as a Governance Technique', in E. Raftopoulos and M.L. McConnell (eds) *Contributions to International Environmental Negotiation in the Mediterranean Context*, MEPIELAN Studies in International Environmental Law and Negotiation, Vol. 2 (Athens: Ant. N. Sakkoulas – Bruylant, 2004), Part I, pp. 3–64.

[11] For an interesting analysis of this point see R.R. Churchill and G. Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law', AJIL, Vol. 94, 2000, pp. 623–659. See also J.E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005), pp. 316–331.

ical levels of authority, and has its own lawmaking powers and compliance mechanism. Thus, they secure adaptability and flexibility, allowing them to respond to changes in the external and internal contexts.

Turning to the multifarious responses of the BCS to global challenges for the Mediterranean Sea related to international shipping activities and the use of marine resources, we may note three important aspects of conventional environmental governance within its framework. The first refers to the evolving governance of vessel-source pollution by the BCS and its contextuality, pointing to the nature, structure and dynamics of its consistency linkages with the LOS Convention constitutive order (as generally required by Articles 197 and 237(2) of the Convention) and, especially, with the relevant global conventional regimes governing international shipping. The second aspect is related to the most recent, complex and unique development of such conventional environmental governance: the establishment of an integrated coastal zone management (ICZM) regime in the Mediterranean, Finally, the third aspect is associated with an evolving new dimension of conventional environmental governance that has far-reaching consequences: the development of a Mediterranean environmental liability and compensation regime**.** All these interrelated aspects demonstrate the importance of the multiplicity, contextuality and integration, and hence the richness and the direction of the BCS in the process of a polycentric international environmental governance, and mark its clear contribution to the evolving international environmental order.

CONVENTIONAL ENVIRONMENTAL GOVERNANCE OF VESSEL-SOURCE POLLUTION

With respect to vessel-source pollution, environmental governance in the framework of the regime of the BCS has been specifically developed at three levels of governance –vessel-source pollution, transboundary movement of hazardous wastes, and shipping (in the framework of the Protocol for the Specially Protected Areas and Biodiversity in the Mediterranean).

Governance of Vessel-Source Pollution in the Mediterranean

The Prevention and Emergency Protocol contains two consequential basic elements: an integrated management of vessel-source pollution embracing both the accidental and the operational pollution, and a meticulous specification of the relational linkages with the relevant global conventional regimes – International Maritime Organization (IMO) conventions in particular. Of related importance is the 2005 Regional Strategy for Prevention and Re-

sponse to Marine Pollution from Ships (hereinafter: the Regional Strategy),[12] set out for ten-year period. This is an instrument used for implementing declarative governance in the framework of the BCS, with reporting obligations for the parties,[13] thus giving specific effect to and advancing the implementation of the Protocol.

Vessel-source pollution can be contextualised not only in the case of accidental pollution, but also preventatively, in the case of operational pollution. At the same time, the relational linkage with global governance context, associated with the role of the IMO and the uniformity of regulation required mainly by the relevant IMO conventions, is specified by a carefully elaborated balanced approach. The contextualising effect of the Protocol does not, in any way, 'regionalise' the substance of the relevant global conventional regimes governing vessel-source pollution; instead, it 'regionalises' their implementation and enforcement in the framework of the BCS. And it does so, as will be explained below, by employing three techniques of relational linkage: referential linkage, 'added value' management, and integrating linkage. In addition, there is an important institutional guarantee to this effect: the unique role of REMPEC (the Regional Marine Pollution Emergency Response Centre). REMPEC is an institutionally hybrid international regional centre located in Malta and established within the framework of the BCS for the implementation of this Protocol; REMPEC is administered by the IMO.[14]

Thus constructed, the Protocol generally refers to four interrelated core elements:

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[12] Regional Strategy for Prevention of and Response to Marine Pollution from Ships (Meeting of MAP Focal Points, Athens, Greece), 21–24 September 2005, UNEP(DEC)/MED WG. 270/12, Annex. The Regional Strategy was prepared and endorsed by the 7th Meeting of REMPEC Focal Points (REMPEC/WG.26/9/2) and was adopted by the 14th Ordinary Meeting of the Contracting Parties at Portoroz (Slovenia), 8–11 November 2005 (UNEP(DEPI)/MED IG 16/13, Annex III, II.A.2, p.15).

[13] According to Art. 26(1)(a) of the Barcelona Convention, the parties are obliged to report to the MAP Secretariat on the implementation not only of the Convention and Protocols but also of the decisions adopted by the Meetings of the Contracting Parties.

[14] REMPEC, as a Regional Activity Centre (RAC) in the framework of MAP and the BCS, is guided by and operates on the basis of the decisions of the Meetings of the Contracting Parties to the Barcelona Convention and is financed by the Mediterranean Trust Fund, while it is administered by the IMO on the basis of an Agreement between the Government of Malta and IMO, signed on 22 April 1990. For a recent statement of REMPEC's mandate as one of the components of MAP, see MAP, *Report of the 16th 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* (Marrakesh, Morocco, 3–5 November 2009), UNEP(DEPI)/MED IG.19/8, 24 November 2009 (Athens: UNEP/MAP, 2009), Annex II, Decision IG 19/5, section 3, p. 49.

1. the implementation of international regulations to prevent, reduce and control pollution of the Mediterranean marine environment from ships;
2. the recognition of the global role of the IMO, the contributing role of the European Union, and the contextualising role of REMPEC;
3. the participation of local authorities, NGOs and socio-economic actors; and
4. the application of the Protocol without prejudice to the sovereignty or the jurisdiction of other parties or states, according to international law.

More specifically, the Protocol identifies its referential linkage with the global environmental governance on vessel-source pollution. Of special interest here is the relational obligation of the contracting parties (CPs) which explicitly links the prevention aspect of the Protocol with the effective implementation of relevant global conventions in the Mediterranean Sea area, associated with their capacities as flag states, port states and coastal states within the framework of international law/the LOS Convention, and their applicable legislation. In this framework, the CPs are further obliged to develop their national capacity and to cooperate bilaterally or multilaterally.[15] This relational obligation is further specified by the Regional Strategy, with time-limits and specifications of the commitments for the implementation of this obligation. Thus, at the level of national capacity, these commitments include the ratification and implementation of MARPOL and other IMO Conventions by the year 2008 by the CPs,[16] enhancement of performance of maritime administration of the CPs on the basis of a National Plan by 2010 and in accordance with the relative IMO recommendations and guidelines, and self-assessment of national capabilities and performance in giving full and complete effect to MARPOL.[17] At the level of cooperation, the commitments refer to the strengthening of the Memorandum of Understanding (MOU) on Port State Control in the Mediterranean region, mandating REMPEC to play a facilitating, coordinating and contributing role vis-à-vis the Mediterranean MOU (1995): to propose assistance to it on port-state control to improve its effectiveness, to facilitate cooperation between the stricter – and mandatory for EU member states by Directive 21/1995 – Paris

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[15] Prevention and Emergency Protocol, Art. 4(2).

[16] So far, all but one CPs have ratified MARPOL (after its ratification by Montenegro in 2006 and Albania in 2008) and two other IMO conventions: the 1972 Convention on the International Regulation for Preventing Collision at Sea (after its ratification by Montenegro in 2006 and Lebanon in 2008) and the 1974 SOLAS Convention (after its ratification by Montenegro in 2006). All but two CPs have ratified another IMO convention, the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (after its ratification by Montenegro in 2006).

[17] Regional Strategy, sections 4.1 and 4.2, pp. 5–6.

MOU (1982) and the more relaxed Mediterranean MOU, and to make available necessary resources and means for its efficient functioning.[18]

Further, the explicit reference to the dynamic interlinkage between the Protocol and the domestic legislation of the CPs offers the platform for accommodating stricter regional environmental governance on vessel-source pollution to the regime of the BCS. By providing that implementation of the Protocol does not affect the power/right of the CPs to adopt relevant stricter domestic measures or other measures in conformity with international law,[19] the Protocol points to the implied application of rules adopted by the European Union which are binding on the seven CPs that are EU members.

Second, the Protocol specifies its contextualising effect in the implementation of the relevant global conventional regimes by providing 'added value' management obligations associated with important implementing actions**.**

Thus, in managing the environmental risks of maritime traffic, the CPs are obliged to assess the environmental risks of the recognised routes used in maritime traffic, and to take appropriate measures to reduce the risks of accidents or their environmental consequences, in conformity with generally accepted international rules and standards and the global mandate of the IMO.[20] The Regional Strategy 'adds on' time-limits and specific commitments of the CPs for implementation of this obligation:

- to review the conditions for the transport of oil and other HNS (hazardous and noxious substances), in particular in single-hull tankers, with a view to establishing a Mediterranean regime in conformity with international regulations;
- to identify Mediterranean areas for improved control for maritime traffic by 2010 by the establishment of a regime based on the use of Automatic Identification System (AIS) in conjunction with Vessel Traffic Services (VTS) and mandatory reporting systems, and to complete approval procedures by 2010;
- to improve technical cooperation among the VTS centres of the neighbouring countries;
- to propose to the IMO by 2008 additional appropriate routing systems in the Mediterranean for possible adoption not later than 2010 to reduce risk of collisions.[21]

The CPs are obliged to develop and apply monitoring activities covering the Mediterranean Sea Area in order to manage effectively operational and acci-

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[18] Ibid., section 4.3, p. 7.

[19] Prevention and Emergency Protocol, Art. 20.

[20] Ibid., Art. 15.

[21] Regional Strategy, section 4.10, p. 15.

dental pollution while ensuring compliance with the applicable international regulations.[22] The continuing inadequate state of affairs as regards the monitoring and surveillance of Mediterranean waters, necessary for the effective implementation of MARPOL, is due to a combination of three factors. The one factor is technical, and concerns the limited degree of monitoring and surveillance compared to other regional seas, such as the Baltic Sea. The factual factor arises from the large volumes of transiting traffic in the Mediterranean, destined to be intensified by the new map of expected oil export projects; from the enhanced spill concentrations detected along major maritime routes; and from the fact that, each year, 70 to 80,000 tons of hydrocarbons are spilled into the Mediterranean Sea because of maritime transport activities. And finally there is the legal factor: beyond their territorial seas, some states have established an area under their jurisdiction to enforce MARPOL, but most oil spills detected are in fact beyond the territorial sea – notably as illicit discharges at sea.

The Regional Strategy offers specific commitments integrating legal and technical aspects with the requirements of time-limits. Thus, all CPs were required to establish by 2010 national monitoring and surveillance systems in the waters under their jurisdiction and subregional systems for the surveillance of environmentally sensitive and/or high-risk zones. They were also to establish by 2010 national legal frameworks for prosecuting discharge offenders for infringements of MARPOL; harmonise them by 2015; and, by 2011, share collected data and accept evidence gathered by other states. Moreover, CPs should establish, where possible and without prejudice to the sovereignty rights of states, areas under their jurisdictions, on a regional or a subregional basis and in compliance with the LOS Convention, to enable the implementation of MARPOL for the prosecution of offenders.[23]

A stronger contextualising effect of the conventional governance is also established by the Protocol by displaying a distinct 'added value' management approach through several relational obligations and their specified implementing actions.

Of importance here is the relational obligation of the CPs to define national, subregional and regional strategies concerning reception in places of refuge, including ports, of ships in distress, in cooperation with REMPEC.[24] In order to minimise the risks of widespread pollution, the Regional Strategy sets out the bases for 'deepening' the obligation, especially by identifying appropriate procedures as outlined in the relevant IMO Guidelines within a specific time frame (within 2007). The 15th Meeting of Parties (MOP), held

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[22] Prevention and Emergency Protocol, Art. 5.

[23] Regional Strategy, sections 4.6 and 4.7, pp. 11–12.

[24] Prevention and Emergency Protocol, Art. 16.

in Almeria, Spain, in 2008, adopted the important Guidelines on the Decision-Making Process for Granting Access to a Place of Refuge for Ships in Need of Assistance.[25] These Guidelines aim at assisting the national maritime administration in identifying places of refuge suitable for handling maritime emergencies that cannot be dealt with at sea, and in the appropriate process in deciding to grant or refuse a request for access to a place of refuge (e.g., balancing the right of the coastal state to protect its coastline or internal waters *versus* its duty not to transfer directly or indirectly damage or hazards from one area to another (Article 195 of the LOS Convention).

The framework obligation of the CPs to negotiate, develop and maintain subregional agreements, with the assistance of REMPEC, in order to facilitate the implementation of the Protocol, also indicates this stronger contextualising effect. Several subregional contingency plans and operational agreements have been adopted and are in force.[26] The Regional Strategy, aimed at strengthening the response capacities of the CPs through the development of subregional agreements, has further specified this obligation, setting time-limits. Thus, all CPs were to prepare and adopt national contingency plans and establish national systems for preparedness and response at the latest by 2008, with a view to negotiating and concluding by 2015 subregional agreements covering the entire Mediterranean region.[27]

The extension of the coverage of the Protocol not only to vessels but also to ports and offshore installations, where shipping incidents may occur, also means a stronger contextualising effect. The Protocol provides the relational obligation of the CPs to require that authorities or operators of ports and handling facilities under their jurisdiction, as well as operators of offshore installations under their jurisdiction, have pollution emergency plans or similar arrangements coordinated with the appropriately established relative national system to prevent and combat pollution incidents.[28] The Regional Strategy sets up the framework for a more integrating approach to the

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[25] MAP, *Report of the 15th 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* (Almeria, Spain, 15–18 January 2008), UNEP(DEPI)/MED IG.17/10, 18 January 2008 (Athens: UNEP/MAP, 2008), Annex V, Decision IG 17/10, pp. 257–273.

[26] These are as follows: the 'RAMOGEPOL Plan', a plan for intervention in the case of accidental marine pollution in the RAMOGE area, signed in 1993 by France, Italy and Monaco and revised in 2005; the Lyon Plan, an agreement for cooperation on salvage and response to marine pollution, signed in 2002 by France and Spain; the South-Eastern Mediterranean Contingency Plan, signed in 1995 by Cyprus, Egypt and Israel; the South-Western Mediterranean Plan, signed in 2005 by Algeria, Morocco and Tunisia; and the Adriatic Plan, a subregional contingency plan for the prevention of, preparedness for and response to major marine pollution incidents in the Adriatic Sea, signed in 2005 by Croatia, Italy and Slovenia.

[27] Regional Strategy, section 4.21, p. 26.

[28] Prevention and Emergency Protocol, Art. 11.

implementation of this obligation by further providing, within a time-limit, for the preparation and adoption of a comprehensive Marine Pollution Safety Management System and reporting on its implementation. Thus, all CPs are to prepare and adopt, by 2015, such a system for use in commercial ports and oil terminals, comprising procedures, personnel training and equipment requirements, and report as from 2015 on its implementation.[29]

Finally, the Protocol contains relational obligations regarding the integrating linkage with the existing global or regional environmental governance on vessel-source pollution.

The relational obligation of the CPs to ensure the availability of adequate port reception facilities, a long-standing problem in Mediterranean ports with important economic implications, incorporates elements of MARPOL (Annex I and Annex V as amended) and the EC Directive 59/2000[30]. The 'adequacy' of port reception facilities refers to their efficient and effective management of operational discharges, efficient use without causing undue delay to ships, efficient cost management related the reasonable costs of the use of reception facilities, and their communication function in providing ships using their ports with updated information on the obligations arising from MARPOL and from their applicable legislation.[31]

The Regional Strategy 'deepens' the implementation of this obligation by setting time-limits for the establishment of procedures for its specific implementation and for the prevention of illegal discharges. Thus, all CPs by 2010 were to establish procedures related to the cost of the use of reception facilities; and in all major ports they are to establish facilities, collection, treatment and disposal procedures for oily wastes and noxious and liquid substances, and for garbage and sewage. With respect to ballast water, all major oil and chemical terminals should establish similar technical procedures, and all major ports and terminals, where the repair and cleaning of ballast tanks occurs, are expected to comply with the 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments (Ballast Water Convention)[32] by 2012, or by the date of its entry into force. Moreover, by 2010, all CPs should have established a system for notifying a vessel's next port of call as to the status of its onboard retention of bilge waters and oily wastes and garbage, while all Mediterranean states are to

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[29] Regional Strategy, section 4.15, p. 20.

[30] Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues [2000] OJ L332/81.

[31] Prevention and Emergency Protocol, Art. 14.

[32] Doc. IMO /BWM/CONF/36 of 16 February 2004. On the Ballast Water Convention, see Vidas and Markovčić Kostelac, chapter 21 in this book.

implement national regulations empowering maritime authorities to require masters of vessels to discharge their wastes into designated port reception facilities before sailing.[33] The 15th MOP, held in Almeria in 2008, decided to adopt the Guidelines Concerning Pleasure Craft Activities and the Protection of the Marine Environment in the Mediterranean,[34] which contain important guidelines regarding, *inter alia*, the waste management of the pleasure craft in marinas providing adequate reception facilities. A catalytic development has recently taken place, with the IMO's Marine Environment Protection Committee (MEPC) resolution bringing into effect, as from 1 May 2009, Special Area status for the Mediterranean Sea under MARPOL Annex V (Regulations for the Prevention of Pollution by Garbage from Ships),[35] following a notification by the parties of the BCS that adequate reception facilities are now provided in all relevant Mediterranean ports. As from that date, all ship disposal of garbage into the Mediterranean Sea is prohibited.

The strong contextualising effect of the Protocol may also be detected on purely relational bases: it is impliedly related to a process of a gradual establishment of special sea area regimes, provided and designated through global environmental governance (IMO). In this connection, the concept of Particularly Sensitive Sea Areas (PSSA) offers a special area regime of integrated and contextual environmental governance, enabling the development and management of associated protective measures derived from the wide range of existing or emergent environmental regimes. In itself, the designation of a PSSA confers no direct regulatory benefit: that comes only through the application of the associated protective measures (a conglomerate environmental governance regime). PSSAs are designated by MEPC, and the elements and procedures for their identification and designation are provided by IMO Guidelines.[36] The Protocol does not directly envisage the step towards the development of such a conglomerate environmental governance regime in the Mediterranean Sea area. However, the process of identification of PSSAs is seen as an aspect of the Regional Strategy, in view of the designation of the Mediterranean Sea as a Special Area under the MARPOL Annexes I and IV. The Regional Strategy specifies the procedure for the initia-

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[33] Regional Strategy, sections 4.4 to 4.5, pp. 8–10.

[34] MAP, *Report of the 15th Ordinary Meeting of the Contracting Parties*, Annex V, Decision IG 17/9, pp. 225–256.

[35] MEPC Resolution 172(57), adopted 4 April 2008.

[36] IMO Resolution A. 982(24), 'Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas' (adopted 1 December 2005), superseding Resolution A. 927(22) 'Guidelines for the Designation of Special Areas under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas' (adopted 29 November 2001). The earlier version of these PSSA Guidelines was contained in Resolution A. 720(17) (adopted 6 November 1991), amended by Resolution A. 885(21) (adopted 25 November 1999).

tion of the process of identification of those areas and for the preparation of the submissions to IMO for the designation of PSSAs by 2007. In the recent past, the Ligurian Sea Cetaceans Sanctuary (on which there has been, since 1999, an agreement between France, Italy and Monaco) was established as a Specially Protected Area of Mediterranean Importance (SPAMI) in 2001, covering the territorial sea as well as the high sea. Moreover, concerning the Straits of Bonifacio between Sardinia and Corsica, there have been instances of announcements, proposals or preparatory steps for PSSA designation, though inconclusive as yet. In 2003, the WWF made a submission to the Barcelona Convention proposing nine larger areas of the Mediterranean to be considered as possible PSSAs; those included the Alboran Sea, the Adriatic Sea,[37] the Aegean Sea, the Sardo-Corso-Liguro Provençal Basin, and the Ionian Islands. The 13th Ordinary Meeting of the Contracting Parties decided to investigate the possibility of approaching the IMO to propose that a number of SPAMIs be designated as PSSAs and to assess such designation in light of the current legal status of the Mediterranean.[38]

Another important development concerns the possibility of designating the Mediterranean Sea as a sulphur oxide (SOx) emissions control area under MARPOL Annex VI by the IMO, thus preventing air pollution from ships by providing that the sulphur content of fuel oil is not to exceed 1.5% m/m in the designated area. This development is also seen as an aspect of the Regional Strategy which specifies the commitment of the CPs to examine the possibility of submitting to the IMO an adequately prepared proposal to designate the Mediterranean Sea as a SOx emission control area (SECA).[39]

Governance of the Transboundary Movement of Hazardous Wastes

The Hazardous Wastes Protocol represents an important protocol-performative aspect of the governance regime of the BCS. Developed in

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[37] On the process towards designating the Adriatic Sea as a PSSA, see in detail: D. Vidas, 'Particularly Sensitive Sea Areas: The Need for Regional Cooperation in the Adriatic Sea', in K. Ott (ed.), *Croatian Accession to the European Union: The Challenges of Participation* (Zagreb: Institute of Public Finance and Friedrich Ebert Stiftung, 2006), pp. 347–380; available at <www.ijf.hr/eng/EU4/vidas.pdf>.

[38] MAP, *Report of the 13th 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* (Catania, 11–14 November 2003), UNEP(DEC)/MED IG.15/11, 8 December 2003 (Athens: UNEP/MAP, 2003), Annex III, II.B.4, p. 15.

[39] Regional Strategy, section 4.13, p. 18. So far, two regional seas have been designated as SECAs under MARPOL: the Baltic Sea (1997, in effect from 2006) and the North Sea (2005, in effect from 2007).

relation to the 1989 Basel Convention global regime,[40] the Hazardous Wastes Protocol integrates, by incorporation or reference, large parts of the pattern of the Basel Convention (relational consistency) while also making considerable advances (relational added value), by establishing a much stronger conventional environmental governance regime for the Mediterranean.

The Hazardous Wastes Protocol is marked by the strong contextualising effect of conventional governance due to the particularities of the Mediterranean context. The 'contextualizing effect' refers to the material scope of its application. Unlike the Basel Convention, it notably: a) applies to radioactive wastes,[41] to certain additional categories of hazardous substances which, being considered products instead of wastes, are not intended for disposal;[42] and b) introduces the allocation of burden of proof for determining whether a particular waste is not subject to the Protocol.[43] It also establishes a stricter environmental governance regime, linking the prohibition of the export and transit of hazardous wastes to developing countries and the exceptional allowance of this activity, with the adequate information and effective participation of the public.[44] When the activity is, as an exception, allowed under the Protocol, then the rules, standards and procedures of the Basel Convention are to be applied, either by their direct integration into the Protocol or by reference.[45]

Moreover, the Protocol introduces an innovative approach to the passage of hazardous wastes through the territorial seas of transit states in the Mediterranean Sea area, thereby taking a decisive step beyond the ambivalent formulation of the general disclaimer clause of the Basel Convention concerning the sea transboundary movement of hazardous wastes.[46] Offering a balance between the interests of maritime traffic and the interests of protection of the marine environment, it provides for a 'notification without

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[40] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted 22 March 1989, entered into force 5 May 1992), text reprinted in ILM, Vol. 28, 1989, p. 649.

[41] Hazardous Wastes Protocol, Annex I.A.Y0.

[42] Ibid., Art. 3(1)(d), which applies to hazardous substances that have been banned or expired or whose registration has been cancelled or refused in the country of manufacture or export for human health or environmental reasons, or have been voluntarily withdrawn or omitted from the government registration in these countries.

[43] Art. 3(3).

[44] Arts. 5, 6 and 12.

[45] See Annex I (Categories of Wastes Subject to this Protocol), Annex II (List of Hazardous Characteristics), Annex III (Disposal Operations), Annex IV (Information to be Provided on Notification and on the Movement Document), Article 6(5), Article 7 (Duty to Re-import), and Article 9 (Illegal Traffic).

[46] Basel Convention, Art. 4(12).

authorisation' scheme[47] which is specific and creatively compatible, in its 'added value', with the LOS Convention. Unfolding the preventive aspect for the governance of the high risks involved in the provided **'**exceptional' transboundary movement of hazardous wastes, the Protocol establishes a workable scheme: it makes applicable Article 22 of the LOS Convention concerning the innocent passage of some dangerous ships,[48] but also gives effect to applicable international environmental regimes, regulations and standards (e.g. PSSAs) which may give rise to more environmental qualifications for the exercise of the right to innocent passage. However, the Protocol left out of its purview the exclusive economic zones (EEZs), thus reflecting the legal situation at the time of its negotiation and adoption in 1996, when no EEZs had yet been established in the Mediterranean.[49] As declared in the Final Act of the Conference of Plenipotentiaries at Izmir (para. 19), 'the Protocol had been drafted in the light of the present legal situation of the Mediterranean Sea'; further, 'in the event of developments affecting this situation, the Protocol might have to be revised'.

Governance of Shipping in the Framework of the Protocol for Specially Protected Areas and Biodiversity in the Mediterranean

The SPA and Biodiversity Protocol presents aspects dealing with issues of governance of vessel source pollution. The governance regime consists also of three implementing instruments of a declarative nature related to it**:**

- the 2003 Strategic Action Programme for the Conservation of Biological Diversity in the Mediterranean,[50] considered by the 14th MOP in 2005 as an essential tool for the implementation of the SPA Protocol;
- the 2003 Action Plan Concerning the Species Introduction and Invasive Species in the Mediterranean Sea,[51] recognising shipping as one of the

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[47] See Art. 6(4).

[48] T. Scovazzi, 'Regional Cooperation in the Field of the Environment', in T. Scovazzi (ed.) *Marine Specially Protected Areas - The General Aspects and the Mediterranean Regional System* (The Hague: Kluwer Law International, 1999), p. 92.

[49] As to developments towards the establishment of EEZs in the Mediterranean, see note 91 below.

[50] MAP, Report of the 13th Ordinary Meeting of the Contracting Parties, Annex III, II.B.6, p. 16. Also, MAP, *Strategic Action Plan for the Conservation of Biological Diversity (SAP BIO) in the Mediterranean Region*, UNEP(DEC)/MED IG. 15/9, 8 October 2003 (UNEP, RAC/SPA–Tunis, 2003).

[51] MAP, Report of the 13th Ordinary Meeting of the Contracting Parties, Annex III, II.B.2.2.3, p. 14.

main known vectors of species introduction and invasive species into the Mediterranean Sea;

– the 2008 Guidelines for Controlling the Vectors of Introduction into the Mediterranean of Non-Indigenous Species and Invasive Marine Species,[52] aimed at preventing further loss of biological diversity due to the introduction of alien invasive species, while encouraging environmentally sound and reasonable use of the Mediterranean marine environment.

The SPA and Biodiversity Protocol, with its governance regime, concerns important aspects related to the management of maritime traffic in the Mediterranean. It establishes the general obligation of the CPs to identify and monitor the effects of activities which have or are likely to have significant adverse impacts on the biological diversity in the Mediterranean Sea[53] – where maritime traffic is clearly implied – and it specifically provides protection measures directly or indirectly applicable to vessel-source pollution and maritime traffic. These protection measures are characterised by context-related consistency (conformity with international law); they are instrumental in effecting an inter-regime implementation (implementation of the network of related Protocols of the BCS and of other relevant conventional regimes); and they provide a specific regime-implementing regulation applicable to vessel-source pollution (prohibition of dumping or discharge of wastes or other substances, regulation of the passage of ships and any stopping or anchoring, regulation of the introduction of any species not indigenous to SPA, and prohibition/regulation of any other activity or act likely to have an impact on SPAs).[54]

Of particular relevance to for international maritime traffic is the establishment of SPAMI List, which also shows the strong contextualising effect of the conventional governance of the Protocol due to the particularities of the Mediterranean context.

SPAMIs refer to the establishment of sites which are of importance for conserving biological diversity in the Mediterranean, contain ecosystems specific to the Mediterranean area or the habitats of endangered species, and are of special scientific, aesthetic, cultural or educational interest.[55] SPAMIs may be established in the marine and coastal zones subject to the sovereignty or jurisdiction of the parties, or in zones partly or wholly on the high seas. Detailed procedures for their establishment are provided in the Protocol.[56]

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[52] MAP, Report of the 15th Ordinary Meeting of the Contracting Parties, UNEP(DEPI)/MED IG.17/Inf.17, 23 July 2007 (Athens: UNEP/MAP, 2007).

[53] SPA and Biodiversity Protocol, Art. 3(5).

[54] See specifically Art. 6(a)–(d) and (h).

[55] Art. 8(2).

[56] Art. 9.

Legal status is awarded to areas included in the SPAMI List guaranteeing their effective long-term protection, depending on the zone they are situated. The status of the SPAMIs is recognised to have public law effects for the parties: within the SPAMI area the parties agree to comply with the measures applicable and not to authorise or undertake any activities that might be contrary to the SPAMI's objectives.[57] SPAMI status entails the application of adequate protection, planning and management measures. With respect to third parties, the parties to the Protocol assume a two-fold relational obligation: to invite them to cooperate in the implementation of the Protocol, and to adopt appropriate measures, consistent with international law, to ensure that no one engages in any activity contrary to the principles or the purposes of the Protocol.[58] So far, 25 SPAMIs have been established in the Mediterranean, all proposed by only six CPs: Spain, France, Italy, Tunisia and, recently, by Morocco and Algeria. Only one of them– the French-Italian-Monegasque Sanctuary – covers areas of the high seas. On the other hand, SPAMI areas may be transformed into PSSAs: the 14th MOP decided to initiate the process of assessing and identifying those SPAMIs which are exposed to environmental risks by international shipping activities and could be proposed to the IMO for designation as PSSAs.[59] This development will entail a stronger integrated governance regime to be extended to those IMO member states that are not parties to the BCS. In an interesting recent development, the 16th MOP (the Marrakesh Declaration) adopted a regional working programme for the coastal and marine protected areas in the Mediterranean including the high seas, where sets of criteria for creating representative ecological networks of marine protected areas in the Mediterranean Sea were identified.[60]

Finally, responding to the recently emerging problem of the introduction of non-indigenous and invasive species into the marine environment, the Protocol deals specifically with the management of the introduction of non-indigenous species into the Mediterranean marine environment which may also caused by shipping (ballast water, hull fouling) or by aquaculture. The Protocol generally sets out the relational obligations of the CPs to take all appropriate measures to regulate the intentional or non-intentional introduction of non-indigenous or genetically modified species into the wild, and to prohibit those that may have harmful impacts on ecosystems, habitats or

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[57] Art. 8(3).

[58] Art. 28.

[59] MAP, Report of the 14th Ordinary Meeting of the Contracting Parties, Annex III, II.B.2(4), p. 22.

[60] MAP: Report of the 16th Ordinary Meeting of the Contracting Parties, Annex II, Decision IG.19/13, p. 99.

species.[61] The development of the Action Plan Concerning the Species Introduction and Invasive Species in the Mediterranean Sea 'deepens' the implementation of this obligation and links it with the implementation of the regime of the Convention on Biological Diversity. It aims at the development of coordinated measures and efforts throughout the Mediterranean region in order to prevent, control and monitor the effects of species introduction. Recognising that shipping has become a major vector of species introduction into the Mediterranean Sea, it provides for the specific implementation of the relational obligation through actions, setting up an implementation time-table for these. The Guidelines for Controlling the Vectors of Introduction into the Mediterranean of Non-Indigenous Species and Invasive Marine Species go further, aiming to prevent further loss of biological diversity due to the deleterious effects of the intentional and unintentional introduction of alien invasive species, while encouraging environmentally-sound and reasonable use of the Mediterranean marine environment. Responding to the contextual developments and in consistency with them (the 2004 Ballast Water Convention, the 2001 AFS Convention,[62] and the EC Regulation 782/2003[63]), these Guidelines deal with ballast water, hull fouling and aquaculture. They incorporate the most advanced guidance and codes of practice on the subject, as well as addressing substantive issues of alien species governance (such as enhancing knowledge and research efforts, improving understanding and awareness, strengthening the management response, and providing adequate legal and institutional mechanisms). In 2009, the 16th MOP decided to develop a regional strategy on ships' ballast water management in the Mediterranean within the MAP.[64]

THE DEVELOPMENT AND ADOPTION OF THE ICZM PROTOCOL

The Protocol on Integrated Coastal Zone Management (ICZM Protocol), signed on 21 January 2008 in Madrid by 14 Contracting Parties of the Barcelona Convention, and soon coming into force after being ratified by six CPs,[65] places on the map of conventional environmental regimes, for the first

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[61] SPA and Biodiversity Protocol, Art. 13(1).

[62] International Convention on the Control of Harmful Anti-Fouling Systems on Ships (AFS Convention), adopted 5 October 2001, IMO doc. AFS/CONF/26 of 18 October 2001.

[63] Regulation (EC) No 782/2003 of the European Parliament and of the Council of 14 April 2003 on the prohibition of organotin compounds on ships [2003] OJ L115/1, which implements the AFS Convention for the EU countries.

[64] See MAP, Report of the 16th Ordinary Meeting of the Contracting Parties, Annex II, Decision IG.19/11, p. 91.

[65] See footnote 9 above.

time, an international legal instrument that promotes an integrated approach to the sustainable management of coastal zones.

The ICZM Protocol constitutes a complex integrated, contextual and interdisciplinary, proactive multilateral response, established to achieve multiple, interrelated aims:

- the sustainable development of coastal zones and the sustainable use of their natural resources;
- the preservation of the integrity of coastal ecosystems, landscapes and geomorphology;
- the prevention or reduction of the effects of natural hazards, in particular of climate change;
- the coherence between public and private initiatives and between all decisions by the public authorities at the national, regional and local level affecting the use of coastal zone.[66]

The ICZM Protocol sets up a paradigmatic regime of conventional environmental governance by reference to which similar developments may be expected in the framework of other conventional environmental regimes elsewhere.

The Protocol lays down the conventional governance framework for an ICZM regime for the Mediterranean. More specifically, the area of coverage of the Protocol is defined geographically, functionally, and contextually, in a manner consistent with the object and purpose of the Protocol regime. It applies to the Mediterranean Sea area, where the seaward limit is the limit of the territorial seas of the parties and the landward limit is the limit of the coastal units as defined by the parties, both limits being subject to a regime-compatible, contextualising decision by any party. Thus, the seaward limit may be less, whereas the landward limit may be different if the party decides to apply contextualising criteria, which may include the ecosystem approach, socio-economic criteria, the specific needs of islands or the negative effects of climate change.[67]

A comprehensive governance approach is required at the institutional and the participation levels. The CPs are obliged to ensure and organise integrated administrative management with respect to institutions, meeting the challenge of the existing institutional fragmentation through effective institutional coordination, organised horizontally and vertically. This refers to coordination among the various competent authorities as regards both the marine and the land parts of coastal zones at the national, regional and local levels and in the field of coastal strategies, plans and programmes, and to the

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[66] ICZM Protocol, Art. 5.

[67] See Art. 3.

issuing of authorisations for activities. With respect to participation, the obligation of the CPs involves all relevant stakeholders (territorial communities, public entities concerned, economic operators, NGOs, social actors and the public concerned) in the phases of the formulation and implementation of coastal and marine strategies, plans and programmes or projects, as well as in the issuing of the various authorisations. In addition, mediation or conciliation procedures and the right to administrative or legal recourse should be available to them.[68]

At the substantive level, the conventional governance framework for an ICZM regime for the Mediterranean contains specific elements of integrated management that respond to the uses of the seas and the marine resources within the coastal zone. Thus, the CPs are under the relational obligation to protect and ensure the sustainable use of the coastal zone in compliance with international and regional legal instruments (contextual consistency), by establishing a setback zone of not less than 100 meters in width where construction is not allowed, subject to exemptions (contextualisation), and by indicatively prescribing the criteria for the sustainable use of the coastal zone to be included in their national legal instruments, taking into account specific local conditions (contextualisation).[69] These criteria refer, *inter alia*, to ensuring that environmental concerns are integrated into the rules for the management and use of the public maritime domain,[70] and to restricting or prohibiting the movement and anchoring of marine vessels in fragile natural areas on land or at sea, including beaches and dunes[71].

Moreover, the relational obligation of the CPs is established with reference to the sustainable integrated management of all economic activities of the coastal zone. These include fishing areas and aquaculture (their protection in development projects, the compatibility of fishing practices with sustainable use of natural marine resources, and the regulation of aquaculture by controlling the use of inputs and waste treatment); infrastructure, energy facilities in ports and maritime works and structures (authorisation to minimise the negative impacts on coastal ecosystems, landscapes and geomorphology); and maritime activities (to be conducted in such a manner as to ensure the preservation of the coastal ecosystems in conformity with the rules, standards and procedures of the relevant international conventions).[72] Finally, a series of relational obligations of the CPs are provided concerning the management (protection, preservation, restoration) of specific coastal

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[68] ICZM Protocol, Arts. 7 and 14.

[69] See Art. 8.

[70] Art. 8(3)(c).

[71] Art. 8(3)(e).

[72] Art. 9(2)(b)(c)(f)(g).

ecosystems (wetlands and estuaries, marine habitats, coastal forests and woods, dunes) and coastal landscapes irrespective of their classification as protected areas,[73] of islands due to their specific characteristics,[74] and of cultural heritage, including underwater cultural heritage[75]. Of special interest here is the relational obligation of the CPs to manage (by making vulnerability and hazard assessments and taking prevention, mitigation and adaptation measures) the effects of natural disasters, climate change in particular, on the resources of the coastal zone.[76]

The conventional governance framework for an ICZM regime for the Mediterranean has important aspects as regards knowledge and communication management. Of particular relevance is the relational obligation of the CPs to develop new modes of thought and innovative knowledge related to a holistic, integrated approach on the subject, carried out through interdisciplinary educational programmes and training, public education, and awareness-raising activities, as well as to provide interdisciplinary scientific research combined with the establishment or support of specialised research centres.[77] All this is coupled with the standard obligations regarding international cooperation in the training and research, in scientific and technical assistance, and in the exchange of information on the use of the best environmental practices.[78]

Finally, the Protocol contains regime-implementing national and international instruments for integrated coastal zone management. These range from technical instruments (monitoring and observation mechanisms, national inventories of coastal zones, a Mediterranean coastal zone network for the exchange of scientific experience, data, and good practices) to legal (appropriate land policy instruments, measures and mechanisms) and economic ones (economic, financial and fiscal instruments to support local regional and national initiatives for ICZM).[79] They further include several interdisciplinary instruments of an innovative nature (Mediterranean Strategy for ICZM complementing the Mediterranean Strategy for Sustainable Development, national coastal strategies, plans and programmes for which the appropriate indicators for evaluating their effectiveness should be defined, and transboundary cooperation for the coordination of national coastal strategies, plans and programmes related to contiguous coastal

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[73] Arts. 10 and 11.
[74] Art. 12.
[75] Art. 13.
[76] Art. 22.
[77] Art. 15.
[78] Arts. 25–27.
[79] See Arts. 16, 17, 20 and 21.

zones)[80] or of a more traditional nature (EIAs for public and private projects likely to affect the coastal zones, and Strategic Environmental Assessments of plan and programmes affecting the coastal zone).[81]

THE DEVELOPMENT OF A MEDITERRANEAN ENVIRONMENTAL LIABILITY AND COMPENSATION REGIME

To maximise the sustainable use of the Mediterranean Sea and the protection of its marine and coastal environment, the CPs to the BCS initiated, in 1997, the process of developing a Mediterranean environmental liability and compensation regime. The negotiating process aimed to develop a liability regime-specification of the 'polluter pays' principle provided in Article 4(3) of the amended Barcelona Convention, and to implement the framework obligation of the CPs of Article 16 of that Convention to cooperate in the establishment of a liability and compensation regime for damages resulting from pollution in the Mediterranean Sea Area (a *pactum de contrahendo* obligation).

The negotiating process was lengthy. In the first stage, an integrated approach to environmental liability regime, cast in a Protocol form, was proposed and advanced, mainly under the influence of the pattern of the 1993 Lugano Convention.[82] The negotiating process was interrupted between 1999 and 2003, overwhelmed by hotly debated contextual developments and uncertainties on the subject. The poor record of the entry into force of related conventional liability regimes, coupled with the continuing negotiating process for developing environmental liability regimes in the framework of the EU as well as in other regimes of conventional environmental governance (e.g. Basel Convention), were seen as calling for a more cautious approach. Importantly, the true underlying cause of this interruption was the poorly perceived and inadequately designed *pre-negotiation* phase of the process of developing a Mediterranean environmental liability and compensation regime which could forge an effective balance of the competing interest of the CPs.[83] The negotiating process resumed in 2003, at an infor-

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[80] Arts. 17, 18 and 28.

[81] Art. 19.

[82] Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (adopted 21 June 1993, not in force), text reprinted in ILM, Vol. 32, 1993, p. 1228. See further E. Raftopoulos, *Studies on the Implementation of the Barcelona Convention: The Development of an International Trust Regime* (Athens: Ant. N. Sakkoulas, 1997), pp. 123–162.

[83] For the importance of the pre-negotiation period in general, and its aspects as a form of transformative governance, see E. Raftopoulos, 'International Environmental Negotiation as a Governance Technique', pp. 14–28.

mal expert level, maintaining the initial methodological approach to and the Protocol form of the earlier proposed regime.[84] It then continued at the formal level between 2006 and 2007, progressively abandoning the Protocol form in favour of a soft-law instrument. Finally, on 18 January 2008, the 15th MOP in Almeria adopted the Guidelines for the Determination of Liability and Compensation for Damage Resulting from Pollution of the Marine Environment of the Mediterranean Sea Area.[85] These Guidelines constitute the first step, in a step-by-step approach, adopted by the CPs, for the more adequate development of a future Mediterranean liability and compensation regime. The second step would be the undertaking of an *assessment* of the implementation of these Guidelines, to be followed by a *decision* by a future Meeting of the Contracting Parties as to whether it would be appropriate to take the third step and go on to *develop a Protocol*.[86] The purpose of these Guidelines is to play a threefold role: firstly, to strengthen cooperation among the CPs for the development of such a regime; secondly, to facilitate their adoption of relevant national legislation, assessing priority needs in terms of institutional and capacity-building at the national and regional levels; and thirdly, to envisage future steps in the elaboration of the regime, the management of the Guidelines and their possible scope of application.

Negotiations on a comprehensive Mediterranean liability and compensation regime and the promotion of an integrated approach to environmental liability were fundamentally contextualised. The negotiating process was directly related to the contextual process of existing and emerging international regimes on environmental liability and compensation. Consistency in the adopted Guidelines with its external context (contextual consistency) was dealt with by clarifying their relationship with existing international regimes of environmental liability and compensation. This relationship has an 'added on value' foundation: the Guidelines are 'without prejudice to existing global and regional environmental liability and compensation regimes, which

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[84] MAP, *Report – Consultation Meeting of Legal Experts on Liability and Compensation for Damage Resulting from Pollution of the Marine Environment in the Mediterranean Sea Area* (Athens, Greece, 21 April 2003), UNEP(DEC)/MED WG.230/2, 6 May 2003 (Athens: UNEP/MAP, 2003).

[85] MAP, Report of the 15th Ordinary Meeting of the Contracting Parties, Annex V, Decision IG 17/4, pp. 133–140.

[86] MAP, *Report of the First Meeting of the Open-Ended Working Group of Legal and Technical Experts to Propose Appropriate Rules and Procedures for the Determination 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, Loutraki (Greece) 7–8 March 2006*, UNEP(DEP)/MED WG.285/4, para. 42.

are either in force or may enter into force'.[87] These regimes are indicatively listed in the Appendix to these Guidelines, which include the IMO International conventions dealing with liability and compensation for pollution damage,[88] the related sector Protocol to the Basel Convention on Liability and Compensation 1999,[89] and the EC Environmental Liability Directive 35/2004[90]. This relationship is not simply an exclusive relationship, excluding from the outset issues already covered by the above instruments, but an interlinking, integrating one that enhances their application and facilitates their effective implementation in the Mediterranean Sea area. Correspondingly, the European regime of EC Directive 35/2004 retains a strong paradigmatic value for the non-EU CPs, which, when adopting or strengthening their relevant national legislation, should consider this Directive as far as possible.

The Guidelines apply to the Mediterranean Sea area (regionality criterion) as defined by the Barcelona Convention and to the extent to which any of its performative Protocols apply (functionality criterion). Thus, the Guidelines will apply to the coastal areas (SPA and Biodiversity Protocol, LBS Protocol, Offshore Protocol, ICZM Protocol), the hydrologic basin (LBS Protocol), and the seabed and its subsoil under the sovereignty or jurisdiction of the CPs (SPA and Biodiversity Protocol, Offshore Protocol). Concerning maritime zones, these Guidelines, apart from their clear application to the internal waters and the territorial sea, may also extend, despite the complex-

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[87] See Guideline 5.

[88] International Convention on Civil Liability for Oil Pollution Damage (adopted 27 November 1992, entered into force 30 May 1996), IMO doc. LEG/CONF.9/15 of 2 December 1992; the International Convention on the Establishment of an International Fund for the Compensation for Oil Pollution Damage (adopted 27 November 1992, entered into force 30 May 1996), IMO doc. LEG/CONF.9/16 of 2 December 1992 and the Supplementary Fund Protocol of 2003 (adopted 16 May 2003, entered into force 3 March 2005), IMO doc. LEG/CONF.14/20; the Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (adopted 17 December 1971, entered into force 15 July 1975), text reprinted in ILM, Vol. 11, 1971, p. 277; the International Convention on Civil Liability for Bunker Oil Pollution Damage (adopted 23 March 2001, entered into force 21 November 2008) (Bunkers Convention), IMO doc. LEG/CONF.12/19 of 27 March 2001; the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances at Sea (adopted 3 May 1996), text reprinted in ILM, Vol. 35, 1996, p. 1406; the Convention on Limitation of Liability for Maritime Claims (adopted 19 November 1976, entered into force 1 December 1986), text reprinted in ILM, Vol. 16, 1976, p. 606.

[89] Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal (adopted 10 December 1999) UN doc. UNEP/CHW.5/29, available at <www.basel.int/meetings/cop/cop5/docs/prot-e.pdf>.

[90] Directive 2004/35/EC of the European Parliament and of the Council on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage [2004] OJL143/56.

ities involved, to the high seas under the terms provided by the SPA and Biodiversity Protocol for coastal states in the case of SPAMIs and to the EEZ.[91]

The normative pattern of the Guidelines was set up by following a minimalist drafting method. It contains the basic elements of an integrated, comprehensive environmental liability and compensation regime related to the BCS and in consistency with the relevant global or regional instruments. Thus, the structure and the content of these elements are largely standardised, and their 'added value' is mainly to be found in their functionality as an aspect of conventional environmental governance in the Mediterranean region. These elements refer to the definition of environmental and 'traditional' damage;[92] the advanced elements of compensation for environmental damage and the criteria for its assessment;[93] the taking of preventive and remedial measures and the channelling of liability;[94] the establishment of strict liability as the basic standard of liability, with the application of fault-based liability in cases of damage resulting from activities not covered by the BCS, and the apportionment of liability in cases of multi-party causation and the definition of an 'incident';[95] a restricted list of exemptions of liability;[96] the establishment and evaluation of financial limits of liability;[97] time-limits for compensation based on a two-tier system of a shorter and a longer period covering all incidents.[98] They also refer to the framework commitments of the CPs to envisage the establishment of a compulsory insurance regime on the basis of an assessment of the products available in the insurance market, and further to explore the possibility of establishing a Mediterranean Compensation Fund to ensure compensation under certain

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[91] Seven Mediterranean states have taken steps towards the establishment of EEZs in the Mediterranean Sea, without giving effect to them so far: Morocco (in 1981), Egypt (in 1983), Croatia (in 1994 and 2003 to 2008), Syria (in 2003), Cyprus (in 2004), Tunisia (in 2005), Libya (in 2009), and, lately, Israel (2010). As to the specific case of Croatia's proclaimed 'Ecological and Fisheries Protection Zone', see a detailed analysis, D. Vidas, 'The UN Convention on the Law of the Sea, the European Union and the Rule of Law: What is Going on in the Adriatic Sea?, IJMCL, Vol. 24, 2009, pp. 1–66.

[92] Guidelines 8, 9 and 14.

[93] Guidelines 10–12. It is worth noting that the compensation for environmental damage includes not only the costs of preventive measures and the costs of measures to clean up, restore and reinstate the impaired environment, but also the 'diminution in value of natural or biological resources pending restoration' and 'compensation by equivalent if the impaired environment cannot return to its previous condition' (Guideline 10)

[94] Guidelines 16–18.

[95] Guidelines 19–22.

[96] Guideline 23.

[97] Guidelines 24–25.

[98] Guidelines 26–27.

conditions as a second tier of the liability and compensation system.[99] Finally, the Guidelines refer to the obligation of the CPs to provide the public with broad access to information and to reply to requests for information within specific time-limits, as well as to ensure the widest possible accessibility of the public to actions for compensation for damage.[100]

The Guidelines aim to apply to environmental damages caused by incidents or activities specifically connected with the Dumping Protocol, the SPA and Biodiversity Protocol, the LBS Protocol, the Offshore Protocol, and the ICZM Protocol – in fact, environmental compensation is part of the sustainable management of coastal resources. They are contextualised with respect to the Prevention and Emergency Protocol and the Hazardous Wastes Protocol, according to Guideline 6; however, they still require a further step to establish an interlinking, integrating relationship with the existing relevant sectoral IMO conventional regimes and the Protocol to the Basel Convention with a view to securing their effective implementation in the Mediterranean Sea area, and possibly expanding them. The Guidelines are also functionally contextualised with respect to the domestic orders of the CPs: following a limiting approach, they leave the more detailed issues to the operation of the domestic legislation of the CPs. However, given the complexity of implementation, they will need to be combined with complementary governance actions that can strengthen the domestic environmental frameworks implementing them and improving capacity building, including the scientific capacities of the CPs.

The 16th MOP, held in 2009, took a pragmatic step towards implementation of these Guidelines. It adopted a reporting format on their implementation as well as a Programme of Action to facilitate such implementation.[101] This includes such important actions as the following: identification of the treaties most relevant for the establishment of a consistent and effective regime of liability and compensation in the Mediterranean and the steps to be taken to ensure the broadest possible participation in these treaties by the CPs; the analysis of existing national legislation and its consequent development, where necessary taking into consideration the particularities of the internal context; the harmonisation of key definitions and the formulation of criteria for evaluating environmental damage, especially as regards the diminution in value of natural resources pending restoration and compensation by equivalent; the strengthening of national institutional capacity and inter-institutional coordination; and the development of means to ensure effective

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[99] Guidelines 28–29.

[100] Guidelines 30–32.

[101] See MAP, Report of the 16th Ordinary Meeting of the Contracting Parties, Annex II, Decision IG.19/3, pp. 15–27.

access to information by the public and its right to participate in legal actions.