International cooperation as regards protection of the environment and fisheries in the Mediterranean Sea

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I am very glad to participate in a collection of essays dedicated to two friends and colleagues who have written leading contributions on various aspects of international law and are the editors of the well-known publication *Anuario Español de Derecho Internacional*.

1. General Aspects of the Mediterranean Sea

The Mediterranean is a semi-enclosed sea surrounded by twenty-three countries[1]. It is connected to the Atlantic Ocean by the narrow outlet of the strait of Gibraltar, to the Black Sea[2] by the straits of Dardanelles and Bosporus and to the Red Sea by the artificial canal of Suez. Some big islands (Sicily,

[1] The United Kingdom (as regards Gibraltar and the two Sovereign Base Areas of Akrotiri and Dhekelia on the island of Cyprus), Spain, France, Monaco, Italy, Slovenia, Croatia, Bosnia-Herzegovina, Montenegro, Albania, Greece, Turkey, Cyprus, Syria, Lebanon, Israel, Palestine, Egypt, Libya, Malta, Tunisia, Algeria, Morocco. Nine among them are members of the European Union, an international organization that exercises, *inter alia*, an exclusive competence for fisheries management and conservation and shared competences with member States in the field of protection of the marine environment.

[2] This paper will not consider the questions relating to the Black Sea.

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Sardinia, Corsica, Cyprus) and a great number of other islands and islets are situated in the Mediterranean.

The bordering countries differ as far as their internal political systems and levels of economic development are concerned. Highly populated cities, ports of worldwide significance, important industrial areas and renowned seaside resorts are located along the Mediterranean shores. Being the shortest waterway between the Atlantic and the Indian oceans, the Mediterranean is crossed by major routes of international navigation. Navies of bordering and non-bordering States cruise the Mediterranean, which is a region of high strategic importance also for the presence of some areas of sensitive political conflict.

Marine living resources are under pressure from pollution and overfishing[3]. Liquid and gaseous hydrocarbons have been found in the continental shelf along the southern and eastern Mediterranean shores. The protection of the marine environment is a serious concern due to several factors, such as land-based pollution, high urbanization of coastal areas, heavy maritime traffic and the very slow rate at which the Mediterranean waters exchange with those of the Atlantic Ocean.

2. The Legal Picture of Mediterranean Waters

The Mediterranean States are still far from taking a uniform attitude as regards the extent and nature of their coastal zones. Looking at the map, a patchwork of different kinds of coastal zones mixed with holes of high seas is immediately visible. The present picture of coastal zones in the Mediterranean is the following.

Maritime internal waters. Several Mediterranean States (Albania, Algeria, Croatia, Cyprus, Egypt, France, Italy, Libya, Malta, Morocco, Montenegro,

[3] «The marine resources and ecosystems of this region, however, have come under increasing pressure in recent decades, driven by demographic and economic growth as well as by diversification and intensification of marine and maritime activities. Pollution, alien species, illegal fishing and overfishing all pose threats, not only to the ecosystems but also to the well-being of Mediterranean and Black Sea coastal communities and riparian States» (FAO & GFCM, *The State of Mediterranean and Black Sea Fisheries 2016*, Rome, 2016, p. iii). «The situation in the Mediterranean and Black Sea is alarming, as catches have dropped by one-third since 2007, mainly attributable to reduced landings of small pelagics such as anchovy and sardine but with most species groups also affected» (FAO, *The State of World Fisheries and Aquaculture 2016*, Rome, 2016, p. 5).

Spain, Tunisia and Turkey) have enacted legislation measuring the breadth of the territorial sea not from the low-water mark, but from straight baselines joining points located on the mainland or islands. Historical bays are claimed by Italy (Gulf of Taranto) and Libya (Gulf of Sidra).

Territorial sea. Most Mediterranean States have established a 12-mile territorial sea. The exceptions are the United Kingdom (3 n.m. for Gibraltar and the Sovereign Base Areas of Akrotiri and Dhekelia), Greece (6 n.m.) and Turkey (6 n.m. in the Aegean Sea, but 12 n.m. elsewhere).

Contiguous zone. 24-mile contiguous zones have been established by some States (Algeria, Cyprus, Egypt, France, Malta, Morocco, Spain, Syria and Tunisia) for customs, fiscal, immigration or sanitary purposes. Algeria, Cyprus, France, Italy and Tunisia exercise rights in the field of archaeological and historical objects found at sea within the 24-mile limit (so-called archaeological contiguous zone).

Sui generis zones (fishing zone, ecological protection zone). Some coastal States have proclaimed a *sui generis* zone beyond the territorial sea, namely a fishing zone or an ecological protection zone. While neither of them is mentioned in the United Nations Convention on the Law of the Sea (Montego Bay, 1982)[4], they are not prohibited either. They encompass only some of the rights that can be exercised by the coastal State within the exclusive economic zone. Such a fragmentation of rights does not seem incompatible with the UNCLOS, considering that the right to do less is implied in the right to do more.

Fishing zones of different width have been proclaimed by Algeria, Libya, Malta and Tunisia. Ecological protection zones have been proclaimed by Italy and Slovenia. A fishing and ecological zone has been established by Croatia.

Exclusive economic zone. A number of Mediterranean States have established an exclusive economic zone (Cyprus, Egypt, Israel, Lebanon, Morocco, France, Spain and Syria) or have adopted legislation for the future establishment of such a zone (Libya and Tunisia).

As regards *maritime boundaries*, so far only a limited number of the required delimitation treaties have been concluded by Mediterranean States with adjacent or opposite coasts and not all of them have entered into force. Several instances of maritime boundaries are still unsettled, including some that are quite complex to handle due to the peculiar geographical configuration of the coastlines of the States concerned (concave or convex coastlines, islands located on the so-called wrong side of the median line, coastal enclaves, etc.).

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[4] Hereinafter: UNCLOS.

In certain cases, where the interested States have already agreed on a boundary relating to their continental shelves, the question is still pending on whether the same boundary should also apply to the super-jacent waters.

Despite the many unsettled boundaries, there is no doubt that Mediterranean States are entitled to establish exclusive economic zones whenever they wish to do so[5]. International law does not prevent States bordering seas of limited dimensions from proclaiming their own exclusive economic zones, provided that maritime boundaries are not unilaterally imposed by one State on its adjacent or opposite neighbours[6]. For geographical reasons the high seas would disappear in the Mediterranean if all the coastal States concerned were to establish their exclusive economic zone. No point in the Mediterranean is located at a distance exceeding 200 n.m. from the nearest land or island, which is the distance equivalent to the breadth of a full-size exclusive economic zone.

Far from being the manifestation of excessive unilateralism, the establishment of a consistent jurisdictional framework in the form of exclusive economic zones could lead to the strengthening of regional co-operation in the Mediterranean with the aim of managing living resources and addressing environmental concerns. It is difficult to see how future Mediterranean governance could be built on the vacuum determined by the persistence of high seas areas or on the confusion created by different kinds of coastal zones.

3. The Picture of Regional Legal Instruments

A number of regional treaties are already in force and address different aspects of international co-operation in the Mediterranean.

As regards co-operation for the protection of the marine environment, the main achievement is the so-called Barcelona system, composed of the Mediterranean Action Plan, the Barcelona Convention and its seven protocols[7].

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[5] In fact, exclusive economic zones have been established in other enclosed or semi-enclosed seas, such as the Baltic, the Caribbean and the Black Seas.

[6] As remarked by the International Court of Justice in the judgment of 18 December 1951 on the *Fisheries* case (United Kingdom v. Norway), «the delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law» (International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders*, 1951, p. 20).

[7] See *infra*, para. 4.

A specific instrument for the protection of endangered marine species in the Mediterranean is the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (Monaco, 1996, amended in 2010; so-called ACCOBAMS). At the sub-regional level two treaties have been concluded by France, Italy and Monaco, namely the Agreement on the Protection of the Waters of the Mediterranean Shore (Monaco, 1976, amended in 2003; so-called RAMOGE) and the Agreement on the Creation in the Mediterranean Sea of a Sanctuary for Marine Mammals (Rome, 1999; so-called Pelagos).

As regards fisheries, emphasis should be put on the General Fisheries Commission for the Mediterranean[8], created by an agreement concluded in 1949. The GFCM works in close co-operation with the International Commission for the Conservation of Atlantic Tunas (ICCAT), established by a convention concluded in 1966. ICCAT is competent for fisheries of tuna and tuna-like fishes in the Convention Area, which includes the whole of the Atlantic, as well as the Mediterranean as a connected sea[9].

As regards shipping, many forms of co-operation have been established at the world level within the framework of the International Maritime Organization (IMO), including instruments which allow for the designation of «Special Areas» or «Particularly Sensitive Sea Areas» (PSSA). In July 2011 the Strait of Bonifacio, located between the islands of Corsica (France) and Sardinia (Italy), has been designated by IMO as a PSSA, the first ever established in the Mediterranean.

The only organization having a specific competence in the field of Mediterranean scientific research is the International Commission for the Scientific Exploration of the Mediterranean Sea (CIESM), whose constitutive assembly was held in Madrid in 1919. It is engaged in promoting fundamental research activities.

4. The Barcelona System for the Protection of the Mediterranean Marine Environment

The so-called Barcelona system is a notable instance of fulfilment of the obligation to cooperate for the protection of a semi-enclosed sea.

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[8] Hereinafter: GFCM. See *infra*, para. 5.

[9] An informal *modus vivendi* is applied by GFCM and ICCAT. GFCM «adopts» the ICCAT decisions relating to tuna and tuna quotas. In this way there are no inconsistencies between the GFCM and the ICCAT actions.

On 4 February 1975, an intergovernmental meeting convened in Barcelona by the United Nations Environment Programme (UNEP) adopted a policy instrument, called the Mediterranean Action Plan (MAP). One of the main objectives of the MAP was to promote the conclusion of a framework convention, together with related protocols and technical annexes, for the protection of the Mediterranean environment. This was done on 16 February 1976 when the Barcelona Convention and two protocols were opened to signature. The Barcelona Convention, which entered into force on 12 February 1978, is chronologically the first and the most articulated among the so-called regional seas agreements concluded under the auspices of the UNEP Regional Seas Programme.

Also in application of the principles embodied in the 1992 Rio Declaration on Environment and Development, several components of the Barcelona System underwent 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 cooperation.

The updating and the additions to the so-called Barcelona system show that the parties consider it as a dynamic body capable of being subject to re-examination and improvement, whenever appropriate. Each of the new instruments contains important innovations and tries to find constructive ways to address complex environmental problems. The present Barcelona system includes one convention and seven protocols.

4.1. *The Convention*

The Convention on the Protection of the Mediterranean Sea against Pollution, which, as amended in Barcelona on 10 June 1995, has changed its name into Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean[10], retains its character of a framework treaty that has to be implemented through specific protocols. It also retains what in 1976 was seen as a major innovation, that is the possibility of participation by the European Economic Community (now the European Union) and by simi-

[10] Hereinafter: Convention. The amendments entered into force on 9 July 2004.

lar regional economic groupings at least one member of which is a coastal State of the Mediterranean Sea and which exercise competence in fields covered by the Convention (art. 30). In fact, the European Union is a party to the Convention and some of its protocols, together with Mediterranean States which are members of this organization.

In 1995 the geographical coverage of the Convention was extended to include all maritime waters of the Mediterranean Sea, irrespective of their legal condition. In fact, the sphere of territorial application of the Barcelona legal system is flexible, in the sense that any protocol may extend the area to which it applies[11].

The amended text of the Convention recalls and applies at a regional scale the main concepts embodied in the instruments adopted by the 1992 Rio Conference (the Declaration on Environment and Development and the Programme of action «Agenda 21»), such as sustainable development, the precautionary principle, the integrated management of the coastal zones, the use of best available techniques and best environmental practices, as well as the promotion of environmentally sound technology, including clean production technologies. For the purpose of implementing the objectives of sustainable development, the parties are called to take fully into account the recommendations of the Mediterranean Commission on Sustainable Development, a body established within the framework of the MAP Phase II.

A new provision (art. 15) sets forth 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 about the thorny question of access to justice by the public.

Compliance with the Convention and the protocols, as well as with the decisions and recommendations adopted during the meetings of the parties, is evaluated on the basis of the periodical reports that the parties are bound to transmit to the UNEP at regular intervals. Such reports, which are examined at the biannual meetings of the parties, relate to the legal, administrative 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 to promote the implementation of deci-

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[11] See infra, paras. 4.C, 4.D and 4.H, as regards the Land-Based Protocol, the Areas Protocol and the Coastal Zone Protocol.

sions and recommendations (arts. 26 and 27). Specific reporting obligations are found in the protocols (see, for example, art. 23 of the Areas Protocol).

In 2008 the Meeting of the parties adopted the procedures and mechanisms on compliance and established a compliance committee. Its objective is «to facilitate and promote compliance with the obligations under the Barcelona Convention and its Protocols, taking into account the specific situation of each Contracting Party, in particular those which are developing countries».

4.2. *The Dumping Protocol*

The Protocol for the Prevention of the Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft (Barcelona, 16 February 1976; in force from 12 February 1978), which, as amended in Barcelona on 10 June 1995, has changed 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[12], 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 operation of vessels or aircraft and their equipment. The latter are considered as 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 prohibition of the dumping of wastes or other matter, with the exception of a fen categories of matters specifically listed, such as dredged materials, fish waste, inert uncontaminated geological materials. The original protocol was based on the idea that dumping was in principle permitted, with the exception of the matters listed in annex I (the so-called black list), whose dumping was prohibited, and the matters listed in annex II (the so-called grey list) whose dumping required a prior special permit. The logic of the original text is now fully reversed in order to ensure a better protection of the environment.

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[12] Hereinafter: Dumping Protocol. The amendments have not yet entered into force.

4.3. *The Land-Based Protocol*

The Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources (Athens, 17 May 1980; in force from 17 June 1983), which, as amended in Syracuse on 7 March 1996, has changed its name into Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities[13], applies to discharges originating from land-based points and diffuse sources and activities. Such discharges reach the sea through coastal disposals, rivers, outfalls, canals or other watercourses, including ground water flow, or through run-off and disposal under the seabed with access from land.

The amended protocol enlarges its application to the «hydrologic basin of the Mediterranean Sea Area». To face land-based pollution of the sea, action must primarily be taken where the polluting sources are located, that is on the land territory of the parties. However, as a party cannot be held responsible for any pollution originating on the territory of a non-party State, the 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 to cooperate in the implementation of the protocol.

With the aim of eliminating pollution deriving from land-based sources, the parties are bound to «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 are called to give priority to the phasing out of inputs of substances that are toxic, persistent and liable to bio-accumulate (art. 1). This kind of substances were not specifically mentioned in the original protocol.

When negotiating the amendments, an extensive discussion took place about how to implement the obligation «to prevent, abate, combat and eliminate to the fullest possible extent pollution» from land-based sources. Finally a solution was found in the adoption of measures and timetables having a legally obligatory nature, but relating to different groups of substances and adapted to the their specific requirements. The procedural machinery to achieve what was agreed upon is embodied in art. 15. It provides that the meeting of the parties adopts, by a two-thirds majority, the short-term and medium-term regional plans and programmes, containing measures and timetables for their implementation, in order to eliminate pollution deriving from land-based sources

[13] Hereinafter: Land-Based Protocol. The amendments have entered into force on 11 May 2008.

and activities, in particular to phase out inputs of substances that are toxic, persistent and liable to bio-accumulate. These measures and timetables become binding on the 180th day following the date of their notification for all the parties which have not notified an objection. So far, six regional plans have been adopted.

4.4. *The Areas Protocol*

The Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean[14] (Barcelona, 10 June 1995; in force from 12 December 1999) replaces the previous Protocol concerning Mediterranean Specially Protected Areas (Geneva, 1 April 1982; in force from 23 March 1986). 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[15]. The extension of the geographical coverage of the instrument was felt necessary to protect also those highly migratory marine species (such as marine mammals) which cross the artificial boundaries drawn by man in the sea.

In order to overcome the difficulties due to different types of Mediterranean coastal zones and unsettled maritime boundaries[16], the new protocol includes two very elaborate disclaimer provisions (art. 2, paras. 2 and 3). On the one hand, the establishment of intergovernmental cooperation in the field of the marine environment should not prejudice other legal questions which have a different nature and are still pending. On the other, the existence of such legal questions should not delay the adoption of measures necessary for the preservation of the ecological balance in the Mediterranean.

The Areas Protocol provides for the establishment of a List of specially protected areas of Mediterranean importance (SPAMI List)[17]. This 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

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14 Hereinafter: Areas Protocol.

15 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.

16 *Supra*, para. 2.

17 The existence of the SPAMI List does not prejudice the right of each party to create and manage marine protected areas which are not intended to be listed as SPAMIs.

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 an area 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 periodical 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», «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. As regards the relationship with third countries, the parties are called to «invite States that are not Parties to the Protocol and international organizations to cooperate 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 problems arising from the fact that any treaty, including the Areas Protocol, can create rights and obligations only for the parties.

The Areas Protocol is completed by three annexes, which were adopted in 1996 in Monaco, namely 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). According to Annex I, the sites included in the SPAMI List must be «provided with adequate legal status, protection measures and management methods and means» (para. A, *e*) and must fulfil at least one of six general criteria («uniqueness», «natural representativeness», «diversity», «naturalness», «presence of habitats that are critical to endangered, threatened or endemic species», «cultural representativeness»). The SPAMIs must be awarded a legal status guaranteeing their effective long term protection (para. C.1) and must have a management body, a management plan and a monitoring programme (paras. from D.6 to D.8).

So far, thirty-four SPAMIs have been established. Only one among them, that is the already mentioned Pelagos sanctuary[18], jointly proposed by France, Italy and Monaco, covers also waters located beyond the territorial sea.

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[18] *Supra*, para. 3.

4.5. *The Seabed Protocol*

The Protocol concerning Pollution resulting from Exploration and Exploitation of the Continental Shelf, the Seabed and its Subsoil[19] (Madrid, 14 October 1994; in force from 24 March 2011) sets forth obligations incumbent on the parties with respect to activities carried out by operators, who can also be private persons, either natural or juridical. This kind of obligations are 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), but also any person who does not hold an authorization, but is *de facto* in control of activities. The parties are 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 previously been authorized or which are exercised illegally.

All activities in the Seabed Protocol area, including erection of installations on site, are subject to the prior written authorization by the competent authority of a party. Before granting the 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 the financial capacity to carry out the activities. Authorization must 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[20]. Special restrictions or conditions may be established for the granting of authorizations for activities in specially protected areas.

The parties are bound to take measures to ensure that liability for damage caused by activities to which the protocol applies is imposed on operators who are required to pay prompt and adequate compensation. They shall also take all measures necessary to ensure that operators have and maintain insurance cover or other financial security in order to pay compensation for damages caused by the activities covered by the protocol.

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[19] Hereinafter: Seabed Protocol.

[20] This obligation can be seen as an application of the precautionary principle.

4.6. *The Wastes Protocol*

The Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal[21] (Izmir, 1 October 1996; in force from 18 December 2007) is applicable to a subject matter already covered, on the world basis, 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 if they stipulate provisions which are not less environmentally sound than those of the Convention itself. This means that, to have some purpose, a regional instrument on movements of wastes should bring some «added value» to the rights and obligations already established under the Basel Convention. In the case of the Wastes Protocol, a better protection for the environment is provided in three instances at least.

First, while the Basel Convention does not apply to radioactive wastes, the 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 Wastes Protocol applies also to a particular kind of substances which are properly to be considered products instead of wastes, as they are not intended for disposal. They 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 Wastes Protocol clarifies 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 movements may only take place with the prior written notification by the State of export to both the State of import and the State of transit and with 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

[21] Hereinafter: Wastes Protocol.

and, indeed, has been interpreted in opposite ways by States inclined to give priority to one or the other solution. In fact, under the Basel Convention, it is questionable whether the export State has any obligation to notify the coastal transit State or to obtain its prior consent.

The Wastes Protocol gives a definite answer to the question by providing for 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 Wastes Protocol strikes a fair balance between the interests of maritime traffic and those of the protection of the marine environment. On the one hand, ships carrying hazardous wastes keep the right to pass, as their passage is not subject to the coastal State's authorization. On the other, the coastal State has a right to be previously notified, in order to know what occurs in its territorial sea and be prepared to intervene in case of casualties during passage which could endanger human health or the environment.

4.7. *The Emergency Protocol*

The Protocol concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea[22] (Valletta, 25 January 2002; in force from 17 March 2004) replaces the previous 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 from 12 February 1978). The changes with respect to the previous instrument were so extensive that the parties decided to draft a new instrument, instead of merely amending the old text. The adoption of a strengthened legal framework for combating pollution from ships is particularly important in view of the increasing maritime traffic and transport of hazardous cargo within and through the Mediterranean.

Pollution from ships is a typical field where regulation at the world level is required. All the technical rules, such as those relating to requirements in respect to design, construction, equipment and manning of ships, need to be adopted at a global and uniform level. Navigation would be impossible if different and conflicting provisions on technical characteristics of ships were

[22] Hereinafter: Emergency Protocol.

adopted at the domestic or regional level. Art. 211 of the 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». It would also be unrealistic to try to modify the allocation of enforcement powers among the flag State, the port State and the coastal State set forth in Arts. 217, 218 and 220 of the UNCLOS, which were the outcome of a difficult negotiation.

The Emergency Protocol acknowledges in the preamble the role of the International Maritime Organization (IMO), which is the competent international organization in the field of safety of navigation, and the importance of cooperating 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 have been concluded under the sponsorship of IMO[23] and to the competences that since longtime IMO has been exercising as regards safety of shipping (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.

However, also regional cooperation has a role to play in the field of pollution from ships. For instance, international cooperation for prompt and effective action in taking emergency measures to fight against pollution can be best organized at the regional level. In this regard, the previous protocol already provided for the setting up of an institutional framework for actions of regional cooperation in combating accidental marine pollution that is the Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea (REMPEC), which is administered by IMO and UNEP and is located in Malta. The role of REMPEC is confirmed by the new protocol.

The Emergency Protocol is not limited (as was the former instrument) to emergency situations. It also covers other aspects of pollution from ships, aiming at striking a fair balance between action at the world and action at the regional level. For instance, art. 15, relating to environmental risk of maritime traffic, provides that «in conformity with generally accepted international rules and standards and the global mandate of the International Maritime Or-

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[23] Such as the Convention for the Prevention of Pollution from Ships as amended by the Protocol (London, 1973-1978; so-called MARPOL), the Convention on Oil Pollution Preparedness, Response and Co-operation (London, 1990), the Convention on the Control of Harmful Anti-Fouling Systems on Ships (London, 2001) or the Convention for the Control and Management of Ships' Ballast Waters and Sediments (London, 2004).

ganization, the Parties shall individually, bilaterally or multilaterally take the necessary steps to assess the environmental risks of the recognized routes used in maritime traffic and shall take the appropriate measures aimed at reducing the risks of accidents or the environmental consequences thereof».

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 that can be affected by pollution 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 costs of assistance has been included.

The Emergency Protocol sets forth a number of obligations directed to the masters of ships 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 case of a pollution accident and at their request, with detailed information about the ship and its cargo and to cooperate 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. The lessons arising from the 1999 *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.

4.8. *The Coastal Zone Protocol*

The Protocol on Integrated Coastal Zone Management in the Mediterranean[24] (Madrid, 21 January 2008; in force from 24 March 2011) addresses the increase in anthropic pressure on the Mediterranean coastal zones which is threatening their fragile equilibrium. It provides Mediterranean States with a legal and technical tool to ensure sustainable development throughout the shores of this regional sea. It is the first treaty ever adopted which is specifically devoted to the coastal zone.

[24] Hereinafter: Coastal Zone Protocol.

The Coastal Zone Protocol defines «integrated coastal management» as «a dynamic process for the sustainable management and use of coastal zones, taking into the account at the same time the fragility of coastal ecosystems and landscapes, the diversity of activities and uses, their interactions, the maritime orientation of certain activities and uses and their impact on both the marine and land parts» (art. 2, *g*).

The precise delimitation of the geographical coverage of the protocol gave rise to lengthy discussion during the negotiations. It was finally agreed (art. 3) that the seaward limit of the coastal zone is the external limit of the territorial sea and its landward limit is the limit of the competent coastal units as defined by parties. But parties may establish different limits, in so far as certain conditions occur.

Art. 6 of the protocol lists a number of general principles of integrated coastal zone management. For instance, the parties are bound to formulate «land use strategies, plans and programmes covering urban development and socio-economic activities, as well as other relevant sectoral polices». They shall take into account in an integrated manner «all elements relating to hydrological, geomorphological, climatic, ecological, socio-economic and cultural systems», so as «not to exceed the carrying capacity of the coastal zone and to prevent the negative effects of natural disasters and of development». The parties are also required to take into account the diversity of activities in the coastal zone and to give priority «where necessary, to public services and activities requiring, in terms of use and location, the immediate proximity of the sea».

Art. 8 of the protocol provides for the establishment of a 100-meter zone where construction is not allowed. However, «adaptations» are allowed «for projects of public interest» and «in areas having particular geographical or other local constraints, especially related to population density or social needs, where individual housing, urbanisation or development are provided for by national legal instruments». Other important obligations of the parties relate to «limiting the linear extension of urban development and the creation of new transport infrastructure along the coast», «providing for freedom of access by the public to the sea and along the shore» and «restricting or, where necessary, prohibiting the movement and parking of land vehicles, as well as the movement and anchoring of marine vessels in fragile natural areas on land or at sea, including beaches and dunes».

Some provisions of the protocol deal with specific activities, such as «agriculture and industry», «fishing», «aquaculture», «tourism, sporting and recreational activities», «utilization of specific natural resources» and «infra-

structure, energy facilities, ports and maritime works and structure» (art. 9, para. 2), as well as with certain specific coastal ecosystems, such as «wetlands and estuaries», «marine habitats», «coastal forests and woods» and «dunes» (art. 10). Due emphasis is granted to risks affecting the coastal zone, in particular climate change (art. 22) and coastal erosion (art. 23).

5. The General Fisheries Commission for the Mediterranean

The GFCM was established in 1949 as an institution within the framework of the Food and Agriculture Organization of the United Nations (FAO). According to the 2014 amendments, the objective of the GFCM Agreement is to ensure the conservation and sustainable use, at biological, social, economic and environmental level, of living marine resources, as well as the sustainable development of aquaculture in the area of application.

The GFCM has twenty-four members, including one non-regional State (Japan) and the European Union. The area covered by the GFCM Agreement includes both the high seas and marine areas under national sovereignty or jurisdiction («all marine waters of the Mediterranean Sea and the Black Sea», as stated in art. 3, para. 1).

Under art. 5, *c*, the GFCM is required to apply the precautionary approach in accordance with the Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 1995) and the Code of Conduct for Responsible Fisheries, adopted in 1995 by the FAO Conference. The GFCM is entitled to adopt «recommendations» on conservation and management measures aimed at ensuring long term sustainability of fishing activities, in order to preserve the marine living resources, as well as the economic and social viability of fisheries and aquaculture. In adopting such recommendations, the GFCM must give particular attention to measures to prevent overfishing and minimize discards, paying particular attention to the potential impact on small-scale fisheries and local communities (art. 5, *a*). The GFCM is also called to formulate appropriate measures based on the best scientific advice available, taking into account relevant environmental, economic and social factors (art. 5, *b*), and to take the appropriate measures to ensure compliance with its recommendations to deter and eradicate illegal, unreported and unregulated fishing activities (art. 5, *f*).

The GFCM also exercises several other functions of scientific and social character, such as to regularly review the state of marine living resources and socio-economic aspects of the fishing industry, including by obtaining and evaluating economic and other data and information relevant to its work (art. 8, *a* and *d*), to promote the development of institutional capacity and human resources, particularly through education, training and vocational activities (art. 8, *e*), to encourage, recommend, co-ordinate and undertake research and development activities, including co-operative projects in the area of fisheries and the protection of living marine resources (art. 8, *g*), and to enhance communication and consultation with civil society concerned with aquaculture and fishing (art. 8, *f*). Within the GFCM, a number of committees have been established, such as the Scientific Advisory Committee (SAC), advised by various sub-committees, the Committee on Aquaculture (CAC) and the Compliance Committee (COC).

The GFCM can formulate and recommend appropriate measures for various purposes, namely: the conservation and management of living marine resources; to minimize impacts for fishing activities on living marine resources and their ecosystems; to adopt multiannual management plans based on an ecosystem approach to fisheries to guarantee the maintenance of stocks above levels which can produce maximum sustainable yield and consistent with actions already taken at national level; to establish fisheries restricted areas for the protection of vulnerable marine ecosystems, including but not limited to, nursery and spawning areas; to ensure, if possible through electronic means, the collection, submission, verification, storing and dissemination of data and information, consistent with relevant data confidentiality policies and requirements; to take action to prevent, deter and eliminate illegal, unreported and unregulated fishing, including mechanisms for effective monitoring, control and surveillance; to resolve situations of non-compliance (art. 8, *b*).

The recommendations referred to in art. 8, *b*, are adopted by a two-thirds majority of Parties present and voting (art. 13, para. 1). Despite their name, the «recommendations» adopted under art. 8, *b*, have a binding nature. Parties are under an obligation to give effect to such recommendations (art. 14, para. 1), unless they cast an objection to them within 120 days from the date of notification (art. 13, para. 3), Parties are bound to transpose adopted recommendations into national laws, regulations or appropriate legal instruments and to report annually to the GFCM indicating how they have implemented them.

The GFCM recommendations so far adopted relate to a broad range of matters, including driftnets, closed seasons, fisheries restricted areas, mesh size, management of demersal fisheries, plans of actions, red coral, incidental

by-catch of seabirds or turtles, conservation of monk seal, records of vessels, port State control, lists of vessels engaged in illegal, unreported and unregulated fishing, logbooks, vessel monitoring systems.

Particularly notable are the measures on the establishment of fisheries restricted areas in order to protect the deep sea sensitive habitats, namely Recommendation 30/2006/3, which prohibits fishing with towed dredges and bottom trawl nets within «Lophelia reef off Capo Santa Maria di Leuca», the «Nile delta area cold hydrocarbon seeps» and the «Eratosthemes Seamount», Recommendation 33/2009/1, on the fisheries restricted area in the Gulf of Lions, and Recommendation 41/2017/3 on the fisheries restricted area in the «Jabuka/Pomo Pit area of the Adriatic Sea». Among the other measures adopted within the GFCM framework, Recommendation 2005/1 on the management of certain fisheries exploiting demersal and deepwater species can be recalled, insofar as it prohibits the use of towed dredges and trawl nets fisheries at depths beyond 1000 m.

6. Gaps in Regional Regulation

In the fields of protection of the marine environment and fisheries, the States bordering the Mediterranean Sea have so far shown imagination and flexibility in adopting advanced legal instruments and updating them when there was a need to do so. However, more needs to be done on the way towards a complete governance of this regional sea.

As stated in Declaration adopted on 30 March 2017 in Malta by the Ministerial Conference on the Sustainability of Mediterranean fisheries (so-called MedFish4Ever Declaration)[25],

> «increasing pressures are exerted on marine ecosystems by a variety of human activities which include overfishing and unsustainable fishing practices, as well as drilling, transport, coastal urbanisations, agriculture and industry oriented pollution, climate change and invasive species».

The signatories of the declaration agreed to strengthen governance for Mediterranean fisheries based on a number of objectives and principles. They

[25] The Declaration was signed by the European Union Commissioner for Environment, Maritime Affairs and Fisheries and by the competent authorities of thirteen Mediterranean States.

urged all Mediterranean States to, *inter alia*, cooperate to establish fisheries restricted and marine protected areas, including in international waters, and undertook to,

> «to the extent possible no later than 2020, manage 100% of the key fisheries with a multi-annual management plan in order to restore and maintain the populations of fish stocks above fishing mortality levels capable of producing maximum sustainable yield. (...)» (para. 36)[26].

Moving from fisheries to other matters, some gaps exist in the present treaty coverage and could be addressed by further legal instruments. For instance, the emerging issue of exploitation of marine genetic resources, which is now being discussed within the United Nations, could need action at the regional level through regulatory measures on bioprospecting. No treaty addresses pollution from noise. Other subjects, such as the production of energy from winds, as well as the establishment of «highways of the sea» or of a network of underwater pipelines for energy transportation, could be dealt in the near future, especially if the concept of marine spatial planning were put forward and supported by Mediterranean States[27].

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[26] The GFCM was asked to agree during its 2018 annual session on the list of key fisheries for which a multi-annual management plan should be implemented and on a progressive calendar with yearly quantified objectives to set-up management plans by 2020.

[27] As regards subjects different from the protection of the environment and fisheries, a regional treaty on the protection of underwater cultural heritage could meet an evident need, also in order to deter the looting by treasure hunters. The problems posed by transnational crimes, especially illegal maritime trafficking in human beings, should be carefully analyzed in order to determine whether action at the regional level would be appropriate to ensure better crime prevention and sanction, as well as more adequate protection for victims.