

SPECIALLY PROTECTED AREAS AND BIODIVERSITY IN THE MEDITERRANEAN

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The Adoption of the Protocol Concerning Specially Protected Areas and Biodiversity in the Mediterranean by the Barcelona Conference

The adoption of the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean is one most interesting outcome of the Conference of Plenipotentiaries on the Convention for the Protection of the Mediterranean Sea Against Pollution (hereinafter the Barcelona Convention) and its Protocols, held in Barcelona on 9-10 June 1995. It is wellknown that the Conference conducted a comprehensive review of the international agreements on the protection of the Mediterranean Sea (67), in order to harmonize the regionally applicable rules with the evolution of the law of the sea at the global level, after the entry into force of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), and even more importantly, the progressive consolidation of the principles of international law on sustainable development emerged at the 1992 United Nations Conference on Environment and Development (UNCED).

Such developments in international law have a significant impact on establishment of marine protected areas and the legal regime applicable to them. This is why, whilst examining the matter, the Barcelona Conference did not limit itself to amend the 1982 Geneva Protocol Concerning Mediterranean Specially Protected Areas, as it did with respect to the Barcelona Convention and the Dumping Protocol, but adopted a new international agreement. It has to be said that the Geneva Protocol is generally regarded as rather modest in comparison with other similar regional arrangements, at least as far as territorial scope is concerned. The Barcelona Conference was thus a favourable occasion for

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(67) See SCOVAZZI, *supra*, p. 48.

reviewing it. The question is still open, however, whether the 1995 Protocol actually introduced radical changes.

Once into force, the new Protocol shall replace the previous one « in the relationship among the Parties to both instruments » (Article 32, para. 2). This provision is consistent with Article 30, para. 4, *b*, of the 1969 Vienna Convention on the Law of Treaties, which reflects customary norms on the application of successive multilateral treaties *in pari materia*. However, should the new agreement be not ratified by all Contracting Parties to the Geneva Protocol, some undesirable effects could result.

From this perspective, it is useful to start by recalling the ratification and accession procedures provided for in Articles 29-31 of the new agreement. In accordance with Article 29, the Barcelona Protocol was open for signature, from 10 June 1995 to 10 June 1996, by any Contracting Party to the Barcelona Convention. The concept also includes the European Community which is a Party both to the Barcelona Convention and the Geneva Protocol. Following Article 31, on 10 June 1996 the Protocol was open for accession « by any State and regional economic grouping » Party to the Barcelona Convention.

On conclusion of the Barcelona Conference on 10 June 1995, the Protocol was signed by 17 of the 21 Contracting Parties to the Barcelona Convention and the Geneva Protocol; only four instruments of ratification were successively deposited with the government of Spain (see Table A).

Considering the cautious approach of the signatories States and the fact that the entry into force of the Protocol only requires six ratifications or accessions (Article 30), it is likely that the functioning of the new conventional regime shall take place, at least at an early stage, amongst a very restricted number of Mediterranean countries.

This said, it seems appropriate to focus on the contents of the 1995 Protocol, with regard firstly to the extension of geographical coverage and secondly to substantive norms on specially protected areas and biodiversity in the Mediterranean. Finally, we shall consider some issues concerning the implementation of the Protocol within Contracting Parties domestic legal systems, devoting some special attention to the Italian legislation on marine protected areas.

The geographical coverage

As for the first topic, widening of geographical coverage is perhaps the major innovation introduced in 1995. The Geneva Protocol applies, on

general terms, to the Mediterranean Sea Area as defined in Article 1 of the Barcelona Convention, i.e. the maritime waters of the Mediterranean Sea, including its gulfs and seas, except for the internal waters of the Contracting Parties. The scope of application of the Protocol is however limited to the territorial waters of the contracting States and may, on the other hand, include the landward side of the baseline of internal waters, as well as wetlands or coastal areas designated by the Parties (Article 2 of the Protocol).

Differences in the geographical coverage of the Barcelona Convention and the Geneva Protocol are due to the fact that marine protected areas must be established in accordance with the law of the sea. Environmental protection measures have therefore to be co-ordinated with navigation, fishing, and other traditional States' activities in the sea, taking into account the rights and obligations of States set by customary and conventional international law and the legal status of the various maritime zones established by UNCLOS.

Furthermore, the effectiveness of environmental measures depends on their observance by all States, including third States. This particular issue is of little importance in case of marine protected areas established within territorial waters, where any measure adopted by the coastal State in its sovereignty must be observed by all other State and can be enforced also in respect of foreign vessels, save the right of innocent passage. It is self-evident that major problems arise for protected areas located in waters beyond territorial seas, particularly within exclusive economic zones (EEZs) or on high seas. Topics of this kind have a rather critical character in the Mediterranean Sea, wherein the legal status of marine areas and their delimitations are partly controversial for reasons of both geographical and political nature. Consequently, apart from the well-established rule fixing in twelve nautical miles the maximum breadth of the territorial sea, the UNCLOS' provisions on maritime zones are very scarcely applied in the Mediterranean Sea, notwithstanding the wide participation of the coastal States to the Convention (see Table B).

This is also why the 1982 Geneva Protocol only covers the territorial seas and other maritime and land areas designated by the Parties within their own territories. This limitation has adverse consequences, however, on the preservation of marine ecosystems and migratory species; it is, in fact, avoided by other regional arrangements on the same matter, such as the Protocol Concerning Protected Areas and Wild Fauna and Flora

in the Eastern Africa Region (Nairobi, 21 June 1985) and the Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Kingston, 17 January 1990).

Furthermore, the limitation of the environmental protection to areas within territorial waters seems by now unnecessary, after the entry into force of UNCLOS. This Convention, as the global international instrument dealing, at the same time, with protection of marine environment from the broadest perspective and the question of the extent of coastal States' authority in the different maritime zones, contributes to clarify the territorial scope of all existing treaties on the protection of marine environment, including regional.

Now, under the terms of UNCLOS, in addition to the general obligation of States to preserve and protect marine environment (Article 192) and the duty to take all the necessary measures for the prevention, reduction and control of marine pollution (Article 194, para. 1), more stringent measures are permitted for the protection of rare or fragile ecosystems in any maritime zone (Article 194, para. 5) and explicitly in the areas of EEZs which present particular risks in relation to their oceanographical, ecological or traffic conditions (Article 211, para. 6). We can recall that also UNCED Agenda 21, dealing in Chapter 17 with the protection of oceans and seas, calls upon States to take action, *inter alia*, to ensure respect of areas designated by coastal States within their EEZs in order to preserve rare or fragile ecosystems (17.30, a, v).

Taking note of the said evolution, the Barcelona Protocol establishes a geographical coverage coincident with that of the Barcelona Convention and, in addition, includes: a) the seabed and its subsoil; b) the internal waters of the Parties, as well as the seabed and its subsoil; and c) the terrestrial coastal areas and wetlands designated by each Party (Article 2, para. 1). Consequently, specially protected areas may be established not only in zones under the sovereignty of the contracting States, but also in their EEZs (Article 5) and even – for the new category of protected areas introduced by the Protocol, the Specially Protected Areas of Mediterranean Importance (SPAMIs) –, on the high seas (Article 9).

It appears evident that protected areas in maritime zones beyond territorial waters can only be established on the grounds of States' consent and co-operation, also involving the competent global and regional organisations. As a matter of fact, for the designation of SPAMIs, which

may include zones partly or wholly on high seas, the 1995 Protocol provides for different procedures according to the legal status of zones involved. In any case, procedure implies mutual co-operation of interested States, participation of UNEP, and a final decision by the Meeting of the Contracting Parties to be taken by consensus for areas on high seas and by majority for other areas (Article 9, para. 4, *b* and *c*).

Finally, under the terms of the disclaimer clauses contained in Article 2, paras. 2 and 3, the application of the Protocol has not incidence on the legal questions concerning the nature and the extent of marine areas and their delimitations, nor constitutes grounds for any claim to national sovereignty or jurisdiction over the said areas. However, the quite modest number of ratifications four years later the adoption of the Protocol shows that these provisions could be not enough to overcome the traditional sensitiveness of some Mediterranean States on this crucial point.

Protection of Mediterranean flora and fauna and conservation of biodiversity

The 1995 Protocol confirms the essential obligation of the contracting States established by the Geneva Protocol to create marine protected areas and to take the necessary measures to ensure their protection and, if necessary, restoration, in order to safeguard the sites presenting a biological and ecological value or a particular importance by reason of their scientific, aesthetic, cultural or educational interest (Articles 3 and 4). In respect of the 1982 Protocol, major attention is paid to the conservation of biodiversity – expressly mentioned in the title of the new agreement –, as well as the preservation of threatened or endangered species of flora and fauna.

The conservation and sustainable use of biological diversity is dealt with, in particular, in Article 3, para. 2-5, under the terms of which the Parties shall: identify and compile inventories of the components of biological diversity; adopt strategies, plans and programmes for the conservation of biological diversity and the sustainable use of marine and coastal biological resources; monitor the components of biodiversity and identify processes and activities « which have or are likely to have a significant adverse impact » on their conservation and sustainable use. It is noteworthy that the last provision, closely reproducing Article 7, *c*, of

the Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), implicitly restates the precautionary principle set forth in Preamble of this Convention as a criterion for the application of the Protocol.

The preservation and management of threatened or endangered species of flora and fauna are mentioned in Article 3, para. 1, *b*, as a general obligation of the Parties, while Article 4, *c*, specifically includes between the objectives of specially protected areas the aim of safeguarding « habitats critical to the survival, reproduction and recovery of endangered, threatened or endemic species of flora or fauna ». More specific provisions are contained in Part III, including the co-operative measures of the contracting States provided for in Article 12 for protection and conservation of the species of flora and fauna listed in Annexes II and III to the Protocol. The Annexes, concerning respectively the endangered or threatened species and the species whose exploitation has to be regulated, were subsequently adopted at Montecarlo, on 24 November 1996.

A further innovation is the drawing up of a list of Specially Protected Areas of Mediterranean Importance (SPAMI List) set in Section Two of the Protocol. The List may include sites which are important for the conservation of the Mediterranean biological diversity, contain ecosystems specific to the Mediterranean Area or of special interest at the scientific, aesthetic, cultural or educational level (Article 8). As we have remarked, the areas designated for inclusion in the SPAMI List may extend partly or wholly on high seas, on the grounds of the mutual co-operation of the Parties, particularly the neighbouring States interested to the designation of such areas. It has to be stressed that, once the areas are included in the List, « The Parties agree ... to comply with the measures applicable to the SPAMIs and not to authorise or undertake any activities that might be contrary to the objectives for which the SPAMIs were established » (Article 8, para. 3).

On adoption of Annexe I to the Protocol on 24 November 1996, concerning the common criteria for the choice of protected marine and coastal areas that could be included in the SPAMI List, the Aegean Sea's coastal States gave a clear sign of their prudence in respect of any application of the Protocol which could involve consequences on questions related to the legal status of marine areas. As a matter of fact, both Greece and Turkey made a declaration on the interpretation of the Protocol. Greece stated that procedures provided for by the Protocol and

Annexe I for the proposals to be jointly made by neighbouring States in order to include areas located partly or wholly on high seas in the SPAMI List are intended by Greece as referred to the areas « at a reasonable distance from, or immediately adjacent to » zones under sovereignty or jurisdiction of the neighbouring Parties.

Turkey stressed, on her turn, that: *a)* the maritime frontiers between Turkey and Greece have not yet been delimited, *b)* there is a number of islets and rocks the international status of which is not clearly established, and *c)* neither Greek legislation nor any form of concern of these islets and rocks by Greece can, although accepted by international organisations, constitute grounds for claims to national sovereignty.

Problems of implementation in national legal systems

The obligations of States under the new Protocol, as those resulting from the previous one, are very general as for their content. There is indeed little difference between the two agreements from this point of view. The only significant progress consists of the drawing up of the lists annexed to the Protocol, for by adopting them Contracting Parties undertake to protect species of flora and fauna clearly identified and singularly designated. This mechanism is however widely used in order to provide a more stringent character to States' obligations resulting from those environmental treaties the content of which is generally regarded at as international « soft-law ».

It remains that the Protocol's provisions are not self-executing, so that the protection of the Mediterranean marine and coastal environment and its natural resources will continue to depend, after all, on measures adopted by contracting States through their domestic legislation. On its turn, the effective implementation of national legislative and administrative measures sometimes meets with additional difficulties. Italian legislation on marine protected areas offers a good example of questions of such kind.

When Italy ratified the Geneva Protocol in 1985, the establishment of marine reserves had been already provided for within the national legal system by Title V of Law 979 of 31 December 1982 « Provisions for protection of the sea ». The Italian legislation was hence perceived at the time as a more advanced one with respect to the legislations of other

Mediterranean States where the matter was not specifically regulated. Such a standpoint seems, however, incorrect if one considers that the relevant provisions of Law 979 have suffered poor and limited application. As a matter of fact, although Article 31 indicated 20 priority sites to be protected through special environmental measures, only seven marine reserves had been established by adopting the necessary ministerial decrees until 1991, nearly ten years after the adoption of the act. Also the general plan for the protection of the sea and coasts, foreseen in Article 1 of Law 979, has never been adopted, which results in the lack of a comprehensive and coherent planning for protection of marine environment.

The situation partly improved with the adoption of Law 394 of 6 December 1991 on protected areas, which in Article 2, para. 4, make an explicit reference to the Geneva Protocol. Without abrogating the previous norms, it partially reformed the marine reserves' legal regime, taking into account the evolution of pertinent international norms, particularly the principles on sustainable use of protected areas. It also increased up to 46 the overall number of sites where marine reserves must be established. Notwithstanding this progress and a general favourable trend in more recent years, marine protected areas existing in Italy are only 15 as yet (including the two marine parks « Golfo di Orosei » and « Torre del Cerrano »), an undoubtedly scarce quantity in a country with about 8,000 kilometres of coasts and a great number of islands. This confirms that the application of both the Geneva Protocol and related domestic legislation is still inadequate. Also in view of the entry into force of the Barcelona Protocol, Italy is thus to improve quality of protection of its marine and coastal environment.

We hope that Law 426 of 9 December 1998 « New interventions in the environmental field », introducing further reform, will achieve the objective. This act, in fact, enhances the role played by regional authorities in management of marine protected areas, thus overcoming one of the problems which have most hampered the application of environmental measures at the local level.

Although Italy has not yet ratified the Barcelona Protocol, Law 426 also enhances the protection of the Mediterranean species of flora and fauna, providing, *inter alia*, for the drawing up of a national plan for individuating and safeguarding the *Posidonia oceanica*, an endogen plant of the Mediterranean region included in endangered or threatened species listed in Annex II to the Protocol.

Future prospects

The preceding remarks can shed some enlightenment on the legal issues that the implementation of the Barcelona Protocol will rise in the near future. It is a matter of evidence that a more effective protection of the Mediterranean marine environment and biological diversity, in accordance with the evolution of the conventional legal regime, firstly needs the broadest possible acceptance amidst Mediterranean States. We shall therefore hope that the new Protocol be ratified by all Signatories, including the European Community. One can note, *in limine*, that a difficult situation could become real should the Protocol not be ratified by both the EC and its member States, because of their concurrent competencies on matters covered by the Protocol and the increasing EC role in managing environmental concerns, at latest reinforced by the Amsterdam Treaty.

Another point to be considered is the eventuality that the Barcelona Protocol enter into force only amongst a few of the Mediterranean States, whereas majority still remain bound by the Geneva Protocol. The circumstance that the new agreement apply at least to a part of the whole of the Mediterranean Area is *per se* a good perspective. One cannot ignore, however, that this could lead to the impossibility of implementing the most innovative provisions, especially in the event that two or more neighbouring countries be not bound by the same agreement. In this case, their mutual relations will continue to be regulated by the 1982 Protocol.

On more general terms, the existence of two different sets of legal norms applicable to the same geographical area, the ecological components of which are interdependent, appears rather unsatisfying from the scientific point of view.

The ultimate question concerns the will of States which shall ratify the Barcelona Protocol to fully apply its provisions, particularly those concerning the establishment of SPAMIs. As the Italian case shows, apart from the necessary international co-operation, a crucial issue on this point is the adoption of adequate measures in domestic legislation and their effective implementation by all public and private subjects involved.

On this line, after the entry into force of the new agreement, it will be interesting to observe to which extent and by what means the Contracting Parties shall take the opportunities offered by the Barcelona Protocol and Annexes for a more complete and co-ordinated action in

favour of the preservation of the Mediterranean habitats and the conservation of biodiversity.

TABLE A

Contracting Parties	Barcelona Convention		Specially Protected Areas Protocol		SPA and Biodiversity Protocol	
	Signature	Ratification	Signature	Ratification	Signature	Ratification
Albania		30.5.90 *		30.5.90 *	10.6.95	
Algeria		16.2.81 *		16.5.85 *	10.6.95	
Bosnia and Herzegovina		1.3.92 ***		22.10.94***		
Croatia		8.10.91 ***		12.6.92 ***	10.6.95	
Cyprus	16.2.76	19.11.79		28.6.88 *	10.6.95	
Egypt	16.2.76	24.8.78 **	16.2.83	8.7.83	10.6.95	
European Community	13.9.76	16.3.78 **	30.3.83	30.6.84 **	10.6.95	
France	16.2.76	11.3.78 **	3.4.82	2.9.86 **	10.6.95	
Greece	16.2.76	3.1.79	3.4.82	26.1.87	10.6.95	
Israel	16.2.76	3.3.78	3.4.82	28.10.87	10.6.95	
Italy	16.2.76	3.2.79	3.4.82	4.7.85	10.6.95	
Lebanon	16.2.76	8.11.77 *		27.12.94 *		
Libya	31.1.77	31.1.79		6.6.89 *	10.6.95	
Malta	16.2.76	30.12.77	3.4.82	11.1.88	10.6.95	Oct. 99
Monaco	16.2.76	20.9.77	3.4.82	29.5.89	10.6.95	3.6.97
Morocco	16.2.76	15.1.80	2.4.83	22.6.90	10.6.95	
Slovenia		15.3.94 ***		16.9.93 *		
Spain	16.2.76	17.12.76	3.4.82	22.12.87	10.6.95	23.12.98
Syria		26.12.78 **		11.9.92 *		
Tunisia	25.5.76	30.7.77	3.4.82	26.5.83	10.6.95	1.6.98
Turkey	16.2.76	6.4.81		6.11.86 *	10.6.95	
* Accession ** Approval *** Succession						

TABLE B

Contracting Parties to the Barcelona Convention	UNCLOS ratifications or successions*	Maritime zones in the Mediterranean Sea			
		Territorial Sea **	Contiguous Zone **	Exclusive Economic Zone **	Continental Shelf **
Albania		12			
Algeria	11.6.96	12			
Bosnia and Herzegovina	12.1.94 (S)				
Croatia	5.4.95 (S)	12		(3)	(5)
Cyprus	12.12.98	12			200
Egypt		12	24	(4)	200
European Community	1.4.98				
France	11.4.96	12	24		(6)
Greece	21.7.95	6	10 (2)		(6)
Israel		12			200
Italy	13.1.95	12			
Lebanon	5.1.95	12			
Libya		12			(6)
Malta	20.5.93	12	24		200
Monaco	20.3.96	12			
Morocco		12	24		200
Slovenia	16.6.95 (S)	12			
Spain	15.1.97	12	24		(6)
Syria		35	41		200
Tunisia	24.4.85	12	24		(6)
Turkey		6 (1) / 12			

* S = succession
** Breadth in nautical miles
(1) Only in the Aegean Sea
(2) Air safety zone established by Law 5017 of 13 June 1931
(3) Regulated by domestic legislation (see Maritime Code of 27 January 1994) but not declared
(4) Declared; breadth undetermined
(5) See 1968 delimitation between Italy and Yugoslavia
(6) See bilateral delimitations