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# Is the Convention-Protocol Approach Appropriate for Addressing Regional Marine Pollution?: The Barcelona Convention System Revisited

Suh-Yong Chung\*

## I. Introduction

The nature of the issues relating to regional marine pollution frequently requires the collaborative efforts of the international community. The convention-protocol approach is one of many ways through which various states may build the necessary international cooperation to achieve regional environmental goals. In particular, the convention-protocol approach increasingly has been introduced in many regions in order to resolve regional marine pollution problems. Under this approach, the participating states first negotiate a framework convention. This framework convention usually includes rules on the decision-making process, an information sharing system, and an initial set of substantive obligations.<sup>1</sup> Once a framework convention is in place, more stringent obligations can be introduced through protocols or annexes.<sup>2</sup> As a result, a set of treaties creates a cooperation regime that may deal with various types of marine pollution in a more systemic and integrated way.

The Barcelona Convention System represented the first instance in which a convention-protocol approach specifically was aimed at cleaning up a region's marine pollution. Since its adoption in 1978, the Barcelona

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1. George W. Downs, Kyle W. Danish, & Peter N. Barsoom, *The Transnational Model of International Regime Design: Triumph of Hope or Experience?*, 38 COLUM. J. TRANSNAT'L L. 465, 470 (2000).

2. *Id.*

Convention System has served as an institutional framework that addresses serious regional marine pollution in the Mediterranean Sea.<sup>3</sup> It provides not only the rules, regulations, and norms that impose legal obligations on the member states, but also the legal grounds underlying relevant institutional arrangements, such as the Program for the Assessment and Control of Pollution in the Mediterranean Region (MED POL), the Blue Plan, and the Priority Plan. As a result, the Barcelona Convention System has been applied to many other regional seas programs, mainly through the United Nations Environment Program (UNEP), which was instrumental in the original development of the Barcelona Convention System.<sup>4</sup>

However, it should be noted that no matter how well-structured the institutional arrangements, we should hold off on evaluating a cooperation regime's efficacy until we can determine if it has brought about *effective* clean-up results. If the cooperation regime based on the convention-protocol approach does not fulfill the goal of decreasing pollution, then it must be concluded that the cooperation regime has not worked in a given region. Although it has been widely applied elsewhere in the world, in part because it has been presumed to be the most successful instance of a convention-protocol approach, the Barcelona Convention System approach has not always resulted in the effective clean-up of a targeted region's marine pollution. This paper analyzes the institutional framework of the Barcelona Convention System with the objective of determining the precise causes that have led to its limited success in achieving its environmental goals.

## II. The Barcelona Convention System<sup>5</sup>

### A. *Building the Barcelona Convention System*

The Barcelona Convention System was a part of UNEP's efforts to create the Mediterranean Action Plan (hereinafter "Med Plan"). Since its

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3. PHILLIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 400 (Cambridge University Press 2003) (1995).

4. See THE FRIDTJOF NANSEN INSTITUTE YEARBOOK OF INTERNATIONAL CO-OPERATION ON ENVIRONMENT AND DEVELOPMENT 146-155 (Olav Schram Stokke & Øystein B. Thommessen ed., Earthscan Publications 1996) (1992).

5. Many of the treaties under the Barcelona Convention system were amended recently, but have not yet entered into force. For the purpose of this paper, those amended convention and protocols will not be discussed. For the same reason, the Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal, which was adopted in 1996, but has not entered into force, will not be discussed. For the texts of the amended treaties, visit [www.unepmap.org](http://www.unepmap.org).

establishment in 1972, UNEP has attempted to address serious regional marine pollution problems by including various states under the concept of the “ecological” region.<sup>6</sup> Under this scheme, UNEP invited sixteen of the eighteen Mediterranean coastal states to Barcelona in 1975 to adopt the Med Plan.<sup>7</sup> Recognizing that the best intentions of the Med Plan were likely to lead nowhere without a solid legal basis for effective cooperation among the members, sixteen states convened in Barcelona in 1976 to undertake formal commitments.<sup>8</sup> This meeting resulted in the adoption of three legal instruments: the framework convention (i.e. the Barcelona Convention), the Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft (hereinafter the “Dumping Protocol”)<sup>9</sup> and the Protocol Concerning Cooperation in Combating Pollution of the Mediterranean Sea by Oil and Other Harmful Substances in Cases of Emergency (hereinafter the “Emergency Protocol”).<sup>10</sup>

Even if it was crucial to include a protocol to deal with land-based sources pollution, which accounted for most of the contamination in the Mediterranean Sea, conflicts of interests arose between the member states, resulting in the delay of the adoption of the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities (hereinafter the “Land-Based Sources Protocol”) until 1980.<sup>11</sup> In 1982, another new protocol, the Protocol Concerning Mediterranean Specially Protected Areas (hereinafter the “Protected Area Protocol”) was adopted.<sup>12</sup> In 1994, after four years of negotiation,

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6. See PETER M. HAAS, *SAVING THE MEDITERRANEAN: THE POLITICS OF INTERNATIONAL ENVIRONMENTAL COOPERATION* 68-78 (1990).

7. See United Nations Environment Programme Mediterranean Action Plan, at [www.unepmap.org](http://www.unepmap.org) (last visited Nov. 2, 2003).

8. *Id.*

9. The Dumping Protocol was later amended as the Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea.

10. The Emergency Protocol was adopted on Feb. 16, 1976 by the Conference of Plenipotentiaries of the Coastal States of the Mediterranean Region for the Protection of the Mediterranean Sea, held in Barcelona. The Protocol entered into force on Feb. 12, 1978.

11. Mediterranean Land-Based Sources Protocol, June 17, 1983, 22 I.L.M. 1227. The Land-Based Sources Protocol was adopted on May 7, 1980 and entered into force on June 17, 1983. The original Protocol was modified by amendments adopted on Mar. 7, 1996. The amended Protocol, recorded as “Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities” has not yet entered into force.

12. This protocol was replaced by the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, which was adopted on June 10, 1995 by the Conference of Plenipotentiaries for the Protection of the Mediterranean Sea against Pollution and its Protocols, held in Barcelona. The new Protocol has not yet entered into force.

the last protocol, named 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 Sub-soil (hereinafter the "Offshore Protocol"), was adopted. In summary, it took years for the Med Plan to establish a legal basis that would enable the region to address its main pollution resources.

### *B. The Framework Convention*

The Barcelona Convention<sup>13</sup> provides the premise for the development of a cooperative effort among coastal states to reverse the progressive degradation of the regional marine environment. Its purpose is to provide an overall framework for the various international agreements that have already been made and for the future creation of a sectoral, local, or sub-regional charter.<sup>15</sup> Furthermore, the Barcelona Convention includes the duty to prevent, abate, and combat pollution in the Mediterranean Sea and to protect and enhance its marine environment.<sup>16</sup> This duty requires states to take all appropriate measures, both individually and jointly, to address pollution caused by dumping from ships and aircraft,<sup>17</sup> discharges from ships,<sup>18</sup> exploration of the continental shelf, and the exploitation of the sea-bed and its subsoil,<sup>19</sup> land-based sources,<sup>20</sup> and environmental damage resulting from accidents or emergencies.<sup>21</sup> It is predicted that a common duty will be implemented by the creation of specific Protocols that will further formulate subject-related common duties.<sup>22</sup>

### *C. The Protocols*

The general scheme of the Barcelona Convention is carried out

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13. The original Convention has been modified by amendments adopted on June 10, 1995 by the Conference of Plenipotentiaries on the Convention for the Protection of the Mediterranean Sea against Pollution and its Protocols, held in Barcelona on June 9-10, 1995 (UNEP(OCA)/MED IG.6/7).

15. UMBERTO LEANZA, *The Regional System of Protection of the Mediterranean Against Pollution*, in *THE INTERNATIONAL LEGAL REGIME OF THE MEDITERRANEAN SEA* 400 (Umberto Leanza ed., 1985).

16. Convention for the Protection of the Mediterranean Sea Against Pollution, Feb. 16, 1976, art. 4, 15 I.L.M. 290 [hereinafter Barcelona Convention of 1976].

17. *See id.* art. 5.

18. *See id.* art. 6.

19. *See id.* art. 7.

20. *See id.* art. 8.

21. *See id.* art. 9.

22. *See id.* art. 4 & 15.

through the several Protocols. Each specific Protocol details the states' legal duties in reducing specific pollution, which effectively aggregates the various legal institutions as a whole.

### 1. The Dumping Protocol<sup>23</sup>

The Dumping Protocol sets out to control the different categories of harmful substances dumped from ships and aircraft. While dumping of the most harmful substances listed in Annex I is strictly prohibited,<sup>24</sup> dumping of less harmful ones requires either a prior special<sup>25</sup> or general<sup>26</sup> permit from competent national authorities. While the Dumping Protocol mentions the rules of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, which was adopted in London in 1972 (hereinafter the "London Convention"),<sup>27</sup> there are significant differences between the London and the Barcelona Convention System in the composition of the lists of prohibited or regulated substances.<sup>28</sup> The Barcelona Convention System is a stricter system because it prescribes a more extensive list of prohibited or restricted substances than that prescribed by the London Convention. The case of radioactive waste dumping provides a good example.<sup>29</sup> The London Convention detailed the rule of the 1958 Convention on the High Seas concerning that case. Annex I of the Convention enumerates those substances for which dumping is prohibited. The 1976 Dumping Protocol forbids dumping of "wastes or other radioactive matter not contained in Annex I on the condition of obtaining a prior special permit."<sup>30</sup> This is a considerable improvement over the London Convention.<sup>31</sup>

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23. The original Convention was modified by amendments adopted on June 10, 1995 by the Conference of Plenipotentiaries on the Convention for the Protection of the Mediterranean Sea against Pollution and its Protocols, held in Barcelona on June 9-10, 1995 (UNEP(OCA)/MED IG. 6/7). The amended Convention, recorded as the "Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea," has not yet entered into force.

24. Dumping Protocol, *supra* note 9, art. 4.

25. *Id.* at art. 5 and Annex II.

26. *Id.* at art. 7 and Annex III.

27. BUDISLAV VUKAS, *The Protection of the Mediterranean Sea Against Pollution*, in *THE INTERNATIONAL LEGAL REGIME OF THE MEDITERRANEAN SEA*, *supra* note 15, at 413, 423. Since the London Convention is not the codification of customary law, the Dumping Protocol is the legal basis for Mediterranean States which are not members to the London Convention.

28. ALEXANDRE KISS & DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* 184 (1991).

29. *Id.* at 185-86.

30. Dumping Protocol, *supra* note 9, art. 5 and Annex II(d).

31. KISS, *supra* note 28, at 185. However, the strongest provision can be found in the 1974 Helsinki Convention relating to the Baltic Sea.

The International Convention for the Prevention of Pollution from Ships (hereinafter MARPOL Convention) also deals with dumping from ships.<sup>32</sup> Regulation 10 of the MARPOL Convention Annex mentions the Mediterranean region as one of the special areas.<sup>33</sup> However, only a small number of the Mediterranean states ratified the MARPOL Convention and even those states did not comply with all of the regulations. Therefore, in the case of pollution by dumping from ships, the Dumping Protocol is the primary source of regulation in the Mediterranean region.<sup>34</sup>

## 2. The Emergency Protocol<sup>35</sup>

Along with the Barcelona Convention and the Dumping Protocol, the Emergency Protocol was adopted in 1976.<sup>36</sup> The Emergency Protocol addresses grave and imminent dangers to the marine environment, as well as coast-related interests of one or more of the parties to the agreement. These dangers can result from the presence of massive quantities of oil or other harmful substances caused by an accident or from a gradual accumulation of small discharges that pollute or threaten to pollute the sea in a particular region.<sup>37</sup> As with other regional agreements, the provisions of the Protocol can be characterized into three different categories: (1) Organizing advance cooperation before the existence of an emergency situation (Article 7); (2) Actions undertaken when an emergency arises (Article 3, 8); and (3) Institutional clauses providing either for the creation of a mutual aid center among the states parties or for periodic meetings between the states parties (Articles 10, 12).

Unlike the rules of the Barcelona Convention and related

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32. International Convention for the Prevention of Pollution from Ships, art. 1, *amended* by the Protocol of 1978, Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978 1340 U.N.T.S. 62, 17 I.L.M. 546.

33. *Id.* at Annex I, reg. 10. Special areas under this Regulation include the Mediterranean Sea area, the Baltic Sea area, the Black Sea area, the Red Sea area, the "Gulfs area" and the Gulf of Aden area.

34. HAAS, *supra* note 6, at 109. Certain substances, for instance titanium dioxide, were not included in the list of prohibited or regulated substances due to conflicting interests between France and Italy. Subsequently, the two countries agreed to refer the problem to the European Economic Community, which later issued the Directive on the Emissions of Titanium Dioxide Wastes.

35. Emergency Protocol, *supra* note 10. The original Emergency Protocol was replaced by the Protocol concerning Cooperation in Preventing Pollution from Ships and, In Cases of Emergency, Combating Pollution of the Mediterranean Sea, which has not yet entered into force.

36. *Id.* at note 10.

37. KISS, *supra* note 28, at 194. The events surrounding Torrey Canyon, Amoco Cadiz and Exxon Valdez are examples of emergency situations.

Protocols, rules for emergency situations have a well-established history; there are many international rules embodied in international agreements, such as the 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, the 1973 International Convention for the Prevention of Pollution from Ships, the 1973 Protocol relating to Intervention on the High Seas of Marine Pollution by Substances Other than Oil, and the 1969 International Convention on Civil Liability for Oil Pollution Damage. Therefore, it was relatively easy to reach an agreement on the rules for emergency situations among the negotiating parties.<sup>38</sup>

### 3. Land-Based Sources Protocol

The Land-Based Sources Protocol sets limits on industrial, municipal, and agricultural emissions into the Mediterranean and sets out to control wastes transmitted into rivers and through the atmosphere.<sup>39</sup> Polluting substances are divided into two categories depending on the different standards of regulation.<sup>40</sup> First, the parties must undertake to eliminate pollution of the Protocol Area from land-based sources under Annex I.<sup>41</sup> They must elaborate and implement jointly or individually, as appropriate and necessary programs and measures. Second, the parties must “strictly” limit pollution regulated by Annex II.<sup>42</sup>

Another feature of the Land-Based Sources Protocol is that it provides for the formulation and adoption of guidelines and, when appropriate, common standards used in dealing with some issues.<sup>43</sup> The Protocol also provides that such common guidelines, standards, or criteria must take into account several factors. Among these factors are local ecological, geographical, and physical characteristics; the economic capacity of the parties and their need for development; and the level of existing pollution and the real absorptive capacity of the marine environment.<sup>44</sup> While these provisions can serve as a good basis to reflect unique local characteristics, there still exists a danger that the provisions may be abused.<sup>45</sup>

It is noteworthy that the EU directives, which maintain stricter

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38. *See id.* at 194-95.

39. Land-Based Sources Protocol, *supra* note 11, art. 4.

40. *Id.* at Annex I and II.

41. *Id.* at art. 5.

42. *Id.* at Annex II. Note that the amended protocol, which was signed on Mar. 7, 1996 and has not yet entered into force, combines Annex I and Annex II of the original into a newly amended Annex I.

43. *Id.* at art. 7, ¶ 1.

44. *Id.* at art. 7, ¶ 2.

45. KISS, *supra* note 28, at 193.



standards than those of the Land-Based Sources Pollution, play a significant role in addressing land-based sources pollution in the Mediterranean region. The 1976 Directive on Pollution Caused by Certain Dangerous Substances Discharged in the Aquatic Environment of the Community banned the discharge of various harmful substances into rivers and seas.<sup>46</sup> Prior permits are required before discharging into the EU marine environment any one of twenty metals that are included in the gray list.<sup>47</sup> Subsequent directives added more harmful substances to the regulations list.<sup>48</sup> In 1987, the EU significantly revised the Treaty of Rome and acquired the authority to implement and enforce common environmental standards over member states. Despite the extensive scope of the covered environmental standards over the member states, the EU directives remain problematic in implementation.<sup>49</sup> For example, according to one report, only thirty-seven percent of European beaches complied with the EU standards for bathing waters in 1987.<sup>50</sup> Furthermore, only a limited number of states are governed by the EU directives among the Mediterranean states.<sup>51</sup> This allows other states to follow standards contained in the Land-Based Sources Protocol, which maintains lower standards than the EU directives.

UNCLOS is the only treaty at the global level so far that addresses the problem of land-based marine pollution, and has met with limited success.<sup>52</sup> Article 194 provides that states should take necessary

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46. Council Directive 76/464/EEC, 1976 O.J. (L129) 23, *amended by* Council Directive 90/656/EEC, 1990 O.J. (L353) 59, *and* Council Directive 91/692/EEC, 1991 O.J. (L377) 48.

47. HAAS, *supra* note 6, at 12-13.

48. *Id.*

49. Since the EU directives replace the domestic laws of the member states, they are also better enforced in the member states. Accordingly, the ultimate effective cause of the successful reduction in land-based pollution by the EU member states (such as France and Italy) is the EU rules, not those of the Med Plan.

50. COUNCIL OF EUROPE, NATUROPA NEWSLETTER-NATURE AND ENVIRONMENT, No.88-4, at 2.

51. Of the current 21 member states of the Med Plan, only Cyprus, France, Greece, Italy, Malta, Slovenia, and Spain are members of the EU.

52. KISS, *supra* note 28, at 189. The United Nations Environment Program studied the problem during 1984-85, and a group of experts adopted guidelines to combat it. However, the legal effect of the guideline remains limited because they are not contained in a treaty or government document. *Id.* Other existing conventional sources regulating land-based pollution are regional ones such as the Convention for the Prevention of Marine Pollution from Land-Based Sources, June 4, 1974, 13 I.L.M. 352; Convention on the Protection of the Marine Environment of the Baltic Sea, Apr. 9, 1992, 1994 O.J. (L 73) 20 (in one part, it addresses the land-based pollution, listing it first among various sources of pollution to be combated); Protocol for the Protection of the South-East Pacific Against Pollution from Land-Based Sources, July 22, 1983; Council Directive 76/464/EEC, 1976 O.J. (L 129) 23.

measures to limit the amount of land-based pollutants.<sup>53</sup> States also are compelled to adopt laws and regulations that are necessary to prevent, reduce, and control this pollution.<sup>54</sup> Finally, states are required to ensure the application of these laws and regulations. It is also noteworthy that UNEP's Global Program of Action for the Protection of Marine Environment from Land-based Activities recently adopted the Washington Declaration on Protection of the Marine Environment from Land-Based Activities, in 1995.<sup>55</sup> However, it still remains legally non-binding. In sum, the Land-Based Sources Protocol remains the main source of addressing serious pollution problems in the Mediterranean Sea.

#### 4. The Protected Area Protocol

The Protected Area Protocol<sup>56</sup> is directed towards areas of the Mediterranean that require special protection. Its purpose is to preserve and protect natural resources and natural seascapes, as well as the cultural heritage of the Mediterranean Sea, by establishing specially protected areas encompassing marine areas and their natural environment.<sup>57</sup> The geographical scope of the Protocol is generally limited to the territorial waters of the state parties, but may include the land bordering internal waters and the wetlands or coastal areas designated by state parties. However, the main objective of the Protocol is to create specially protected marine areas.<sup>58</sup>

The Protocol provides states with general guidelines to adopt and institute a legal regime to govern those areas.<sup>59</sup> The primary obligations of the contracting states are to create protected areas and to take necessary actions to ensure their protection and, if necessary, restoration.<sup>60</sup> In order to serve those purposes, the Protocol provides a non-exhaustive list of measures, such as the organization of a planning and management system, the prohibition of dumping or discharge of wastes, and regulation of harmful activities.<sup>61</sup> In addition, states must cooperate in research endeavors and the exchange of scientific

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53. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 18 33 U.N.T.S. 3, 478 [hereinafter UNCLOS].

54. *Id.* at 481-82.

55. UNEP, About the GPA Program of Action. *available at* <http://www.gpa.unep.org/about/default.htm#tag2> (last visited Oct. 6, 2004).

56. *See supra* note 12.

57. *Id.* at art. 1.

58. KISS, *supra* note 28, at 281.

59. Protected Area Protocol, *supra* note 12, arts. 4, 6.

60. *Id.* at arts. 3-5.

61. *Id.* at art. 7.

information.<sup>62</sup> Finally, along with UNEP as the secretariat, the contracting parties hold ordinary or extraordinary sessions to improve the implementation of the Protocol.<sup>63</sup>

Despite the fact that the Protected Area Protocol mentions the 1982 UNCLOS, the 1982 UNCLOS does not contain specific provisions regarding specially protected areas. Instead, it contains comprehensive provisions regarding the conservation of marine living resources.<sup>64</sup> Coastal states generally have the authority to ensure the conservation of biological resources in the zones over which they exercise jurisdiction (i.e. the territorial sea, the exclusive economic zone, and the continental shelf).<sup>65</sup> The Protected Area Protocol conclusively provides a solid legal basis for protecting marine areas in the Mediterranean region.

### 5. The Offshore Protocol

In 1994, the Mediterranean states adopted a 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.<sup>66</sup> This protocol called for all activities in the Protocol Area,<sup>67</sup> including erection on the site of installation, to be subject to prior authorization from a competent authority for exploration or exploitation.<sup>68</sup> Article 5 of the Protocol sets out the requirements for prior authorizations in detail.<sup>69</sup> Like UNCLOS, which the Offshore

62. *Id.* See also *id.*, at arts. 10-14.

63. Protected Area Protocol, *supra* note 12, art. 17.

64. UNCLOS, 1833 U.N.T.S. 3, 405, 418, 420-423, 427, 429-30.

65. In fact, there has been no global treaty concerning protected area because the nature of specially protected area itself rather requires the regional arrangements. The examples of the regional agreements about specially protected areas are:

- The Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere;
- The African Convention on the Conservation of Nature and Natural Resources;
- The Bern Convention on the Conservation of European Wildlife and Natural Habitats;
- The Apia Convention on the Conservation of Nature in the South Pacific; and
- The ASEAN Convention on the Conservation of Nature and Natural Resources.

66. Although the Offshore Protocol has not yet entered into force, discussion in this section is based on the text of the Offshore Protocol. Protocol of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil, art. 21, Oct. 14, 1994 (hereinafter Offshore Protocol), reprinted in INTERNATIONAL ENVIRONMENTAL LAW-MULTILATERAL TREATIES 976:13/E (1995).

67. For a definition of "Protocol Area," see Offshore Protocol, *supra* note 66, at art. 2.

68. Offshore Protocol, *supra* note 66, at art. 4, ¶ 1.

69. *Id.* at art. 5.

Protocol reflects,<sup>70</sup> the Protocol distinguished between the Protocol Area and Territorial Area.<sup>71</sup> In the Protocol Area, the Protocol details provisions concerning harmful or noxious substances and materials, oil and oily mixtures and drilling fluids, and cuttings, sewage, and garbage.<sup>72</sup> However, states must ensure the safety of activities within its jurisdiction.<sup>73</sup> To ensure its purpose, the Protocol requires that contingency planning to combat accidental pollution be coordinated with the contracting parties' contingency plan established in accordance with the Emergency Protocol. Furthermore, in emergency cases, a state may request help either directly or through REMPEC (Regional Marine Pollution Emergency Response Center for the Mediterranean Sea).<sup>74</sup>

To protect the specially protected areas, states must take proper measures to conform to international law. This includes states' compliance with the Protected Areas Protocol and their efforts of multilateral or bilateral cooperation to prevent, abate, combat, and control pollution arising from activities in these areas.<sup>75</sup> To give more force to these provisions, the Protocol provides for the monitoring and sanctioning of parties. At the same time, in order to enhance the capability of developing countries, states must provide scientific and technical assistance to developing countries.<sup>76</sup>

#### *D. Concluding Remarks*

In the previous sections, I have detailed the Barcelona Convention System and the legal grounds for the Mediterranean Action Plan. The Barcelona Convention has developed rules and standards to address various pollution issues and has close links to relevant global and regional agreements. However, it is still questionable whether the standards of the Barcelona Convention System are sufficient to bring about effective implementation of its policies. Some protocols have developed better standards than other international agreements. In particular, the most important area, land-based sources pollution, has not

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70. Article 194 of UNCLOS provides that states should take measures, individually or jointly, to minimize pollution from installation and devices used in exploration or exploitation of the natural resources of the seabed and subsoil. Most regional seas treaties reaffirm the UNCLOS principles in general, but only the Mediterranean region along with the region covered under the Kuwait Convention System, has its own regional treaty to deal with that problem. Basically, the Offshore Protocol reflects the scheme of UNCLOS in the Barcelona Convention System.

71. See Offshore Protocol, *supra* note 66, at sec. III.

72. *Id.* at arts. 9-12.

73. *Id.* at art. 15.

74. *Id.* at art. 18.

75. *Id.* at art. 21.

76. *Id.* at art. 24.

been well-regulated or controlled. The Barcelona Convention System, especially the Land-Based Sources Protocol, does not provide any significant development in terms of regulation standards over other agreements. It is important to note, however, that even the strict standards provided by EU directives have had implementation problems at the domestic level within member states.

### III. Limitations to the Effective Clean-up of the Mediterranean Marine Pollution

It is remarkable to observe the institutional developments under UNEP's leadership in the mid-1970s. These developments were a direct result of cooperative efforts by the Mediterranean states to develop a viable regime that addresses serious marine environment problems. As set out previously, the Barcelona Convention System provides a solid legal basis for regional efforts. It now has one framework convention, five protocols, and several regional programs. Based on its success, the UNEP has applied the Mediterranean experiences to other regions.

However, the Barcelona Convention System has received its share of criticism from people who argue that the Mediterranean Action Plan has not yet brought about a decrease in or successful control of the region's pollutants. Unless it can effectively result in the decrease of pollutants in the Mediterranean region, the regime's systemically designed and developed institutional arrangements are meaningless.

For example, the Worldwide Fund for Nature has recently issued warnings that industrial waste, oil spills, illegal trawling, and construction on beaches have already damaged fourteen percent of the sea's coast.<sup>77</sup> It also claims that less than one percent of the Mediterranean's coastal regions are officially protected.<sup>78</sup> In accordance with the critique by the Deputy Under-Secretary of Turkey, certain types of land-based sources pollution from non-point sources are still problematic in many areas.<sup>79</sup> Tourism also has been identified as a serious cause for the deterioration of the marine environment in the region.<sup>80</sup> Recently, the Food and Agriculture Organization (FAO) has

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77. *Tourism 'Destroys Beauty of the Med'*, THE EXPRESS, July 15, 2000, available at 2000 WL 24213220; *Protect Mediterranean Before Species Are Lost, Warns WWF*, ENVIRONMENT NEWS SERVICE, July 17, 2000, available at 2000 WL 7839085.

78. *Id.*

79. Hilary F. French, *After the Earth Summit: The Future of Environmental Governance*, WORLDWATCH PAPER 107, Mar. 1992, at 10 (recited in Hilary F. French, *Reforming the United Nations to Ensure Environmentally Sustainable Development*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 559, 563 (1994)).

80. *Move to Protect Tourism Hot-Spot*, Evening Mail, March 20, 2001, available at 2001 WL 16854; *Tourism is Killing the Mediterranean, Travel Fair Told*, ENVIRONMENT NEWS SERVICE, March 1, 2001, available at 2001 WL 8662611; *European Union Urged*

warned that rising Mediterranean pollution levels threaten marine life in several areas and have already caused the disappearance of several species of mollusks and crustaceans.<sup>81</sup> It is therefore difficult to decide conclusively whether the Med Plan has been as successful as it was intended. While it may not be fair to claim that the Med Plan has been a total failure, the truth probably lies somewhere between the two extremes. In the following sections, I will focus on factors that may improve the effectiveness of the Mediterranean regime.

#### A. Implementation Problem

The Barcelona Convention System emphasizes the need for cooperation among states. Article 4 of the Barcelona Convention proclaims that the states must take all appropriate measures to prevent, abate, and combat pollution of the Mediterranean Sea Area and to protect and enhance the marine environment in the region.<sup>82</sup> It further provides that the states must cooperate in the formulation and adoption of the protocols, prescribing agreed measures, procedures, and standards for implementation of the Barcelona Convention.<sup>83</sup> In order to do so, it requires that some national measures be undertaken. For example, it has provisions for the designation of competent authorities, the issuance of permits, the issuance of instructions to masters of ships, and so on.<sup>84</sup> In contrast to other treaty systems such as UNCLOS, the Barcelona Convention System lacks supervision mechanisms for its implementation.<sup>85</sup> In other words, it lacks "general provisions concerning national legislation on the protection of the marine environment, although national legislation is indispensable for the implementation of many global and regional rules."<sup>86</sup> Article 20 of the Barcelona Convention requires only that states cooperate in the development of procedures enabling them to control the application of the Convention and Protocol.<sup>87</sup> Based on this provision, the contracting

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to Deal with Unsustainable Tourism, ENVIRONMENT NEWS SERVICE, Oct. 16, 2000, available at 2000 WL 7840026.

81. *Mediterranean Environment Ministers Plan Action on Toxic Substances*, AGENCE FRANCE PRESSE, June 8, 1995, available at 1995 WL 7814140.

82. Barcelona Convention of 1976, *supra* note 16, at art. 4, ¶ 1.

83. *Id.* at ¶ 2.

84. *E.g.*, Land-Based Sources Protocol, *supra* note 39, at arts. 5-7.

85. The UNCLOS establishes the duty of States to adopt laws and regulations to prevent, reduce, and control marine pollution in relation to all pollution sources.

86. Ambiente Marino, *The Protection of the Mediterranean Against Pollution*, THE INTERNATIONAL LEGAL REGIME OF THE MEDITERRANEAN SEA 413, 428 (Unmberto Leanza ed., 1987).

87. Barcelona Convention of 1976, *supra* note 16, art. 20. About 80% of the pollution load in the Mediterranean Sea comes from land-based activities. Global

parties are often asked to provide information on their legislation, and these requests generally have been met with compliance. A lack of enforcement still remains a problem since it is impossible to guarantee that provisions of the Protocol actually will be implemented.<sup>88</sup>

The Land-Based Protocol reveals another problem in terms of implementation. Without resolving land-based sources pollution, which is the main cause of pollution in the Mediterranean region, the Mediterranean region could not have been cleaned up.<sup>89</sup> Thus, the participants at the Genoa Meeting expressed the view that the “early implementation of the Protocol is a single and most important contribution to the control of pollutants entering the Mediterranean Sea.”<sup>90</sup> Furthermore, since the Protocol’s implementation requires a survey of land-based sources and the amounts of pollutants reaching the Mediterranean, the Genoa Meeting recommended the adoption of an additional annex addressing pollution from land-based sources transported through the atmosphere by 1988.<sup>91</sup> However, it took another three years before the contracting parties adopted this annex at their Seventh Ordinary Meeting in 1991. Although it has been more than two decades since the Land-Based Sources Protocol was launched, its lack of an enforcement mechanism has kept it from implementing the Med Plan policies that will result in an actual decrease in the most serious sources of pollution in the region. Most efforts regarding the Land-Based Sources Protocol still focus on how to gather relevant information on the pollutants that would demonstrate a lack of cooperation on the part of member states.<sup>92</sup> Improvement in this area, if there is any, is likely to result from EU directives rather than from the Land-Based Sources Protocol itself.

### B. *Political Concerns over Environmental Issues*

Most opinions regarding the success of regional efforts in the Mediterranean to deal with its marine pollution have focused on the

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Programme of Action for the Protection of the Marine Environment from Land-based Activities, available at <http://www.gpa.unep.org/about/default.htm#tag2> (last visited October 6, 2004).

88. See Evangelos Raftopoulos, *The Barcelona Convention System for the Protection of the Mediterranean Sea against Pollution: An International Trust at Work*, 7 INTERNATIONAL JOURNAL OF ESTUARINE AND COASTAL LAW, 39-41 (1992).

89. See U.N. Env’t Programme, Survey of Pollutants from Land-Based Sources in the Mediterranean Sea: MAP Technical Rep. Series No. 109, 103 (1996).

90. UNEP/IG.56/5, at 32.

91. UNEP/IG.56/5, at 32.

92. U.N. Env’t Programme, *supra* note 89; Gabriela Kütting, *Mediterranean Pollution: International Cooperation and the Control of Pollution from Land-Based Sources*, 18 MARINE POL. 233, 237 (1994).

system's well-designed institutional framework. According to Professor Evangelos Raftopoulos, the Barcelona Convention System "has an important legitimating effect on the regional strategy for pollution control . . . [i]t establishes community rules on the subject in the context of political, socio-economic and technical realities of the Mediterranean Area."<sup>93</sup> He further argues that the Barcelona Convention System has not only legal but also institutional and technical elements which are crucial to realizing regional interests.<sup>94</sup>

Raftopoulos argues that the Barcelona Convention System has been a success because two of its elements, its cooperation among regional governments and the coordination of technical work made possible by the United Nations, have resulted in the establishment of the Med Plan.<sup>95</sup> Despite the amount of time it took to reach an agreement on the issue of land-based sources pollution, the adoption of the Land-Based Sources Protocol itself is important evidence of the success that the Barcelona Convention System has had in achieving its "political" aims.

Indeed, where the political bargaining process leads to an agreement, give-and-take is natural among the related states. Thus, the states considered "political interests" more seriously than the dynamics of the natural ecosystems,<sup>96</sup> resulting in the establishment of very low standards for the Land-Based Sources Protocol.

Although land-based sources pollution accounts for eighty to ninety percent of Mediterranean Sea contamination, developed countries such as France seriously resisted the adoption of the Land-based Sources Protocol at the time when the Barcelona Convention and other Protocols were introduced. These countries feared the possible impact that adopting the Land-Based Sources Protocol would have on their domestic industries because they were the main contributors to the pollution.<sup>97</sup> In the case of developing countries, especially the southern coastal states, the problem of land-based sources pollution was not as critical. Rather, they feared that the system might be used to restrain their economic development by imposing additional production costs on their development schemes.<sup>98</sup> For example, Turkey and Algeria were concerned about the possibility that the protocol would act as a new non-

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93. Raftopoulos, *supra* note 88, at 28.

94. *Id.*

95. UNEP, CONVENTION FOR THE PROTECTION OF THE MEDITERRANEAN SEA AGAINST POLLUTION AS ITS RELATED PROTOCOLS, UNITED NATIONS, NEW YORK, at 1-2 (1982).

96. *Id.* See also David G. Victor et al., *Introduction and Overview, in THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS* 23 (David G. Victor et al. eds., 1998).

97. HAAS, *supra* note 6, at 110-117.

98. *Id.*



tariff barrier on their trade.<sup>99</sup>

As a commentator has noted, in order to overcome this political tension, the Land-Based Sources Protocol continued to have a number of limitations as it “avoids, wherever possible, ‘strict’ norms for setting maximum levels of wastes from watercourses opening into the sea; or regulation of industrial reconversion; or control of urban settlements and the development of tourism.”<sup>100</sup> In addition, the maximum levels of waste disposal may vary from state to state depending on its level of development in order to deal with the tensions among the states.<sup>102</sup> As a result, the Protocol adopted different standards and regulations depending on the different kinds of pollutants.<sup>103</sup>

The gathering of poor information under the Barcelona Convention System is another example of states’ political interests dominating over environmental concerns. For example, when UNEP conducted a survey on the pollutants from land-based sources in the Mediterranean in 1996, all of the member states did not answer all questionnaires.<sup>104</sup> Although most states did respond to questions on the less sensitive issue of liquid domestic discharges, only Algeria provided a reply on industrial discharges of petroleum hydrocarbons.<sup>105</sup> France, one of the major industrial pollutant dischargers, did not answer any of the questionnaires on industrial discharges.<sup>106</sup> More seriously, other major industrial states, such as Italy and Israel, did not provide a reply on any form of pollutants, including liquid domestic discharges.<sup>107</sup>

According to Victor, data gathering is the backbone of ensuring the effectiveness of an environmental regime or Systems for Implementation Reviews (SIRs).<sup>108</sup> Unless the member states demonstrate legitimate concerns about the marine environment’s protection by putting their “political interests” aside and providing relevant information on pollutants, the Barcelona Convention System cannot possibly work as a policy measure that will bring about the effective control of the most

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99. *Id.* at 68-78.

100. LEANZA, *supra* note 15, at 408.

102. *Id.*

103. Land-based Sources Protocol, *supra* note 11, at arts. 4-5.

104. U.N. Env’t Programme, *supra* note 89.

105. *Id.* at 16.

106. *Id.*

107. *Id.* at 15.

108. According to Victor, “SIRs comprise rules and procedures by which the parties to international agreements . . . exchange data, share information on implementation, monitor activities, assess the adequacy of existing commitments, and handle problems of poor implementation.” Although these functions are often “performed by many different actors and organizations, in practice they constitute a single system.” Victor et al., *supra* note 96, at 16.

serious pollution sources in the Mediterranean.<sup>109</sup> In other words, a plethora of well-designed provisions encouraging cooperation to decrease land-based sources pollution in the Barcelona Convention System cannot work as an effective policy tool unless the member states place environmental objectives above their political considerations.

### C. *Hard-law Based Approach*

According to a recent study, the specific type of legal instrument used is an important element that influences the effectiveness of an environmental regime.<sup>110</sup> While traditional wisdom emphasizes the importance of legally binding instruments, the reality is often different. As demonstrated in both Baltic and North Sea cases, when parties recognize the necessity of cooperation but are not certain about the level of their commitments, non-binding agreements or soft-law based instruments usually work more effectively.<sup>111</sup> When uncertainty was high, states were hesitant to adopt clear and ambitious commitments that were legally binding. This usually led to the introduction of low and ineffective standards.<sup>112</sup> In contrast, non-binding agreements allowed states to adopt clearer and more ambitious goals. This benefit, as Victor said, brings together like-minded enthusiasts and more flexibility, allowing for more effective cooperation.<sup>113</sup>

It is questionable whether the Med Plan has used the right types of legal instruments in the form of the hard-law based Barcelona Convention System. The Barcelona Convention System is a set of legally binding rules. As demonstrated in the case of the Land-Based Sources Protocol, the main stakeholders' uncertainties about the level of their commitments to the legally binding standards delayed the adoption of the protocol that was presumed to be the most important and urgent.

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109. *See id.* at 23.

110. *See* JON BIRGER SKJAERSETH, *The Making and Implementation of North Sea Commitments: The Politics of Environmental Participation*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS* 327 (David G. Victor et al. eds., 1998); ALEXEI ROGINKO, *Domestic Implementation of Baltic Sea Pollution Commitments in Russia and the Baltic States*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS* 575 (David G. Victor et al. eds., 1998).

111. JØRGEN WETTESTAD, *Participation in NO<sub>x</sub> Policy-Making and Implementation in the Netherlands, UK, and Norway: Different Approaches but Similar Results?*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS* 381 (David G. Victor et al. eds., 1998); SKAERSETH, *supra* note 110; ROGINKO, *supra* note 110.

112. KAL RAUSTIALA AND DAVID G. VICTOR, *Conclusions*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS* 659, 684-689 (David G. Victor et al eds., 1998).

113. *Id.* at 687

The standards of the Land-Based Sources Protocol were also too low to control the pollutants due to a general reluctance by the states and the existence of conflicts of interests between the states. It may have been more effective if the Med Plan introduced a soft-law based institution which could have provided more flexibility to reluctant states and created like-minded enthusiasm among the states.

*D. Lack of Financial Sources*

At first glance, the Med Plan seems to incorporate financial issues into its institutional framework fairly well, as the Plan has its own financial system in its Trust Fund. This Trust Fund has been expected to provide a good foundation for the financing of a comprehensive framework by the Med Plan and of activities designed to protect the Mediterranean Sea against marine pollution. According to Raftopoulos, the Trust Fund "creates an incentive to co-operate . . . as to the enforcement of the Mediterranean Action Plan, at least to the degree that they expect to draw some important technical and political benefits from the very enforcement action."<sup>114</sup>

Despite this aspiration, the reality has turned out to be very different. The Trust Fund does not supply the Plan with adequate financial resources. For example, in 1992 and 1993 the Mediterranean Trust Fund, which is the main source of the Med Plan's financing, was comprised of only U.S. \$3,850,000.<sup>115</sup> Furthermore, except for France, Spain, and Italy (which contributed about 85% of the funds), other states contributed very little.<sup>116</sup> Albania, Lebanon, Malta, and Monaco each contributed as little as U.S. \$2,696 in 1992 and 1993, while only U.S. \$100,000 of the Med Plan's financing came from the UNEP Environment Fund.<sup>117</sup> Of a more serious concern is the balance of unpaid pledges by the member states totaling US \$3,700,000 in 1992.<sup>118</sup>

To make the situation even worse, crucial states such as France have been reluctant to increase the amount of their contributions. If the "polluter pays principle"<sup>119</sup> were a part of the Med Plan system, developed countries (DCs), which have been the main polluters of the

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114. Raftopoulos, *supra* note 88, at 40.

115. *Id.* at 363.

116. *Id.* at 365.

117. *Id.*

118. *Id.*

119. "Polluter pays principle" means the polluter should bear the expenses of carrying out the measures deemed necessary by public authorities to protect the environment. This principle was introduced by the 1972 OECD Council Recommendation on Guiding Principles Concerning the International Economic Aspects of Environmental Policies. Original text is available at 14 ILM 236 (1975).

Mediterranean region, should be compelled to increase the amount of their contributions.<sup>120</sup> This problem was pinpointed by UNEP coordinator, Lucien Chabason. Chabson states that "if the protocol is to prove to be more than just a statement of good intentions, money must be found."<sup>121</sup> In other words, in contrast to Raftopolous's above arguments, Chabason contends that the Barcelona Convention System cannot provide the solid legal foundation necessary to secure financial sources from member states. Rather, the fact that the main contributors to the Fund have been the region's principal polluters increases the possibility that the goals of the Barcelona Convention System will not be realized.

#### IV. Conclusion

I have attempted to illustrate that there does not always exist a positive relationship between well-designed institutional arrangements based on the Convention-Protocol approach and an effective clean-up of regions affected by marine pollution for which the arrangements are designed. In support of this position, I have analyzed the Barcelona Convention System, which was introduced to the Mediterranean region by UNEP and subsequently became a model for other forms of regional cooperation elsewhere. After discussing the formation of the Barcelona Convention System in the political context, I analyzed the structure of the Barcelona Convention system. As indicated earlier, the Barcelona Convention system appears to provide framework conventions and protocols that seem adequate to accomplish its environmental goals. In reality, however, the Barcelona Convention System has proved to be ineffective in achieving these goals. Part of the problem lies in the system's inability to guarantee the effective implementation of its policies.

The Barcelona Convention System has also suffered from member states choosing to put political concerns ahead of environmental issues. The hard-law based approach of the Barcelona Convention System also has led to the acceptance of low standards since states were reluctant to make commitments on uncertain or ambiguous issues. Finally, a lack of financial resources has prevented the region from carrying out the activities necessary to decrease and regulate the region's pollution. These impediments suggest that we should be wary of applying a convention-protocol approach to other regions of the world until the problems associated with such an approach are resolved.

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120. HAAS, *supra* note 6, at 177.

121. FRENCH, *supra* note 79, at 563.

