

DERECHO DEL MAR Y SOSTENIBILIDAD AMBIENTAL EN EL MEDITERRÁNEO

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1. SUSTAINABILITY GOVERNANCE, PUBLIC TRUST AND THE CONVENTIONAL PROTECTION OF MEDITERRANEAN ENVIRONMENT

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1. A THEORETICAL AND PHILOSOPHICAL OVERVIEW

Some years back, I have suggested² that the Barcelona Convention System (BCS), namely the framework Convention and its performative Protocols setting up a conventional regime of international common interest (ICI) *in processu* for the protection of the marine environment and the resources of the Mediterranean in a sustainable manner³, should be viewed and constructively explained as an

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² See E. RAFTOPOULOS, “The Barcelona Convention System for the Protection of the Mediterranean Sea Against Pollution: An International Trust at Work”, *IJECL*, Vol. 7, 1992, pp. 27-41; *Studies on the Implementation of the Barcelona Convention: The Development of an International Trust Regime*, Ant. N. Sakkoulas Publishers, Athens, 1997.

³ *The Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean* (1976, as amended on 10 June 1995, amendment entered into force 9 July 2004) is a framework convention being specifically implemented by the following seven Protocols: *The Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea* (1976, as amended on 10 June 1995, amendment not yet in force) (“the Dumping Protocol”); *The Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea* (2002, entered into force 17 March 2004)

international trust regime in context. Equally, all regional or global conventional regimes governing the protection of the environment and sustainable development should be approached and elaborated.

The international trust approach primarily serves, in my view, fundamental theoretical needs in understanding the nature, structure and function of the BCS – and of any other conventional environmental regime in its context – and it essentially contributes to their better governance in the continuous building of ICI. In doing so, this approach encompasses both the imperative of intergenerational equity and also the need for greater governmental accountability to achieve it by bringing out the overlooked fiduciary aspect of the relational base of a conventional environmental regime. The paradigm of public trust may, thus, come to fill out the sustainability function of governance of such regimes in the context of their operation and implementation, promoting their coherence. At the same time, the international trust approach may well reinforce our quest providing a creative platform that would allow the development, at all levels, of a more responsible, more sustainably effective, more participatory, more visionary and pragmatic approach to the governance of conventional environmental regimes.

In essence, the international trust approach to the BCS stems from the contemporary approach to the public trusteeship which has mainly been developed in the framework of domestic orders. In fact, public trusteeship is well established in the US, emanating from the English Common Law of Charitable Trust, and is widely internationalized, in an expressed or implied form, in the Constitutions

(“the Prevention and Emergency Protocol”), replacing the Emergency Protocol, 1976; *The Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-based Sources and Activities* (1980, as amended on 7 March 1996, amendment entered into force 11 May 2008) (“the LBS Protocol”); *The Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean* (1995, entered into force 12 December 1999) (“the SPA and Biodiversity Protocol”), replacing the SPA Protocol, 1982; *The Protocol for the Protection of the Mediterranean Sea Against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil* (1994, entered into force 24 March 2011) (“the Offshore Protocol”); *The Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal* (1996, entered into force 19 January 2008) (“the Hazardous Wastes Protocol”); and *The Protocol on Integrated Coastal Zone Management* (2008, entered into force 24 March 2011) (“the ICZM Protocol”). On the initiation of the term “Barcelona Convention System” see E. RAFTOPOULOS, *The Barcelona Convention and Protocols – The Mediterranean Action Plan Regime* (Simmonds & Hill Publishing Ltd., London, 1993). Also, T. SCOVAZZI, “The Recent Developments in the ‘Barcelona System’ for the Protection of the Mediterranean Sea against Pollution”, *IJMCL*, Vol. 11, 1996, p. 95; JUSTE RUIZ, J., “Regional Approaches to the Protection of the Marine Environment”, in *Th.A.*, 2002, p. 402.

and Statutes of many States all over the world⁴. And what makes the contemporary public trusteeship doctrine a powerful paradigm for explaining sustainability governance in conventional environmental regimes is that it is extended to environmental governance and it projects conservationist principles to natural resources, both aquatic and terrestrial, thus being liberated from the confines of its static traditional notion of “another ownership”. As such it functions as a “fiduciary” institution which creates a legal status for the sovereign to hold and govern natural resources in trust for its people, protecting and preserving the environment and resources as a unit in a sustainable manner, for present and future generations. At the process level, it fosters democratization of decision making and broadly enlightens the qualities in the evolutionary management of public resources ensuring that they would not be lost in low visibility administrative decisions⁵. At the normative level, since public resources are mostly threatened by poor public decision-making, the public trusteeship had to contain a legal right to the public, it had to be enforceable against the government and it had to advance contemporary environmental management and juridical concerns in context.

Overall, “trusts”, in their appropriate contemporary legal conception, should be seen “as self contained, autonomous institutions, zones of self-regulation”⁶ into which positive law judgements should not intrude and, as a result, they should require finesse and judgement on the part of the trustees. As the idea of any legal trust, and especially of a public trust, may well exist in some extra-legal sense varying in accordance with the detected purpose requirements, so the BCS, as an autonomous international trust regime of ICI, serves sustainability *inter-subjectively* and *in context*.

Despite the immense potentialities stemming from the paradigm of the contemporary approach to public trusteeship, the public trust approach to the BCS remains lost in the intricacies of deeply rooted positivist theoretical persuasions and debatable presuppositions. And when invoked, it was used as a purely metaphorical formulation⁷, it remained stuffed with political rhetoric devoid of juridical content. In fact, the international trust approach to the BCS defies the so

⁴ See BLUMM, M.C. & GUTHRIE, R.D., “Internationalizing the Public Trust Doctrine”, 44 *U.C. Davis Law Review* (2012), available at: “<http://ssrn.com/abstract=1816628>”.

⁵ See, generally, the pioneering article by Sax, SAX, J. L., “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention” 14 *U.C Davis Law Review*. (1970) *passim*.

⁶ See GARDNER, S., *An Introduction to the Law of Trusts*, Clarendon Press-Oxford, 1990, p. 192.

⁷ SAND, P., “Sovereignty Bounded: Public Trusteeship for Common Pool Resources?”, 4(1) *Global Environmental Politics* (2004), pp. 47, 54-55.

familiar but misleading legal positivist perception of constructing and objectifying fundamental legal concepts of international law on the basis of “Private Law Analogies”. It manifests the inadequacy of transposing into treaty relations the logic of two fundamental interweaving Private Law Analogies, the *private law contract analogy for treaties* and *the ownership for sovereignty*, both of which crudely underlie the discussion on the nature and governance of the inappropriately so termed “Multilateral Environmental Agreements (MEAs)”.

Treaties are not analogous to private law contracts⁸. They *constitute conventional regimes of ICI*. As such, their purpose is legislative serving ICI rather than contractual, they are established and operate in consistency with their context, and they develop, in a continuous negotiating process, particular *relations* between States. BCS, and similar conventional environmental regimes, are built up by States, with the “contributing participation” of relevant Non-State Actors, *in relation to the internal context* (domestic orders of the State Parties, particular socio-economic, political, technological, geographical and cultural conditions as well as the internal practice and decisions of the conventional regime) and, also, *in relation to the external context* (the existing and developing international order, which is an horizontal order in process). In effect, they are constituted and implemented as an aspect of the process of polycentric international environmental governance. They are related to the multiplicity of conventional regimes managing the protection of the environment and sustainable development at interacting regional and global levels and they presuppose, for their operation, relevant national, vertical orders.

Equally, Sovereignty with respect to the sustainable governance of marine environment and natural resources *is not analogous to private ownership, it is not proprietary but fiduciary*⁹. It is, in other words, *a relationship of confidence* in which the “fiduciary” (the State or the States) is “entrusted” with the role to exercise a governance for public benefit, for international common interest, protecting and promoting the interests of present and future generations (“the principal”) on equitable bases. In effect, their role within the framework of conventional environmental regimes of international common interest *is akin to a kind of international public trusteeship* (Sovereign Trusteeship).

⁸ RAFTOPOULOS, E., *The Inadequacy of the Contractual Analogy in the Law of Treaties*, Publications of the Hellenic Institute of International & Foreign Law, Vol. 14, Alkyon Publishers, Athens, 1990. PARRY Clive, *The Sources and Evidences of International Law*, Manchester University Press, 1965, pp. 48-55.

⁹ SAND, P., “Sovereignty Bounded: Public Trusteeship for Common Pool Resources?”, *supra* note 6, pp. 48ff.

On the other hand, approaching the BCS as an international trust regime does not, of course, mean that we fall into the theoretical trap of another Domestic Law analogy – that is, the analogy of “public trust doctrine” (PTD). Instead, we look into the *paradigmatic relationship* between Public Trust and sustainability governance of the Barcelona Convention system whereby the former *makes more robustly intelligible* the latter¹⁰. In fact, the concept of public trust is the medium of know-ability of sustainability governance of CERs. It is something that “points out beyond”, generating a new creative context for the sustainability governance of CERs, acquiring the capability of further developing and guiding in conditions of uncertainty, complementarity and implementative-specification paradoxes (the more the seeming thing is specified through its implementation in context, the more it is changed).

2. ON THE TRUST BASE OF THE ENVIRONMENTAL GOVERNANCE OF THE BARCELONA CONVENTION SYSTEM

2.1. *The trust evidence*

A clear indication of the trust base of the governance of the regime of the BCS is to be found in the language of the Preamble but also of the general obligations prescribed in Article 4 of the Barcelona Convention.

In its Preamble, the Barcelona Convention pronounces a far-reaching communitarian approach: it declares that “the marine environment of the Mediterranean Sea Area” is “common heritage for the benefit and enjoyment of present and future generations” and, as a result, the Contracting Parties are responsible for its preservation and sustainable development¹¹. It is worth noting that the Preamble of the last and most innovative Protocol to the Convention, the ICZM Protocol (2008), makes a step further: it states that the coastal zones of the Mediterranean Sea “are the common natural and cultural heritage of the peoples of the Mediterranean” and, as a result, “they *should be preserved and used judiciously* for the benefit of present and future generations”¹².

Under Article 4 of the Barcelona Convention, the Contracting Parties are vested with the general relational obligation, jointly or individually, “to prevent, aba-

¹⁰ For this conception of “paradigm” see the Aristotelian treatment of paradigm in *his Rhetorics*, 1357b. Also AGAMBEN, G., “What is a Paradigm?” Lecture at the European Graduate School, August 2002, available at “<http://www.egs.edu/faculty/giorgio-agamben/articles/what-is-a-paradigm>”.

¹¹ See Barcelona Convention (1976), Preamble, para. 2.

¹² See ICZM Protocol (2008), Preamble, para. 3 (*emphasis mine*).

te, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area and to protect and enhance the marine environment in that Area so as to contribute towards its sustainable development”¹³. Simultaneously, they are under the duty to implement the Mediterranean Action Plan (MAP) by taking all appropriate measures, and, further, to pursue the protection of the marine environment and the natural resources of the Mediterranean as an integral part of the development process, “meeting the needs of present and future generations in an equitable manner”¹⁴. In doing so, they are entrusted with the application of the precautionary principle, the polluter pays principle, the EIA procedures at national and transnational level, and the promotion of ICZM Protocol¹⁵. Finally, they are also entrusted with certain general duties, instrumental to the *implementative aspect* of the conventional regime governance: to adopt programmes and measures with time limits, to utilize BAT and BEP to promote environmentally sound technology, to cooperate for the adoption of performative Protocols and to promote the implementing measures of the BCS within the competent international bodies¹⁶.

Interestingly enough, the Barcelona Convention and its Protocols, also contain general relational obligation-duties and powers *contextualizing the trust governance of the conventional regime* in terms of *normative consistency* at all levels (global, regional bilateral, national) and of *an added value*. They thus provide:

- the relational obligation-duty of the CPs to act in conformity with international law when applying the BCS (consistency with the UNCLOS or applicable IMO Conventions, the Basel Convention or the UN Biodiversity Convention);
- the relational power of the CPs to further constitute “related” bilateral or multilateral agreements for the protection of the Mediterranean marine environment and the conservation of its natural resources consistent with BCS and in conformity with international law;
- the relational power of the CPs *to individuate* their participation by standard “disclaimer or without prejudice clauses” preserving or reserving “the rights, the present and future claim or legal views of any Party relating to the Law of the Sea”¹⁷ or the right of any Party to apply “stricter provisions” or “stricter domestic measures” under its national legisla-

¹³ Barcelona Convention, Art. 4(1).

¹⁴ Ibid., Art. 4(2).

¹⁵ Ibid., Art. 4(3).

¹⁶ Ibid., Art. 4(4-6).

¹⁷ SPA and Biodiversity Protocol (1995), Art. 2(2); ICZM Protocol (2008), Art. 4(1).

tion¹⁸, or the sovereign immunity of warships or other ships “in government service”¹⁹, or the right of any Party to operate “national security and defence activities” in its coastal zone²⁰.

- the relational obligation-duty of the CPs to promote, individually or collectively and through relevant international organizations the implementation of the BCS to all the non-party States²¹;

Such a contextualization of the trust governance of the conventional environmental regime is clearly related to the collective-individual identity and role of State in the international order of law protecting and promoting ICI.

Overall, the BCS provides the establishment of an international environmental trust regime of fiduciary governance, the *corpus* of which is *conventionally identified*—explicitly or impliedly— by the framework Barcelona Convention and its gradually specified performative Protocols. To attain sustainability, the trust governance of the BCS is associated with principles and relational powers and duties/obligations operating in conditions of uncertainty, complementarity with the internal and external context, and a process of agreed transformations better serving sustainability. Thus, the trust corpus of the BCS becomes progressively specified by the scaled adoption of performative Protocols, expanding the scope of conventional environmental governance of the Mediterranean Sea and its resources as a unit. In this process, the BCS manifests *two basic contextual characteristics*: first, the specifying Protocols *are not exhaustive*—further performative Protocols may also be implied by ICI purpose of the conventional environmental regime; second, the framework Convention— performative Protocols system *is evolved gradually and in response to the conventional regime exigencies*— its expansion is scaled and generated through a consensus-negotiating process in a time-space context aiming to attain better sustainability.

2.2. *The Trilateral Structure*

Envisaging BCS as an international trust regime, we focus on the determination of the trilateral legal structure in the conventional regime: the trustor/settler, the trustees and the beneficiaries.

¹⁸ SPA and Biodiversity Protocol (1995), Art. 27; ICZM Protocol (2008), Art. 4(3). See also the more specified terms in the Hazardous Wastes Protocol (1996), Art. 4.

¹⁹ Barcelona Convention (1976), Art. 3(5).

²⁰ ICZM Protocol (2008), Art. 4(4).

²¹ See e.g. Barcelona Convention (1976), Art. 3, Prevention and Emergency Protocol (2002), Art. 4(2), Hazardous Wastes Protocol (1996), Arts. 6 (4-5), 7(5), 9(8).

As *Trustors or Settlers* should be considered the Contracting Parties to the BCS (the Mediterranean States and the EU) establishing a CER of ICI. They constitute Trustors or Settlers in two senses: As collective founders of the BCS, who have negotiated the consensus-establishment of the conventional regime (*Mediterranean Trustors or Settlers*), and as collective representatives of international community, who have negotiated the scope of the contextual reference of the BCS to related global conventional regimes or established international practices (*International Community Trustors or Trustees*). In these two combined senses, they serve ICI.

At the same time, the Contracting Parties should also be considered as ICI regime *Trustees*: they are provided/vested with powers and duties to govern, as international public trustees, the designated/specified aspects of the trust regime for the benefit of the present and future generations. Likewise, they constitute Trustees in two senses: Mediterranean Trustees for the implementation or revision of the BCS in their individual-collective identity and International Community Trustees for the effective and expanding operation of the contextual inter-linkages of the BCS with related global conventional regimes or established international practices, thus serving ICI.

The people concerned should be considered as *Beneficiaries*: the Contracting Parties as ICI regime trustees are responsible to all beneficiaries (present and future generations) whereas the current generation is both beneficiary and trustee to the future generation. Acting as Beneficiaries, the public, whatever their legal identity, is empowered to participate in, and hold the Contracting Parties accountable to, *societally adequate* intergenerational decision-making regarding the trust governance of the specified aspects (Protocols, Regime Decisions) of the BCS. Non-State Actors participating in a horizontal governance partnership with the Contracting Parties – the International Trustees, hold both, *the role of Beneficiaries* towards the International Trustees and *the role of Relational Trustees* towards future generations. And this hybrid role of Non-State Actors as Beneficiaries and Relational Trustees is entirely consistent with the sustainable environmental governance of trust resources.

3. ON THE FIDUCIARY ASPECTS OF THE GOVERNANCE OF THE BARCELONA CONVENTION SYSTEM

3.1. *On the Public Participation Pattern of the Beneficiaries*

The public trust approach to the Barcelona Convention system requires a stronger, more meaningful participation pattern of the *public-as-beneficiaries* or *intergenerational beneficiaries* – thus introducing a temporal dimension of the be-

neficiaries. As a result, the fiduciary aspect of environmental governance will be specifically implemented facilitating the enforceability of the terms of the conventional trust regime, the advancement of its legislative (ICI) purpose and, relatedly, the participatory democratization of its legislative or administrative decision making. It will address the current deficiencies of the participatory standard in relational environmental governance and it will provide the basis for the development of a coherent, compatible and complementary right to *public participation as beneficiaries* (Access to information, Public Participation, Access to Justice). It will, thus effectively liberate from the existing low visibility administrative decisions and poor public decision-making of the state centric model with respect to the *governance of trust resources*. Of decisive importance, in this regard, is the normative impact of the relational external context and its specific developments, provided by the Aarhus Convention²² or the EU relevant legislation.

Article 15 of the Barcelona Convention refers to the standard a-temporal conception of the public and the widely discretionary duty of the Contracting Parties in regard to public information and participation, while it is silent as regards the important third pillar, access to justice. The Contracting Parties are vested with the duty “to ensure” that their competent authorities will give the public *appropriate* access to environmental information and the *opportunity* to participate in the decision-making process.

All in all, Article 15 retains a state-centric backbone. It simply lays down the general, widely discretionary duty of the Contracting Parties *to give adequate effect*, through its national system and its competent authorities, to the participatory right of the public – a “state obligation of result” as was pronounced by the Permanent Court of Arbitration in the MOX Plant Case when constructing the similar Article 9 of the OSPAR Convention²³. Moving to the level of the performative Protocols to the BCS, it should be noticed that, despite the fact that the application of Article 15 of the Convention *is to be implied* in the implementation of its related Protocols, the overall picture at the Protocol level remains somehow diverse, presenting a fragmented and widely discretionary picture. Thus, whe-

²² *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 1998, 38 ILM (1999), 517. It entered into force on 30 October 2001.

²³ PERMANENT COURT OF ARBITRATION: *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)* (The MOX Plant), 42 ILM (2003), 1118, 1143. The Tribunal took the view that Article 9(1) of the OSPAR Convention “is advisedly pitched at a level that imposes an obligation of result rather than merely to provide access to a domestic regime which is directed at obtaining the required result” (para. 137).

reas two of the Protocols remain entirely silent (the Dumping Protocol, 1976, as amended, and the Offshore Protocol, 1994), five Protocols provide variable references to the duty of public information and participation,. More interest, in this regard, present the SPA & Biodiversity Protocol, and particularly the ICZM Protocol²⁴.

The Specially Protected Areas and Biodiversity Protocol (1995) provides more specified aspects of the duty to information: giving the appropriate publicity to the establishment and operation of specially protected areas, informing the public of the interest and value of specially protected areas and species and of their scientific knowledge promoting it to education programmes²⁵. It also proceeds with the specification of the duty to public participation: promoting the “participation of their public and their conservation organizations in measures that are necessary for the protection of the SPAs and species.... including EIAs”²⁶, and advancing “the active involvement of local communities and populations” in the management of these areas “including assistance to local habitants who might be affected by the establishment of such areas”²⁷.

The Integrated Coastal Zone Management Protocol (2008) requires to be looked at more closely. As the last and most sustainability-oriented Protocol reflecting a new generation Protocol, it provides a distinctly specified framework for public information and participation, incorporating even some the fundamental standardized language of the Aarhus Convention, thus adding to the fiduciary aspect of governance, and more specifically to the trust accountability of the State Party.

Article 6, refers, *inter alia*, to the duty of the Parties to ensure “appropriate governance allowing adequate and timely participation in a transparent decision-making process by local polulations and stakeholders in civil society concerned with coastal zones”. Article 14, prescribes the duty of the Parties to provide information “in an adequate, timely and effective manner” so as to ensure efficient governance through effective public participation. As is more specifically provided therein, the Parties “with a view to ensuring efficient governance *throughout the process* of the integrated management of coastal zones” have the duty to “take the necessary measures to ensure the appropriate involvement *in the phases of the formulation and implementation of coastal marine strategies, plans and program-*

²⁴ For general references on the issue in the other three Protocols, see the Emergency Protocol (2002), Art. 3(2), the Land-Based Protocol (1980, as amended in 1996), Art. 8, and the Hazardous Wastes Protocol (1996), Art. 12.

²⁵ See the SPA and Biodiversity Protocol (1995), Art. 19(1)(2).

²⁶ *Ibid.*, Art. 19(2).

²⁷ *Ibid.*, Art. 7(2).

mes or projects, as well as the issuing of the various authorizations, of the various stakeholders”²⁸. These stakeholders are indicated, but also general forms of participation are indicatively prescribed, involving inter alia “*consultative bodies, inquiries or public hearings, and may extend to partnerships*”. More importantly, Article 14 makes the important step forward to provide *the stakeholders’ right to access to justice* in this regard: the Parties have the duty to make available the right to recourse to legal or administrative Justice “to any stakeholder challenging decisions, acts or omissions” presumably by private persons and public authorities, as is stated in Article 9(3) of the Aarhus Convention. In addition, this duty of the Parties is expanded to ensure *the right of the stakeholders to access to other independent means of settlement of disputes*, “other than a court of law” in the wording of the Aarhus Convention (Article 9(1), of a political (mediation) or a mixed character (conciliation). Such a right to access by stakeholders “*is subject to the participation provisions established by the Parties with respect to plans, programmes or projects concerning the coastal zone*”.

On the other hand, the participation of the stakeholders in plans, programmes or projects concerning the coastal zone requires the development of a systematic, long term strategy of information which is *a sine qua non* condition for generating a meaningful and knowlegable participation of stakeholders in these plans, programmes and projects. For this purpose, Article 15 of the Protocol provides for the duty of the Parties to carry out awareness-raising activities on ICZM Protocol at all levels (national, regional and local) and to “develop educational programmes, training and public education on the subject”, and further to establish or support specialized national research centres providing interdisciplinary scientific research, thus advancing the relevant knowledge, contributing to public information and facilitating public and private decision-making.

From the above fragmented picture it follows that the public trust approach would require an effective harmonization of public participation in the BCS being appropriately supplemented by the 1998 UNECE Aarhus Convention. In fact, the relational impact the Aarhus Convention on the BCS may be approached to from various, interrelated, scaled and dynamically operating ordering aspects.

First, the Aarhus Convention *constitutes the normative supplementary context* for those Contracting Parties to the BCS which have ratified this Convention. Twelve Contracting Parties, including the EU, have done so²⁹ and one has signed it (Monaco) for which the Convention has a relevant normative and evidentiary

²⁸ ICZM Protocol (2008), Art. 14 (emphasis mine).

²⁹ Albania (2001), Bosnia and Herzegovina (2008), Croatia (2007), Cyprus (2003), European Union (2005), France (2002), Greece (2006), Italy (2001), Malta (2002), Montenegro (2009), Slovenia (2004), and Spain (2004).

value³⁰ buttressed with Article 18 of the Vienna Convention on the Law of Treaties obliging the signatories to refrain from acts that would defeat its objects and purposes pending ratification.

Second, with respect to the rest of the Contracting Parties which are not members of the Economic Commission of Europe, the Aarhus Convention constitutes *a referential context* which should normally be taken into account when implementing Article 15 of the Barcelona Convention and, as such, its impact can be substantial for a number of reasons.

- In the first place, being already obligatory for more than a half of the Contracting Parties, the Aarhus Convention sets up the specific standards and procedural rights to be appropriately applied by them in context and within the objects and purposes of the BCS: the specification of these standards and procedural rights takes into consideration the particularities of the context of the BCS, the objects and purposes of the established conventional regime and its developing practice, since they acquire separate regime existence³¹.
- In the second place, the regime established by the Aarhus Convention contains certain distinctive innovative elements which clearly reinforce the approximation of its double function, as a normative supplementary context and as a referential context in the framework of the BCS. Thus, it specifically provides for the potentiality of expanding the scope of its geographical application and, hence, of *relativizing its regionality*: Article 19 (3) states that any other State that is simply a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties, thus indicating the potentiality of the progressive *de-regionalization* of its standards and procedural rights and, in effect, for its eventual transformation into a conventional regime with more global/extra regional characteristics. Moreover, it lays down, under Article 3(7), the general duty of each Contracting Party to promote the application of the princi-

³⁰ PERMANENT COURT OF ARBITRATION, The MOX Plant, *supra* note 5, Dissenting Opinion of Gavan Griffith, 1162-1163.

³¹ As is most perceptively observed by the ITLOS in its Order of 3 December 2001 in the MOX Plant Case, 41 ILM (2002), 405, at 413, "... even if the OSPAR Convention, the EC Treaty, and the Euratom Treaty contain rights or obligations similar to or identical with the rights and obligations set out in the Convention [UNCLOS], the rights and obligations under those agreements have a separate existence from those under the Convention" (para. 50). And continues: "... the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*" (para. 51).

ples of the Convention in any international environmental decision-making process and within the framework of any international organization when dealing with matters relating to the environment. This duty is armed with the innovative *Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums, 2005*³², subsequently supported by Decisions III/4³³ and IV/3³⁴ of the Meeting of the Parties to the Aarhus Convention, which are declared to serve as “a source of inspiration to Signatories and other interested States, as well as to multilateral environmental agreements and other international forums, non-governmental organizations and other members of the public having an interest in promoting the application of the principles of the Convention in international forums”³⁵. The Almaty Guidelines also provide for the *contextuality of their application*³⁶ and the systematic and adequate participation of the public in the negotiation process and application of conventional regimes, securing for it an effective channel of input in all relevant stages of the decision-making process and control³⁷.

In the light of all this, the Aarhus Convention offers a powerful and dynamically working referential context for the Contracting Parties to the BCS which are not Parties to it. Direct evidence of this is to be found in the implementation of *declarative instruments* of the BCS. Thus, in 2004, the development of guidelines concerning public participation for the preparation, adoption, implementation and follow up of National Action Plans (NAPs) in the framework of the Strategic Action Programme (SAP) for the implementation of the amended Land-Based Protocol, 1980, made reference to the Aarhus Convention because it represented “the most comprehensive available standard that has been agreed upon in this

³² ECE: Report of the Second Meeting of the Parties to the Aarhus Convention, Almaty, Kazakhstan, 25-27 May 2005, ECE/MP.PP/2005/2/Add. 5, Addendum, Decision II/4, Annex.

³³ ECE: Report of the Third Meeting of the Parties to the Aarhus Convention, Riga, Latvia, 11-13 June 2008, ECE/MP.PP/2008/2/Add. 6, Addendum, Decision III/4, Annex.

³⁴ ECE: Report of the Fourth Meeting of the Parties to the Aarhus Convention, Chisinau, Republic of Moldova, 29 June – 1 July 2011, ECE/MP.PP/2011/2/Add. 1, Addendum, Decision IV/3, Annex.

³⁵ *Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums, 2005*, *supra* note 10, para 3.

³⁶ “...to the extent appropriate in the light of reasonable consideration such as the institutional integrity and particular characteristics of each international forum concerned, its procedures and decision-making processes, and the nature and availability of its resources”, *Ibid.*, para 1.

³⁷ See e.g. *Ibid.*, paras. 29, 32.

field”³⁸. Moreover, in achieving one of the four major objectives of the MSSD (“Improve governance at the local, national and regional levels”), the application of the principles of the Aarhus Convention is stated in order to promote the involvement of civil society in achieving sustainable development, whereas the ratification of the Aarhus Convention is stated *as an indicator* for MSSD follow-up³⁹.

3.2. *On the Fiduciary Duties of the Contracting Parties to Act as Public Trustees in the BCS*

3.2.1. The Fiduciary Duty to Institutional Coordination

Building on the concept of public trusteeship, the CP are under the fiduciary duty to establish institutional coordination at the domestic level. State authorities/agencies, while maintaining their autonomy (in terms of expected tasks and expertise), *should be directed to operate in an integrated manner coordinating their activities*, thus abandoning their hitherto diverse, sectoral approaches and actions. They should operate as trustees with complementary activities for the comprehensive attainment of a common interest purpose, that is, the protection, the sustainable development and the repair of the trust resources. They should be compelled to work proactively with one another to ensure that their actions are consistent with the sustainable development of the trust resources.

This fiduciary aspect of environmental governance at the domestic level is directly reflected only in the last, recently adopted ICZM Protocol (2008) where the challenge of institutional fragmentation within each State Party is met by a special provision. Thus, Article 7 prescribes the duty of the State Parties to ensure *institutional coordination* through appropriate bodies or mechanisms in order to avoid sectoral approaches and facilitate the establishment comprehensive approaches. This institutional coordination should be *horizontal* (“between the various authorities competent for both the marine and land parts of the coastal

³⁸ MAP: GEF Project “Determination of Priority Actions for the Further Elaboration and Implementation of the Strategic Action Programme for the Mediterranean Sea” – Common Methodology, UNEP-Athens, 2003, 2. Also MAP: Strategic Action Programme – Public Participation in the National Action Plan (NAPs) for the Strategic Action Programme (SAP) to Address Pollution from Land-Based Sources in the Mediterranean Region, UNEP(DEC)/MED/GEF WG. 245/7, 3 Feb. 2004, UNEP/MAP, Athens, 2004.

³⁹ MAP: Mediterranean Strategy for Sustainable Development – A Framework for Environmental Sustainability and Shared Prosperity, 14th Ordinary Meeting of the Contracting Parties to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols, UNEP(DEC)/MED IG. 16/7, 27 June 2005, UNEP/MAP, Athens, 2006, 8, Annex 2, 33.

zones in the different administrative services”) as well as *vertical* (operating at “the national, regional and local levels”). Besides, *an additional layer of coordination* is stipulated: the development of coastal strategies, plans and programmes and the various authorizations for activities require a close coordination between national authorities and regional and local bodies “through joint consultative bodies or joint decision-making procedures”. Finally, it is specifically required that the competent national, regional and local coastal zone authorities should work together to strengthen the coherence and effectiveness of the coastal strategies, plans and programmes established. The fact that a wide power of discretion is allowed with regard to the last case (“insofar as practicable”) is beyond the point. It is evident that such an institutional coordination *is a necessary element* of effective and efficient public interest sustainable governance for the trust management of coastal resources. And as such, it should appropriately be applied to the diverse Protocol aspects of the Barcelona Convention.

This fiduciary aspect is implied in Article 7(4) of the Specially Protected Areas and Biodiversity Protocol (1995): the duty to ensure the coordination of administration and management of the established specially protected areas covering both land and marine areas as a whole. Although formulated in a weak and generalizing language, this Article manifests the (legislative) intention of the Parties to effectively reduce the administrative barriers through appropriate coordination of the administration and management of these specially protected areas so that a territorial integration is to be achieved. The need for a comprehensive management of the resource through coordination of the agencies is clearly indicated. Adversely, the aspect of institutional coordination is conspicuously missing in certain crucial aspects of the only recently entered into force Offshore Protocol (1994) where the challenge of institutional fragmentation is inadequately treated⁴⁰. Following the long-established state-centric approach of the time of its establishment⁴¹, this Protocol reflects the state-centric environmental governance model where the conventional environmental regime deals with the abstract unqualified vertical relationship between the competent authority of the State and the operator.

⁴⁰ See e.g. contingency planning (Article 16 and Annex VII), monitoring (Article 19) or removal of installations (Article 20).

⁴¹ In fact, this Protocol is basically a product of the 80s and the reactivation of the negotiating process of its initial draft in 1993, after a long period of disruption, was aiming at the finalization of the existing draft with a few agreed improvements.

3.2.2. The Fiduciary Duty to Compliance

The more recent structural development of the BC regime which led to the establishment of a *compliance mechanism* basically continues to serve the state-centric positivist approach.

Set up according to *the Decision IG. 17/2 on Compliance Procedure and Mechanisms at the 15th MOP*, the so-called *Compliance Committee*⁴², emerged as an innovative subsidiary organ of the BCS to attain its better, more efficient implementation, taking into account the specific situation of each CP. However, its structure and its function remain confined to the positivist state-centric model with no relational concessions and public trust underpinnings. Thus, the seven members of the Committee are elected “by the Meeting of the Contracting Parties from a list of candidates nominated by the Contracting Parties”⁴³ and there is no such right for the public that would allow a direct involvement – as the Aarhus Convention does. More importantly, the right to trigger the Committee is exclusively conferred upon the Contracting Parties and the Secretariat (Self-trigger, Party to Party trigger, Secretariat trigger)⁴⁴. No such right is conferred upon the public or the right to attend the Meetings of the Committee and to make interventions – as the Bern Convention on the Conservation of European Wildlife and Natural Habitats, 1979, or the Protocol on Water and Health to the UNECE Water Convention, 1999⁴⁵, actually do. Besides, the inclusion of the right of the

⁴² MAP: *Decision IG 17/2: Procedures and Mechanisms on Compliance under the Barcelona Convention and its Protocols*, in: *Report of the 15th Ordinary Meeting of the Contracting Parties to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols, Almeria (Spain), 15-18 January 2008*, UNEP(DEC)/MED IG. 17/10, Annex V, Decisions of the 15th Meeting of the Contracting Parties, pp. 23-27. See, also, MAP: *Decision IG. 19/1: Rules of Procedure for the Compliance Committee and its Work during 2010-2011 Biennium*, in: *Report of the 16th Ordinary Meeting of the Contracting Parties to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols, Marrakesh (Morocco), 3-5 November 2009*, UNEP(DEPI)/MED IG. 19/8, Annex II, pp. 1-23.

⁴³ MAP: *Decision IG 17/2: Procedures and Mechanisms on Compliance under the Barcelona Convention and its Protocols*, op. cit., section II(3).

⁴⁴ Ibid., section V (18-23).

⁴⁵ As is provided by Decision I/2, section VI(16), contained in the Report of the First Meeting of the MOP to this Protocol, “communications may be brought before the Committee by one or more members of the public concerning that Party’s compliance with the Protocol, unless that Party has notified the Depositary in writing by the end of the applicable period that it is unable to accept, for a period of not more than four years, the consideration of such communications by the Committee” and that “the Depositary shall without delay notify all Parties of any such notification received”, ECE/MP.WH/2/Add. 3, EUR/06/5069385/1/Add. 3, 3 July 2007, Annex, p. 5-6.

public to trigger the Committee could perceptively generate developments in the related operation of the domestic order and its remedies⁴⁶. Relatedly, the more *indirect involvement of the public* is limited to access to documents and information⁴⁷, whereas such aspects of indirect involvement of the public, like the right of the public to comment on nominations to the Committee or its capacity to be indirectly involved in any follow-up to implement the Committee's findings at the national level, are not provided.

It is worth noticing that the Fourth and the Fifth Meetings of the Compliance Committee dealt with the question of public involvement *merely* by preparing a leaflet on compliance procedures and mechanisms within the framework of the Barcelona Convention and its Protocols to serve as a guide to the public (in Arabic, English and French)!⁴⁸ At the same time, in view of the total absence of referrals by the Contracting Parties and the Secretariat, the Committee turned to the secondary need for improving the national reporting patterns, providing a familiar indirect administrative-type of approach to the disturbing fact that some—and not identified—CPs had never submitted their reports!

3.2.3. The Fiduciary Duty to Use Expert Knowledge in Context

In view of the the *autonomous nature* of the BCS—and of all CER of ICI—and the need to advance its public benefit (sustainability) legislative purpose under conditions of uncertainty, complementarity and implementative openness, the required “finesse and judgement” on the part of the CPs, acting as trustees, is associated with their duty to use expert knowledge in context.

Thus, the CPs are vested with a fiduciary duty that State authorities/agencies *specifically make use of knowledge, expertise and skills* for an effective, efficient and socially acceptable sustainable governance of Mediterranean marine and coastal environment and its natural resources. Knowledge, expertise and spe-

⁴⁶ In regard to communications from the public, Section VI (19) of Decision I/2 of the Protocol on Water and Health to the UNECE Water Convention, 1999, provides that “the Committee should, at all relevant stages, take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress”. *Ibid.*

⁴⁷ See Rule 15 “Public Access to Documents and Information”, *Rules of Procedure for the Compliance Committee under the Barcelona Convention and its Related Protocols*, *op. cit.*, providing the availability to the public of the provisional agenda, reports of the Committee meetings, official documents and, under the conditions stated in Rule 14, of any other non-confidential document.

⁴⁸ MAP: *Report of the Fourth Meeting of the Compliance Committee, Athens, Greece, 5 and 6 July 2011*, UNEP(DEPI)/MED Compliance Committee 4/7, 13 October 2011, para. 16, p. 3.

cial skills should be *properly solicited and practised* by the Contracting Parties, acting as Trustees, so that a *comprehensive, integrated* (inter-disciplinary, inter-linked) and *contextually-relevant* (social/public participation, process-dependent knowledge) approach to the governance of public trust resources will be generated. State authorities/agencies as public trustees should adequately base their decisions on a multifaceted and evolving expertise knowledge, on established international practices and, where appropriate, on relevant local community knowledge.

This has certain consequences. First, a failure to do so may give ground for drawing an *aspect of accountability* for the Trustees CPs. Second, the CPs, in soliciting expert advice, applying established international practices and incorporating local knowledge, should *ensure their proper consideration in the light of their sustainability governance*. They should regularly monitor their performance and safeguard their consistency with the dynamically evolved context (internal and external). As a result, they should be organized by establishing reliable and dynamically working data banks related to the corpus of international environmental trust set up by the BCS, and threats to it, providing good and accessible records with continuously updated information. Finally, the CPs, in their autonomy to act as intergenerational trustees, should *apply expertise prudently and diligently*. Thus, on the one hand, they should not use scientific dissent as an excuse to avoid action when a reasonable degree of scientific consensus is established, being under the consequential duty to evaluate “the soundness of the scientific opinions proffered”. On the other hand, they should apply the “precautionary principle”—which is largely consistent with trustee duties and the “prudence” required for public trustee—in the management of highly uncertain and potentially catastrophic events (“where at best only subjective probabilities can be assigned”)⁴⁹.

3.2.4. The Fiduciary Duty to Liability and Compensation

The *Guidelines on Liability and Compensation for Damage Resulting from Pollution of the Marine Environment in the Mediterranean Sea Area*, adopted by Decision IG. 17/4 in 2008 at the 15th MOP⁵⁰, basically continue to serve the

⁴⁹ As A. Scott remarks “...Both trust law and the precautionary principle are.....concerned not with maximizing welfare but with protecting against bad outcomes”, SCOTT. A., “Trust Law, Sustainability. and Responsible Action”, 31 *Ecological Economics* (1999), 139-134, 150.

⁵⁰ MAP: *Report of the 15th Ordinary Meeting of the Contracting Parties to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols* (Almeria, Spain, 15-18 January 2008), UNEP(DEPI)/MED IG.

state-centric positivist approach. Having a generic character⁵¹, they allow only some carefully restricted participation of the public in the governance of a Mediterranean environmental liability and compensation regime. In fact, given their inherent flexible nature and the expressed intention of the Contracting Parties that these Guidelines constitute the essential first step in the process of implementation of the liability and compensation regime stipulated in the framework provision of Article 16 of the Convention, they should have allowed *inter alia* a more solid and consistent formulation of effective public participation with respect to issues of liability and compensation for environmental damage in the Mediterranean. Instead, these Guidelines make a general and highly reserved reference to access to information and public participation, clearly reflecting the lack of any public trust approach to this important aspect of sustainability in environmental governance.

Thus, *Guideline 30 on Access to Information* “pursuant to Article 15 of the Convention”, vaguely speaks of “wide” access to information—an equally discretionary term to that of “appropriate” used by Article 15—and it is only able to specify the duty of the Contracting Parties to give replies to requests for information “within specific time limits”, an obviously weak formulation that fails to take into account the related general standards provided by the Aarhus Convention. *Guidelines 31 and 32 on Action for Compensation*, merely refer to the general duty of the Contracting Parties to “ensure” in their legislation that actions for compensation for environmental damage “⁵²are as widely accessible to the public as possible”, and that “natural and juridical persons that are victims of traditional damage⁵³ may bring actions for compensation in the widest possible manner”. Notwithstanding, Guideline 31 may potentially serve, more sustainably, the public trust approach, since compensation for environmental da-

17/10, 18 January 2008 (UNEP/MAP, Athens, 2008), Annex V, Decision IG 17/4, pp. 133-140.

⁵¹ According to Guideline A(4), they apply “to the activities to which the Barcelona Convention and any of its Protocols apply”, *Ibid*.

⁵² “Environmental Damage”, according to Guideline 9, means “a measurable adverse change in a natural or biological resource or measurable impairment of a natural or biological resource service which may occur directly or indirectly”, *Ibid*.

⁵³ “Traditional damage”, according to Guideline 14, means “(a) loss of life or personal injury; (b) loss of or damage to property other than property held by the person liable; (c) loss of income directly deriving from an impairment of a legally protected interest in any use of the marine environment for economic purposes, incurred as a result of impairment of the environment, taking into account savings and costs; (d) any loss or damage caused by preventive measures taken to avoid damage referred to under sub-paragraphs (a), (b) and (c)”, *Ibid*.

mage “should include”, according to Guideline 10, not only the costs of measures “to clean up, restore and reinstate the impaired environment, including the cost of monitoring and control of the effectiveness of such measures” —a clear obligation of result— but also “diminution in value of natural or biological resources pending restoration” and “compensation by equivalent if the impaired environment cannot return to its previous condition”.

On the other hand, the Working Group of Legal and Technical Experts for the Implementation of Guidelines⁵⁴, in its third meeting in 2009, underlined “the fact that not all Contracting Parties give to the public access to information as regards environmental damage or the threat thereof, or ensure actions for compensation to the public, seems to suggest an important area where certain national legislations could be strengthened in the near future”⁵⁵. And in general, it referred to “an important governance deficit... identified by the answers provided by most Contracting Parties pointing ...to the inadequate participation of the civil society in the introduction of elements of the compensation for damage and damage assessment into their domestic legislation”, thus concluding that one of the main directions for facilitating the implementation of these Guidelines by the Contracting Parties is “introducing appropriate measures and actions to enhance public participation and involvement”⁵⁶. So far, the legislation of very few Contracting Parties contain the elements for compensation for environmental damage provided by the Guidelines⁵⁷. And there is more to it. First, it should not escape our attention that these Guidelines continue to leave unsettled two issues of decisive importance for ensuring more effective fiduciary governance offshore activities: *the establishment of a Mediterranean Trust Fund*, as a second-tier of the liability and compensation system under certain conditions, and *the establishment of a compulsory insurance regime for operators*; both issues are left to future —and uncertain— decisions of the Parties to the Barcelona Convention system⁵⁸. Second, and even more subtle, these Guidelines should not be *used to complacently divert from the process of developing an appropriate* (contextually consistent) *legal regime* specifying the framework obligation of the CPs of Article 16 of the

⁵⁴ See MAP: *Third Meeting of the Working Group of Legal and Technical Experts for the Implementation of Guidelines for the Determination of Liability and Compensation for Damage Resulting from Pollution of the Marine Environment in the Mediterranean Sea Area, Athens, Greece, 22-23 January 2009*, UNEP(DEP)/MED WG 329/3, UNEP/MAP, Athens, Greece.

⁵⁵ *Ibid.*, para. 11, p. 2.

⁵⁶ *Ibid.*, paras. 13, 14, p. 3.

⁵⁷ *Ibid.*, Annex 1, p. 2.

⁵⁸ See Guidelines K and L, *Ibid.*, p. 138.

Barcelona Convention to formulate and adopt in this regard “appropriate rules and procedures”. The collectively agreed step-by-step approach for the more adequate development of a future Mediterranean liability and compensation regime⁵⁹ should not defy its ICI purposive character, its legal specification; otherwise, it will not be meaningful in terms of attaining ICI. After all, the Offshore Protocol (1994) has already made an important substantial step toward this direction. Going beyond the standard framework clause of Article 27(1) providing for cooperation for the adoption of appropriate rules and procedures on liability and compensation, it sets forth, in Article 27(2), three provisional, but substantive obligations: thus, the parties to the Offshore Protocol are vested with the duty to take measures to ensure that, first, liability is channeled on the operators, second, they pay prompt and adequate compensation and, third, they have and maintain compulsory insurance or other financial guarantee.

3.2.5. The Fiduciary Duty to Legislative Implementation of the BCS

Finally, the CPs are vested with a fiduciary duty to legislative implementation of the Convention and its performative Protocols in an effective and efficient manner. This duty emanates from the framework formulation of Article 14 of the Barcelona Convention which provides that the CPs “shall adopt legislation implementing the Convention and the Protocols” and that the Secretariat may assist any CP to draft “environmental legislation in compliance with the Convention and the Protocols” if requests so. This Article was stimulated by Rio Declaration Principle 11 which embodies the duty of States to “enact effective environmental legislation”. Proposed by the Secretariat during the amendment negotiating process of the Convention (1994-1995) as a new Article, its purpose was to respond to the somehow scarce legislative follow up to the commitments of the CPs to implement the Convention and its Protocols⁶⁰ and, hence, to underline the importance of an appropriate legislative follow up at national level which, coupled with the creation of a compliance mechanism, were considered as the key elements

⁵⁹ See RAFTOPOULOS, E., “The Mediterranean Response to Global Challenges: Environmental Governance and the Barcelona Convention System” *in: The World Ocean in Globalization – Climate Change, Sustainable Fisheries, Biodiversity, Shipping, Regional Issues* (ed. Davor Vidas & Peter Johan Schei), Martinus Nijhoff Publishers, Leiden – Boston, 2011, Chapter 27, pp. 507, 527-532; SCOVAZZI, T., “The Mediterranean Guidelines for the Determination of Environmental Liability and Compensation: The Negotiations for the Instrument and the Question of Damage that can be Compensated”, 13 *Max Planck Yearbook of United Nations Law* (2009), p. 183.

⁶⁰ See RAFTOPOULOS, E., *Studies on the Implementation of the Barcelona Convention: The Development of an International Trust Regime*, *supra* note 1, Study 1, pp. 1-116.

for achieving effectiveness of the BCS. In exercising this fiduciary duty, the CPs should secure *a certain standard of care and competence*. They should specifically adopt and apply laws and regulations and take administrative measures within the framework of their legal system implementing the Convention and its Protocols *effectively and in their specific context*. They should secure the necessary specificity and clarity on their formulation so as to enhance implementation, appropriate integration, consistency and enforcement of the BCS into their legal system and tradition. And they should also regularly assess them to determine how they attain their purported results and make the necessary progressive amendments or enact progressive new laws accordingly. They should, in other words, care for a continuously more effective legal implementation.

A failure to act so clearly undermines the trust base of environmental governance of the BCS and may provide another ground for drawing an *aspect of trustee accountability* for the CPs. Relatedly, such a legal implementation process *should not, in practice, be digressed* by retreating to national strategies, plans or other declarative kinds of instruments—which, otherwise, can be appropriately associated with a continuously progressing legal implementation—for whatever reason. Nor should legal implementation process be diverted to a collective recourse to Action Plans for the implementation of Protocols entered into force – which of course can be most useful if operating synergetically with, and in view of the exigencies of, legal implementation. It therefore raises some pertinent questions the newly developed practice by the MOPs of the CPs to adopt Action Plans for the implementation of Protocols recently entered in force.

Perhaps the most striking example is the Offshore Protocol. The 17th MOP decided to adopt “the Action Plan to Implement the Protocol of the Barcelona Convention concerning the Protection of the Mediterranean Sea Against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil”⁶¹ entirely overlooking the fact that the seventeen years elapsed between its signature (14 October 1994) and its entry into force (24 March 2011) have had far-reaching implications for its effective operation and legal implementation. In fact, unlike other Protocols of the BCS, the Offshore Protocol remained in a “dormant situation”⁶² all these years: following its signature in 1994, it was not the object of any specific soft law treatment by the MOPs—even the MOPs typical recommendation to the CPs for its ratification was inexplicably withdrawn since the 12th MOP (2001, Monaco)—and, as a result,

⁶¹ Ibid., Decision IG 20/12, p. 217.

⁶² See RAFTOPOULOS, E., “Sustainable Governance of Offshore Oil and Gas Development in the Mediterranean: Revitalizing the Dormant Mediterranean Offshore Protocol”, *MEPIELAN E-Bulletin*, Thursday, 19 August 2010.

the environmental governance of offshore development imperceptibly slipped into the domain of national sovereignties, thus perpetuating the patchwork of very general and widely differing national legislations of the Mediterranean States on the subject. More importantly, the Offshore Protocol, despite its many progressive aspects and its adequate and comprehensive treatment of the subject, it was inescapably a product of the first generation Protocols of the BCS and their underlying *state-centric approach*. It was generated and adopted *before* the second phase of development of the BCS⁶³ which, launched at the 9th MOP (Barcelona, 1995), gradually effected an extensive and substantial revision of the Barcelona Convention and its Protocols integrating sustainability in environmental governance. In light of this, the real Protocol implementation problems faced by the CPs after its entry into force were threefold: first, its adaptation to the contemporary sustainable environmental governance requirements (public participation, legal and technical updating of the regulated issues); second, its harmonization with the other related Protocols to the BCS rectifying the existing inconsistencies and discrepancies between them; third, finding the appropriate legal form to reply to the previous two challenges in order to make sustainably effective the legal implementation of the Protocol.

Instead, the above Action Plan orientates implementation towards technical, coordinative and cooperative issues thus digressing from the urgent, multifarious legal implementation issues. It requests for the preparation of “an in depth assessment and stock taking analysis of the existing practical measures” of the Mediterranean countries regarding Offshore activities “as a baseline to measure progress towards Protocol implementation in the future” and for the preparation of an Action Plan for a 10 year MAP implementation of the Protocol supported by the facilitating role of other MAP components and necessary partnerships. These actually useful actions, if only complementing the consistent and effective legal implementation of the Protocol at all levels, *work digressively* when operating as elements of an action plan implementation of the Protocol. On the other hand it worth noticing that the EU, while preparing its very recently completed accession

⁶³ This Protocol has been basically drafted in the 80s and, after the lapse of some years of inaction, the negotiating process was reactivated in 1993 with the view to finalize the existing draft with the insertion of certain improvements. So far, there are seven Parties to the Protocol: Albania (2001), Cyprus (2006), Libya (2005), Morocco (1999), Syria (2011), Tunisia (1998) and, recently, European Union (2013). Eight Parties to the BCS are Signatories: Croatia (1994), Greece (1994), Israel (1994), Italy (1994), Malta (1994), Monaco (1994), Slovenia (1995), and Spain (1994).

to the Protocol⁶⁴, elaborated carefully and through broad consultation a Draft Regulation on safety of offshore exploration and exploitation activities in the Mediterranean and is still meticulously working on the complementary function between the “proposed Regulation” and the Offshore Protocol.

Possibly one can see these forms of digression as a practice of eventually undermining the fiduciary duty of the CPs to secure a certain standard of care and competence for the effective legal implementation of the BCS, and, more generally, as a subtly performed *preludium* to an imperceptible regression from environmental law which is so eloquently explored in recent well-argued works⁶⁵ and advocated in international decisions⁶⁶.

⁶⁴ See EU Council Decision of 17 December 2012 on the accession of the European Union to the Protocol for the Protection of the Mediterranean Sea against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil, OJ L 4, 9.1.2013, p. 13.

⁶⁵ See PRIEUR, M. & GARVER, G., “Non-Regression in Environmental Protection: A new Tool for Implementing the Rio Principles”, in: *FUTURE PERFECT, RIO+20*, Tudor Rose/UN, 2012; PRIEUR, M. & SOZZO G., *The Principle of Non-regression in International and Comparative Law*, Brylant-Larcier, 2012; PRIEUR, M., “Non-Regression in Environmental Law”, S.A.P.I.E.N.S (Online), 5.2 (2012), available at: “<http://sapiens.revues.org/1405>”.

⁶⁶ *European Parliament Resolution of 29 September 2011 on developing a common EU position ahead of the United Nations Conference on Sustainable Development (Rio+20)*, para. 97; *UNEP: Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability*, UNEP WORLD CONGRESS ON JUSTICE, GOVERNANCE AND LAW FOR ENVIRONMENTAL SUSTAINABILITY (Rio de Janeiro, Brazil, 17-20 June 2012), available at: “http://www.unep.org/rio20/Portals/24180/Rio20_Declaration_on_Justice_Gov_n_Law_4_Env_Sustainability”.