



UNITED  
NATIONS

EP

UNEP(DEPI)/MED CC.13/6



UNITED NATIONS  
ENVIRONMENT PROGRAMME  
MEDITERRANEAN ACTION PLAN

18 August 2017  
Original: English

13<sup>th</sup> Meeting of the Compliance Committee of the Barcelona Convention and its Protocols

Athens, Greece, 26-27 September 2017

**Agenda item 3: Follow-up of the implementation of Decisions IG.22/15 and IG.22/16 of the 19th Meeting of Contracting Parties (COP19)**

**Preliminary Scoping Paper on the Legal Nature and Main Obligations of COP Decisions**

For environmental and cost-saving reasons, this document is printed in a limited number. Delegates are kindly requested to bring their copies to meetings and not to request additional copies.

UNEP/MAP  
Athens, 2017



## Note by the Secretariat

### Introduction

1. At its 12<sup>th</sup> meeting (Athens, Greece, 24-25 January 2017), the Compliance Committee of the Barcelona Convention and its Protocols examined progress made in implementing its Programme of Work for 2016-2017. In this context, the Committee discussed how to take work forward as regards activity number nine of the Programme of Work:

“Provision of opinion on the assessment to be carried out by the Secretariat with the help of appropriate legal expertise, on the extent of the legally binding nature for the Contracting Parties of programmes of measures and their implementation timetables as adopted in the framework of the Protocols of the Barcelona Convention”.

2. In the ensuing discussion, the Committee noted that the very broad terms in which this activity is formulated make it possible to shape it to further improve the assessment of national implementation reports to identify actual or potential cases of non-compliance. In this context, a step-by-step approach was favoured, so that the mode of working should be from the general to the concrete, setting the framework for further work on concrete issues (e.g. work on specific provisions of the Barcelona Convention and its Protocols or precise actions under Regional Action Plans), as need be and as priorities dictate.

3. To conduct this work the Committee agreed on the Secretariat to prepare in consultation with José Juste-Ruiz and Bernard Brillet, a scoping document addressing the legal nature and the main obligations of thematic decisions, including Regional Actions Plans, adopted by the Meeting of Contracting Parties for consideration of the next Compliance Committee Meeting.

4. As instructed and following consultation with José Juste-Ruiz and Bernard Brillet on the main elements that should frame discussion on the subject matter at the 13<sup>th</sup> Compliance Committee Meeting, the following starting points have been identified to guide further work.

### COP Decisions: elements for discussion within the context of compliance

5. *The COP as the supreme decision making body.* The Barcelona Convention grants the Meeting of the Contracting Parties the authority, inter alia: “to adopt, review and amend as required the annexes to this Convention and to the protocols” (Article 18.2.iii), “to make recommendations regarding the adoption of any additional protocols or any amendments to this Convention or the protocols” (Article 18.2.iv) and “to consider and undertake any additional action that may be required for the achievement of the purposes of this Convention and the protocols” (Article 18.2.vi).

6. The Rules of Procedure for Meetings and Conferences of the Contracting Parties to the Convention for the Protection of the Mediterranean Sea against Pollution and its related Protocols empowers the COP to adopt “substantive decisions, recommendations and resolutions”, unless otherwise provided by the Barcelona Convention, its Protocols or the financial terms of reference (Rule 43.1)<sup>1</sup>, as well as “procedural decisions” (Rule 44.1)<sup>2</sup>.

7. From the reading of Rules 43 and 44 in the context of Article 18, it appears safe to say that the COP is the supreme decision making body. It follows then that the outcomes of subsidiary body negotiations must be considered by and receive the assent of the COP. A quite different issue is the

---

<sup>1</sup> Rule 43.1 reads: “Unless otherwise provided by the Convention, the protocols or the financial terms of reference, substantive decisions, recommendations and resolutions shall be made by two-thirds majority of the Contracting Parties present and voting”.

<sup>2</sup> Rule 44.1 reads: “Procedural decisions are taken by a simple majority”.

form that such outcomes could take, whether a decision, a recommendation or a resolution. This question carries us to analyse whether COP Decisions are legally binding.

8. *The binding character of COP Decisions derives from the underlying treaty.* Until the 14<sup>th</sup> Ordinary Meeting of the Contracting Parties in 2005, the legal formulation used for decision making was “Recommendations to the Contracting Parties”. The paragraph below illustrates that point concerning the draft Guidelines for the dumping of inert uncontaminated geological materials, adopted by the 14<sup>th</sup> Ordinary Meeting of the Contracting Parties in 2005 (UNEP(DEPI)/MED IG. 16/13, Annex III) as follows:

“II.A.1.3 Implementation of the Dumping Protocol

Recommendations to the Contracting Parties:

2. To adopt the guidelines prepared by the Secretariat in close cooperation with national authorities and experts on dumping of inert uncontaminated geological materials (UNEP(DEC)MED IG.16/9)”.

9. At the 15<sup>th</sup> Ordinary Meeting of the Contracting Parties in 2008, COP Decisions were established as the legal instrument for decision making. At this point, it may be argued that the use of the term “Decision”, instead of “Recommendation”, confers legally binding status to the text in question.

10. It should be noted, firstly, the listing of COP Decisions adopted since 2008 shows that the term “Decision” is used as a heading for all COP measures, and does not automatically imply their legally binding force. Secondly, as already mentioned, the authority for a COP to adopt legally-binding Decisions must derive from a provision in the Treaty and the Parties’ intention to be bound by the Decision. This leads us to also factor into this analysis the question of the type and nature of the obligations contained in the COP Decisions.

11. *The type and nature of the obligations contained in COP Decisions: evidence of intent.* Relying solely on the legal form to determine the legal status may be insufficient. Even where the COP Decision itself may be binding, it does not necessarily mean that all obligations contained in it will be binding, as such obligations could be drafted in such a way to qualify their binding nature. Terminology here plays a key role as evidence of intent. For example, obligations may be expressed in aspirational terms or give general in nature or give Parties discretion as to whether to implement them.

12. *Closing point.* Considerations so far should frame further work on the legal nature and the main obligations of COP thematic decisions for the purposes of compliance. Further work in that regard should be taken in the context of the revised reporting format of the Barcelona Convention and its Protocols, under which the implementation of the Regional Action Plans adopted by COP Decisions is of particular relevance.

Action requested

13. The Compliance Committee is invited to consider the elements for discussion on the legal nature of COP Decisions identified in this document and prepare the relevant recommendations to COP20.