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**MEDITERRANEAN ACTION PLAN (MAP)  
REGIONAL MARINE POLLUTION EMERGENCY RESPONSE CENTRE FOR THE  
MEDITERRANEAN SEA (REMPEC)**

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Second Meeting of the Mediterranean Network of  
Law Enforcement Officials relating to MARPOL  
within the framework of the Barcelona Convention (MENELAS)

REMPEC/WG.42/4  
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Agenda Item 4

**FRENCH PROPOSAL FOR THE CREATION OF TWO NEW JUDICIAL COOPERATION TOOLS  
WITHIN THE FRAMEWORK OF THE REGIONAL STRATEGY FOR PREVENTION OF AND  
RESPONSE TO MARINE POLLUTION FROM SHIPS (2016-2021) AND MENELAS**

**Note by France**

**SUMMARY**

**Executive Summary:** In order to strengthen cooperation between the Contracting Parties to the Barcelona Convention in the area of repression of acts of pollution, France proposes the development of regional jurisdictional and judicial cooperation in the Mediterranean, along with a common report that would enable the courts of the Contracting Parties to the Barcelona Convention to prosecute all individuals, irrespective of the place of pollution. France suggests accompanying this judicial cooperation with the downstream establishment of a regional "Blue Fund", to which a part of the pecuniary sanctions would be transferred.

**Action to be taken:** Paragraph 71

**Related documents:** REMPEC/WG.41/11/2, REMPEC/WG.41/16, REMPEC/WG.42/INF.3,  
REMPEC/WG.42/INF.7

**Introduction: the Mediterranean Sea, a special and vital area for cooperation**

1 Besides being the crossroads of civilisations, the Mediterranean Sea is also an economic crossroads that needs to be protected in the face of pollution from ships operating there (Section 1). International and regional regulations, as well as the current context of increasing environmental concerns, have led France to propose new tools for reducing operational pollution in the Mediterranean Sea (Section 2).

- **Section 1: the Mediterranean Sea, an economic space that should be protected**

2 In order to understand the need for new tools, the Mediterranean Sea and its characteristics should be placed in context (I) before identifying the main threats it is facing (II).

I. A semi-enclosed sea and a crossroads for international maritime transport

3 Geographically and legally, the Mediterranean Sea is regarded as a "semi-enclosed" sea, i.e.:

*"a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States"<sup>1</sup>.*

4 Since ancient times, the Mediterranean Sea has been the crossroads of civilisations and has gradually become a vital economic crossroads for States. At present, the Mediterranean witnesses nearly 30% of the world's shipping traffic. It is therefore one of the epicentres of the worldwide maritime network. This proportion also includes a share of 25% made up of oil tankers carrying full tanks of oil to Northern States. What's more, transport is not the only economic sector that benefits its coastal States; fishing employs almost 250,000 people in Mediterranean waters and, finally, note should be taken of the tourism and leisure craft sectors, which represent a substantial proportion of the activity in the Mediterranean.

5 Maritime activity in the Mediterranean is constantly increasing and there is a need, in future, to recognise the importance of preserving this area in the face of its sustained use.

6 In this respect, the Mediterranean Sea is an economic area, which benefits both the Southern and Northern States. Its activity should be regulated in order to limit the negative consequences of its intensive exploitation.

## II. Vital protection of the Mediterranean Sea

7 Intensive use of the Mediterranean marine space naturally increases the risk of pollution. The phenomenon of pollution is not new, but we have waited many years for a universally accepted legal definition.

8 In this regard, the United Nations Convention on the Law of the Sea, known as the "Montego Bay Convention" (UNCLOS), of 10 December 1982, provides us with a clear definition of pollution of the marine environment:

*"The introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities"<sup>2</sup>.*

9 The pollution reports (POLREP) submitted to the Centre of Documentation, Research and Experimentation on Accidental Water Pollution (Cedre) in 2016 are very clear; the Mediterranean Sea is currently one of the areas subjected to the greatest pollution from ships in Europe. With a marked increase in 2016 (a total of 319 POLREP in 2016 compared to 239 in 2015), pollution from ships is essentially caused by oil. The French coastline has experienced 68 pollution events in the Mediterranean Sea, including 40 caused by oil, in the year 2016.

10 Marine pollution should be divided into two forms of pollution found in the Mediterranean, with a clear distinction between accidental pollution and operational pollution.

11 There is no difficulty in understanding accidental pollution, as it is broadly enshrined in positive law. As its name suggests, it results from maritime peril and shipping hazards. Involuntary by nature, this form of pollution is characterised by events that are sometimes catastrophic, such as large oil spills. Moreover, it inevitably needs to be governed by preventive standards before being suppressed.

12 Operational pollution is a quite different matter. The latter results from a deliberate act or an intentional process. Examples include the discharge of garbage produced on board a ship, the discharge of oily mixtures or even the intentional discharge of oil or water containing oil. Operational pollution also includes operations known as "degassing" and "de-ballasting". This form of pollution is witnessing a change in its process with the emergence of "nocturnal spillage", which complicates the matter of catching a ship in the act.

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<sup>1</sup> United Nations Convention on the Law of the Sea, known as the "Montego Bay Convention" (UNCLOS), adopted on 10 December 1982 and enacted on 16 November 1994, *United Nations, United Nations Treaty Series*, vol. 1833, Art. 122.

<sup>2</sup> *Ibid.*, Art. 1, paragraph 1 sub-paragraph (4).

13 These two types of pollution coexist in the Mediterranean and have no notion of borders. Beyond solid cooperation, managing this pollution requires the establishment of universal standards for the Mediterranean area. The establishment of international and regional conventions, as well as criminal sanctions, has had a deterrent effect, enabling pollution to be significantly reduced in recent years. As combating accidental pollution is essentially a preventive approach, which has already been widely incorporated into international legislation, we should develop and pursue protection of the Mediterranean marine space by adopting common regional standards and tools, in order to continue the fight against operational pollution.

- **Section 2: a favourable international and regional context for exceeding current limits**

14 The Mediterranean is a wonderful cooperative space fostered by a strong international and regional legislative framework (I). Its character as a "semi-enclosed" sea facilitates this cooperation, but also makes it essential (II).

I. A strong legislative framework

15 International law (A) and regional law (B) tackle pollution from ships and, more particularly, operational pollution.

A. Protection of the marine environment at the international level in respect of the Mediterranean Sea

16 Two international instruments enforce protection of the marine environment in the face of operational pollution from ships: the Montego Bay Convention (1) and the International Convention for the Prevention of Pollution from Ships (MARPOL)<sup>3</sup>(2).

1. The Montego Bay Convention, a global tool for protection of the marine environment

17 Part XII of the Montego Bay Convention provides for the establishment of a global framework for protection and preservation of the marine environment.

18 First and foremost, States have a general obligation to protect and preserve the marine environment<sup>4</sup>. In this regard, they shall, unilaterally or jointly, take measures to prevent, reduce and control pollution from ships under the terms of Article 194 paragraph 3 sub-paragraph (b). In addition, States shall also ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to the environment of other States, and that this pollution does not spread beyond the areas where they exercise sovereign rights<sup>5</sup>. This last obligation is becoming ever more important in the light of scientific developments, which clearly establish the unity of the marine environment. Indeed, the marine environment cannot be viewed as an environment divided by national borders. It is a global entity, where polluting activities affect the entire environment.

19 The Montego Bay Convention also establishes a broadly cooperative framework for the formulation and application of standards for protection of the marine environment. Thus, Article 197 states:

*"States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organisations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features"*<sup>6</sup>.

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<sup>3</sup> International Convention for the Prevention of Pollution from Ships (MARPOL) adopted on 2 November 1973, supplemented by a protocol dated 17 February 1978, and enacted on 2 October 1983, *United Nations, United Nations Treaty Series*, vol. 1340.

<sup>4</sup> United Nations Convention on the Law of the Sea, known as the "Montego Bay Convention" (UNCLOS), adopted on 10 December 1982 and enacted on 16 November 1994, *United Nations, United Nations Treaty Series*, vol. 1833, Art. 192.

<sup>5</sup> *Ibid.*, Art. 194 paragraph 2.

<sup>6</sup> *Ibid.*, Art. 197.

20 This cooperation is intensified in the case of "semi-enclosed" seas, such as the Mediterranean, in accordance with Article 123 of the Convention. It should be noted that the obligation to cooperate and to preserve the marine environment was reaffirmed by the International Tribunal for the Law of the Sea (ITLOS) in its order of 3 December 2001 in the MOX Plant case.

21 Finally, Article 211 of the Convention deals specifically with pollution from ships. Thus, the article requires States to adopt "international rules and standards to prevent, reduce and control pollution of the marine environment from vessels"<sup>7</sup>.

22 Beyond these general obligations, specific powers are granted to States; these powers are divided into three categories.

23 States shall ensure compliance by vessels flying their flag or of their registry with international rules governing marine pollution in accordance with Article 217. In the event of a violation, the latter is obliged to conduct an investigation in order to punish the behaviour. It should be noted that this investigation can be conducted with the assistance of another State under the terms of Article 217 paragraph 5. In this case, the penalty imposed shall be sufficiently dissuasive to prevent a recurrence of the polluting behaviour<sup>8</sup>. The efficacy of the powers of the flag State must be assessed in relation to Mediterranean States. While a great deal of progress has been made in recent years to reduce the number of flags of convenience, certain Mediterranean States are still on the grey list (Albania, Algeria, Egypt, Libya, Morocco, Tunisia) compared to 6 on the black list in 2008. However, these States should not be viewed as the only ones not to comply with their international obligations, the consensus among numerous studies and authors is that numerous States have a low level of compliance with international standards or remain outside the relevant conventions<sup>9</sup>.

24 In this respect, the coastal State represents a palliative stakeholder. Given that it can adopt laws and regulations to protect the environment within its territorial waters<sup>10</sup> and has a right of jurisdiction within its exclusive economic zone (EEZ)<sup>11</sup>, the coastal State is able to establish whether a violation has occurred, or not, within its waters. Thus, the coastal State has a right to inspect foreign vessels and to require foreign vessels to provide all the information needed to establish whether a violation has occurred, or not<sup>12</sup>. However, this is not a free investigation for the coastal State, as it is subject to compliance with Article 226. Moreover, where it is confirmed that a violation has occurred, the coastal State may detain the foreign vessel and institute proceedings against the latter<sup>13</sup>. However, its proceedings will be suspended "upon the taking of proceedings to impose penalties in respect of corresponding charges by the flag State within six months of the date on which proceedings were first instituted, unless those proceedings relate to a case of major damage to the coastal State or the flag State in question has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels"<sup>14</sup>.

25 Finally, with the Montego Bay Convention, the port State has new competences that are of benefit in the fight against marine pollution. Thus, the port State can conduct an investigation and institute proceedings for illicit discharges that take place in areas under its jurisdiction, as well as outside these areas where the flag State or coastal State requests this, even where the port State has not suffered any harm<sup>15</sup>. Therefore, the port State is a key player in the application of the rules of the Montego Bay Convention and prioritises cooperation with other States.

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<sup>7</sup> *Ibid.*, Art. 211 paragraph 1.

<sup>8</sup> *Ibid.*, Art. 217 paragraph 8.

<sup>9</sup> J-P BEURIER, *Droits maritimes (Maritime laws)*, Dalloz, 2016, p. 1641.

<sup>10</sup> United Nations Convention on the Law of the Sea, known as the "Montego Bay Convention" (UNCLOS), adopted on 10 December 1982 and enacted on 16 November 1994, *United Nations, United Nations Treaty Series*, vol. 1833, Art. 21.

<sup>11</sup> *Ibid.*, Art. 56.

<sup>12</sup> *Ibid.*, Art. 220.

<sup>13</sup> *Ibid.*, Art. 220 paragraph 6.

<sup>14</sup> *Ibid.*, Art. 228 paragraph 1.

<sup>15</sup> *Ibid.*, Art. 218.

26 The Montego Bay Convention proposes a relatively global protection framework. It apportions the environmental obligations between different States. While cooperation is prioritised, what is clear is that the avenues for prosecution are subject to existing borders between States. Given the current challenges, cooperation should enable the Mediterranean marine environment to be protected as a whole.

## 2. MARPOL, a specific tool for protecting the marine environment

27 MARPOL establishes a specific protection framework for pollution of the marine environment. The Convention uses six annexes to cover different forms of pollution. The following section deals specifically with MARPOL Annex I relating to the prevention of deliberate discharges of oil.

28 It should first be noted that deliberate discharges of oil are not all illicit. Article 2 paragraph 3 of the Convention provides a definition of discharges. This definition should be supplemented by MARPOL Annex I, which sets out the regulations for the prevention of pollution by oil. Thus, Regulation 9 of MARPOL Annex I states that it is not unlawful to discharge water offshore where the oil content of this water does not exceed 15 parts per million. However, the Mediterranean Sea has far more stringent rules since it is viewed as a "special area" under the terms of Regulation 10 of MARPOL Annex I. No discharges are permitted within these special areas, apart from a few exceptions, which are set out precisely in the article. Indeed, deliberate discharges into the Mediterranean Sea are illicit. Nevertheless, Regulation 11 of MARPOL Annex I states that discharges for the purpose of securing the safety of a ship or saving human life at sea, or even as the result of damage, are not illicit.

29 Oil discharges are not the only ones that may be illicit; in this respect, noxious liquid substances transported in bulk are covered by Regulation 13 of MARPOL Annex II, harmful substances carried by sea in packaged forms are covered by Regulation 7 of MARPOL Annex III and garbage is governed by Regulations 3, 4 and 5 of MARPOL Annex V.

30 According to Cedre, nowadays, oil tankers rarely appear on the lists of illicit discharges. There is a need to look at other types of vessels, i.e. specifically passenger ships, cruise liners and recreational craft, which represent a substantial proportion of Mediterranean traffic.

31 It is necessary to add a regional dimension to these international instruments. It is routinely recognised that a regional framework is the level that is best suited to developing environmental law. Some people see the regional level as a testing ground, as it is true that the contribution of regional agreements has enabled innovative tools for protecting the marine environment to be put in place.

### B. Regional protection of the Mediterranean Sea by means of the Barcelona Convention

32 It is within the framework of the Mediterranean Action Plan (MAP) of the United Nations Environment Programme (UN Environment), also referred to as the UN Environment/MAP, that the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean ("the Barcelona Convention")<sup>16</sup> and its Protocols seek to protect the Mare Nostrum.

33 The Barcelona Convention does not replace existing international conventions, but adapts international provisions to specific Mediterranean characteristics. It establishes a framework for cooperation between the Contracting Parties to the Barcelona Convention to protect and preserve the region's marine environment. Thus, Article 3 of the Convention states:

*"The Contracting Parties may enter into bilateral or multilateral agreements, including regional or sub-regional agreements for the promotion of sustainable development, the protection of the environment, the conservation and preservation of natural resources in the Mediterranean Sea Area, provided that such agreements are consistent with this Convention and the Protocols and conform to international law"*<sup>17</sup>.

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<sup>16</sup> Convention for the Protection of the Mediterranean Sea Against Pollution, known as the "Barcelona Convention", adopted on 16 February 1976 and enacted on 12 February 1978, subsequently renamed the "Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean" by means of an amendment on 10 June 1995, which was enacted on 9 July 2004, *United Nations, United Nations Treaty Series*, Vol. 1978.

<sup>17</sup> *Ibid.*, Art. 4.

34 Beyond this possibility, the Contracting Parties to the Barcelona Convention have a general obligation to individually or jointly implement the necessary measures to prevent, abate and combat pollution of the Mediterranean Sea<sup>18</sup>. Finally, Article 6 states that this obligation shall be applied equally to cases of pollution from ships.

35 More specifically, the Protocol Concerning Co-operation in Combating Pollution of the Mediterranean Sea by Oil and other Harmful Substances in Cases of Emergency ("the 1976 Emergency Protocol")<sup>19</sup>, as well as the Protocol concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea ("the 2002 Prevention and Emergency Protocol")<sup>20</sup> to the Barcelona Convention establish a relatively complete framework for cooperation in combating operational pollution. Thus, the Contracting Parties to the Barcelona Convention shall cooperate in order to implement international regulations on preventing and combating pollution, as well as monitoring<sup>21</sup>, disseminating and exchanging information<sup>22</sup>, and transmitting information and reports relating to pollution events<sup>23</sup>.

36 The various international and regional instruments apportion States' authorities and thereby limit the effective and efficient repression of occurrences of criminal pollution. Sharing areas of competence reduces the possibility of recording offences, while the international rules for enforcing legal decisions restrict the effective punishment of criminal behaviour. Nevertheless, the above brief overview of the various international and regional instruments that apply to the Mediterranean Sea also provides a reminder of the need to bring about effective cooperation between the States around the Mediterranean. This cooperative spirit has gradually developed with the establishment of effective cooperation tools in the region.

## II. Recent developments that are conducive to increased regional cooperation

37 The Mediterranean Sea is an area that is conducive to cooperation. In this regard, the Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea (REMPEC) provides a framework for facilitated cooperation. Thus, a number of tools for cooperation have been created over the past ten or so years and demonstrate the willingness of the Contracting Parties to the Barcelona Convention to cooperate in order to halt pollution in the Mediterranean. Three particular tools enable cooperation between the Contracting Parties to the Barcelona Convention to be established:

- .1 MEDEXPOL 2007 improved the effectiveness of prosecutions brought by the Contracting Parties to the Barcelona Convention (A).
- .2 The Mediterranean Network of Law Enforcement Officials relating to MARPOL within the framework of the Barcelona Convention (MENELAS) is creating a cooperative network of officials entrusted with the enforcement of MARPOL (B).
- .3 The Regional Strategy for Prevention of and Response to Marine Pollution from Ships (2016-2021), hereinafter referred to as the Regional Strategy (2016-2021), which is presented in the Annex to document REMPEC/WG.42/INF.3, is clear: operational pollution should be reduced, specifically by means of cooperation between the Contracting Parties to the Barcelona Convention (C).

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<sup>18</sup> *Ibid.*, Art. 14.

<sup>19</sup> Protocol Concerning Co-operation in Combating Pollution of the Mediterranean Sea by Oil and other Harmful Substances in Cases of Emergency, known as the "1976 Emergency Protocol", adopted on 16 February 1976 and enacted on 12 February 1978.

<sup>20</sup> Protocol concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea, known as the "2002 Prevention and Emergency Protocol", adopted on 25 January 2002 and enacted on 17 March 2004.

<sup>21</sup> *Ibid.*, Art. 5.

<sup>22</sup> *Ibid.*, Art. 7.

<sup>23</sup> *Ibid.*, Art. 8.

#### A. The judicial framework fostered by MEDEXPOL 2007

38 Within the framework of the Regional Strategy for Prevention of and Response to Marine Pollution from Ships (2005-2015) adopted in 2005 by the Fourteenth Ordinary Meeting of the Contracting Parties to the Barcelona Convention and its Protocols, which was held in Portorož, Slovenia, from 8 to 11 November 2005, REMPEC organised a Regional Seminar on Illicit Discharges from Ships and Prosecution of Offenders (MEDEXPOL 2007), which was held in Marseille, France, from 27 to 30 November 2007, in order to discuss improvement of the level of enforcement and the prosecution of those responsible for illicit discharges. In addition to the aim of providing participants with precise information on the various technical and legal aspects of the issue of operational pollution from ships, the seminar offered the opportunity to promote cooperation between States in the Mediterranean region on aspects relating to monitoring, investigation and prosecution.

39 The first day of the seminar provided the opportunity to remind participants of the inherent dangers of operational pollution in the Mediterranean Sea. At this point, certain key areas for Mediterranean maritime traffic were identified as particularly sensitive to operational pollution. Thus, "bottlenecks" represented by the Strait of Gibraltar, the Turkish Straits and the Suez Canal are places where there are still concentrations of operational pollution. Nevertheless, what emerged from this first day was the idea that international targets for reducing operational pollution were not unachievable, in particular thanks to the cooperative route.

40 In addition to the necessary reminder of the powers of Contracting Parties to the Barcelona Convention in terms of preventing and combating operational pollution, the second day touched on the means for gathering evidence of offences. In this respect, there are currently various means of evidence. It may be meaningful to mention the importance of satellite images, specifically within the framework of CleanSeaNet, sampling and even the future Automatic Identification System (AIS).

41 The third day covered the prosecution of offenders and the role of magistrates. While it cannot be denied that close cooperation between the authorities entrusted with investigation and the judicial authorities is essential, the French system should be appreciated for these principles of the freedom of evidence and the judge's deep-seated conviction. In this respect, the detection report is deemed *prima facie* evidence until proved otherwise.

42 Finally, the fourth day provided a renewed sense of optimism as it tackled the key question of regional cooperation in relation to illicit pollution from ships. The seminar's participants concluded that they would move towards an agreement on common practices regarding the admissibility of evidence and the level of fines.

43 MEDEXPOL 2007 was a particularly important forum for combating operational pollution. It fostered increased cooperation between States. The establishment of new tools, such as those proposed by France in this document, meets the expectations set out by MEDEXPOL 2007.

#### B. The cooperative network of law enforcement officials relating to MARPOL: MENELAS

44 For the purpose of cooperation with a view to the effective application of international regulations relating to discharges at sea by ships, the MENELAS network was created in accordance with Article 6 of the Barcelona Convention and Article 3 of the 2002 Prevention and Emergency Protocol.

45 The MENELAS network has allowed best practice and knowledge relating to the Contracting Parties to the Barcelona Convention's efforts to combat illicit discharges at sea to be shared via, on the one hand, a digital platform comprising a public area and a restricted area, and on the other hand, the organisation of training and meetings. Thus, the meeting of the MENELAS network, which was held in Toulon, France, from 29 September to 1 October 2015, provided the opportunity to confirm that the majority of member countries were using the standard pollution accidents reporting format POLREP. This is evidence of the current positive approach adopted by the Contracting Parties to the Barcelona Convention.

46 It is within this context that France wishes to propose new cooperation tools enabling operational pollution from ships to be sustainably reduced. The idea of formalising a means of evidence that is common to all States, if it can first be tested within an experimental framework, should enable a strong message to be sent out, demonstrating the willingness of the Contracting Parties to the Barcelona Convention to cooperate on an innovative level.

C. The aim of cooperation with a view to reducing pollution set out in the Regional Strategy (2016-2021)

47 Among the general objectives formulated in the Regional Strategy (2016-2021), the prevention of pollution from ships and other maritime craft and structures is the primary goal. Thus, in the medium term, specific targets for prevention and control of the introduction of contaminants, oil discharges and spills, as well as prevention of the discharges of garbage into the sea are set out in the Regional Strategy (2016-2021).

48 While the reduction of operational pollution involves the provision of reception facilities in ports<sup>24</sup>, it is inevitably linked to an improved follow-up of pollution events as well as monitoring and surveillance of illicit discharges<sup>25</sup>. This improvement should be viewed in terms of sharing information and evidence in relation to operational pollution, in accordance with the objectives of the Regional Strategy (2016-2021).

49 Finally, the Regional Strategy (2016-2021) recognises the need to introduce new regional legal instruments to combat operational pollution.

50 The brief overview provided by this introduction to the challenges associated with operational pollution in the Mediterranean Sea as well as to the various international instruments and to the cooperative momentum generated at the regional level, has led France to propose two new judicial cooperation tools, which are designed to limit and reduce this form of pollution from ships.

**An innovative regional evidence system: a common detection report**

51 A single report, common to the Contracting Parties to the Barcelona Convention, would enable the tool for recording an offence to be streamlined and harmonised. Before developing the content of this harmonised report between the Contracting Parties to the Barcelona Convention and the procedures for recording offences of operational pollution (Section 2), it is appropriate to present the options for incorporating this tool into positive regional law (Section 1).

• **Section 1: A regionalised area, a means for facilitated cooperation**

52 The Mediterranean area is divided into areas, which are subject to different rights of jurisdiction and sovereign rights. There is therefore a need to distinguish between:

- .1 The high seas, which is a free space governed by Article 87 of the Montego Bay Convention.
- .2 The EEZ, which is governed by the rights of jurisdiction in relation to preservation of the marine environment, in accordance with Article 56 of the Montego Bay Convention.
- .3 Territorial waters, which are subject to the sovereignty of the coastal State, in accordance with Article 2 of the Montego Bay Convention, with a right of innocent passage, in accordance with Section 3 of Part II of the said Convention.

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<sup>24</sup> Regional Strategy for Prevention of and Response to Marine Pollution from Ships (2016-2021), presented in the Annex to document REMPEC/WG.42/INF.3, p. 16.

<sup>25</sup> *Ibid.*, p. 21.



53 These areas are subject to special rules in relation to pollution from ships under the terms of the Montego Bay Convention and MARPOL. Within the framework of the Bonn Agreement, a North Sea Manual on Maritime Oil Pollution Offences was published in January 2010. With great clarity, this manual covers the main regulations and powers of States as regards pollution from ships. Cedre has also undertaken this same work. **Appendix I** to the present document lists these developments, in order to present the main rights and powers of States in relation to the said areas.

54 A study of these provisions clearly reveals a partitioning of areas and options for the prosecution of offences. It has been said that operational pollution and, more broadly, marine pollution, does not recognise borders and the partitioning of areas. In a regionalised area, cooperation takes on a special meaning. The Mediterranean is no exception to this rule and the specific features of its "semi-enclosed" nature make it an area where cooperation is both essential and facilitated.

55 Scientific and technological advances enable higher objectives for cooperation to be set and this cooperation should not end at the simple rules developed in international instruments. The establishment of new collaborative tools is key to achieving a significant reduction in operational pollution.

56 Therefore, France is proposing the establishment of a new means of evidence for offences of operational pollution. This tool, which would be harmonised at the regional level, should take the form of a common report.

57 While the content of this report will be detailed in the second section, its aim and application procedures need to be clarified.

58 The aim is clear: to create a new means of evidence, enabling operational pollution from ships to be recorded.

59 The application methods need to be divided on the basis of the location of the offence and the State recording the offence. First and foremost, the Contracting Parties to the Barcelona Convention should accept a right of action in the waters under their jurisdiction. There is then a need for agreement on which areas can be covered by this right of action.

60 Intervention by a Contracting Party to the Barcelona Convention within the EEZ of another Contracting Party, in order to record an offence of operational pollution in the latter's waters, does not appear to pose any legal difficulties and should be viewed in relation to the spirit of international and regional instruments governing protection of the marine environment. The matter of recording an offence of operational pollution in the territorial waters of a Contracting Party to the Barcelona Convention by another Contracting Party may raise issues in terms of the right of innocent passage. Nevertheless, under the terms of Article 21 of the Montego Bay Convention, this right of passage may be regulated for the purpose of protecting and preserving the environment.

61 There is therefore a need to distinguish between a number of different situations:

- .1 An operational pollution occurs within the EEZ or the territorial waters of a Contracting Party to the Barcelona Convention and is detected by this same Party.
  - The offence is recorded by the said Party's authorised officials in the form of a common report.
  - The offence is then tried in accordance with the law applicable by this Party.
  - The same Party takes charge of collecting the fine.
- .2 An operational pollution occurs within the EEZ or territorial waters of a Contracting Party to the Barcelona Convention and is detected by another Contracting Party to the said Convention.
  - The offence is recorded by the latter's authorised officials in the form of a common report.
  - Where the offence is committed in the territorial waters of the Contracting Party to the Barcelona Convention, the relevant authorities forward the common report to the coastal State.
    - The offence is then tried in accordance with the law applicable by the coastal State.

- The same State takes charge of collecting the fine.
  - Where the offence is committed in the EEZ of a Contracting Party to the Barcelona Convention, the relevant authorities forward the common report directly to the flag State, and inform the coastal State of pollution in its waters.
    - The offence is then tried in accordance with the law applicable by the flag State where the latter assumes jurisdiction for the offence. Or otherwise, it is tried in accordance with the law applicable by the coastal State if the flag State does not institute proceedings in accordance with Article 228 of the Montego Bay Convention.
    - The same State takes charge of collecting the fine.
  - What about a lack of action by a Contracting Party to the Barcelona Convention which has been informed of pollution within its territory or by one of its vessels?
    - Jurisdictional cooperation between the Contracting Parties to the Barcelona Convention could be developed in order to guarantee the effective imposition of penalties.
    - In this case, the vessel that committed an offence will be tried by the Contracting Party to the Barcelona Convention, which identified and signed the detection report in accordance with the law applicable by the Contracting Party to the Barcelona Convention for the location of the pollution.
    - The amount of the fine is transmitted to the flag State, which takes charge of collecting it.
- .3 An operational pollution occurs within the high seas.
- The offence is recorded by the authorised officials of the Contracting Parties to the Barcelona Convention in the form of a common report.
  - The relevant authorities forward the report to the flag State.
  - Should there be a lack of action, the vessel that committed an offence will be tried by the Contracting Party to the Barcelona Convention, which identified and signed the detection report, in accordance with the law applicable by the flag State.
  - The amount of the fine is transmitted to the flag State, which takes charge of collecting it.

62 These situations result in a number of developments, which need to be examined at the regional level.

- .1 The establishment of a jurisdictional and judicial cooperation agreement between the Contracting Parties to the Barcelona Convention. Jurisdictional cooperation should allow authorised officials to produce a report in the waters of the Contracting Parties to the Barcelona Convention by means of a system of authorisations. Judicial cooperation should enable offence files to be transmitted, but should also provide the opportunity, in the event of lack of action, to take responsibility for prosecution. At a time when the marine environment is viewed as a single and global entity, jurisdictional and judicial cooperation should be encouraged.
- .2 The establishment, specifically by means of the MENELAS network, of a compendium containing the various pieces of national legislation relating to operational pollution from ships, intended for the judicial bodies of the Contracting Parties to the Barcelona Convention. This compendium should, thereby, facilitate prosecutions for operational pollution.
- .3 Harmonised training of officials authorised to produce reports, in order to guarantee a good understanding of the reporting mechanism and the regional aspects of the identification of operational pollution.

- **Section 2: A common report with harmonised content**

63 Certain details should appear in the report, in order to clearly identify operational pollution from a ship and to provide conclusive evidence.

64 There are several existing regional pollution report templates: the "Standard pollution observation / detection log" from the Bonn Agreement (**Appendix II** to the present document) or the "Pollution observation/detection report on polluters and combatable spills" from the Convention on the Protection of the Marine Environment of the Baltic Sea Area, known as the "Helsinki Convention".

65 To draw up the basic lines of the common report, which could be put in place within the Mediterranean region, the "marine pollution detection report" used in France could provide a robust basis for consideration (**Appendix III** to the present document). A specific example of the marine pollution detection report is presented in the Annex to document REMPEC/WG.42/INF.7.

66 Thus, certain details should appear in the structure of the common report:

- .1 Identification of the reporting official (name, level/grade, position, governing body/department, ship/aircraft name, port/official base),
- .2 Characteristics of the ship(s) suspected of having committed the offence (name of the ship, flag and port of registration, type of ship, draught, heading, approximate speed, date, time, position of the ship, reasons for suspecting the ship, position of the spill in relation to the ship, section of the ship from where the discharge appears to originate, whether the discharge has ceased or not),
- .3 Characteristics of the spill (date, time, position [start/end], distance, overall dimensions, description, appearance of the spill),
- .4 Conditions within the area (sky conditions, sea state, surface wind, direction and speed of currents),
- .5 Identification of the observer or observers (name of the observer, organisation to which he/she reports, position within the organisation, name or identity of the ship or aircraft from which the observation was made, exact position of the ship [specifically the azimuth] or position on the coast from where the observation was made, activity in which the observer was engaged when the observation was made),
- .6 Observation method and document (visual observation/photograph/telephotography/telerecording/sample collected/other types of observation),
- .7 Other information if it has been possible to establish radio communication (information from the captain on the pollution, explanations provided by the captain, last port of call, next port of call, name and nationality of the captain, the ship owner, the Chief Engineer and the deck officer, the ship's call sign), and
- .8 Reporting formalities (information on the article of the law criminalising the behaviour).

### **Creation of a "Blue Fund": a common monetary fund for improving the tools for protection of the marine environment**

67 The creation of a monetary fund, partially financed by regional levies for operational pollution, has two benefits.

68 A financial benefit: in keeping with the "polluter pays" principle, with the costs of remedying damage caused by pollution from ships being borne by the latter. The creation of a "Blue Fund" would enable the financial resources derived by the Contracting Parties to the Barcelona Convention by means of their fight against operational pollution to be pooled. The fund could be specifically used to develop tools and protective measures for the poorer Mediterranean countries.

69 The benefit would also be preventive, as the creation of this kind of fund would have a deterrent effect for offenders. The creation of a "Blue Fund" would demonstrate the willingness of the Contracting Parties to the Barcelona Convention to sustainably combat operational pollution from ships. As the financial penalties are high, the instrument would have a significant deterrent effect.

70 The French proposal reflects the willingness to demonstrate the importance of cooperation between States in relation to operational pollution, in order to effectively combat the latter. New scientific knowledge, new discharge methods, the increasing difficulty in identifying offences, the lack of action by certain States or prosecution issues encountered by some, are the main reasons for France to introduce this common means of evidence for all the Contracting Parties to the Barcelona Convention.

#### **Actions requested by the Meeting**

71 **The Meeting is invited to:**

- .1 **take note** of the information provided in this document; and
- .2 **consider** the proposals put forward from paragraph 50 onwards of the present document.

**APPENDIX I**

**The main rights and powers of States based on areas subject to special rules in terms of  
pollution from ships**



<b><i>Flag State/Vessel's State = The vessel's country of registration</i></b>		
<b>Areas of offences</b>	<b>International conventions</b>	<b>Description</b>
Territorial waters of the coastal State	Art 4 MARPOL Art 228 UNCLOS	The flag State is obliged to institute proceedings if it receives a request to this effect from a coastal State. This does not suspend proceedings instituted by the coastal State.
High seas, EEZ, territorial waters, internal waters of the flag State	Art 6 MARPOL	The flag State may ask a port State to conduct an inspection.
	Art 4 MARPOL Art 217 UNCLOS	If the flag State is informed of a violation of regulations governing discharges or any other provision of MARPOL and it is certain that the evidence in its possession is sufficient to institute proceedings, it is obliged to institute these as quickly as possible under the conditions provided for in its own legislation. The flag State promptly informs the party that reported the alleged offence, as well as the International Maritime Organization (IMO), of the measures taken.
	Art 218 UNCLOS	A flag State may ask a port State to institute proceedings in the event that the offence took place in the area of jurisdiction of a coastal State.
	Art 228 UNCLOS	A flag State can normally suspend proceedings instituted by a State for a violation of MARPOL beyond the limits of its territorial waters, if it institutes proceedings within a period of six months from the date on which the proceedings were instituted in the first instance.
	Art 231 UNCLOS	States shall promptly notify the flag State and, any other State involved, of all measures taken against foreign vessels, and provide the flag State with the official reports relating to these measures.

<b><i>Port State = Country in whose port the vessel is berthed</i></b>		
<b>Areas of offences</b>	<b>International conventions</b>	<b>Description</b>
Territorial waters and EEZ		If the offence is committed in the territorial waters or EEZ of the port State, the port State acts as the coastal State. If it was committed in the territorial waters or EEZ of another State, the port State acts on the request of the coastal State, within the limits of international conventions (see below High seas, art 218 UNCLOS).
High seas	Art 5 & 6 MARPOL Art 219 UNCLOS	A port State can apply to take administrative measures preventing a vessel located in one of its ports, or at one of its offshore terminals, from returning to sea if it is in breach of the international rules and standards relating to its seaworthiness and, as a result, there is a danger of it harming the marine environment. As an inspection may result in temporary detention of the vessel, its report can be forwarded to any requesting State. For vessels not party to the UNCLOS, a port State applies the provisions of MARPOL.
	Art 4 MARPOL Art 218 UNCLOS	A port State can institute proceedings where the offence, committed in the internal waters, territorial waters or EEZ of another State, has polluted or is likely to pollute its own internal waters, territorial waters or EEZ and can report this to the flag State.
	Art 218 UNCLOS	In the event that a criminal discharge takes place in the area of jurisdiction of another coastal State, the port State institutes and/or suspends proceedings: <ul style="list-style-type: none"> <li>- on the request of the said coastal State,</li> <li>- on the request of the flag State (whatever the location of the offence),</li> <li>- on the request of another State affected or endangered by the offence,</li> <li>- if the offence has caused or risks causing pollution in its own territorial waters or EEZ.</li> </ul>
	Art 228 UNCLOS	Proceedings instituted by the port State are suspended if the flag State in turn institutes proceedings (with certain exceptions) within six months.



<b>Coastal State</b>		
<b>Areas of offences</b>	<b>International conventions</b>	<b>Description</b>
EEZ, territorial waters of the coastal State	Art 6 MARPOL	The coastal State can request an inspection by the port State (administrative investigation).
	Art 211 UNCLOS	Where a vessel is willingly inside a port or at an offshore terminal of a coastal State, the latter can institute proceedings for any breach of its laws and regulations, as adopted in application of MARPOL and UNCLOS, where the offence has been committed in its territorial waters or EEZ.
	Art 220 UNCLOS	Where a vessel suspected of pollution is navigating in the EEZ or territorial sea, the coastal State can, depending on the circumstances, question it or conduct an in-depth inspection, which may result in the institution of proceedings, including detention of the vessel.
	Art 228 UNCLOS	Proceedings instituted by the coastal State are suspended if the flag State in turn institutes proceedings (with certain exceptions) within six months.
High seas	Art 4 MARPOL	All offences occurring within the jurisdiction of a coastal State, which is party to MARPOL, constitute an offence under the legislation of the said coastal State – whether the vessel is flying the flag of a party or not - in this case, the offence is punishable in accordance with MARPOL. A coastal State can ask a country exercising control of the port State to conduct an inspection. A coastal State can institute proceedings in accordance with its own legislation for any offence that has occurred within its area of jurisdiction and report this to the flag State.
	Art 111 UNCLOS	Under certain conditions, the coastal State can pursue a foreign vessel in the event of a breach of its laws and regulations, which is committed in the waters under its jurisdiction, including within its EEZ. This right ceases to apply once the vessel being pursued enters its own territorial waters or those of a third country, but this does not rule out the possibility of cooperation between countries.
	Art 218 UNCLOS (mutual assistance in legal and criminal cases)	If the coastal State decides to institute proceedings, it can ask the port State to provide it with legal assistance (letters rogatory, judicial inquiry), or to institute proceedings itself.
	Art 220 UNCLOS	Where a vessel suspected of pollution is navigating in its territorial waters, the coastal State can conduct a physical inspection, which may result in the institution of proceedings, including detention of the vessel.
	Art 226 UNCLOS	In the event of serious pollution, the coastal State can "immediately" conduct an in-depth inspection of the suspected vessel, or even institute proceedings, including by detaining the vessel. The scope of measures that can be taken in this way at sea by a coastal State depends on the evidence in its possession, the seriousness of the offence and the extent of the (possible) harm to the marine environment. Certain governments are currently developing objective criteria for defining these situations.



**APPENDIX II**

**"Standard pollution observation / detection log" within the framework of the Bonn Agreement**



HELCOM  BONN AGREEMENT **STANDARD POLLUTION OBSERVATION / DETECTION LOG**  NO POLLUTION DETECTED

REPORTING AUTHORITY	AIRCRAFT REG	MISSION No	CAPTAIN	CO PILOT	OPERATOR	OBSERVER	DAY	DATE	MONT H	YEAR

FLIGHT TYPE	ROUTE / AREA				TIME OVER THE SEA DAY		TIME OVER THE SEA NIGHT		TOTAL TIME OVER THE SEA	
					hrs	mins	hrs	mins	hrs	mins

No	AREA CODE	TIME UTC	POSITION		DIMENSIONS		AREA COVER %	OILED AREA Km <sup>2</sup>	OIL APPEARANCE COVERAGE (PERCENTAGE - %)						MINIMUM VOLUME m <sup>3</sup>	MAXIMUM VOLUME m <sup>3</sup>	COMBAT Y / N
			LATITUDE 'NORTH'	LONGITUDE 'EAST/WEST'	LENGTH Km	WIDTH Km			1	2	3	4	5	Oth			

No	POLL TYPE	DETECTION						PHOTO	VIDEO	FLIR	WEATHER					REMARKS	
		SLAR	IR	UV	VIS	MW	LF	Y / N	Y / N	Y / N	WIND	CLOUD	VIS	SEA	Wx		
											°			FT			
											°			FT			
											°			FT			

No	REMARKS	OIL APPEARANCE TABLE			
		No	OIL APPEARANCE DESCRIPTION	MINIMUM VOLUME m <sup>3</sup> / km <sup>2</sup>	MAXIMUM VOLUME m <sup>3</sup> / km <sup>2</sup>
		1	SHEEN	0.04	0.30
		2	RAINBOW	0.30	5.00
		3	METALLIC	5.00	50.0
		4	DISCONTINUOUS TRUE COLOUR	50.0	200
		5	TRUE COLOUR	200	>200



**APPENDIX III**

**Marine pollution detection report**





MARINE POLLUTION DETECTION REPORT

BY DISCHARGE	- OF OIL	<input type="checkbox"/>
	- OF NOXIOUS LIQUID SUBSTANCES	<input type="checkbox"/>
	- OF GARBAGE	<input type="checkbox"/>

**1. - IDENTIFICATION OF THE AUTHORISED REPORTING OFFICIAL** (articles L 218-26 and L 218-27 of Environmental Code)

- 1.1. Name, grade/level, position:
- 1.2. Governing body/department or organisation:
- 1.3. Ship name / aircraft call sign:
- 1.4. Official port or base:

**2. - CHARACTERISTICS OF THE SHIP(S) SUSPECTED OF HAVING COMMITTED THE OFFENCE:**

- 2.1. Name of the ship:
- 2.2. Reasons for suspecting the ship:

2.3. Date: \_\_\_\_\_ Time (UTC): \_\_\_\_\_  
2.4. Position of the ship: Latitude \_\_\_\_\_ N Longitude: \_\_\_\_\_ W  
2.5. Flag and port of registration.

2.6. Type of ship: TANKER  CARGO  FISHING  PASSENGERS

Colour of the ship: \_\_\_\_\_ hull: \_\_\_\_\_ superstructure: \_\_\_\_\_

Estimated tonnage: \_\_\_\_\_ TONNES

Markings on the funnel(s):  
2.7. Draught: \_\_\_\_\_ (loaded or in ballast)

2.8. Heading: \_\_\_\_\_ degrees approximate speed: \_\_\_\_\_ knots

2.9. Position of the pollution in relation to the ship (for example, astern, to port, to starboard):

2.10 Section of the ship from where the discharge appears to originate:

2.11 Did the discharge cease when the ship was observed or contacted by radio?

YES  NO

**3 - CHARACTERISTICS OF THE POLLUTION:**

3.1 Observations:

DATE: \_\_\_\_\_ TIME (UTC): \_\_\_\_\_  
(if this differs from the date and time stated in 2.3.)

3.2 Position of the pollution:      **Longitude:**      N      **Latitude:**      W

Other possible pollution:      **Longitude:**      N      **Latitude:**      W (if  
this differs from the position stated in 2.4.)

3.3 Approximate distance to the nearest sea mark: \_\_\_\_\_ (in nautical miles/km).

3.4 Overall dimensions of the pollution:

**Length:**      **km - Width:**      **km - Area:**      **km<sup>2</sup> (LxW)**

3.5 Description of the pollution:

FORM: CONTINUOUS  PATCHES  STREAKS  COVERAGE LEVEL \_\_\_\_\_ %  
Estimated polluted area: \_\_\_\_\_ (area in km<sup>2</sup> x % of coverage) Direction:

Direction of other possible pollution:

3.6 Appearance of the pollution (Bonn Agreement Appearance Code) and minimum quantity of oil estimated in the ship's wake by category:

CATEGORY 1 - SHEEN: \_\_\_\_\_ % - \_\_\_\_\_ m<sup>3</sup> (polluted area x % x 0.04)

CATEGORY 2 - RAINBOW: \_\_\_\_\_ % - \_\_\_\_\_ m<sup>3</sup> (polluted area x % x 0.3)

CATEGORY 3 - METALLIC: \_\_\_\_\_ % - \_\_\_\_\_ m<sup>3</sup> (polluted area x % x 5)

CATEGORY 4 - DISCONTINUOUS TRUE OIL COLOUR: \_\_\_\_\_ % - \_\_\_\_\_ m<sup>3</sup>  
(polluted area x % x 50)

CATEGORY 5 - CONTINUOUS TRUE OIL COLOUR: \_\_\_\_\_ % - \_\_\_\_\_ m<sup>3</sup>  
(polluted area x % x 200)

**4. - CONDITIONS WITHIN THE AREA:**

4.1. Sky conditions: Light and visibility: (km) at the time of the observation

4.2. Sea state:

4.3. Surface wind: direction: speed: knots

4.4. Direction and speed of currents:

**5. - IDENTIFICATION OF THE OBSERVER OR OBSERVERS:**

5.1. Name of the observer:

5.2. Organisation to which he/she reports (where applicable):

5.3. Position within the organisation:

5.4. Observation from a ship, aircraft, the coast, other location:

5.5. Name or identity of the ship or aircraft from which the observation was made:

5.6. Exact position of the ship:

Position on the coast or of any other location from where the observation was made:

5.7. Activity in which the observer was engaged when the observation was made, for example, on patrol, travelling (flight from .. to ...) etc.

**6. - OBSERVATION METHOD AND DOCUMENT:**

6.1. Visual observation

6.2. Photographs on film

Number of photos (enclosed with the report):

6.3. Digital photographs

Number of photos (enclosed with the report):

6.4. Telephotography  Telerecording

6.5 Sample collected from the pollution and on board

6.6 Other types of observation:

**7. - OTHER INFORMATION. IF IT HAS BEEN POSSIBLE TO ESTABLISH RADIO COMMUNICATION:**

7.1. Information from the captain on the pollution:

7.2. Explanation provided by the captain:

7.3. The ship's last port of call:

7.4. The ship's next port of call:

7.5. Name and nationality of the captain:      Name of the ship's owner:

Name and nationality of the chief engineer: Name and nationality of the deck officer:

7.6. The ship's call sign

**8. - REPORTING FORMALITIES:**

These actions may constitute a violation of the provisions of:

- the London International Convention of 2 November 1973 for the Prevention of Pollution from Ships, modified by the Protocol of 17 February 1978,
- articles L 218-10 to L 218-31 of Environmental Code.

***Drawn up on board the***

Signature