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to the Convention for the Protection of the
Mediterranean Sea against Pollution and its
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Review Meeting of Mediterranean Coastal States
on the Action Plan

Cannes, 2-7 March 1981

GEOGRAPHICAL COVERAGE OF THE DRAFT PROTOCOL RELATING TO
THE MEDITERRANEAN SPECIALLY PROTECTED AREAS

Study by a group of legal experts designated by UNEP



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I. TERMS OF REFERENCE

1. The Intergovernmental Meeting on Mediterranean Specially Protected Areas, held in Athens from 13 to 17 October 1980, recommended that the UNEP secretariat should undertake a legal study in order "to determine whether such coverage corresponds in every respect to that of the Barcelona Convention and, if not, whether special procedures should be introduced in order to bring about the adoption of the protocol."
2. In response to UNEP's request the group of legal experts listed in the annex, who met in Geneva on 4 and 5 December 1980, submits the observations set forth in the present document. 1/

II. QUESTIONS ARISING

3. A reading of the terms of reference prompts questions concerning:
 - (i) the compatibility of article 2 of the draft protocol with the geographical coverage laid down in the basic Convention;
 - (ii) the procedures that might be introduced for the adoption of a protocol the geographical coverage of which is incompatible with that of the basic Convention.

III. RELEVANT TEXTS

4. The text establishing the geographical coverage of the Convention for the Protection of the Mediterranean Sea against Pollution and its protocols is the first article of that Convention, which states:

- (Article 1) "1. For the purposes of this Convention, the Mediterranean Sea Area shall mean the maritime waters of the Mediterranean Sea proper, including its gulfs and seas, bounded to the west ...
- "2. Except as may be otherwise provided in any protocol to this Convention the Mediterranean Sea Area shall not include internal waters of the Contracting Parties."

Thus it seems that the internal waters of Contracting Parties are excluded from the normal geographical coverage of the Convention in the absence of agreement to the contrary by the parties to a specific protocol.

1/ These observations were formulated by the experts in their personal capacity and are therefore no indication of the positions their respective authorities may take.

5. The draft protocol concerning Mediterranean specially protected areas provides:

(Article 2) "The area to which this Protocol applies shall be the Mediterranean Sea Area as defined in article 1 of the Convention for the Protection of the Mediterranean Sea against Pollution (hereinafter referred to as "the Convention"); it being understood that, for the purposes of the present Protocol it also includes areas on the landward side of the baselines from which the breadth of the territorial sea is measured, including wetlands and coastal areas and estuaries subject to the influence of the marine environment."

6. The draft protocol thus raises the problem of the extension of the coverage laid down in the Convention to areas on the landward side of the baselines from which the breadth of the territorial sea is measured. An extension of the coverage is not prohibited by the main Convention; on the contrary, for article 1, paragraph 2, quoted above, provides for that possibility. Furthermore, such an extension appears in the Protocol for the protection of the Mediterranean Sea against pollution from land-based sources.

7. Article 3 of that protocol in fact provides that the area to which it applies shall include, in addition to the Mediterranean Sea Area as defined in article 1 of the Convention,

(Article 3) (i) "waters on the landward side of the baselines from which the breadth of the territorial sea is measured and extending, in the case of watercourses, up to the freshwater limit;"

(ii) "saltwater marshes communicating with the sea."

8. Hence the extension contemplated in the draft protocol (article 2) should be examined from the point of view of the terms of the main Convention (article 1, paragraph 2) and of its possible significance in the light of the Protocol concerning protection against pollution from land-based sources (article 3, paragraphs (b) and (c)).

IV. COMPATIBILITY OF ARTICLE 2 OF THE DRAFT PROTOCOL WITH THE BASIC CONVENTION

9. The fundamental purpose of this question is to examine the contribution of article 2 of the draft protocol to the concept of internal waters, which includes certain generally accepted elements (ports, bays, roadsteads etc.) and also other elements which may be accepted, by express agreement between States. But the difficulties of reaching a common interpretation of internal waters sometimes leads States to seek a formulation which clarifies or develops their ideas. Thus, article 3 of the Protocol for the Protection of the Mediterranean Sea against pollution from land-based sources states that it applies to "waters on the landward side of the baselines", a term already employed in the 1974 Paris Convention on the same subject. The same desire to reach a common understanding on the concept of internal waters or at least the common consent of the contracting Parties also made it possible to include "saltwater marshes communicating with the sea" and "watercourses up to the freshwater limit".

10. What we have, then, is an extension of the coverage laid down in the basic Convention to include sea or salt water through an agreed interpretation by the Parties of the concept of "internal waters".

11. In order to achieve the purposes which the draft protocol was designed to meet, it was deemed necessary, by analogy with the formulation used in the protocol concerning protection against land-based pollution, to include "wetlands and coastal areas and estuaries subject to the influence of the marine environment".

12. As a first step and for the purposes of analysis, a distinction must be drawn between estuaries and wetlands and coastal areas:

- (i) With regard to estuaries, their inclusion in the manner employed in the protocol concerning land-based pollution (a combination of articles 3 (b) and 2 (c)) with respect to watercourses and the salt water limit, does not call for any special comment;
- (ii) In the case of wetlands and coastal areas, the problem is different. It is more complex, since these terms have not yet been defined in the draft protocol owing to the lack of a generally accepted international definition. Up to now, it seems, these concepts have been within the realm of municipal law and hence liable to vary from State to State. In any event the basic Convention, which aims at the protection of the "maritime waters", would appear to exclude wetlands and "coastal areas", which could include land areas. Such areas should nevertheless be included under a common concept stemming from the idea of "internal waters", which would appear to exclude both areas that are purely land areas and areas of fresh water. Consequently, the inclusion of wetlands and coastal areas, if these are to be interpreted on a national basis, appears to be a source of real difficulty in the context of a general approach such as that formulated in the draft. Hence, it seems difficult to reconcile the draft protocol in this respect with article 1 of the basic Convention.

V. POSSIBLE SOLUTIONS

13. In order to resolve the difficulties arising from the inclusion of "wetlands and coastal areas" in the draft protocol, one of several possible solutions might be adopted:

- (i) Extension of the geographical coverage of the basic Convention in the manner provided for in article 16 of the Convention;
- (ii) Adoption of a convention separate from the basic Convention but open to the same parties and perhaps linked with certain provisions of the basic Convention (institutional and procedural machinery);
- (iii) Maintenance of the draft as a protocol to the basic Convention but inclusion of the reference to wetlands and coastal areas in a specific optional provision; this solution, which might be the most practicable, would, moreover, make it possible to use the expression employed in the protocol concerning protection against land-based pollution ("waters" - rather than areas - on the landward side of the baselines).

Whatever the solution adopted, however, it would be advisable to clarify the concept of "coverage" from the point of view of the purposes of the protocol, namely, the designation of specially protected areas, and the present wording should therefore be reviewed.

14. To meet the requirements of paragraph (iii), the following wording might be considered:

"For the purposes of the designation of specially protected areas, the area to which this Protocol applies shall be the Mediterranean Sea Area [.....]; it being understood that, for the purposes of the present Protocol, it also includes waters on the landward side of the baselines from which the breadth of the territorial sea is measured and extending, in the case of watercourses, up to the freshwater limit. It may also include wetlands or coastal areas designated by each of the Parties".

ANNEX

List of members of the group of experts

- Mr. Marcel SURBIGUET (France) - Chairman
- Mr. René-Christian BERAUD (EEC)
- Mr. Farouk LADJIMI (Tunisia)
- Mr. Mahand LADJOUZI (Algeria)
- Mr. Abdelkader LAHLOU (Morocco)