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# THE INTERNATIONAL MARINE PARK OF THE MOUTHS OF BONIFACIO

## RELEVANT PERSPECTIVES IN INTERNATIONAL LAW



IUCN Global Marine Programme  
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## ABSTRACT

The paper presents a case study regarding the on-going process of establishment of the International Marine Park of the Mouths of Bonifacio between France and Italy from its genesis in 1992 up to the present and explores the way forward.

It focuses on the legal questions related to the establishment of a marine protected area as a mean to protect a vulnerable marine ecosystem in an international strait. Legal tools available at the regional and international level are quite recent and insufficient. Stronger political support and adequate legislative reform is required.

The International Marine Park (IMP) of the Mouths of Bonifacio is located in the Mediterranean Sea covers about 80 000 km<sup>2</sup> of French southern part of Corsica and Italian northern part of Sardinia as well as the international strait of the Mouths of Bonifacio. The area enjoys exceptional ecological features which, as all States bear a general obligation to protect and preserve the marine environment, should be preserved.

The Mouths is also a “*strait used for international navigation*” under the United Nations Convention for the Law of the Sea signed in Montego Bay on December 10, 1982. The bordering States have been actively cooperating since 10 years to prevent maritime pollution and organise maritime traffic in this particularly sensitive area. In 2002, about 3800 ships used the strait.

However, to be effective the IMP requires international recognition in order to be applicable to other States. Existing structures and current legal frameworks of regional cooperation such as the Barcelona system in the Mediterranean shows the gaps that need to be addressed. National legislative initiatives to extend national jurisdiction beyond the traditional 12 n.m. should be promoted and coordinated at the regional level. The Barcelona system (including the SPAMI tool) should be promoted and strengthened as a regional coordinating platform, thus supporting the implementation of the Protocol on Specially Protected Areas and Biodiversity in the Mediterranean (1995) and its SPAMI list.

The International Maritime Organisation (IMO) in charge of organising maritime navigation has traditionally interpreted the principle of freedom of navigation quite strictly, suggesting that few limitations were admitted. However, looking at recent developments, we can see that the general obligation borne by States to protect and preserve the marine environment is increasingly taken into account. The IMO faces a significant challenge to combine the principle of freedom of navigation with that of protection of the environment.

## RESUME

Cette étude de cas présente le processus d'établissement du parc marin international des Bouches de Bonifacio entre la France et l'Italie de sa genèse en 1992 jusqu'à aujourd'hui et propose quelques perspectives destinées à appuyer la création et l'effectivité du parc.

Cette étude se concentre sur les questions juridiques liées à l'établissement d'une aire marine protégée comme outil permettant de protéger un écosystème marin vulnérable dans un détroit international. Les outils juridiques disponibles au niveau régional et international sont récents et insuffisants. Un appui politique fort ainsi que des réformes législatives sont nécessaires. Le parc marin international (PMI) des Bouches de Bonifacio couvre une surface d'environ 80 000 km<sup>2</sup> à cheval entre la partie méridionale de la Corse (France) et la partie nord de la Sardaigne (Italie) ainsi que le détroit international des Bouches de Bonifacio. Le Parc bénéficie d'atouts écologiques exceptionnels, atouts qui, vu l'obligation générale pesant sur les Etats de protéger et préserver l'environnement marin, doivent être protégés.

Les Bouches forment aussi un « détroit international » qui sert conformément à la Convention des Nations Unies sur le droit de la mer signée à Montego Bay le 10 décembre 1982 à la navigation internationale. Les deux Etats frontaliers ont depuis dix ans activement coopéré pour empêcher la pollution maritime et organiser le trafic maritime dans ce secteur particulièrement sensible. En 2002, 3 800 bateaux ont transité dans le détroit.

Cependant, pour être complètement efficace, le régime de protection du PMI doit être reconnu internationalement et applicable aux autres Etats. Les structures et cadres juridiques existants organisant la coopération régionale tels que le système de Barcelone montrent les lacunes qui doivent être comblées. Les initiatives récentes de législatives nationales étendant la zone maritime sous juridiction nationale au delà des 12 n.m. traditionnels devraient être favorisées et coordonnées au niveau régional. Le système de Barcelone (y compris l'outil de l'Aire Spécialement Protégée d'Importance Méditerranéenne ASPIM) devrait être favorisé et renforcé comme plateforme pour la coopération régionale, appuyant ainsi la mise en oeuvre du Protocole relatif aux aires spécialement protégées et à la biodiversité en Méditerranée (1995) et la mise en place d'un réseau représentatif d'aires protégées Méditerranéennes par la liste ASPIM.

L'Organisation Maritime Internationale (OMI) responsable d'organiser la navigation maritime a traditionnellement interprété le principe de la liberté de navigation de manière large (comme le montre cette présente étude de cas), suggérant que peu de limitations sur cette liberté soient possibles. En refusant d'appliquer un régime obligatoire lève effectivité des interdictions. Cependant, les développements récents présentés dans cette étude montrent que les Etats s'engagent de plus en plus pour protéger et préserver l'environnement marin et que cela témoigne d'une évolution. L'OMI, qui doit combiner le principe de protection de l'environnement avec la liberté de navigation doit faire face à un véritable défi.

## **PREFACE**

The challenge of managing and protecting the marine environment has increasingly been raised to the top of the international agenda as the recognition that the high seas are no longer a kind of last frontier where human activities are undertaken at our peril, but rather part of our own back yard where over exploitation of resources, or major pollution incidents can directly impact communities and countries.

Nowhere is this truer than in the semi-enclosed Mediterranean Sea where few international frontiers have been negotiated between neighbouring states, and most countries have only declared their national interests within the 12 mile zone. If all States were to agree an EEZ of 200 miles, very little of the Mediterranean would still be considered “high seas”, yet at present the Sea is one of the busiest navigation routes in the world, carrying x % of global shipping. At the same time it is home to a rich biodiversity, with significant levels of endemism, as well as emblematic species such as whales, dolphins monk seals and turtles.

Recent major pollution incidents from oil tankers (Erika, Prestige...) have led States in the north of the region to increasingly consider protecting their coasts from future incidents of this type, while global processes, such as the World Summit on Sustainable development (2002) have called on States to implement a representative network of marine protected areas by 2012.

Reconciling navigation, the law of the sea, and the management or protection of shared resources beyond national jurisdiction is a delicate balancing act. This case study seeks to illustrate how France and Italy have collaborated to establish norms and principles using existing international conventions, to regulate and reduce shipping traffic in sensitive areas, while still allowing free circulation of vessels in an international straight.

Jamie Skinner  
Director  
IUCN Centre for Mediterranean Cooperation

# **THE INTERNATIONAL MARINE PARK OF THE MOUTHS OF BONIFACIO: RELEVANT PERSPECTIVES IN INTERNATIONAL LAW<sup>1</sup>**

## **INTRODUCTION**

### **The International Marine Park (IMP)**

The legal structure underlying the establishment of a protected area covering the Mouths of Bonifacio dates back to 1986. On November 28, France and Italy concluded an agreement on the delimitation of their maritime borders in the Mouths. It is only a few years later, on October 31, 1992, that the French and Italian Ministers for the environment agreed on the idea of creating a marine protected area in this zone.

The same year (May 21, 1992), the European Commission decided, on proposal of the two governments and local and regional authorities concerned, to take part in the creation and the financing of an International Marine Park within the framework of European program INTERREG. Many studies and actions were undertaken.

Two distinct structures (one French one Italian) were created. It was intended that these two structures would eventually link up and coordinate their actions into the "International Marine Park" (IMP). In the French side, an agreement between the central Government and the territorial authority of Corsica designated the Office of the Environment of Corsica (OEC) to manage the project and the Natural Reserve of the Mouths of Bonifacio was thus created by a decree of September 23, 1999. For the Italian part, a National park was born in 1994 around the Archipelago of Maddalena and the minor islands (Mortorio, Nibani and Bisco), under the initiative of the Italian State and the autonomous Area of Sardinia.

The surface of the French natural reserve covers an area of about 80.000 hectares, from the cap of Chiappa to the cap of the Monks. The Lavezzi Island is also part of the Reserve and enjoys a higher standard of protection. This rocky archipelago not far from Bonifacio offers to the visitor the incredible spectacle of mineral landscape (granitic chaos), and birds biodiversity (Blue Rock, Shag, Yellow Lagged Gull, Cory's), a refuge of rare quality. The flora is rich of rare plants, sometimes endemic. There are about 1.600 hectares under no extracting zone status where no type of hunting or fishing is authorized. Some fishing activities are still authorised as well as some forms of commercial fishing exercised within the framework of the regulation defined by the local fishing authority (prud'homie) of Bonifacio. As for maritime navigation, anchoring remains authorized but can be subject to a specific regulation by the Préfet Maritime.

[Comparable data being obtained regarding the national park covering the archipelago of La Maddalena]

Together, these areas comprise the IMP and are addressed by an IMP project aimed at preserving the richness of the natural and cultural heritage but also controlling human environment-related activities. The IMP enjoys the support of INTERREG III

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<sup>1</sup> This document has been prepared by lead author Claudiane Chevalier (IUCN Centre for Mediterranean Cooperation) supported by the Mediterranean Marine Law Specialist Group.

but also other EU Programmes such as Life program, launched within the framework of the Habitat directive on the protection of the species of fauna and the flora.

As originally envisioned, management of the area is becoming increasingly coordinated. However, making the IMP effective is still the challenge ahead.

A Franco-Italian Steering committee, composed of the principal representatives of the Parties concerned, now heads this structure of transboundary co-operation. This committee has already defined and acknowledged the main competence that will be entrusted to the structure of the international coordination:

- Development of management action and protection of the natural heritage
- Scientific follow-up
- raising awareness of the public and communication.

The strait is renowned for its dangerous reefs and heavy winds. The September 1996 accident of the *Fenès*, a cargo liner flying Panamanian flag, which occurred in the heart of the IMP, relaunched the debate on the freedom of navigation and prevention of pollution in the Mouths of Bonifacio. The release of the liner's cargo near the Lavezzi islands (2.600 tons cereals) seriously threatened the underwater flora, and more particularly the sea grass bed that is a refuge and food reserve of many marine species.

### **Regulatory regime for the monitoring of the Mouths of Bonifacio**

France and Italy have joined efforts since ten years to organise maritime traffic and thus prevent maritime pollution in this particularly sensitive zone. The current regime that is applicable is a recommended route for ships transporting dangerous and hazardous substances decided at the IMO. Both countries are in charge of the implementation of the 1998 IMO Circulars. The monitoring infrastructure consists of two terrestrial bases: the Semaphore of Pertusato (French side) and the Coast Guard base in La Maddalena (Italian side). Newly acquired radar of the Coast Guard base in La Maddalena became active on 1<sup>st</sup> September 2003.

### **Evolution of the maritime traffic**

According to the Semaphore of Pertusato, almost 80% of captains navigating in the strait are aware of the international regulations concerning the procedures of ship reporting system and ship separation scheme in the strait. More than 50% comply to the recommended route. Cases of Infringement are rare. In 2002, about 70% of ships navigating in the strait were complying to the recommended route whereas in 2001, 55% only did.

In 1998, following the enactment of both French and Italian legislation banning the ships flying their flag to use of the strait, the traffic was drastically lowered. Ships still navigate but their number is also lowering. Each year, approximately 3800 ships are using the Bonifacio Mouths (ten per day)<sup>2</sup>. This trend is also visible for traffic of ships transporting dangerous and hazardous substances. Transport of hazardous substances have been reduced by 6 since 1993. As for oil transportation, traffic has been reduced by 10.<sup>3</sup> [more significant figures should put here]

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<sup>2</sup> In comparison, in Ouessant about 150 ships are reported each day.

<sup>3</sup> Préfecture Maritime de Toulon, Méditerranée.



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All States bear a general obligation under both customary international law and the UN Convention on the Law of the Sea<sup>4</sup> to protect and preserve rare or fragile ecosystems wherever located including in straits used for international navigation. Difficulties arise however when such obligations clash with the traditional rule of freedom of navigation. A number of international and regional legal tools are worth evaluating to explore their potential to organise maritime navigation in marine special and protected areas.

The question of the applicability of a marine protected area to ships flying the flag of non Parties is crucial and depends on the international recognition of the protected area. In this context, it is worth promoting the existing regional structures and seeking to establish a regional practice. The following discussion highlights questions and obstacles arising from the legal tools available in regional systems such as the Specially protected areas of Mediterranean Importance (SPAMI) under the Protocol Concerning Specially Protected Areas and Biological Diversity (1995).

## **I. INTERNATIONAL LAWS AND PRINCIPLES**

Regarding obligations for the conservation and sustainable use of marine living and non living resources, the legal implications of the Bonifacio strait are complex.

- There are a certain number of instruments applicable at the global level (United Nations Convention on the Law of the Sea) in which principles that are particularly relevant for this study are stated
- At the regional level, the Barcelona Convention which contains an instrument particularly relevant for us: the Protocol on Specially Protected Areas and Biodiversity in the Mediterranean.

On the shipping side, the International Maritime Organization has been since the beginning of the century the only world organization in charge of maritime safety and maritime navigation.

### **A. The UN Convention on the Law of the Sea**

The UN Convention on the Law of the Sea (UN Convention on the Law of the Sea) was signed in Montego Bay 1982 and entered into force in 1994. The Convention, which is very wide in scope (most States have signed except a few including Turkey) organises the framework for the law of the sea. It is noted that the Convention codified a great number of norms of customary law. However there are innovative provisions in the Convention about which their nature (customary or not) is under discussion.

International law is constantly under evolution and therefore it is crucial to interpret international instruments accordingly.

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<sup>4</sup> The UN Convention on the Law of the Sea was signed in Montego Bay and is called UNCLOS as well as the Convention of Montego Bay.

Coastal States' rights are exceptionally restricted in international straits despite the gravity of the environmental risk posed by navigation in such marine areas.

One critical element of UNCLOS relates to the delimitation of national jurisdiction over ocean areas. In this connection, France has agreed its maritime borders with Italy as regards the region of the Mouths of Bonifacio in 1986<sup>5</sup>.

- (1) According to Law N. 71.1060 of 14 December 1971, French territorial waters extend from the delimitation of the straight baseline to 12 n.m. ashore<sup>6</sup>. Since the adoption of the 2003 legislation, although it has not declared an Exclusive Economic Zone (EEZ) as such, France has declared a *zone de protection écologique* lying beyond its territorial waters.
- (2) Italy declared its territorial waters of 12 nm. from the delimitation of its baselines<sup>7</sup>. Italy has not declared an EEZ, therefore beyond the Italian territorial waters, lies the high seas.

#### 1. Coastal State' rights within its territorial waters

States are sovereign to implement their laws and regulations in their territorial seas (including in international straits)<sup>8</sup>, in respect of generally accepted rules of international law. However, ships of all States "enjoy the right of innocent passage through the territorial sea" (Article 17). Innocent passage meaning that "(...) [p]assage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages (...) [h] any act of wilful and serious pollution contrary to this Convention (...)" (Article 19 UNCLOS).

Without impairing the right of innocent passage, France and Italy can implement their domestic law corpus<sup>9</sup> related to control and prevention of vessel source pollution, including those rules and regulations taken in application of their obligations under other agreements to which they are parties: MARPOL, ACCOBAMS, RAMOGE, the Hamburg Convention and the Barcelona system.

As there are no Exclusive Economic Zones (EEZs) declared in the Mediterranean, the powers exercised by the coastal States with regard to implementation on foreign vessels of its laws and regulations of vessel source pollution stop at the limit of its territorial waters (or contiguous zone as the case may be) thus seriously reduce the scope of implementation of laws and regulation. Verifying whether foreign vessels coming from the high seas (and not from French and Italian territorial waters) and entering in the mouths of Bonifacio are "safe" is difficult.

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<sup>5</sup> Convention between the French government and the Italian government relative to the delimitation of maritime borders in the region of the Mouths of Bonifacio. 28 November 1986.

<sup>6</sup> A contiguous zone was also established 24 n.m (Law N. 89-874 of 1st December 1989) but has no particular relevance in this paper.

<sup>7</sup> Italy adopts the method of straight baselines as well according to decree N. 816 of 26 April 1977. To our knowledge, no contiguous zone was declared.

<sup>8</sup> And to a certain extent in the Contiguous zone when it is relevant.

## 2. Coastal State' rights beyond its territorial waters

Beyond its national waters, a Coastal State does not have the right to implement its national laws and regulations.

However, there exist few cases where coastal States enjoy a right of intervention.

In the Convention of Brussels of 29 November 1969 (in force on 6 May 1975) ratified by France and Italy, Parties can "take necessary measures" in the high seas in order to "prevent, attenuate or eliminate the danger" in case of accident with a threat of oil pollution. The 1973 Protocol extends its scope to other hazardous substances (in force on 2 October 1983).

Article 221 of the Montego Bay Convention refers to the "international and customary law" that States enjoy to take such measures. The Convention further states that intervention is possible "beyond territorial sea". The conditions of such intervention are larger than that of the Brussels Convention: there is a need to have "prejudicial consequences" and the intervention shall be proportionate.

## 3. Bordering State' rights in international strait

The regime of transit passage applying on vessels in straits used for international navigation is an exception to the legal regime of the waters in the strait, the seabed, the subsoil and the aerial space above which fall under the territorial seas of the State. Therefore, laws and regulations of the bordering State applies in the strait as long as (1) it does not affect the right of passage in transit and (2) it does not discriminate against foreign vessels. If maritime safety requires it, bordering States can designate navigational routing and organise traffic separation schemes "in accordance with general acceptable rules of international law and in cooperation with interested States and the IMO (Article 42).<sup>10</sup>

Behind this a priori shared competence between bordering States and the IMO, practice has shown however that (1) bordering States can only recommend routes and (2) IMO only has the power to declare mandatory routes.

Mandatory reporting schemes is not included in the list of measures /according to article 42 para 1) bordering States can adopt for the control of vessel source pollution in straits where the regime of transit passage applies.<sup>11</sup>

## 4. Right of transit passage in international strait

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<sup>10</sup> As regard measures of control and implementation the bordering State can take, the Convention gives two elements: (1) vessels enjoying immunity status can be held internationally responsible for damage (2) States bordering the straits may take appropriate enforcement measures on vessels infringing measures referred in article 42 and causing or threatening major damage to the marine environment of the straits (Article 233 of the Convention).

<sup>11</sup> T. SCOVAZZI, Marine Specially Protected Areas, The General Aspects and the Mediterranean Regional System, International Law and Policy Series, Kluwer Law International, The Hague, Boston, London, 1999.

Foreign vessels enjoy a right of passage in transit and of innocent passage in international straits. Transit passage means the exercise in accordance of the freedom of navigation “solely for the purpose of continuous and expeditious transit of the strait”. (Art. 38)

In accordance to article 39 of the Convention, vessels in transit passage shall comply with generally accepted rules regarding maritime safety and pollution (by the international maritime organisation IMO)<sup>12</sup>. “Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State”. Such passage shall take place in conformity with this Convention and with other rules of international law. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities: “...(h) any act of wilful and serious pollution contrary to this Convention”.

## **B. The International Maritime Organisation**

The International Maritime Organisation (IMO) is the United Nations' specialized agency responsible for improving maritime safety and preventing pollution from ships and is competent to adopt special mandatory measures regarding maritime navigation<sup>13</sup>. The system of voting rights that the IMO has is derogatory of the principle of equality of States: the bigger the fleet and the bigger financial contribution, the bigger the weight in voting. A significant number of international Conventions have been negotiated in the IMO fora, some of them of major importance (some not yet in force)<sup>14</sup>.

Coastal States can ask the IMO to adopt special measures addressing problems of any kind of vessel source pollution, not only discharge pollution.<sup>15</sup> With the initiative of coastal States, the IMO authorizes special measures in special circumstances “in case the generally accepted international rules and standards are inadequate to meet special circumstances and coastal States have reasonable grounds for believing that a particular, clearly defined area of their respective EEZs is an area where *the adoption of special mandatory measures for the prevention of pollution from vessels is required for recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic*” (article 211 para 6a UNCLOS).

The procedure is as follows:

- (1) Coastal State submits scientific and technical evidence in support and information on necessary reception facilities to the IMO Marine Environmental Protection Committee (MEPC).
- (2) If the Organisation determines that the conditions are met, the coastal States may, *for that area, adopt laws and regulations for the prevention, reduction and*

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<sup>12</sup> P. DAILLIER and A. PELLET, Droit international public, Paris, LGDJ, 1999, 1544 p.

<sup>13</sup> In March 2003, 162 member States were Parties to the IMO. [Comparable data being obtained regarding number of Parties to the UNCLOS].

<sup>14</sup> Data being obtained.

<sup>15</sup> Under MARPOL 73/78, coastal States can propose designation of special areas only as far as discharge standards are concerned.

*control of pollution from vessels implementing such international rules and standards or navigational practices as are made applicable, through the organization, for special areas.*

States have been generally reluctant to accept mandatory nature of these special measures affecting their freedom of navigation beyond territorial waters. Therefore, the IMO has generally only recommended traffic separation schemes (TSS) to States, i.e. giving the recommendation a non-binding nature. However, the fact that the obligation to comply to TSS has been inscribed in other international Conventions shows that it gained a certain acceptance by States.<sup>16</sup> Today, there are more than 100 TSS worldwide.<sup>17</sup>

Recently, the IMO has a new category of TSS: No-anchoring areas. This should be adopted in areas where anchoring is unsafe, unstable, hazardous, or it is particularly important to avoid damage to the marine environment, and therefore anchoring should be avoided by all ships or certain classes of ships.

### **C. The Barcelona system**

In 1995, the Barcelona system, consisting of the 1976 Convention on the Protection of the Mediterranean Sea against Pollution and its relevant protocols, underwent important changes in several of its components. The convention and most existing protocols have been amended. New protocols have been adopted. Each of the texts of the updated Barcelona system contains important improvements. Some of the protocols show a degree of legal imagination in envisaging new solutions.

The framework convention, as amended in Barcelona in 1995, changes its name into Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean. The updated Convention retains its nature of a framework agreement which has to be implemented through specific protocols.

The Convention reflects and applies to a regional scale the main ideas arising from the United Nations Conference on Environment and Development (Rio de Janeiro, 1992): the precautionary principle; the integrated management of the coastal zones; the resort to best available techniques and best environmental practices and the promotion of environmentally sound technology, including clean production technologies. For the purpose of implementing the objectives of sustainable development, the parties shall take fully into account the recommendations of the Mediterranean Commission on Sustainable Development, a new body which is established within the framework of the Mediterranean Action Plan, Phase II. A new article provides for the right of the public to have access to information on the state of the environment and to participate in the decision-making processes relevant to the field of application of the convention and the protocols.

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<sup>16</sup> In 1972, the Convention of London (COLision REGulation COLREG 72) is adopted and entered in force on 15 July 1977. Under this instrument, member States bear the obligation to comply with Traffic Separation Schemes (TSS) adopted by the IMO (rule number 10). The Convention has been ratified by 125 States representing 96% of the world tonnage (1995).

<sup>17</sup> E. STEINMYLLER, *Navigation dans les détroits internationaux et protection de l'environnement*, Les Cahiers du CRIDEAU, n. 5, 1999, Pulim.

The Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, opened to signature in Barcelona in 1995, is applicable to all the marine waters of the Mediterranean, irrespective of their legal condition, as well as to the seabed, its subsoil and to the terrestrial coastal areas designated by each party, including wetlands.

- The new protocol provides for the establishment of a List of specially protected areas of Mediterranean interest (SPAMI List), which may include sites which are of importance for conserving the components of biological diversity in the Mediterranean, contain ecosystems specific to the Mediterranean area or the habitats of endangered species or are of special interest at the scientific, aesthetic, cultural or educational levels.
- The decision to include an area in the SPAMI List is taken by consensus by the contracting parties during their periodical meetings.
- Once an area is included in the SPAMI List, all the parties agree to comply with the applicable measures and not to authorize nor undertake any activities that might be contrary to the objectives for which the SPAMI was established.

For geographical reasons, this regional and semi-enclosed sea would be entirely covered by exclusive economic zones, if such coastal zones were to be established by the bordering States. Without unduly encroaching on third States rights, the regime governing this kind of seas could be particularly oriented towards the protection of the marine environment and the sound management of living resources.

## **II. NATIONAL INITIATIVES TO BAN VESSELS FROM THE BONIFACIO STRAIT**

### **A. Community support and national initiatives to prohibit vessels**

With a strong support from local population, France and Italy decided to take the necessary steps in order to ban certain vessels (national at first) from navigating through the strait. As a result, two parallel legislations were enacted in February 1993 banning vessels carrying hazardous substances through the strait<sup>18</sup>.

Although bordering States can set laws and regulations for safety of navigation, they cannot enforce it over foreign flag vessels. Therefore these measures triggered protestation from States, and as a result only vessels flying French and Italian flags carrying hazardous substances were banned.

Maritime traffic dropped from 950 medium-size oil tankers in 1992 to 300 in 1993 and the number of vessels carrying hazardous substances has seriously reduced as well. However, Jean-Marie Bacquer [title] considers that this apparent amelioration disrupted attention from the real problem i.e. enhancing the maritime traffic organisation in the strait<sup>19</sup>.

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<sup>18</sup> Arrêté Préfectoral N.1/93 of 15 February 1993 (France) and Decree of 26 February 1993 from the Ministry of Merchant Marine (Italy).

<sup>19</sup> J.-M. BACQUER, "Etude relative aux conditions de la navigation dans les Bouches de Bonifacio et aux modalités qui permettraient d'en améliorer le contrôle, OEC, 1996, p. 26-30.

As mentioned in introduction, the 1996 accident of a vessel flying Panamean flag (Fénès) carrying cereals highlighted the lack of an adequate regime for maritime safety, and launched again the debate of banning of navigation in the strait by the IMO.

### **B. IMO resolution A. 766 (18) of 4 November 1993**

[Integrate a paragraph addressing the different norms that the IMO can edict and their legal strength and effects].

In its proposal, France had put forward a proposal before the IMO for discussing establishment of Traffic Separation Scheme (TSS) but IMO decided not to address this topic. Therefore debate over “zones to be avoided” was aborted. But a contrario nothing precluded IMO from issuing an opinion in 1998 on this issue.

The IMO’s opinion was based on its Resolution A. 766 (November 1993) which encourages IMO members to “forbid or strongly discourage” the transit of their flag vessels carrying hazardous substances. The IMO reaffirmed that freedom of navigation in international straits is an absolute priority. As noted below, this is the current applicable regime.

Why should a member State enact legislation for the conservation of such an insignificant and isolated strait? In his 1996 study, Jean-Marie Bacquer states that no IMO member States –except France and Italy- had enacted such a regulation, not even EU Mediterranean countries. And the situation does not seem to have changed.

### **C. IMO Circulars SN/Circ. 1998 and 201 of 26 May 1998: Mandatory shipping system for ships of 300 gross tonnage**

Between 1993 and 1996, a series of maritime accidents (including Fénès) occurred in the straits that triggered reappearance of the issue of traffic separation scheme debate about safety of maritime navigation in the straits of Bonifacio.

The IMO Maritime Safety Committee in its 69th session furthered the system of traffic organisation by something different than a separation scheme: a mandatory ship reporting system (SRS). The IMO Circulars sets a mandatory ship reporting system (SRS) in the strait of Bonifacio for “ships of 300 gross tonnages and over are required to participate in the system”. Annex 2 details the system of reporting, the procedure to follow, the radiocommunication system. Parties are required to report information on any defect, damage, deficiency or limitations “in accordance with provisions of SOLAS and MARPOL Conventions”.

The IMO, in the Circulars, lists the rules and regulations in force in the area of the system. From these rules and regulations listed are:

- COLREGs (international regulations for preventing collisions at sea).
- Non binding IMO resolution A.766 (18) of 1993, which shall “remain in force as far as it recommends each flag State to prohibit or at least strongly discourage the transit by certain categories of ships.”

- National regulation: (1) Arrêté of the Préfet maritime for Mediterranean region N. 23/83 dated 6 May 1983 rules navigation in the approaches of the French coast in order to prevent accidental marine pollution, for ships carrying hazardous or polluting cargoes. (2) Arrêté of the Préfet maritime N. 1/83 dated 15 February 1993 and 7/93 dated 5 March 1993 and Italian decree of the Minister of Merchant Marine dated 26 February 1993 prohibit transit through the Strait of Bonifacio for French and Italian ships carrying oil products or hazardous goods. These provisions are further backstopped by the IMO's Circulars saying that the national prohibition shall remain in force.

The IMO circulaires were introduced in the French legal system by an Arrêté préfectoral N. 84/98 of 3 November 1998 of the Préfet maritime in the Mediterranean and in Italy with a Decree of 27 November 1998.

According to article 211 para 6c, coastal States can adopt in presence of special circumstances for an area already established under article 211 para 6a "additional necessary laws and regulations". Tullio Scovazzi considers that this "appears to refer to measures *different from those generally established by the IMO* for application in special areas". In presence of special circumstances, States would be entitled to apply to the IMO in order to be authorized to exercise additional anti pollution jurisdiction in clearly defined areas: EEZs, territorial seas and international straits<sup>20</sup>. So far, this legal possibility has received no application by coastal States. However, establishment of technical standards by IMO addressed to maritime operators could be an application of this possibility.

#### **D. The IMO: shipping industry vs. environmental concerns**

The IMO as a forum where the global agenda on maritime safety and pollution prevention is discussed, the rule "one State one vote" does not apply like in other fora. In the IMO, States' right to participate is proportionate to the degree of its shipping activity. The shipping industry is quite present within IMO and environmental concerns do not always go in favour of shipping industry's interests.

In the case of Bonifacio, the fact that the IMO refused to ban ships from using the strait by only setting a recommendation, undermined the objectives of the national bans edicted by France and Italy and this encouraged the use of flags of convenience.

However, the IMO's "Particularly Sensitive Sea Area" (PSSA) designation is a potentially important tool for marine protected areas beyond national jurisdiction and for straits used for international navigation. It can act as a "safety valve" enabling to take into consideration exceptional character of certain areas to legitimate zones to be avoided<sup>21</sup>. Already back in 1985, the IMO in its Resolution A.572 (14) of 20

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<sup>20</sup> T. SCOVAZZI, *Marine Specially Protected Areas*, The General Aspects and the Mediterranean Regional System, International Law and Policy Series, Kluwer Law International, The Hague, Boston, London, 1999.

<sup>21</sup> T. SCOVAZZI, *Marine Specially Protected Areas*, The General Aspects and the Mediterranean Regional System, International Law and Policy Series, Kluwer Law International, The Hague, Boston, London, 1999.



November 1985<sup>22</sup>, considered that the “zones to be avoided” should be areas where the environment could have irreparable damage in case of accident.

A Particularly Sensitive Sea Area (PSSA) is an area that needs special protection through action by IMO because of its significance for recognized ecological or socio-economic or scientific reasons and which may be vulnerable to damage by international maritime activities. PSSA could be legally founded under article 211 para 6 of the Convention. Professor Scovazzi considers that States “are willing to give the IMO the power to authorize the adoption by coastal States of special anti pollution measures in their coastal zones”<sup>23</sup>.

Guidelines on designating a “particularly sensitive sea area” (PSSA) are contained in resolution A.927(22) *Guidelines for the Designation of Special Areas under MARPOL73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas*<sup>24</sup>. The Guidelines includes criteria to allow areas to be designated as PSSA: 1. ecological criteria, such as unique or rare ecosystem, diversity of the ecosystem, or vulnerability to degradation by natural events or human activities; 2. social, cultural and economic criteria, such as significance of the area for recreation or tourism; and 3. scientific and educational criteria, such as biological research or historical value. Only one of these criteria is sufficient to request that an area be designated as PSSA.

The State proposing a PSSA should be able to persuade<sup>25</sup> the international community (IMO) of:

- (1) exceptional vulnerability of a certain area;
- (2) ineffectiveness of generally approved measures in that area.

So far, PSSA is useful with regard application of generally accepted rules and standards. According to Tullio Scovazzi, “in cases where the exceptional character is made absolutely clear with the PSSA designation, the negative attitude might be surrounded”.<sup>26</sup>

### III. IMPOSABILITY OF MEASURES

What does the national initiatives banning vessels imply in the framework of the Barcelona system?

It seems that a restriction of navigation may not be imposed on States without IMO approval. However: such restriction of navigation could be imposed on Barcelona Convention Members through inscription of sites on SPAMI list, which must occur by consensus.

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<sup>22</sup> Point 5, paragraph 5.6.

<sup>23</sup> *Ibid*,

<sup>24</sup> Adopted on 29 November 2001.

<sup>25</sup> In this regard it is worth noting that the proposal from western European Countries for a PSSA in the Atlantic during MEPC 49 was significantly large. The bigger and strategically situated the area proposed as a PSSA is, the more it is likely to meet States’ reluctance.

<sup>26</sup> T. SCOVAZZI, *Marine Specially Protected Areas*, *Ibid*.

## **A. The Barcelona system is an innovative system**

The Barcelona System consists in its legal structure of a core Convention enriched with protocols including the 1995 Protocol on specially protected areas and biological diversity in the Mediterranean (the SPA and Biodiversity Protocol<sup>27</sup>). The main idea emerging from the Barcelona system is that it is based on cooperation among Parties and with non Parties.

The major element of the SPA Protocol is that, according to article 2 of the protocol, its scope covers any sea area within the Mediterranean, regardless of the juridical status of the area. This means that the protocol envisages possible repercussions that specially protected areas can have beyond national jurisdiction on navigation. "The Parties, in conformity with international law and taking into account the characteristics of each specially protected area, shall take the protection measures required, in particular; (...) c. the regulation of the passage of ships and any stopping or anchoring (...)" (Article 6 of the 1995 protocol).

Specially Protected Areas of Mediterranean Importance (SPAMI) are created by multilateral action and consensual approval of all member States<sup>28</sup>. Reaching a consensus is thus a challenge. Interested State(s) have to initiate a request with a proposal containing information on the geographical position of the area, its environmental characteristics, its juridical status, the proposed management plan and the means for its implementation, as well as a statement justifying its Mediterranean importance. One major aspect is that the proposed areas will be included in the SPAMI list by a decision involving the consensus of all contracting Parties. By approving the inclusion, Parties to the protocol undertake to recognize its particular importance for the Mediterranean and bear obligations in this regard.

## **B. Imposability of measures**

The principle is that a Convention only binds member Parties. However some instruments can have some effect on third States where, where as in the SPA Protocol, Countries are required to "endeavor to cooperate" no matter if Parties or not Parties (Article 4).

### **1. Obligations of Parties to the protocol**

Under the Protocol, Parties bear a duty to comply with the measures applicable to the SPAMI and not to authorize nor undertake any activities that might be contrary to the objectives of the SPAMI.

The objectives of the SPAMI are: [data being obtained].

The Parties must also undertake to adopt appropriate measures, consistent with international law, to ensure that no one engages in any activity contrary to the

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<sup>27</sup> Although the SPA and Biodiversity in the Mediterranean Protocol has been signed in 1995 and is now in force, the SPA Protocol of 1976 is still in force.

<sup>28</sup> 21 Member States and the EU.

principles or purposes of this Protocol (Article 28 of the SPA and Biodiversity Protocol).

## 2. Regime applying to third States beyond national jurisdiction

Parties to the Protocol are required to co-operate with third States and international organisations for the implementation of the protocol (article 28 of the Protocol). Third States therefore can be asked to impose navigation restrictions measures within Specially Protected Areas of Mediterranean Importance to the vessels flying their flag. The IMO, although not mentioned as the only exclusive competent organisation to do so, may adopt non binding resolutions. Mandatory measures can be asked at IMO including with regard to establishing mandatory ship reporting systems or routing schemes.

Parties bear an obligation to adopt appropriate measures, consistent with international law, to ensure that no one engages in activities contrary to the principles or purposes of the protocol. Such an obligation means that States should implement the provisions in their different capacities of flag, coastal or port States. [to develop and expand this statement].

Professor Scovazzi considers that the role of port States can be of particular value in assuring a certain effectiveness of the special areas provisions adopted under the protocol with respect to third States ships in marine areas located beyond the limits of coastal jurisdiction. States have the right under international law to set conditions for the access of foreign ships to their ports although this is not an absolute right. The Mediterranean coastal States most interested in the protection of a certain SPAMI could make use of the power to set conditions for access to their ports in order to obtain the compliance of foreign ships with the protective measures adopted in the area<sup>29</sup>.

## **IV. PRACTICE IN THE MEDITERRANEAN**

The regional framework of the Barcelona System operates in the area of the marine environment. It consists in the Barcelona Convention of 1976 for the protection of the Mediterranean Sea against pollution and the relative protocols.

However an innovative regime is now available since the revision in 1995 and are brings major elements to take into consideration here.

Practice is consistent with Barcelona system. Mediterranean countries should take action collectively (Art. 5 paragraph 2 SPA)

### **A. Extending national jurisdiction beyond territorial waters**

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<sup>29</sup> T. SCOVAZZI, *Marine Specially Protected Areas*, The General Aspects and the Mediterranean Regional System, International Law and Policy Series, Kluwer Law International, The Hague, Boston, London, 1999.

According to the Montego Bay Convention, each Coastal States declare its EEZs. The principle is that, in the EEZs, coastal States are entitled to adopt laws and regulations giving effect to generally accepted international rules and standards established through the competent international organisation or general diplomatic conference. (article 211 para 5 UNCLOS)

In the Mediterranean, however, for geopolitical reasons, no EEZs has been declared. Therefore, the High seas accidentally reign in most of the Mediterranean. All Mediterranean Countries adopt different and uncoordinated approaches in their extension of jurisdiction.

## 1. Prevention of marine pollution

### France's Zone de Protection Ecologique

France enacted a law declaring a zone de protection écologique (ZPE) in March 2003 in operation since 8 January 2004<sup>30</sup>. To justify such legislation, the Minister of Ecology explained that maritime traffic of oil and dangerous products is in continuous increase, with nearly 28 % of the world maritime oil traffic occurring in the Mediterranean. The absence of EEZs under French jurisdiction in the Mediterranean prevented application of the Law of May 3, 2001 on vessel source pollution from foreign ships beyond French territorial waters. But now, under the 2003 law, any contraveners will be liable under the Law. The creation of this zone enables application of the provisions envisaged in the MARPOL Convention 1973/78. Penal sanctions for unauthorized discharge will be also applicable in the ZPE.

Such initiative of appropriation of the High seas will ameliorate safety of navigation in the strait, as it will allow french authorities to implement anti pollution standards on foreign vessels ONLY in transit as far as they are coming from the french jurisdictional waters (territorial waters or ZPE).

The best safety regime for vessels that could be reach until navigational restriction in the strait are possible, is to fill the rest of remaining high seas zone with Italian jurisdiction. If Italy so decides, ALL vessels passing the strait will have to cross Italian and French waters and therefore will have to comply with french or italians regulations.

The Law was enacted after two major maritime accidents (Erika and Prestige) and fails to properly address other threats to the marine environment such as overfishing, tourism, extraction of natural resources<sup>31</sup>.

[an informative map of the maritime zone is under construction]

## 2. Fishing zones

### Spain's protective fishing zone

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<sup>30</sup> décret n°2004-33 du 8 janvier 2004 portant création d'une zone de protection écologique en Méditerranée.

<sup>31</sup> The ZPE legislation is clearly not meant to regulate fishery aspects.

The Zone for Protection of Fisheries of Spain is 49 nm distant from the baseline. It is a zone of variable surface in which coastal States enjoy an exclusive right for fishing. If its exploitation capacity is inferior to the fixed total admissible captures, it can authorize other coastal States of the region to exploit the rest (Decree 1315 of August 1997).

### 3. Ecological Protection and Fishing Zone

#### Croatia's Zone of Ecological Protection and Fishing Zone

Croatia passed a law establishing a Zone of Ecological Protection and Fishing Zone in October 2003. In this extended zone, Croatia will implement its laws and regulations regarding prevention of pollution and protection of fisheries. The zone is first declared to create the legal basis for negotiations and agreements on its delimitations with relevant countries. By establishing such zone, Croatia considered that extension of jurisdiction is the best mean to achieve the objective of environmental protection.

Open questions are:

- to what extent should the State proclaiming an EEZ or other sui generis zone comply to the obligation of cooperation with other countries?
- What is the effect of a zone of ecological protection or fishing zone on the freedom of navigation found in the High seas?

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On November 10, 2003 (one month after Croatia's legislation), the permanent mission of the Republic of Slovenia at the UN, handed over to the UN secretary-general a diplomatic note with which it responded to Croatia's notification of a protection ecological-fisheries zone in the Adriatic.

Most Mediterranean States have adopted rather uncoordinated approaches in extending their jurisdiction beyond territorial waters

#### **B. Collective declaration through the Barcelona system**

The approaches adopted by Mediterranean States lacks coordination and fail to provide an appropriate legal framework for conservation of the marine environment in the Mediterranean. Within French waters, it is French laws and regulations concerning prevention of marine pollution which apply (nothing on over-fishing).

A collective declaration through a regional forum like the Barcelona Convention would provide a coordinated approach in these initiatives. Some arguments in favour of such declaration:

- The presence of High Seas in the Mediterranean is incidental
- Any national initiatives have *little effect* as long as remain isolated. What is the point for a State to declare a ZPE ashore its Mediterranean coasts if all other

Mediterranean countries have not done as such? As long as action will not be collective, a corridor of high seas will remain in the Mediterranean preventing appropriate implementation of laws and regulations.

- Isolated and non-coordinated legislative initiatives may create issues of delimitation of maritime boundaries. Such collective declaration could be a way to overcome the geopolitical problem of delimitation maritime boundaries.

Delimitation of maritime borders results in conflicts that could be submitted to arbitration or to an international forum that would adopt a solution binding on the two countries.

It seems that the idea of a collective declaration could grow in the Barcelona system. The Barcelona system has all interest to promote such a collective declaration as it would support the implementation of the Barcelona instruments and in particular the Protocol on specially protected areas and biodiversity in the Mediterranean.

Such a collective declaration will reflect the willingness of the Mediterranean countries to comply with a norm that is believed to be an international obligation (article 38 International Court of Justice Statute). Nothing prevents such collective initiative to reflect a customary law at the regional level. Such a collective declaration seems consistent with UN Convention on the Law of the Sea. Customary norms contribute to, is part of the evolution of international law.

The effectiveness of such a “collective declaration” in the Mediterranean could change the way the IMO has been addressing navigation in the Bonifacio strait. The IMO takes into account the balance between navigational interests and environmental interests could certainly weigh in favour on the environment.

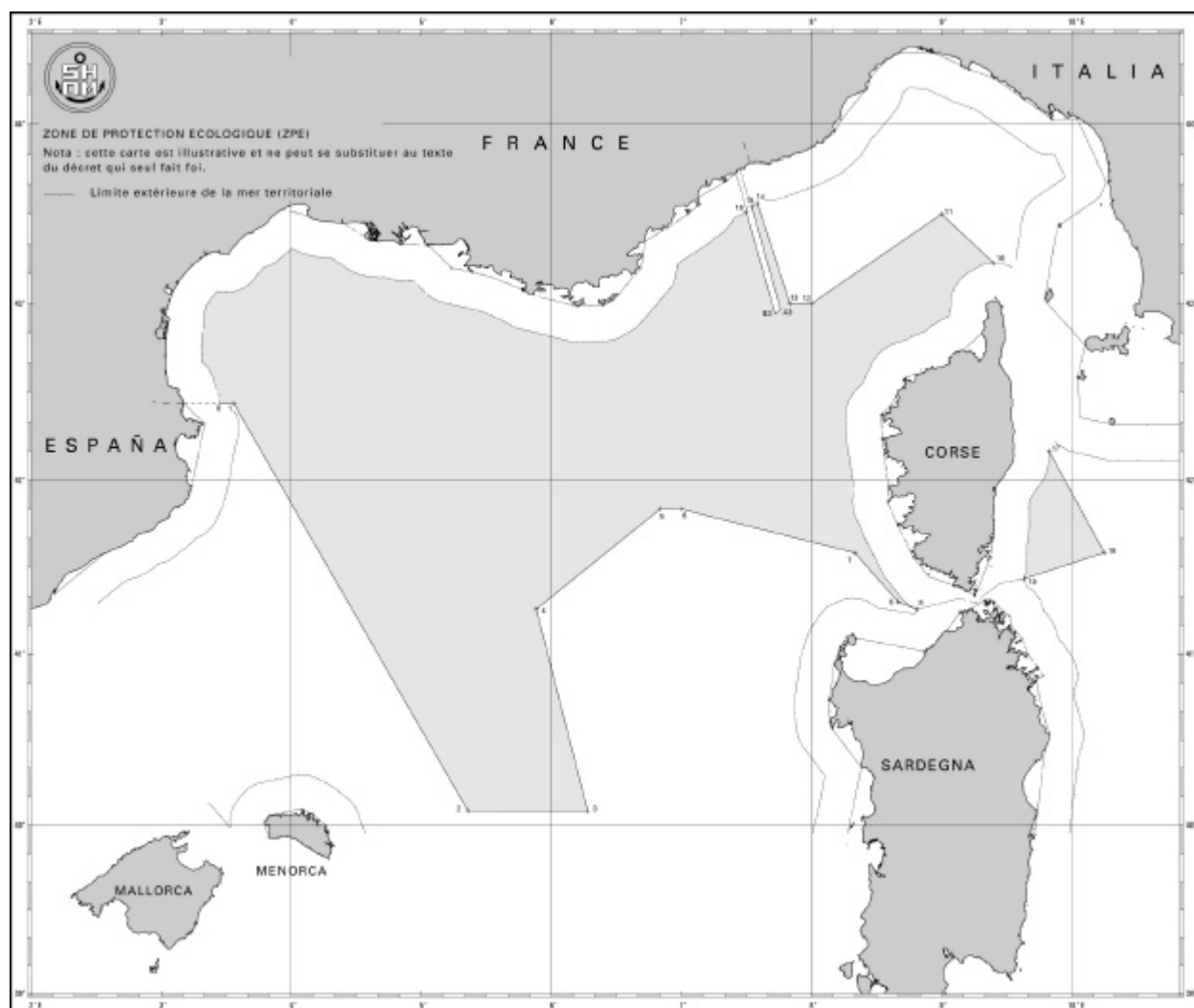
## ANNEXES

Annex :



[http://www.amb-croatie.fr/actualites/adriatique\\_croatie\\_zpep.htm](http://www.amb-croatie.fr/actualites/adriatique_croatie_zpep.htm)

Annex:



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## IUCN

Founded in 1948, the World Conservation Union brings together States, government agencies and diverse range of non-governmental organizations in a unique world partnership: over 900 members in all, spread across some 138 countries. The World Conservation Union builds on the strengths of its members, networks and partners to enhance their capacity and to support global alliances to safeguard natural resources at local, regional and global levels.

IUCN Centre for Mediterranean Cooperation works with IUCN members and cooperate with all other agencies that share the objectives of the IUCN. Our Mission is "to influence, encourage and assist Mediterranean societies to conserve and use wisely the natural resources of the region". The Centre for Mediterranean Cooperation has inaugurated a new programme, directed at making a major contribution to sustainable development and conservation of the marine resources in the Mediterranean – understanding, continued development and progress in implementing the legal regime. The centrepiece of the new marine law programme is the development of an IUCN Specialist Group to address marine law issues in the Mediterranean. This group will be part of the IUCN's global Commission on Environmental Law, and will represent the first step in creation of the global Specialist Group on Marine Law.

IUCN Centre for Mediterranean Cooperation  
Parque Tecnológico de Andalucía  
Calle Marie Curie,  
Sede Social  
Campanillas  
29009 Málaga, Spain  
Tel.: +34-952028430  
Fax: +34-952028145

For further information please contact:

Claudiane Chevalier  
Legal Officer  
Marine Programme  
IUCN Centre for Mediterranean Cooperation  
[Claudiane.chevalier@iucn.org](mailto:Claudiane.chevalier@iucn.org)

Tomme R. Young  
Senior Legal Officer  
IUCN Environmental Law Centre  
[TYoung@elc.iucn.org](mailto:TYoung@elc.iucn.org)

