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Meeting of Legal Experts on the Draft Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources

Geneva, 25-29 June 1979

Preliminary draft Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources

COMMENTS ON THE INVENTORY OF AREAS OF DISAGREEMENT

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INTRODUCTION

1. Pursuant to the recommendation contained in resolution 9 of the Conference of Plenipotentiaries of the Coastal States of the Mediterranean Region (Barcelona, 2-16 February 1976), the Executive Director of the United Nations Environment Programme (UNEP) convened an Intergovernmental Review Meeting of Mediterranean Coastal States on the Mediterranean Action Plan, held at Monaco from 9 to 14 January 1978.

2. The Meeting addressed itself more particularly to starting a review of the preliminary draft Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources (UNEP/IG.II/3/Annex III, appendix II). In view of the many questions remaining to be settled before a consensus could be reached on the text of a final protocol, it was decided, after each article of the draft had been considered, and on the basis of the observations put forward, to draw up an inventory of areas of disagreement and of points that needed clarification. That inventory has been circulated to all participants to enable them to transmit proposed amendments or additional texts to the secretariat where appropriate.

3. The Meeting recommended that UNEP should organize, in the light of the data so assembled, working groups of governmental technical and legal experts, as appropriate, to seek agreement on the questions raised during the Meeting and to prepare a revised preliminary draft protocol before another intergovernmental consultation was convened (UNEP/IG.II/4, para. 54).

4. The purpose of the present document is to place before the Working Group on Legal Questions a number of legal precedents, both national and international, which might help to clarify the areas of disagreement mentioned in the inventory and possibly to provide, on the basis of those precedents, an inventory of possible solutions.

5. In conformity with the method used in the inventory of areas of disagreement, and with a view to clearly identifying each of those areas, this report considers on an article-by-article basis the legal elements on which no consensus was reached or in respect of which, in the opinion of some delegations, additional information of a legal nature was required. It also takes account of the alternative draft protocols submitted by one delegation and circulated at the Intergovernmental Meeting at Monaco.

PREAMBLE

6. At the Intergovernmental Consultation held at Athens from 7 to 11 February 1977 the secretariat suggested some items for inclusion in a preamble (UNEP/IG.6/3); it subsequently prepared, for the Monaco Meeting, the following draft preamble:

"THE CONTRACTING PARTIES TO THE PRESENT PROTOCOL,

Being Parties to the Convention for the Protection of the Mediterranean Sea against Pollution,

Recognizing the danger posed to the marine environment and to human health by pollution from land-based sources and the serious problems existing in this respect in many coastal waters and river estuaries of the Mediterranean Sea, mostly due to the release of untreated, insufficiently treated or inadequately disposed domestic or industrial discharges,

Determined to take in close co-operation all necessary measures to protect the Mediterranean Sea from this pollution,

HAVE AGREED AS FOLLOWS:"

7. The content of the preamble must not be ignored because it is no less mandatory than the operative part. Thus - as one example among several others of relevant international jurisprudence - the International Court of Justice referred in its judgement of 20 November 1950 in the "right of asylum" case to the preamble of the Havana Convention of 20 February 1928 on the right of asylum in order to determine the meaning and purpose of that Convention.[1/] Similarly, domestic tribunals have referred in various instances to the preamble in order to clarify the meaning of a treaty. It may therefore seem superfluous to specify in the body of the protocol that the preamble is an integral part of the protocol.

8. Some delegations proposed the inclusion in the preamble of a paragraph drawing attention to the relationship between the protocol and the Barcelona Convention of 1976. From a general legal standpoint, such a relationship accords quite well with the fundamental nature of a protocol. Thus Professor Charles Rousseau[2/] defines the protocol concept as a term applied to widely differing instruments, some intended to lay down rules of law and others

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1/ International Court of Justice, Reports, 1950, p. 282.

2/ Droit international public, Paris, Sirey, 1971, vol.I, p. 67.

to implement, prolong, supplement, interpret or modify a pre-existing treaty to which it is appended. From this point of view, therefore, it seems quite appropriate to draw attention to the relationship with the 1976 Convention. For the sake of precision, and in conformity with the general practice, it would be appropriate to add to the first paragraph of the draft preamble reproduced in paragraph 6 the words "signed at Barcelona on 16 February 1976,".

9. The explicit reference to the pertinent articles of the Barcelona Convention is also likely to strengthen and clarify the direct relationship between this basic treaty and the present protocol. Immediately after the paragraph establishing the general relationship between the two texts, a new paragraph might specify the following special relationship:

> "Desirous of implementing article 4, paragraph 2, and articles 8 and 15 of the said convention,".

10. At the intergovernmental consultation held at Athens from 7 to 11 February 1977 it was proposed more particularly that a paragraph should be included in the preamble referring to other relevant international agreements (UNEP/IG.6/6, para. 11). Such a reference has been used in other conventions on occasion. For example, the Paris Convention of 4 June 1974 for the Prevention of Marine Pollution from Land-Based Sources1/ refers in its preamble to the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, concluded at Oslo on 15 February 1972.

10.1. The aforesaid Paris Convention constitutes one of the rare international precedents relating specifically to the control of pollution from land-based sources. However, a reference along the following lines to broader precedents within the strict Mediterranean framework may also meet the concern expressed at Athens:

> "Bearing in mind the RAMOGE Convention concluded in 1976 between France, Italy and Monaco, and the Italo-Yugoslav Convention of 14 February 1974 relating to the Protection of the Adriatic Sea,".

1/ This Convention will be referred to hereinafter as the "Paris Convention of 4 June 1972".

10.2 A reference to other pertinent international agreements is, however, in no way obligatory, particularly in the matter of the present protocol; the Barcelona Convention specified in its article 15, paragraph 1, the character of a protocol of this type as being additional to the Convention itself. Reference to its relationship with the protocol gives concrete expression to that character. It will be noted however that the Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft mentions in its preamble a pertinent international precedent, i.e. the London Convention of 29 December 1972 on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter.1/ But the precedent referred to deals with the same problems as the protocol, which strengthens the specificity of the latter's area of application.

11. With regard to the actual content of the preamble, the second paragraph of the draft reproduced in paragraph 6 stresses the dangers inherent in the discharge of domestic and industrial wastes. It would also be appropriate to draw attention to the constant increase in sources of pollution resulting from the economic changes and tourist activities peculiar to the Mediterranean coast.

11.1. In this connexion, the third preambular paragraph of the Convention on the Protection of the Marine Environment of the Baltic Sea Area, signed at Helsinki on 22 March 1974, states:

> "NOTING the rapid development of human activities in the Baltic Sea area, the considerable population living within its catchment area and the highly urbanized and industrialised state of the Contracting Parties as well as their intensive agriculture and forestry;".

11.2. In the Mediterranean area, pollution from land-based sources is particularly associated with industrialization, urbanization and tourism. Accordingly, a paragraph might read as follows: "Noting the rapid development of human activities in the Mediterranean Sea Area, particularly in the matters of industrialization and urbanization, and the substantial increases in the coastal populations at certain periods of the year as a result of tourism,".

1/ This Convention will be referred to hereinafter as the "London Convention of 29 December 1972".

ARTICLE 1. GENERAL OBJECTIVE

12. Consensus was reached on the following text:

"The Contracting Parties to this Protocol (hereinafter referred to as 'the Parties') shall take all appropriate measures to prevent, abate and combat pollution of the Mediterranean Sea Area originating from land-based sources within their territories.".

12.1. Two comments may be made. First, the law of nations provides that an international treaty shall develop its effects over the whole of the territory that is subject to the sovereignty of the State. This principle was explicitly formulated in article 29 of the Vienna Convention of 1969 on the Law of Treaties. The territory is linked to the sovereignty of the State, and the Permanent Court of Arbitration has stated in this regard: "One of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that, failing proof to the contrary, the territory is coterminous with the sovereignty,".1/

12.2. Secondly - and in illustration of the foregoing comment - it should be noted that in international law the generic term "territory" does not mean only land territory, but also river territory, maritime territory (inland waters and territorial sea) and "aerial territory" (air space) subject to the sovereignty of the State. Unless the contrary is specified, an international treaty applies to all these areas or spaces. Were application to be limited to some of them a precise definition would be necessary. The second draft protocol submitted by one delegation therefore defines the term "territory" in a restrictive manner in its article 3, paragraph (b), by implicitly excluding certain areas which are subject to State sovereignty.

ARTICLE 2. COVERAGE

13. The Monaco meeting did not enable a consensus on the geographical coverage of the Protocol to be reached. In particular, the concept of "internal coastal waters" gave rise to a number of reservations which were also expressed during the discussion of article 4, paragraph 1 (c). This concept and the discussion of it raise two distinct problems in respect of their scope.

1/ Award of the Permanent Court of Arbitration in the North Atlantic Coast Fisheries case; Great Britain and the United States (7 September 1910). Publication of the Carnegie Endowment, p. 157.

14. The first problem raised by a number of delegations was one of definition, of terminology. Traditionally, the concept generally accepted is that of internal waters, without further qualification. Needless to say, the meaning to be attributed to this notion is not geographical, but legal, and it seeks to define the waters on the landward side of the limit of the territorial sea. Accordingly, "internal waters" principally comprise seaports and their facilities, roadsteads, waters between the shoreline and the low-water line, and certain so-called "historic" waters and bays.

14.1. Thus a number of international legal instruments use the term and concept "internal waters" without further qualification. For example, article 8 of the Informal Composite Negotiating Text of the Third United Nations Conference on the Law of the Sea[1/] is headed "internal waters" and provides in its paragraph 1: "Except as provided in Part IV of the present Convention, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.".

14.2. The same situation is found in national legislative texts. Monaco's Act No. 954 of 19 April 1974, for example, prohibits harmful discharges, *inter alia*, "... in the waters of the internal sea ...", and Bulgarian decree No. 728 of 24 October 1963, on the protection of the air, water and the ground against pollution includes "maritime waters" in its coverage.

14.3. The Paris Convention of 4 June 1974 adopted a solution of a different kind; it did not use the term itself, but its content. In this connexion, article 3 a provides as follows: " 'Maritime area' means: the high seas, the territorial seas of Contracting Parties and waters on the landward side of the base lines from which the breadth of the territorial sea is measured and extending in the case of watercourses, unless otherwise decided under article 16 c of the present Convention, up to the freshwater limit;".

14.4. On the other hand, the OECD Recommendation of 1976 on the principles governing the management of coastal areas[2/] [*/] does not specify what should be understood by "coastal areas". Such an area includes a fringe of land and an adjacent fringe of sea, but no clear definition is given, despite the various proposals put forward at the meeting.

1/ Document A/CONF.62/WP.10. This text will hereinafter be referred to as "ICNT".

2/ Document OECD C (76) 161 (Final).

*/ Note by the translator. As the English version of this document is not available at the Palais des Nations, the wording used in paragraph 14.4. is not necessarily authentic.

14.5. It will also be noted that even the Barcelona Convention of 16 February 1976 refers in article 1, paragraph 2, to "internal waters of the Contracting Parties" without explanation of the terminology.

14.6. These few examples, which are by no means exhaustive, bear witness to the frequent use made of the term "internal waters", which is defined quite clearly in international law. However, the term "internal coastal waters" is also conceivable where it is desired to emphasize that the internal waters referred to are internal salt waters as opposed to fresh river water, although this distinction is implicit in the definition of internal waters generally accepted in international law.

14.7. At least one international precedent can be cited in support of the use of the term "internal coastal waters". In the European Communities, Council Directive 76/464 of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community 1/ uses the term "internal coastal waters", giving for it a definition identical to that set forth previously in article 3 a of the Paris Convention of 4 June 1974. This Directive also applies, inter alia, to "inland surface water", which explains the choice of the parallel term "internal coastal waters" as a means of making an unequivocal distinction.

15. Once the similarity in the international-law context of the terms "internal waters" and "internal coastal waters" has been established, the second related problem is the definition of "freshwater limit" (article 4, paragraph 1(d)); in other words, the delimitation of the internal waters on the landward side.

15.1. In this respect, the definition adopted in the draft protocol is exactly the same as that given in article 3 b of the Paris Convention of 1974. This definition, satisfactory in its principles, is particularly necessary because domestic systems of law are liable to give differing solutions. It is even observable that in some cases - including that of French law - domestic systems of law adopt limits that are divergent according to the aspect considered, i.e. according as what is concerned is maritime registration, fisheries policy or inland-water navigation. 2/

15.2. In view of these sometimes delicate problems of limit-fixing, the Paris Convention of 1974 provided in its article 16 c that one of the duties of the Commission established was "to fix, if necessary, on the proposal of the

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1/ Official Journal of the European Communities No. L 129/23, 8 May 1976.

2/ See L. Cavaré, Droit international public, p. 799.

Contracting Party or Parties bordering on the same watercourse and following a standard procedure, the limit to which the maritime area shall extend in that watercourse;". On that basis, therefore, the Commission will fix the precise landward limit of the internal waters of the Contracting Party or Parties concerned.

16. One final question arises with regard to "internal coastal waters". Paragraph 7 of the inventory of areas of disagreement reports that several delegations asked that the inclusion of "internal coastal waters" should be reconsidered. The question at stake would no longer be one of definition, but one of a reservation on the principle of including such waters in the geographical coverage of the Protocol.

16.1. A number of international precedents have in effect excluded the internal waters of their Contracting Parties from their coverage. An example is the London Convention of 29 December 1972, whose article III, paragraph 3, stipulates: " 'Sea' means all marine waters other than the internal waters of States.". Similarly, the Helsinki Convention of 22 March 1974 rules in its article 1 that "the Baltic Sea Area" does not include internal waters of the Contracting Parties. This position of principle notwithstanding, article 4, paragraph 3, of the same Convention again takes up the question of internal waters by stating: "While the provisions of the present Convention do not apply to internal waters, which are under the sovereignty of each Contracting Party, the Contracting Parties undertake, without prejudice to their sovereign rights, to ensure that the purposes of the present Convention will be obtained in these waters.".

16.2. The Kuwait Regional Convention on Co-operation for the Protection of the Marine Environment against Pollution*/ (24 April 1978) excludes in principle the internal waters of the Contracting Parties from the maritime area to which the agreement applies, except where the Convention or one of its protocols provides otherwise (article 2). Article 1, paragraph 2, of the Barcelona Convention of 16 February 1976 takes up a similar position by making provision a contrario enabling a protocol to include the internal waters of the Contracting Parties in its geographical coverage.

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*/ Note by the translator. As the English version of this Convention is not available at the Palais des Nations, the title quoted in paragraph 16.2 is not necessarily authentic.

16.3. Such exclusions in principle of internal waters are explained by the nature of the conventions in question, which establish general principles at the regional level covering all forms of marine pollution; the additional protocols, however, constitute as it were a second level of penetration in specific areas which might necessitate an extension of the general convention's geographical coverage.

16.4. Everything depends in such cases on the type of pollution contemplated and on that pollution's most frequent geographical location. Thus the Protocol for the prevention of pollution of the Mediterranean Sea by dumping from ships and aircraft refers in its article 2 to the area of application of article 1 of the Barcelona Convention, since that area corresponds closely enough to the critical areas for pollution of that type.

16.5. A compromise solution was adopted by the Kuwait Regional Conference in the Protocol concerning regional co-operation in combating pollution by oil and other harmful substances in cases of emergency, whose article 4, paragraph 1, stipulates that the Protocol shall apply in the maritime area described in article 2 of the Convention, thereby excluding internal waters, while paragraph 2 provides in the following words for a possible extension to internal waters in the event of a sovereign decision by the Party concerned: "For the purposes of dealing with a marine emergency, ports, harbours, estuaries, bays and lagoons may be treated as part of the Sea Area if the concerned Contracting State so decides.".

16.6. The inclusion of internal waters is entirely justified in the case of pollution from land-based sources, since this type of pollution originates in the territory and therefore primarily affects internal waters. The Paris Convention of 1974 concerning land-based pollution also included them quite naturally in its coverage (article 3 a). Given the origin of the discharges, it is difficult to conceive of their exclusion from a protocol specifically concerned with land-based pollution; the waters which directly receive such discharges cannot be disregarded in specifying coverage. This fact is in practice inherent in the concept of the control of land-based pollution.

ARTICLE 3. SCOPE

Paragraph 1

17. The use of the expression "dépôt à la côte" in the French version of the draft prompted a number of questions. In the matter of terminology, this imprecise French version of the term "coastal dumping" doubtless reflects a difficulty of translation. The problem can be tackled again in the light of the notion's content. It apparently covers two situations; one, the depositing on the shore of pollutants capable of being subsequently swept along by a rise in the water level at certain periods; and the other, the discharge of pollutants into the sea area from the shore.

17.1. In view of that double meaning, and in order to express it fully and unambiguously, the following definition is proposed: "dépôts ou déversements effectués sur la côte ou à partir de celle-ci;".

18. It was proposed that an express reference to "groundwater" should be included in paragraph 1, subparagraph (c), because of the frequent occurrence of karst structures in several Mediterranean countries. What international precedents are there in this matter?

18.1. There is no express mention of groundwater in the 1974 Paris Convention, whose article 3, subparagraph (c), states:

> "'Pollution from land-based sources' means: the pollution of the maritime area
>
> (i) through watercourses,
>
> (ii) from the coast, including introduction through underwater or other pipelines,
>
> (iii) from man-made structures placed under the jurisdiction of a Contracting Party within the limits of the area to which the present Convention applies."

18.2. The Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States on the Programme of Action of the European Communities on the Environment 1/ refers to rivers in its Part II, Title I, chapter 6, section 1, paragraph 3, "Measures for reducing land-based marine pollution", but does not expressly mention groundwater. Such mention does occur, however, in Directive 76/464 of the Council of the European Communities, dated 4 May 1976, on

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1/ Meeting of the Council of the European Communities held on 22 November 1973. Official Journal of the European Communities, No. C.112/25, 20 December 1973.

pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (preambular paragraph 10; article 1, para. 1; and article 4, para. 1).[1/]

18.3. Mention of groundwater in the draft protocol may also be justified in the light of the global approach to water conservation adopted in the legislation of several States. Thus Monaco's Act No.954 of 19 April 1974 concerning the control of water pollution and air pollution expressly mentions groundwater in its article 1.[2/] France's Decree No.73-218 of 23 February 1973,[3/] giving effect to articles 2 and 6 (I°) of the Act of 16 December 1964 concerning the management and distribution of water resources and the control of pollution of those resources, substantially amended the regulations in force up to that time. The Circular dated 15 January 1977 concer ing the authorization of discharges, outflows, jets, dumping and other acts liable to impair the quality of surface waters, groundwaters and seawater within the territorial limits[4/] states in that connexion that the application of the regulations on water pollution shall henceforth be governed by the same rules, whatever the geographical nature of those waters. "This is an innovation in law, more particularly with regard to groundwater, whose qualitative protection was hitherto ensured only by instruments of specific scope."[5/]

18.4. By analogy with that global approach in the regulations governing the protection of water, the express mention of groundwater in the draft protocol would emphasize that the protocol is intended to be equally comprehensive in the matter of the origin of polluting discharges through watercourses.

19. No consensus was reached on the inclusion of a reference to the atmosphere in paragraph 1, subparagraph (d). This problem is directly linked to the precise definition of the concept of "land-based pollution", and has already been indirectly evoked in paragraph 12 of this report in connexion with the legal definition of "territory". But in law the notions "territory" and "land-based" cannot be totally assimilated, the content of the first being defined by international law, while the second relates to a geographical situation.

1/ Official Journal of the European Communities, No.L/129/23, 18 May 1976.

2/ Journal de Monaco, 26 April 1974, p.304.

3/ Journal Officiel de la République française, 2 March 1973, p.2333.

4/ Journal Officiel de la République française, 9 March 1977, NC, p.1274.

5/ Ibid., p.1275.

19.1. Etymologically speaking, "land-based pollution" is marine pollution from onshore sources, as opposed to pollution originating at sea.1/ However, consideration might be given to broadening this narrow definition by including in it reference to:

The atmosphere, and to

Polluting discharges originating not from the shore, but from industrial activities carried out from fixed man-made structures in adjacent maritime areas.

19.2. Concerning the specific problem of the atmosphere, the solutions furnished by the international precedents are not homogeneous and at times there is some ambiguity in the terminology adopted. In ICNT, for example, article 195, paragraph 1, reads: "States shall take all necessary measures consistent with the present Convention to prevent, reduce and control pollution of the marine environment <u>from any source</u> ...."2/ The same article's paragraph 3, subparagraph (a) goes beyond that global approach to sources by specifying that the measures taken shall include, <u>inter alia</u>, those designed to minimize to the fullest possible extent:

"(a) Release of toxic ... substances ...:

(i) from land-based sources;

(ii) from or through the atmosphere;".

Thus the article makes a distinction between land-based sources, i.e. pollution from the land itself and pullution from or through the atmosphere.

19.3. The problem at issue is in fact wider in its scope than the mere definition of land-based pollution in a broader or a narrower sense, i.e. referring or not referring to the atmosphere. It seems useful also to distinguish between on the one hand the real origin of the pollution and on the other the medium supporting and carrying it; the atmosphere is one of the possible carriers of a pollutant from a source on the land.

19.4. Terminological ambiguity is also apparent in other articles of ICNT. In Section 5, headed "International rules and national legislation to prevent, reduce and control pollution of the marine environment", article 208 relates exclusively, according to its title, to "pollution from land-based sources", which term embraces

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1/ Cf. the report by Professor Pacteau to the Second Congress of the French Society for Environmental Law, Bordeaux, October 1977.

2/ Underlining added.

sources that are physically linked to the land territory, such as "rivers, estuaries, pipelines and outfall structures". In the same section 5, article 213 applies to "pollution from or through the atmosphere". ICNT again distinguishes the atmosphere from directly land-based sources in its Section 6, entitled "Enforcement"; article 214 concerns "Enforcement with respect to land-based sources of pollution", while article 223 deals with "Enforcement with respect to pollution from or through the atmosphere".

19.5. The expression "from or through the atmosphere" used in ICNT's articles 213 and 223 clearly shows the atmosphere's potential dual role in this matter:

The atmosphere may itself be the place where the pollution menacing maritime areas is formed, and this would be expressed by the phrase "pollution from the atmosphere";

On the other hand, the atmosphere may be no more than a support for the transmission of pollution originating from purely land-based sources, i.e. from the land territory. This is "pollution through the atmosphere".

19.6. This distinction cannot be disregarded, for it may directly affect the future protocol's precise scope. If the term "territories" is not so defined in article 3, paragraph 1 of the draft protocol as to restrict it to, for example, purely terrestrial and inland-waterway territories then it will possess its full meaning in law and accordingly include the "aerial territory", or air space, over which the State exercises sovereignty. If, therefore, that broader definition is applied, then the words "the Protocol shall apply to all polluting discharges ... from the territories of the Parties" will mean that the Protocol will apply to, inter alia, polluting discharges from the atmosphere within the limits of the air space under a Party's jurisdiction.

19.6.1. It will be observed in this connexion that if the notion "territory" is to be interpreted in this non-restrictive fashion, in keeping with the meaning which it has in international law, the inclusion of subparagraph (d), "through the atmosphere", is logically justified. Indeed, the acceptance of polluting discharges from the atmosphere as being within the scope of the Protocol entails acceptance also of the atmosphere as a supporting medium as set out in subparagraph (d).

19.6.2. If, however, "territory" is so defined as to exclude the "aerial territory" (air space), subparagraph (d) could conceivably be either retained or deleted according as the Parties wished to assign wider or narrower scope to the protocol.

19.7. Article 3, subparagraph (c) of the Paris Convention of 4 June 1974 gives the definition of "pollution from land-based sources" reproduced in paragraph 18.1. of this report. That definition makes no mention of the atmosphere as a medium for supporting and transmitting land-based pollution. Yet the definition apparently gives an exhaustive list of such supporting media, since it contains no such term as "in particular" or "inter alia".

19.8. On the other hand, the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area states in its article 2, paragraph 2: "'Land-based pollution' means pollution of the sea caused by discharges from land reaching the sea waterborne, airborne[1/] or directly from the coast, including outfalls from pipelines;". It should also be noted that the Helsinki Convention does not take up the problem of the inclusion or non-inclusion of aerial territory when limiting land-based pollution to discharges from land. In this context the atmosphere is considered as being no more than a possible support for pollutants originating from sources on land.

The Kuwait Convention of 24 April 1978, previously referred to, also includes the atmosphere as a support for pollutants of land origin by adapting to its article VI a definition practically identical to that given in the Helsinki Convention's article 2, paragraph 2 i.e.:

"Article VI

Pollution from land-based sources

> The Contracting States shall take all appropriate measures to prevent, abate and combat pollution caused by discharges from land reaching the Sea Area whether water-borne, air-borne, or directly from the coast including outfalls and pipelines."

ARTICLE 3, Paragraph 2

20. According to some delegations, the term "structures under the jurisdiction of a Party" raises problems of legal interpretation which call for clarification. The question of revision of the paragraph as a whole has also been raised.

20.1. The first legal problem attaching to this question concerns the actual definition of these "structures under the jurisdiction of a Party". No precise information is given about it in article 3, paragraph 2, and the term is not included among the definitions in article 4. The same situation exists in the Paris Convention of 4 June 1974, which includes under "pollution from land-based sources" pollution of the maritime area "from man-made structures placed under the jurisdiction of a Contracting Party ...",[2/] but does not define such structures.

1/ Underlining added.

2/ Article 3, paragraph c (iii).

20.1.1. Specifically, do the "structures" contemplated in paragraph 2 include all fixed man-made structures situated in the Protocol Area or do they exclude, in particular, platforms intended for exploration and for the working of submarine minerals? Reference to previous meetings supplies a first answer to this question. At the Intergovernmental Consultation held at Athens in February 1977, principle 2 ("Scope and geographical coverage") included in subparagraph (b) (iv) the expression "... from man-made off-shore structureswwhich are under the jurisdiction of a Party and which serve purposes other than the exploration and exploitation of mineral resources in the sea". However, no consensus was reached on this subparagraph, and it was placed between square brackets.

20.1.2. On the other hand, article 3, paragraph 2, of the preliminary draft protocol prepared at the second Intergovernmental Consultation held at Venice in October 1977 omitted the earlier clause excluding structures connected with mineral resources, and this paragraph is no longer enclosed in square brackets, as it was in the text submitted to the Athens meeting. It is permissible to conclude from this deliberate change that under the present paragraph 2 all fixed man-made off-shore structures come within the scope of the protocol, including those connected with the exploration and exploitation of mineral resources.

20.1.3. However, the Barcelona Convention of 16 February 1976 singles out the latter type of activity rather clearly. Thus its article 7 is applicable to "pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil", whereas article 8 relates to "pollution from land-based sources". This Convention accordingly draws a clear distinction between pollution of the first-mentioned type and land-based pollution proper.

20.1.4. In law, as we shall see later, and technically, a distinction is often made between these two types of pollution. For instance, the Working Group of Experts on Environmental Law, set up to examine and continue the work undertaken by UNEP in the area of environmental law, decided at its first session[1/] to begin by examining the legal aspects of off-shore mining and drilling carried out within the limits of national jurisdiction.[2/] Also pertinent is the Meeting of Experts convened by the International Juridical Organization (IJO) on Legal Aspects of Pollution Resulting from Exploration and Exploitation of the Continental Shelf, the Seabed and its Subsoil in the Mediterranean.

1/ Held at Geneva from 29 August to 1 September 1977.

2/ Cf. document UNEP/WG.14/4, 12 April 1978.

20.1.5. Although no limitative definition of these structures is given, different countries' legislative enactment provide precise information concerning the coverage of their legislation in the matter. Article 5, paragraph 4, of the 1958 Convention on the Continental Shelf provided that installations and devices necessary for the exploration and exploitation of the continental shelf were under the jurisdiction of the coastal State. Article 60, paragraph 2, of ICNT makes similar provision for jurisdiction in respect of such installations established in the exclusive economic zone.

20.1.6. In French law, this principle of jurisdiction was put into effect by the Act of 30 December 1968 and the enabling decrees of 1971. This Act defines in its article 3, what is to be understood by "installations and devices", dividing them into two categories:

First, the expression covers platforms and other items of equipment for exploration and exploitation, and their ancillary items. According to the statement of the Act's purposes, such a definition covers a wide field, including in particular the piping, the buoys and beacons, and the pontoons used for housing personnel and for storing equipment and products.[1/]

Secondly, the Act is also applicable to sea-going vessels while they are participating directly in exploration or exploitation operations. This notion of "installations and devices" is thus particularly broad, and covers in particular - according to the statement of purposes - drilling vessels and dredgers, special-purpose craft such as dormitory-vessels and storage vessels to the extent that, being anchored near the installations, they can be regarded as being ancillary to them.

The following are not deemed to be "installations":

The same devices and vessels while navigating and not participating directly in the work;

Vessels providing communication between installations or between installations and the shore;

Vessels participating, without being anchored, in research work - e.g. geophysical, seismic or other.

Thus the fact that structures connected with the exploration and exploitation of submarine mineral resources are taken into account in the protocol is likely to broaden the coverage of the text.

1/ Cf. Jean Devaux Charbonnel, "Les installations pétrolières en mer" in Le pétrole et la mer, CERDEM Symposium, Nice, published by Presses universitaires de France, Paris, 1976, p. 341.

20.2. The second legal problem posed by article 3, paragraph 2, goes beyond the mere definition of the types of structure covered by the protocol and concerns the inclusion or exclusion of fixed off-shore installations. There are two possible solutions to this problem:

According to a broad concept of pollution from land-based sources, such pollution should include not only waste of mainland origin, but also discharges from industrial activities carried out in maritime areas adjacent to the shore. This concept was adopted in article 3, paragraph (c), of the 1974 Paris Convention.

However, in other international precedents it has been thought proper to consider such industrial activities within the context of the off-shore rights and obligations of States,1/ and particularly in cases where such activities move further and further out to sea. Thus strictly maritime conventions which do not concern land-based pollution have included within their coverage pollution caused by such artificial devices and structures and - a particular noteworthy fact in the maritime-law context - have sometimes assimilated such installations to ships in the matter of the applicable system of law. This is the case in, for example, the Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (15 February 1972) and the London Convention for the Prevention of Pollution from Ships (2 November 1973).

20.2.1. Thus the Oslo Convention lays down in its article 19, paragraph 2, that: "'Ships and aircraft' means sea-going vessels and air-borne craft of any type whatsoever. This expression includes air-cushion craft, floating craft whether self-propelled or not, and fixed or floating platforms."2/

20.2.2. According to article III, paragraph 1 (a), of the London Convention of 29 December 1972, "dumping" means:

"(i) any deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea;"2/ and

"(ii) any deliberate disposal at sea of vessels, aircraft, platforms or other man-made structures at sea."2/

20.2.3. Lastly, the London Convention of 2 November 1973 gives in article 2, paragraph 4, the following definition of "ship": "'ship' means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms".2/

1/ Cf. the report by Prof. Bernard Pacteau, op.cit., p.2.

2/ Underlining added.

20.2.4. The particularly wide scope of each of these conventions should be compared with that of the aforementioned French legislative text. The French Act of 30 December 1968 regards as "installations and devices certain sea-going vessels while engaged in certain of their operations. But these three Convejtmons apply, a different concept, in that they widen their scope by assimilating platforms to ships. Such an approach thus assimilates pollution caused by these installations to pollution caused by ships, and accordingly excludes it from the coverage of the concept of land-based pollution. This adaptation in fact spings from a manifest desire to bring the legal status of platforms and of exploring and exploiting installations closer to, and on occasion to identify it with, that of ships. Classifications in the matter of pollution are only a consequence of this frequent assimilation to ships and hence to pollution caused by ships.

20.2.5. Some or all of these fixed installations are also occasionally assimilated to ships in conventions intended to protect the marine environment from various types of pollution. This is the case with article 2, paragraph 4, of the Helsinki Convention of 22 March 1974, while paragraph 3 of the same article makes the same assimilation with respect to the scope of the term "dumping". Certain national legislative texts also adopt a similar approach. In Ireland, for instance, the Local Government (Water Pollution) Act, 1977, does not apply to polluting discharges from off-shore structures. Such structures are dealt with separately, together with dumping operations carried out by ships.

20.2.6. The most recent international precedent of particular interest to us in the present context is provided by the Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, whose article 3, paragraph 1, contains the following definition: "'Ships and aircraft' means waterborne or airborne craft of any type whatsoever. This expression includes air-cushioned craft and floating craft whether self-propelled or not, <u>and platforms and other man-made structures at sea and their equipment</u>."1/

This Protocol accordingly covers dumping operations, particularly those performed from man-made off-shore structures. To include a further prohibition

1/ Underlining added.

in the Protocol on pollution from land-based sources might accordingly constitute duplication, to some extent, particularly if structures used for exploration and and for exploiting mineral resources are included.

On the other hand, the installation and use of certain of these structures directly associated with off-shore activities militates in favour of including them in the coverage of a protocol applicable to pollution from land-based sources. Other structures, moreover, are no less closely associated with navigation and with land-based industrial activities. This is the case, for example, with oil "super-ports" involving the off-shore installation of substantial structures, including, exceptionally, artificial islands.1/

20.2.7. On the basis of this abundant international practice, the following points should be borne in mind:

The draft protocol's article 3, paragraph 2, as at present worded, applies without limitation to all fixed man-made off-shore structures under the jurisdiction of a Party;

International precedents very often dissociate polluting discharges from such structures from pollution coming from land-based sources, and associate them instead with marine pollution caused by ships. Nevertheless, the 1974 Paris Convention constitutes a notable and not insignificant exception to this practice;

The exclusion of installations and devices exploiting mineral resources can be justified if a special legal approach is subsequently adopted in respect of activities conducted in the seabed and its subsoil. Another exclusion might also apply to structures installed beyond the limits of the territorial sea. But since in its article 60, paragraph 2, ICNT gives the coastal State jurisdiction over installations set up in the exclusive economic zone, this might set up a dualism of legal régimes that would be awkward in practice.

1/ Cf. Jean-André Diaz, "Les super-ports pétroliers" in Le pétrole et la mer, op.cit., p. 321 et seq.

ARTICLE 4

21. The question of "internal coastal waters" and the related question of the "freshwater limit" were mentioned earlier, in connexion with article 2. At this point we shall deal more particularly with the notion of "new installation" - avoiding, however, overlapping with the note prepared on this topic by the WHO Secretariat (UNEP/WG.17/INF.5).

22. An example additional to those given in the aforesaid WHO note is the Greek Act No. 743 of 13 October 1977, which concerns the protection of the marine environment and has related aims.[1/] Article 10 concerns new and existing installations and provides, inter alia, that the assembly and operation of new and the enlargement and alteration of existing installations shall be subject to the prior grant of an authorization for the elimination of wastes and residues. If there is a major risk of deterioration of the environment because of the installation's size, nature or activities, the operator must submit to the competent authority a special report setting out the foreseeable effects on the environment.

23. A francophone coastal State in the Gulf of Guinea has also drawn a distinction between new installations and existing installations in its legislation on water pollution. It does not give any detailed definition, but installations erected after the issue of the "survey decree" (décret d'inventaire) establishing the degree of pollution of the surface waters as a whole are deemed to be new installations. This is the only time-criterion adopted, and no mention is made of subsequent alterations to existing installations. Moreover, the expression "erected after the issue of the survey decree" is open to different interpretations as to the precise state of completion of the installation to be taken into account.

23.1. The legislation of this African country then goes on to make strict distinctions between these several categories of installation in the matter of the obligations imposed on each of them. In the case of discharge installations existing prior to the publication of the aforesaid survey decree, the owners must, without prejudice to the obligations incumbent on them under the legislation in force, make all necessary arrangements to fulfil the requirements concerning the installations' effluents within the time-limit established by the decree. Discharges from new installations are subject to:

Prior approval by the Minister of the Environment of the technical specifications for the new installations' purification equipment; and to the issue by the Minister of the Environment, after actual construction of the purification equipment in conformity with the technical specifications so approved, of a starting-up authorization.

1/ Ephêmeris tês kybernêseôs tês Hellênikês Dêmokratias, part I, No. 319, pp. 2961-2967, 17 October 1977.

24. In the light of these examples and those contained in the note prepared by the WHO Secretariat, and taking into account the definitions in the preliminary draft protocol and in the variant thereof submitted by one delegation, it is appropriate to piece together the various suitable components of a definition.

24.1. The most clear-cut distinction need be no more than a simple two-way system in which the adjective "new" or the adjective "existing" is applied according as the installation comes into existence after or existed before the entry into force of a particular legal text. This radical solution is far from solving all the problems, and - more particularly - it disregards possible development of the installation. In this respect the distinction, and the inclusion in the same definition of really new installations and installations having undergone substantial alterations, are fully justified in that they constitute a comprehensive approach to the problem.

24.2. However, by their nature, these two categories of new installations entail the application of differing criteria of definition:

24.2.1. In the case of a completely new installation the fixed-point-of-time system seems most appropriate, but its application poses at least two preliminary questions:

First: should the point of time adopted be that of the entry into force of the protocol or should it be prescribed as the end of a period running from the date of such entry into force? The examples found in domestic laws and regulations indicate that the domestic legislation generally chooses the date of entry into force of the pertinent legal text. By analogy, a similar system might be applied in the matter of the date of the protocol's entry into force. However, the analogy cannot be complete, and in any case information requirements may warrant fixing a relatively short interval of time running from the text's entry into force. Such an interval is also justified by the fact that, contrary to what is the case with domestic laws and regulations, a Government will not know in advance the exact date of the protocol's entry into force. This element of uncertainty can be compensated for by an interval or time-limit enabling the bringing into force of the pertinent provisions to be efficiently organized.

Secondly, the time-limit problem is bound up with the question of determining accurately what constitutes a completely new installation. The wording "in the process of being set up" used in Council Directive No. 78/176/EEC may give rise to problems of legal interpretation, depending on the particular domestic laws and regulations involved. The existence of a building contract or a construction permit is, however, a precise point of reference in the case of installations not yet built. As to installations under construction, subparagraph (ii) in the preliminary draft protocol contemplates two situations:

That of establishments for which construction or site works are not completed three years after the entry into force of the protocol. This principle reflects the idea that the installation being set up may, because of its slow pace of construction, be subject to the special régime for new installations. Circumstances peculiar to each specific case sometimes warrant fairly long time-limits, and in the event of economic or technical difficulties subjection to the "new installations" régime could lead to initially unforseen constraints that on occasion might jeopardize the financial stability of the installation; and

That of establishments for which construction or site works are begun after the time-limit indicated in subparagraph (i). This assimilation is perfectly laudable so far as its principles are concerned, but it substantially lessens the value of the building contract or construction permit by endangering it or them, at least to some extent. For example, a contract awarded for a particular establishment before the expiry of the prescribed time-limit might be denounced if major alterations jeopardizing the installation's financial stability were curtailed. The law of contracts calls for a certain stability, and that stability might be adversely affected to some extent by this provision.

The not inconsiderable legal effects of the two situations discussed in subparagraph (ii) might be attenuated by a cumulative rather than an alternative approach, i.e. "for which construction or site works are begun after [expiry of] the time-limit indicated above and are not completed three years after the entry into force of the Protocol;".

24.2.2. In the case of extensions or conversions of existing installations, a system based on a time-limit is obviously unsuitable. Two criteria are appropriate for use in this definition:

The first relates to polluting discharges and has aspects of two kinds, i.e. qualitative and quantitative. It is qualitative in that a change in the nature of the discharges will lead to application of the "new installations" régime. It is quantitative in that this régime will be applied when the amount of waste has increased by x per cent as a result of the change. These two criteria, relating solely to changes - whether qualitative or quantitative - in the discharges, could accordingly be combined in a single subparagraph, whereas the preliminary draft protocol deals with them in two separate subparagraphs, (i) and (ii).

The second criterion concerns the degree of increase in the establishment's production capacity over its earlier capacity or capacities. Since it applies to a very wide range of establishments, this proportional criterion is more suitable here than the fixed criterion adopted in Council Directive No. 78/176/EEC for a single industry, i.e. the titanium dioxide industry.

24.2.3. Apart from the dual assumption of conversion and extension of existing installations, the notion of renouvellement ("renewal" or "replacement") of equipment, put forward in a second draft submitted by one delegation, is likewise not without importance in law. If an establishment entirely renews ("replaces") the equipment, the production tool described in legal terms as "movable property" is substantially transformed, even if the "real property" housing it remains unchanged.

25. Several delegations have requested the insertion in article 4 of a definition of "pollution from land-based sources". This notion unquestionably has to be made clear, but article 3 of the preliminary draft protocol in fact constitutes such a definition and distinguishes the chief ways in which this type of pollution is introduced into the sea. The Paris Convention of 4 June 1974 presents the matter in a rather similar way, but does so specifically in its "definitions" article (article 3, subpara.(c)). The various comments made earlier on article 3 in connexion with the concept of "land-based pollution" will not be recalled here.

26. One delegation has also suggested the inclusion in article 4 of a definition of "discharge". Hardly any of the international precedents employing this particular term expressly define it. Council Directive No. 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community[1/] constitutes an exception in this respect and defines the term "discharge" in its article 1, paragraph 2 (d), as "the introduction into the waters referred to in paragraph 1 of any substances in List I or List II of the Annex, with the exception of:

- discharges of dredgings,
- operational discharges from ships in territorial waters,
- dumping from ships in territorial waters;"

26.1. This is in fact simply a particular application of the general definition of pollution. On the other hand, many definitions of the term "dumping" are to be found, as for example in article 1, paragraph 1 (5), of ICNT and in article 3 of the Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft. The term "dumping" is reserved for polluting discharges

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1/ Official Journal of the European Communities, No. L 129/23, 18 May 1976.

from vessels and aircraft and also from platforms or other man-made structures at sea. If the latter category comes within the scope of the protocol on pollution from land-based sources, the notion of dumping will accordingly have a limited application in it.

ARTICLES 5 and 6

27. Several delegations proposed that articles 5 and 6 should be consolidated into a single article concerning "reduction of pollution". In its preamble, Council Directive No. 78/176/EEC on wastes from the titanium dioxide industry separates into two distinct paragraphs the legal régime as applicable to existing industrial establishments and the legal régime as applicable to new industrial establishments. Similarly, article 9 of the Directive sets out the programmes applicable to existing industrial establishments, while article 10 does likewise in respect of new industrial establishments. Another example of the separation of the respective provisions applicable to these two categories of establishment is found in the Italian Act No. 319 of 10 May 1976 laying down rules for the protection of water against pollution. That Act defines in its article 12 the conditions to be met by waste from new manufacturing establishments and in its article 13 those applying to waste from existing manufacturing establishments.

27.1. These precedents are not, however, inconsistent with the possible consolidation of articles 5 and 6 into a single article in the protocol, because the Community measures and the national measures referred to set forth in detail the action to be taken for each of the two categories of establishment. In contrast, articles 5 and 6 of the preliminary draft protocol set forth general objectives whose common point and long-term justification are the reduction of pollution. This community of aim as to the purpose of the protocol cannot but be strengthened by the adoption of a single article dealing nevertheless in two separate paragraphs with the two categories of establishment.

27.2. One delegation proposed that the structure of articles 5, 6, 7 and 8 should be completely recast, and it submitted two draft protocols offering alternatives designed to link the existing articles 5 and 6 (distinction between existing sources and new installations more clearly with the existing articles 7 and 8 (substances listed in annexes I and II). Such a discussion is not confined to a mere question of the rational arrangement of provisions; it touches upon a substantive problem of some importance concerning the coverage of articles 5 and 6. It will be recalled in this connexion that in the "Principles" suggested at the Athens Consultation (UNEP/IG.6/3) the distinction between existing sources and new installations seemed to aim at discharges of substances other than those expressly listed in the annexes (cf. commentary to Principle 3), whereas the provisions relating to the listed substances did not differentiate between the two categories of sources. The present draft stipualates in its article 6, paragraph 2, that the régime applicable to new installations shall not permit the implementation of measures less stringent than those prescribed for listed substances (thus implicitly accepting the possibility of adopting programmes of broader scope). So far as existing sources of pollution are concerned, however, neither the wording nor the placing of the existing article 5 indicates clearly to what extent such sources will be subject to the provisions relating to substances listed in annexes I and II. However, it seems essential that all ambiguity should be removed and that the wishes of Governments in this respect should be clearly expressed. In particular, if it is desired that the existing articles 5 and 6 should apply to acts of pollution other than pollution by the substances referred to in the two annexes, it would be difficult purely and simply to regroup these articles with the provisions specific to the listed substances.

ARTICLE 7

28. Paragraph 2: Some delegations wondered whether it was desirable to prescribe a time-limit or "deadline" for adoption of a time-table for the application of emission standards and/or standards of use, as appropriate. In this respect the solutions furnished by international precedents are more or less binding.

28.1. In the context of the Community, Council Directive No. 78/176/EEC on waste from the titanium dioxide industry stipulates in its preamble that "for existing industrial establishments Member States must, by 1 July 1980, draw up programmes for the progressive reduction of pollution caused by such waste with a view to its elimination; ... these programmes must fix the general reduction targets to be attained by 1 July 1987 at the latest and indicate the measures to be taken for each establishment;". Article 9, paragraph 3, states that within a period of six months after receipt of all national programmes the Commission shall "submit suitable proposals to the Council for the harmonization of these programmes", and that "The Council shall act on these proposals within six months of the publication of the opinion of the European Parliament and that of the Economic and Social Committee in the Official Journal of the European Communities.". Article 9, paragraph 4, provides that "Member States shall introduce a programme by 1 January 1982 at the latest.".

28.2. A time-table is also established by Council Directive No. 76/160/EEC of 8 December 1975 concerning the quality of bathing water.1/ Article 4, paragraph 1, provides that: "Member States shall take all necessary measures to ensure that, within 10 years following the notification of this Directive, the quality of bathing water conforms to the limit values set in accordance with Article 3.".

28.3. Similarly, Council Directive No. 76/464/EEC of 4 May 1976, on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, provides that so far as concerns the discharge of substances within List I "the Council should, within specific time limits and on a proposal from the Commission, adopt limit values which the emission standards should not exceed, measures of measurement, and the time limits with which existing dischargers should comply" (seventh preambular paragraph). Article 6, paragraph 4, stipulates that the deadlines shall be laid down by the Council, taking into account the features of the industrial sectors concerned and, where appropriate, the types of products.

1/ Official Journal of the European Communities, No. L 31/1, 5 February 1976.

28.4. Such examples are particularly precise, but it should not be forgotten that these provisions are applied within a particular international legal framework having specific rules. Among ordinary-law treaties the Convention on the Protection of the Rhine against Chemical Pollution, signed at Bonn on 3 December 1976, establishes, as is usual, a distinction according to the types of substances discharged.

28.4.1. Concerning substances under Annex I the International Commission proposes limit-values for the emission standards (article 5, para.1). According to the rules of procedure established in article 14, these limit-values enter into force after unanimous adoption by the Contracting Parties. Under the same procedure the International Commission proposes to the Contracting Parties the time-limits prescribed in the authorizations for existing discharges, so as to ensure that the conditions laid down therein are met (article 5, para.3). There is accordingly no mandatory deadline for the adoption of the limit-values and time-limits by the Parties.

28.4.2. Regarding Annex-II substances article 6, paragraph 2, provides: "The Governments Parties to this Convention will endeavour to establish within two years from the entry into force of this Convention national programs for reducing the pollution of the waters of the Rhine by Annex II substances,". Before establishing those national programmes the Contracting Parties are to "coordinate within the International Commission". To ensure coherence of the draft programmes the Commission is to "present proposals on achieving ... the common objectives of reducing the pollution of the waters of the Rhine." (article 6, para.3). These proposals are required, under the procedure laid down in article 14, to be unanimously approved by the Parties, which means that there cannot be a rigid time-table for their adoption. While a deadline of two years is mentioned for the adoption of national programmes, the words "The Governments ... will endeavour" means that it is in no way binding. Article 6, paragraph 7, stipulates however that the programmes "shall establish deadlines for their implementation.".

28.5. The Paris Convention of 4 June 1974 worked out a fairly comparable system. Article 4, paragraph 3, stipulates that the Contracting Parties shall implement, with a view to reducing or eliminating pollution originating from land-based sources, programmes and measures including, as appropriate, specific standards applicable to discharges. The programmes are to contain time-limits for their completion, but no mandatory time-table for adoption of the programmes is prescribed. Article 18, paragraph 3, provides that the Commission "shall adopt, by unanimous vote, programmes and measures for the reduction or elimination of pollution from land-based sources as provided for in Article 4, ... The programmes and measures shall commence for and be applied by all Contracting Parties two hundred days after their adoption, unless the Commission specifies another date.". However, "Should unanimity not be attainable, the Commission may nonetheless adopt a programme or measures by a three quarters majority vote of its members.". But that programme is or those measures are applicable only in respect of the Contracting Parties which voted for them. The system adopted accordingly treats the question of time-limits in two different ways: a strict time-table is prescribed for putting in hand and completing programmes and measures, but no strict deadline is imposed on Parties for the adoption of those programmes or measures.

ARTICLE 8

29. Some clarification concerning the discharge authorization has been asked for. This system, which makes discharges of certain substances subject to the issue of an authorization by the competent national authorities is already applied in numerous precedents, both national and international.

29.1. This is the case, for example, with Council Directive 76/464/EEC, with the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area (article 6, para.4), and with the Bonn Convention on the Protection of the Rhine against Chemical Pollution, dated 3 December 1976. It will be noted that the last-mentioned Convention specifies in article 3, paragraph 1, that prior authorization is required, while paragraph 4 provides that the authorization can be granted only for a limited period and may be renewed in the light of any changes in limit values.

29.2. Articles 5 and 6 of the Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft also prescribes the prior issue of either a special or a general permit. The Paris Convention of 4 June 1974 stipulates in its article 4, paragraph 2 (b), that the substances listed in Part II of Annex A shall be discharged only after approval has been granted by the appropriate authorities within each Contracting State. These two terms in effect overlap with the expression "authorization", and in this connexion it might be mentioned that the Oslo Convention of 15 February 1972 uses in its article 6 the expression "specific permit" and, in article 7, the term "approval", while its Annex III enumerates the provisions governing the issue of permits and approvals for the dumping of wastes at sea. The London Convention of 29 December 1972 also adopts a similar system of special and general permits, but in addition it prescribes in its article VI, paragraph 1, that each Contracting Party shall designate an appropriate authority or authorities for that purpose.

29.3. The domestic laws and regulations of many countries also subject to prior authorization the discharge of certain substances into the sea; the following are a few examples. Greece's Act No. 743, dated 13 October 1977, concerning the protection of the marine environment makes the discharge of any substance into the sea subject to the grant of an authorization issued in accordance with the appropriate regulations and contingent upon there being no risk of pollution (article 3). Similar provisions, generally specifying the type of authority competent to issue authorizations, are also found in Bulgarian Decree No. 728 of 24 October 1963 on the protection of the air, water and the ground against pollution (article 12); in the Netherlands Acts on, respectively, pollution of surface waters (13 November 1969, article 1) and pollution of sea water (5 June 1975); in the Norwegian Act on water pollution (No. 75, 1970; article 9); in the Romanian Act on water management of 20 April 1973 (article 45); in the Spanish Order of 27 May 1967 prohibiting the discharge of industrial petroleum products or residues into the sea and the Spanish Act of 26 April 1969 concerning coastal areas; in the Yugoslav Act on national and international waters of 28 December 1973; in the Italian Act No. 319 of 10 May 1976 prescribing rules for the protection of waters against pollution (articles 9 and 11); and in French Decree No. 73-218 of 23 February 1973 (articles 2 and 4).

ARTICLE 9

30. Several delegations asked for clarifications regarding the word "specific" in the phrase "the quality of sea-water used for specific purposes". This term qualifies certain uses of sea-water involving particularly stringent pollution control. Such is the case, for example, with bathing water, rules concerning the quality of which are given in Council Directive 76/160/EEC of 8 December 1975. In the same spirit of differentiation, the Spanish Order of 29 April 1977 approving the instructions governing the discharge of waste water into the sea from the land through under-water outfalls establishes in its paragraph 2.2 different parameters for, inter alia, the following areas:

Bathing areas;

Aquacultural areas;

Areas subject to restrictions (waters of estuaries, coves and other areas in which the water is renewed very slowly and in which high concentrations of flora and fauna are found); and

Special areas (waters of aesthetic value, coastal areas classified as natural reserves).

31. Clarifications concerning "recommended practices" and the phrase "incorporated in the annexes to the protocol" (article 9, para.3). The common guidelines, criteria or standards differ in their legal scope vis-à-vis the Contracting Parties according as they are adopted in the form of recommended practices or in that of provisions incorporated in annexes to the protocol. In the former case, as the expression clearly shows, these standards will only be recommended, i.e. proposed, to the Parties. Although they have been determined by agreement, their application will depend on the good will of the Parties.

On the other hand, if these standards take the form of provisions incorporated in annexes to the protocol they will constitute an integral part of the protocol and have the same legal force. It will be noted that article 18 of the preliminary draft protocol prescribes, for amendments to the annexes or the adoption of additional annexes, the agreement of an as yet unspecified majority of the Parties, whereas most international precedents require the unanimous agreement of the Parties for the adoption of such standards and criteria.

32. Paragraph 34 of the inventory of areas of disagreement states that it was pointed out that the annexes to the preliminary draft favoured the adoption of emission standards, whereas one delegation had urged the need to adopt recipient-water quality standards.

32.1. Some international precedents place the main emphasis on water quality standards, which express the level of pollution that must not be exceeded. For example, the Agreement on Great Lakes Water Quality, signed at Ottawa on 15 April 1972, establishes different standards for "general water quality objectives" (article II) and "specific water quality objectives". Article I provides:

> "(i) 'Specific water quality objective' means the level of a substance or physical effect that the Parties agree, after investigation, to recognize as a maximum or minimum desired limit for a defined body of water or portion thereof, taking into account the beneficial uses of the water that the Parties desire to secure and protect;".

Emission standards are also dealt with indirectly in article V of the same Agreement, which provides that "programs and other measures directed toward the achievement of the water quality objectives shall be developed and implemented ... in accordance with legislation in the two countries" (Canada and the United States of America). These programmes entail setting emission standards, but these are left to the domestic legal system of each of the Parties.

32.2. In France, Decree No. 73-218 of 23 February 1973 was followed by two executive orders (arrêtés d'application) of 13 March 1975. The Circular dated 14 January 1977, to which reference has already been made, concerning the authorization of discharges, outflows, jets, dumping and other acts liable to impair the quality of surface water, groundwater and sea water within the territorial limits states with regard to these two executive orders: "The spirit of these texts rests on the notion of a quality aim: the quantity of pollution acceptable in a watercourse, a section of a watercourse, a canal, a lake, a pond, the sea or the groundwater depends on the purpose assigned, whether formally or not, to the recipient environment; on its vulnerability; and on its existing level of pollution".1/

1/ Journal Officiel de la Republique française, 9 March 1977, NC, p.1281.

32.3. In many cases, domestic laws and regulations also differentiate their quality standards according to the use made of the seawater. This element in the Spanish legislation has already been stressed in paragraph 30 above. In many instances the texts establish complementarity between the quality standards of recipient waters and the emission standards. Thus the above-mentioned Spanish Order of 29 April 1977, while it sets recipient-water quality standards varying according to the sector of use, also establishes, in its article 3, different parameters for the effluents, which parameters constitute emission standards.

32.4. The Italian Act No. 319 of 10 May 1976, prescribing rules for the protection of waters against pollution, establishes in its article 9 for the regulation of discharges a national system of standards based on the acceptability limits set out in tables A, B and C annexed to the Act. The standards are essentially emission standards, but certain observations appended to tables A, B and C also require criteria relating to the recipient waters to be taken into account.

32.5. Council Directive 76/464/EEC prescribes a system of prior authorization by the national authorities, conforming to emission standards which must not exceed "limit values" to be established by the Council of the European Communities. The concept of water quality also plays a part, for the Directive requires Member States to apply these limit values except in cases where such a State can prove to the Commission, in accordance with a monitoring procedure set up by the Council, that the quality objectives established by the Council on a proposal from the Commission are being met and continuously maintained, because of the action taken by, among others, that Member State, throughout the area which might be affected by the discharges (eighth preambular paragraph, and article 6, para.3).

32.6. Such quality objectives have already been established by the Council of the European Communities in Directive 76/160/EEC concerning the quality of bathing water and are provided for in the Proposal for a Council Directive relating to the quality requirements for waters favourable to shellfish growth.[1/] Similarly, article 7, paragraph 1, of Council Directive 78/176/EEC stipulates: "Irrespective of the method and extent of treatment of the waste in question, its discharge, dumping, storage,

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1/ Official Journal of the European Communities, No. C.283, 30 November 1976, p.1.

tipping and injection shall be accompanied by the monitoring referred to in Annex II of the waste and of the environment concerned1/ having regard to its physical, chemical, biological and ecological aspects.".

32.7. The Paris Convention of 1974 is particularly lacking in stringency in the formulation used in article 4, paragraph 3: "The programmes and measures [for reducing or eliminating land-based pollution] adopted under paragraph 2 of this article shall include, as appropriate,1/ specific regulations or standards governing the quality of the environment, discharges into the maritime area, such discharges into watercourses as affect the maritime area, and the composition and use of substances and products.".

32.8. Reference to a few of the international precedents in this area reveals, in most cases, the necessary complementarity of emission standards and recipient-water quality standards. There should be no exclusion of one of the terms by the other, but on the contrary a combination enabling the recipient-water-quality objectives to be achieved more particularly through emission standards. Achievement of this complementarity is particularly important in the specific context of the control of the land-based pollution of maritime waters.

32.9. The Organization for Economic Co-operation and Development (OECD) has also studied the problem and has isolated the element of complementarity referred to earlier. "Some [environmental standards] approach the notion of objectives (quality standards), whereas emission, process and product standards are instruments serving environmental quality objectives."2/

"(i) Quality standards: Environmental quality standards3/ [lay down the maximum permissible levels of pollution in the receptor media ...].4/ [They] are legal constraints which make it possible to achieve or approach given quality objectives defined for an environment. These objectives are always fixed at the appropriate political level according to the kind of pollution to be controlled or the kind of environment to be protected.".3/

1/ Underlining added.

2/ OECD, "Environmental Standards: Definitions and the need for international harmonization", Paris, 1974, p.3.

3/ Ibid., p.4.

4/ Ibid., p.6.

"(ii) Emission and process standards:[1/] [The purpose of emission standards is to specify the quantity of pollutants (or their concentration in effluents) which may be discharged from a given source per unit of time or during a given cycle of operations ...][2/] It would seem undesirable, as a general rule, to harmonize emission and process standards internationally, especially as their nature requires them to be varied according to area. Economic efficiency demands that these standards be suited to local conditions, and it would be economically wasteful to impose the same emission standard in areas at different stages of industrialization and having different populations and environments with different assimilative capacities ... In practice it often happens that emission standards are fixed case by case within the framework of general directives ...".[1/]

Although the two standards are intended to be complementary, emission standards can to some extent be assessed according to the circumstances of each particular case, whereas the marine environment's quality standards necessitate a very advanced level of harmonization among all the Contracting Parties.

32.10. This outline survey of pertinent international precedents would not be complete without an account of the relevant experience acquired in connexion with the Mediterranean Action Plan. Under the WHO/UNEP Joint Co-ordinated Pilot Project on Coastal Water Quality Control in the Mediterranean, in particular, biological quality criteria have been studied in connexion with recreational waters and shellfish-growing areas.[3/] In addition, WHO and UNEP intend gradually to introduce other quality criteria, with particular reference to the requirements resulting from the Protocol on Land-Based Pollution.

1/ Ibid., p.4.

2/ Ibid., p.7.

3/ See the following WHO/UNEP reports: "WHO/UNEP Joint Co-ordinated Pilot Project on Coastal Water Quality Control in the Mediterranean (MED VII). Mid-term Review" (Rome 1977); "La pollution des eaux côtières. Critères sanitaires et études épidémiologiques" ("Coastal water pollution. Health criteria and epidemiological studies") (Athens 1977); "Monitoring of recreational coastal water quality and shellfish culture areas" (Rome 1978).

ARTICLE 13

33. A twofold legal problem here makes certain items of information necessary: must the technical assistance be provided specifically "to developing countries" (article 13, para. 1) and must it be "provided on a favourable financial basis" (article 13, para. 2)? The analysis may relate both to the existing situation in technical assistance in general and to that in technological assistance in the particular area of the marine environment.

33.1. The attention paid by the international community to problems of development is increasingly reflected in the implementation of development-promoting measures of assistance and co-operation which take the inequality in the economic conditions of individual States into account. This approach is in keeping with the idea that inequality in the economic development of peoples must be matched by compensatory inequality in legal status.[1/] This principle, inherent in all international law concerned with development, has taken on particular prominence in the many programmes of technical assistance "to developing countries".

A very large number of texts illustrate this trend, and among many United Nations Resolutions the Charter of Economic Rights and Duties of States, whose text is an integral part of General Assembly Resolution 3281 (XXIX), affirms inter alia:

> "Article 9 - All States have the responsibility to co-operate in the economic, social, cultural, scientific and technological fields for the promotion of economic and social progress throughout the world, especially that of the developing countries.".
>
> "Article 13, paragraph 2 - ... In particular, all States should facilitate the access of developing countries to the achievements of modern science and technology, the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies and their needs.".

In the light of these trends, technical assistance in the United Nations system is designed to favour the developing countries and is provided on a favourable financial basis, the latter varying considerably, however, according to the financial capacity of each developing country considered.

1/ Cf. Guy de Lacharrière, "Identification et statut des pays moins développés", Paris, Annuaire Français de Droit International, 1971, p. 473.

33.2. As regards technical assistance in the marine context, the trends are the same and should even be strengthened, because the marine environment is a common property of all States. Supporting the same view, the OECD recommendation of 1976 on the principles governing the management of coastal zones[1/] recognized in its preamble that the protection of the coastal zones constituted a common interest of mankind and a "responsibility" for all Member States. The marine areas thus constitute a heritage from which all riparian States derive benefit. The preservation of this marine environment that benefits everybody can accordingly warrant technical assistance adapted to the financial capacities of each State in the region.

33.2.1. ICNT follows this line, especially in its articles 203 and 204, which read:

"Article 203 - Scientific and technical assistance to developing States

States shall directly or through competent international or regional organizations, global or regional:

(a) Promote programmes of scientific, educational, technical and other assistance to developing States for the protection and preservation of the marine environment and the prevention, reduction and control of marine pollution. Such assistance shall include, *inter alia*:

- (i) training of their scientific and technical personnel;
- (ii) facilitating their participation in relevant international programmes;
- (iii) supplying necessary equipment and facilities;
- (iv) enhancing the capacity of developing States to manufacture such equipment;
- (v) developing facilities for and advice on research, monitoring, educational and other programmes;

(b) Provide appropriate assistance, especially to developing States, for the minimization of the effects of major incidents which may cause serious pollution in the marine environment;

(c) Provide appropriate assistance, in particular to developing States, concerning the preparation of environmental assessments.

1/ C (76) 161 (Final).

Article 204 - Preferential treatment for developing States

Developing States shall, for purposes of the prevention of pollution of the marine environment or the minimization of its effects, be granted preference in:

(a) The allocation of appropriate funds and technical assistance facilities of international organizations, and

(b) The utilization of their specialized services.".

33.2.2. However, a less advanced view will on occasion be noted in certain international conventions. For example, the London Convention of 29 December 1972 on the Prevention of Marine Pollution by Dumping of Wastes and other Matter contemplated assistance to all Parties, and not only "to developing countries"; and it made no provision for a special "financial basis". Article IX provides as follows in that connexion:

"The Contracting Parties shall promote, through collaboration within the Organisation and other international bodies, support for those Parties which request it for:

(a) the training of scientific and technical personnel;

(b) the supply of necessary equipment and facilities for research and monitoring;

(c) the disposal and treatment of waste and other measures to prevent or mitigate pollution caused by dumping; preferably within the countries concerned, so furthering the aims and purposes of this Convention.".

33.2.3. In view of these different aspects, it would be possible for the draft protocol at one and the same time to refrain from limiting technical assistance exclusively to developing Contracting Parties, making it instead an instrument of co-operation between all Parties, as in the aforesaid London Convention, yet also to mention the special and perhaps overriding interest of the less-developed Parties in this type of assistance.

ARTICLE 14

34. Paragraph 2 of this article concerns the effect of the Protocol on a third State not a Party to it. In this matter, general international law has repeatedly reaffirmed, apart from strictly-understood exceptions, the relative effect of treaties by applying the rule res inter alios acta nec nocere nec prodesse potest. The Vienna Convention on the Law of Treaties, of 23 May 1969, clearly confirms this principle in its article 34: "A treaty does not create either obligations or rights for a third State without its consent.".

34.1. The Paris Convention of 4 June 1974 sets out the legal consequences of this situation in its article 14, paragraph 1, which is similar to the preliminary draft protocol's article 14, paragraph 2. Nevertheless, in order to strengthen the application of its provisions, article 14, paragraph 2, of the Paris Convention contains the following provision: "However, the said Contracting Party shall endeavour to cooperate with the non-Contracting State so as to make possible the full application of the present Convention.". An identical provision is also contained in article 10, paragraph 2, of the second draft protocol submitted by one delegation.

ARTICLE 15

35. This article relates to the more general problems posed by the application of article 12 of the Barcelona Convention. In this connexion a study of the complex of problems of compensation is to be made by a committee of Government experts (UNEP/IG.11/4, annex IV, para. 37); in addition, UNEP is preparing a comparative study of the legal precedents in this matter for the first meeting of the Contracting Parties to the Barcelona Convention, scheduled to be held in February 1979.

ARTICLE 16

36. Some delegations have considered the use of the phrase "as soon as possible" in connexion with the circulation of information to the other Parties to be insufficiently precise. The international precedents offer a variety of alternatives in this matter.

36.1. The 1974 Paris Convention prescribes no time-limit in this connexion. Its article 10 provides, in the matter of the complementary or joint programmes of scientific and technical research to be established by the Parties, that the parties "... agree ... to transmit to each other the information so obtained.". Concerning the measures taken by the Parties under the Convention, the latter's article 12, paragraph 2, merely provides: "The Contracting Parties shall inform the Commission of the legislative and administrative measures they have taken to implement the provisions of the preceding paragraph.".

36.2 ICNT prescribes in its article 206: "States shall publish reports of the results obtained relating to risks or effects of pollution of the marine environment, or provide at appropriate intervals[1/] such reports to the competent international or regional organizations, which should make them available to all States.".

1/ Underlining added.

36.3. The Bonn Convention of 3 December 1976 for the Protection of the Rhine against Chemical Pollution is more precise in this respect. With regard to the determinations of the concentration of dangerous substances which the Governments concerned are required to perform, it stipulates as follows in its article 10, paragraph 2: "Each Government concerned will report regularly and at least once a year to the International Commission on the results of these controls.". On the other hand, apart from this strict time-limit, article 12 merely stipulates in its paragraph 1: "The Contracting Parties will report regularly[1/] to the International Commission on the data obtained in the application of this Convention.".

ARTICLE 18

37. The international precedents in the matter of the majority required for amendment or adoption of annexes, or in related matters, reveal frequent but not exclusive application of the unanimity rule.

37.1. Thus, article 12 of Council Directive No. 76/464/EEC on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community prescribes a unanimous decision of the Council on, in particular, Commission proposals made pursuant to article 6 (limit values for emission standards, and quality objectives).

37.2. On the other hand, Council Directive No. 76/160/EEC concerning the quality of bathing water provides in its article 11, paragraph 2, that the Committee on Adaptation to Technical Progress shall adopt by a majority of 41 votes its decisions on draft measures submitted by the Commission, the votes of the Member States being weighted as provided in article 148 (2) of the Treaty establishing the Community.

37.3. The Helsinki Convention of 1974 prescribes a two-stage procedure for the adoption of new annexes or of amendments to existing annexes. Article 24 of the Convention stipulates to begin with that an amendment proposed by a Contracting Party must first be adopted by the Commission. However, under article 12, paragraph 5, each Contracting Party has one vote in the Commission and the latter takes its decisions unanimously in the absence of provisions to a different effect. If the amendment is adopted unanimously in this way, it is then communicated to the Contracting Parties and recommended for their acceptance (article 24, para. 1). If no Contracting Party has objected to the amendment within a period prescribed by the Commission, the amendment is deemed to have been adopted and enters into force on a date determined by the Commission (article 24, para. 2). Paragraph 3 of the same article rules that new annexes are subject to the same provisions.

1/ Underlining added.

37.4. The Paris Convention of 1974 likewise adopted the unanimity principle, but permitted recourse to a specified majority in exceptional cases. Thus its article 18, paragraph 3, stipulates that the Commission shall adopt by unanimous vote, inter alia, programmes and measures for the reduction or elimination of pollution from land-based sources as provided for in article 4, and decisions under article 16 c. However, "should unanimity not be attainable, the Commission may nonetheless adopt a programme or measures by a three quarters majority vote of its members". Paragraph 4 of the same article 18 likewise specifies that the Commission may adopt recommendations for amendments to annex A to the Convention by a three-quarters majority vote of its members. But only recommendations are concerned, and the paragraph stipulates that they shall be submitted to the Governments of the Contracting Parties for approval. Accordingly, the provision in question substantially restricts the scope of this majority-voting procedure.

37.5. Such a distinction between the recommendation of a measure (the recommendation being most often adopted by a majority vote) and the measure's definitive adoption by the Contracting Parties is also found in the Convention for the Protection of the Rhine against Chemical Pollution, whose article 14 provides that the International Commission shall recommend the amendments or additions necessary to adapt the annexes (para. 2) but adds that the amended or expanded texts shall not enter into force until they have been unanimously approved by the Contracting Parties (para. 3).

37.6 The majority-voting procedure is prescribed in other international precedents which, however, do not deal principally with pollution from land-based sources. Thus article 14, paragraph 3, of the Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft prescribes a three-fourths majority of the Parties for the adoption of amendments to the annexes to the Protocol. This procedure, it should be noted, conforms to the ordinary law on the matter as embodied in article 17 of the Barcelona Convention.

37.7. Lastly, there are two other international precedents that adopt differing approaches in this matter:

Article XV, paragraph 2, of the London Convention of 29 December 1972 on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter stipulates that amendments to the annexes shall be approved by a two-thirds majority of the Parties; and

Article 18, paragraph 2, of the Oslo Convention of 15 February 1972 for the Prevention of Marine Pollution by Dumping from Ships and Aircraft provides that recommendations for modification of the annexes shall be adopted by a unanimous vote in the Commission and that the modifications which are the subject of such recommendations shall enter into force after unanimous approval by the Governments of Contracting Parties.

CONCLUSION

38. The last examples quoted, like those concerning the draft protocol's other articles, display a range of solutions from which it is possible to pick out those most frequently adopted. Nevertheless, they can be transposed by analogy only after close consideration of the specific features of the protocol under negotiation, more particularly in the matter of its precise subject (pollution from land-based sources) and its regional coverage (the Mediterranean in the widest sense, including the internal waters of the Contracting Parties).