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Agenda item 8: Legal Analysis of the Regional Plans Adopted under the Land-Based Sources Protocol

Analysis of the Legal Nature of the Main Obligations Contained in the Regional Plans Adopted by the Meeting of the Contracting Parties under the Land-Based Sources Protocol

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Note by the Secretariat

Introduction

1. Following-up on the conclusions and recommendations of the 13th Meeting of the Compliance Committee as to the legal nature of the main obligations contained in the Land-Based Sources related Regional Actions Plans adopted by the Meetings of the Contracting Parties (see the report of the meeting: UNEP(DEPI)/MED CC.13/12 paragraph 20, as presented in document UNEP/MED CC.14/Inf.3), the Members of the Compliance Committee, Mr. Bernard Brillet and Mr. José Juste Ruiz, in coordination with the Secretariat, have prepared the annexed analysis.
2. As mandated, the analysis has been developed for the purpose of assessing compliance and focuses on the regional plans adopted by the Meeting of the Contracting Parties within the framework of the Land-Based Sources and Activities Protocol (LBS Protocol). The implementation of these action plans is to be reported under the Revised Reporting Format, adopted by Decision IG. 23/1 of the 20th Meeting of the Contracting Parties (Tirana, Albania, 17-20 December 2017).

Action requested

3. The Compliance Committee is expected to review the analysis provided, express its agreement and advise on follow-up steps.

Analysis of the Legal Nature of the Main Obligations Contained in the Regional Plans Adopted by the Meeting of the Contracting Parties under the Land-Based Sources Protocol

Introduction

1. This document provides an analysis of the legal nature of the main obligations contained in the regional plans adopted by the Meeting of the Contracting Parties under the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities Protocol (LBS Protocol) for compliance purposes. This covers the following regional plans:

- (a) Regional Plans on Persistent Organic Pollutants (POPs) (COP IG. Decisions 19/8, 19/9 and 20/8.3);
- (b) Regional Plans on the Reduction of BOD5 (COP IG. Decisions 19/7 and 20/8.2);
- (c) Regional Plan on the Reduction of Inputs of Mercury (COP Decision IG.20/8.1);
- (d) Regional Plan on Marine Litter Management in the Mediterranean (COP Decision IG.21/7); and
- (e) Regional Action Plan on Sustainable Consumption and Production in the Mediterranean (COP Decision IG. 22/5).

2. In undertaking the present analysis, the following elements have been considered for each of the regional plans listed above: (1) the legal basis for the adoption of the regional plans, (2) the general form and terminology employed for the regional plans, and (3) the wording and content of each regional plan specific provision.

Analysis

First stage: legal basis for the adoption of the regional plans

3. In assessing the legal nature of the regional plans main obligations, as a point of departure, the first element to be considered is the relevant Article(s) of the Barcelona Convention and LBS Protocol based on which the regional plan has been adopted. In that respect, the preambular paragraphs of the COP Decisions adopting the regional plans have been examined as follows.

4. For the Regional Plans on Persistent Organic Pollutants (POPs), on the Reduction of BOD5, on the Reduction of Inputs of Mercury and on Marine Litter Management in the Mediterranean, COP Decisions examined refer specifically to the following articles:

- (1) Article 8 of the Barcelona Convention, under which Contracting Parties have the obligation to take all appropriate measures to prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea and draw up and implement plans for the reduction and phasing out of substances that are toxic, persistent and liable to bioaccumulate arising from land-based sources;
- (2) Article 5 of the LBS Protocol, which sets out the obligation of the Contracting Parties to undertake to eliminate pollution from land-based sources and activities, in particular to phase-out inputs of the substances that are toxic, persistent and liable to bioaccumulate listed in Annex I to the LBS Protocol. To this end, Contracting Parties shall elaborate and implement national and regional action plans and programmes containing measures and timetables for their implementation; and
- (3) Article 15 of the LBS Protocol, whereby the meeting of the Parties shall adopt regional action plans and programmes containing measures and timetables for their implementation provided for in article 5 of the LBS Protocol. Paragraph 3 of Article 15 further states that: “[t]he measures and timetables adopted ... *become binding* on the one hundred and eightieth day following the day of notification for the Parties which have not notified the Secretariat of an objection within one hundred and seventy-nine days from the date of notification.” (*emphasis added*)

5. Most COP Decisions examined also recall in their preambles COP15 Decision 17/8, entitled “Implementation of NAPs and the preparation of *legally binding measures and timetables* required by Art. 15 of the LBS Protocol (*emphasis added*). Therefore, it can be concluded that Articles 5 and 15 of

the LBS Protocol provide the legal base under which the Regional Plans on POPs, on the Reduction of BOD5, the Reduction of Inputs of Mercury, and on Marine Litter have been adopted. Furthermore, as clearly stated in Article 15, the measures and timetables contained in regional plans impose binding obligations to the Contracting Parties.

6. As regards the Regional Action Plan on Sustainable Consumption and Production (SCP) Article 4 of the Barcelona Convention provides the legal basis for adoption. Under this Article, Contracting Parties have the general obligation to take all appropriate measures to prevent, abate and combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area and to protect and enhance the marine environment in that Area so as to contribute to sustainable development.

7. This adds to the acknowledgment that the tools and instruments of the SCP Regional Action Plan are well anchored in: (1) Article 5.4 of the LBS Protocol, which provides for the implementation of Best Available Techniques (BAT) and Best Environmental Practices (BEP); (2) Article 5.2 of the Hazardous Wastes Protocol, according to which Parties shall take all appropriate measures to reduce to a minimum, and where possible eliminate, the generation of hazardous wastes; and (3) Article 9 of the Integrated Coastal Zone Management (ICZM) Protocol on the sustainable development of economic activities in the immediate proximity to, or within, the coastal zones. The articles referred to highlight the cross-cutting nature of the SCP Regional Action Plan as a transversal instrument to support the implementation of the Barcelona Convention and its Protocols as well as the Mediterranean Strategy for Sustainable Development.

8. Furthermore, the Decision adopting the SCP Regional Action Plan strongly encourages Contracting Parties “to mainstream SCP in national and local development policies, according to national laws” and “to include information on measures taken implementing the Action Plan” when reporting.

9. The references above put together a picture on the legal basis of the SCP Regional Action Plan that substantially differs from the one for the Regional Plans on POPs, on the Reduction of BOD5, on the Reduction of Inputs of Mercury and on Marine Litter.

Second stage: general form and terminology employed for the regional plans

10. In a second stage, it is important to consider the general form and terminology used in drafting the regional plans. In the case of the Regional Plans on POPs, on the Reduction of BOD5, the Reduction on Inputs on Mercury and on Marine Litter, they consciously employ a treaty form and language (“Article”, “shall”, “agree”, “obligations”, “Party” etc.). This gives a strong indication of the binding character of these regional plans, which is explicitly formulated in their entry into force clauses, drafted as follows: “The present regional Action Plan shall enter into force and *become binding* on the 180th day following the day of notification by the Secretariat in accordance with Article 15, paragraph 3 and 4 of the LBS Protocol” (*emphasis added*).

11. A quite a different situation emerges as regards the SCP Regional Action Plan, which was developed as a forward-looking framework to complement and work in full synergy with existing national and regional policy frameworks. This responds to the specific mandate from COP 18 to design the SCP Plan “as a dynamic and forward-looking framework, integrating the potential of the different policy instruments and measures addressing targeted human activities which have a particular impact on the marine and coastal environment and related transversal/cross-cutting issues”. Having been developed as a “forward-looking framework”, the implementation of which requires the adoption of specific guidelines, the SCP Regional Action Plan should be seen in the context of soft law.

Third stage: the wording and content of each regional plan specific provision

12. In addition to, and this brings us to the third stage of this analysis, in order to further elaborate on the binding content of each regional plan specific provision, it is important to review each relevant provision of the regional plans on the light of the following criteria: (a) wording of the obligations (binding or aspirational terms), (b) content of the obligations (obligation of means or obligation of result), (c) precision of the obligations (specific measures and timetables), and (d) hard law and soft

law considerations. As a practical way forward, this assessment is focused on the provisions listed for each regional plan in the Revised Reporting Format (COP Decision IG. 23/1) as shown below.

Regional Plans on Persistent Organic Pollutants (POPs)

- (1) Prohibit and/or take legal and administrative measures necessary to eliminate the production and use, import and export of POPs and their wastes;
- (2) Application of BAT and BEPs for environmentally sound management of POPs; and
- (3) Take appropriate measures to handle, collect, transport, store and dispose in an environmentally sound manner POPs wastes, including products and articles upon becoming wastes

13. All regional plan provisions on POPs are drafted in mandatory terms: this includes the obligations concerning wastes' reduction and use, application of BAT and BEP and appropriate measures to handle, collect, transport, store and dispose in an environmentally sound manner. The terms used have a clear binding character. In general, the regional plan provisions on POPs are construed as obligations of results rather than obligations of means and they employ categorical terms such as "shall prohibit", "shall ensure", "shall take appropriate measures", "shall report". With respect to application of BAP and BEPs, Art. II, 4 of both Decisions on POPs use the qualifier "shall endeavour" which is the appropriate wording for a procedural obligation. Only in rare cases it is said that Parties "should" act in a given way (such as in identifying to the extent practicable stock piles containing POP wastes in Art. VI of Decision IG.19/8). Timetables and deadlines for implementation are also set forth very precisely in Art. III of both Decisions on POPs.

Regional Plans on the Reduction of BOD5

- (1) Adopt National Emission Limit Values (ELV) for BOD5 in urban wastewater after treatment in accordance with the requirements of the Regional Plan (Article III.2 and 3);
- (2) Monitor discharges from municipal wastewater treatment plants to verify compliance with the requirements of the Regional Plan taking into account the Guidelines included in Appendix II to the Regional Plan (Article III.4);
- (3) Ensure that all agglomerations of more than 2000 inhabitants collect and treat urban wastewater before discharging them into the environment (Article III, [1] Appendix I and Appendix III);
- (4) Establishment of ELV and authorization compatible with the operation and the emission discharge values of the urban waste water treatment plan, in case the food sector installation discharges into the sewage system (Article IV.1); and
- (5) Monitor food sector installation discharges into water to verify compliance with the requirements of the Regional Plan taking into account the Guidelines included in Appendix I to the Regional Plan (Article IV.2).

14. The regional plan provisions concerning the reduction of BOD5, both from urban waste water and in the food sector, are drafted in mostly mandatory terms. The words employed are categorical and generally express binding obligations for the Contracting Parties which are formulated using the verb "shall". The obligations established are obligations of result consisting in the reduction of BOD5 wastes but not its outright elimination. This explains why the language used is sometimes less radical than the one used in the POPs decisions. The quantitative limits of discharges permitted are very precise as well as the timetables and deadlines for implementation of the reduction of BOD5. It could be then concluded that all five obligations enumerated above are binding and shall be implemented as indicated in the relevant provisions.

Regional Plan on the Reduction of Inputs of Mercury

- (1) Prohibit the installation of new Chlor-alkali plants using mercury cells and vinyl chloride monomer production plants using mercury as a catalyst (Article IV.1 A);
- (2) Ensure that the releases of mercury from the activity of Chlor-alkali plants shall cease by 2020 at the latest (Article IV.A);
- (3) Adopt National Emission Limit Values (ELVs) by 2015 and 2019 for mercury emissions based on values included in the Regional Plan on the Reduction of inputs of Mercury from other than Chlor-alkali industry (Article IV.B);
- (4) Monitor releases of mercury into water, air and soil in order to verify compliance with the requirements of the Regional Plan (Article IV.D);
- (5) Achieve environmental sound management of metallic mercury from the decommissioned plants (Article IV.A);
- (6) Progressively reduce total releases of mercury (to air, water and to products) from existing Chlor-alkali plants until their final cessation with the view not to exceed 1.0g per metric tonne of installed chlorine production capacity in each plant (Article IV.A); and
- (7) Take appropriate measures to isolate and contain the mercury containing wastes (Article IV.D).

15. The wording used in drafting the specific provisions of this Regional Plan range from directly opposable formulations (e.g. "The Parties shall prohibit the installation of new Chlor-alkali plans using mercury cells with immediate effect" (Article IV. A.1), or "The Parties shall neither open new mines nor re-open old mercury mining sites" (Article IV. B. 6), or "The present regional Action Plan shall enter into force and become binding" the 180th day after notification of the Decision (Article VIII)) to other gradually looser formulations in terms of effectiveness (e.g. "The Parties shall identify existing sites which have been historically contaminated with mercury ... and take with regard to these sites, environmental management measures.... as appropriate" (Article IV. B. 5) or "The Parties shall take the necessary steps to enforce the above measures" (Article IV. B.8)).

16. In addition, some provisions of the Regional Plan are formulated as obligations of result (e.g. "The Parties shall adopt by 2015 and 2019 National [Emission Limit Values] ELV for Mercury emissions from other than Chlor-Alkali industry" (Article IV B); "The Parties shall ensure the releases of mercury from the activity of Chlor-alkali plants shall cease by 2020 at the latest" (Article IV A. 3), or "The Parties shall ensure that the total releases of mercury (to the air, the water and to the products) from existing Chlor-alkali plants are progressively reduced until their final cessation with a view not to exceed 1.0g per metric tonne" (Article IV A. 3.ii), whereas others are formulated as obligations of means (e.g. "The Parties shall report to the Secretariat by January 2013 on the identified sites [which have been historically contaminated with mercury]" (Article IV B.5.ii) or "The Parties shall ensure that their competent authorities or appropriate bodies monitor releases of mercury into water, air and soil to verify compliance with the requirements of the above table" (Article IV B.7).

17. Based on the analysis above, it can be said that the obligations contained in the Regional Plan on the Reduction of Inputs of Mercury are legally binding. The implementation of the administrative, legal and other measures laid down in the Plan rests on the Contracting Parties, though the Secretariat has a key role in following-up on the implementation of the Plan as reported in the national implementation reports. In so doing, it is key to keep in mind that all the obligations of the Regional Plan (either obligations of means or result) aim at achieving the overall goal of the protection of the coastal and marine environment and human health from the adverse effects of mercury (Article II.2).

Regional Plan on Marine Litter Management in the Mediterranean

- (1) Reduction of fraction of plastic packaging waste that goes to landfill or incineration (Article 9. Timetable-2019);

- (2) Ensure adequate urban sewer systems, wastewater treatment plants and waste management systems to prevent run-off and riverine inputs of marine litter (Article 9. Timetable 2020);
- (3) Application of cost effective measures to prevent any marine littering from dredging activities (Article 9. Timetable 2020);
- (4) Urban solid waste management is based on reduction at source with the following waste hierarchy: prevention, re-use, recycling, recovery and environmental sound disposal (Article 9. Timetable 2025);
- (5) Enhancement of public awareness and education of pollution and involvement of various stakeholders with regard to marine litter management (Article 16. Timetable: as appropriate);
- (6) Adopt preventive measures to minimize inputs of plastic in the marine environment (Article 9. Timetable 2017);
- (7) Implement programmes on regular removal and sound disposal of accumulations/hotspots of marine litter (Article 10. Timetable 2019);
- (8) Remove existing accumulated litter from Specially Protected Areas of Mediterranean Importance (SPAMI) and litter impacting endangered species listed in Annexes II and III of the SPA and Biodiversity Protocol (Article 10. Timetable 2019);
- (9) Close to the extent possible existing illegal solid waste dump sites (Article 9. Timetable 2020);
- (10) Explore and implement National Marine Litter Cleanup Campaigns, participate in international Coastal Cleanup Campaigns and Programmes, apply Adopt a Beach or similar practices and apply Fishing for Litter practices (Article 10. Timetable 2019) and
- (11) Explore and Implement a No-Special Fee System in port facilities used for implementing the measures provided for in Article 10 of the Regional Plan on removing existing marine litter and its environmentally sound disposal (Article 10. Timetable 2019).

18. In assessing the legal nature of the main obligations contained in the Regional Plan on Marine Litter, consideration shall be given to the fact that its purpose is twofold: i.e., to set up a “strategic framework” for marine litter management and to “control pollution by persistent synthetic materials” in the Mediterranean (3d. preambular paragraph). As a consequence, the provisions of the Regional Plan on Marine Litter combine “measures” and “operational targets” (Part II), which are not all of the same legal nature.

19. This is evidenced by a comparative analysis of Article 9, which uses treaty language (“Contracting Parties”, “shall implement by the year”, etc.), and other articles, such as Article 16, which employ a somewhat more qualified wording (“shall undertake”, “where appropriate”, etc.). The former measures are closer to obligations of results whereas the latter might rather be characterized as obligations of means. But that by itself does not modify its normative character and legally binding force.

20. More in detail, the analysis of the provisions of Article 9 of the Regional Plan on Marine Litter shows that most of the obligations set forth are worded in mandatory terms and shall therefore be implemented by the Contracting Parties within the indicated deadlines. This includes the obligations (1) to (4) listed above. Other provisions of the Regional Plan on Marine Litter establish obligations that are qualified by terms such as “as appropriate”, “to the extent possible” and other similar expressions. Such obligations are nonetheless equally binding in their terms for the Contracting Parties which shall implement the measures concerned within the deadlines established. However, it is equally true that these provisions, which include the obligations (5) to (11) listed above, by being qualified by the terms “as appropriate” or “to the extent possible” provide Contracting Parties with an important degree of flexibility when it comes to their implementation. This should be considered by the relevant bodies when assessing compliance, with particular focus on the reasons provided by the concerned Contracting Party on the level of implementation achieved.

Regional Action Plan on Sustainable Consumption and Production in the Mediterranean

- (1) Food, Fisheries and Agriculture (FFA): Adoption and implementation of Good Agricultural Practices (GAP) in line with the EcAP ecological objectives and ICZM guidelines;
- (2) Food, Fisheries and Agriculture (FFA): Adoption and implementation of Sustainable Fishing Practices, in line with the EcAP ecological objectives and ICZM guidelines;
- (3) Food, Fisheries and Agriculture (FFA): Establishment of certification schemes (eco-labels) that confirm the sustainable production of food and fisheries products;
- (4) Food, Fisheries and Agriculture (FFA): Adoption of Sustainable Public Procurement (SPP) schemes for food and fisheries products;
- (5) Food, Fisheries and Agriculture (FFA): Adoption of measures in the field of communication and education to promote the consumption of sustainable, healthy and local food;
- (6) Goods Manufacturing: Adoption of measures to implement the waste management hierarchy, develop extended producer responsibility schemes, and encourage circular economy;
- (7) Goods Manufacturing: Development of policy instruments to support the private sector;
- (8) Goods Manufacturing: Adoption and implementation of Sustainable Public Procurement (SPP) in the Goods Manufacturing Sector;
- (9) Goods Manufacturing: Establishment of certification schemes (eco-labels) for manufactured goods and awareness raising among the population on the consumption of eco-labelled goods;
- (10) Tourism: Creation of eco-taxes, eco-charges or fees to internalize externalities of tourism activities;
- (11) Tourism: Revision of the current national tourism legislation to integrate sustainable principle and measures;
- (12) Tourism: Adoption of measures to promote the diversification of the tourism offer from mass tourism to alternative forms of tourism;
- (13) Tourism: Adoption of measures to promote tourism eco-labels and facilitate their award by tourist facilities;
- (14) Housing and Construction: Develop measures to support sustainable coastal urban development and green construction, taking into account the entire life cycle of buildings; and
- (15) Promote sustainable public procurement in the public housing and construction sector.

21. As drafted, some of the provisions of the SCP Regional Action Plan have the character of public regulation, being therefore legally binding. This includes for instance the general actions aimed at “develop[ing] an institutional framework to encourage integrated national and local decision making” (Action 17, Operational Objective 2.2) or “develop[ing] and encourage[ing] regulatory and incentives policies” (Action 41, Operational Objective 4.2). Other provisions are of markedly technical nature, such as to “[a]dopt Good Agricultural Practices (GAP) schemes” (Action 1, Operational Objective 1.1) or the “[i]mplementation of Environment Management Systems (EMS) and Ecolabels” (Action 21, Operational Objective 2.2).

22. Against this background, it can be concluded that the SCP Regional Action Plan is an instrument of “soft law”, providing mainly for obligations of means. However, the SCP Regional Action Plan is instrumental in achieving the objective of reducing anthropogenic pressures on the Mediterranean, and therefore a necessary condition for achieving the objectives of the Barcelona Convention and maintain the Mediterranean Sea Area in a good state of conservation.

23. The implementation of the SCP Regional Action Plan at both national and local levels rests upon Contracting Parties. In addition, as shown in the operative paragraph of the Decision adopting the Plan, the Coordinating Unit and the MAP components, are requested “to ensure the coordinated delivery of regional actions in support of the countries’ efforts” in implementing the SCP Regional

Action Plan. In short, it is up to the Contracting Parties to implement the SCP Regional Action Plan, with the Secretariat to follow-up on its overall implementation. Within this framework, reporting on the national implementation of the Plan becomes fundamental. Firstly, for the Compliance Committee to assess general compliance issues, with particular focus on the measures referred to in paragraph 21 above. Secondly, in undertaking by the Secretariat in 2020 an indicator-based midterm evaluation of the Action Plan implementation.

Concluding remarks

24. As laid down in the Procedures and Mechanisms on Compliance, the objective of the Compliance Committee is to facilitate and promote compliance with the Barcelona Convention and its Protocols. In this context, the role of the Compliance Committee is to consider specific situations of actual or potential non-compliance by individual Parties as well as general compliance issues, at the request of the Meeting of the Contracting Parties. Within that mandate, after considering compliance issues, the Compliance Committee can make recommendations to the Meeting of the Contracting Parties on cases of non-compliance. In this framework, the role of the Compliance Committee in providing advice and impetus is crucial in meeting the objectives of the Barcelona Convention.

25. Although the varying wording and bindingness of the obligations of the regional plans examined before might affect the normative intensity and reach of the measures concerned, this shall not be regarded as an impeachment for the Compliance Committee to exercise its functions as established in its Procedures and Mechanisms

26. It should be stressed that the task of the Compliance Committee is to verify the existence of cases of possible non-compliance and recommend the appropriate remedial cooperative actions to the Meeting of the Contracting Parties. For the purposes of the work of the Compliance Committee, it is sufficient to verify that the measures listed in the reporting format have a normative (prescriptive) character and, therefore, its compliance or non-compliance by Contracting Parties can be assessed and on that basis to decide upon the appropriate measures, including making recommendations to the Meeting of the Contracting Parties.