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**Draft approach to facilitate proposals for inclusion in the SPAMI
List of areas located on the high seas or in areas where the limits
of national sovereignty or jurisdiction have not yet been defined**

*In the framework of a sustainable development approach, this document will be available only
in electronic format during the meeting*

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Mediterranean Action Plan
Regional Activity Centre for Specially Protected Areas (RAC/SPA)
Boulevard du leader Yasser Arafat
B.P.337 - 1080 Tunis CEDEX
E-mail: car-asp@rac-spa.org

Table of contents

Context	2
1. Introduction	4
2. Provisions of the SPA/BD Protocol related to the SPAMIs on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined.....	5
3. Preparatory stages for establishing SPAMIs on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined.....	6
3.1 Developing a governance framework at the sub-regional scale	6
3.1.1 <i>Identification of the neighbouring Parties concerned.....</i>	<i>6</i>
3.1.2 <i>Consultation between the neighbouring Parties concerned and national consultation processes</i>	<i>7</i>
3.1.3 <i>Consultation with the relevant international organizations at the regional level</i>	<i>8</i>
3.1.4 <i>Involving other relevant organizations.....</i>	<i>10</i>
3.2 Defining the limits of the future SPAMI.....	11
3.3 Legal instrument needed for establishing marine protected areas likely to be SPAMIs on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined.....	11
4. Making management of SPAMIs on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined operational	12
4.1 An operational management body endowed with the appropriate resources.....	12
4.2 Adoption of a management plan and implementation of the monitoring activities.....	13
4.3 Adoption of regulatory measures	14
4.3.1 <i>Regulating the shipping activities.....</i>	<i>14</i>
4.3.2 <i>Regulating fisheries</i>	<i>15</i>
4.3.3 <i>Regulating exploitation of the mineral resources of the seabed.....</i>	<i>16</i>
4.3.4 <i>Measures for the conservation of the large migratory pelagic species.....</i>	<i>16</i>
4.4 Implementation, compliance and enforcement of the regulatory measures	17
4.4.1 <i>Implications for the Contracting Parties to the SPA/BD Protocol</i>	<i>17</i>
4.4.2 <i>Implication for third States.....</i>	<i>18</i>
5. Conclusions.....	19

Context

1. In 2008, the Contracting Parties to the Barcelona Convention decided to promote measures for the establishment of a comprehensive and coherent Mediterranean network of coastal and marine protected areas by 2012.

2. The expression of this political will was repeated in 2009 when the Contracting Parties to the Barcelona Convention called States to continue the establishment of marine protected areas and to pursue the protection of biodiversity with a view to the establishment by 2012 of a network of marine protected areas, including on the high seas, in accordance with the relevant international legal framework and the objectives of the World Summit on Sustainable Development.

3. In addition, the Contracting Parties to the Barcelona Convention adopted in 2009 a regional working programme for coastal and marine protected areas in the Mediterranean, including in the high seas, which aims to support Mediterranean countries to achieve the 2012 targets of the Convention on Biological Diversity by establishing a representative network of marine protected areas in the Mediterranean.

4. To date, the SPAMI List includes 25 sites, among which one encompasses an area established also on the high sea: the Pelagos Sanctuary for marine mammals established under an agreement signed in Rome in 1999 by France, Italy and Monaco and included in 2001 in the List.

5. In 2010, during the last Conference of the Parties to the Convention on Biological Diversity (CBD), the Parties were invited to make further efforts on establishing ecologically representative and effectively managed marine and coastal protected areas under national jurisdiction or in areas subject to international regimes competent for the adoption of such measures, and achieving the commonly agreed 2012 target of establishing marine and coastal protected areas, in accordance with international law, including the United Nations Convention on the Law of the Sea¹.

6. So, in the frame of the implementation of the ecosystem approach, and to progress towards the objectives set by the CBD and the Mediterranean Action Plan / Barcelona Convention related to marine protected areas, it is necessary to work for the establishment of marine protected areas in the whole Mediterranean Sea, taking into consideration the complexity of the legal situation of the Mediterranean Sea, and bearing in mind accordingly the legal issues raised concerning the establishment and management of such marine protected areas, and the enforcement of the regulatory measures.

7. In this context, and based on the provisions of the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean, the Regional Activity Center for Specially Protected Areas (MAP-RAC/SPA) implements a project aiming to support the development of marine protected areas, through the Specially Protected Areas of Mediterranean Importance (SPAMIs) system in open sea areas, including the deep seas. Based on the identification of priority conservation areas located in open seas, including the deep seas, this project aims to support the concerned interested Parties for setting up a favorable framework to prepare, as appropriate, the joint SPAMI proposal with a view to develop processes for joint management of marine protected areas.

8. The international legal framework for regulating all activities in the oceans and the seas is provided in the United Nations Convention on the Law of the Sea (UNCLOS). Therefore, all

¹ Decision X/29 on marine and coastal biodiversity.

actions taken within the framework of a regional legal instrument need to be consistent with UNCLOS provisions.

9. In this context, during its meeting held on 5 and 6 May 2010, the Bureau of the Contracting Parties to the Barcelona Convention requested the Secretariat to begin a reflection to prepare a legal and institutional approach for establishing SPAMIs beyond national jurisdiction. As stated by the report of the meeting, “the Bureau addressed ways and means for elaborating a sound legal and institutional approach for establishing SPAMIs in areas beyond national jurisdiction for further discussion by the Bureau and SPA/RAC Focal Points. This approach would help creating a clear vision with regard to SPAMI management and the need to enhance cooperation with other component international organizations for this purpose, in line with MAP Programme of work and Marrakesh Declaration”.

10. A working group meeting with experts from international organizations and Mediterranean independent experts was convened upon MAP Coordinating Unit's initiative in Athens, on 3 and 4 March 2011, to discuss and elaborate this approach.

11. The present document takes into account the recommendations of this meeting and intends to provide indications and suggestions to facilitate proposals for inclusion in the SPAMI List of areas located, partly or wholly, on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined. This document also includes elements on the management of these SPAMIs, in accordance with the relevant international legal framework. The legal aspects of the issues considered in this document are detailed in the report “*Note on the establishment of marine protected areas beyond national jurisdiction in the Mediterranean Sea*” presented as an information document to the approach proposal (UNEP(DEPI)/MED WG.359/Inf.3).

12. This document is submitted to the Tenth Meeting of the Focal Points for SPAs as a draft for review.

Draft approach to facilitate proposals for inclusion in the SPAMI List of areas located on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined

1. Introduction

13. In the Mediterranean, deep seabed encompasses some unique habitats such as hydrothermal vents, seamounts, submarine canyons and deep coral reefs characterized by high biodiversity and endemism. In addition, oceanographic features and movements of open sea waters like upwelling, gyres or fronts create critical habitats for the development, reproduction and feeding of many pelagic species. They are also supporting a wide range of components of the trophic chain from planktonic species to top predators like bluefin tuna, pelagic sharks and cetaceans. But these ecosystems are under several pressures.

14. Fishing activities represent an important threat to the biodiversity in the Mediterranean open seas: by-catch affects harshly the populations of cartilaginous fishes, turtles, monk seals, cetaceans and sea birds; bottom trawling disturbs the most vulnerable benthic habitats such as cold coral communities and the coralligenous facies; and stocks of some commercial fishes like bluefin tuna and swordfish are locally overexploited weakening the sustainability of local economies. More generally, shipping activities, drilling, accidental oil spills, discharge of waste, also represent causes of ecosystem degradation, disturbing the food chain.

15. The Mediterranean enjoys, through the Mediterranean Action Plan (MAP) and the Barcelona Convention, a legal and institutional framework that is particularly favorable to the fulfillment of the commitments related to the setting-up by 2012 of a network of marine protected areas, including on the high seas, in accordance with the relevant international legal framework and the objectives of the World Summit on Sustainable Development. In this case, the Protocol concerning Specially Protected Areas and Biological Diversity (SPA/BD Protocol), adopted in 1995 by the Contracting Parties to the Barcelona Convention, provides for the establishment of a List of Specially Protected areas of Mediterranean Importance (SPAMI List) in order to promote the conservation of natural areas and protection of threatened species and their habitats, taking into consideration that the SPAMIs can be established both in marine and coastal areas under sovereignty or jurisdiction of the Parties and in areas situated partly or wholly on the high seas (Art. 9, para. 1).

16. The SPA/BD Protocol provides for the criteria for the choice of protected marine and coastal areas that could be included in the SPAMI List, as well as the procedure and the stages to be followed with the view of including an area in the List. The Protocol provisions cover the steps from the SPAMI presentation report provided by the Party (or the Parties) concerned to the decision to include the proposed area in the SPAMI List.

17. The present approach proposal aims to give indications on the stages non-covered by the Protocol, in particular the preparatory phase of the proposals for inclusion in the SPAMI List, as well as on the implementation of the management once this protected area is established. Thus, this document aims to complete, through indications and proposals, the procedure provided by the SPA/BD Protocol, but without intending to modify it.

18. In particular, considering Art. 9, paras. 2b and 2c, of the SPA/BD Protocol, this approach is focused on both situations subjected to similar SPAMI proposal procedure: for areas situated,

partly or wholly, on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined².

19. For SPAMIs situated partly or wholly on the high seas, it is important to consider the specificity and the complexity of the legal and political situation of the high seas which is not subject to any sovereignty or jurisdiction and where the international cooperation is appropriate.

20. However, considering the geographical characteristics of the Mediterranean Sea, no point in the Mediterranean is located at a distance of more than 200 n.m. from the closest land or island. Thereby, any high-seas waters beyond the limits of national jurisdiction would disappear if in the future all the coastal States decided to establish their own exclusive economic zones.

21. Lastly, considering at the regional scale the high variability of the socio-environmental and political contexts as well as the threats on the ecosystems, it is difficult to get an approach applicable everywhere in the Mediterranean. Each case must certainly be examined taking into account its own political, social, economic and environmental conditions.

2. Provisions of the SPA/BD Protocol related to the SPAMIs on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined

22. The List of Specially Protected Areas of Mediterranean Importance (SPAMI List) may include sites which are of importance for conserving the components of biological diversity in the Mediterranean; contain ecosystems specific to the Mediterranean area or the habitats of endangered species; are of special interest at the scientific, aesthetic, cultural or educational levels (Art. 8, para. 2).

23. In addition, the SPA Protocol includes three annexes, among them the Annex I on the Common Criteria for the Choice of Protected Marine and Coastal Areas that Could be Included in the SPAMI List. In this respect, the sites included in the SPAMI List must be "provided with adequate legal status, protection measures and management methods and means" (para. A, e) and must fulfill at least one of six general criteria ("uniqueness", "natural representativeness", "diversity", "naturalness", "presence of habitats that are critical to endangered, threatened or endemic species", "cultural representativeness"). The SPAMIs must be awarded a legal status guaranteeing their effective long term, protection (para. C.1) and must have a management body, a management plan and a monitoring programme (paras. from D.6 to D.8).

24. The procedure for establishing SPAMIs is envisaged in Article 9 of the Protocol, providing that the proposal for inclusion is submitted by two or more neighbouring Parties concerned if the area is situated, partly or wholly, on the high seas, and by the neighbouring Parties concerned in areas where the limits of national sovereignty or jurisdiction have not yet been defined.

25. The Parties concerned provide the RAC/SPA with a presentation report, whose format was adopted in 2001 by the Contracting Parties to the Barcelona Convention, containing information on the area's geographical location, its physical and ecological characteristics, its legal status, its management plans and the means for their implementation, as well as a statement justifying its Mediterranean importance.

26. For proposing an area situated, partly or wholly, on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined, the neighbouring Parties

² That is to say that is in an area where no agreement has been concluded by the States concerned as regards their maritime boundaries (definition of the boundary of territorial seas, continental shelves, as well as, if already established, exclusive economic zones, fishing zones or ecological protection zones).

concerned shall consult each other with a view to ensuring the consistency of the proposed protection and management measures, as well as the means for their implementation.

27. After officially sending the presentation report to RAC/SPA, the proposal is submitted to the National Focal Points which shall examine its conformity with the guidelines for the establishment and management of specially protected areas and the common criteria for the choice of protected marine and coastal areas that could be included in the SPAMI List (Annex I of the SPA/BD Protocol).

28. If the proposal is considered to be consistent by the National Focal Points, the RAC/SPA then transmits it to the Secretariat, which informs the meeting of the Parties. The decision to include the area in the SPAMI List is taken by consensus by the Contracting Parties, which also approve the management measures applicable to the area.

29. In addition, the Parties may revise the SPAMI List according to the procedure adopted in 2008. The objective of this procedure is to evaluate SPAMI sites in order to examine whether they meet the SPA/BD Protocol's criteria (Annex I).

30. Lastly, to overcome the difficulties arising from the fact that different types of zones have been proclaimed (e.g., ecological protection zone, fishing zone) and that several maritime boundaries have yet to be agreed upon by the Mediterranean States concerned, the Protocol included two non-prejudice clauses:

"Nothing in this Protocol nor any act adopted on the basis of this Protocol shall prejudice the rights, the present and future claims or legal views of any State relating to the law of the sea, in particular, the nature and the extent of marine areas, the delimitation of marine areas between States with opposite or adjacent coasts, freedom of navigation on the high seas, the right and the modalities of passage through straits used for international navigation and the right of innocent passage in territorial seas, as well as the nature and extent of the jurisdiction of the coastal State, the flag State and the port State.

No act or activity undertaken on the basis of this Protocol shall constitute grounds for claiming, contending or disputing any claim to national sovereignty or jurisdiction." (Art. 2, paras. 2 and 3)

3. Preparatory stages for establishing SPAMIs on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined

31. Designed as a tool to promote cooperation between the riparian countries of the Mediterranean Sea, the establishment of SPAMIs on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined could be considered as a way to promote new forms of cooperation between the States concerned by the establishment of marine protected areas in the whole Mediterranean Sea.

3.1 Developing a governance framework at the sub-regional scale

3.1.1 Identification of the neighbouring Parties concerned

32. In order to identify the neighbouring Parties concerned with the establishment of a SPAMI, the legal status of this area, the limits of which were defined on the basis of the scientific and ecologic data collected during preliminary work, has to be examined.

33. If this area is situated in areas where the limits of national sovereignty or jurisdiction have not yet been defined, then it should not be difficult to identify the States that have a claim over the waters where the area is located. So, they qualify as the “neighbouring Parties concerned”.

34. If the area is situated, partly or wholly, on the high seas, the notion of “neighbouring Parties concerned” acquires a more elastic character and is not devoid of a certain margin of ambiguity. It needs to be determined on a case by case basis, taking into account the relevant circumstances. The notion of neighbourhood should be understood in the sense of vicinity and not necessarily of contiguity.

35. The “neighbouring Parties concerned” might even be only one State, if the area of high seas is surrounded by the territorial sea that State solely, but in most cases the “neighbouring Parties concerned” are more than one State and they should be identified taking into consideration the potential claims that they may put forward as regards future exclusive economic zones and the possibility of overlapping claims. In areas where there are potential overlapping claims by two or more States, all the claimant States shall jointly formulate the proposal for inclusion in the SPAMI List.

3.1.2 Consultation between the neighbouring Parties concerned and national consultation processes

36. Considering the provisions of the SPA/BD Protocol recalled in the first part of the document, it appears necessary for the neighbouring Parties concerned to begin a cooperation and consultation process, especially for preparing jointly the presentation reports (collecting the data, defining the limits of the site, defining the management measures...).

37. The joint submission of a proposal for inclusion in the SPAMI List could then be considered as the catalyst for bilateral and multilateral cooperation that could be strengthened if need be by the development of sub-regional framework agreements.

38. This sub-regional cooperation could also be supported by the existing cooperation agreements and cooperation frameworks, such as the ones developed in the framework of the prevention of marine pollution.

39. So the establishment of a SPAMI on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined has to be supported by the development, at the appropriate scale, of a governance framework with the concerned countries.

40. For this purpose, on the basis of the intention of the neighbouring Parties concerned to cooperate, and on their initiative, the countries could set up for example informal working groups or consultation committees between their technical departments. If it is necessary for the States to formalize this approach, official letters or diplomatic notes could be exchanged through the appropriate diplomatic channels.

41. [The Meetings of the Focal Points for Specially Protected Areas are opportunities for the Parties to announce their intention to cooperate with a view to prepare joint proposals for SPAMIs in areas situated on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined. For strengthening their initiative, the Parties could also consider to make political declarations during the Meetings of the Contracting Parties.]

OR³

³ If the Tenth Meeting of the Focal Points for SPAs decides to keep the second option, it will be necessary to propose to the Contracting Parties to improve the annotated format for the presentation reports for the areas proposed for inclusion in the SPAMI List, considering that when the format was adopted in 2001, the Contracting Parties have agreed that it could be improved if necessary (UNEP (DEC)/MED IG.13/8).

[The countries could also consider making individually or jointly a preliminary declaration on their proposal for inclusion in the SPAMI List and on their intention to conduct a consultation process with the neighbouring Parties concerned for preparing the presentation report.

For the preliminary declaration, the country considered would not have to present the proposal format but it could content itself with providing information requested in the following parts of the format:

- 1.3 Name of the area
- 1.4 Geographic location (it is implied at this stage that the geographic location is not yet the precise determination of the boundaries of the proposed area)
- 1.5 Surface of the area
- 7.1 Legal status (with a general indication of the kind of measures that would be appropriate for the area)

Such preliminary declaration could allow to get opinions and any possible reactions from other Parties on the SPAMI proposal project and could be used as an invitation to the neighbouring Parties concerned for getting involved in the necessary consultation. Through this declaration, the country may as appropriate request RAC/SPA and Secretariat assistance to facilitate the consultation process.

That would be particularly helpful when countries don't have enough information as requested by the format and more scientific explorations are necessary.]

42. In addition, in parallel with these sub-regional consultation processes, the countries have to begin internally national consultation processes. In fact, it is necessary that the authorities in charge of SPAMIs and other competent authorities of the country agree on the objectives and expected results of the sub-regional approach.

43. The national consultation could then allow to orient and to organize the sub-regional consultation. It would enable to ensure effectiveness and sustainability of the sub-regional governance framework set up.

44. With regard to the context of the area considered and its related environmental issues, this national consultation process could involve many stake-holders. Even if the institutional organization is specific to each country, several departments and ministries could be involved at the central level of the States, such as the ministries in charge of environment, fisheries, foreign affairs, maritime affairs as well as transport.

45. Each State has specific means and tools for institutional consultation, such as the setting up of advisory committees, steering committees or working groups.

46. In addition, in a context of good governance, the consultation with the civil society and sea users concerned has also to be considered at the national scale, through appropriate participatory approach.

3.1.3 Consultation with the relevant international organizations at the regional level

47. Consultation with the relevant international organizations has to be considered during the preparatory stages for establishing SPAMIs on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined. Articles 21 and 28 of the SPA/BD Protocol invite Contracting Parties to cooperate with international organizations concerned.

48. In fact, a certain number of measures that can be adopted for a SPAMI already fall within the specific scope of treaties different from the SPA/BD Protocol or institutions different from UNEP-MAP. Full coordination and consistency are then necessary among all the legal instruments and entities operating at the Mediterranean level.

49. The neighbouring Parties concerned could then include the relevant international organizations in the sub-regional consultation process. For this purpose, and as appropriate, Memoranda of Understanding could be established.

50. The political declarations of intention mentioned in paragraph 41 hereinbefore could constitute a basis for requesting the collaboration and contribution of the organizations in the process for preparing SPAMI proposals. These organizations may need a mandate to cooperate in the process from their respective governance bodies (Scientific Committee, Parties, etc).

51. Countries may contact for consultation purposes the relevant international organizations, directly or with the assistance of the Secretariat, including REMPEC and RAC/SPA as the case may be, especially if the preliminary assessment of the area and the analysis of the conservation objectives may require action with regard to maritime navigation, fisheries or the protection of the environment”.

a) The International Maritime Organization (IMO) and the REMPEC

52. The International Maritime Organization (IMO) is a United Nations' specialized agency responsible for improving maritime safety and preventing pollution from ships. Through its instruments, IMO has mechanisms in place for the elaboration, development and adoption of international treaties, rules and regulations related to the shipping activities, including for preventing the pollution of the marine environment.

53. IMO consists of an Assembly, a Council and five main Committees, including the Marine environment Protection Committee (MEPC) which is empowered to consider any matter within the scope of the IMO concerned with prevention and control of pollution from ships. In particular it is concerned with the adoption and amendment of conventions and other regulations and measures to ensure their enforcement. It is responsible among others for the International Convention for the Prevention of Pollution from Ships (Marpol Convention).

54. The Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea (REMPEC), managed under the joint auspices of MAP and IMO, assists the Mediterranean coastal States in ratifying, transposing, implementing and enforcing international maritime conventions related to the prevention, reduction and surveillance of marine pollution from ships.

b) The General Fisheries Commission for the Mediterranean

55. The General Fisheries Commission for the Mediterranean (GFCM) is a regional fisheries management organization established in 1949 under Article XIV of the Constitution of the Food and Agriculture Organization of the United Nations (FAO). It consists of 23 Member countries along with the European Union.

56. Its objectives are to promote the development, conservation, rational management and best utilization of living marine resources in the Mediterranean, Black Sea and connecting waters. The area covered by the GFCM Agreement includes both the high seas and marine areas under national sovereignty or jurisdiction.

57. Through its instruments, GFCM has mechanisms in place for the elaboration, development and adoption of international regulations related to fisheries activities in the Mediterranean.

c) ACCOBAMS

58. Adopted in 1996 under the Convention on the Conservation of Migratory Species of Wild Animals, the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and neighbouring Atlantic Area (ACCOBAMS) aims to encourage the Parties to take coordinated measures to achieve and maintain a favorable conservation status for cetaceans; to prohibit and to take all necessary measures to eliminate, where this is not already done, any deliberate taking of cetaceans; and to cooperate to create and maintain a network of specially protected areas to conserve cetaceans. This Agreement is currently composed of 23 States parties.

59. The Conservation Plan, as included in the Annex 2 of the Agreement, requires that the ACCOBAMS Parties endeavor to establish and manage specially protected areas for cetaceans corresponding to the areas which serve as habitats of cetaceans and/or which provide important food resources for them. Such specially protected areas should be established within the framework of the Regional Seas Conventions (OSPAR, Barcelona and Bucarest Conventions), or within the framework of other appropriate instruments.

60. Guidelines for the establishment and management of marine protected areas for cetaceans were prepared in collaboration with RAC/SPA and adopted by the Eighth Meeting of RAC/SPA Focal Points (Palermo, Italy, 6-9 June 2007).

3.1.4 Involving other relevant organizations

61. For building this sub-regional governance framework, the countries may involve, as appropriate and in accordance with their national regulations and UNEP/MAP policy, other relevant organizations.

a) The International Union for Conservation of Nature

62. The International Union for Conservation of Nature (IUCN) is an international organization established in 1948. The IUCN unites both States and non-governmental organizations. IUCN aims to support the coordination of the work related to the biodiversity conservation and use of natural resources, and develops a knowledge strategy intending for a better conservation of species and habitats in the Mediterranean.

63. In the Mediterranean, IUCN has conducted for a few years a project on the improvement of the governance of the sea beyond national jurisdiction as well as a project for identifying priority representative areas and species.

b) The Mediterranean Science Commission

64. Established in 1919, the Mediterranean Science Commission (CIESM) aims to promote scientific cooperation in the Mediterranean, in particular through the development of monitoring programmes, the organization of oceanographic campaigns or the organization of scientific congresses and research workshops. 22 countries are members to the Commission, among them 17 are Parties the Barcelona Convention (Algeria, Croatia, Cyprus, Egypt, France, Greece, Israel, Italy, Lebanon, Malta, Morocco, Monaco, Slovenia, Spain, Syria, Tunisia and Turkey).

c) Non-governmental organizations

65. Thanks to their bilateral relations with the countries, as well as through their action within international bodies, NGOs have the potential to play an important role for increasing decision-makers awareness.

66. NGOs could also contribute technically to establish a state of the knowledge for an area. Through their research and exploration work, some NGOs contribute to improving knowledge of the Mediterranean environment.

3.2 Defining the limits of the future SPAMI

67. According to the regional working programme for the coastal and marine protected areas in the Mediterranean adopted in 2009, it is recommended that States consider the establishment of protected areas in the setting-up of representative networks, and not in a isolated way. SPAMIs may be established in a planning framework at the different scales considered, regional, sub-regional and national, and based on existing inventories for the sites of conservation interest and the relevant criteria.

68. In this field, the work conducted by the RAC/SPA and recognized by its Focal Points, for identifying Mediterranean ecologically or biologically significant marine areas, and priority conservation areas in the open seas, including the deep seas, as well as on the Operational criteria for identifying SPAMIs in open sea areas, including the deep seas, could be considered as an example of process that could be followed and replicate in the future.

69. The countries could rely more generally on the biogeographic classification works conducted by other organizations. In this respect, it could be pointed out that in the ACCOBAMS framework areas of special importance for cetaceans are identified and adopted by the Contracting Parties to the Agreement.

70. On the basis of the data collected, the selection criteria and taking into consideration the ecological issues of the area, the States can define jointly the limits of the future SPAMI.

71. The data on the site (geographic location, physical, hydrological and ecological features, socio-economic data) justifying its importance for the Mediterranean, are then included in the presentation report.

3.3 Legal instrument needed for establishing marine protected areas likely to be SPAMIs on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined

72. Once the area has been identified and delimited on the basis of the relevant scientific data related to the ecological issues of the area, the countries have to formalize their will to establish jointly this SPAMI. For this purpose, the best and most effective way to establish a marine protected area beyond national jurisdiction or in waters where the maritime boundaries between the States concerned have not yet been delimited is to conclude a treaty. Unilateral legislation by one State is not likely to be acceptable for other States.

73. Nevertheless, the fact that an agreement between the neighbouring Parties concerned is the best and most effective way does not mean that the States directly concerned must necessarily sign and ratify a specific treaty for the establishment of any future marine protected areas on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined, and wait for its entry into force after having exchanged or deposited their ratifications.

74. If the States concerned prefer to do so, they can proceed in an informal and flexible way. In fact a treaty framework, that is the SPA/BD Protocol itself, already exists for that purpose. It provides for a special procedure of making proposals for inscription in the SPAMI List by two or more neighbouring Parties concerned.

75. The joint proposal, which is discussed, negotiated, agreed and signed by the competent authorities of the States concerned and must indicate the protection and management measures applicable to the envisaged area, can be considered as a treaty concluded in a simplified form subject to the condition of subsequent approval by the Meeting of the Parties to the SPA/BD Protocol.

76. The only cases where a specific treaty is needed would be where the Parties concerned with the future protected area include a State which is not a party to the SPA/BD Protocol or where the States concerned do not intend to have the MPA inscribed on the SPAMI List.

77. Nevertheless, this does not prevent the States concerned, if they want to do so, to conclude before or after the joint proposal for inscription of the area on the SPAMI list a specific treaty giving details on some provisions, in particular for the setting-up of the joint management structure and its operating terms. For example, the Pelagos Sanctuary was established under a treaty between the three States concerned, who proposed afterwards its inclusion on the SPAMI List.

78. During the preparatory work for setting the joint proposal (and as appropriate), the neighbouring Parties concerned have to take into account the legal status of the area, in accordance with the provisions of the Annex I, para. C.

79. It is also recommended that the joint proposal and/or the treaty include a non-prejudice clause as the one included in Art. 2, paras. 2 and 3, of the SPA/BD Protocol.

4. Making management of SPAMIs on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined operational

80. The management of a SPAMI has to be considered with regard to both the institutional side related to the area management body, and the regulation measures that would be in force in the area, in accordance with the main trends of the management plan.

4.1 An operational management body endowed with the appropriate resources

81. Under paragraph D, 6 of Annex I of the SPA/BD Protocol, "to be included in the SPAMI List, a protected area must have a management body, endowed with sufficient powers as well as means and human resources to prevent and/or control activities likely to be contrary to the aims of the protected area".

82. For a SPAMI situated beyond national jurisdiction or in areas where the limits of national jurisdiction have not yet been defined between the concerned States, the treaty or the joint proposal for establishing the SPAMI should provide for a governance body. This one could rely on national management bodies, having a clear mandate and the necessary human and financial resources, guaranteeing the involvement of each neighbouring Party concerned in decision-making related to the management.

83. If the countries would like to set up a joint management body, they should face legal and administrative complexities that exist in any project of cross-boundary governance, considering the heterogeneity of the legal contexts and administrative procedures in force in each country.

84. For progressing towards the setting-up of a joint management body considering these constraints, guidance and good practices could be gotten from projects and experiences developed in other cross-boundary management frameworks, in particular the ones developed

for the management of shared waters (cross-boundary management of rivers, drainage basins, lakes or ground waters). However, for SPAMIs situated partly or wholly on the high seas, it is important to consider the specificity and the complexity of the legal and political situation of the high seas which is not subject to any sovereignty or jurisdiction and where the international cooperation is appropriate.

85. It could also be useful to point out that the European countries could rely on a tool set up by the European Union (EU): the European cross-border cooperation groupings (EGCC). These groupings may be established between EU Members States, and they provide for a status ensuring the involvement of each Party in a bilateral or multilateral cooperation framework.

86. A progressive process could also be considered by the neighbouring Parties concerned, that is to say a provisional management body, coming under one of the Parties, would be designated in agreement with all the Parties, and would have a mandate to prepare the setting-up at mid-term of a joint management body. This progressive process would allow each Party to examine all the implications related to the legal responsibility of this new structure and would also allow to overcome the difficulties for implementing.

4.2 Adoption of a management plan and implementation of the monitoring activities

87. In order to guarantee an effective management of the area, the SPA/BD Protocol specifies that "protection, planning and management measures applicable to each area must be adequate for the achievement of the conservation and management objectives set for the site in the short and long term, and take in particular into account the threats upon it" (Annex I of the SPA/BD Protocol, para. D, 2).

88. Planning and management measures must be based on an adequate knowledge of the elements of the environmental conditions and of socio-economic and cultural factors that characterize the area.

89. Under the paragraph D, 7 of Annex I of the SPA/BD Protocol, "to be included in the SPAMI List, an area will have to be endowed with a management plan. The main rules of this management plan are to be laid down as from the time of inclusion and implemented immediately. A detailed management plan must be presented within three years of the time of inclusion. Failure to respect this obligation entails the removal of the site from the List".

90. Thus, the treaty or the joint proposal that will provide to the neighbouring Parties concerned the framework for establishing the SPAMI, should provide at least the main rules of the management. In such case, it should also precise the necessary conditions for preparing the management documents during the three years after the time of inclusion of the site in the SPAMI List.

91. In addition, under the paragraph D, 8 of Annex I of the SPA/BD Protocol, "to be included in the SPAMI List, an area will have to be endowed with a monitoring programme. This programme should include the identification and monitoring of a certain number of significant parameters for the area in question, in order to allow the assessment of the state and evolution of the area, as well as the effectiveness of protection and management measures implemented, so that they may be adapted if need be. To this end further necessary studies are to be commissioned".

92. Once established, a marine protected area requires continuous monitoring of ecological processes, habitats, population dynamics and the impact of human activities. This information is essential for periodic updating of applicable regulations and management plans.

93. The treaty or the joint proposal should then define the procedures according to which new protection measures, as well as the management plan and the subsequent modifications, are to be agreed and adopted by the States concerned.

4.3 Adoption of regulatory measures

94. The management of a natural area is associated with the regulation of activities within the site and, as appropriate, with the zoning of the activities. However, it is important to recall that the management of an area and its natural resources associated does not necessarily mean the closing of the area to one or more activities that take place in it⁴.

95. In addition, wherever possible, incentives and non-regulatory approaches should be considered to encourage voluntary compliance and a culture of self-enforcement of rules by user groups. This is particularly important at sea where monitoring and detection are often harder than on land. Such approaches are likely to work best within a context that encourages public participation, education and awareness-building on the values of these ecosystems and the services they supply.

96. The international legal framework for regulating all activities in the oceans is provided in the United Nations Convention on the Law of the Sea (UNCLOS), thus all actions taken within the framework of a regional legal instrument need to be consistent with UNCLOS provisions. Nevertheless, it is important to bear in mind that not all the States parties to the Barcelona Convention are parties to UNCLOS⁵.

4.3.1 *Regulating the shipping activities*

97. Shipping activities are regulated under the instruments provided according to IMO competence, such as the establishment of a Particularly Sensitive Sea Area (PSSA).

98. The Guidelines for the Identification of Particularly Sensitive Sea Areas (PSSAs) adopted in 1991 by the Assembly of the IMO and revised in 2001 and 2005, define a PSSA as an area that needs special protection through action by IMO because of its significance for recognized ecological or socio-economic or scientific reasons and which may be vulnerable to damage by international maritime activities.

⁴ During the February 2010 meeting of the Ad Hoc Open-ended Informal Working Group established by the United Nations General Assembly to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, "it was underlined that management arrangements should be based on science, including considerations of threats and ecological values. Several delegations emphasized the need for flexibility in the selection of area-based management tools, and the need to avoid a "one-size-fits-all" approach, recognizing regional and local characteristics. In that regard, some delegations noted that the designation of marine protected areas did not require closing those areas to all activities, or particular activities, but rather managing those areas to ensure that ecological values were maintained. A suggestion was made that fisheries management measures, such as the protection of spawning stocks and the establishment of catch or fishing limits for specific areas could be considered a form of marine protected area." U.N. Document A/65/68 (para. 66)

⁵ The UNCLOS provisions on the high seas codify customary law and are then binding for all States, Parties to UNCLOS or not. UNCLOS is considered as the oceans constitution, and has, to date, 161 Parties, having then a character almost universal.

99. When an area is agreed as PSSA, specific measures may be taken to control maritime activities in this area, as for example measures related to ship' routing, stricter application of MARPOL⁶ obligations related to equipment and discharges from ships, or setting up of services of vessel traffic management.

100. To be identified as a PSSA, an area should meet at least one of eleven ecological criteria (uniqueness or rarity; critical habitat; dependency; representativity; diversity; productivity; spawning or breeding grounds; naturalness; integrity; vulnerability; bio-geographic importance), three social, cultural and economic criteria (economic benefit; recreation; human dependency) or three scientific and educational criteria (research; baseline and monitoring studies; education). In addition, the area should be at risk from international shipping activities, taking into consideration vessel traffic (operational factors; vessel types; traffic characteristics; harmful substances carried) and natural factors of hydrographical, meteorological and oceanographic character.

101. The guidelines for the identification of PSSA specify that at least one of the relevant criteria should be present in the entire proposed area, though this does not have to be the same criterion throughout the area.

102. PSSAs may be located in or beyond the limits of the territorial sea. They are identified by the Marine Environment Protection Committee of IMO on proposal by one or more member States and under a procedure which takes place at the multilateral level. PSSA proposals should be accompanied by proposals for associated protective measures, identifying the legal basis for each measure.

103. Associated protective measures that may be taken in PSSAs include those available under IMO instruments and cannot be extended to fields different from shipping. They encompass the following options: designation of an area as a Special Area under MARPOL Annexes I, II, V and VI; adoption of ships' routing systems under the 1974 International Convention for the Safety of Life at Sea, including areas to be avoided; reporting systems near or in the area; other measures, such as compulsory pilotage schemes or vessel traffic management systems.

104. A proposal for regulating the shipping within a SPAMI should be then jointly submitted to IMO by the Parties concerned with the establishment of SPAMI and, whenever possible, by all the Parties to the SPA/BD Protocol. The 2002 Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea already contains a provision that should encourage Mediterranean States to take such an action:

"In conformity with generally accepted international rules and standards and the global mandate of the International Maritime Organization, the Parties shall individually, bilaterally or multilaterally take the necessary steps to assess the environmental risks of the recognized routes used in maritime traffic and shall take the appropriate measures aimed at reducing the risks of accidents or the environmental consequences thereof" (Art. 15).

4.3.2 *Regulating fisheries*

105. Fisheries activities are regulated under GFCM competence who adopts binding decisions as regards the conservation and rationale management of living marine resources, in particular with a view to:

- Regulate fishing methods and fishing gear,

⁶ The International Convention for the Prevention of Pollution from ships, adopted in 1973 in the frame of the IMO, and completed by the 1978 Protocol, known as MARPOL, provides the provisions to designate sensitive areas as special areas with regard to a particular type of pollution, leading to the application of stricter standards than those generally applicable, in particular for the equipment and discharges from ships. The whole Mediterranean Sea is designate as a special area under Annex I (Regulations for the Prevention of Pollution by Oil) and Annex V (Regulations for the Prevention of Pollution by Garbage from Ships).

- Prescribe the minimum size for individuals of specified species,
- Establish open and closed fishing seasons and areas,
- Regulate the amount of total catch and fishing efforts and their allocation among members,
- Control of fishing capacity,
- Take measures for the conservation of endangered species.

106. In addition, in the framework of their close collaboration, the GFCM takes on the recommendations of the International Convention for the Conservation of Atlantic Tunas (ICCAT) who is responsible for the management of tuna and tuna-like species in the Atlantic Ocean and its adjacent seas, including the Mediterranean Sea.

107. Lastly, regarding the establishment, in the GFCM framework, of Fisheries Restricted Areas (FRA), the procedure to be followed implies the fulfilling of a form ("Standard Format for the Submission of Proposals for GFCM Fisheries Restricted Areas (FRA) in the Mediterranean"). Presented by either an institution, a scientist or by GFCM Members, it must first get the endorsement by the GFCM Sub-Committee of Marine Environment and Ecosystems (SCMEE). If endorsed, it is further verified by the Scientific Advisory Committee and then transferred to the Contracting Parties annual Session of the GFCM, where it is examined with a view of its possible adoption.

4.3.3 *Regulating exploitation of the mineral resources of the seabed*

108. There is no point in the Mediterranean that is located at a distance of more than 200 n.m. from the nearest land or island. Consequently, activities for the exploration and exploitation of mineral resources of the seabed all fall within the sovereign rights of a Mediterranean State as they are conducted on the continental shelf of a State (see paragraph 77(3) of UNCLOS).

109. The proposal for the inclusion of an area on the SPAMI List, with the relevant protection and management measures, must consequently be submitted by the concerned State(s).

110. The Parties could also refer to the Article 21 of the Protocol Concerning Pollution Resulting from Exploration and Exploitation of the Continental Shelf, the Seabed and its Subsoil adopted in 1994 and entered into force in 2011:

"For the protection of the areas defined in the Protocol concerning Mediterranean Specially Protected Areas and any other area established by a Party and in furtherance of the goals stated therein, the Parties shall take special measures in conformity with international law, either individually or through multilateral or bilateral cooperation, to prevent, abate, combat and control pollution arising from activities in these areas.

In addition to the measures referred to in the Protocol concerning Mediterranean Specially Protected Areas for the granting of authorization, such measures may include, *inter alia*:

- (a) Special restrictions or conditions when granting authorizations for such areas:
 - (i) The preparation and evaluation of environmental impact assessments;
 - (ii) The elaboration of special provisions in such areas concerning monitoring, removal of installations and prohibition of any discharge.
- (b) Intensified exchange of information among operators, the competent authorities, Parties and the Organization regarding matters which may affect such areas".

4.3.4 *Measures for the conservation of the large migratory pelagic species*

111. The conservation of the large migratory pelagic species requires often actions on the high seas. It is the case, for example, of the cetaceans whose conservation is under the ACCOBAMS

Agreement. The Agreement includes a conservation plan which mentions the conservatory measures that have to be undertaken by the Parties so that the cetaceans' species present in the area enjoy a favorable protection status. These measures concern the following issues:

- Adoption and enforcement of national legislation
- Assessment and management of human-cetacean interactions
- Habitat protection
- Research and monitoring
- Capacity building, collection and dissemination of information, training and education
- Responses to emergency situations.

4.4 Implementation, compliance and enforcement of the regulatory measures

112. Implementation, compliance and enforcement of the regulatory measures within SPAMIs situated on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined could be distinguished between the Contracting Parties to the SPA/BD Protocol and the third States.

4.4.1 Implications for the Contracting Parties to the SPA/BD Protocol

113. In accordance with Article 9, para. 5, of the SPA/BD Protocol, "the Parties which proposed the inclusion of the area in the List shall implement the protection and conservation measures specified in their proposals". The neighbouring Parties concerned, as parties to a specific treaty or signatories of a joint proposal, are thus required to implement the protection, planning and management measures applicable.

114. If the area proposed for inclusion in the SPAMI List is situated in areas where the limits of national sovereignty or jurisdiction have not yet been defined, that is to say that is in an area where no agreement has been concluded by the States concerned as regards their maritime boundaries, then the neighbouring Parties concerned for establishing the SPAMI are those who could have a claim over the waters where the area is located.

115. In this case, the neighbouring Parties concerned could agree, as regards enforcement of the relevant measures, on a solution similar to that adopted by the parties to the Agreement establishing the Pelagos Sanctuary, which provides as follows: "1. In the part of the sanctuary located in the waters subject to its sovereignty or jurisdiction, any of the States Parties to the present agreement is entitled to ensure the enforcement of the provisions set forth by it" (Art. 14, para. 1). Such a solution is facilitated by the disclaimer provision included in the SPA/BD Protocol (Art. 2, para. 2), according to which no act adopted on the basis of the Protocol "shall prejudice the rights, the present and future claims or legal views of any State relating to the law of the sea, in particular, the nature and the extent of marine areas, the delimitation of marine areas between States with opposite or adjacent coasts".

116. In addition, in accordance with Article 8, para. 3, of the SPA/BD Protocol, all the Parties agree "to comply with the measures applicable to the SPAMIs and not to authorize nor undertake any activities that might be contrary to the objectives for which the SPAMIs were established". Moreover, in accordance with the provisions of the Article 9, para. 5, all the Parties undertake to respect the rules laid down in the proposal for the protection and conservation of the area. These provisions make the protection, planning and management measures adopted for the SPAMI binding on all the Parties to the SPA/BD Protocol.

117. In this situation, procedures and mechanisms on compliance under the Barcelona Convention and its protocols, adopted in 2008 by the Contracting Parties, are also applicable⁷.

⁷ Decision IG. 17/2

Their objective is “to facilitate and promote compliance with the obligations under the Barcelona Convention and its Protocols, taking into account the specific situation of each Contracting Party, in particular those, which are developing countries”.

118. These procedures provide the setting-up of the Compliance Committee who “shall consider submissions by:

- a Party in respect of its own actual or potential situation of non-compliance, despite its best endeavours; and
- a Party in respect of another Party’s situation of non-compliance, after it has undertaken consultations through the Secretariat with the Party concerned and the matter has not been resolved within three months at the latest, or a longer period as the circumstances of a particular case may require, but not later than six months.”

119. Then, the Committee may take measures with a view “to promoting compliance and addressing cases of non-compliance, taking into account the capacity of the Party concerned, in particular if it is a developing country, and also factors such as the cause, type, degree and frequency of non-compliance”, by providing advice or facilitating assistance, or by inviting the Party concerned to develop an action plan to achieve compliance.

4.4.2 Implication for third States

120. The issue of third States is often raised as an obstacle to the implementation of measures intended to be applied in marine areas beyond the limits of national jurisdiction. In these areas, where no sovereignty exists, jurisdiction is exercised according to criterion of the nationality of the ship concerned that is by the State that has granted its flag to a certain ship. No State can impose its own legislation on the others. No State can, consequently, unilaterally establish a marine protected area on the high seas and claim that ships flying a foreign flag abide by the relevant provisions.

121. As regards the enforcement of the provisions applying to the SPAMI against ships flying the flag of third States in areas where the limits of national sovereignty or jurisdiction have not yet been defined or in the waters beyond the sovereignty or jurisdiction of the neighbouring Parties concerned, the latter could agree on a solution similar to that adopted by the parties to the Agreement establishing the Pelagos Sanctuary, which provides that any of the States parties is entitled to ensure the enforcement of the relevant provisions “with respect to ships flying its flag, as well as, within the limits established by the rules of international law, with respect to ships flying the flag of third States” (Art. 14, para. 2). Such a solution is facilitated by the fact that, due to the limited extension of the Mediterranean Sea, all the present high seas waters included in the SPAMI would fall within the exclusive economic zones of one or another of the coastal States if they decided to establish such zones.

122. In addition, the cooperation with the international competent organizations and the mobilization of instruments under their competence could be a helpful tool in addressing some of the obstacles. In fact, specific instruments allow to regulate, under certain conditions, some precise activities in areas beyond national jurisdiction, such as the Particularly Sensitive Sea Area (PSSA) declared under the International Maritime Organization (IMO) and the Fisheries Restricted Areas established under the General Fishery Commission for the Mediterranean (GFCM).

123. These instruments, which legal scope is different from Barcelona Convention’s one, could allow to extend the enforcement of regulation measures to some States non-parties to the SPA/BD Protocol.

124. Moreover, Article 28 of the SPA/BD Protocol provides that:

“1. The Parties shall invite States that are not Parties to the Protocol and international organizations to cooperate in the implementation of this Protocol.

2. The Parties undertake to adopt appropriate measures, consistent with international law, to ensure that no one engages in any activity contrary to the principles or purposes of this Protocol.”

125. Managing a SPAMI beyond national jurisdiction could be then considered as a way to promote new forms of cooperation between the neighbouring Parties involved in the SPAMI and the non-parties States that could be concerned by enforcing the regulation.

5. Conclusions

126. In the framework of the UNEP/MAP Barcelona Convention, the SPA/BD Protocol provides for the establishment of SPAMIs on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined. The proposal for inclusion in the SPAMI List has to be prepared jointly by the competent authorities of the neighbouring Parties concerned.

127. The main aspect for creating and managing a SPAMI on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined is related to the will of the countries concerned to set up a sub-regional cooperative framework favorable for developing and implementing such project, involving all the technical departments concerned in each country as well as the relevant international organizations.

128. The coordination and consultation process would be achieved when an agreement would be adopted between the neighbouring Parties concerned for establishing the SPAMI. For this purpose, the joint proposal, which is discussed, negotiated, agreed and signed by the competent authorities of the States concerned and must indicate the protection and management measures applicable to the envisaged area, can be considered as a treaty concluded in a simplified form subject to the condition of subsequent approval by the Meeting of the Parties to the SPA/BD Protocol.

129. Nevertheless, this does not prevent the States concerned, if they want to do so, to conclude before or after the joint proposal for inscription of the area on the SPAMI list a specific treaty giving details on some provisions, in particular for the setting-up of the joint management structure and its operating terms.

130. For regulating activities beyond national jurisdiction, the international legal framework for regulating activities beyond national jurisdiction is provided in the United Nations Convention on the Law of the Sea (UNCLOS), thus all actions taken within the framework of a regional legal instrument need to be consistent with UNCLOS provisions, taking into account that not all the States parties to the Barcelona Convention are parties to the UNCLOS.

131. Through the establishment of a SPAMI, the neighbouring Parties concerned are involved in the implementation of the protection and conservation measures defined in the proposal for inclusion. More broadly, considering the *erga omnes partes* effect given by the SPA/BD Protocol dispositions, all the Parties to the Protocol are committed to respecting the protection and conservation measures defined in the proposal for inclusion.

132. Lastly, the mobilization of legal instruments under the competence of other organizations, such as IMO and GFCM, could allow to regulate, under certain conditions, some precise

activities in areas beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined, involving some States non-parties to the SPA/BD Protocol in the implementation of these specific measures.

133. Thus, the joint establishment of SPAMIs could be considered as the driving force for developing a broader cooperation between the States concerned, contributing to a better governance of the Mediterranean and its shared resources.