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Coastal setback zones in the Mediterranean: A study on Article 8-2 of the Mediterranean ICZM Protocol

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HIGHLIGHTS

COASTAL SETBACK ZONES, A WELL-ENTRENCHED TOOL The establishment of setback zones is a tool that is increasingly used worldwide as part of coastal policies because that meets many different policy objectives: it contributes to biodiversity preservation, helps maintaining ecosystem services and, by protecting populations against the risks of submersion and erosion, is a relevant option for adaptation to climate change.

A FLAGSHIP PROVISION OF THE ICZM PROTOCOL Article 8-2 of the Mediterranean ICZM Protocol, laying down the establishment of a 100 metre setback zone in Mediterranean coastal areas, is undeniably a flagship provision of this new legal instrument that was adopted in January 2008. This article reveals how regional Mediterranean law in this case filters into the traditional sphere of domestic law to govern an area, regional planning, which is usually the sole competence of national and sub-national authorities.

IMPLEMENTATION ISSUES Article 8-2 of the ICZM Protocol was the subject of heated debate during negotiations due to the fact that its implementation raises many challenges for an integrated and sustainable management of Mediterranean coastal zones. It is therefore not surprising that the building ban is accompanied by possibilities for adaptation. As the Protocol is about to enter into force, it seems necessary to study the precise content and scope of this emblematic provision of the Protocol in order to determine the exact obligations falling to States.

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1. Introduction

1.1.Context and objective of the report

This report is part of the project on "Challenges and opportunities for implementing the Protocol on ICZM in the Mediterranean" (Protogizc), led by IDDRI and funded by the French Ministry of Ecology (Programme Liteau) and the PAP/RAC. Adopted in January 2008 by the Contracting Parties to the Barcelona Convention, the Mediterranean ICZM Protocol is the first supra-State legal instrument aimed specifically at coastal zone management. Previously, coastal zones were still governed in a fragmented way by international law, while the rare instruments aimed at transcending sectoral policies and guiding national systems towards integrated coastal management were confined to the realm of soft law. As Mediterranean coastal zones have been on an unsustainable development path for the last few decades, the application of this new legal tool is of vital importance for the future of the Mediterranean basin. The Protogizc project is therefore devoted to the specific issues, both theoretical and operational, raised by the future entry into force of the text. Making a detailed analysis of the Protocol's provisions – their content, their normative scope, etc. – the aim of the research is to study the methods for implementing the text, focusing particularly on four case studies (Croatia, France, Italy and Syria) whose comparison is interesting on several counts. The goal of this project is to make it easier to gradually create the conditions for implementing the Protocol, in various fields ranging from the legal framework to capacity building (administrative and legal staff, etc.), the use of regional planning documents (cadastres, land use plans, etc.) and the integration of climate change issues in planning and ecosystem protection decisions.

This report makes an initial analysis of Article 8-2 of the ICZM Protocol, and particularly endeavours to study its content and to determine its legal scope. It therefore provides a general overview of the underlying obligations and implications of the implementation of its provisions. However, it does not prejudge the legal modifications that States will need to make after an in-depth examination of their national legal systems in light of the requirements specified by the text.

1.2. Why focus specifically on Article 8-2? The 100 metre setback zone, an emblematic provision of the ICZM Protocol

According to Article 8-2 of the ICZM Protocol, the Parties:

- (a) Shall establish in coastal zones, as from the highest winter waterline, a zone where construction is not allowed. Taking into account, inter alia, the areas directly and negatively affected by climate change and natural risks, this zone may not be less than 100 metres in width, subject to the provisions of subparagraph (b) below. Stricter national measures determining this width shall continue to apply.
- (b) May adapt, in a manner consistent with the objectives and principles of this Protocol, the provisions mentioned above:
  - 1) for projects of public interest;

- 2) in areas having particular geographical or other local constraints, especially related to population density or social needs, where individual housing, urbanisation or development are provided for by national legal instruments.

- (c) Shall notify to the Organization their national legal instruments providing for the above adaptations.

Article 8-2-a of the ICZM Protocol, laying down the establishment of a 100 metre setback zone in Mediterranean coastal areas, is undeniably a **flagship provision** of this new legal instrument that was adopted in January 2008. This article reveals how regional Mediterranean law in this case filters into the traditional sphere of domestic law to govern an area, regional planning, which is usually the sole competence of national and sub-national authorities. It also reflects the will of the Mediterranean States to resolutely commit to the protection of coastal ecosystems. This article was the **subject of heated debate** during negotiations due to the fact that its implementation raises many challenges for an integrated and sustainable management of Mediterranean coastal zones. It is therefore not surprising that the building ban is accompanied by possibilities for **adaptation**, to which States remain particularly attached. As the Protocol is about to enter into force, it now seems necessary to study the precise content and scope of this emblematic provision of the Protocol in order to determine the exact obligations falling to States.

1.3. General considerations on coastal setback zones

Before making an analysis of Article 8-2 itself, it seems necessary to put the concept of the setback zone back in its general context and to briefly present its objectives as well as the use already made of this tool today in the Mediterranean.

1.3.1. Objectives of coastal setback zones

Coastal planning regulations are a major part of any integrated coastal zone management (ICZM) policy. In this respect, the establishment of coastal setbacks is proving to be a tool that meets many different policy objectives.

First, establishing setbacks of this kind clearly contributes to **biodiversity protection**. By preventing construction at the land-sea interface, which is by nature extremely fragile, setback zones ensure the protection of coastal species, ecosystems and habitats such as dunes, wetlands, seagrass meadows and coastal forests.

Second, establishing a setback zone helps to **maintain ecosystem services**. Indeed, oceans and coastal zones provide humankind with invaluable benefits through their associated ecosystems (Millennium Assessment, 2005). By contributing to the preservation of wetlands and estuaries, a setback zone helps, for example, to maintain the water purification functions provided by these special environments. A tool of this kind also helps to slow down the natural erosion of coastal systems: for instance, beach loss is considerably enhanced by coastal artificialisation, which can be prevented by a setback zone. Similarly, protecting dune ridges helps to stabilise the ground and thereby prevent erosion. Finally, by facilitating the public access to an area larger than the public maritime domain alone, the establishment of a setback zone helps to maintain the recreational services provided by this particularly attractive environment: by preventing excessive coastal artificialisation, it responds to the permanent and seasonal populations' "desire for nature".

Finally, the creation of setbacks is also proving to be a useful tool for the **adaptation of coastal zones to climate change**, by protecting populations against the risks of submersion and erosion and, as we have seen, by reducing pressure on biodiversity and ecosystem services that are already under considerable threat. Indeed, we know that climate change not only increases pressure on ecosystems that are already weakened by pollution, the destruction of habitats and the over-exploitation of natural resources, but also questions past – and sometimes present – development strategies in the light of the new physical conditions it imposes or points to.

1.3.2. Coastal setback zones, a well-entrenched tool in the Mediterranean

The establishment of setback zones is a tool that is increasingly used worldwide as part of coastal policies. In this respect, two options are commonly chosen: first, the "qualitative" option, which involves adapting building regulations to the specific circumstances of a coastal fringe. In California, for example, the

construction setback line is not uniform, but is calculated according to two factors: "the length of life of the structure and the time path of exposure to coastal hazards (erosion and flooding)" (Hanak and Moreno, 2008). Second, the "quantitative" option, based on the establishment of a setback with a uniformly determined width for the whole of the national coastline. This second option is the one favoured in the Mediterranean, and we shall give several examples here, without providing an exhaustive list.

In **Algeria**, the Law of 1 December 1990 on urban and regional planning imposed a building ban on "a strip of 100 metres in width from the shoreline[1]". Article 18 of the Law of 5 February 2002 on coastal protection and development states that "this ban may be extended to 300 metres for reasons linked to the sensitive nature of the coastal environment". Although the law nevertheless authorises "buildings or activities requiring proximity to the sea", the decree intended to specify the application of this provision has yet to be adopted, which has resulted in many cases of misapplication of the text (Megfhour Kacemi and Tabet Aoul, 2007).

In **Croatia**, the 2007 Physical Planning Act establishes a "protected coastal area[2] (PCA)", a zone "encompassing all islands, the continental belt 1 000 metres in width from the coastline and the sea belt 300 metres in width from the coastline[3]". Articles 50 and 51 ban new construction works within a belt from 70 to 100 metres from the coastline under certain conditions. Nevertheless, exceptions are provided for "construction works for utility infrastructure and underground power lines, accompanying facilities used for hospitality and catering and tourism purposes, construction works which by nature must be located on the coast (shipyards, ports etc.) and for development of public areas[4]".

In **France**, the principle of protecting a continuous 100 metre strip was already set out in the National Planning Directive of 25 August 1979. Legislative confirmation by the Law of 3 January 1986 on coastal planning, protection and development, known as the *Loi Littoral*, clarified the principle, removing the numerous exceptions that existed under the previous regulation. Article L 146-4-III of the French Urban Planning Code thus provides that "outside urban areas, buildings and facilities are prohibited within a 100 metre coastal strip (...). A zoning and land use scheme may extend the coastal setback (...) to more than 100 metres when justified by the sensitivity of the environment or by coastal erosion". Although the general principle of a 100 metre setback zone is clearly established, it should be stressed that this development ban does not apply to "buildings and facilities necessary for public service or economic activities requiring proximity to the sea". This concept has been strictly interpreted by the law, principally authorising facilities needed for the maintenance and development of traditional coastal activities (aquaculture, naval repairs, etc[5]).

In **Israel**, the National Masterplan for the Mediterranean Coast, adopted in 1983, aims to prevent development which is unrelated to the coast and to resolve conflicts of interest among land uses which require a coastal location. It includes a clause prohibiting development within 100 metres of the coastline, which may be extended, if necessary, according to the physical characteristics of the coast (UNEP/MAP/PAP, 2000).

In **Morocco**, the draft law on coastal protection and development establishes a setback zone of 100 metres, which may be extended when justified by the sensitivity of the environment or by coastal erosion. Exceptional authorisation may, however, be granted to "building projects of guaranteed economic interest".

In **Spain**, chapter II of Coastal Law 22/1988 of 28 July establishes a protection zone of 100 metres which may be extended to 200 metres upon agreement of the autonomous communities

1. Article 45.
2. Article 48.
3. Article 49.
4. Article 51.

5. Consequently, the following requests were rejected: a sea spa centre (Administrative Court of Nice, 17 December 1987, Mouvement niçois pour la défense des sites et du patrimoine and others), a bar-restaurant (Council of State, 9 October 1996, Union départementale Vie et Nature 83), a car park (Council of State, 10 May 1996, Commune de Saint-Jorioz). On the contrary, exceptions were granted for aquaculture activities (Administrative Court of Rennes, 11 October 1989, Société pour l'étude et la protection de la nature en Bretagne), the construction of a lifeguard post (Administrative Court of Caen, 27 December 1990, Sahiguède), and the creation of two basins for the development of oyster-farming activities (Administrative Court of Rennes, 23 April 2003, Association Les amis de Locmiquel, de Baden et du golfe du Morbihan).

and the municipalities concerned. In this zone, the construction of establishments for residential use is prohibited. It should be noted that the application of this law was left in abeyance for a long time, leading the Spanish government to adopt in 2008 a strategy to recover land that has been illegally built upon in this zone.

Finally, in **Turkey**, Coastal Law 3621/3830 provides for a 100 metre "shoreline buffer zone" in which facilities aimed at the protection of the shoreline or the use of the coast for the public interest may be built if authorised by a land use planning permit. This category of buildings includes piers, ports, harbours, berthing structures, quays, breakwaters, bridges, seawalls, lighthouses, boat lifts, dry berths and storage facilities, salt production plants, fishery installations, treatment plants and pumping stations.

Thus, the establishment of coastal setback zones is a measure that is increasingly being adopted in the Mediterranean. In this respect, **national legislations share three major elements**: (i) the institution of the general principle of a ban on building in a coastal strip that varies in width from country to country, (ii) the use of geographical considerations to justify the extension of this zone, and (iii) the definition of exceptions (or dispensations, etc.) that vary in scope and may or may not be well-defined.

Last, in those Mediterranean States that have not established coastal setback zones *stricto sensu*, it should be pointed out that special attention is nevertheless often given to the areas closest to coastlines through consolidated legal protection. In **Egypt** for example, the 1994 Environment Law submits the construction of any establishment within 200 metres of the coastlines to the permission of the competent administrative authority, in coordination with the Environmental Affairs Agency[6]. In **Italy**, the Law on landscapes also calls for special attention to be given to the 300 metre strip by prohibiting, if need be, any new building[7].

6. Article 73.

7. Legge 8 agosto 1985, No 431, Conversione in legge con modificazioni del decreto legge 27 giugno 1985, No 312 concernente disposizioni urgenti per la tutela delle zone di particolare interesse ambientale, Gazzetta Ufficiale della Repubblica Italiana No 197 del 22 agosto 1985 (Legge Galasso).

1.4 Structure of the report

The report first examines the principle of the setback zone as provided for by the Protocol (section 2), discussing the details of Article 8-2-a and debating its legal nature and normative strength. This section also analyses specific implications for European Union (EU) Member States. Section 3 then briefly elaborates on Article 4 concerning the "preservation of rights" and its implications for Article 8-2. Section 4 is dedicated to Article 8-2-b; it analyses the conditions and actual meaning of the key word "adaptation", before looking into the notions of "public interest" and "geographical or local constraints", in light of existing experiences.

2. The principle of a 100 metre setback zone

2.1. The content of the principle

2.1.1. The objectives attached to the establishment of a setback zone

It is first important to put Article 8-2 back into the broader context of the Protocol and to determine the exact objectives attached to the establishment of a setback zone.

Regional planning is traditionally a sovereign competence a State asserts over its territory. The ICZM Protocol nevertheless marks a shift away from this original approach and considerably disrupts the traditional field of inter-State cooperation, filtering into disciplines that were hitherto governed by domestic law alone: this is particularly true for regional planning and urban planning law, areas that are governed by some of the provisions of the Protocol. The text thus aims to establish a "common framework for the integrated management of coastal zones[8]", in other words to define common rules for coastal management. In this case, although some Mediterranean States have already included the establishment of setback zones in their legal system, the main objective of Article 8-2 is in fact **to set minimum requirements and common criteria** for the establishment of such zones.

Article 4-3-e of the Barcelona Convention requires States to "promote the integrated management of the coastal zones, taking into

8. Article 1.

account the protection of areas of ecological and landscape interest and the rational use of natural resources". Echoing this provision of the framework convention, the ICZM Protocol recognises Mediterranean coastal zones as "common natural heritage (...) that must be preserved" and urges States to guarantee the protection of natural and landscape heritage[9]. Article 8-1 itself – which introduces the principle of the setback zone – concerns the preservation of "coastal natural habitats, landscapes, natural resources and ecosystems". We can therefore conclude that the establishment of a setback zone as provided for by the Protocol is part of the broader objective of **protecting natural heritage** in Mediterranean coastal zones.

Finally, for those who drafted the Protocol, the relevance of the principle of a setback zone "lies not only in the concern to protect an area of ecological and landscape interest which is very fragile due to the land-sea interface, but also the necessity to prevent natural risks resulting from the rise in sea levels related to climate change[10]". This acknowledgement of natural risks is in fact set out in Article 8-2-a itself, which states that the coastal zone includes "areas directly and negatively affected by climate change and natural risks". Consequently, the establishment of a setback zone is also part of the broader goal of **preventing natural risks and adapting to climate change**, and is a major tool for achieving this goal.

2.1.2. The establishment of a setback zone as a tool for applying international treaties

We can consider that the three objectives attached to the establishment of a setback zone – setting common rules and criteria, protecting natural and cultural heritage, and preventing risks and adapting to climate change – echo certain international instruments laying down similar obligations.

First, the approximation of domestic laws by means of setting common rules is a direct consequence of regional cooperation on coastal issues - cooperation which is largely encouraged by international instruments. **Agenda 21**, resulting from the Rio Conference (1992), thus calls for cooperation on integrated coastal zone management, especially within a regional framework[11]. In the same way, the **Programme of Action adopted during the Johannesburg Summit** (2002) advocates the application of an integrated management of the oceans and coasts, suggesting the development of "regional programmes of action[12]" to achieve this.

The protection of natural and landscape heritage is also an obligation set out in numerous international treaties. The **United Nations Convention on the Law of the Sea** (UNCLOS), for example, establishes the obligation to protect the marine environment[13] and encourages regional cooperation to this end[14], especially in the case of enclosed or semi-enclosed seas[15]. The obligation to sustainably manage coastal zones and, more specifically, the establishment of coastal setback zones by States therefore clearly correspond to the objectives set out in UNCLOS. Since it concerns the protection of ecosystems, habitats and, more broadly speaking, biodiversity, it is also a tool for applying the **Ramsar Convention on Wetlands of International Importance** or the **Convention on Biological Diversity** and the Jakarta Mandate[16]. By including a section on landscapes, the ICZM Protocol and Article 8-2 also tie in with the objectives set by the **European Landscape Convention**, signed in Florence on 20 October 2000.

Finally, underlining in its preamble that States with low-lying coastal areas are particularly vulnerable to the adverse effects of climate change, the **United Nations Framework Convention on Climate Change** invites States to "cooperate in preparing (...) appropriate and integrated plans for coastal zone management[17]". The development of ICZM initiatives at the

9. Articles 5(b) and 5(d), for example.

10. UNEP/MAP, Draft Protocol on the integrated management of Mediterranean coastal zones, Meeting of MAP Focal Points, Athens (Greece), 21-24 September 2005, UNEP(DEC)/MED WG.270/5.

11. Chapter 17: Protection of the Oceans, all Kinds of Seas, Including Enclosed and Semi-enclosed Seas, and Coastal Areas and the Protection, Rational Use and Development of their Living Resources, 17.10.

12. Plan of Implementation of the World Summit on Sustainable Development, 33-c.

13. UNCLOS, Article 192.

14. UNCLOS, Article 197.

15. UNCLOS, Article 123.

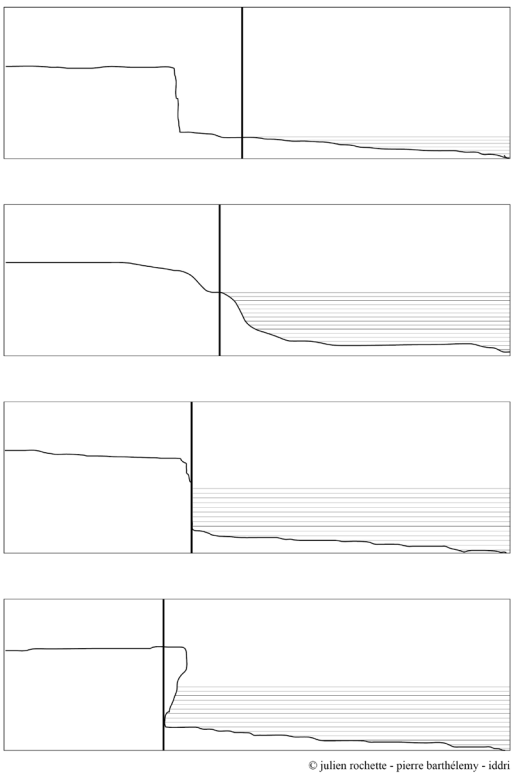
16. CBD COP II, Decision II/10, Conservation and sustainable use of marine and coastal biological diversity, Jakarta, Indonesia, 6-17 November 1995, UNEP/CBD/COP/2/19.

17. Article 4(e).

regional level, in particular through the establishment of setback zones, thus falls within the legal framework of the Convention[18].
The ICZM Protocol and especially article 8-2 therefore respond for the Mediterranean region to several international treaties and political commitments. Consequently, it is important to draw States' attention to the fact that the establishment of a coastal setback zone, as provided for by the text, could be the subject of specific developments in the national reports required by certain conventions. This invites States to maximise the synergies between the different treaties to which they are party.

2.1.3. Calculating the setback zone

Article 8-2-a specifies the method for calculating the 100 metre strip, which must be established "as from the highest winter waterline". The "highest winter waterline" is a reference to a standard of Roman origin codified in the Institutes of Justinian of 533, whose Book II title I defines the shoreline: "*est autem litus maris quatenus hibernus fluctus maximum excurrit*", or the shore of the sea extends to the point attained by the highest tide in winter.
The application of this provision will first require the national authorities to accurately determine, according to the configuration of the area, the **precise point** reached by the highest winter tides. The plan of the setback zone must then be recorded and mapped in the **relevant planning documents**, especially those used as the basis for land use permits (especially building permits). Finally, the plan of the setback zone must be **regularly updated** according to changes in the coastline, whether due to erosion, progradation or sea level rise caused by climate change.
The delimitation of the highest winter waterline could be more complex in case of steep or cliff coastlines, where the waves directly hit the coastal mountains or cliffs. In France, courts consider that the starting point of the 100 metre setback zone is the vertical elevation of the point until which the highest waterline can stretch, without exceptional meteorological conditions (see figures below).



2.1.4.Setback zone and existing urbanisation

Obviously, the principle provided by Article 8-2a does not affect the existing properties located within the 100 metre area: therefore, the implementation of this provision does not require the systematic demolition of the existing buildings.
Nevertheless, regarding the exposure of a coastal fringe to natural risks and taking into account the need for adaptation to climate change – all challenges mentioned in the ICZM Protocol – it could be necessary for States, in precise circumstances, to organise strategic retreat, i.e. move coastal installations further inland. Of course, it may be difficult to get the different players involved to accept this measure but there is mounting experience to show that the process can be understood. Similar strategies could also be developed to ensure the preservation of natural heritage or the public access along the shore.

2.2. The legal scope of the principle

2.2.1. An obligation to produce results

The legal scope of a provision is traditionally determined by making a distinction between

18. For a more in-depth analysis of the links between ICZM and adaptation to climate change, see e.g. Rochette, Magnan and Billé, 2010.

an obligation to use best efforts and an obligation to produce results. The former is usually understood as an obligation under which the debtor – the State in international law – must employ its best efforts to achieve a specific goal; it therefore differs from the latter, under which the debtor may accept liability for achieving a specific goal.

Paragraph 2 of Article 8 provides that the Parties "shall establish in coastal zones (...) a zone where construction is not allowed". The use of the verb "establish", an action verb used in the present tense, reveals beyond dispute the desire of those responsible for drafting the Protocol to subject States to an **obligation to produce results**. According to the principle of *Pacta sunt servanda*, codified in Article 26 of the Vienna Convention on the Law of Treaties, the Parties to the Protocol must therefore apply this provision "**in good faith**" and refrain from taking measures that would reduce its scope and prevent the establishment of a 100 metre setback zone, subject to the provisions of Article 8-2-b.

Stricter national measures determining the width of the setback zone "shall continue to apply". This means that the Protocol endeavours to set minimum rules for protection, but that States reserve the right to establish stricter rules.

2.2.2. Specific consequences for the Mediterranean EU Member States

From the viewpoint of the EU system, the ICZM Protocol is a mixed agreement: the Member States and the EU thus have shared competence for its implementation. In accordance with Article 216 of the Treaty on the Functioning of the European Union (TFEU), international agreements "concluded by the Union are binding upon the institutions of the Union and on its Member States". EU approval of the Protocol and its future entry into force will therefore have important consequences for the Mediterranean EU Member States.

The provisions of an international agreement form an integral part of the Community legal order as soon as the agreement enters into force[19]. This principle extends to the mixed agreements concluded by the EU and its Member States with non-member countries. Under Court of Justice of the European Communities (CJEC) case law, these agreements "have the same status in the Community legal order as purely Community agreements[20]". In the hierarchy of EU standards, an international treaty takes precedence over secondary Community law (regulations, directives and decisions). Finally, as EU law originates in a monistic approach, the EU does not necessarily need to adopt an instrument to transpose international agreements into Community law, at least where EU competence is concerned.

These effects of an international agreement that is duly approved by the EU and its Member States have several consequences, which have been confirmed by the CJEC since its **case law in the Etang de Berre case** on the applicability of the Athens Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources to the Barcelona Convention[21].

First, the Court considers that "in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement". It therefore concludes that "there is a Community interest in compliance by both the Community and its Member States with the commitments entered into under those instruments". Consequently, if a Mediterranean EU Member State that is party to the Protocol fails to respect the provisions of the Protocol, the Commission may, on its own initiative or by declaring admissible a complaint brought by an individual, initiate proceedings for failure to fulfil an obligation against the State in question[22] or even for non-implementation of judgments for failure to fulfil obligations, and may then impose penalty payments[23].

Second, because the provisions of duly concluded international agreements are an integral part of Community law, the Court finds itself competent to rule on the proper

19. CJEC, 30 April 1974, R. & V. Haegeman v Belgian State, Case 181/73; CJEC, 30 September 1987, Demirel, Case 12/86.

20. CJEC, 19 March 2002, Commission v Ireland, Case C-13/00.

21. CJEC, 15 July 2004, Syndicat professionnel coordination des pêcheurs de l'étang de Berre et de la region v Électricité de France (EDF), Case C-213/03.

22. Article 256, TFEU.

23. Article 260, TFEU.

application of an international agreement, whether mixed[24] or otherwise[25], by the EU Member States. It may therefore allow an action for failure to fulfil an obligation brought by the European Commission on the basis of Article 256 of the TFEU, as previously mentioned.

Third, the Court rules that "a provision of an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure". In the Etang de Berre case, the Court thus used case law established since the aforementioned Demirel case of 1987, considering that Article 6-3 of the Athens Protocol on Pollution from Land-Based Sources "clearly, precisely and unconditionally lays down the obligation for Member States to subject discharges of substances listed in Annex II to the Protocol to the issue by the competent national authorities of an authorisation taking due account of the provisions of Annex III to the Protocol".

In this case, **it is important to ask whether the provisions of Article 8-2 of the ICZM Protocol may be regarded as being directly applicable**. Article 8-2-a subjects the Contracting States Parties to the Protocol to a "clear and precise obligation" to establish a setback zone from a fixed point – the highest winter waterline –, notwithstanding the fact that States may adapt the width of this zone for projects of public interest and in areas having particular constraints. Indeed, the obligation applies to the establishment of the zone. The fact that adaptations may be made to this zone does not call into question the principle of the establishment of the zone in the national law of the Contracting Parties.

A more complex issue is whether this clear and precise obligation is subject, in its implementation or effects, to the adoption of any subsequent measure, to use the Court's own terms. In the Etang de Berre case, the Court considered that the fact that the national authorities had room for interpretation (in the issue of authorisations taking due account of the provisions of Annex III to the Athens Protocol) in no way diminished the clarity, precision or unconditional nature of the prohibition laid down in Article 6-3 of the Athens Protocol.

In this case, the fact of being able to make adaptations in accordance with Article 8-2-b does not call into question the unconditional nature of the obligation to establish a setback zone. Although the criteria for using coastal zones that must be included in national legal instruments pursuant to Article 8-3 to implement Article 8-2 leave States with room for interpretation, especially to take into account specific local conditions, this in no way diminishes the unconditional nature of the obligation to establish a setback zone. Finally, the obligation to notify the national instruments providing for the aforementioned adaptations pursuant to Article 8-2-c does not subordinate the obligation to establish a setback zone. This is corroborated by both the purpose and nature of the ICZM Protocol – as they may be interpreted in light of Articles 5 and 6 – in other words to guarantee sustainable coastal planning, especially from the viewpoint of environmental protection. Moreover, for those States that have already established setback zones, the Protocol provides that stricter measures shall still apply.

If the need arises, it will fall to the national courts and, for EU Member States, to the CJEC, to acknowledge the **direct applicability of Article 8-2-a**, if this matter is referred to them. This could well be the case, at least for the EU Member States, given the CJEC Etang de Berre case law.

The scope of the direct applicability is not without consequences for the due implementation of the ICZM Protocol and its monitoring. It lays down the recognition of an obligation to produce results for States and, in accordance with the established case law of the Court[26], direct effect confers rights and obligations on individuals that the national and EU courts must enforce: this gives all concerned persons the possibility to rely on it before the national courts or within the framework of a complaint submitted to the Commission for non-compliance with Community law.

For the European member States that ratify the

24. CJEC, 30 September 1987, Demirel, Case 12/86.

25. CJEC, 30 April 1974, R. & V. Haegeman v Belgian State, Case 181/73.

26. CJEC, 5 February 1962, Van Gend & Loos, Case 26/62.

Protocol, this means that failure to establish a setback zone within a reasonable time from the Protocol's entry into force may result in the European Commission launching proceedings for non-compliance with Community law, even in the absence of EU measures to transpose the provisions of the Protocol. Moreover, beyond the measures provided for by the Protocol itself or by the Barcelona Convention concerning non-compliance with their provisions, a Member State may bring before the Commission an action for failure to comply against another Member State on the basis of Article 257 of the TFEU, for example in the case of non-compliance with the obligation to establish a setback zone at the meeting point of their respective borders.

3. Activities excluded from the field of application of the principle

3.1. An exemption concerning national security and defence activities and/or facilities

The "preservation of rights" provisions (Article 4) directly concerns the implementation of Article 8-2 since its fourth point stipulates that "nothing in this Protocol shall prejudice national security and defence activities and facilities". Those activities and facilities can therefore be established and operated within the 100 metre strip and do not fall under the scope of Article 8-2.

3.2. A need for conciliation with the objectives of the Protocol

Nevertheless, according to Article 4-4, even those activities and facilities "should be operated or established as far as is reasonable and practicable, **in a manner consistent with this protocol**". The parties do not have to enact specific national legal instruments organising the establishment of such facilities and activities to be in compliance with the Protocol. However, numerous Mediterranean legislations already take into account the specificities of national defence and security facilities and activities along the seashore and grant them an exemption[27]. In France for example, this exemption is subject to "imperative technical necessities".

27. See for example Article L 146-6 of the French Urban Planning Code or Article 25(ter) paragraph 2 of the Tunisian Urban Planning Code.

4. Adaptations to the principle

Aiming at integrated coastal zone management, the Protocol agrees with the idea that a complete building ban within the 100 metre strip from the highest winter waterline is unrealistic: constructions already exist and the Protocol does not require any systematic expropriation. However, contrary to some national legislations such as the French Loi Littoral, the Protocol does not specifically mention the non-application of the coastal setback zone in areas that are already built up. Therefore, the implementation of Article 8-2 requires a high level of flexibility. In the Mediterranean, many urbanised areas are indeed located along the coast and within the setback zones and future projects of considerable importance for the development of Mediterranean countries may require immediate proximity to the sea. The Protocol deals with this fact by adding an "adaptation clause" to Article 8-2a in Article 8-2-b. Thus, the Parties "*may adapt [the implementation of the setback zone provision], in a manner consistent with the objectives and principles of the Protocol (...): 1) for projects of public interest, 2) in areas having particular geographical or other local constraints, especially related to population density or social needs, where individual housing, urbanisation or development are provided for by national legal instruments*". These two adaptation hypotheses will be studied in the following pages, but first an analysis of their common framework is needed.

4.1. A common framework for adaptation conditions

4.1.1. Formal condition: A State-level text

Article 8-2-c clearly stipulates that adaptation of the setback zone must be ruled by "national legal instruments". Adapting the width of the setback zone is, in others terms, **a State matter** that shall not be delegated to inferior levels of administration such as regions or municipalities. An adaptation cannot therefore be directly made by a sub-State authority.

This stipulation does not prejudice the type of national legal instruments, since the expression "legal instruments" cannot be interpreted as "legislative instruments". The notion of national legal instruments must be understood as an **act, at national level, by the legislative**

or regulatory power, which is binding and enforceable against administrations, local authorities and citizens.

4.1.2. Substantial condition: Adapting the width "in a manner consistent with the objectives and principles" of the Protocol

The whole of Article 8 is ruled by the **objectives and principles set out in Articles 5 and 6 of the Protocol**. The establishment of a 100 metre setback zone from the highest winter waterline is basically aimed at these principles and objectives. The same principles and objectives must be taken into account while adapting the width of the setback zone. This means, for example, that the **general objective of protecting coastal ecosystems and landscapes** must be respected when adapting the principle of Article 8-2-a. ICZM is therefore a complex but homogenous policy and it can be considered that every objective and principle stated in Articles 5 and 6 of the Protocol must be globally taken into account when adapting the width of the setback zone. The challenge at hand is to follow these objectives and principles in a pertinent way during the process leading to the enacting of the national legal instrument providing for the adaptation of the setback zone.

4.1.3. Meaning of "adaptation"

Some authors have already noted that the use of the term "adaptation" is unusual within the framework of international law. T. Scovazzi (2010) thus asks: "**What is an "adaptation" to a treaty provision?** The answer is not clear".

Fundamentally, there is no doubt that the "adaptations" provided for in Article 8-2-b indeed make it possible to **reduce the width of the setback zone** provided for in Article 8-2-a.

Despite this possibility given to States, the Parties have nevertheless established the 100 metre zone as a specific area in which planning precautions must be guaranteed, pursuant to Articles 5 and 6 of the Protocol. This means, for example, that adaptations to the principle of the setback zone must be implemented in a moderate way, respecting the particular sensitivity of the area. In France, for instance, the non-application of the principle in areas that are already urbanised within the 100 metre strip does not authorise vast property developments: in fact, the principle of the "limited extension of urbanisation[28]" applies, a concept that is evaluated according to the location of the planned urbanisation, the density of existing construction, and the specific configuration of the site, etc. The use of such precautions makes it possible to guarantee **special protection for the 100 metre strip**, over and above the potential applicability of the principle of the setback zone alone.

Furthermore, the notion of adaptation refers to the fact that although the setback zone may be reduced below 100 metres, it can also be extended beyond this width. While certain sites, such as small islands, may indeed necessitate a reduction of the setback zone, other geographical configurations, on the other hand, require its extension (coastal plains that are subject to considerable natural risks, for example).

4.2. Adaptations for "projects of public interest"

4.2.1. Common features of the notion of "public interest"

It is widely admitted that the notion of public interest, which is often connected with that of general interest, excludes any kind of action conducted in the sole interest of an individual or a group of individuals[29]. There is also no doubt that projects of public interest are projects aimed at ensuring **social and/or economic benefits for the community**. The notions of public interest and economic or social interest are not mutually exclusive. The economic or social nature of the public interest is in fact the core of the idea of adaptation for "projects of public interest" according to the Protocol, since Article 4-4 reserves the right of the Parties to establish or operate national defence and security facilities and activities.

The idea of public interest is often associated with that of national interest. From this perspective, adaptation under Article 8-2-b should be opened strictly to State-operated projects (Sano, Marchand and Medina, 2010). The Protocol does not follow such a conception. Article 8

28. Conseil d'État, 2 March 1998, Commune de Saint-Quay-Portrieux; Conseil d'État, 10 May 1996, Société du port de Toga SA and others; Conseil d'État, 14 January 1994, Commune du Rayol-Canadel; Administrative Court of Pau, 22 October 1991, Association Sauve plage Hossegor.

29. Conseil d'État, 1999, *L'intérêt général*, Paris, La documentation française. On the notion of public utility: Conseil d'État, 2002, *L'utilité publique aujourd'hui*, Paris, La documentation française.

does not prejudice the **national or local nature of the public interest projects** to be conducted within the setback zone. It only requires that the adaptations be enacted in "national legal instruments". A local level-operated project of public interest seems to be compliant with the Protocol, which only requires that such a project be regulated at State level.

The notion of a "project of public interest" should not be confused with that of "**public services requiring, in terms of use and location, the immediate proximity of the sea**", which also exists in the Protocol. The second notion is more specific and narrower than the first one. The problem of the location of such "public services" must be disconnected from the "adaptation for projects of public interest". These services will be granted an ordinary dispensatory regime allowing them to settle along the seashore, whatever the local width of the setback zone. This dispensatory regime must respect the objectives and principles of the Protocol, which means at least that the location of public service activities and facilities must be: (i) motivated by an essential need to be near the seashore, and (ii) assessed beforehand in terms of its effect on the coastal environment. In the majority of European countries, public services generally benefit from exemptions from the special provisions for the coastal strip. After being authorised by the competent administration, they can settle within the established coastal setback. This is why "projects of public interest" are usually ruled by specific provisions, which must not be confused with those dedicated to public service activities and facilities. The French coastal law provides a good example of how a national legal instrument could handle the settlement of public services within the setback zone. Article L 146-4-III para. 2 provides that the building ban in the coastal setback "does not apply to buildings or facilities necessary to public services or to economic activities requiring immediate proximity to the sea. Their construction is, however, submitted to a public inquiry following the modalities of law N°83-630 of 12 July 1983 on the democratisation of public inquiries and environmental protection". Projects of public interest therefore follow a different regime regarding their exceptional characteristics.

4.2.2. Examples of national legislations relating to projects of public interest

National legislations providing for a setback zone along the seashore do not always distinguish between the needs of economic activities and public services and the development of a project of public interest. Spain and France do make this distinction[30]. They provide an interesting illustration of the originality of an adaptation for a project of public interest.

In **Spain**, where public services and activities that require immediate proximity to the sea are usually permitted within the 100 metre coastal setback zone[31], exceptional dispensations for other kinds of activities or facilities may be granted by the government (*Consejo de Ministros*) for specific public use reasons (*razones de utilidad pública debidamente acreditadas*). In such cases, the construction or modification of high-traffic roads and the deployment of high-voltage electricity networks are possible within the setback zone[32]. Moreover, in some parts of the setback zone – with the exception of coastal wetlands and specially protected areas – housing projects and industrial facilities that do not require immediate proximity to the sea may be established if they are of "exceptional importance" and if, for "specific

30. The Turkish legislation (Coastal Law 3621/3830 from 1990 and 1992) provides for a 100 metre "shoreline buffer zone" in which facilities aimed at the protection of the shoreline or the use of the coast for the public interest may be built if authorised by a land use planning permit. This category of buildings includes piers, ports, harbours, berthing structures, quays, breakwaters, bridges, seawalls, lighthouses, boat lifts, dry berths and storage facilities, salt production plants, fishery installations, treatment plants and pumping stations. See Ahmet Sesli F. et al., 2009, Coastal legislation and administrative structures in Turkey, Scientific Research and Essay, Vol. 4. Algeria's coastal law provides for an adaptation of the min. 100 / max. 300 metre coastal setback in the interest of activities requiring immediate proximity to the sea, and does not distinguish between activities clothed or not with a public interest. Indeed, it seems that the interest of activities requiring immediate proximity to the sea is considered as a relevant public interest. Taking into account the needs of those activities, it is possible to create roads in the coastal zone where they are normally prohibited (within a 800 metre strip from the seashore, see Law 2002-02 of 5 February 2002 on the protection and development of the coast, Article 16). The Moroccan Draft Law on coastal protection and management provides for an exemption to the 100 metre coastal strip for "building projects of guaranteed economic interest". The Greek Land Planning Act n°2971/2001, which only provides for a 15 to 50 metre setback zone, authorises constructions for environmental and cultural reasons of public interest.

31. Law 22/1988, Article 25(2).

32. Article 25(3).

economic reasons", it is more convenient to settle them along the coast.

The **French legislation** also grants a general exemption from the building ban within the 100 metre coastal strip for public services and activities that require immediate proximity to the sea. Their settlement must be preceded by a public inquiry[33]. Roads may also be built in such interest. Beyond the domestic and essential needs of those public services, the Code also provides that "facilities, buildings, the establishment of new roads and works necessary to maritime and air safety, national defence, civil security, and those necessary to the functioning of airports and public ports, with the exception of marinas, are not subject to the present section [which in particular provides for the 100 metre coastal strip and the public inquiry prior to the exemption] when their localisation is an imperative technical necessity[34]". This provision shall not be considered equivalent to the stipulation of the fourth point of the clause on the preservation of rights; its scope is indeed wider. This text actually governs some of the most typical coastal "projects of public interest" that could, in a manner consistent with the objective of the Protocol, justify an adaptation of the width of the 100 metre setback zone, such as public ports (with the exceptions of marinas)[35]. The imperative technical necessity to which this text refers can be qualified taking urbanisation constraints into account[36].

4.2.3. The development of projects of public interest: Experiences from EU environmental law

Beyond the ICZM Protocol, which could become part of Community law, EU law does not include any other setback provisions. It has, however, produced a number of sectoral instruments for environmental protection and is developing expertise in the practice of adapting legal texts for public interest reasons.

In this context, the **Habitats Directive**, which aims to preserve natural habitats in the Union and to create the Natura 2000 network, may be considered as one of the most emblematic texts, setting out strong, efficient and preventive means of protection. In order to depart from these rules of protection, its Article 6-4 provides that: "if, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest." The rationale of this provision is largely comparable to the one behind the ICZM adaptation clause for projects of public interest. This is why it may be useful to analyse the way European authorities use it.

In general, the case law of the Court of Justice of the European Communities identifies the public interest of a project particularly from the viewpoint of criteria concerning general interest, human health, public security and environmental protection[37]. In the more specific field of the Habitats Directive, the Commission moreover provides interesting guidelines for assessing the legality of operations conducted in the areas protected by this text. In its "**Guidance document on Article 6-4**[38]", the European Commission states that "it is reasonable to consider that the "imperative reasons of overriding public interest, including those of social and economic nature" refer to situations where plans or projects envisaged prove to be indispensable:

33. Urban Planning Code, Article 146(4)(III) para. 2.

34. Article L.146(8) para. 1.

35. It was recently ruled that the construction of a public hospital within the 100 metre strip could not be considered as a facility necessary to civil security: Administrative Court of Appeal of Nantes, 23 June 2009, N°08NT01439.

36. See, for example, Conseil d'État, 29 December 1999, N°197720 (construction of a new road connecting a public port).

37. CJEC, 28 February 1991, Commission/Germany [Leybucht], Case C-57/89.

38. Guidance document on Article 6(4) of the "Habitats Directive" 92/43/EEC, January 2007, http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

- within the framework of actions or policies aiming to protect fundamental values for the citizens' life (health, safety, environment);
- within the framework of fundamental policies for the State and the Society;
- within the framework of carrying out activities of economic or social nature, fulfilling specific obligations of public service".

The principles highlighted here by the Commission provide potential guidelines for designing projects that could correspond to the idea of the "projects of public interest" provided for by the Protocol.

4.2.4. The notion of public interest in light of the Protocol's provisions

From its conception to its implementation, the adaptation of the width of the setback zone for a project of public interest must be **guided by the objectives and principles of the Protocol**. First of all, the project of public interest must be relevant regarding the "rational planning of activities[39]" and the "ecosystem approach to coastal planning[40]", and should basically result from the formulation of land use strategies, plans and programmes covering urban development and socio-economic activities as well as other relevant sectoral policies[41]. Fundamentally, such a project should concern facilities and activities requiring immediate proximity to the sea: port infrastructures and facilities essentially required for their normal functioning as well as coastal defence works could constitute obvious examples. But the list is open and could integrate facilities required by scientific research or by other coastal-related public interests (relevant activities are broadly listed in Article 9-2).

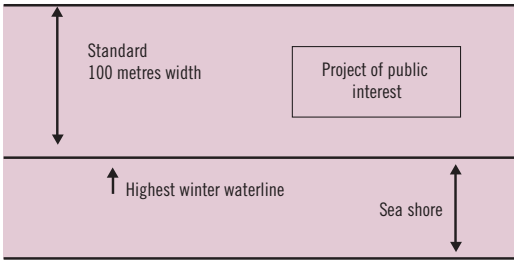
In any case, the decision must be made at the end of a specific "**assessment of the risks** associated with the various human activities and infrastructure so as to prevent their risk and reduce their negative impact on coastal zones[42]". This negative impact could consist in increasing coastal erosion[43] and overwhelming the carrying capacities of the affected coastal zone[44]. In this respect, Article 19 of the Protocol provides that "the Parties shall ensure that the process and related studies of **environmental impact assessment** for public and private projects likely to have significant environmental effects on the coastal zones, and in particular their ecosystems, take into consideration the specific sensitivity of the environment and the inter-relationships between the marine and terrestrial parts of the coastal zone". An adequate assessment method dedicated to the coastal zones is thus required at every level of the decision-making process. Indeed, assessment must be effective from the stage of coastal planning and programming to that of the specific conception of the project of public interest, as stated in Article 19-2: "in accordance with the same criteria, the Parties shall formulate, as appropriate, a strategic environmental assessment of plans and programmes affecting the coastal zones".

4.2.5. Consequences of the establishment of projects of public interest in the 100 metre coastal fringe

For projects of public interest, a crucial issue is to determine whether the "adaptation" possibilities provided by article 8-2b refer to the width of the non-building zone or to the non-building principle. An example suffices to explain the issue.

Let's imagine a project of public interest located in the 100 metre coastal fringe, as illustrated by Figure 1.

Figure 1

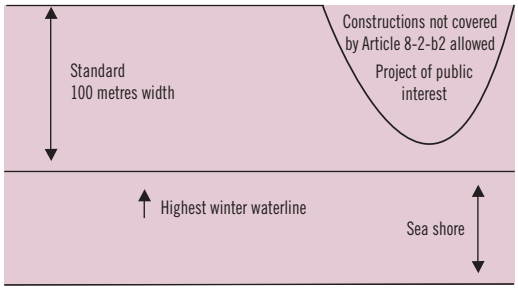


The question is whether constructions – individual houses for example – not covered by article 8-2-b2 can be allowed beyond the project of public interest zone but inside the 100 metres zone, or if the 100 metres non-building principal is still applicable.

39. Article 5(a).
40. Article 6(c).
41. Article 6(f).
42. Article 6(i).
43. Article 23(2).
44. Article 19(3) for example.

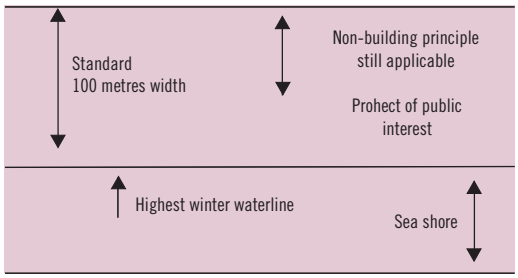
The first option, illustrated by Figure 2, would mean that **the width of the non-building zone is "adapted"**, which would let the possibility to build beyond the project of public interest zone, even if it is in the 100 metres zone.

Figure 2



The second option illustrated by Figure 3 would mean that **the non-building principle is specially adapted** for projects of public interest but that the general principal itself remains applicable. In this context, constructions not covered by Article 8-2-b-2 shall not be allowed.

Figure 3



Provisions of Article 8-2 are not clear enough to give a peremptory and definitive answer to this question.

4.3. Adaptations for geographical or local constraints

Article 8-2-b-2 provides for a second possibility for adapting the principle of the 100 metre setback zone "in areas having particular geographical or other local constraints, especially related to population density or social needs, where individual housing, urbanisation or development are provided for by national legal instruments". Detailed analysis of this provision makes it possible to distinguish one condition and two grounds for the implementation of this article.

4.3.1. Condition for the adaptation

Article 8-2-b-2 provides that the two criteria may permit an adaptation to the principle "where individual housing, urbanisation or development are **provided for by national legal instruments**". This means that, on the basis of the two aforementioned basis, States may adapt the principle of the setback zone and, consequently, urbanise areas within the 100 metre strip where a **national legal instrument** provides for this.

This is a considerable relaxing of the principle, especially given that the two grounds for adaptation are themselves rather broad, vague and non-restrictive – cf. the use of the term "especially". The "good faith" application of Article 8-2 will nevertheless require States to scrupulously comply with the grounds for adaptation provided for by the text and to take into account the general objectives of the Protocol.

4.3.2. Grounds for the adaptation

Adaptation to the principle of the setback zone is authorised in "**areas having particular geographical constraints**" or "**other local constraints**".

4.3.2.1. Adaptation in areas having particular geographical constraints

46,000 km long, the Mediterranean coastline is divided between rocky (55%) and sedimentary coasts (45%) and includes various types of landscapes. Therefore, the 100 metre setback zone principle cannot be implemented in the same manner along all the Mediterranean coasts. That is why the ICZM Protocol provides some possible adaptation for "particular geographical constraints". We will give here a few examples of geographical particularities which may influence the way of implementing the 100 metre setback zone.

First, it is important to remind that there are 162 **islands** of over 10 km² and 4 000 **islets** of less than 10 km² in the Mediterranean, which have their own specificities and constraints from a geographical, environmental, social and economic point of view (Benoit and Comeau, 2005). Even if each case remains specific, it should be stressed that the "geographical constraints" related to insularity can justify an adaptation of the 100 metre setback zones in two ways. First, it can justify narrowing the non-building area, especially when the

geographical constraints are such that they make impossible the necessary development of urbanisation beyond the sole coastline. That is the case, for instance, in Greek Islands or in some Italy's Aeolian Islands where the urbanisation can only be developed next to the shore because of volcanoes (Figure 1). However, the insularity can also justify the extension of the coastal setback zone when vulnerable ecosystems are located beyond the 100 metre strip. Indeed, islands often provide habitats for endemic species: therefore, the application of the non-building principle until 100 metre does not justify a destruction of vulnerable ecosystems and can conversely invite States to widen this zone.

Made of beaches and dunes, **sandy coastlines** are "the most sensitive environment to coastal changes" (Sano et al, 2010), which invites to implement a setback zone carefully. In particular, the width of the ideal setback zone should be determined taking into account the current (biodiversity loss, coastal erosion...) and future (climate change impacts) threats weighting on these vulnerable ecosystems (Nicholls and Hoozemans, 1996; Magnan, 2009; Magnan et al., 2009) (Figure 2). Besides, the unity of the sandy dunes should be taken into account in delimitating the non-building area: ecological (Paskoff, 1985) but also legal (article 10-4 of the ICZM Protocol) basis justify the protection of the whole dune beds and not only the part located within the 100 metre zone (Figure 2). Dunes are important ecosystems, not only from a biological point of view but also in terms of protection from the sea (buffer zones), which should be preserved beyond the sole 100 metre zone (Figure 3).

Principally made of cliffs or mountains, **rocky coastlines** could also be areas of high vulnerability to erosion and natural hazards. Therefore, attention should be paid to the delimitation of the non-building zone which should be extended beyond 100 metre when the vulnerability of the area so requires. In particular, special studies should be conducted in order to determine precisely the rate of detachment of the cliff (Figure 4) and the exposure to natural hazards, especially mudslides. The same caution should be taken in planning **coastal lagoons**, particularly exposed to natural disasters and climate change impacts (Figure 6).

Geographical considerations can therefore justify adaptation to the 100 metre setback zone principle. Obviously, as the Mediterranean coasts are characterised by a high level of diversity, attention should be given to specific coastal fringes that could require narrowing or widening the non-building areas. Ideally, specific studies should be conducted in order to determine the most relevant setback zone width, taking specifically into account biodiversity protection, landscape preservation, natural hazards – all challenges mentioned in the ICZM Protocol. Adaptation to climate change, moreover, invites to plan coastal urbanisation with a long-term perspective: to this end, the utilisation of the "100 year setback zone" concept could be relevant, commanding strategic studies on sea level rise, coastal erosion, exposure to natural hazards and taking into account the geographical specificity of coastal fringes. Nevertheless, without relevant studies and data, it could be hazardous to use the adaptation possibilities provided by the Protocol to narrow the 100 metre width. Indeed, if this width is obviously arbitrary and not implementable uniformly along all the Mediterranean coasts, it is limited enough to allow agreement by most Mediterranean States, and significant enough to produce considerable effects in terms of biodiversity conservation, risk prevention and adaptation to climate change. Therefore, the precautionary principle invites not to decrease this width without conducting specific studies.

4.3.2.2 Adaptation in areas having "other local constraints"

Adaptations are also possible in areas having "other local constraints especially related to population density or social needs". This provision needs some clarifications in order to draw the frontiers of this particularly broad criterion which may justify the adaptation of the 100 metre setback zone principle.

In the Mediterranean, there is a particularly strong and increasing occupancy of the coastlines. The number of coastal cities of at least 10,000 inhabitants has almost doubled during the second half of the twentieth century. Thus, 30 % of people in bordering countries live on the coast, which represents slightly more than 140 million people. In negotiating Article 8-2, it seems clear that States added the adaptation possibility for constraints related to population

Figure 4. Stromboli Island, Italy, where the development of urbanisation is "constrained" by the specific geography of the area.
Source : http://www.dinosoria.com/climatique/stromboli_05.jpg

Figure 5. In Thau (France), coastal erosion affecting a road located too close to the shore. Source : http://www.thau-agglo.fr/IMG/pdf/Plaquette_Lido_De_grands_enjeux_un_grand_projet_1-2.pdf

density in order not to stop the **development of coastal cities that are already densely populated and urbanised**. It means, for example, that when a coastal city is already saturated and the development is impossible elsewhere, the provision of Article 8-2-b-2 could justify the reduction, or even the non-implementation, of the 100 metre setback zone. Nevertheless, this adaptation will have to be in accordance with the other provisions of the protocol, especially the ones dealing with the protection of natural heritage.

In addition to the domestic demographic pressure must be considered national and international tourists travelling within the Mediterranean basin - almost 218 and 145 million respectively. This increase of human pressure raises the issue of what is the most appropriate way to ensure the protection of coastal ecosystems. Indeed, in all Mediterranean countries, some places near the shore (beaches, cliffs with exceptional panorama, shoreline with cultural heritage...) are known to be "hot spots" of tourism and are very popular during holiday season. Urbanisation in a non-built area located in the 100 metre fringe could therefore be useful in order to **limit the impacts of the touristic pressure on coastal ecosystems**: building a car park in a highly frequented area can, for example, prevent cars from parking on coastal grass or dunes and therefore help to preserve theses ecosystems.

According to the Protocol, "social needs" could also justify the adaptation of the 100 metre setback zone and therefore enable States to build in this sensitive area. In this regard, examples of traditional coastal activities can be given. Indeed, aquaculture or agriculture farms are plenty all along the Mediterranean coastlines and sometimes located in the 100 metre fringe without any other building around. In these important economic sectors, national legislations quickly evolve and impose new constraints, notably in the environmental field (sanitation, pollution control, waste management...). In this context, the implementation of such legislations can require the extension of existing facilities or even the construction of new ones. Therefore, the provision of Article 8-2-b-2 referring to adaptation for "social needs" could be used to authorize, in the 100 metre zone, **the adaptation of coastal maritime activities to new environmental regulations**. For example, France adopted measures in that sense in 2004[45].

In conclusion, it is important to underline that this adaptation possibility related to "local constraints" should be interpreted with caution. Firstly, even if this provision is broad *de facto*, the implementation of Article 8-2 should not be diverted by a non-appropriate

45. Decree No 2004-310 adopted on March 29, 2004 modifying the Urbanism Code (Décret No 2004-310 du 29 mars 2004 relatif aux espaces remarquables du littoral et modifiant le code de l'urbanisme).

Figure 6. In the "dune di piscinas" in Sardinia (Italy), the dunes ecosystem is so important that the institution of the non-building zone in the sole 100 metre strip would not make any sense in terms of biodiversity protection: the zone where construction is not allowed could therefore be extended beyond 100 metres in order to respect the unity of the dunes ecosystem. Photo courtesy:of Julien Rochette.

Figure 7. In this coastal fringe (South East of Djerba, Tunisia) dunes have been taken in consideration in urban planning, pushing back the buildings far from the coastline. Photo courtesy:of Alexandre Magnan.

and systematic resort to the "local constraints". Secondly, the use of this adaptation possibility to limit the coastal setback zone must be done in accordance with other relevant provisions of the Protocol and, in particular, articles dealing with natural heritage protection, natural risks and environmental assessments.

5. Conclusion

5.1.The establishment of a 100 metre setback zone laid down as an obligation to produce results

Article 8-2-a undeniably constitutes a binding provision of the ICZM Protocol, laying down the establishment of a 100 metre setback zone as a veritable obligation to produce results. The terminology used in the text, along with the spirit in which the negotiation of this article was conducted, demonstrate this without a doubt.

5.2. Broad possibilities for adaptation

Despite the declaration of the principle of the setback zone, States have considerable room for manoeuvre in the implementation of the obligation provided for in Article 8-2-a. First, as the concept of "public interest" is not defined in the text, in practice its scope and content is only limited by any national provisions on the matter. While the spirit and the text of the Protocol, aiming at the establishment of a "common framework" for ICZM, theoretically invite States to define the concept in a relatively similar way, States nevertheless remain sovereign in the matter: consequently, the "public interest" may take different forms and be interpreted along different lines according to the national systems. In the same way, adaptations to the principle based on geographical criteria and local constraints leave States with considerable room for interpretation given the broad and non-restrictive terms used in the text in certain respects.

5.3. A 100 metre strip that is undeniably protected

However, despite the considerable possibilities for adaptation granted to States, the 100 metre strip remains well protected by the Protocol in general and by Article 8-2 in particular. Indeed, the "good faith" application of this article, as laid down in the Vienna Convention on the Law of Treaties, requires that States do not distort the content, scope or spirit of this provision. Moreover, beyond the principle of the setback zone, the negotiation meetings and the Protocol itself reveal the will to establish the 100 metre strip as a specially protected coastal area. This means that even in the case where adaptations to the principle are applicable, special attention must be given to this area. The general principles contained in Article 6 must be applied with care, especially the need to: (i) give priority "to public services and activities requiring, in terms of use and location, the immediate proximity of the sea", (ii) ensure the balanced allocation of activities

Figure 8. In Corfu (Greece), an example of urbanisation in a cliff exposed to erosion. Photo courtesy of Alexandre Magnan.

Figure 9. The geography of the Venice Lagoon exposes the city to a risk of submersion. Source : http://www.lapanse.com/venise/vues_du_ciel/satellite.html

and prevent "unnecessary concentration and urban sprawl", and (iii) make preliminary assessments "of the risks associated with the various human activities and infrastructure so as to prevent and reduce their negative impact on coastal zones".

5.4. The transposition of Article 8-2 into national law

Methods for the transposition of Article 8-2 depend above all on the national legal systems. Each State must therefore precisely study its positive law and determine whether or not legal adjustments are needed to comply with the provisions of the Protocol. The situation therefore depends on the case by case study of national legal systems. Nevertheless, at this stage it seems possible to assert that States will not be able to avoid making the establishment of a minimum 100 metre setback zone a general principle of coastal planning. The legal scope of Article 8-2-a is such that we believe it is impossible, for a "good faith" application, to settle for a reinterpretation of the principle in the sole light of the adaptations authorised by Article 8-2-b. The principle must take precedence over the adaptations that may nevertheless be made by the national systems, in accordance with the provisions of Article 8-2-b.

5.5. The role of the Secretariat and the PAP/RAC in the implementation of Article 8-2

States are asked to "notify to the Organization their national legal instruments providing for the adaptations" mentioned in Article 8-2-b-2. The Secretariat of the Barcelona Convention will therefore receive the national transpositions of adaptations to the principle of the setback zone. It will undoubtedly then be necessary to conduct an in-depth analysis of these national instruments in order to precisely determine the range of adaptations provided for in national laws. Should these national laws propose a highly varied interpretation of Article 8-2-b-2, it is possible that the Secretariat might then attempt to encourage a shared vision by organising workshops or even adopting guidelines specifically focusing on this subject.

Moreover, as a centre specialising in ICZM issues, the PAP/RAC certainly has a role to play in the implementation of Article 8-2. First, it is undoubtedly in a position to reiterate, explain and promote this major provision of the Protocol. Perhaps it could also contribute to its application. Through the scientific and technical assistance mechanisms provided for by the Protocol[46], the Centre could first support States in the legal transposition of Article 8-2. Furthermore, while the prevalence of the project-based approach in the application of ICZM has certain considerable limitations, which the Protocol itself is in fact attempting to overcome (Billé and Rochette, 2010), the use of CAMP-type projects could also provide a relevant framework for facilitating the application of the provisions of Article 8-2, especially regarding the extension of the setback zone. ■

46. Article 26.

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Coastal setback zones in the Mediterranean: A study on Article 8-2 of the Mediterranean ICZM Protocol

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FOUNDED IN PARIS IN 2001, the Institute for Sustainable Development and International Relations (IDDRI) is born from three assumptions: the global changes resulting from human activities are unsustainable over the long-term; a complete transformation of development models is needed; this is possible if coherent policies are soon implemented at the global level to bring about changes in lifestyles.

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