Chapter 14

Theorizing about Conventional Environmental Sea Regimes as International Trusts: The Case of the Barcelona Convention System

Evangelos Raftopoulos*

1 An Overview

The Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its seven performative Protocols, the so-called Barcelona Convention System (BCS), constitutes a conventional

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* LLB (Athens), LLM (Cantab.), PhD (Cantab.); Professor of International Law at the Panteion University of Athens; Founding Director of MEPIELAN Centre; Former UNEP/MAP Legal Advisor.

sea regime of international common interest (ICI) *in processu*. It governs the protection of the marine environment and the resources of the Mediterranean in a sustainable manner so that the needs of present and future generations will be met equitably. Such sustainability governance should be understood to operate from two interrelated pragmatic— but often neglected— perspectives: in conditions of uncertainty and in context, responding progressively, feasibly and effectively to the exigencies of an evolving conventional environmental regime (CER) perpetually serving ICI; purposively and as a special, undivided responsibility to the future, as a fiduciary concept, as an international trust relationship. Theorizing about the international trust nature of the BCS— and of any other conventional environmental regime in its context— is inherently dynamic, open-ended and operates on two interrelated levels.

First, it conceptualizes treaties as conventional regimes of international common interest *in processu*: they constitute relational regime patterns and process patterns of ICI in pairs, in a complementary relationship, *sufficiently contextualized*. Treaties punctuate regime relations between States and other international legal entities through conventional patterns of ICI which are produced, implemented and revised by constant and continuous reference to their external and internal context, and through a structured negotiating process of conferential governance.

Second, it conceptualizes the governance of a conventional environmental regime and its sustainability objective as a relationship of public trust, thus bringing out the overlooked fiduciary aspect of the relational base of a conventional environmental regime associated with the special position and role of its Parties. The employment of the paradigm of public trust may, thus, come to fill out the sustainability function of governance of such regimes.

II Some Theoretical and Philosophical Considerations

The international trust approach to the BCS basically defies the prevailing but misleading legal positivist view of constructing and objectifying fundamental legal concepts of international law on the basis of ‘Private Law Analogies’. It manifests the inadequacy of transposing into treaty relations the logic of two fundamental interweaving Private Law Analogies, the private law contract analogy for treaties and ownership for sovereignty, both of which crudely

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