









## **Introduction**

1. In conformity with the recommendation approved by the Contracting Parties at their 14<sup>th</sup> Meeting held in Portoroz, Slovenia, in November 2005, an open-ended working group of legal and technical experts has been set up to propose appropriate rules and procedures for the determination of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area, as provided for in Article 16 of the Barcelona Convention.

2. Pursuant to this recommendation, the first meeting of the open-ended Working Group of Legal and Technical Experts was held in the Club Hotel Loutraki, in Loutraki, Greece, on 7-8 March 2006.

## **Participants**

3. Experts from Albania, Algeria, the European Commission, Egypt, France, Greece, Israel, Italy, Lebanon, Malta, Morocco, Slovenia, Syria, Tunisia, and Turkey attended the meeting.

4. The Regional Marine Pollution Emergency Response Centre (REMPEC), as well as MAREVIVO, representing the NGOs, MAP partners, and MEDASSET, also attended the meeting.

5. A list of participants is attached as **Annex I** to this report.

## **Agenda item 1: Opening of the meeting**

6. The meeting was opened by Mr Paul Mifsud, MAP Coordinator, at 9.30 a.m. on 7 March 2006. Mr Mifsud welcomed the participants and stressed the importance of the decision of the Portoroz meeting in 2005. He pointed out that the sensitive and complex issue of liability and compensation had so far been under reflection for at least 10 years.

## **Agenda item 2: Election of Officers**

7. In accordance with Rule 20 of the "Rules of Procedures of the Barcelona Convention", the Meeting elected the following Officers:

Chairperson:	Mr Brahim Zyani (Morocco)
Vice-Chairpersons:	Mr Joseph Edouard Zaki (Egypt) Mr Didier Guiffault (France)
Rapporteur:	Ms Etleva Canaj (Albania)

## **Agenda item 3: Adoption of the Agenda and organization of work**

8. The meeting adopted the provisional agenda (UNEP(DEPI)/MED WG.285/1) and the timetable of work contained in document UNEP(DEPI)/MED WG.285/2. The Agenda of the Meeting is attached as **Annex II** to this Report.

**Agenda item 4: Presentation of the main findings of the “Feasibility study covering the legal, economic, financial and social aspects of a liability and compensation regime in the Mediterranean Sea and its coastal area”**

9. Mr Aref Fakhry, MAP Consultant, introducing the main findings of the Feasibility Study carried out during the previous biennium (document UNEP(DEC)/MED WG.270/Inf. 4), noted that there were two main parts to the study: (i) a review of the findings following consultations with the Contracting Parties, MAP Partners and other NGOs; and (ii) a review of other relevant global and regional regimes of liability and compensation. He said that the consultation with the Contracting Parties showed that most of those who had responded believed that it would be advisable to develop some type of liability and compensation regime for environmental damage in the Mediterranean. In addition, it was generally agreed that such a regime should, insofar as possible, avoid any overlapping or conflict with other relevant global or regional regimes which were in force or expected to enter into force. The need had also been emphasized to take fully into account Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (the Environmental Liability Directive). A number of the parties consulted had also insisted on the technical assistance, and particularly legal assistance, which would be required in developing countries for the implementation at the national level of any liability and compensation scheme that was adopted.

10. With regard to the form of a future liability and compensation regime, Mr Fakhry explained that most of the respondents favoured a very careful step-by-step approach, with a review being undertaken of the progress achieved at each stage, rather than the development in the near future of a new Protocol. However, the NGOs consulted preferred a hard law instrument. All of those consulted supported the need for Parliamentary approval of any regime that was developed. There was general support that the prospective regime should cover the whole area of application of the Barcelona Convention and that it should extend to the coastal area of the Mediterranean, although some Parties had indicated that the application of the regime to the coastal area would be a matter to be covered by the laws and regulations of the countries concerned.

11. In relation to the type of damage to be covered by the regime, there was general agreement among those consulted that it should extend beyond such traditional heads as damage to persons and property, to include economic loss, such as loss of business. There was also general support that it should cover pure environmental damage, although it had been pointed out that such damage was difficult to measure and that the definition of environmental damage would need to be harmonized with those contained in other relevant instruments. In principle, the respondents favoured the adoption of a list of the types of activities to be covered by the regime, which would include land-based activities of all types, aquaculture, offshore mineral activities, dumping at sea, leisure activities at sea and other activities, such as overfishing. The type of incident to be covered should include continuous phenomena of diffuse pollution, and not merely isolated sudden incidents.

12. On the subject of the identity of the liable party, a general preference had been shown for an operator-based single party system of liability. It was agreed that, in accordance with the “polluter pays” principle, private parties (operators) should be held responsible. However, there was no common position on whether there should in addition be some liability of the State. Other matters which remained to be discussed included the possibility of establishing an inter-State compensation fund

and whether liability should be limited or unlimited. Participants favoured strict, rather than fault-based liability. Governments, including national authorities at all levels, should have the right to sue the parties liable. While the NGOs supported the right of the public, or at least civil society organizations, to sue, Governments were more cautious on this issue. With regard to the question of insurance, most respondents cautioned that compulsory insurance would appear to be difficult, as the market was not yet ready. In particular, no insurance coverage was available for damage to biodiversity. The feasibility and affordability of the related insurance products would depend on the precise parameters of the scheme.

13. Mr Fakhry concluded that the value of the consultation process had been undermined by the fact that only six Contracting Parties and a small number of NGOs had replied to the questionnaire, which therefore raised the issue of the representative nature of the answers received.

14. He then highlighted the main findings of the Feasibility Study with regard to the relevant global and regional regimes of liability and compensation. He recalled that liability and compensation regimes, whether general or environmental, were based on the principles of delictual or tort law. In this respect, general non-sector specific liability was covered by general rules, such as national Civil Codes. With regard to general regional environmental liability, a number of international (IMO, UNEP) instruments were applicable to the region, as well as regional regimes. Some of these regimes had not yet entered into force. He added that a compensation and liability regime for environmental damage would tend to be based on the principle of strict liability, rather than fault-based liability, covering activities that were dangerous or abnormally dangerous to the environment. The principle of strict liability generally included certain narrowly defined exemptions and a financial cap, and would normally be linked to a system of insurance. The compensable damage would also need to be specified in the regime and this question was covered by a detailed chapter in the Feasibility Study. It would also be necessary to consider certain specific exemptions from strict liability that were contained in other relevant instruments, such as the exemption set out in the Basel Protocol in cases where the operators were complying with a compulsory measure required by a Government authority.

15. In conclusion, Mr Fakhry recalled that there was a need to take action in order to comply with the mandatory provisions of the Barcelona Convention (Article 16) and the Offshore Protocol (Article 27) and that the regime would have to be based on the polluter pays principle set out in Article 4, paragraph 3(b), of the Barcelona Convention. When developing the regime, care would need to be taken to exploit any possible synergies with other applicable regimes and to avoid duplication. The Mediterranean regime should merely fill the gaps left by other regimes.

16. In the discussion of the Feasibility Study, many speakers thanked Mr Fakhry for the very detailed examination of the issue. They also emphasized that the development of a liability and compensation regime for environmental damage in the Mediterranean was a very important, yet extremely complex and delicate issue. The development of such a regime would form an important aspect of the implementation of the Barcelona Convention and its Protocols.

17. There was agreement on the importance of avoiding overlapping with other liability and compensation regimes at the global and regional levels which were already in force or which would enter into force in the future. Moreover, the methodology and definitions adopted should be complementary to those of other instruments and regimes. In particular, it was important that any regime that was developed was considered in conjunction with the EC Directive. It was also pointed

out that the international agreements on liability and compensation which were in force mainly concerned two specific areas, namely oil pollution and nuclear activities, for which the original versions of the agreements dated back to the 1960s. The agreements negotiated more recently, such as the Lugano Convention, 1993, the Basel Protocol, 1999, and the Kiev Protocol, 2003, were not yet in force and the prospects of their entry into force were seemingly remote. It would therefore appear that States around the world harboured certain concerns, or were reluctant to ratify such instruments. The need for a regime which could be implemented in practice, in view of the complexity highlighted by the Feasibility Study, should be borne in mind when discussing the prospective rules and procedures, particularly with regard to the form of the instrument to be developed. As questions remained as to whether a regional instrument could succeed in an area in which international instruments had so far failed, efforts should also be focused on bringing existing instruments into force. For these reasons, a step-by-step approach would be preferable.

18. During the discussion, reference was also made to the multiplicity of issues which still required careful consideration in the prospective liability and compensation regime. These included the geographical scope of the regime, and particularly its application to the high seas and to the areas covered by the LBS and SPA and Biodiversity Protocols. If the regime were to apply to the high seas, care would need to be taken to determine how it would be applied to areas which were outside the control of a single Contracting Party. Further consideration should also be given to the definition of "operator" and of "environmental damage". For example, would cliff erosion count as environmental damage, or was it a natural process? Who would be held responsible for such processes? When assessing environmental damage, it would be necessary to take into account the influence of all the various factors, including natural processes. The regime should therefore provide guidance for the assessment of environmental damage, for the determination of those responsible and of victims. While a number of speakers believed it important to set up a regional fund to compensate certain kinds of environmental damage and to support preventive measures, it was also pointed out that funds which could be used for these purposes already existed, or were about to be established. The question of insurance coverage to provide compensation for environmental damage would also require careful examination. Finally, the question was raised of the difficulty of giving effect to such a regime at the national level and the need for it to be in conformity with national systems that were already in existence.

19. In response to questions raised by the members of the Working Group, Mr Fakhry explained that, while those replying to the questionnaire had expressed the general opinion that insurance for environmental damage would be desirable, interviews that he had carried out with insurance practitioners had shown that it would be difficult to develop insurance schemes for this type of risk. With regard to the assessment of damage, he indicated that several international organizations were currently examining this issue, for example within the context of the IOPC Fund Convention. There were therefore opportunities for synergy in this area.

*Discussion of the outcome of previous meetings and the methodology to be followed for the development of a liability and compensation regime*

20. Mr. Tullio Scovazzi, Professor at the University of Milano-Bicocca, Italy, recalled the previous work on this subject within the context of MAP, with particular reference to the meeting of Government-designated legal and technical experts held in Brijuni, Croatia, in September 1997, and the consultation meeting of legal experts on liability and compensation, held in Athens on 21 April 2003. Agreement had been reached on certain points at the Brijuni meeting. These included a preference for a

binding legal instrument, rather than a soft law instrument. A preference had also been stated for a Protocol, rather than an Annex to the Convention. It had been emphasized that any future Mediterranean regime should not overlap with treaties that were in force or expected to enter into force. It was the general view that the regime should also cover the high seas although, if Mediterranean States established exclusive economic zones, there might be no areas of high seas left in the Mediterranean. There was a majority view that the regime should be limited to dangerous activities, which should be specifically listed. The Brijuni meeting had noted the trend to compensate not only damage to persons and property, but also damage consisting of the impairment of the marine and coastal environment, covering measures of reinstatement, or reinstatement by equivalent where the re-establishment of the status quo ante was not possible. Finally, there was a general view that the liability regime should be based on strict liability.

21. However, Mr Scovazzi noted that divergent views had been expressed at the Brijuni meeting on a number of subjects. One of these was whether or not the regime should cover liability arising from gradual pollution, which was likely to occur due to land-based pollution from diffuse sources, in relation to which it was difficult to identify the operator responsible. Nor had there been any agreement on whether a pre-determined ceiling should be applied to the compensation to be paid by the operator or to the liability of the operator. There had been no agreement on the proposal to establish a Mediterranean inter-State compensation fund. Reservations had also been expressed concerning the idea of granting NGOs the right to take legal action in certain specified cases.

22. Mr Evangelos Raftopoulos, MAP Legal Advisor, added that one major difference with previous meetings was that the present discussion was being held in a different context, as several new instruments had now been adopted, including the EC Directive and the instrument covering the Antarctic. The instruments which had been adopted in recent years showed that negotiation of a liability and compensation regime would undoubtedly be a long and difficult task. In his view, the full implementation of Article 16 of the Barcelona Convention would require a comprehensive approach involving the development of some kind of binding instrument. The Contracting Parties would have to give careful consideration to this issue.

23. Mr Mifsud recalled that the process of developing appropriate rules and procedures for the determination of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area had stalled following the Brijuni meeting. The process was now being relaunched, which was why the present meeting was styled the "first meeting" of the open-ended working group. Although past work should not be ignored, it was necessary to start afresh.

24. Mr Scovazzi, in response to a question concerning the approach to be adopted, indicated that in his opinion there was no fundamental contradiction between the aim of developing a Protocol and the adoption of a step-by-step approach, which might include the formulation, as a first stage, of a model law or guidelines, to be followed at a later stage by a Protocol. The adoption of a gradual approach would permit current developments to be taken into account more fully and would allow more time to address the difficult matters involved.

**Agenda item 5: Brief presentations by members of the working group of the existing systems being applied on liability and compensation**

25. Several members of the working group made presentations on the systems of liability and compensation which were applied or were being developed in specific countries or areas.

26. In the context of the European Union, Directive 2004/35/EC focused on the compensation of damage to the environment, rather than the compensation of damage to persons and property, which were the traditional types of damage covered by national law. It did not cover all types of environmental damage, but specified water damage, land damage and damage to protected species and habitats, as defined in the Birds Directive and the Habitats Directive. The Environmental Liability Directive only considered a certain level of damage and envisaged that national authorities would play an important role in its implementation. In contrast with traditional damage, in respect of which the relevant cases were pursued through the courts, it had been felt that the substantive intervention of the public authorities would be needed, acting in the role of trustees of the environment, to ensure that the responsible operators took the relevant preventive or remedial action. The Directive covered economic activities, rather than private activities, and made a distinction between the activities listed in Annex III, deemed to be of actual or potential concern, which were subject to stricter requirements, and activities not listed in the Annex, for which an operator would have to be proved to be at fault or negligent to be held liable for the consequent damages. Examples of activities which were subject to the stricter liability regime included waste management and the use of hazardous chemicals. Operators had to be held strictly liable for such activities and there was no need to establish any fault or negligence by them. The Directive provided however for a number of cases in which the liability of the operator could be attenuated, such as where damage was caused by an emission or event expressly authorized in accordance with the national laws and regulations giving effect to the Community environmental legislation referred to in its Annex III.

27. In cases where there was an imminent threat of environmental damage occurring, or when such damage had occurred, the operator was under the obligation to take the necessary preventive measures without delay and, when damage occurred, to inform the competent authority of all relevant aspects of the situation. This gave rise to the issue of the evaluation of the damage, in respect of which the provisions of the Directive were based on certain principles established by environmental law in the United States. In cases of environmental damage, the operator responsible was liable to pay for the necessary measures of restoration or remedial measures. Where restoration was difficult or impossible, the Directive allowed for the possibility of the restoration of alternative sites and the re-establishment of equivalent or similar elements. Member States may adopt additional protective measures. The Directive also took into account the time element, as restoration could well take several years to accomplish. Another very important element was the question of limitations and the reasons for which exemptions to liability might be allowed. In this respect, the Directive established exemptions for cases in which the damage was caused by a third party in spite of the measures taken by the operator, or where it resulted from the application of an order or instruction issued by the competent authority. However, the Directive left it to the discretion of Member States to decide on certain causes of exemption from liability, including activities which, according to the current state of scientific knowledge, were not considered to be harmful at the time of the activity. This allowed evolving issues, such as the use of biotechnology, to be taken into account. In the belief that

appropriate insurance schemes were not yet available, particularly for damage to biodiversity, the Directive did not make provision for compulsory insurance for environmental damage. Finally, interested third parties, including NGOs, were authorized to request the competent authority to take action under the Directive, and to call for a judicial review, and could take legal action to oblige the authority to take such action.

28. In respect of the second level of responsibility established by the Directive, namely for those activities not covered by Annex III, the Directive only applied to one type of environmental damage, namely protected natural habitats and species. The liability of operators could only be invoked in cases where an element of fault or negligence could be established. Finally, the Directive did not apply to environmental damage or any imminent threat of such damage arising out of an incident in respect of which liability and compensation fell within the scope of any of the international Conventions listed in Annex IV, which were principally the IMO Conventions, where such instruments were in force at the national level. The Directive, which was already in force, would need to be implemented by 30 April 2007.

29. It was noted with regard to the Directive that its transposition into national law was likely to give rise to certain challenges since it broke new ground in many aspects by comparison with existing national laws. Moreover, certain differences of views had emerged during the elaboration of the Directive, on which discretion had been left to Member States. One of these concerned the development of financial security instruments and markets to enable operators to use financial guarantees to cover their responsibilities under the Directive. The Directive required the Commission to report in 2010 on the availability and affordability of financial security products. The need to include a provision of this type illustrated the difficulties anticipated in the development of an effective and appropriate system of financial security under the Directive.

30. The meeting was informed that in Israel three types of legal tools were used in relation to liability and compensation for environmental damage. These were criminal liability, civil liability and administrative means, including orders to stop activities which might cause damage to coastal areas and cleaning orders, which were used fairly frequently. However, environmental disputes in Israel were mainly resolved by means of criminal law. The principal issue in this regard was the question of time. When dealing with environmental pollution, it was necessary to take immediate action to stop the damage. As civil processes took a long time, it was therefore more effective to obtain injunctions from the courts. In the case of civil processes, the competent authorities endeavoured to provide advice to help the courts undertake an economic analysis of the harm caused so that they could establish the level of the fine to be imposed. With regard to civil liability, under the Civil Wrongs Ordinance, the main offence in tort cases was negligence, for which it was necessary to prove that an act had been committed under the circumstances in which *a reasonable prudent person* would not carry out such an act. Civil liability cases could be long and complex. Another offence was a public nuisance, which had been broadened by including acts or omissions which endangered the *comfort of the public*. The offence of a private nuisance under the Civil Wrongs Ordinance was also often used and offered greater possibilities for the public to bring legal action under tort law. The Abatement of Nuisances Law, 1961, had been amended to include compensation provisions, as one of the difficulties of civil suits had been that it was not otherwise possible to obtain compensation, but merely to encourage the authorities to issue the relevant orders. It was generally agreed that the issue of liability and compensation for environmental damage needed further consideration in Israel. The main instruments currently used were criminal and administrative

measures, rather than civil liability. Consideration should be given to combining the two, shifting from a fault perception to a social risk perception and encouraging the public to sue.

31. The system in Italy was based on fault liability, with the State or local authorities having exclusive responsibility for initiating any relevant legal proceedings. It was on the basis of Act No. 349 of 1986 that judges were responsible for assessing environmental damage and for requiring the payment of compensation. The law had recently been amended in Italy to give effect to the EC Directive, which had involved a change of perspective in relation to liability for environmental damage. When environmental damage occurred, the first objective was to restore the area concerned to its baseline condition. Where this was not possible, the economic and financial potential of the operator was taken into account, although liability was also limited.

32. In the case of Greece, the legal framework for liability and compensation for environmental damage was based on the Civil Code as well as on environmental and special legislation. The basis of environmental law was Article 24 of the Constitution, which set forth the right to the environment. Disputes between private parties were based on the Civil Code, while Act No. 1650 of 1986 for the protection of the environment, established the strict civil liability of any person who through his acts damaged the environment. Compensation could be granted by the courts under the terms of the latter Act, which also provided for penal sanctions, including imprisonment and fines. Penal provisions were also contained in special legislation to protect the sea and forests, while Decree No. 55 of 1998 for the protection of the maritime environment set out penal administrative and disciplinary sanctions. NGOs were entitled to initiate proceedings in civil courts, provided they could prove that they had a legal interest in taking such action. However, the majority of disputes relating to environmental damage involved State services. In the absence of tribunals with specific competence in the field of the environment, such disputes lay within the competence of the Council of State and administrative tribunals, which could order the suspension of the activity in question until a definitive court order could be issued. Action could be taken before administrative tribunals, based on the introductory law of the Civil Code, to obtain compensation from a public body for its illegal actions or omissions. Finally, environmental damage was also covered by the laws ratifying international instruments, such as the amended Barcelona Convention.

33. In Algeria, the legal framework for liability and compensation for environmental damage was based on the Civil Code, the Penal Code and environmental laws, including the Maritime Code. These laws established procedures for bringing charges, the authority competent to assess environmental damage and initiate legal proceedings, and the respective penalties and fines. The evaluation of environmental damage was mainly based on the polluter pays principle. The transposition into national legislation of the principles of liability and compensation for environmental damage contained in international and regional instruments often gave rise to problems and it would therefore be interesting to assess the conformity of the legislation of the countries in the region with these instruments.

34. In Slovenia, the main law in the area of civil liability was the Civil Code, which established fault-based liability. However, strict liability was prescribed in the case of damage caused by dangerous substances or activities, which would be determined by the courts in each case. The doctrine of abnormal private nuisance also applied. The Maritime Code contained provisions on the liability of ship owners and operators, with liability being limited in accordance with the LLMC Convention. The Maritime Code also established fines for pollution of the sea. The international Conventions

ratified by Slovenia prevailed over national law. The Criminal Code established the offence of damaging the environment.

35. With regard to France, it was noted that national law did not deal specifically with liability for environmental damage, which was mainly covered by the legislation on civil liability. However, specific legislation existed covering natural catastrophes and technological risks. Moreover, protection levels had been increased by recent legislation, particularly in the Mediterranean, where an ecological protection zone had been created in 2003. Following disastrous marine incidents, penalties had been multiplied for oil spills. France was therefore taking stronger measures to combat oil discharges, particularly in the Mediterranean, and was strengthening its cooperation with other coastal States in the region.

36. In the Syrian Arab Republic, the Environmental Protection Law of 2002 adopted the approach to liability and compensation of establishing penalties, in the form of fines and prison sentences, combined with compensation for the damage caused through the adoption of remedial measures. However, practical measures had still not been taken for the implementation of the Law. In view of the Government's recognition of environmental issues, other legislation respecting the environment had been issued recently, including the Water Statute Law of 2005 and the Law for the Protection of Marine Waters from Ship Wastes and Litter of 2006. In accordance with the implementing regulations of these Laws, the Ministry of Irrigation was responsible for monitoring water quality and would collaborate with the Ministry of the Environment. With a view to giving effect to the Environmental Protection Law, warnings had been issued to economic operators indicating that they should bring their operations into compliance with the Law within one year. The inspection process was now about to commence. A network of environmental experts had been established to assist the police in the implementation of the Law. Fines would be imposed upon operators which were in violation of the legislation, and prison sentences could be applied in the event of repeat offences. The courts could order the cessation of activities which continued to cause pollution in breach of the provisions of the Law. In addition, compensation for the damage caused was payable to the State. The Law of 2006 on the protection of the marine environment from ship waste and litter also contained provisions establishing penalties and compensation, as well as exemptions.

37. In the case of Tunisia, operators causing environmental damage could be held liable under penal, civil and administrative provisions. Those responsible were subject to penal sanctions, in the form of fines or imprisonment, as well as being liable to pay for remedial measures or compensation. The administrative authorities could order the temporary or permanent closure of establishments causing environmental damage. Although the marine environment was not covered by specific provisions, the Act establishing the National Environmental Protection Agency established a system for the compensation of environmental damage. The 1996 Act on waste management was based on the polluter pays principle and promoted the recycling of waste. The National Environmental Protection Agency was empowered to act in the public interest in environmental matters, although individual victims of environmental damage could also take their cases to court. In general, while environmental issues were broadly covered by a number of laws, there remained problems of application. In the first place, judges encountered problems in assessing environmental damage, for example in the case of deterioration in the quality of water. A second problem lay in the fact that it was very easy to damage the environment, but the cost of restoring the damage caused might well exceed the economic capacity of the operators concerned, particularly in the case of small and medium-sized enterprises.

38. Similarly, in Morocco, civil, administrative and environmental responsibility was set out in laws from different periods, which showed a certain degree of awareness of environmental problems. Civil liability for the damage caused by the acts of third parties had a long history in the country. The responsibilities of the public authorities were determined in a number of sectoral texts, such as those covering maritime activities and water. The Water Act of 1995 established the responsibility of any person causing environmental damage to water. The Maritime Code was under revision with a view to transposing into national law the provisions of the various international instruments to which Morocco was a party. Environmental liability was established by the general environmental law of 2003, although it only covered a limited number of activities and harmful substances.

**Agenda item 6: Introduction and discussion of possible recommendations with respect to the formulation and adoption of appropriate rules and procedures for the determination of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area**

On behalf of the Secretariat, Mr. Raftopoulos, MAP Legal Adviser, introduced Agenda item 6 on the basis of Part III of document UNEP(DEPI)/MED WG.285/3.

*Rationale for a prospective scheme*

39. It was agreed that, in accordance with Article 16 of the amended Barcelona Convention, it was necessary to formulate and adopt appropriate rules and procedures for the determination of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area.

*Formal aspects – Nature of the instrument*

40. The Secretariat indicated that the question of the format to be taken by rules and procedures on liability and compensation was related to a number of factors. These included the integration of the rules and procedures into the existing Barcelona legal system, the content of the prospective rules and procedures and the extent to which it was intended that they should be developed. Another important aspect to be taken into account was the inter-linkage between the Mediterranean rules and procedures and those set out in other relevant international instruments, including the EC Directive. Although it had been agreed at the Brijuni meeting that a Protocol should be developed, in the intervening years the more flexible option of a step-by-step approach had also been proposed. If a binding instrument were to be adopted, it would appear that there were two main possibilities, namely a Protocol or an Annex to the Convention. Current practice in the Barcelona system tended to favour the adoption of Protocols, although an Annex offered another option, which was less formal, but equally binding. The Contracting Parties were under the obligation to give effect to Article 16 of the Convention, which required to cooperate in the formulation and adoption of rules and procedures concerning liability and compensation, and to apply the polluter pays principle, which was set out in Article 4, paragraph 3(b), of the Convention. Article 27 of the Offshore Protocol and Article 14 of the Hazardous Wastes Protocol also required the development of rules and procedures on liability and compensation. The Secretariat pointed out that the process of formulating a Protocol on liability and compensation would be long and complex and recalled that such a Protocol would have to be submitted to national Parliaments for ratification. Another possible option was the development of a soft

law instrument, such as a model law, guidelines or recommendations, as an intermediary step before proceeding to the formulation of a Protocol. Such a soft law instrument could go into greater depth than a Protocol and its development might facilitate the subsequent elaboration of a Protocol. There was already a tradition of using soft law within MAP, although mainly in relation to strategies, policies and technical recommendations. The current trend at the regional and international levels in the field of liability and compensation was for the development of Protocols, although these tended to cover sectoral aspects of the question. The development of a Protocol on liability and compensation at the level of the Mediterranean would therefore have to take into account a very complex series of inter-linkages with other regional and international instruments, as well as national legal systems.

41. During the discussion on this subject, it was recognized that a hard law instrument, such as a Protocol, would give fuller effect to the relevant provisions of the Barcelona Convention and its Protocols and the representative of NGOs called for the elaboration of a Protocol. However, it was also acknowledged that most of the instruments developed on aspects of environmental liability and compensation in recent years had not yet come into force, and there were doubts as to when they would actually come into force. Moreover, two Protocols and other amended Protocols under the amended Barcelona Convention had not yet entered into force, and nothing would be gained by elaborating yet another instrument which might never be applied. Many of the speakers therefore advocated a slower and more flexible step-by-step approach, which would allow time for the development of the relevant rules and procedures over a longer period, taking fully into account all the relevant experience acquired in relation to liability and compensation schemes under other international and regional Conventions and in the context of the European Union.

42. It was accordingly agreed that a prudent approach would be recommended consisting of a limited number of steps. The first of these would consist of the development of guidelines on liability and compensation for environmental damage in the Mediterranean, which should be elaborated and proposed for adoption by the next meeting of the Contracting Parties. An assessment would then be undertaken of the implementation of the guidelines and a decision would be taken by a future meeting of the Contracting Parties as to whether it was appropriate to develop a binding instrument. On the basis of this decision, a binding instrument could then be negotiated. It was understood that, in view of the adoption of this step-by-step approach, the guidelines would have an advanced content and would attempt to find solutions to the complex issues which remained to be resolved, such as procedures for assessing the cost of the restoration of the environment, the application of the regime in exclusive economic zones and the high seas, the development of appropriate insurance schemes and the concept of establishing a Mediterranean compensation fund.

43. The representative of NGOs expressed regret at the lack of support for the elaboration of a Protocol on liability and compensation.

#### *Relationship with other regimes*

44. An important aspect of the future rules and procedures was to identify their relationship with other global and regional instruments that were in force or expected to come into force. One option was to exclude from the outset issues which were already covered by other instruments. Another was to ensure that other international instruments were applicable within the framework of the new regime that was to be developed.

45. During the course of the discussion it was agreed that there should be no contradiction between the rules and procedures developed for the Mediterranean and those set out in international and global instruments covering specific aspects of liability and compensation which were in force or would come into force. It was also important for the rules and procedures to be in harmony with the EC Directive, which was already a compromise text that did not, for example, require the establishment of a guarantee fund.

46. The view was also expressed that any new legal instrument covering the Mediterranean would be of little use if it did not offer added value in relation to other instruments which were already in force or which would come into force. The new instrument should therefore contain more stringent provisions covering all activities which could cause environmental damage, including those which were not covered by existing instruments. If it were possible to develop an instrument that was applied in a uniform fashion by all the countries in the region, it would be an important achievement. If not, it would have little added value.

47. The importance of having the relevant international instruments ratified by all the Parties was recognized. In this regard, the Parties are called upon to take measures in conformity with international law to ensure in the Mediterranean region the effective implementation of these international instruments.

#### *Geographical scope of application*

48. It was recalled that major progress had been made by the amended Barcelona system in terms of its geographical scope of application, which now included the high seas and the coast. The amended LBS Protocol also covered the hydrological basin, while the SPA and Biodiversity Protocol extended to the high seas in the context of SPAMIs.

49. It was also recalled that Article 1, paragraph 3, of the Convention allowed for the possibility for any Protocol to the Convention to extend the geographical coverage to which that particular Protocol applied. Even though this type of variable geometry might create certain problems, it was important for rules and procedures on liability and compensation in the region to take into account all the areas covered by the various Protocols. It was recalled in this regard that the United Nations Convention on the Law of the Sea (UNCLOS), to which most Mediterranean countries were parties, called on States to cooperate in the development of a general regime relating to pollution of the marine environment. It was therefore agreed that the geographical scope of application of the rules and procedures should be in conformity with Article 1 of the Barcelona Convention and should take into account the geographical scope of its Protocols.

#### *Damage*

50. It was emphasized that the definition of damage in the rules and procedures on liability and compensation would have to be compatible with the obligations of the Contracting Parties under the Barcelona Convention. It should specify the object of environmental damage and the nature of the activities which fell within the liability and compensation regime. It should concentrate on activities, which should be defined. It would therefore be necessary to indicate the most significant activities to be covered. Consideration should also be given to the issue of the assessment of environmental damage.

51. The discussion of this point highlighted several problematic issues and different approaches. It was pointed out that environmental damage consisted not only of damage caused by chemical and/or physical pollution, but also the physical alteration of fauna, flora or land, which might be termed “any measurable adverse change that affects natural resources, habitats, human life, property or human activities”. In addition, one of the purposes of rules and procedures on liability and compensation should be to phase out the constant increase in pollution from land-based sources. In this respect, it was noted that the physical alteration of the environment was difficult to measure and that during discussions in the framework of other international environmental instruments great difficulties had been encountered in agreeing upon a broadly accepted definition of ecological damage. The related question therefore also arose of harmonizing any definition adopted in the context of the Mediterranean with those contained in other international and regional instruments. It should also be borne in mind that not all alterations in the state of the environment were attributable to environmental damage caused by pollution, but might, for example, be due to causes such as natural disasters.

52. Another important issue concerned the approach to be adopted when environmental damage was caused by a large number of diffuse sources, which would be difficult to identify. A related technical problem concerned the manner in which the impact of environmental damage could be assessed in relation to the initial state of the environment. In this connection, it was pointed out that the comprehensive data compiled by countries in relation to the implementation of the Strategic Action Programme (SAP) to combat pollution from land based sources, particularly in the form of the baseline budgets of emissions of land-based sources of pollution, could be used for the assessment of environmental damage. It was also recalled that the purposes of a Mediterranean guarantee fund for environmental damage could include remedying damage from diffuse and unknown sources of pollution, as well as taking preventive measures to reduce such forms of pollution.

53. The question was raised as to whether the rules and procedures should cover both traditional damage (such as damage to property and loss of earnings) and environmental damage, or just the latter. It was agreed in this respect that the principal type of damage to be covered by the regime was clearly environmental damage. A decision could be taken later on whether coverage should also include traditional damage, which was covered by other regimes. The point of view was expressed that environmental damage should be defined very broadly. However, there was also a danger that acceptance of the regime would be hindered if the definition of environmental damage was very comprehensive. The regime would therefore be more widely accepted and applied if the definition of environmental damage adopted was limited to a few specific types of damage.

#### *Activities*

54. It was recalled that it was also necessary to define the activities that would be covered by the Mediterranean liability and compensation regime. At the Brijuni meeting, the majority view had been that the regime should be limited to dangerous activities, which should be specifically listed. There had been no agreement at that meeting on whether land-based pollution should be covered. At the Athens meeting in 2003, three types of activities had been identified for inclusion, namely the operation of offshore installations, dumping and land-based pollution. The parties consulted for the Feasibility Study had also referred to aquaculture and leisure activities at sea. With regard to land-based pollution, it was recalled that a list of dangerous activities was contained in annex to the LBS Protocol. In the field of biodiversity, a very important model was the EC Directive. Other models were

provided by the Basel Convention and, in particular, the liability and compensation scheme developed in the context of the Antarctic Treaty System.

55. It was pointed out that if the activities to be covered by the regime were set out in a list, there was a danger that the list would not be exhaustive and that certain harmful activities would not be covered. Moreover, the weakness of adopting a list approach was that new activities and technologies would almost certainly emerge which were not covered. The wording adopted therefore needed to be sufficiently flexible to take into account activities and sources of pollution which emerged as a result of the development of new technologies and processes. This could probably best be achieved by combining a list with a general definition of the activities covered. However, it was also necessary to bear in mind that, if a competitive insurance market were to be developed for environmental damage, clear criteria would have to be provided so that potential insurers were certain of the risks that they were covering. Moreover, the regime should give judges sufficient guidance so that they had adequate criteria for determining whether a specific activity gave rise to liability and compensation under the regime. One innovative means of providing guidance for the implementation of the regime would be through the establishment of a group of experts, which could make use of the various technologies that were now becoming available, such as satellite imaging and the data compiled by NGOs and other competent institutions, to identify and assess environmental damage in the region. One speaker proposed that the damages caused by all human activities should be covered by the Mediterranean liability and compensation regime, with the sole exception of those caused by war, insurrection, terrorism, and, of course, by exceptional and inevitable natural events. This different approach would ensure that new technologies, processes, substances and physical pollutants were included.

56. It was also recalled that, as technology progressed, activities which were once harmful for the environment might become less harmful because they no longer used certain harmful substances. For example, the production of chlorine used to involve the use of mercury cells, which were harmful to the environment. Now, a membrane technique had been developed which no longer required the use of mercury. Consideration should therefore be given to combining both a list of activities and of harmful substances.

57. With regard to environmental damage affecting biodiversity, a useful model was provided by the EC Directive, which provided for two types of liability: strict liability in the case of environmental damage caused by any of the activities enumerated in Annex III; and fault-based liability which arose in relation to activities other than those listed in Annex III.

*“Incident” and “operator”*

58. It was indicated that the term “incident” was used in a very broad sense that went beyond the concept of an “accident” or sudden occurrence and included a series of occurrences, such as continuous or repeated releases of pollutants into the sea. The incident needed to have a causal link with the environmental damage. The term “operator” signified the natural or juridical person in control of a hazardous or potentially hazardous activity. The operator was the person or entity which exercised effective control over the activity or had the power to make decisions concerning that activity. Definitions of the term “operator” were provided in other global and regional texts. In some cases, a distinction might be made between “operator”, “subcontractor”, etc.

59. During the discussion, it was pointed out with regard to the term “incident” that this concept also covered the notion of the cause of the environmental damage. In a discussion of whether “incident” also covered phenomena which resulted in the gradual deterioration of the environment, it was pointed out that what was important was the causal link between the activity and the damage, even where this covered repeated or continuous incidents or activities over a long period of time. Great care was needed in deciding upon the relevant definitions, bearing in mind the need to develop appropriate insurance instruments.

60. It was noted that the definition of “operator” should cover the person or entity which assumed responsibility for the activity under the liability and compensation regime, including the person or entity carrying out the activity, controlling the activity and/or which had received authorization or a mandate to carry out the activity. Useful guidance could be obtained in this respect from the definition of “operator” contained in the Offshore Protocol, which covered both natural or juridical persons authorized to carry out the activity, or those that were in *de facto* control of such activities. In this respect, the operator was the natural or juridical person responsible for the environmental security of the activity.

61. The issue was also raised of whether States could be considered to be operators, and particularly concerning the liability of States in cases where the legal and institutional measures adopted at the national level were inadequate to give effect to the relevant global or regional instruments. In practical terms this raised the question of whether an operator which had caused environmental damage, but which had not been in violation of national legislation, could rely on the defense that the activity had been in accordance with national law. In such cases, could the State then be held liable for compensation? It was agreed that this was an extremely delicate matter which would have a major influence on the willingness of States to accept and apply a liability and compensation regime. The comment was also made in this respect that, in the case of the European Union, failure to transpose European requirements into national law and practice gave rise to consequences, but it would be going too far in the case of the present regime to establish a direct link between an omission by the State and direct liability for any damage that occurred. A parallel issue concerned cases in which it was impossible to identify an operator from which compensation could be claimed. The guidelines developed on the liability and compensation regime should consider these issues carefully.

#### *Standard of liability and exemptions from liability*

62. It was mentioned that the most suitable form of liability would appear to be a system of strict liability with narrowly defined exemptions. However, there might also be cases in which absolute liability could be applied, for example in the event of illegal activities. Moreover, consideration might also be given in certain cases to applying the principle of fault-based liability, for example in cases where adequate domestic legislation had not been adopted. With regard to exemptions from liability, two issues in particular required consideration: acts which were beyond the control of the operator; and acts of *force majeure*, including terrorism. It was important that any exceptions were defined as narrowly as possible to prevent operators from taking advantage of any gaps that were left in the provisions. In addition, the burden of proof should be placed on any operator, which wished to avail itself of such exemptions.

63. During the discussion, it was agreed that strict liability should be the basic standard for the liability and compensation regime, although a combination with fault-based liability could also be considered along the lines set out in the EC Directive. It

was recalled in this respect that the experience of developing the EC Directive showed that, while it was relatively easy to obtain agreement between jurists on the standard of liability to be adopted, greater difficulties arose when policy-makers became involved. Indeed, the provisions of the EC Directive in this regard constituted a compromise, which left the choice to national law in certain cases. One speaker added that the principle of absolute liability might have to be applied in respect of certain risks.

64. It was also necessary, when considering the standard of liability to be adopted, to take into account the close relationship between damage assessment, compensation and insurance. The availability of insurance schemes was a vital element in deciding upon the standard of liability and any exemptions, particularly in areas that were not covered by insurance, such as acts of war. If the principles were not laid out very carefully in this regard, with only very clear exemptions being admitted, the door would be left open to endless litigation by insurance companies. It would be very beneficial to the process of developing the liability and compensation regime if experts in the field of insurance could participate in the next phases of negotiation.

*Limitation of liability and compulsory financial and security scheme*

65. The Secretariat explained that two main elements were normally involved in the limitation of liability. These were the limitation of financial liability and time limits. A system of limited financial liability would be closely related to a two or three tier system of liability. The Brijuni meeting had been close to accepting that limits should be placed on financial liability, with the exception of fault liability, for which the financial limits would not be applicable. In this respect, the problem of financial security raised many problems, as the insurance market was not developed and it would not be possible to require compulsory insurance in such areas as biodiversity and land-based pollution, for which no insurance existed. It might also be necessary to exclude low-risk activities from liability for compensation. With regard to time limits, a system might be envisaged which included a shorter and a longer time limit, such as three and ten years, respectively.

66. On the issue of time limits, it was indicated that prescription was necessary, as it would be very difficult after a very long period, such as 50 or 60 years, to establish the operator responsible. It was also argued that care should be taken when instituting a system of prescription, as the problem of compensation and the financing of remedial measures would still remain, even after several decades. A dual time limit could be applied, in the first place to the time of the incident, and secondly to the time when the environmental damage was identified.

67. With regard to financial security, it was re-emphasized that the question of the insurance of environmental risks raised very great problems and that expertise in the field of insurance would be needed in developing the liability and compensation regime. Although it was hoped that the EC Directive would play a role in developing an insurance market for these risks, there was no guarantee that this would occur in practice. Moreover, the experience of the United States in this field in the 1970s was not very encouraging since, although certain companies had started to offer insurance for environmental damage, many of them had since withdrawn from the market. It was also recalled that the EC Directive called upon the Commission to report back on this issue in 2010. Representatives of the insurance market consulted for the formulation of the Feasibility Study had expressed caution in this respect.

*Mediterranean compensation fund*

68. The Secretariat explained that if a two-tier system were to be established, a Mediterranean compensation fund could play a supporting role in ensuring the implementation of the polluter pays principle. However, the circumstances under which such a fund would operate would have to be strictly prescribed. These circumstances might include, for example: cases in which compensation was beyond the liability of the operator; instances in which the operator was unable to pay the compensation; or cases in which the operator was not liable for the damage caused under the terms of national laws and regulations. If a fund were to be established, it might also be decided that it could play a role in the implementation of preventive measures, particularly in developing countries, and that the fund could intervene in the case of damage which had transboundary effects. In addition, it would be necessary to decide whether it would be a receiving fund for compensation. It was noted that a fund mechanism had been set up under the Antarctic system, to which States and operators could make voluntary contributions.

69. During the discussion, the issue was raised of whether such a fund would be financed by States or by the sectors concerned. It was recalled that the system covering nuclear power generation, which was characterized by the high level of State involvement, was a special case in this respect. In the oil industry, the IOPC Funds were financed by the sector concerned. If a fund were to be established, there were various options for its financing, including contributions by operators and State funding. If State funding were to be chosen, a system would have to be developed to assess the contributions to be made by the various countries, based on criteria such as the size of their population and level of development. An alternative to the establishment of a Mediterranean compensation fund might be the development of a Mediterranean re-insurance system. Certain reservations were expressed concerning the possibility of establishing a Mediterranean compensation fund.

*State residual liability*

70. It was also added that another option was to develop a three-tier system, with a Mediterranean compensation fund and residual State liability playing a supplementary role. Residual State liability could be envisaged, for example, in cases of severe environmental damage and transboundary effects. However, it was acknowledged that previous discussions and consultations had shown that States were not very willing to support such a concept.

71. Certain reservations were expressed concerning the principle of State residual liability, which appeared to take all the meaning out of the polluter pays principle. While it could be envisaged that States would assess cases in which they believed they should intervene, it should not be made compulsory for them to do so. Consideration also needed to be given to nuclear liability and the international commitments of States under the various treaties to which they were parties.

*Actions for compensation – who can sue?*

72. It was emphasized that this very important issue raised questions concerning the role of the State as a trustee of the general interest in protecting the environment. It also raised the issue of access to information on the environment, as established in Article 15 of the Barcelona Convention and the Aarhus Convention. With regard to access to information, consideration might be given to the establishment of a specific time limit for replies to requests for information and the right of parties suffering damage to obtain information from the operator. It was noted that past discussions

showed that there were some reservations among governments concerning the right of NGOs to sue or to request action by the authorities. The Brijuni meeting had been forward-looking in envisaging situations in which NGOs could be involved, for example by requesting the authorities to issue orders requiring preventive measures or the reinstatement of the environment.

73. It was agreed that access to information was a very important issue, particularly since most of the countries concerned in the region had ratified the Aarhus Convention. The issue of access to justice was currently under negotiation in the European Union. The view was also expressed that when action was taken by the public authorities, such authorities should have access to information from the operator, with the usual protection for intellectual property and commercial secrets. However, the concept of private parties having the right of access to information from operators raised greater difficulties. It would be more appropriate for them to gain access to such information through the public authorities. The representative of NGOs added that the right to take court action should be extended to civil society and NGOs in protection of the sacred right to the environment. It was agreed that MAP was very advanced in terms of the involvement of civil society in its activities and that the discussion of this issue should be postponed so as to take into account any further developments with regard to the right to sue.

#### *Further work*

74. The Secretariat proposed that it would prepare draft guidelines on liability and compensation for environmental damage in the Mediterranean by early 2007. The draft guidelines would then be circulated and comments taken into account before a second meeting of the working group was convened in the spring of 2007. It also noted that, for the sake of the continuity of its work, the membership of the working group should insofar as possible remain unchanged, but that experts from the field of insurance and other relevant stakeholders should be invited to attend the next meeting.

#### **Agenda item 7: Adoption of conclusions and recommendations**

75. The recommendations prepared by the Secretariat were discussed and amended as appropriate.

76. During the discussion of the proposed recommendations, the representative of the Syrian Arab Republic encouraged the working group to consider the applicability of the guidelines, particularly when determining their scope of application and the activities to be covered.

77. The representative of MAREVIVO, speaking on behalf of Mediterranean environmental NGOs in general, expressed regret that a preference had been shown for a list approach for the definition of activities and substances to be covered by the regime, as a list could never be exhaustive and was likely to become outdated. Account should also be taken of physical pollutants. With regard to the relationship of the proposed guidelines with other regimes, he indicated that the principal problem was that the global or regional instruments establishing other liability and compensation regimes had not been ratified by all the countries in the region, and that their provisions were not therefore applicable throughout the region.

78. The working group's recommendations as adopted by the meeting are contained in **Annex III** to this report.

**Agenda item 8: Any other business**

79. No other business was raised.

**Agenda item 9: Closure of the meeting**

80. The meeting was closed at 6.30 p.m. on 8 March 2006.



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## **ANNEX II**

### **AGENDA**

1. Opening of the meeting
2. Election of Officers
3. Adoption of the Agenda and organization of work
4. Presentation of the main findings of the "Feasibility study covering the legal, economic, financial and social aspects of a liability and compensation regime in the Mediterranean Sea and its coastal area"
5. Brief presentations by members of the Working Group on the existing systems being applied on liability and compensation
6. Introduction and discussion of possible recommendations with respect to the formulation and adoption of appropriate rules and procedures for the determination of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area
7. Adoption of conclusions and recommendations
8. Any other business
9. Closure of the meeting



## ANNEX III

### Recommendations

In conformity with the recommendations to the Contracting Parties approved at their 14<sup>th</sup> Meeting held in Portoroz, Slovenia, in November 2005, the first meeting of an open-ended working group of legal and technical experts was convened in Loutraki, Greece, on 7 and 8 March 2006, to prepare appropriate rules and procedures pursuant to Article 16 (Liability and compensation for damage resulting from pollution of the marine environment) of the amended Barcelona Convention.

The meeting of the working group reached the following conclusions:

#### **Rationale for a liability and compensation regime**

1. In view of the requirements set out in Article 16 of the amended Barcelona Convention, which was adopted in 1995 and came into force in 2004, there is a clear need to develop appropriate rules and procedures for the determination of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area. These rules and procedures should be based on the strict application of the polluter pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter, with due regard to the public interest.

#### **Formal aspects: Choice of the legal instrument**

2. Bearing in mind the complexity of the subject and the need to take due account of the rapid developments which are occurring in this area at the global, regional and national levels, a step-by-step approach should be applied with respect to the choice of the legal instrument, consisting of the following steps:

- a) work should first focus on developing guidelines on liability and compensation, the content of which should provide for a high level of environmental protection, to be proposed for discussion and possible adoption by the next meeting of the Contracting Parties;
- b) this should be followed by an assessment of the implementation of the guidelines to be carried out according to a time-table to be determined later on, and based on which a decision should be taken by the meeting of the Contracting Parties on whether it is appropriate to develop a binding legal instrument or not.

#### **Relationship with other regimes**

4. The guidelines should be compatible with existing liability and compensation regimes at the global and other levels. The guidelines will not cover areas already addressed in international binding law regimes, which are either in force or expected to enter into force in the future. The guidelines should cover the relationship of the prospective Mediterranean liability and compensation scheme with existing international and regional instruments relating to liability and compensation for environmental damage, as listed in annex to the guidelines, with a view to ensuring their effective implementation in the Mediterranean Sea Area.

### **Geographical scope of application**

5. The geographical scope of application of the guidelines should be in conformity with Article 1 of the Barcelona Convention, including the high seas and the seabed. As far as the hydrological basin and the coastal zone area are concerned, the guidelines should also take into account the geographical scope of the Protocols to the Barcelona Convention.

### **Damage**

6. The definition of environmental damage in the guidelines should, as far as possible, be compatible with the provisions of other relevant global and regional instruments.

7. The principal type of damage to be covered by the regime is environmental damage. A decision should be taken as to whether the guidelines should also cover traditional damage (damage to persons, property and loss of earnings), or whether such damage would be excluded in so far as it is adequately covered by other regimes.

8. It would also be necessary to determine the compensation to be envisaged for environmental damage. This should include, *inter alia*, reimbursement of the cost of reasonable measures to restore the environment. Consideration should also be given as to whether compensation should include costs relating to the interim damage incurred until such time as the environment is restored.

9. A means should be developed of assessing the extent of the damage caused in relation to the state of the environment at the time when the incident occurred. Use should be made for this purpose of all available sources of information, including the baseline budgets of emissions developed in the context of the application of the Strategic Action Programme under the LBS Protocol.

10. Potential solutions would need to be identified for addressing the issue of liability and compensation for pollution from diffuse or point sources with respect to which it is difficult to identify the operators responsible. In this context, consideration should be given to identifying means of financing action to remedy pollution from diffuse or point sources.

### **Activities**

11. The definition of "damage" should also include a minimum common list of activities and substances that fall within the scope of the liability and compensation scheme of the Barcelona Convention system. This indication of activities and substances concerned should be broad, sufficiently flexible to take into account future developments and specific enough to provide effective guidance for the implementation of the liability and compensation scheme.

### **Incident**

12. The term "incident" should be used in a very broad meaning to cover a sudden occurrence, a continuous occurrence or a series of occurrences or phenomena with the same origin from which environmental damage results.

### **Operator**

13. A precise definition of "operator" should be determined on the basis of carrying out and/or control of the activity, taking into account, *mutatis mutandis*, the definition provided for in the Offshore Protocol.

### **Standard of liability**

14. Strict liability should be the basic standard of the liability and compensation scheme, with the possibility of combining it with fault-based liability. Liability should be dependent on the establishment of a causal link between the incident and the damage.

### **Exemptions of liability**

15. Strict liability should allow narrowly defined exemptions, taking into account the availability of insurance. The burden of proof should lie with operators which avail themselves of the exemptions determined.

### **Limitation of liability**

16. Strict liability should be combined with financial limits to be specified. It should also be combined with time limits based on a two-tier system of a shorter period from the knowledge of the damage and a longer period from the date of the incident.

### **Financial and security scheme**

17. Insurance or other types of financial security should in principle be compulsory, taking into account the availability of insurance products. Experts in the field of insurance should be invited to the next meeting of the Working Group to intervene on these issues.

### **Mediterranean compensation fund**

18. The possibility of establishing a Mediterranean compensation fund to play a supplementary role in ensuring compensation should be explored. If established, the fund could be used in the following cases: where the damage exceeds the operator's liability; where the operator is incapable of meeting the cost of damage and it is not covered by the financial security scheme; and where the operator is unknown. The possibility for the fund to be involved in preventive measures should also be explored.

### **State subsidiary liability**

19. There should be no State subsidiary liability to repair damage caused by the operator under the liability and compensation scheme.

### **Further work**

20. Draft guidelines should be prepared by the Secretariat by early 2007 by the latest, circulated well in advance to members of the working group and a second meeting of the working group should be convened in the spring of 2007. For the continuity of the work on this subject, the membership of the working group should preferably remain unchanged and other relevant stakeholders should be invited to attend the meeting.