





## ABBREVIATIONS OF CONVENTIONS, PROTOCOLS AND OTHER LEGAL INSTRUMENTS

Barcelona Convention ( <i>also Convention or amended Convention or revised Barcelona Convention etc.</i> )	Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona, 16 February 1976; amended, Barcelona, 10 June 1995)
Basel Protocol	Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 10 December 1999)
Brussels Supplementary Convention	Convention of the 31st January 1963 Supplementary to the Paris Convention of the 29th July 1960 on Third Party Liability in the Field of Nuclear Energy (Brussels, 31 January 1963)
Bunkers Convention	International Convention on Civil Liability for Bunker Oil Pollution Damage (London, 23 March 2001)
CLC '69	International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969)
CLC '92	International Convention on Civil Liability for Oil Pollution Damage, 1992 (Brussels, 29 November 1969; amended, London, 27 November 1992)
CRTD Convention	Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (Geneva, 10 October 1989)
Dumping Protocol	Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft (Barcelona, 16 February 1976; amended, Barcelona, 10 June 1995)
Environmental Liability Directive	Directive 2004/35/CE of the European Parliament and of the Council of the 21st April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage
Fund Convention '92	International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (Brussels, 18 December 1971; amended, London, 27 November 1992)
Hazardous Wastes Protocol	Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal (Izmir, 1 October 1996)

HNS Convention	International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (London, 3 May 1996)
Joint Protocol	Joint Protocol relating to the Application of the Vienna Convention and the Paris Convention (Vienna, 21 September 1988)
Kiev Protocol	Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters (Kiev, 21 March 2003)
LBS Protocol	Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities (Athens 17 May 1980; amended, Syracuse, 7 March 1996)
Lugano Convention	Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993)
Maritime Nuclear Material Convention	Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (Brussels, 17 December 1971)
Nuclear Ships Convention	Convention on the Liability of Operators of Nuclear Ships (Brussels, 25 May 1962)
Offshore Protocol	Protocol for the Protection of the Mediterranean Sea against Pollution resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil (Madrid, 14 October 1994)
OPOL Convention	Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources (London, 1 May 1977)
original Barcelona Convention ( <i>also original Convention</i> )	Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona, 16 February 1976)
Paris Convention	Convention on Third Party Liability in the Field of Nuclear Energy of the 29th July 1960 (Paris, 29 July 1960)
Prevention and Emergency Protocol	Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea (Valletta, 25 January 2002)

SPA and Biodiversity Protocol	Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (Barcelona, 10 June 1995)
Supplementary Fund Protocol	Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (London, 16 May 2003)
UNCLOS	United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)
Vienna Convention	Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 March 1963)
Vienna Supplementary Convention	Convention on Supplementary Compensation for Nuclear Damage (Vienna, 12 September 1997)



## 1. Introduction

This document aims to explain the Draft Guidelines on Liability and Compensation for Damage resulting from Pollution of the Marine Environment in the Mediterranean Sea Area (**hereinafter the “Draft Guidelines”**). This explanatory document begins by briefly setting out the background to the preparation of the Draft Guidelines (section 2). The articulation of underlying issues and the Draft Guidelines’ rationale is found in section 4, which follows a preliminary section providing guidance to Contracting Parties to the Convention on the necessary prior identification and compiling of the law existing within those Contracting Parties on the subject covered by the Draft Guidelines (section 3). The Explanatory Text of the Draft Guidelines was prepared by Mr Aref Fakhry, MAP consultant.

## Background

This section sets forth the background to the Draft Guidelines by first referring to the originating provision in the Convention and the mandate given to the MAP Secretariat on the basis of that provision. A recapitulation of the previous work on the topic within MAP ensues.

The development of the Draft Guidelines originates in article 16 of the Barcelona Convention, which provides as follows:

“The Contracting Parties undertake to cooperate in 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.”

In furtherance of the above provision and on the recommendation of the 14<sup>th</sup> meeting of the Contracting Parties held in Portoroz, Slovenia, from 8-11 November 2005,<sup>1</sup> the Open-Ended Working Group was set up by the MAP Secretariat. At its Loutraki meeting, the Open-Ended Working Group recommended proceeding cautiously through a step-by-step approach and requested the MAP Secretariat to prepare draft guidelines on the subject by early 2007 and to circulate the same to members of the Open-Ended Working Group ahead of a second meeting to be held in the spring of 2007. At that stage, the Open-Ended Working Group could decide to forward the draft guidelines for their discussion and possible adoption to the following meeting of the Contracting Parties to be held in late 2007. The Draft Guidelines were prepared by the MAP Secretariat accordingly.

It should be recalled that work on the subject of liability and compensation started in 1978 with the commissioning by the MAP Secretariat of a study under article 12 of the Convention for the Protection of the Mediterranean Sea against Pollution, done at Barcelona on 16 February 1976 (**hereinafter the “original Barcelona Convention” or the “original Convention”**),<sup>2</sup> which is the predecessor to article 16 of the revised Convention, quoted above.<sup>3</sup> Following the amendment to the Convention, the MAP Secretariat convened in Brijuni, Croatia, from 23-25 September 1997, a meeting of government-designated legal and technical experts for the purpose of preparing 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 (**hereinafter the “Brijuni meeting”**).<sup>4</sup>

More recently, a meeting of legal experts was organized by the MAP Secretariat in Athens, Greece, on 21 April 2003 (**hereinafter the “Athens meeting”**).<sup>5</sup> The matter was then brought in November 2003 to the 13<sup>th</sup> meeting of the Contracting Parties to the Convention, held in Catania, Italy from 11-14 November 2003, which requested the MAP Secretariat to prepare a feasibility study covering the legal, economic, financial and social aspects of a liability and compensation regime based on the organization of a participatory process with the Contracting Parties and socio-economic actors and with a view to avoiding overlapping with any other liability and compensation regime.<sup>6</sup> Following consideration of a draft version of the feasibility study at a meeting of legal experts held in Athens, Greece, on 17 June

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<sup>1</sup> UNEP(DEPI)/MED IG.16/13, annex III, section I.A.1.3, p. 2.

<sup>2</sup> That article reads:

“The Contracting Parties undertake to cooperate as soon as possible in the formulation and adoption of appropriate procedures for the determination of liability and compensation for damage resulting from the pollution of the marine environment deriving from violations of the provisions of this Convention and applicable Protocols.”

<sup>3</sup> The study was submitted in two parts as Documents UNEP/IG.14/INF.18 & UNEP/IG.23/INF.3.

<sup>4</sup> The report of that meeting is found in Document UNEP(OCA)/MED WG.117/4.

<sup>5</sup> The report of that meeting is found in Document UNEP(DEC)/MED WG.230/2.

<sup>6</sup> UNEP(DEC)/MED IG.15/11, annex III, p. 2.

2005,<sup>7</sup> the study was submitted in its final form to the 14<sup>th</sup> meeting of the Contracting Parties held later that year.<sup>8</sup> As stated above, one of the recommendations of the 14<sup>th</sup> meeting of Contracting Parties was the creation of the Open-Ended Working Group referred to above, which called for the preparation of draft guidelines.

Insofar as the contemplated outcome of the process at hand is the development of “appropriate rules and procedures,” quoting from the Convention’s article 16 (**hereinafter “the prospective rules and procedures”**), then this process necessarily involves *as a first step* a review of the existing rules and procedures operating in the law of each of the Contracting Parties on the subject of liability and compensation. Such a review will enable each of the Contracting Parties to determine what adjustments are necessary to its law if the desired “appropriate rules and procedures” are to be put in place. *The second step* in this process will consist in the articulation and explanation of those “appropriate rules and procedures” consistent with the consensus achieved at the first meeting of the Open-Ended Working Group as well as an identification and discussion of the legal avenues available for putting them in place in each of the Contracting Parties. These two steps will, as stated above, be reflected successively in sections 3 and 4 below.

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<sup>7</sup> The report of that meeting is found in Document UNEP(DEC)/MED WG.280/3.

<sup>8</sup> 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* (**hereinafter the “Feasibility Study”**) is found in Document UNEP(DEC)/MED WG.270/Inf.4, which is incorporated in Document UNEP(DEPI)/MED WG.285/Inf.4. References to the Feasibility Study should be understood as references to Document UNEP(DEC)/MED WG.270/Inf.4.

## 2. Review of Existing Law

Contracting Parties should first identify the law applying to liability and compensation in their respective legal systems by reviewing national, local, regional and international regimes and rules and procedures of relevance. It is important to determine what the law is before attempting to set up any new rules designed to achieve the purpose of article 16 of the Convention. Although the main rationale of the Draft Guidelines is that the prospective rules and procedures for the determination of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area will fill in certain areas which have so far been by and large outside any specific legislation, the amendment or replacement of certain existing rules may well be necessary for implementing those prospective rules and procedures. Necessary changes to existing rules may aim inter alia at clarifying the scope of application of the prospective rules and procedures or removing conflicting rules. The identification of the existing rules could be carried out along the following plan.<sup>9</sup>

### 2.1 General Liability

#### 2.1.1 Civil Liability

At the basis of any legal system lies the regime of general delictual (or tortious) liability.<sup>10</sup> A key question to be asked is therefore:

What is the source of general delictual (or tortious) liability?

The general rules of delictual (or tortious) liability constitute the backdrop to any specific rules to be designed for the purposes of article 16 of the Convention. It will be typically necessary for such specific rules to depart from the general law of delicts (or torts), which is traditionally ill-equipped to deal with instances of environmental damage and varies among the Contracting Parties.

Sub-questions which should be asked in this context include the following:

- Does the general national law on delicts (or torts) uphold strict or absolute liability in certain cases and, if so, what are those cases?
- What are the main features of the regime of general delictual (or tortious) liability as regards the following instances?
  - o Compensable damage: In particular, is pure environmental damage, e.g. loss of biodiversity, compensable under such regime and, if so, who can sue for it?
  - o Remedies: In the event of environmental harm, does the law permit the award of damages and under what conditions? Can the court or other competent authority impose operational prescriptions affecting the conduct of the person

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<sup>9</sup> Further guidance for determining the existing law may be sought in the Feasibility Study. See for instance section 7.1, p. 18 et seq., of the Feasibility Study, where a general exposition of the law is presented and structured along a sequence of originating sources of liability and compensation. The sequence starts with the more general delictual (or tortious) liability and moves through to the more specific environmental and ultimately marine liabilities. The plan suggested here follows the same sequence. The *Questionnaire on the State of the Art of Liability and Compensation Systems in Mediterranean Countries with Particular Reference to Environmental Damage in Marine and Coastal Areas*, which appears in section 12.3.1, p. 223 et seq., of the Feasibility Study, may also be helpful in determining the state of the law. This questionnaire was circulated to Contracting Parties by MAP in the process of the preparation of the Feasibility Study. Some Contracting Parties completed and returned the questionnaire: see Feasibility Study, sections 7.2.1 & 7.2.2, p. 71 et seq.

<sup>10</sup> Delictual or tortious liability refers to third-party civil liability. The more prevalent term used in the Mediterranean countries is delict, tort being the term used in the common law countries.

responsible for the harm in order to reduce environmental damage? Is there room to impose an order for the reinstatement of the environment?

### 2.1.2 Administrative Liability

In certain countries, the extra-contractual liability of public authorities is governed by a separate body of rules and principles. In France, for instance, administrative liability is based largely on case-law (not the Civil Code) and is triggered before a specialized type of jurisdictions, which are different from the general courts. Other national laws may treat the liability of State organs in the same manner as that of private parties, subject however to certain adjustments and special rules.

The main questions to be asked are therefore as follows:

- If any, what is the source of administrative extra-contractual liability?
- What are the main features of the regime of general delictual (or tortious) liability as regards the following instances?
  - o Compensable damage: In particular, is pure environmental damage, e.g. loss of biodiversity, compensable under such regime and, if so, who can sue for it?
  - o Remedies: In the event of environmental harm, does the law permit the award of damages and under what conditions? Can the court or other competent authority impose operational prescriptions affecting the conduct of the public authority responsible for the harm in order to reduce environmental damage? Is there room to impose an order for the reinstatement of the environment?

### 2.1.3 Marine Liability

In general, there is no specificity surrounding the principles and rules of *general* delictual liability as regards their applicability at sea or in coastal areas, saving however the rule of limitation of the shipowner's liability. In other words, general extra-contractual liability at sea is usually governed by the same principles and rules as those operating for land activities. However, in maritime law, a shipowner—and by extension other defined persons associated with the operation of a vessel—is typically entitled to have its extra-contractual liability limited to certain financial ceilings which are usually calculated as a function of the vessel's tonnage. This rule is now codified in a number of international conventions, the most recent being the *Convention on Limitation of Liability for Maritime Claims*, done at London on 19 November 1976, and amended by the Protocol done at London on 3 May 1996.<sup>11</sup>

Questions to be considered are:

- Is *general* extra-contractual liability in maritime waters and coastal areas subject to the same rules as those pertaining to land activities? What are the applicable sources?
- Is the liability of the shipowner generally limited? What is the source of the rule of limitation of liability? Who benefits from it?

## 2.2. Environmental Liability

As reflected in the Feasibility Study,<sup>12</sup> the subject of environmental liability is covered by a plethora of both global and regional legal instruments, besides being addressed by specific national environmental legislation.

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<sup>11</sup> The Convention entered into force on 1 December 1986. The 1996 Protocol entered into force on 13 May 2004.

<sup>12</sup> See section 7.1.2.2, p. 29 et seq.

### **2.2.1 Non Sector Specific**

Before considering the specific marine and/or coastal liability regimes, Contracting Parties should turn to environmental legislation and conventions operating in their law and setting forth rules of liability and compensation that permeate all the sectors of the environment, including marine and coastal areas. Reference is made to the Feasibility Study again where major global and regional instruments are described.<sup>13</sup> Contracting Parties could in this regard enumerate those regimes that are in force or will enter into force in their legal systems in the foreseeable future.

In addition to international instruments of relevance, Contracting Parties should pay particular regard to their own national laws and regulations which often include specific provisions on liability and compensation covering the environment. A typical example would be a national environmental protection act.

### **2.2.2 Marine and/or Coastal Sector Specific**

Having identified the legal provisions covering all environmental sectors, Contracting Parties may then look at the specifically marine and/or coastal regimes of liability and compensation of environmental significance. Again, as a guide, the Feasibility Study would be useful in this regard.<sup>14</sup>

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<sup>13</sup> See section 7.1.2.2.1, p. 29-41.

<sup>14</sup> See section 7.1.2.2.2, p. 41-51.

### 3. Section-by-Section Explanation of the Draft Guidelines

This part aims to provide a section-by-section explanation of the Draft Guidelines. In so doing, it identifies and discusses the principal issues underlying the achievement of the main goal behind the development of the Draft Guidelines, namely to assist Contracting Parties to the Convention in formulating and adopting the rules and procedures on liability and compensation called for under article 16. For ease of reference, the following subdivisions are those of the Draft Guidelines.

#### A. Purpose of the Guidelines

##### **Draft Guideline 1/**

These Guidelines implement article 16 of the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, done at Barcelona on 16 February 1976, as amended in Barcelona on 10 June 1995 (the "Barcelona Convention"), according to which Contracting Parties undertake to cooperate in 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.

It is recalled that article 16 of the Barcelona Convention does not mandate a particular vehicle for achieving its aim of formulating and adopting the prospective rules and procedures. Earlier work identified a number of options, including the development of a protocol or an annex to the Convention; however, the Open-Ended Working Group has singled out the soft law instrument option in the form of guidelines.

##### **Draft Guideline 2/**

These Guidelines also aim to the furtherance 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, as provided for in article 4, paragraph 3, sub-paragraph (b), of the Barcelona Convention. These Guidelines do not provide for any State subsidiary liability.

As far as State subsidiary liability is concerned, it is recalled that the Open-Ended Working Group's recommendation 19 reads:

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

##### **Draft Guideline 3/**

While not having a binding character per se, these Guidelines are intended to strengthen cooperation among the Contracting Parties for the development of a regime of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area and to facilitate the adoption by Contracting Parties of relevant legislation.

Draft Guideline 3 spells out what is implicit in Draft Guideline 1: that the purpose of the Draft Guidelines is to lead Contracting Parties in the formulation and adoption of the prospective rules and procedures. It is appropriate at this juncture to ponder at article 16 of the amended Barcelona Convention, which constitutes the originating provision, as well as the mandate given by the Open-Ended Working Group to the MAP Secretariat for the development of the Draft Guidelines. Article 16 does not say that the prospective rules and procedures need to

be the same across the Contracting Parties, but if anything is meant by the words “to cooperate in the formulation and adoption of... [such] rules and procedures,” then surely a joint undertaking to develop such rules is called for. This joint undertaking has already commenced and was summarized above.<sup>15</sup> The Draft Guidelines constitute a step in the process of cooperation envisaged by the said article 16.

Accordingly, the further follow-up to the work already undertaken under article 16 (and its predecessor, article 12 of the original Barcelona Convention) should as far as possible draw on the cooperation of the Contracting Parties rather than being a course of action left for each of them separately. This applies particularly to the follow-up to the Draft Guidelines which will hopefully materialize in the further elaboration and generalized adoption of the rules and procedures provided for under article 16. The Draft Guidelines have been drawn up in this spirit of cooperation and are addressed to all the Contracting Parties. As such, they take into consideration as far as possible the variety of national systems in place.

Turning to the subject of cooperation, article 16 of the Barcelona Convention talks of “rules and procedures.”<sup>16</sup> These words fundamentally colour the outcome expected of such cooperation. Rules and procedures are essentially a legal construct and the outcome of the cooperation should therefore lie on the legal plane. Article 16 envisages in other words the adoption of legal norms in the law of each of the Contracting Parties (the word “rules” would probably refer to binding legal norms). As such, the prospective rules and procedures could be contained in a national law or regulation, an international convention<sup>17</sup> or a combination of these. In the EU space, the prospective rules and procedures could also take the form of a Community directive or regulation, which have the force of law.<sup>18</sup>

While the purpose of the Draft Guidelines is, as stated above, to help Contracting Parties achieve such a legal construct, the Open-Ended Working Group did not specify the exact form in which the prospective rules and procedures should be couched into and thus left the door open for a number of options (the Draft Guidelines do not constitute per se the prospective rules and procedures). However, the recommendations adopted at that meeting do provide guidance on the constituting elements which, whatever option is chosen, should appear in the system of rules and procedures to be adopted. In other words, the content is specified, but not the exact nature of the regime.

The foregoing does not mean, however, that the implementation of article 16 of the Barcelona Convention requires necessarily the development of *new* rules and procedures in all areas covered by the said article. As further explained below,<sup>19</sup> various sets of rules and procedures are already in existence at the global, regional and national levels covering various aspects of liability and compensation for environmental damage. One of the premises adopted in the Draft Guidelines is that the prospective rules and procedures may very well consist of the combination of regimes of liability and compensation for environmental damage already in existence, extended across the Mediterranean region, together with a purpose-made regime covering those aspects of environmental damage provided for in article 16 of the Barcelona Convention and which are left outside the scope of application of those regimes.

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<sup>15</sup> See section 2 above.

<sup>16</sup> In comparison, article 12 of the original Convention provides for the adoption of “procedures” only.

<sup>17</sup> Where in the relevant Contracting Party, the provisions of international conventions are not executory as such and need to be formally incorporated into national law by way of legislation in order to acquire a binding legal effect, then the prospective rules and procedures will necessitate such implementing legislation.

<sup>18</sup> See generally article 14(1) of the Barcelona Convention which provides that “[t]he Contracting Parties shall adopt legislation implementing the Convention and the Protocols.”

<sup>19</sup> See Part B, *Scope of the Guidelines and Relationship with Other Regimes*, below.

Notwithstanding the ultimate configuration of the prospective rules and procedures, it is clear that, given the need for cooperation, some uniformity in these rules and procedures across the Contracting Parties is essential. At the Loutraki meeting, the view was expressed that:

“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.”<sup>20</sup>

As to the main features of the prospective rules and procedures, the Open-Ended Working Group called at the same meeting for the pursuit of “a high level of environmental protection.”<sup>21</sup> It was thus opined that the prospective Mediterranean regime should make a difference in the existing legal framework by way of providing an “added value” in relation to other regimes of liability and compensation; otherwise, the exercise would be futile.<sup>22</sup> As to how far the guidelines needed to go, the following excerpt from the Loutraki meeting report provides some guidance:

“It was understood that, in view of the adoption of [the] 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...”<sup>23</sup>

## **B. Scope of the Guidelines and Relationship with Other Regimes**

### **Draft Guideline 4/**

These Guidelines apply to the activities to which the Barcelona Convention or any of its Protocols applies.

The above Draft Guideline should be read in conjunction with Draft Guideline 5, which provides that the Draft Guidelines are subject to existing global and regional environmental liability and compensation regimes, as listed in Annex I thereto. As a consequence, activities which are covered under those regimes will lie outside the ambit of any new set of rules and procedures which may be set up further to the adoption of the Draft Guidelines. In other words, activities covered under such global and regional regimes will continue to be covered thereby, bearing in mind, however, the need to extend the application of those regimes across the Mediterranean Sea Area. The relationship between the prospective rules and procedures and existing regimes of liability and compensation is further discussed under Draft Guideline 5.

Reverting to Draft Guideline 4, it is recalled that the Open-Ended Working Group’s recommendation 10 read:

“The definition of ‘damage’ should... 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.”

The scope of application of the prospective rules and procedures evolved as it came to be envisaged by the successive working parties prior to the drafting of the Guidelines. For instance, whereas the majority view at the Brijuni meeting was that the prospective rules and

<sup>20</sup> UNEP(DEPI)/MED WG.285/4, par. 46, p. 12.

<sup>21</sup> UNEP(DEPI)/MED WG.285/4, annex III, par. 2(a), p. 1. See also par. 46, p. 12.

<sup>22</sup> Ibid. par. 46, p. 12.

<sup>23</sup> Ibid. par. 42, p. 11.

procedures should cover “dangerous activities,”<sup>24</sup> a different approach emerged from the Athens meeting. There, it was felt that work should proceed, at least as a further next step, on four areas, namely land-based activities, dumping, operation of offshore installations and damage to biodiversity from alien species.<sup>25</sup> On the other hand, parties consulted in the course of the preparation of the Feasibility Study opined overall in favour of a wide scope of application, including aquaculture and leisure activities at sea.<sup>26</sup>

At the Loutraki meeting, the Open-Ended Working Group took a more flexible approach, as reflected in recommendation 10 quoted above, and in the discussion on this item:

“The view was ... 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.”<sup>27</sup>

This broad approach calls however for clarification in a number of respects. First, from both the point of view of legal certainty and insurability, activities or substances covered must be sufficiently determinable in advance.<sup>28</sup> That is what is meant by the final part of recommendation 10 of the Open-Ended Working Group, quoted above.

Furthermore, the type of activities and substances that should be read into article 16 of the Barcelona Convention must be consistent with the wording of that provision, which talks of “damage resulting from pollution of the marine environment.” The term “pollution” is defined in article 2(a) of the Convention as follows:

“‘Pollution’ means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results, or is likely to result, in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of seawater and reduction of amenities.”

The inclusion of both substances and energy in the above definition allows for an expansive subject-matter which is not necessarily restricted to chemical pollution. For example, thermally or physically induced disturbances to the environment could be covered. The term “pollution” could also potentially extend to the harmful impacts on the living and distribution patterns of marine fauna and the peaceful enjoyment by coastal inhabitants and tourists of beach amenities due to intense water ripple activity as a result of speeding boats and large ships. Noise pollution could also be covered.

As for the view that activities and substances covered by the prospective rules and procedures should match those already regulated specifically via the Convention’s Protocols, such an approach has been disfavoured ever since the amendment of the original Barcelona Convention. It may be recalled in this respect that article 12 in the original Convention linked specifically the development of procedures for the determination of liability and compensation to damage resulting from pollution of the marine environment “from violations of the

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<sup>24</sup> UNEP(OCA)/MED WG.117/4, para. 31, p. 5; annex III, section II, p. 1-5.

<sup>25</sup> UNEP(DEC)/MED WG.230/2, paras. 29, 30 & 33, p. 4-5.

<sup>26</sup> UNEP(DEC)/MED WG.270/Inf.4, section 8.1, p. 191-194.

<sup>27</sup> UNEP(DEPI)/MED WG.285/4, para. 46, p. 12. See also paras. 54-57; Athens meeting report, UNEP(DEC)/MED WG.230/2, para. 33, p. 5.

<sup>28</sup> See Loutraki meeting report, UNEP(DEPI)/MED WG.285/4, para. 55, p. 14.

provisions of this Convention and applicable protocols.” That specific proviso was dropped in the amended Barcelona Convention.<sup>29</sup>

Some guidance is provided in the Open-Ended Working Group’s discussions regarding the implementation of recommendation 10 above:

“It was emphasized that the definition of damage in the rules and procedures on liability and compensation ... should specify ... 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...”<sup>30</sup>

Further,

“[i]t 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.”<sup>31</sup>

It is noteworthy that the scheme envisaged above—combining a list together with a general definition—has been adopted in Directive 2004/35/CE of the European Parliament and of the Council of the 21st April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage (**hereinafter the “Environmental Liability Directive”**). The latter covers activities already governed by specific preventive EC legislation and enumerated in annex III to the Directive<sup>32</sup> as well as any other non-enumerated occupational activities.<sup>33</sup> The list in annex III is quite extensive and incorporates lists of activities annexed to other Community legislative instruments. The Directive applies a different standard of liability to each of those two sets of activities: listed activities are subject to strict liability for any environmental damage caused thereby<sup>34</sup> whereas non-listed activities attract fault-based liability for damage caused to protected species and natural habitats only.<sup>35</sup>

As far as the identification of covered substances is concerned, these are defined side-by-side with activities. For example, the activity referred to in paragraph 1 of annex III to the Environmental Liability Directive reads:

“The operation of installations subject to permit in pursuance of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control. That means all activities listed in Annex I of Directive 96/61/EC with the exception of installations or parts of installations used for research, development and testing of new products and processes.”

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<sup>29</sup> Brijuni meeting report, UNEP(OCA)/MED WG.117/4, para. 19, p. 3, & para. 31, p. 5.

<sup>30</sup> UNEP(DEPI)/MED WG.285/4, para. 50, p. 12.

<sup>31</sup> Ibid. para. 55, p. 14.

<sup>32</sup> As per art. 3(1)(a).

<sup>33</sup> As per art. 3(1)(b). There are, however, certain exclusions relating to transport and nuclear energy where specific global regimes are applicable (art. 4(2) & (4)).

<sup>34</sup> Art. 3(1)(a).

<sup>35</sup> Art. 3(1)(b).

In turn, the activities listed in annex I to Directive 96/61/EC are for the most part defined hand-in-hand with the substances or matter they involve. This includes, for instance, the following activities:

- “1. Energy industries
  - 1.1. Combustion installations with a rated thermal input exceeding 50 MW
  - 1.2. Mineral oil and gas refineries
  - 1.3. Coke ovens
  - 1.4. Coal gasification and liquefaction plants
- ...
- 4. Chemical industry

Production within the meaning of the categories of activities contained in this section means the production on an industrial scale by chemical processing of substances or groups of substances listed in Sections 4.1 to 4.6

- 4.1. Chemical installations for the production of basic organic chemicals, such as:
  - (a) simple hydrocarbons (linear or cyclic, saturated or unsaturated, aliphatic or aromatic)
  - (b) oxygen-containing hydrocarbons such as alcohols, aldehydes, ketones, carboxylic acids, esters, acetates, ethers, peroxides, epoxy resins
  - (c) sulphurous hydrocarbons
  - (d) nitrogenous hydrocarbons such as amines, amides, nitrous compounds, nitro compounds or nitrate compounds, nitriles, cyanates, isocyanates
  - (e) phosphorus-containing hydrocarbons
  - (f) halogenic hydrocarbons
  - (g) organometallic compounds
  - (h) basic plastic materials (polymers synthetic fibres and cellulose-based fibres)
  - (i) synthetic rubbers
  - (j) dyes and pigments
  - (k) surface-active agents and surfactants...”

Compared with other general environmental liability instruments, the Directive appears to be quite innovative insofar as it extends to a wide spectrum of human activities and is not as restricted as for instance the *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment*, done at Lugano on 21 June 1993 (**hereinafter the “Lugano Convention”**) or the *Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters*, done at Kiev on 21 March 2003 (**hereinafter the “Kiev Protocol”**). The former applies only to dangerous activities.<sup>36</sup> These are defined broadly in article 2(1) as involving dangerous substances,<sup>37</sup> genetically modified organisms and micro-organisms posing certain risks.<sup>38</sup> The operation of waste installations and sites is also included in the definition.<sup>39</sup> “Dangerous substances” are defined in article 2(2) of the Lugano Convention both generally and via an enumerative list.

The Kiev Protocol covers similarly hazardous activities.<sup>40</sup> These are defined as activities in which one or more hazardous substances are present or may be present in quantities at or in

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<sup>36</sup> Arts. 6(1) & 7(1).

<sup>37</sup> Art. 2(1)(a).

<sup>38</sup> Art. 2(1)(b).

<sup>39</sup> Art. 2(1)(c) & (d). Carriage carried out otherwise than by pipeline (art. 4(1)) and damage caused by nuclear substances are excluded from the scope of application (art. 4(2)).

<sup>40</sup> Art. 2(2)(e) via art. 3(1).

excess of the threshold quantities listed in annex I to the Protocol.<sup>41</sup> The Protocol provides guidance on how to classify substances as hazardous for its purposes, but does not set forth any list.<sup>42</sup>

No matter how attractive, the Environmental Liability Directive is built into a framework of pre-existing and elaborate Community preventive legislation. The activities and substances covered by the Directive derive from legislation already adopted by the Community and purporting to regulate the same. At law, there is no principle mandating the pre-existence of preventive provisions for there to be liability and compensation; however, system coherence would usually require that preventive legislation is adopted first.

It is noteworthy that the Barcelona Convention Protocols set forth advanced regulatory regimes covering a wide spectrum of activities and substances. *Without restricting the scope of application of the prospective rules and procedures to what is covered in these Protocols, there appears to be a need to at least tie them together.*<sup>43</sup> *The starting point should be the scope of application of the Protocols, but the end-result could very well be wider, in accordance with recommendation 10 of the Open-Ended Working Group, and as close as possible to the regime set forth by the Environmental Liability Directive.*<sup>44</sup>

It is thus important to identify what is covered by the Protocols to the Convention:

- Dumping Protocol

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The *Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea*, done at Barcelona on 16 February 1976 and amended in Barcelona on 10 June 1995 (**hereinafter the "Dumping Protocol"**), regulates dumping of wastes or other matter from ships and aircraft, and incineration at sea inasmuch as these activities cause pollution to the marine environment.<sup>45</sup> "Dumping" is defined as:

- "(a) Any deliberate disposal at sea of wastes or other matter from ships or aircraft;
- (b) Any deliberate disposal at sea of ships or aircraft;
- (c) Any deliberate disposal or storage and burial of wastes or other matter on the seabed or in the marine subsoil from ships or aircraft[.]"<sup>46</sup>

but does not include:

- "(a) The disposal at sea of wastes or other matter incidental to, or derived from, the normal operations of vessels or aircraft and their equipment, other than wastes or

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<sup>41</sup> Art. 2(2)(f).

<sup>42</sup> Annex I, Notes on the Indicative Criteria for the Categories of Substances and Preparations Given in Part One.

<sup>43</sup> This idea (that activities and substances covered by the prospective rules and procedures should match those already regulated specifically via the Convention's Protocols) was evoked at the Loutraki meeting by way of "the integration of the rules and procedures into the existing Barcelona legal system:" UNEP(DEPI)/MED WG.285/4, para. 40, p. 10. See also Brijuni meeting report, UNEP(OCA)/MED WG.117/4, annex III, section II, para. 1, p. 1. It finds some comfort in article 4(1) of the Convention which provides:

"The Contracting Parties shall individually or jointly take all appropriate measures in accordance with the provisions of this Convention and those Protocols in force to which they are party to prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area and to protect and enhance the marine environment in that Area so as to contribute towards its sustainable development."

(Emphasis added.)

<sup>44</sup> See commentary under Draft Guideline 5 below.

<sup>45</sup> Art. 1.

<sup>46</sup> Art. 3(3).

other matter transported by or to vessels or aircraft, operating for the purpose of disposal of such matter, or derived from the treatment of such wastes or other matter on such vessels or aircraft;

(b) Placement of matter for a purpose other than the mere disposal thereof, provided that such placement is not contrary to the aims of this Protocol.”<sup>47</sup>

As stated above, the Protocol regulates the dumping of “wastes or other matter” which expression is defined as “material and substances of any kind, form or description.”<sup>48</sup> The basic regulatory regime is contained in articles 4, 5 and 6. As for “incineration at sea,” which is totally prohibited,<sup>49</sup> the term is defined as:

“the deliberate combustion of wastes or other matter in the maritime waters of the Mediterranean Sea, with the aim of thermal destruction and does not include activities incidental to the normal operations of ships or aircraft.”

- Prevention and Emergency Protocol

The *Protocol concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea*, done at Valletta on 25 January 2002 (**hereinafter the “Prevention and Emergency Protocol”**), covers pollution of the marine environment from ships.<sup>50</sup> Rather than regulating the subject-matter itself however, the Protocol refers to “international regulations to prevent, reduce and control pollution of the marine environment from ships.”<sup>51</sup> The Protocol also regulates preparedness for and response to pollution incidents<sup>52</sup> involving oil and/or hazardous and noxious substances. All those terms are defined as follows:

“‘Pollution incident’ means an occurrence or series of occurrences having the same origin, which results or may result in a discharge of oil and/or hazardous and noxious substances and which poses or may pose a threat to the marine environment, or to the coastline or related interests of one or more States, and which requires emergency action or other immediate response...”<sup>53</sup>

“‘Hazardous and noxious substances’ means any substance other than oil which, if introduced into the marine environment, is likely to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea...”<sup>54</sup>

As defined above, a pollution incident can occur at sea, on board a ship or an offshore installation, or on land, but within the geographical area of coverage of the Protocol.<sup>55</sup>

- LBS Protocol

The *Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities*, done at Athens on 17 May 1980, as amended in Syracuse on 7 March 1996 (**hereinafter the “LBS Protocol”**), deals with pollution caused by discharges from rivers, coastal establishments or outfalls, or emanating from

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<sup>47</sup> Art. 3(4).

<sup>48</sup> Art. 3(2).

<sup>49</sup> Art. 7.

<sup>50</sup> Arts. 3(1)(a) & 4(2).

<sup>51</sup> Art. 3(1)(a).

<sup>52</sup> Art. 3(1)(b) & passim.

<sup>53</sup> Art. 1(b).

<sup>54</sup> Art. 1(c).

<sup>55</sup> See art. 2.

any other land-based sources and activities within the territory of the Contracting Parties.<sup>56</sup> It applies:

- “(a) To discharges originating from land-based point and diffuse sources and activities within the territories of the Contracting Parties that may affect directly or indirectly the Mediterranean Sea Area. These discharges shall include those which reach the Mediterranean Area ... through coastal disposals, rivers, outfalls, canals, or other watercourses, including ground water flow, or through run-off and disposal under the seabed with access from land;
- (b) To inputs of polluting substances transported by the atmosphere to the Mediterranean Sea Area from land-based sources or activities within the territories of the Contracting Parties...”<sup>57</sup>

The LBS Protocol also applies to:

“... polluting discharges from fixed man-made offshore structures which are under the jurisdiction of a Party and which serve purposes other than exploration and exploitation of mineral resources of the continental shelf and the sea-bed and its subsoil.”<sup>58</sup>

The Protocol does not provide for a definition of “polluting substances” appearing in article 4(1)(b) or “polluting discharges” in article 4(2).

The lists of sectors of activity, of categories of substances and of characteristics of substances in the environment, which appear in annex I<sup>59</sup> to the Protocol, are not meant to define the scope of application of the Protocol in terms of activities or substances covered, but rather to help in the preparation of action plans, programmes and measures for the elimination of pollution from land-based sources and activities.<sup>60</sup> Provisions on the regulatory regime are found in articles 5, 6 and 7.

- SPA and Biodiversity Protocol

The *Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean*, done at Barcelona on 10 June 1995 (**hereinafter the “SPA and Biodiversity Protocol”**), commits Contracting Parties to take the necessary measures to protect areas of particular natural or cultural value and biodiversity.<sup>61</sup> This comprises regulating activities which are adverse to specially protected areas<sup>62</sup> and protected species of flora and fauna,<sup>63</sup> including the introduction of non-indigenous or genetically modified species to the wild.<sup>64</sup>

- Offshore Protocol

The *Protocol for the Protection of the Mediterranean Sea against Pollution resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil*, done at Madrid on 14 October 1994 (**hereinafter the “Offshore Protocol”**), tackles “activities concerning exploration and/or exploitation of the resources in the Protocol Area,”<sup>65</sup> which are defined as follows:

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<sup>56</sup> Art. 1.

<sup>57</sup> Art. 4(1).

<sup>58</sup> Art. 4(2).

<sup>59</sup> Respectively found in sections A, C and B.

<sup>60</sup> Annex I, opening paragraph, & art. 5(1).

<sup>61</sup> Art. 3 on general obligations.

<sup>62</sup> Arts. 6, 7(2)(e) & 8(3)(b).

<sup>63</sup> In particular, arts. 11(2), (3) & (5), & 12(2) & (3).

<sup>64</sup> Art. 13(1).

<sup>65</sup> Referred to as “activities.”

- “(i) Activities of scientific research concerning the resources of the seabed and its subsoil;
- (ii) Exploration activities:
  - Seismological activities; surveys of the seabed and its subsoil; sample taking;
  - Exploration drilling;
- (iii) Exploitation activities:
  - Establishment of an installation for the purpose of recovering resources, and activities connected therewith;
  - Development drilling;
  - Recovery, treatment and storage;
  - Transportation to shore by pipeline and loading of ships;
  - Maintenance, repair and other ancillary operations...”<sup>66</sup>

The risks tended by the Protocol include pollution resulting from the above activities<sup>67</sup> and involving wastes and harmful or noxious substances and materials.<sup>68</sup> Importantly, the removal of installations is also addressed.<sup>69</sup> Other provisions refer more generally to “the effects of the ... activities on the environment.”<sup>70</sup>

Reverting to pollution, the Protocol incorporates the definition of “pollution” found in article 2(a) of the original Barcelona Convention.<sup>71</sup> It defines “wastes” and “harmful and noxious substances and materials” as follows:

“‘Wastes’ means substances and materials of any kind, form or description resulting from activities covered by this Protocol which are disposed of or are intended for disposal or are required to be disposed of;”<sup>72</sup>

“‘Harmful or noxious substances and materials’ means substances and materials of any kind, form or description, which might cause pollution, if introduced into the Protocol Area...”<sup>73</sup>

Specific provisions are dedicated to certain types of polluting matter, namely oil and oily mixtures,<sup>74</sup> drilling fluids and cuttings,<sup>75</sup> sewage<sup>76</sup> and garbage.<sup>77</sup>

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<sup>66</sup> Art. 1(d).

<sup>67</sup> Generally art. 3.

<sup>68</sup> Arts. 4(2), 8, 13, 14, 15(2) & (4), 16, 17, 18 & 21 on wastes and harmful or noxious substances and materials generally. Art. 9 deals specifically with harmful or noxious substances and materials.

<sup>69</sup> Arts. 20 & 21, 2<sup>nd</sup> paragraph, (a)(ii).

<sup>70</sup> Arts. 5(1)(a) & 19(1). Art. 19(2) refers to “the impact of the activities on the environment.” The Protocol also concerns itself with the safety of installations (art. 15), emergency response (art. 16(1) & (3)) and contingency planning (art. 16(2) & (3)).

<sup>71</sup> Art. 1(e).

<sup>72</sup> Art. 1(i).

<sup>73</sup> Art. 1(j).

<sup>74</sup> Arts. 10(1) & (2) & 14(1)(b). “Oil” and “oily mixture” are defined in article 1(l) and (m) respectively as follows:

“‘Oil’ means petroleum in any form including crude oil, fuel oil, oily sludge, oil refuse and refined products and, without limiting the generality of the foregoing, includes the substances listed in the Appendix to this Protocol;”

“‘Oily mixture’ means a mixture with any oil content...”

<sup>75</sup> Art. 10(2) & (3).

<sup>76</sup> Art. 11. “Sewage” is defined in article 1(n) as follows:

“‘Sewage’ means:

- (i) Drainage and other wastes from any form of toilets, urinals and water-closet scuppers;
- (ii) Drainage from medical premises (dispensary, sick bay, etc.) via wash basins, wash tubs and scuppers located in such premises;

(iii) Other waste waters when mixed with the drainages defined above...”

<sup>77</sup> Art. 12. “Garbage” is defined at article 1(o) as follows:

- Hazardous Wastes Protocol

The *Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal*, done at Izmir on 1 October 1996 (**hereinafter the “Hazardous Wastes Protocol”**), addresses the transboundary movement of hazardous wastes.<sup>78</sup> It specifically deals with their export and transit to developing countries.<sup>79</sup> Disposal<sup>80</sup> and generation<sup>81</sup> of hazardous wastes are also covered.

The Protocol provides a definition of “hazardous wastes” as follows:<sup>82</sup>

- “(a) Wastes that belong to any category in Annex I to this Protocol;
- (b) Wastes that are not covered under paragraph (a) above but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the State of export, import or transit;
- (c) Wastes that possess any of the characteristics contained in Annex II to this Protocol;
- (d) Hazardous substances that have been banned or are expired, or whose registration has been cancelled or refused through government regulatory action in the country of manufacture or export for human health or environmental reasons, or have been voluntarily withdrawn or omitted from the government registration required for use in the country of manufacture or export.”<sup>83</sup>

For purposes of the Protocol, “hazardous wastes” do not include “[w]astes which derive from the normal operations of ships, the discharge of which is covered by another international instrument...”<sup>84</sup>

To recapitulate, the purpose of Draft Guideline 4 is to anchor the Draft Guidelines and through them the prospective rules and procedures to those activities that are regulated via the Convention and/or its Protocols. This ensures minimum coherence in the system. However, given the existence of various international regimes of liability and compensation in the field, certain exceptions are necessary, as explained further under Draft Guideline 5.

**Draft Guideline 5/**

These Guidelines are subject to existing global and regional environmental liability and compensation regimes, including Directive 2004/35/CE of the European Parliament and the Council of the European Union of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, which are either in force or may enter into force, as listed in Annex I to these Guidelines, bearing in mind the need of ensuring their effective implementation in the Mediterranean Sea Area.

The Open-Ended Working Group’s recommendation 3 reads:

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“‘Garbage’ means all kinds of food, domestic and operational waste generated during the normal operation of the installation and liable to be disposed of continuously or periodically, except those substances which are defined or listed elsewhere in this Protocol...”

<sup>78</sup> Arts. 5(1), (3) & (5), 6, 8, 9 & 12. “Transboundary movement” is defined in article 1(f).

<sup>79</sup> Art. 5(4). The Protocol also envisages banning of imports by any country: art. 5(3) in fine.

<sup>80</sup> Arts. 5(1) & 8. “Disposal” is defined in article 1(e).

<sup>81</sup> Arts. 5(2) & 8. This brings into play the regulation of “clean production methods,” referred to in article 8; the term is defined in article 1(i).

<sup>82</sup> Art. 1(d).

<sup>83</sup> Art. 3(1). A definition of “wastes” is to be found in article 1(c).

<sup>84</sup> Art. 3(2).

“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.”

As a starting point, it should be stated that a number of international regimes have already been developed in the area of liability and compensation for environmental damage. It would have been counter-productive for any prospective rules and procedures to overlap or conflict with regimes already in existence, especially where such regimes have proven to be successful. That is precisely why the Open-Ended Working Group, like all working parties before it on the subject, felt that it was paramount to tackle very carefully the relationship between the guidelines and those regimes.

Some guidance is provided by recommendation 3 above and the Barcelona Convention itself on the main features of that relationship. It is for instance noteworthy that article 3(1) of the Convention states that “[t]he Contracting Parties, when applying this Convention and its related Protocols, shall act in conformity with international law.” This provision is quite common in international treaties. In the present instance, that provision signifies that the application of the Convention should not result in the violation of existing rules of international law, such as regimes of liability and compensation which may already have been adopted internationally.

Turning to recommendation 3 adopted by the Open-Ended Working Group at its Loutraki meeting, it is stated there firstly that “[t]he guidelines should be compatible with existing liability and compensation regimes at the global and other levels.” Compatibility means harmony or lack of disagreement or contradiction.<sup>85</sup> As to what is covered by “regimes at... other levels,” it is submitted that, in light of the remaining parts of recommendation 3 and the discussions at the Loutraki meeting<sup>86</sup> as well as previously, the reference is probably to regional regimes, including those adopted at the European Community level, but not to national regimes.

Secondly, pursuant to the same recommendation, “[t]he 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.” This caveat is basically intended to avoid overlap, but it may give rise to two possible interpretations, as reflected in the following excerpt from the report of the Open-Ended Working Group’s Loutraki meeting:

“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.”<sup>87</sup>

It is submitted that the latter option is the more correct one and is accordingly espoused herein. Indeed, it would be amiss if the Draft Guidelines concerned themselves only with those areas of liability and compensation that have so far been left outside international

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<sup>85</sup> See Loutraki meeting report, UNEP(DEPI)/MED WG.285/4, para. 45, p. 12.

<sup>86</sup> See *ibid.* para. 41 in fine, p. 11, & para. 45, p. 12.

<sup>87</sup> *Ibid.* para. 44, p. 11.

regulation without trying to bring some harmony with regard to regimes which have already been developed. It follows that, "... with a view to ensuring their effective implementation in the Mediterranean Sea Area...",<sup>88</sup> the Draft Guidelines carry a pronouncement on what the course of action of Contracting Parties should be vis-à-vis existing international instruments relating to liability and compensation for environmental damage.<sup>89</sup>

That being said, tackling existing regimes is not an easy task.<sup>90</sup> For instance, some regimes may be in force in certain parts of the Mediterranean, but not in others. It may moreover be difficult to predict whether certain regimes will gather the required number of ratifications or accessions for them to enter into force. "European regimes," including regimes adopted by the European Community and those adopted under the auspices of the Council of Europe and UNECE, pose yet another type of difficulty given their geographical asymmetry with the MAP region as a whole. While it may be easier to integrate global regimes in the framework of rules and procedures to be developed pursuant to article 16 of the Barcelona Convention, "European regimes" call for a differentiated approach given such asymmetry. Furthermore, European Community regimes are to be treated separately from the others given their sui generis nature which sets them apart from international instruments.

Special mention should be made of the Environmental Liability Directive. The Directive constitutes a significant and positive step towards harmonization of environmental liability and compensation in the Mediterranean region and beyond. Participants at the Loutraki meeting considered that "[i]t was ... important for the rules and procedures to be in harmony with the EC Directive, which was already a compromise text."<sup>91</sup>

Based on the foregoing, *it is suggested that Contracting Parties deal with existing international and regional instruments relating to liability and compensation for environmental damage in the manner indicated below:*

- International instruments

- Vienna and Paris Conventions

*As applicable, Contracting Parties should consider becoming Parties to and implementing the Vienna Convention on Civil Liability for Nuclear Damage, done at Vienna on 21 March 1963 (hereinafter the "Vienna Convention")<sup>92</sup> and its amendments,<sup>93</sup> or the Convention on Third Party Liability in the Field of Nuclear Energy of the 29th July 1960, done at Paris on 29 July 1960 (hereinafter the "Paris Convention")<sup>94</sup> and its amendments<sup>95</sup> together with the Convention of the 31st*

<sup>88</sup> Quoting from the Open-Ended Working Group's recommendation 3, adopted at the Loutraki meeting. See also *ibid.* para. 47, p. 12.

<sup>89</sup> See also Barcelona Convention, art. 4(6).

<sup>90</sup> Loutraki meeting report, UNEP(DEPI)/MED WG.285/4, para. 40, p. 10-11.

<sup>91</sup> *Ibid.* para. 45, p. 12.

<sup>92</sup> This Convention is in force. Thirty-three States are party to the Convention, including, in the Mediterranean region, Bosnia & Herzegovina, Croatia, Egypt and Lebanon: IAEA, *Latest Status*, [www.iaea.org](http://www.iaea.org) under "Publications / Documents / IAEA Legal Conventions" (site last accessed on 6 February 2007).

<sup>93</sup> The Vienna Convention was amended by the Protocol done at Vienna on 12 September 1997. The Protocol is in force. Five States are party to the Protocol, including, in the Mediterranean region, Morocco: *ibid.* (site last accessed on 14 February 2007). See further, on the Vienna Convention, Feasibility Study, section 7.1.2.2.1.2.1.2, p. 38-40, & section 7.2.3.2.3.1, p. 168-178.

<sup>94</sup> This Convention is in force. Fifteen States are party to the Convention, including, in the Mediterranean region, France, Greece, Italy, Slovenia, Spain and Turkey: OECD Nuclear Energy Agency, *Status of Ratifications or Accessions*, [www.nea.fr](http://www.nea.fr) under "Work Areas / Nuclear Law" (site last accessed on 6 February 2007).

January 1963 Supplementary to the Paris Convention of the 29th July 1960 on Third Party Liability in the Field of Nuclear Energy, *done at Brussels on 31 January 1963 (hereinafter the “Brussels Supplementary Convention”)*<sup>96</sup> and its amendments.<sup>97</sup> *In either case, as applicable, Contracting Parties should also consider ratifying or acceding to, and implementing, in addition, the Joint Protocol relating to the Application of the Vienna Convention and the Paris Convention, done at Vienna on 21 September 1988 (hereinafter the “Joint Protocol”)*<sup>98</sup> and the Convention on Supplementary Compensation for Nuclear Damage, *done at Vienna on 12 September 1997 (hereinafter the “Vienna Supplementary Convention”)*.<sup>99</sup>

- Basel Protocol

The *Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal*, done at Basel on 10 December 1999 (**hereinafter the “Basel Protocol”**), appears to be very slowly securing the minimum number of ratifications and/or accessions necessary for its entry into force, but it is unclear whether the minimum will be reached soon. So far, there is only one Mediterranean Contracting State to the Protocol.<sup>100</sup> *As applicable, Contracting Parties should consider ratifying or acceding to, and implementing the Protocol.*

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<sup>95</sup> The Paris Convention was amended by the Additional Protocol done at Paris on 28 January 1964 and the Protocols done at Paris on 16 November 1982 and 12 February 2004. Only the first two Protocols are in force, having been ratified or acceded to, in the Mediterranean region, by France, Greece, Italy, Slovenia, Spain and Turkey: *ibid.* (site last accessed on 14 February 2007). See further, on the Paris Convention, Feasibility Study, section 7.1.2.2.1.2.1.1, p. 36-38, & section 7.2.3.1.4.1, p. 119-131.

<sup>96</sup> This Convention is in force. Twelve States are party to the Convention, including, in the Mediterranean region, France, Italy, Slovenia and Spain: OECD Nuclear Energy Agency, *Status of Ratifications or Accessions*, [www.nea.fr](http://www.nea.fr) under “Work Areas / Nuclear Law” (site last accessed on 6 February 2007).

<sup>97</sup> The Brussels Supplementary Convention was amended by the Additional Protocol done at Paris on 28 January 1964 and the Protocols done at Paris on 16 November 1982 and 12 February 2004. Only the first two Protocols are in force, having been ratified or acceded to, in the Mediterranean region, by France, Italy, Slovenia and Spain: *ibid.* (site last accessed on 14 February 2007). See further, on the Brussels Supplementary Convention, Feasibility Study, section 7.1.2.2.1.2.1.1, p. 36-38, & section 7.2.3.1.4.2, p. 131-144.

<sup>98</sup> The Joint Protocol is in force. Twenty-four States are party to the Protocol, including, in the Mediterranean region, Croatia, Egypt, Greece, Italy and Slovenia: IAEA, *Latest Status*, [www.iaea.org](http://www.iaea.org) under “Publications / Documents / IAEA Legal Conventions” (site last accessed on 6 February 2007). See further, on this Protocol, Feasibility Study, section 7.1.2.2.1.2.1.3, p. 40, & section 7.2.3.2.3.2, p. 178-179.

<sup>99</sup> This Convention, which is supplementary to both the Vienna and Paris Conventions, is not in force. Three States are party to the Convention, including, in the Mediterranean region, Morocco: *ibid.* (site last accessed on 6 February 2007). It is unclear whether the Convention will enter into force in the future. The Convention will enter into force upon ratification by at least five Contracting States with a minimum of 400,000 units of installed nuclear capacity (art. XX(1)). See further, on this Convention, Feasibility Study, section 7.1.2.2.1.2.1.2, p. 38-40, & section 7.2.3.2.3.3, p. 179-183.

<sup>100</sup> Overall, there are seven Contracting States to the Protocol, namely Botswana, the Democratic Republic of Congo, Ethiopia, Ghana, Liberia, Syria and Togo (United Nations Treaty Collection, *Status of Multilateral Treaties Deposited with the Secretary-General* (status as at 1 January 2007), <http://untreaty.un.org>). In order to enter into force, the Protocol requires a total 20 ratifications or accessions (art. 29). See further, on this Protocol, Feasibility Study, section 7.1.2.2.1.2.2.1, p. 40-41, & section 7.2.3.2.1.1, p. 145-148.

- Nuclear Ships Convention

The *Convention on the Liability of Operators of Nuclear Ships*, done at Brussels on 25 May 1962, has never entered into force. There are seven Contracting States to the Convention, including two Mediterranean States.<sup>101</sup> This Convention is probably out of date and is unlikely to ever enter into force. *No action is suggested to Contracting Parties in relation to this Convention.*

- Maritime Nuclear Material Convention

The *Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material*, done at Brussels on 17 December 1971 (**hereinafter the “Maritime Nuclear Material Convention”**), is in force and has been ratified by 17 States worldwide, including, in the Mediterranean region, France, Italy and Spain.<sup>102</sup> *As applicable, Contracting Parties should consider becoming Parties to and implementing the Convention.*

- CLC '92

The *International Convention on Civil Liability for Oil Pollution Damage, 1992*, done at Brussels, on 29 November 1969 and amended at London on 27 November 1992 (**hereinafter the “CLC '92”**), is in force and has been ratified by all Mediterranean States, except Bosnia & Herzegovina, Libya and Serbia & Montenegro.<sup>103</sup> *As applicable, Contracting Parties should consider becoming Parties to and implementing this Convention.*

- CLC '69

The *International Convention on Civil Liability for Oil Pollution Damage*, done at Brussels on 29 November 1969, is intended to be superseded by the CLC '92. *Contracting Parties which are still Parties to the CLC '69<sup>104</sup> should consider denouncing it.*

- Fund Convention '92

The *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992*, done at Brussels on 18 December 1971 and amended at London on 27 November 1992 (**hereinafter the “Fund Convention '92”**), is in force and has been ratified by all Mediterranean States,

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<sup>101</sup> Those States are Lebanon, Madagascar, The Netherlands, Portugal, Suriname, Syria and Zaire: CMI, *Yearbook 2005-2006*, p. 444, available on the Comité Maritime International's Web site at [www.comitemaritime.org](http://www.comitemaritime.org). The Convention is reproduced at (1963) 57 *AJIL* 268.

<sup>102</sup> IMO, *Status of Conventions - Summary as at 31 December 2006 & Status of Conventions by Country as at 31 December 2006*, [www.imo.org](http://www.imo.org) under “Conventions.” See further, on this Convention, Feasibility Study, section 7.1.2.2.2.2.1, p. 43-44, & section 7.2.3.2.2.6, p. 167-168.

<sup>103</sup> IMO, *Status of Conventions - Summary as at 31 December 2006 & Status of Conventions by Country as at 31 December 2006*, [www.imo.org](http://www.imo.org) under “Conventions.” See further, on this Convention, Feasibility Study, section 7.1.2.2.2.2.1, p. 44-47, & section 7.2.3.2.2.1, p. 148-151.

<sup>104</sup> This concerns Albania, Egypt, Lebanon and Syria which are Parties to both the CLC '69 and CLC '92 while Montenegro is party to the CLC '69 only: IMO, *Status of Conventions - Summary as at 31 December 2006 & Status of Conventions by Country as at 31 December 2006*, [www.imo.org](http://www.imo.org) under “Conventions.” See further, on the CLC '69, Feasibility Study, section 7.1.2.2.2.2.1, p. 44-45.

except Bosnia & Herzegovina, Egypt, Lebanon, Libya, Montenegro and Syria.<sup>105</sup> *As applicable, Contracting Parties should consider becoming Parties to and implementing the Convention.*

- *Supplementary Fund Protocol*

The *Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971*, done at London on 16 May 2003 (**hereinafter the “Supplementary Fund Protocol”**), is in force and has been ratified by 20 States worldwide, including, in the Mediterranean region, Croatia, France, Greece, Italy, Slovenia and Spain.<sup>106</sup> It may be expected that new and prospective Mediterranean EU Member States will also become Parties to the Protocol.<sup>107</sup> *As applicable, Contracting Parties should consider becoming Parties to and implementing this Protocol.*

- *Bunkers Convention*

The *International Convention on Civil Liability for Bunker Oil Pollution Damage*, done at London on 23 March 2001 (**hereinafter the “Bunkers Convention”**), is not in force. So far, it has been ratified or acceded to by 14 States, including Cyprus, Greece, Slovenia and Spain amongst Mediterranean States.<sup>108</sup> It is expected that other Mediterranean EU Member States will also ratify or accede to the Convention, which is thus likely to enter into force in the near future.<sup>109</sup> *As applicable, Contracting Parties should consider ratifying or acceding to, and implementing this Convention.*

- *HNS Convention*

The *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea*, done at London on 3 May 1996 (**hereinafter the “HNS Convention”**), is not in force. The number of Contracting States has not changed lately.<sup>110</sup> Amongst these are three Mediterranean States, namely Cyprus, Morocco and Slovenia. It is, however,

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<sup>105</sup> IMO, *Status of Conventions - Summary as at 31 December 2006 & Status of Conventions by Country as at 31 December 2006*, [www.imo.org](http://www.imo.org) under “Conventions.” See further, on this Convention, Feasibility Study, section 7.1.2.2.2.2.1, p. 44-47, & section 7.2.3.2.2.2, p. 151-155.

<sup>106</sup> IMO, *Status of Conventions - Summary as at 31 December 2006 & Status of Conventions by Country as at 31 December 2006*, [www.imo.org](http://www.imo.org) under “Conventions.” Ratification by EU Member States follows from the Council Decision of 2 March 2004 authorising the Member States to sign, ratify or accede to, in the interest of the European Community, the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, and authorising Austria and Luxembourg, in the interest of the European Community, to accede to the underlying instruments (2004/246/EC).

<sup>107</sup> See further, on this Protocol, Feasibility Study, section 7.1.2.2.2.2.1, p. 46-47, & section 7.2.3.2.2.3, p. 155-158.

<sup>108</sup> IMO, *Status of Conventions - Summary as at 31 December 2006 & Status of Conventions by Country as at 31 December 2006*, [www.imo.org](http://www.imo.org) under “Conventions.” Ratification by EU Member States follows from the Council Decision of 19 September 2002 authorising the Member States, in the interest of the Community, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention) (2002/762/EC).

<sup>109</sup> To enter into force, the Convention requires ratification and/or accession from 18 States, including five States each with ships whose combined gross tonnage is not less than 1 million (art. 14(1)). See further, on this Convention, Feasibility Study, section 7.1.2.2.2.2.2, p. 47-49, & section 7.2.3.2.2.4, p. 158-161.

<sup>110</sup> It remains as reported in the Feasibility Study at eight: IMO, *Status of Conventions - Summary as at 31 December 2006 & Status of Conventions by Country as at 31 December 2006*, [www.imo.org](http://www.imo.org) under “Conventions.”

expected that at least the bulk of EU Member States will at some point ratify en bloc the Convention and help bring it into force.<sup>111</sup> *As applicable, Contracting Parties should consider acceding to and implementing this Convention.*

- CRTD Convention

Although largely non maritime in focus, the *Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels*, done at Geneva on 10 October 1989 (**hereinafter the “CRTD Convention”**), is applicable in the coastal area and is thus relevant to article 16 of the Barcelona Convention. The Convention was developed under the auspices of UNECE, but any State can accede thereto.<sup>112</sup> The Convention, which is not in force, has so far been acceded to by one State, namely Liberia.<sup>113</sup> It will enter into force upon receiving five ratifications or accessions.<sup>114</sup> It is unclear whether that number will be reached in the future. *As applicable, Contracting Parties should consider acceding to and implementing this Convention.*

- Regional instruments

- Lugano Convention

The Lugano Convention has received no ratification or accession<sup>115</sup> and is unlikely to enter into force in the future.<sup>116</sup> *Accordingly, no action is suggested to Contracting Parties in relation to this Convention.*

- Kiev Protocol

The Kiev Protocol is not yet in force and it is unclear whether it will enter into force in the future. It was concluded under the auspices of UNECE. States from outside that organization can accede to the Protocol, subject to the approval of the Meeting of the Parties.<sup>117</sup> So far, the Protocol has secured only one ratification from a non-Mediterranean State.<sup>118</sup> *Contracting Parties should consider ratifying or acceding to, and implementing this Protocol. Contracting Parties which are Member States of UNECE should also consider facilitating accession to the Protocol by interested Contracting Parties which are not Member States of UNECE.*

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<sup>111</sup> See the Council Decision of 18 November 2002 authorising the Member States, in the interest of the Community, to ratify or accede to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the HNS Convention) (2002/971/EC). See further, on this Convention, Feasibility Study, section 7.1.2.2.2.3.1, p. 49-51, & section 7.2.3.2.5, p. 161-167.

<sup>112</sup> Art. 22(3).

<sup>113</sup> UNECE, *CRTD: Present Status*, [www.unece.org](http://www.unece.org) under “Transport Division” (site last accessed on 20 February 2007).

<sup>114</sup> Art. 23(1).

<sup>115</sup> Council of Europe Treaty Office, <http://conventions.coe.int> (site last accessed on 6 February 2007).

<sup>116</sup> As to the conditions for accession by non-member States of the Council of Europe to this Convention, see art. 33(1). See further, on this Convention, Feasibility Study, section 7.1.2.2.1.1.1, p. 30-32, & section 7.2.3.1.2.1, p. 111-115.

<sup>117</sup> Art. 28(3).

<sup>118</sup> United Nations Treaty Collection, *Status of Multilateral Treaties Deposited with the Secretary-General* (status as at 1 January 2007), <http://untreaty.un.org>. The Protocol requires a total 16 ratifications or accessions to enter into force. See further, on this Protocol, Feasibility Study, section 7.1.2.2.1.2, p. 42-43, & section 7.2.3.1.3.1, p. 115-119.

- OPOL Convention

The *Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources*, done at London on 1 May 1977, is unlikely to enter into force in the future. Accordingly, no action is suggested to Contracting Parties in relation to this Convention.

- Environmental Liability Directive

The deadline for implementing the Environmental Liability Directive by EU Member States was set 30 April 2007.<sup>119</sup> Given its exemplarity, non-EU Contracting Parties should consider adopting national legislation mirroring as far as possible the provisions of the Directive, as further suggested in the Draft Guidelines.<sup>120</sup>

To recapitulate, implementation of article 16 of the Barcelona Convention should logically give rise to a set of *ad hoc rules and procedures* operating hand-in-hand with, but without prejudice to existing international regimes of liability and compensation for environmental damage, which are either in force or expected to enter into force in the future. Those regimes are identified below. The activities they cover—and *which accordingly should lie outside the scope of the ad hoc regime*—are set out hereunder:

- Operation of nuclear installations, as per the Vienna Convention,<sup>121</sup> or of nuclear installations used for peaceful purposes, as per the Vienna Convention, as amended by the Protocol done at Vienna on 12 September 1997,<sup>122</sup> and the Vienna Supplementary Convention,<sup>123</sup> or operation of nuclear installations and carriage of nuclear substances from or to nuclear installations, as per the Paris Convention, as amended by the Additional Protocol done at Paris on 28 January 1964 and the Protocols done at Paris on 16 November 1982 and 12 February 2004,<sup>124</sup> and operation of and carriage of nuclear substances from or to nuclear installations used for peaceful purposes, as per the Brussels Supplementary Convention, as amended by the Additional Protocol done at Paris on 28 January 1964 and the Protocols done at Paris on 16 November 1982 and 12 February 2004;<sup>125</sup>
- Transboundary movement and disposal of hazardous wastes and other wastes, including illegal traffic, as per the Basel Protocol;<sup>126</sup>
- Maritime carriage of nuclear material, as per the Maritime Nuclear Material Convention;<sup>127</sup>
- Operation of a ship carrying oil in bulk as cargo, as per the CLC '92,<sup>128</sup> the Fund Convention '92,<sup>129</sup> and the Supplementary Fund Protocol;<sup>130</sup>

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<sup>119</sup> Art. 19(1).

<sup>120</sup> See further, on this Directive, Feasibility Study, section 7.1.2.2.1.1.2, p. 32-35, & section 7.2.3.1.1.1, p. 107-111.

<sup>121</sup> Art. II(1).

<sup>122</sup> Art. II(1).

<sup>123</sup> Art. II(2).

<sup>124</sup> Arts. 3(a), 1(a)(ii) & 4.

<sup>125</sup> Arts. 1, 2(a)(i) & 13. Activities covered by the Joint Protocol and the Vienna Supplementary Convention are the same as those covered under either the Vienna Convention or the Paris Convention, inter alia (art. II(2) Vienna Supplementary Convention).

<sup>126</sup> Arts. 3(1) & 2(1) & (2)(b).

<sup>127</sup> Preamble and art. 1.

<sup>128</sup> Arts. III(1) & I(1).

<sup>129</sup> Art. 2(1)(a).

<sup>130</sup> Art. 4(1).

- Carriage on board a ship of bunker oil for operation or propulsion purposes, as per the Bunkers Convention;<sup>131</sup>
- Operation of a ship carrying hazardous and noxious substances by sea, as per the HNS Convention.<sup>132</sup>

The following activities are for their part covered by some other existing international regimes whose entry into force is uncertain:

- Carriage of dangerous goods by road, rail or inland navigation vessel, as per the CRTD Convention;<sup>133</sup>
- Hazardous activities giving rise to industrial accidents with transboundary effects on transboundary waters, as per the Kiev Protocol.<sup>134</sup>

As per the recommendation of the Open-Ended Working Group, the list of the above international and regional instruments relating to liability and compensation for environmental damage is being formally annexed to these Draft Guidelines.<sup>135</sup>

#### **Draft Guideline 6/**

These Guidelines do not prejudice questions of State responsibility for internationally wrongful acts.

### **C. Geographical Scope**

#### **Draft Guideline 7/**

These Guidelines apply to the Mediterranean Sea Area as defined in article 1, paragraph 1, of the Barcelona Convention. They also apply to other areas, such as the seabed, the coastal area and the hydrologic basin, insofar as they are covered by the relevant Protocols to the Convention, in accordance with article 1, paragraph 3, of the Convention.

The Open-Ended Working Group's recommendation 4 reads:

“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.”

The geographical scope of application of the prospective rules and procedures has generated debate primarily in relation to the high seas and coastal areas. At the Loutraki meeting:

“It was understood that ... the guidelines would have an advanced content and would attempt to find solutions to the complex issues which remained to be resolved, such as the application of the regime in exclusive economic zones and the high seas...”<sup>136</sup>

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<sup>131</sup> Arts. 3(1) & 1(5).

<sup>132</sup> Art. 4(1).

<sup>133</sup> Art. 3(1).

<sup>134</sup> Arts. 3(1), 2(2)(e) & 2(2)(f).

<sup>135</sup> See section 5, below.

<sup>136</sup> Loutraki meeting report, UNEP(DEPI)/MED WG.285/4, para. 42, p. 11.

At the outset, it is noteworthy that, according to article 235(2) of the *United Nations Convention on the Law of the Sea*, done at Montego Bay on 10 December 1982 (**hereinafter “UNCLOS”**), States can legislate in relation to liability and compensation for damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction. Whether States can legislate with respect to foreign persons depends on the area considered.

Starting with the high seas, although the Barcelona Convention seems to unequivocally cover the high seas through its article 1(1),<sup>137</sup> implementation of the Draft Guidelines through national or European Community legislation would pose the question of the legality of the extension of such legislation to an area in relation to which article 89 of UNCLOS provides:

“No State may validly purport to subject any part of the high seas to its sovereignty.”

A similar difficulty arises with respect to the “Area,” defined in UNCLOS as the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.<sup>138</sup> It is recalled that the seabed and its subsoil are specifically included in the geographical coverage of the SPA and Biodiversity Protocol<sup>139</sup> and the Offshore Protocol.<sup>140</sup> Article 137(1) of UNCLOS proclaims that:

“No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources...”

By virtue of article 139(2) of UNCLOS, a State Party is liable for damage caused by any failure to comply with the provisions of the Convention regarding the “Area” by persons whom it has sponsored unless, pursuant to article 4(4) of annex III to the Convention, entitled “Basic Conditions of Prospecting, Exploration and Exploitation:”

“...that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.”

Furthermore, article 22, paragraph 1, of the same annex III provides:

“The contractor shall have responsibility or liability for any damage arising out of wrongful acts in the conduct of its operations, account being taken of contributory acts or omissions by the Authority.”

The International Seabed Authority, for its part, is made liable for its shortcomings by virtue of the same article 139(2) of UNCLOS as well as article 22, paragraph 2, of annex III to UNCLOS.

In summary therefore, under UNCLOS, as regards both the high seas and the “Area,” there does not seem to be power vested in States to individually regulate environmental liability and compensation in respect of activities carried out otherwise than by persons under their jurisdiction—and in the “Area,” by persons whom they have sponsored. Incidentally, it is true that the high seas may ultimately disappear in the Mediterranean Sea as a result of the

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<sup>137</sup> That article provides:

“For the purposes of this Convention, the Mediterranean Sea Area shall mean the maritime waters of the Mediterranean Sea proper...”

<sup>138</sup> Art. 1(1)(1).

<sup>139</sup> Art. 2(1).

<sup>140</sup> Art. 2(1).

proclamation of exclusive economic zones by the littoral States, so the issue may become moot at some point.

Moving to the exclusive economic zone, the coastal State has therein jurisdiction under article 56(1)(b)(iii) of UNCLOS with regard to the protection and preservation of the marine environment. Such jurisdiction probably extends to any activities performed or damage sustained therein.<sup>141</sup> This is a fortiori true in the territorial sea. As far as internal waters are concerned, these are subject to the full sovereignty of the coastal State.

Apart from the issue of the legality of the extension of national legislation purporting to implement the Draft Guidelines to the various maritime zones, there arises the question of the appropriateness of such extension. It should be borne in mind that the Barcelona Convention, along with the Dumping Protocol,<sup>142</sup> the Prevention and Emergency Protocol<sup>143</sup> and the Hazardous Wastes Protocol,<sup>144</sup> apply to the same area, that is the Mediterranean Sea Area as defined in article 1(1) of the Convention. Only the LBS Protocol,<sup>145</sup> the SPA and Biodiversity Protocol<sup>146</sup> and the Offshore Protocol<sup>147</sup> extend their application beyond the Mediterranean Sea Area, as permitted under article 1(3) of the Barcelona Convention. Furthermore, Contracting Parties are given the latitude to extend the application of the Barcelona Convention "to coastal areas as defined by each Contracting Party within its own territory."<sup>148</sup>

It is arguable whether it would be appropriate to extend the application of the prospective rules and procedures in relation to activities and substances regulated by the Barcelona Convention's Protocols to areas beyond those specified in the relevant Protocols. For instance, it would not make sense to provide for liability and compensation on the seabed in relation to the transboundary movement or disposal of hazardous wastes if the Hazardous Wastes Protocol applies only to the Mediterranean Sea Area (which does not include the seabed as such).<sup>149</sup> As stated further above,<sup>150</sup> there is a need to safeguard the coherence of the system of the Barcelona Convention and its Protocols in implementing the former's article 16. Such coherence would, it seems, require symmetry between the Protocols and the prospective rules and procedures with respect to their areas of geographical application.

Quite a distinct but important question is whether the geographical area of coverage should relate to the damage, the incident, the activity and/or the installation where such activity is being carried out. Article 16 of the Barcelona Convention refers to "damage resulting from pollution of the marine environment in the Mediterranean Sea Area," but it does not answer the question. Accordingly, the prospective rules and procedures should be harmonized on this point.

*Based on the foregoing, it is advisable that Contracting Parties seek to harmonize the geographical connecting points of the prospective rules and procedures by choosing from amongst the damage, the incident, the activity and the installation where such activity is being carried out. Notwithstanding the question marks raised in relation to their extension to the high seas and the "Area" in terms of UNCLOS, it is appropriate that the prospective rules*

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<sup>141</sup> For instance, the US Oil Pollution Act extends to the exclusive economic zone (U.S. Code, title 33, chapter 40, § 2702(a)).

<sup>142</sup> Art. 2.

<sup>143</sup> Art. 2.

<sup>144</sup> Arts. 5(1) & 2.

<sup>145</sup> Art. 3.

<sup>146</sup> Art. 2.

<sup>147</sup> Art. 2.

<sup>148</sup> Art. 1(2) Barcelona Convention.

<sup>149</sup> Art. 1(1) Barcelona Convention.

<sup>150</sup> See commentary under Draft Guideline 4.

*and procedures follow the same geographical area of application as that adopted in the Barcelona Convention and, as regards activities and substances regulated by any of the Convention's Protocols, the relevant area of coverage should be the same as that provided for in the respective Protocol.*

#### **D. Damage**

##### **Draft Guideline 8/**

The legislation of Contracting Parties should include provisions to compensate [both traditional damage and] environmental damage resulting from pollution of the marine environment.

It is recalled that the Open-Ended Working Group's recommendation 7 read:

"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."

At the outset, it should be stated that the expression "damage resulting from pollution of the marine environment" as it appears in article 16 of the Barcelona Convention can accommodate both environmental damage per se and traditional damage caused through pollution. There is a strong case to include both types of damage in the prospective rules and procedures. Indeed, apart from global regimes covering certain defined sectors and referred to above,<sup>151</sup> there are significant gaps in the international and regional regulatory framework on environmental liability and compensation.

##### **Draft Guideline 9/**

[For the purpose of these Guidelines, "traditional damage" means:

- (a) loss of life or personal injury;
- (b) loss of or damage to property other than property held by the person liable;
- (c) loss of income directly deriving from an impairment of a legally protected interest in any use of the marine environment for economic purposes, incurred as a result of impairment of the environment, taking into account savings and costs;
- (d) any loss or damage caused by preventive measures taken to avoid damage referred to under sub-paragraphs (a), (b) and (c).]

The above Draft Guideline is consistent with recent international environmental liability instruments,<sup>152</sup> which define compensable traditional damage as follows:

- loss of life or personal injury;<sup>153</sup>
- loss of or damage to property other than property held by the person liable;<sup>154</sup>
- loss of income directly deriving from an impairment of a legally protected interest in any use of the marine environment for economic purposes (*or* from an economic interest in any use of the marine environment), incurred as a result of impairment of the environment, taking into account savings and costs;<sup>155</sup>

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<sup>151</sup> See commentary under Draft Guideline 5 above.

<sup>152</sup> E.g. Kiev Protocol (art. 4(1)); Basel Protocol (arts. 4 & 5).

<sup>153</sup> As per Kiev Protocol, art. 2(2)(d)(i), & Basel Protocol, art. 2(2)(c)(i).

<sup>154</sup> As per Kiev Protocol, art. 2(2)(d)(ii) & Basel Protocol, art. 2(2)(c)(ii).

<sup>155</sup> As per Kiev Protocol, art. 2(2)(d)(iii). The alternative formulation in parentheses is as per the Basel Protocol, article 2(2)(c)(iii).

- any loss or damage caused by preventive measures (or by response measures).<sup>156</sup>

**Draft Guideline 10/**

For the purpose of these Guidelines, “environmental damage” means a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly.

It is recalled that the Open-Ended Working Group’s recommendation 6 read:

“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.”

The above Draft Guideline finds its origins in article 2(2) of the Environmental Liability Directive.

**Draft Guideline 11/**

Compensation for environmental damage should include, as the case may be:

- (a) costs of activities and studies to assess the damage;
- (b) costs of preventive measures including measures to prevent a threat of damage or an aggravation of damage;
- (c) costs of measures undertaken or to be undertaken to clean up, restore and reinstate the impaired environment;
- (d) diminution in value of natural resources pending restoration;
- (e) compensation by equivalent if the impaired environment cannot return to its previous condition.

It is recalled that the Open-Ended Working Group’s recommendation 8 read:

“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.”

However, as expressed during the discussions at the Loutraki meeting,

“there was ... 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.”<sup>157</sup>

Compensable environmental damage under recent international environmental liability instruments<sup>158</sup> consists of the following:

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<sup>156</sup> As per Basel Protocol, art. 2(2)(c)(v). The alternative formulation in parentheses is as per the Kiev Protocol, article 2(2)(d)(v).

<sup>157</sup> Loutraki meeting report, para. 53, p. ...

<sup>158</sup> E.g. Kiev Protocol (art. 4(1)); Basel Protocol (arts. 4 & 5).

- costs of preventive measures (or of response measures);<sup>159</sup>
- costs of remedial measures (or of measures of reinstatement of the impaired environment, limited to the costs of measures actually taken or to be undertaken).<sup>160</sup>

The Environmental Liability Directive defines for its part environmental damage as damage to protected species and natural habitats, water damage and land damage.<sup>161</sup> This circumscribed definition of damage may not necessarily be appropriate in the MAP context given the interests protected by the Barcelona Convention and its Protocols, and their geographical area of application.<sup>162</sup> Under the Convention, protected interests are encompassed under the term “marine environment.”<sup>163</sup> Although nowhere defined, the latter must surely include areas and species specifically protected under the SPA and Biodiversity Protocol. Furthermore, as explained above,<sup>164</sup> the Mediterranean Sea Area means the maritime waters of the Mediterranean Sea proper, but it also extends under a number of Protocols much further. In addition, Contracting Parties may extend the application of the Convention to coastal areas as defined by them.

The Loutraki meeting recognized the complexity of assessing the cost of the restoration of the environment.<sup>165</sup> The definition of “costs” in the Environmental Liability Directive together with the procedure for determining remedial measures under article 7 thereof provide an interesting model. Included in the cost of remedial actions are interim losses.<sup>166</sup>

#### **Draft Guideline 12/**

In assessing the extent of environmental damage, use should be made of all available sources of information on the previous condition of the environment, including the National Baseline Budgets of Pollution Emissions and Releases, developed in the context of the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities, done at Athens on 17 May 1980, as amended in Syracuse on 7 March 1996, and the Biodiversity Inventory carried out in the framework of the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean, done at Barcelona on 10 June 1995.

It is recalled that the Open-Ended Working Group’s recommendation 9 read:

“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.”

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<sup>159</sup> As per Environmental Liability Directive, art. 8(1) & (2); Basel Protocol, art. 2(2)(c)(v). “Preventive measures” are defined in the Environmental Liability Directive at article 2(10) and in the Basel Protocol at article 2(2)(e). The alternative terminology in parentheses is as per the Kiev Protocol, article 2(2)(d)(v), and is defined in article 2(2)(h).

<sup>160</sup> As per Environmental Liability Directive, art. 8(1) & (2). “Remedial measures” is defined in the Environmental Liability Directive at article 2(11). The alternative terminology in parentheses is as per the Kiev Protocol, article 2(2)(d)(iv), where it is defined at article 2(2)(g), and the Basel Protocol, article 2(2)(c)(iv), where it is defined at article 2(2)(d).

<sup>161</sup> Art. 2(1).

<sup>162</sup> See commentary under Draft Guideline 7 above.

<sup>163</sup> The expression appears passim in the Convention and Protocols.

<sup>164</sup> Ibid.

<sup>165</sup> UNEP(DEPI)/MED WG.285/4, para. 42, p. 11.

<sup>166</sup> Art. 2(11) & annex II, paras. 1(c), (d) & penultimate sub-paragraph, & para. 1.1.3.

**Draft Guideline 13/**

The measures referred to in paragraph 11(b) and (c) should be reasonable, that is appropriate, practicable, proportionate and based on the availability of objective criteria and information.

**Draft Guideline 14/**

When compensation is granted for damage referred to in paragraph 11(d) and (e), it should be earmarked for intervention in the environmental field in the Mediterranean Sea Area.

**E. Preventive and Remedial Measures**

**Draft Guideline 15/**

The Contracting Parties should require that the measures referred to in paragraph 11(b) and (c) are taken by the operator. If the operator fails to take such measures or cannot be identified or is not liable under these Guidelines, the Contracting Parties should take these measures themselves by charging the operator where appropriate.

As far as the issue raised in recommendation 10 of the Open-Ended Working Group is concerned, it is noteworthy that the Environmental Liability Directive does not provide for the specific financing of prevention and remediation costs where the operator is unidentified.<sup>167</sup> It is assumed that the competent authority taking prevention and remedial measures will bear the costs of these measures by itself. A possible solution to this problem could be found in the Mediterranean Compensation Fund.<sup>168</sup>

**F. Operator**

**Draft Guideline 16/**

Liability for damage covered by these Guidelines should be imposed on the operator.

**Draft Guideline 17/**

For the purpose of these Guidelines, “operator” means any natural or legal, whether private or public, person, who exercises the control over an activity covered by these Guidelines. “Operator” includes any person who does not hold an authorization, but is in de facto control of an activity covered by these Guidelines.

The Open-Ended Working Group’s recommendation 13 reads:

“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.”

The provision in that Protocol is as follows:

“‘Operator’ means:

- (i) Any natural or juridical person who is authorized by the Contracting Party exercising jurisdiction over the area where the activities are undertaken... in accordance with

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<sup>167</sup> Art. 8(2) in fine.

<sup>168</sup> See Part “M” below.

- this Protocol to carry out activities and/or who carries out such activities; or
- (ii) Any person who does not hold an authorization within the meaning of this Protocol, but is de facto in control of such activities...<sup>169</sup>

## **G. Apportionment**

### **Draft Guideline 18/**

These Guidelines apply to damage caused by pollution of a diffuse character provided that it is possible to establish a causal link between the damage and the activities of individual operators. In such a case, liability should be apportioned between these operators on the basis of an equitable assessment of their contribution to the damage.

It is recalled that the Open-Ended Working Group's recommendation 9 read:

"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."

## **H. Standard of Liability**

### **Draft Guideline 19/**

The basic standard of liability should be strict liability; however, in cases of damage resulting from activities not covered by any of the Protocols to the Convention, the Contracting Parties could apply fault-based liability.

The Open-Ended Working Group's Loutraki meeting recommendation 14 reads:

"Strict liability should be the basic standard of the liability and compensation scheme, with the possibility of combining it with fault-based liability."

A number of instruments of environmental liability, notably the Environmental Liability Directive, combine strict and fault-based liability. Consistent with the model provided by the Environmental Liability Directive, the prospective rules and procedures could for instance, on the one hand, provide for strict liability in relation to a list of activities and substances covered thereby which include *as a minimum* those covered by the Protocols to the Barcelona Convention. On the other hand, the prospective rules and procedures could provide for fault-based liability in relation to other, unlisted activities and substances.

### **Draft Guideline 20/**

Liability under these Guidelines should be dependent on the establishment of a causal link between the incident and the damage.

The above Draft Guideline corresponds to recommendation 14 in fine of the Open-Ended Working Group adopted at its Loutraki meeting.

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<sup>169</sup> Art. 1(g).

**Draft Guideline 21/**

For the purpose of these Guidelines, “incident” means any sudden occurrence or continuous occurrence or any series of occurrences having the same origin, which causes damage or creates a grave and imminent threat of causing damage.

The Open-Ended Working Group’s recommendation 12 reads:

“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.”

Except for the notion of “phenomena,” the recommended definition of “incident” above is similar to that found in the Lugano Convention.<sup>170</sup> It is noteworthy, however, that not all instruments of environmental liability employ “incident” as a trigger for liability and compensation. The Environmental Liability Directive refers simply to environmental damage “caused by” the subject activities.<sup>171</sup> The Kiev Protocol has two bases of liability, that is:

- strict liability for damage caused by an industrial accident,<sup>172</sup> itself defined as an event resulting from an uncontrolled development in the course of a hazardous activity;<sup>173</sup>
- fault-based liability.<sup>174</sup>

It is not clear what the term “phenomena” could add to the terms preceding it in recommendation 12 above. It is useful to revisit the passage in the Loutraki meeting report where the term came to surface:

“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.”<sup>175</sup>

*It would appear that there is no need to refer in the definition of “incident” to “phenomena,” which is a vague term and is already covered by way of the other three types of incidents contained in the recommendation.*

**I. Exemptions of Liability**

**Draft Guideline 22/**

The operator should not be liable for damage which he proves to have been caused by acts or events which are totally beyond its control, namely an act of war, hostilities, civil war, insurrection, an act of terrorism or a natural phenomenon of an exceptional and irresistible character.

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<sup>170</sup> Art. 2(11).

<sup>171</sup> Art. 3(1). However, the Directive refers to the “emission, event or incident, resulting in the damage” as a starting point of the limitation period (art. 17 in fine).

<sup>172</sup> Art. 4(1).

<sup>173</sup> Art. 2(2)(e).

<sup>174</sup> Art. 5.

<sup>175</sup> UNEP(DEPI)/MED WG.285/4, para. 59, p. 15.

The Open-Ended Working Group's recommendation 15 reads:

“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.”

It is noteworthy that article 8 of the Dumping Protocol refers to force majeure as an exempting cause. Article 14(1)(a) of the Offshore Protocol is to the same effect.

In addition to the exempting causes enumerated in the above Draft Guideline, an operator could also be exempted from liability under the prospective rules and procedures when he proves that the damage or imminent threat of damage:

- was caused by a third party and occurred despite the fact that appropriate safety measures were in place; or
- resulted from compliance with a compulsory order or instruction emanating from a public authority.

## **J. Limitation of Liability**

### **Draft Guideline 23/**

In cases where strict liability applies, financial limits of liability may be established on the basis of international treaties or relevant domestic legislation.

The Open-Ended Working Group's recommendation 16 reads in part:

“Strict liability should be combined with financial limits to be specified.”

Financial limits of liability are provided for in a number of existing instruments, including the Kiev and Basel Protocols, as well as the IMO Conventions.

Financial limits of liability should be provided for in relation to strict liability only, except in case of wilful or reckless fault.

### **Draft Guideline 24/**

The limits should be reviewed by the Contracting Parties on a regular basis taking into account, inter alia, the potential risks posed to the environment by the activities covered by these Guidelines.

## **K. Time Limits**

### **Draft Guideline 25/**

Time limits should be based on a two-tier system of a shorter period from the knowledge of the damage (three years) and a longer period from the date of the incident (thirty years).

The Open-Ended Working Group's recommendation 16 reads in part:

“Strict liability... 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.”

*Time limits should be based on a two-tier system, in accordance with the most relevant international and regional instruments of environmental liability and compensation*

**L. Financial and Security Scheme**

**Draft Guideline 26/**

Contracting Parties should take measures to encourage the development of insurance or other financial security instruments and markets, with the aim of enabling and requiring operators to use financial guarantees to cover their liability under these Guidelines.

The Open-Ended Working Group's recommendation 17 reads:

"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."

This is a complex matter which the Loutraki meeting wished for the guidelines to resolve.<sup>176</sup>

**M. [Mediterranean Compensation Fund**

**Draft Guideline 27/**

The Contracting Parties should explore the possibility of establishing a Mediterranean Compensation Fund to ensure compensation where the damage exceeds the operator's liability, where the operator is unknown, where the operator is incapable of meeting the cost of damage and is not covered by a financial security or where the State takes preventive measures in emergency situations and is not reimbursed for the cost thereof.

**Draft Guideline 28/**

The Contracting Parties may exclude the operation of the Fund in cases of diffuse pollution.

**Draft Guideline 29/**

The Fund should be financed as appropriate by regular contributions from both the Contracting Parties and operators.]

The Open-Ended Working Group's recommendation 18 reads:

"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."

This is a complex matter which the Loutraki meeting wished for the guidelines to resolve.<sup>177</sup> It is noteworthy that the Environmental Liability Directive, which is a compromise text, does not require the establishment of a guarantee fund.

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<sup>176</sup> Loutraki meeting report, UNEP(DEPI)/MED WG.285/4, para. 42.

<sup>177</sup> Loutraki meeting report, UNEP(DEPI)/MED WG.285/4, para. 42.

## **N. Access to Information**

### **Draft Guideline 30/**

Contracting Parties should ensure that their competent authorities give to the public the widest possible access to information as regards environmental damage or the threat thereof, as well measures taken to receive compensation for it. Replies to requests for information should be given within specific time limits.

## **O. Action for Compensation**

### **Draft Guideline 31/**

Contracting Parties should identify the public authorities, which are entitled to bring action in court for the compensation of environmental damage under these Guidelines.

### **Draft Guideline 32/**

Contracting Parties should define the appropriate legal means to involve the public, including non-governmental organizations active in the environmental field, in the procedures referred to in paragraph 31.

## **P. Future Steps**

### **Draft Guideline 33/**

Contracting Parties should assess the implementation of these Guidelines within two [four] years from their adoption by the meeting of the Contracting Parties. On the basis of the assessment, the meeting of the Contracting Parties could make a decision regarding the advisability of developing a legally binding instrument.

The Open-Ended Working Group's recommendation 2 called for:

"... 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."

## **Annex I**

List of instruments setting forth global and regional environmental liability and compensation regimes pursuant to Guideline 5:

- Convention on Third Party Liability in the Field of Nuclear Energy of the 29th July 1960 (Paris, 29 July 1960), amended by: Paris Additional Protocol (28 January 1964); Paris Protocol (16 November 1982); Paris Protocol (12 February 2004)
- Convention of the 31st January 1963 Supplementary to the Paris Convention of the 29th July 1960 on Third Party Liability in the Field of Nuclear Energy (Brussels, 31 January 1963), amended by: Paris Additional Protocol (28 January 1964); Paris Protocol (16 November 1982); Paris Protocol (12 February 2004)
- Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 March 1963), amended by: Vienna Protocol (12 September 1997)
- Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (Brussels, 17 December 1971)

- Joint Protocol relating to the Application of the Vienna Convention and the Paris Convention (Vienna, 21 September 1988)
- Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (Geneva, 10 October 1989)
- International Convention on Civil Liability for Oil Pollution Damage, 1992, (Brussels, 29 November 1969), amended by: London Protocol (27 November 1992)
- International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (Brussels, 18 December 1971), amended by: London Protocol (27 November 1992)
- International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (London, 3 May 1996)
- Convention on Supplementary Compensation for Nuclear Damage (Vienna, 12 September 1997)
- Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 10 December 1999)
- International Convention on Civil Liability for Bunker Oil Pollution Damage (London, 23 March 2001)
- Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters (Kiev, 21 March 2003)
- Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (London, 16 May 2003)
- Directive 2004/35/CE 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