

1. Introduction

The 15th Meeting of Contracting Parties, in 2007, approved Decision IG17/ 4 concerning the guidelines for the determination of liability and damage reparation resulting from pollution of the marine environment in the Mediterranean Sea area and tasked a Working Group of legal and technical experts to assist and evaluate the implementation of these Guidelines, and to submit proposals on the opportunity for additional measures. Following three meetings of this Working Group, a draft report form for the Guidelines was developed and approved (Decision IG. 19/3) by the 16th Meeting of the Contracting Parties in 2009.

In preparation for the Fourth Meeting of the Work Group, the Secretariat asked the Contracting Parties to fill out the attached form and to return it to the Secretariat by 10 September, 2011. As of 21 November 2011, the Secretariat has received responses from nine Contracting Parties (Algeria, Tunisia, Croatia, Bosnia-Herzegovina, Italy, Greece, Spain, Israel, and Monaco). The goal of the present note is to provide a summary, though necessarily an incomplete one, of the responses submitted by the Contracting Parties to the questions of this Guidelines Implementation Form.

2. Context

The Guidelines, legally non-binding in nature, constitute a first step in the implementation of article 16 of the Barcelona Convention, which requests that the Contracting Parties adopt appropriate rules and procedures in determining liability and damage reparations in cases of pollution of the marine environment in the Mediterranean sea zone.

The principles on which the Guidelines are based aim toward fostering as wide and balanced a protection of the environment as possible. Their aim is to reach a maximal level of coherence in the implementation of liability and reparation policies. Thus, these Guidelines aim for reparations not only for traditional damages (to goods and persons) but also damages to the environment. Likewise, they advocate for applying strict liability as the liability standard, its application being much more favourable to the victims of environmental damage. Likewise, certain Guidelines are quite innovative, in particular Guideline 10 on environmental damage reparations, which outlines, respectively: primary reparations (restoring the damaged environment to its initial state); compensatory reparations (covering the diminution in value of natural or biological resources pending restoration); and finally, compensation by equivalent if the impaired environment cannot return to its previous condition.

3. General comments on the state of implementation of the Guidelines

The responses to the Survey highlight important disparities in the implementation of the Guidelines in the national legislation of the Contracting Parties. One notes, for instance, that the Contracting Parties which are current or aspiring European Union members, unlike the others, have adopted into domestic law the prescriptions outlined in European directive 2004/ 35/ CE of 21 April 2004 regarding environmental liability as applied to the prevention and reparation of environmental damages. This is particularly clear in the area of damage reparation policies (compensation for diminution in value and compensation by equivalent).

A general evaluation of the responses to the application form reveals elements of both convergence and divergence in the application of these Guidelines:

3.1 Elements of convergence

- As far as the implementation of the "polluter pays" principle, 7 Contracting Parties indicate that this principle has been adopted into their national legal system, although 6 of these point out constraints on applying this principle due to difficulties in identifying polluters, as well as the lack of institutional or technical capacity.
- Another convergence is notable in the development of national legislation regulating environmental damages: 8 out of 9 Contracting Parties, 1 of which is still in progress, report the passing of laws applying specifically to the environment, while simultaneously pointing out the various constraints that can hinder their application, both in translating them into more specific legal measures, and in overcoming insufficient financial or institutional capacity.
- Also notable is a significant convergence in the accepted definition of the concept of environmental damage. Practically all the responses show that this definition is understood to include not only the cost of damage-evaluation activity and studies, but also and the cost of preventive and restorative measures. Several Contracting Parties (4), however, note that assessing environmental damage also brings up implementation difficulties, due to the lack of specialised environmental institutions, the insufficient reliability of assessment data, and the lack of qualified personnel. Likewise, identical problems are cited by these Contracting Parties in regards to accessing information sources that can document a prior, baseline environmental state against which to assess damages.
- Furthermore, a significant majority (5) of the Contracting Parties have adopted in their national legislation various cases of exoneration (force majeure, acts of war, hostilities, civil war, insurrections or acts of terrorism) as defined in Guideline 23, as well as the definition of an "Operator" given in Guideline 18.
- The principle of joint and several liability, outlined in Guideline 21, has also been adopted into national legislation by 5 Contracting Parties.
- A significant convergence is also noticeable as concerns the implementation of Guideline 30 regarding open public access to information regarding environmental damage or threats, as well as compensation measures. One notes that 6 out of 8 Contracting Parties not only fulfil this obligation, but have also taken measures to allow for making information available to parties that request it, regardless of whether they are directly affected by a loss event, particularly environmental protection NGOs.
- As far as preventive and corrective measures, the responses clearly demonstrate that the Parties have applied Guideline 6, which holds the Operator liable for taking preventive and corrective action on the one hand, while requesting the Contracting Parties take such action when the Operator cannot be identified.
- A broad convergence is, finally, notable among the Contracting Parties concerning the implementation of Guideline 32 which advocates for maximum openness in the options available to victims of environmental damage in bringing actions for compensation. Thus, a very broad majority of the Concerned Parties is in favour of the possibility for such actions to be brought both by the State, as well as by other public entities, non-governmental organisations, or private persons.

3.2 Elements of divergence

- Guideline 19, which establishes strict liability as the basic standard, is unevenly applied by the Contracting Parties. Only 3 Contracting Parties have introduced this liability standard into their domestic legislation.
- Likewise the definition of an "incident" as outlined in Guideline 22, has only been adopted by 2 parties. The same is the case for Guideline 21, which outlines the principle of apportioning liability among the responsible parties in the case of a multiple-party incident according to an equitable assessment of their respective contribution to the damage. Only 3 Contracting Parties have implemented this guideline.
- Likewise, only 3 Contracting Parties have adopted into domestic legislation provisions in line with Guideline 31, which allows NGOs or natural persons to bring legal action or to intervene in court cases.
- Significant differences are also notable in the participation of the Contracting Parties in treaties that relate to liability and compensation.
- A noticeable difference is observable in the availability of capacity building resources. For example, only 3 Contracting Parties report having institutes which are specialised in questions of liability and damage reparations due to pollution of the marine environment. Only 2 parties report having technical institutions or research laboratories responsible for determining environmental or traditional damage resulting from pollution of the marine environment.

3.3 Financial questions

Guideline 28 deals with the financial aspect of the Guidelines. It opens up the possibility, once 5 years have elapsed since the date of the adoption of the Guidelines, of instituting a mandatory insurance policy, as well as Guideline 29, on the possibility of creating a Mediterranean Compensation Fund to ensure compensation in cases where the Operator cannot be identified or is insolvent, or when the state has not taken preventive measures in emergency situations and is not reimbursed for the cost of these measures.

- The responses submitted by the Contracting Parties regarding this financial aspect fall into three categories:
- All the Contracting Parties' legislations stipulate that the Operator conducting activities falling under the scope of the Guidelines should participate in a financial guarantee mechanism to cover the Operator's liability.
- A consensus is emerging among all the Contracting Parties that appropriate financial security products are not currently available on the current insurance market, but that such products are being developed. A large majority (5 Contracting Parties) considers that to this end, it would be advisable to study the products available on the market, and create a proposal for an appropriate mandatory insurance policy.
- 5 Contracting Parties are in favour of starting a feasibility study on the opportunity of creating a Mediterranean Compensation Fund. However, a majority (5 Contracting Parties) considers that the obstacles to the creation of such a Fund, while mostly of a

financial nature, would also include legal and institutional challenges. For 4 Contracting Parties, this would mean addressing its compatibility with other international Funds already in effect, as well as specifying its operating policies. As far as the financing of such a Fund, the Contracting Parties (3 answers only pertain to this) consider that financial contributions to the fund ought to come from both member states and concerned private operators.

4. *Proposals for action*

- Ratification of international conventions pertaining to liability and reparations.

The survey responses demonstrate differences between the Contracting Parties in their participation in the various international treaties pertaining to liability and reparations. Given this observation, it would be useful to list the important treaties likely to facilitate the implementation of a consistent liability and reparation policy in the Mediterranean Sea zone, and on the basis of this research, to invite the Contracting Parties who remain outliers to ratify the relevant Treaties.

- Standardisation of definitions

A greater standardisation in the Guidelines' definitions should be systematically pursued. This standardisation should principally aim at central elements such as the definition of standard damage or environmental damage.

- Capacity building:

The Implementation Survey responses demonstrate the need to reinforce, on both the national and regional levels, the scientific knowledge and technical capacity needed by the Contracting Parties to evaluate the nature of environmental damage and to address it with relevant reparation actions.

A broad majority of the Contracting Parties is in favour of appropriate measures to facilitate the implementation of the Guidelines. Such measures principally include the strengthening of national institutions that can provide and evaluate technical data relevant to liability and reparations. They include, as well, the training of personnel conversant with the international legislation on the subject as well as the Guidelines relevant to cases involving liability and reparations. They also pertain to the organisation by the Secretariat of training workshops and conferences on a national, regional or sub-regional level. The goal of these events would be both to analyse the current legal framework pertaining to liability and reparations, and to propose, where appropriate, amendments to the legal framework to bring it more in line with the Guidelines, particularly as concerns standardising the basic definitions contained in the Guidelines.

- Measures to inform the public

A broad majority of the Contracting Parties emphasise the need to develop awareness among the general public on the content of the Guidelines, and in particular on the policies for legal reparation action. Along the same lines, several Contracting Parties are in favour of a campaign to educate the Operators about the Guidelines' content.

- Establishment of a mandatory insurance policy and Mediterranean Insurance Fund.

Several Contracting parties are concerned about the need for financial structures appropriate to the issues surrounding the fight against pollution, and adequate to dealing with the large costs it incurs. The Survey answers highlight two tracks for further study:.

On the one hand, several Contracting Parties are considering studies of the products available on the insurance market and the feasibility of a mandatory insurance policy. On the other, they propose evaluating the feasibility and appropriateness of a Mediterranean Compensation Fund. The Contracting Parties are well aware of the optional nature of such a mandatory insurance policy and Mediterranean Compensation Fund, and are cognizant that their eventual implementation would be contingent on the results of in-depth studies to identify the policies governing their operation.