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17 September 2007

ENGLISH

MEDITERRANEAN ACTION PLAN

Second meeting of the open-ended working group of Legal and Technical Experts to propose Appropriate Rules and Procedures for the Determination of Liability and Compensation for Damage Resulting from Pollution of the Marine Environment in the Mediterranean Sea Area

Athens, Greece, 28-29 June 2007

REPORT

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Introduction

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

2. Following its first meeting (Loutraki, Greece, 7-8 March 2007), the working group held a second meeting on 28 and 29 June 2007 at the Holiday Inn Hotel, Athens, Greece.

Participants

3. The meeting was attended by experts from Albania, Algeria, Bosnia and Herzegovina, Croatia, European Community, Egypt, France, Greece, Israel, Italy, Libyan Arab Jamahiriya, Malta, Morocco, Slovenia and Turkey, and an observer from Montenegro.

4. Representatives of the Regional Activity Centre for Specially Protected Areas (SPA/RAC) and MAREVIVO, representing MAP NGO partners, also attended the meeting.

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

Agenda item 1: Opening of the meeting

6. The meeting was opened by Mr Paul Mifsud, MAP Coordinator, at 9.30 a.m. on 28 June 2007. Mr Mifsud welcomed the participants and observed that the development of appropriate rules and procedures on liability and compensation was one of several important initiatives, including the development of a Protocol on Integrated Coastal Zone Management (ICZM) and a compliance mechanism, that were currently being taken to further the implementation of the Barcelona Convention and its Protocols. The fact that the issue of establishing a liability and compensation regime in the region had been under consideration since 1978 emphasized the delicacy of the subject, which had led the first meeting of the working group to agree that a step-by-step approach should be adopted and that the development of guidelines constituted a viable first step in the adoption of appropriate rules and procedures, in accordance with the recommendation of the Contracting Parties.

Agenda item 2: Election of officers

7. In accordance with Rule 20 of the "Rules of Procedure for the Meetings and Conferences of the Barcelona Convention and its Protocols", the meeting elected the following officers:

Chairperson:	Mr Didier Guiffault (France)
Vice-Chairpersons:	Mr Ahmed Elanwar (Egypt)
	Mr Farid Nezzar (Algeria)
	Mr Sevket Salman (Turkey)
Rapporteur:	Mr Joe Catania (Malta)

Agenda item 3: Adoption of the agenda and organization of work

8. The meeting adopted the provisional agenda (UNEP(DEPI)/MED WG.319/1) and the timetable of work contained in document UNEP(DEPI)/MED WG.319/2. The agenda of the meeting is attached as **Annex II** to this report.

Agenda item 4: Presentation of the Draft Guidelines on Liability and Compensation for Damage Resulting from Pollution of the Marine Environment in the Mediterranean Sea Area

9. Mr Aref Fakhry, MAP Consultant, began by observing that the main legal purpose of the present guidelines was to give effect to the obligation set out in Article 16 of the amended Barcelona Convention, which places a requirement on the Contracting Parties 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, as well as the related provisions of its Protocols, with particular reference to the Hazardous Wastes and the Offshore Protocols. He recalled that the 14th Meeting of the Contracting Parties had recommended that an open-ended working group be set up on the subject and that the working group had held its first meeting in March 2006 in Loutraki, Greece. One of the main recommendations of the first meeting of the working group had been that a step-by-step approach should be adopted, starting with the development of soft law in the form of guidelines, which would not be binding *per se*, but would set out a high level of environmental protection. The intention was that the guidelines would be adopted by the meeting of the Contracting Parties later in the year. Their implementation would subsequently be assessed to help decide what further action should be taken, which might include the adoption of an Annex to the Convention or another form of instrument. He added that liability and compensation for environmental damage was a complex field of law which was already covered by national regulations in a number of countries, as well as by certain regional and international treaties and European Community legislation. However, the existing legal instruments at the national, regional and international levels adopted different approaches, for example in relation to the issue of environmental damage and the relationship between traditional damage and environmental damage. Moreover, the relevant international instruments all covered specific sectors, but left gaps, which would have to be filled in accordance with the provisions of the Convention and its Protocols. The underlying objective was therefore to establish uniform provisions on liability and compensation, without prejudicing existing legal regimes.

10. During the discussion, the draft guidelines were broadly welcomed as reflecting very precisely the discussions in Loutraki and as a good basis for discussion and further improvement. It was recalled that the notes contained in document UNEP(DEPI)/MED WG.319/3 had been included for explanatory purposes and would be removed in subsequent versions of the guidelines, although in a few cases consideration might be given to transforming certain of the notes into clauses of the guidelines. It was also pointed out that, while the proposed guidelines constituted a soft law instrument, the intention was that they would be implemented through domestic law. While they offered flexibility in their implementation, binding effect, with the corresponding rights and obligations, could nevertheless be attributed to their national law. It was further noted that an assessment was envisaged of the implementation of the guidelines within a certain period of their adoption and that such an assessment would constitute an important stage in the step-by-step process in providing the basis for determining the subsequent steps.

11. Emphasis was placed on the importance of the issue covered by the guidelines, which were intended to strengthen the protection provided for the marine environment and coastal areas against the various types of pollution covered by the Convention and its Protocols. The guidelines would provide a basis for improved cooperation between countries and greater commitment to the acceptance and implementation of environmental safety rules. In this respect, the question was raised as to whether the guidelines were only intended to cover sources of pollution, or whether they would also encompass other forms of degradation, such as the over-exploitation of natural resources and other ecologically irrational practices. In this respect, it was explained that, under paragraph 4, the draft guidelines applied to the activities to which the Barcelona Convention or any of its Protocols

applied, which included such activities as dumping, the transboundary movements of hazardous wastes and exploration and exploitation of the sea bed.

12. The representative of Greece said that the outcome of the previous meeting of the working group, and the resulting guidelines, offered a good basis for further discussion in the framework of the step-by-step approach that had been recommended. The draft guidelines went into the subject in greater depth than a hard law instrument would have been able to do and could accordingly be considered to be advanced and in certain ways innovative. They clearly took into account the liability and compensation regimes that already existed, with particular reference to the Environmental Liability Directive (Directive 2004/35/EC), while going beyond the Directive in accepting traditional damage caused to persons and property. It had been agreed that the guidelines should not overlap or conflict with other relevant global or regional regimes that were in force or were expected to enter into force. In that respect, she said that the regime of mandatory insurance for ships in Greece was sufficiently regulated by the international conventions in force, in the view of the Greek Ministry of Mercantile Marine, and for that reason it should be clarified that the term “operator” did not apply to ships or include them.

13. Mr Evangelos Raftopoulos, MAP Legal Advisor, observed that there was no reference in the draft guidelines to the level of damage that was required to incur liability and that this issue would need to be addressed. He added that, as recommended by the Loutraki meeting, the purpose of formulating guidelines was that they should constitute a first step in the step-by-step process. As such, they could usefully go into certain issues in a certain amount of depth. As the guidelines would have no legally binding force, certain thorny and controversial issues on liability and compensation might be easier and more effectively discussed. In future, the guidelines might be used as part of a legally binding instrument. Nevertheless, Article 16 of the Convention would not be fully implemented solely by the adoption of guidelines. The Article required the adoption of rules and procedures. The success of the guidelines would therefore be judged, firstly, on the manner in which they were implemented by the countries and, secondly, on whether they were to be followed by binding measures. In response to a request for clarification, he added that, within the context of MAP, guidelines had been developed on several cases to provide guidance on the implementation of specific Protocols. In other cases, such as the development of the LBS Protocol, guidelines had been developed first and had then been used to contribute to the formulation of the Protocol. The present step-by-step approach was therefore one example of a normal process eventually leading to the development of a legal instrument.

14. In conclusion, Mr Mifsud expressed the belief that, in proposing a step-by-step process on this delicate subject, the Loutraki meeting had adopted a very prudent and realistic approach. If the present meeting so agreed, the proposed course of action would be for the guidelines to be submitted to the next meeting of the Contracting Parties for approval and adoption, which would leave the countries with several months to consult their legal and technical experts.

Agenda item 5: Review of the draft Guidelines on Liability and Compensation for Damage Resulting from Pollution of the Marine Environment in the Mediterranean Sea Area

A. Purpose of the guidelines

15. Mr Raftopoulos, introducing the draft guidelines prepared by the Secretariat on the basis of the discussions by the first meeting of the working group in Loutraki (document UNEP(DEPI)/MED WG.319/3), recalled that the objective of section A was to refer to the sources and function of the guidelines, which consisted in particular of giving effect to Article 16 of the Convention and furthering the ‘polluter pays’ principle, as set out in Article 4,

paragraph 3(b), of the Convention. He added that, while it was intended that there should be no subsidiary liability of the State, it was necessary to envisage cases in which the operator was not liable or the liability was limited, as well as those in which the operator was unknown or could not pay. One solution to such problems was the establishment of a Mediterranean Compensation Fund, to which reference was made later in the draft text. He also noted that the purpose of the guidelines was to strengthen cooperation between the Contracting Parties in this field and to facilitate the adoption of the relevant legislation.

16. Mr Tullio Scovazzi, MAP Consultant, University of Milano-Bicocca, Italy, added that the draft guidelines had been formulated in English and then translated into French. Some of the translations into French of the English terms were not necessarily direct equivalents. He therefore proposed that the working group should use the English version of the draft guidelines as its working document and that the French translation could then be reviewed by the Secretariat.

17. The discussion on this section focussed on the issue of State liability. While agreement was expressed with intention behind the draft text, it was pointed out that, although the text referred to State subsidiary liability, it made no mention of State primary liability. The intention was clearly that there should be no primary liability of the State, except where the State was itself the operator. The real problem arose where the polluter could not pay, was insolvent or could not be identified. The underlying concept was the 'polluter pays' principle, but it was necessary to envisage situations in which, for one reason or another, the polluter did not pay. In response, it was also noted that when this expression was read in conjunction with paragraph 15 on preventive and remedial measures, which established the requirement for the measures to be taken by the operator, and paragraph 17, which defined the 'operator', the meaning was clear subject, where appropriate, to clarifications in subsequent paragraphs.

B. Scope of the guidelines and relationship with other regimes

18. Mr Scovazzi observed that paragraph 4 set out the general principle with regard to the intended scope of the guidelines. It should be recalled that the paragraph referred both to those Protocols that were already in force and those that had not yet come into force, such as the Offshore Protocol and the Hazardous Wastes Protocol. He emphasized the importance of paragraph 5, which clarified the notion that the guidelines were not intended to prejudice any regime that was in force or might enter into force. Reference was therefore made to an Annex containing a list of instruments respecting global and regional environmental liability and compensation schemes, which had not unfortunately been attached to the present version of document UNEP(DEPI)/MED WG.319/3, but could be found in another document distributed to the participants. The purpose of paragraph 6 was to refer to customary international law on State responsibility for international wrongful acts.

19. During the discussion, several speakers noted that the list of international and regional instruments was merely indicative, as the present instruments might in future be supplemented by others, while those that were not yet in force could well come into force. While every effort should be made to ensure that the list was as complete as possible, there was always the possibility that there might be other instruments now or in the future. Moreover, the terminology "are without prejudice to" was to be preferred to "do not prejudice".

20. The representative of Morocco believed that the reference to Directive 2004/35/EC was out of place, as it only directly concerned certain countries in the region. Reference should only be made to international or regional instruments that could cover all the countries in the region.

21. Mr Scovazzi agreed that the guidelines should be without prejudice to binding international regimes. However, certain issues still needed to be determined in this respect. The first concerned the situation with regard to regional and international instruments that had not yet come into force. As the intention behind the guidelines was that they should be given effect by domestic legislation, it was clear that the future guidelines should not prejudice international treaties, but rather fill the gaps left by them. Moreover, it was also the intention that the guidelines could eventually form the basis of a binding instrument, such as a Protocol, which should also not run counter to any international treaties that were in force or might come into force. With regard to Directive 2004/35/EC, it was for the parties to decide whether or not the reference should be maintained in the body of the guidelines or in its annex.

22. The participants agreed that paragraph 4, being of a very general nature, should be placed in section A on the purpose of the guidelines. Different views were expressed concerning the placing of paragraphs 5 and 6, which could for example be moved from the body of the guidelines and placed in the text of the decision that would accompany the guidelines. After some discussion, it was agreed that paragraphs 5 and 6 would be placed in a separate section entitled “Relationship with other regimes”, the reference to Directive 2004/35/EC would be removed, the Annex would be referred to as being indicative and reference would be made to paragraph 7 concerning the definition of the Mediterranean Sea Area.

C. Geographical scope

23. Mr Raftopoulos explained that the geographical scope of the guidelines, as indicated in paragraph 7, consisted of the Mediterranean Sea Area, as defined in Article 1, paragraph 1, of the Convention, and including other areas to which the geographical scope of the Convention was extended by its various Protocols, such as the seabed, the coastal area and the hydrologic basin.

D. Damage

24. Mr Scovazzi explained that the general principle underlying the guidelines was that they should cover both traditional damage and environmental damage. Most States already had national provisions covering traditional damage. Indeed, the European Directive only covered environmental damage, as it assumed that traditional damage was already covered by national legislation. In the interests of being complete, the guidelines called upon the Contracting Parties to take measures to cover and defined both types of damage. However, he said that the main focus of the guidelines was the relatively new area of environmental damage. Compensation for environmental damage included the cost of assessing, preventing and cleaning up environmental damage, as indicated in points (a) to (c), the loss of the value of natural resources pending restoration (d) and compensation by equivalent if the impaired environment could not be returned to its previous condition (e). The definition of compensation for environmental damage was quite advanced and was inspired, among others, by the legislation of the United States and the European Community.

25. The experts generally agreed that it was important to refer to both traditional and environmental damage and that the definitions provided were clear and concise. Although so-called “traditional” damage was generally already covered by national legislation, the link was not always made in national legislation between the two types of damage, nor was there necessarily a clear distinction between them. It would therefore be beneficial for the guidelines to make the distinction between the two types of damage. However, as environmental damage was the main type of damage referred to by the instruments of the Barcelona system, the order of the paragraphs should be changed to ensure that the references to environmental damage came before those to traditional damage. Moreover,

greater attention should be paid in the text to environmental damage, which was a much newer concept and therefore required closer definition, particularly since the value of environmental damage was likely to vary widely from one area to another and was, at least in part, governed by the reliance of economic and social actors on the marine environment. It was accordingly agreed that the square brackets could be removed from paragraph 9 covering traditional damage. It was further agreed that the reference to "the marine environment" should be made more specific and therefore replaced by a reference to the geographical scope of the guidelines as defined in paragraph 4.

26. With regard to the elements covered by compensation for environmental damage, it was agreed that, although the term "natural resources" would normally be understood as meaning "natural and biological resources", the latter term should be used in the guidelines for the purposes of achieving greater clarity. The compensation should also include the costs of monitoring and control measures to ensure that the action taken was effective. It was also pointed out that, even though in emergency situations national authorities might be called upon to make provision for very costly urgent measures, these would clearly be covered by the reference in paragraph 11(b) to "measures to prevent a threat of damage or an aggravation of damage". The question was also raised as to whether the term "loss of income" in paragraph 10(c) included loss of profit, for example from a decline in tourism following an impairment of the environment. In this respect, the opinion was expressed that the definition appeared to be fairly exhaustive and should therefore also cover loss of profit.

27. In a discussion of the definition of environmental damage contained in paragraph 10, several speakers referred to the use of the term "measurable" to qualify an adverse change in a natural resource or an impairment of a natural resource service. It was not always easy to measure damage, and there was often no clear method for such measurement, particularly in the case of impairments to biodiversity. However, the term was used in the European Directive and in other UNEP guidelines and it was necessary to establish equitable criteria as a basis for quantifying damage with a view to being able to assess and decide upon the compensation to be paid. A proposal introducing the alternative concept of "significant damage" (instead of "measurable damage") so as to thwart claims for negligible damage did not gather sufficient support and was turned down. Following discussion and given the lingering doubts, it was decided to place the term "measurable" in square brackets.

E. Preventive and remedial measures

28. Mr Scovazzi indicated that the basic idea behind paragraph 15 was that the necessary measures should be taken by the operator. If for any reason the operator failed to take the required measures, the State would have to replace the operator, although it could then recover the costs from the operator. In certain cases, where measures were required urgently, the State was compelled to intervene even if the operator was not yet identified.

29. During the discussion on paragraph 15, it was pointed out that it was through their legislation that countries would have to require the operator to take the necessary measures. The wording of the paragraph should therefore refer to national legislation and to the need to "recover the costs" from the operator. The discussion also emphasized the importance of the principle set out in paragraph 15, which should be reflected in the use of a stronger form of language, such as "shall". However, after noting that the term "should" was the one normally used in non-binding instruments such as guidelines, it was agreed to retain the term "should".

F. Operator

30. Mr Scovazzi observed that paragraph 16 reaffirmed the underlying 'polluter pays' principle in accordance with which liability for damage had to be imposed upon the operator concerned. The definition of 'operator' contained in paragraph 17 made it clear that the term

included also operators who were not legally authorized to carry out the respective operation, but who were in *de facto* control of an activity covered by the guidelines. It would perhaps be preferable to replace the term “natural or legal person” by the expression “natural or juridical person”, which was used in the offshore Protocol.

31. During the discussion of these paragraphs, it was argued that the liability of the operator for the damage it caused was so axiomatic that the verb “will” commended itself instead of the weaker “should” at paragraph 16. MAP’s legal team cautioned against the use of “will” in a soft law instrument such as the current draft guidelines, maintaining that it was usually reserved to the drafting of binding legal provisions. However, after some debate, the change was accepted. Finally, it was evidently the *liable* operator who had to shoulder liability and the paragraph was amended accordingly to make the point clearer.

31bis. A further proposal was made that all the definitions in the guidelines might be placed in a section entitled ‘definitions’. However, it was finally agreed that the text would be clearer if paragraph 17 remained in its present position. It was also agreed that the wording of the paragraph should be simplified to refer to natural or juridical persons, whether private or public, who exercised “*de jure* or *de facto* control” over an activity covered by the guidelines. A cross-reference to paragraph 4, which provided for this matter, was inserted. It was further agreed that the section should be entitled “Channelling of liability”.

G. Apportionment

32. Mr Scovazzi said that paragraph 18 sought to cover cases in which damage was caused by diffuse sources of pollution. In such cases, there was a need for an equitable apportionment of liability between all the operators concerned. The idea was therefore that “joint and several liability” would be excluded, as individual operators should not be called upon to pay for the damage caused by other operators. Clearly, it was necessary to establish a causal link between the damage and the activities of the operators concerned. This meant that the State’s primary obligation in such cases was to identify the operators responsible for the damage. He nevertheless acknowledged that pollution from diffuse sources was very difficult to handle.

33. In the exchange of views on this section, it was felt that the two ideas of the establishment of liability in the case of pollution from diffuse sources and the apportionment of liability in such cases should be separated. The text establishing that the guidelines covered pollution of a diffuse character, provided that a causal link could be established between the damage and the activities of individual operators, should be moved to the section on “Damage”. The provision relating to the apportionment of liability on an equitable basis in the case of multiple-party causation could be moved to the section on “Standard of liability”. Moreover, in this context, it would be necessary to strengthen the term “should”, for example through the use of the word “will”. The opinion was also expressed that the concept of “joint and several liability”, such as in the case of the dissemination and cultivation of GMOs, should not necessarily be excluded from the liability and compensation regime.

H. Standard of liability

34. Mr Fakhry observed that it had been agreed that the draft guidelines would establish a high level of protection. Paragraph 19, based on the precedents established by many other regional and international instruments, therefore called for the basic standard to be strict liability, which was imposed irrespective of whether there was proof of negligence or fault, as it was only necessary to establish that damage had been caused and that there was a causal link between the activity and the damage. There were also a number of precedents for the reference in the guidelines to both strict liability and fault-based liability, such as the European Directive and the Basel Protocol. He noted that the European Directive established

strict liability as the general rule, but only where the specific activity was already regulated. In contrast, fault-based liability applied where the activity was not regulated. The main issue was therefore whether the guidelines should leave the possibility for the application of fault-based liability in certain clear-cut cases. He added that the definition of “incident” proposed in paragraph 21 was a fairly standard provision in such instruments.

35. There was general agreement that the basic standard of liability should be strict liability. However, certain speakers questioned the need to refer to the application of fault-based liability in cases of damage resulting from activities not covered by any of the Protocols to the Convention. Others expressed the view that the draft guidelines struck a good balance between the two forms of liability and that the reference to fault-based liability made the guidelines more complete. It was agreed that a definition of strict liability should be included, based on the language used in the ‘note’ to section H. It was further agreed that the term “should” would need to be strengthened in paragraph 19.

I. Exemptions of liability

36. Mr Scovazzi observed that most treaties contained a list of exceptions from liability in the case of events which could not be foreseen, such as acts of war, terrorism or what were often referred to as “acts of God”, namely natural phenomena of an exceptional and irresistible nature.

37. General agreement was expressed with the clause contained in paragraph 22, although it was pointed out that the expression “a natural phenomenon of an exceptional and irresistible character” could be replaced by the term “*force majeure*”.

J. Limitation of liability

38. Mr Fakhry recalled that a cap was almost always applied in cases where strict liability was imposed. At its meeting in Loutraki, the Working Group had called on the Secretariat to reflect on the issue and to endeavour to propose appropriate wording. The Secretariat’s proposal was set out in paragraphs 23 and 24. He added that it was important that any limitations that were established to liability should keep pace with both inflation and developments in the understanding of the environmental impact of specific activities. It was therefore necessary to review the caps placed on strict liability on a regular basis.

39. During the discussion on these paragraphs, it was noted that the term “may” in paragraph 23 meant that the Contracting Parties could establish limits to strict liability, although they were not necessarily encouraged to do so. The European Directive, which was the most recent legal instrument in the field, did not establish limits to liability. It was therefore important to ensure that any limits that were established did not serve to void the guidelines of their substance. It was also noted that, in practice, insurers tended to establish their own caps to their insurance products. It was further recalled that the provisions on the limitation of liability were closely related to those on a potential Mediterranean Compensation Fund, which would be used to cover amounts in excess of the cap. Reference was made in this respect to Staff Working Paper from the European Commission, in accordance with which the limitation of liability in amount was used in some liability and redress regimes based on strict liability to reduce the risk on the person upon whom liability had been channelled. In so doing, the potential effects of liability regimes on economic sectors could be limited and liability rules could become more easily acceptable. However, such limits had to take into consideration the nature of an activity and the possible magnitude of the damage that it might cause. Moreover, while caps protected operators of economic activities, the absence of financial limits might better ensure full restoration of the environment and compensation of the victims. It would therefore appear that the choice of whether or not to establish a cap and the level of any such cap would need to be made on a case-by-case

basis, balancing the need to protect the environment and the victims of the harmful effect, on the one hand, and the legal certainty necessary for economic operators, on the other.

40. It was also pointed out that, while in practice strict liability normally went hand-in-hand with a cap, it was not necessary to apply this mechanism in each case. Indeed, caps were important for many operators. It was, for example, a widely held view that shipping would not have developed as much as it had without a financial cap on liability. Nevertheless, it was important to keep such caps under review, as specific activities might, on the basis of advances in scientific knowledge, be found to be more dangerous to the environment than had previously been thought. It was therefore appropriate to retain the term “may” in paragraph 23, which would enable the countries to review the necessity for financial limitations on a case-by-case basis. However, the language in paragraph 24 should be strengthened. If countries decided to establish financial caps, they should be actively encouraged to re-evaluate such caps on a regular basis in order to assess whether the amount of the limits was still appropriate, taking into account in particular the risks posed to the environment by the activities concerned.

K. Time limits

41. Mr Scovazzi indicated that the purpose of paragraph 25 was to establish a statute of limitations or prescription concerning the time limits within which proceedings for compensation could be commenced from the occurrence of damage. Two limits were proposed: a shorter period starting from the knowledge of the damage, and a longer period running from the date of the incident. If claims were submitted after those periods, too much time would have elapsed and the claims would no longer be entertained. If further details were required in the text of the guidelines, the ‘note’ to section K could be upgraded to become part of the text of the guidelines.

42. It was agreed that the note should be included in the text of the guidelines with a view to specifying further the date from which the time limits would run. Moreover, it should be specified that the time limits applied to the commencement of proceedings for compensation. In addition, the shorter time limit should run not only from the knowledge of the damage but also, as an alternative, from the identification of the liable operator, whichever was later. With regard to the actual time limits proposed, it was noted that, while the 30 year limit was generally accepted in such instruments, various shorter limits could be specified. The limit of three years had been proposed taking into account the specific nature of the Mediterranean environment and its vulnerability. Following discussion, it was agreed that, while the time limits proposed (three years and 30 years) were acceptable, they should not be strict. It should therefore be specified that the time limits specified in the guidelines were only indicative.

L. Financial and security scheme

43. Mr Raftopoulos said that the availability of a market for insurance and other financial security instruments was a very important aspect of the guidelines, even though paragraph 26 was drafted in minimal terms. As drafted in the proposed version, the paragraph merely called upon the countries to develop the market for such insurance products. Most of the sectoral regional and international instruments establishing liability and compensation regimes tackled this aspect and established the requirement for operators to be covered by financial guarantees. However, general instruments, such as the European Directive and the present guidelines, faced the problem that there was at present no insurance available to cover general environmental liability.

44. During the exchange of views on this paragraph, it was recalled that the subject had given rise to a long discussion in Loutraki, where the Secretariat had been requested to

consult the insurance industry. Unfortunately, it had not been possible to identify representatives of the insurance industry who were prepared to address the working group on this type of insurance. Certain speakers were prepared to accept the proposed text without amendment in recognition of the fact that it was not possible in practice to impose a requirement for insurance coverage if no appropriate insurance products were available. Moreover, the acceptance of environmental liability made it more difficult for an insurance market to develop. The purpose of the paragraph was therefore to remind countries that they needed to take measures to encourage the development of appropriate insurance markets. One course of action would be to call on the countries to take measures to encourage the development of the necessary insurance products and, after a specific period of time, such as three or five years, to carry out an assessment to review the decision and determine whether it would be possible to envisage the establishment of a compulsory insurance regime. This was the approach adopted by the European Directive.

45. The representative of Greece wished it to be clarified that that the regime of mandatory insurance for ships was covered by the instruments in force. Moreover, direct reference to IMO instruments should be included in the text of the guidelines. Following discussion, it was agreed that the Annex to paragraph 5 was indicative and included the relevant IMO instruments. In addition, it was noted the explanation that the text of paragraph 26 was essentially taken from the European Directive, which took into account the concern that she had expressed.

M. Mediterranean Compensation Fund

46. Mr Scovazzi indicated that the question of whether or not to set up a Mediterranean Compensation Fund (MCF) to ensure the provision of compensation where the damage exceeded the operator's liability, or where the operator was unknown, incapable of meeting the cost of damage or not covered by financial security, was more of a political than a legal nature. The possibility of setting up an MCF had given rise to long discussions in previous meetings. The text of proposed paragraph 27 was therefore drafted in very prudent terms, merely calling on the Contracting Parties to explore the possibility of establishing an MCF. Moreover, an MCF could only in practice be set up by a legally binding instrument. If a provision were included in the guidelines, it could therefore only serve to prepare the way for the establishment of an MCF at a later stage.

47. During the discussion on this paragraph, it was pointed out that an appropriate balance was needed. The basic principle was that the polluter should pay for the damage caused. Nevertheless, there could well be circumstances in which other sources of funding needed to be found. Moreover, it should not be assumed that the community would always pay the bill in such circumstances. The issue of the financing of the MCF was key. However, it would not be in accordance with the step-by-step approach to attempt to set up such a fund at the present time. The appropriate time to examine the matter more closely would be during a second stage, when the implementation of the guidelines was being reviewed. With regard to the actual financing mechanism of an MCF, it could be envisaged that each Contracting Party might make its own arrangements for the compensation of damage within the overall framework of such a mechanism. However, it was also emphasized that the MCF was a key component in the successful implementation of a liability and compensation regime. The establishment of an MCF would demonstrate the commitment of the Mediterranean community to address the various forms of damage that might occur to the environment in the region. Serious thought was therefore required on the form to be taken by the MCF and the financing mechanisms, including the necessary balance to ensure that it fulfilled its purpose without undermining the 'polluter pays' principle. Finally, as paragraphs 28 and 29 addressed certain detailed features of the MCF, it was decided to remove them and to reflect paragraph 27, which addressed future action, in the decision adopting the guidelines.

N. Access to information

48. Mr Scovazzi indicated that proposed paragraph 30 reflected the provision contained in the amended Barcelona Convention on public participation. A reference had been added to the need to respond to requests for information within specific time limits.

49. It was recalled that the time limits for replying to requests for information specified by European Community legislation, in accordance with the Aarhus Convention, consisted of between 20 days and one month, and two months in certain cases. It was also pointed out that not all the countries in the region were parties to the Aarhus Convention or had transposed its provisions into their domestic legislation. Moreover, the Aarhus Convention was broader in scope than paragraph 30, as it also covered such access to justice. The question was raised as to whether the Aarhus Convention should be included in the Annex to the guidelines, but in view of the fact that it had not been ratified by all the countries concerned, it was decided that it could be used as a point of reference for this section of the guidelines, but would not be included in the Annex. Ultimately, since Article 15 of the Barcelona Convention was controlling on the subject, it should be referred to in the paragraph under consideration.

50. It was also recalled that public access to information did not include such information as industrial or military secrets. As such, the term “the widest possible access” should be moderated through the use of “wide access”.

O. Action for compensation

51. Mr Raftopoulos said that the final section of instruments on liability and compensation traditionally addressed the issue of action for compensation. Proposed paragraphs 31 and 32 were drafted in very general terms and called on the Contracting Parties to identify the public authorities that were entitled to bring action in court for the compensation of environmental damage and to define the appropriate legal means to involve the public, including NGOs, in such procedures. The public authorities concerned could be at the national, regional or local levels, while the NGOs active in the environmental field could also be established at various levels.

52. During the course of the discussion on these paragraphs, it was noted that, as currently drafted, they only referred to environmental damage and did not cover traditional damage. In addition, only public authorities were identified as having the right to go to court, and not individual victims, such as fishers or hotel owners. Paragraph 32 envisaged the involvement of the public, including NGOs active in the environmental field. A broader approach to public involvement might also envisage the right of NGOs to go to court and of individuals to intervene in such actions in justice. Several speakers expressed the belief that it was necessary to extend the draft provisions to make access to court by the public as wide as possible.

53. In response to a request for clarification, Mr Scovazzi said that there was no internationally accepted definition of the term ‘public authorities’, which would be determined in accordance with the legislation of the State concerned. The term was not limited to national level public authorities, nor would jurisdiction be limited to damage caused by nationals of the country in question. The competent jurisdiction would be determined by the place in which the damage occurred. He added that when individuals suffered traditional forms of damage, they already had the right to go to court under the national law. It would therefore seem useful to specify in what cases individuals or non-governmental organizations should be able to go to court in their individual capacity or to intervene in actions brought by other persons or bodies to obtain compensation for environmental damage.

53bis. Ultimately, it was agreed to address both environmental and traditional damage in this section of the draft guidelines by laying down the basic idea that access to justice should be made widely available to concerned parties in general terms.

P. Future steps

54. It was decided to delete this section of the draft guidelines and to transfer its contents to the draft decision referred to the meeting of the Contracting Parties.

Agenda item 6: Next steps

55. Following their adoption by the current meeting, the draft guidelines along with a draft decision on them would be sent to the forthcoming meeting of the Contracting Parties to be held in Almeria, Spain, later in the year.

56. The Secretariat circulated in this regard a draft decision which was then considered and amended by the meeting. More particularly, given that the draft guidelines were going to be annexed to the draft decision, the list of instruments of environmental liability would be converted to an appendix.

57. The highlights of the draft decision were, on the one hand, provision for the future reporting on the implementation of the draft guidelines and, on the other, the establishment of a working group of legal and technical experts to facilitate and assess the implementation of the Guidelines and make proposals regarding the advisability of additional action relating, *inter alia*, to compulsory insurance, a supplementary compensation fund and the development of a legally binding instrument for the consideration of the meeting of the Contracting Parties in 2013. The Secretariat would also be called upon to provide assistance to Mediterranean countries upon request in the implementation of the Guidelines, with particular reference to the development of domestic legislation and capacity building

Agenda item 7: Adoption of conclusions and recommendations

58. The representative of Israel informed the meeting that, after having consulted with her home authorities, she would have to defer approval of the draft for two weeks to allow for sufficient consideration back home. The Secretariat stated that Israel's position would be duly recorded in the meeting's report.

Agenda item 8: Any other business

59. There were no issues raised by the participants.

Agenda item 9: Closure of the meeting

60. At the closure of the meeting, the Chairperson thanked the participants for their hard work in this complex and difficult subject. He was joined in his thanks by Mr Mifsud.

61. After the customary exchanges of courtesy, the Chairperson declared the meeting closed at 6:00 p.m. on 29 June 2007.

ANNEX I

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ANNEX II

PROVISIONAL AGENDA

1. Opening of the meeting
2. Election of Officers
3. Adoption of the Provisional Agenda and organization of work
4. Presentation of the Draft Guidelines on Liability and Compensation in the Mediterranean Sea and its coastal area
5. Review of the draft Guidelines on Liability and Compensation for Damage Resulting from Pollution of the Marine Environment in the Mediterranean Sea
6. Next steps
7. Adoption of conclusions and recommendations
8. Any other business
9. Closure of the meeting

ANNEX III

Draft Decision on the adoption of the Guidelines for the Determination of Liability and Compensation for Damage resulting from Pollution of the Marine Environment in the Mediterranean Sea Area

The 15th Meeting of the Contracting Parties,

Recalling Articles 16 and 18 of the Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, as amended in 1995, hereinafter referred to as the "Barcelona Convention",

Recalling also their decisions adopted at their 13th Meeting held in Catania, Italy, and their 14th Meeting held in Portoroz, Slovenia, on the need to develop appropriate rules and procedures for the determination of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area,

Taking note of the work carried out in the framework of MAP in the field of liability and compensation since 1997, the conclusions and recommendations of the meeting of government-designated legal and technical experts held in Brijuni, Croatia, in 1997, and of the meeting of legal experts held in Athens, Greece, in 2003,

Noting with appreciation the work undertaken by the Open-Ended Working Group of Legal and Technical Experts to Propose Appropriate Rules and Procedures for the Determination of Liability and Compensation for Damage resulting from Pollution of the Marine Environment in the Mediterranean Sea Area and its recommendations at its first and second meetings, in Loutraki, Greece, 2006 and in Athens, Greece, 2007, respectively;

Decides to adopt the Guidelines for the Determination of Liability and Compensation for Damage resulting from Pollution of the Marine Environment in the Mediterranean Sea Area together with its Appendix, hereinafter referred to as the "Guidelines", which are contained in the Annex to this Decision,

Calls *on* the Contracting Parties to take the necessary measures, as appropriate, to implement the Guidelines and to report on their implementation in accordance with Article 26 of the Barcelona Convention to the 17th Meeting of the Contracting Parties in 2011,

Recommends that the Contracting Parties take into account 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 UNEP(DEC)/MED WG.270/Inf.4 and the Explanatory Note to the Draft Guidelines UNEP(DEPI)/MED WG.320/Inf.4 for the purpose of facilitating the implementation of the said Guidelines,

Invites the Contracting Parties to cooperate and provide support to facilitate the implementation of the Guidelines as appropriate,

Also decides to establish a working group of legal and technical experts to facilitate and assess the implementation of the Guidelines and make proposals regarding the advisability of additional action relating, *inter alia*, to compulsory insurance, a supplementary compensation fund and the development of a legally binding instrument for the consideration of the Meeting of the Contracting Parties in 2013, and

Requests the Secretariat to:

- prepare for adoption by the 16th Meeting of the Contracting Parties in 2009 a concise draft format for reporting on the implementation of the Guidelines;

- provide assistance to Mediterranean countries upon request to facilitate the implementation of the Guidelines, with particular reference to the development of domestic legislation and capacity building,

- prepare a draft assessment report on the implementation of the Guidelines for the consideration of the working group of legal and technical experts established for this purpose by the Meeting of the Contracting Parties.

DRAFT GUIDELINES ON LIABILITY AND COMPENSATION FOR DAMAGE RESULTING FROM POLLUTION OF THE MARINE ENVIRONMENT IN THE MEDITERRANEAN SEA AREA

A. Purpose of the Guidelines

1. These Guidelines aim at implementing Article 16 of the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, done in Barcelona on 16 February 1976, as amended in Barcelona on 10 June 1995 (the "Barcelona Convention"), according to which 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.

2. These Guidelines are also aimed at 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.

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 the Contracting Parties of relevant legislation.

4. These Guidelines apply to the activities to which the Barcelona Convention and any of its Protocols apply.

B. Relationship with Other Regimes

5. These Guidelines are without prejudice to existing global and regional environmental liability and compensation regimes, which are either in force or may enter into force, as indicatively listed in the Appendix to these Guidelines, bearing in mind the need to ensure their effective implementation in the Mediterranean Sea Area as defined in paragraph 7.

6. These Guidelines are without prejudice to the rules of international law on State responsibility for internationally wrongful acts.

C. Geographical Scope

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

D. Damage

8. The legislation of Contracting Parties should include provisions to compensate both environmental damage and traditional damage resulting from pollution of the marine environment in the Mediterranean Sea Area.

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

10. 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, including the cost of monitoring and control of the effectiveness of such measures;
(d) diminution in value of natural or biological resources pending restoration;
(e) compensation by equivalent if the impaired environment cannot return to its previous condition.

11. 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 in Athens on 17 May 1980, as amended in Syracuse on 7 March in 1996, and the Biodiversity Inventory carried out in the framework of the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean, done in Barcelona on 10 June 1995.

12. The measures referred to in paragraph 10(b) and (c) should be reasonable, that is appropriate, practicable, proportionate and based on the availability of objective criteria and information.

13. When compensation is granted for damage referred to in paragraph 10(d) and (e), it should be earmarked for intervention in the environmental field in the Mediterranean Sea Area.

14. 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).

15. These Guidelines also 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.

E. Preventive and Remedial Measures

16. The legislation of the Contracting Parties should require that the measures referred to in paragraph 10(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 the legislation implementing these Guidelines, the Contracting Parties should take these measures themselves and recover the costs from the operator where appropriate.

F. Channeling of Liability

17. Liability for damage covered by these Guidelines will be imposed on the liable operator.

18. For the purpose of these Guidelines, “operator” means any natural or juridical person, whether private or public, who exercises the *de jure* or *de facto* control over an activity covered by these Guidelines, as provided for in paragraph 4.

G. Standard of Liability

19. The basic standard of liability will be strict liability, that is liability dependent on the establishment of a causal link between the incident and the damage, without it being necessary to establish the fault or negligence of the operator.

20. In cases of damage resulting from activities not covered by any of the Protocols to the Barcelona Convention, the Contracting Parties may apply fault-based liability.

21. In the case of multiple-party causation, liability will be apportioned among the various operators on the basis of an equitable assessment of their contribution to the damage.

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

H. Exemptions of Liability

23. The operator should not be liable for damage which it proves to have been caused by acts or events which are totally beyond its control, such as *force majeure*, an act of war, hostilities, civil war, insurrection or an act of terrorism.

I. Limitation of Liability

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

25. The Contracting Parties are invited to re-evaluate on a regular basis the appropriate extent of the amount of such limits, taking into account, in particular, the potential risks posed to the environment by the activities covered by these Guidelines.

J. Time Limits

26. Time limits to commence proceedings for compensation should be based on a two-tier system of a shorter period from the knowledge of the damage or from the identification of the liable operator, whichever is later (e.g. three years), and a longer period from the date of the incident (e.g. thirty years).

27. Where the incident consists of a series of occurrences having the same origin, the time limits should run from the date of the last of such occurrences. Where the incident consists of a continuous occurrence, the time limits should run from the end of that continuous occurrence.

K. Financial and Security Scheme

28. The Contracting Parties, after a period of five years from the adoption of these Guidelines, may, on the basis of an assessment of the products available on the insurance market, envisage the establishment of a compulsory insurance regime.

L. Mediterranean Compensation Fund

29. 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.

M. Access to Information

30. Pursuant to Article 15 of the Barcelona Convention, the Contracting Parties should ensure that their competent authorities give to the public wide access to information as regards environmental damage or the threat thereof, as well as measures taken to receive compensation for it. Replies to requests for information should be given within specific time limits.

N. Action for Compensation

31. The legislation of the Contracting Parties should ensure that actions for compensation in respect of environmental damage are as widely accessible to the public as possible.

32. The legislation of Contracting Parties should also ensure that natural and juridical persons that are victims of traditional damage may bring actions for compensation in the widest manner possible.

Appendix

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

- Convention on Third Party Liability in the Field of Nuclear Energy, Paris, 29 July 1960, amended by Paris Additional Protocol of 28 January 1964; Paris Protocol of 16 November 1982; and Paris Protocol of 12 February 2004

- Convention Supplementary to the Paris Convention of the 29th July 1960 on Third Party Liability in the Field of Nuclear Energy, Brussels, 31 January 1963, as amended by Paris Additional Protocol of 28 January 1964; Paris Protocol of 16 November 1982; and Paris Protocol of 12 February 2004

- International Convention on Civil Liability for Oil Pollution Damage, London, 27 November 1992

- Convention on Civil Liability for Nuclear Damage, Vienna, 21 March 1963, amended by Vienna Protocol of 12 September 1997

- Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, Brussels, 17 December 1971

- International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, London, 27 November 1992

- Convention on Limitation of Liability for Maritime Claims, London, 19 November 1976, amended by London Protocol of 2 May 1996

- 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 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, 1992, 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