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MEDITERRANEAN ACTION PLAN

First meeting of Government-designated legal and technical experts on the preparation 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

Brijuni, Croatia, 23-25 September 1997

REPORT

FIRST MEETING OF GOVERNMENT-DESIGNATED LEGAL AND TECHNICAL EXPERTS ON THE PREPARATION 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

UNEP
Athens, 1997

Introduction

1. The Ninth Ordinary Meeting of the Contracting Parties (Barcelona, 5-8 June 1995) requested the MAP Secretariat "to convene a meeting of legal and technical experts to review the draft of appropriate procedure for the determination of liability and compensation for damages from the pollution of the marine environment" (Annex XIII, recommendation A (ii), to document UNEP(OCA)/MED IG.5/16).

2. Pursuant to this recommendation, the first Meeting of government-designated legal and technical experts was held at Brijuni, Croatia, from 23-25 September 1997 at the kind invitation of the Government of the Republic of Croatia.

Participants

3. Experts from the following Contracting Parties attended the meeting: Albania, Bosnia and Herzegovina, Croatia, Egypt, European Community, France, Greece, Israel, Italy, Lebanon, Monaco, Slovenia, Spain, Syrian Arab Republic, Tunisia and Turkey.

4. The UNEP/IMO Regional Marine Pollution Emergency Response Centre for the Mediterranean (REMPEC) was also represented.

5. The list of participants is attached as Annex II to this report.

Agenda item 1. Opening of the Meeting

6. On behalf of Ms Elizabeth Dowdeswell, Executive Director of the United Nations Environment Programme (UNEP), Mr Lucien Chabason, Coordinator of the Mediterranean Action Plan, welcomed the participants and declared the Meeting open. He warmly thanked the Croatian authorities for organizing the Meeting in the National Park of Brijuni and felt sure that the excellent working conditions provided would facilitate a successful outcome.

7. Mr Ante Kutle (Director, State Directorate for Environment of the Republic of Croatia) welcomed the participants on behalf of the host country and wished them every success in their work. Maritime transport was of great importance to Croatia's economy but sea-going vessels, particularly those carrying mineral oils, were potential polluters of the marine environment. Indeed, data indicated that 35 per cent of such pollution was due to hydrocarbons. There was intensive traffic of that kind in the Adriatic Sea, which was characterized by complex navigation in a narrow area, with a weak exchange of water. Accordingly, special attention was needed to protect the coast of Croatia, off which there were over 1,100 islands.

8. The Croatian coast had many ports, industrial and petrochemical facilities, oil refineries and terminals, shipyards and marinas, all representing a danger of pollution. In view of its special situation, the Republic of Croatia took a keen interest in the results of the present Meeting, which it was pleased to host, and had taken part in the development of the draft document. In that connection, it should be noted that Croatia had already carried out many activities for marine protection and had set up a special department for that purpose within the State Directorate for Environment.

9. Mr Darko Martincic, representative of the region of Istria, welcomed participants to the region. He said that sustainable development was a high priority in Istria and since 1993 there had been a regional sustainable development plan that provided the parameters for future

development and ensured that the environment's carrying capacity was not exceeded. Liability and compensation were important elements of environmental protection and he was convinced that the Meeting would contribute towards resolving the problem of making the polluter pay.

Agenda item 2. Rules of Procedure

10. The Meeting decided that the Rules of Procedure for Meetings and Conferences of the Contracting Parties to the Convention for the Protection of the Mediterranean Sea against Pollution and its Protocols would apply *mutatis mutandis* to its deliberations (document UNEP/IG.43/6, Annex XI).

Agenda item 3. Election of Officers

11. In accordance with Rule 20 of the Rules of Procedure and after informal consultations, the Meeting unanimously elected the following Bureau:

Chairperson:	Mr Tullio Scovazzi (Italy)
Vice-Chairpersons:	Ms Maja Markovcic Kostelac (Croatia) Mr Abdullatif Youssef (Syrian Arab Republic)
Rapporteur:	Mr Tarik Kupusovic (Bosnia and Herzegovina)

Agenda item 4. Adoption of the agenda and organization of work

12. The Meeting adopted the provisional agenda (UNEP(OCA)/MED WG.117/1) and approved the timetable of work set out in the Annex to the annotated agenda (UNEP(OCA)/MED WG.117/2). The agenda is attached as Annex I to this report.

Agenda item 5. Examination of the draft of an appropriate procedure for the determination of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area

13. The Coordinator introduced the Secretariat's working document on an appropriate procedure for the determination of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area (UNEP(OCA)/MED WG.117/3). He emphasized that the subject of a liability and compensation regime under the Barcelona Convention was an open one and the purpose of the Meeting was to explore the issue and to provide the Contracting Parties with guidance on implementation of Article 16 of the 1995 Barcelona Convention. Procedurally, the task would not be easy because the Contracting Parties had not indicated what the follow-up to the Meeting should be. The task was not an easy one from a substantive standpoint either because, although important work had already been carried out on the issue at the international level, in many instances no definitive conclusions had been reached. Furthermore, it was a sensitive matter from the jurisprudential point of view, and he drew attention to the relevant provisions to be found in existing instruments at both the international and regional levels.

14. It was expected that the outcome of the Meeting would be a number of proposals to be submitted to the Contracting Parties, based on the discussions held at the Meeting, so that they could take practical measures to implement Article 16.

15. Mr Evangelos Raftopoulos, MAP Legal Consultant, explained that the purpose of the document before the Meeting was to identify the basic issues that had to be discussed. A liability

and compensation regime within the Barcelona Convention system could be conceived as legislative implementation of the public interest purpose of the Convention and specifically of the public duties of the Contracting Parties as international trustees of the Mediterranean environment and natural resources. Article 16 of the Barcelona Convention, which provided in a framework form for the establishment of a Mediterranean liability regime, should be interpreted in its operational context as stated in the Convention and in the light of the sustainable development objective.

16. There were references to liability and compensation in general terms in several international treaties and there were also sectoral treaties that dealt with them in a more detailed manner. The 1993 Council of Europe Convention on Civil Liability (Lugano Convention) stood out as a good model of a comprehensive approach to liability for environmental damage. It was his view that the special nature of the Mediterranean made a comprehensive liability and compensation regime necessary and he described the broad outlines such a regime under the Barcelona Convention might take.

17. Lastly, he said that the regime could take the form of an additional Annex to the Convention or a new Protocol. The simplest procedure would be for the Contracting Parties to adopt an Annex to the Convention, thereby avoiding the need for the lengthy ratification process required for a new protocol.

18. The Chairperson invited the Meeting to present its initial reactions to the document that had just been introduced. Several participants congratulated the Secretariat on the quality of the text that had been prepared for the Meeting, which provided a good starting point for the discussion. They agreed that there was a need for a specific liability and compensation regime for the Mediterranean region. However, they cautioned that the present exercise, while valid, must of necessity be preliminary in nature, aimed at reaching a consensus on the basic elements to be included, with particular emphasis on effectiveness and taking the concept of sustainable development into account.

19. Some experts noted that Article 12 of the Barcelona Convention currently in force referred to liability and compensation for damage deriving from violations of the Convention, while the philosophy of the document before the Meeting was based on Article 16 of the revised Convention, not yet ratified, which provided for damage resulting from pollution of the marine environment in the Mediterranean Sea Area. In that context, replying to a question concerning ratifications of the revised Barcelona Convention, the Coordinator informed the participants that at the recent Meeting of National Focal Points, several representatives had stated that their competent authorities had initiated the ratification process. After some discussion, the Meeting agreed to base its discussion on Article 16 of the revised Convention.

20. The representative of REMPEC said that he had been requested by the Director of the Legal Division of IMO to seek clarification *inter alia* of the objectives of the Secretariat text, which made no explicit reference to existing conventions and regimes concerning liability and compensation for damage due to pollution by hydrocarbons and those relating to the maritime transport of hazardous and potentially dangerous substances, but referred to “dangerous activities” without making it clear whether pollution from ships was excluded or included maritime transport.

21. The need to avoid duplicating provisions contained in other conventions was strongly emphasized. It was the general view of the Meeting that the Mediterranean liability regime should not overlap or enter into competition with specific liability regimes established by treaties in force or expected to enter into force in the near future (for example, in the field of maritime transport), if, after more detailed examination, these regimes proved to be adequately adapted to the

objectives of the Barcelona Convention and its Protocols in relation to liability and compensation for damage. One expert emphasized, however, that to date none of the States signatory had ratified the Lugano Convention, in his view due to the difficulty of implementing it. In this connection, one expert drew attention to the situation of countries that were not signatories to such conventions and opined that it would be preferable to draft a completely new instrument specifically for the Mediterranean.

22. There was also widespread agreement that the geographical scope of any new instrument should be based on that in the revised text of the Barcelona Convention.

23. The Meeting then considered the various sections of document UNEP(OCA)/MED WG.117/3, attached to this report for easy reference as Annex III.

I. Form

24. In relation to the question of the form which a future Mediterranean liability regime might take, the general view among the experts was that a binding legal instrument was to be preferred to a soft law instrument. It was also the general view that a Protocol to the Convention was to be preferred to an Annex to the Convention. In this respect it was pointed out that in some instances a liability and compensation regime would require amendment of domestic legislation, which could only be done if a ratification process involving national parliaments was followed.

II. Damage

25. The Meeting considered the elements to be included in a definition of damage as set out in paragraph 2 of the document annexed.

26. The Meeting noted that there was a trend toward compensating not only damage to persons and property but also damage consisting in the impairment of the marine and coastal environment of the Mediterranean. A number of articles in existing agreements were cited in which compensation for impairment of the environment (so-called “environmental damage”) covered the cost of measures of reinstatement actually undertaken or to be undertaken. Reference was made in particular to Article 2, paragraph 7 c, of the Definitions in the Lugano Convention. Reinstatement by equivalent could be accepted only if the re-establishment of the *status quo ante* was not possible. The Meeting considered that a broad provision should be included in the Mediterranean liability régime under the Barcelona Convention, encompassing damage to persons and property, damage to the marine and coastal environment, and the cost of preventive measures.

27. The Meeting noted that in the case of damage consisting in impairment of the environment, the State could be considered as a trustee of the general interest for the protection of the Mediterranean marine environment. It was added that in certain cases the State might in fact be both the perpetrator and the victim of the environmental damage. Even in this case, it was the State’s duty to reinstate the environment as its trustee.

28. The Meeting discussed whether impairment of the marine environment also included the high seas, which might entail further consideration of how to identify the victim. It was also remarked that future declarations of exclusive economic zones in the Mediterranean, if any, would eliminate the high seas. In any event, it was pointed out that the geographical scope of the Barcelona Convention and its Protocols covered the whole of the Mediterranean, including the high seas. It was the general view that the Mediterranean liability regime should also cover the high seas and that the drafting of this regime should solve all the technical legal problems arising from its application to the high seas.

29. In relation to the concept of incidents, several experts considered that it would be more logical not to include continuous occurrence (from land-based sources and activities), while others pointed out that such an interpretation was fully in line with the Barcelona Convention. The majority trend was in favour of the inclusion of land-based pollution in the concept of incidents without confining it to accidents.

30. With regard to the definition of operators, the representative of REMPEC recalled that existing maritime conventions referred solely to the liability of the owner of the ship and not of the operator. In accordance with the majority view expressed on this item, the Meeting considered that all liability should accrue to the operator and that the definition contained in the Secretariat's working document should therefore be kept.

31. The Meeting then considered the question of whether the Mediterranean liability regime should be limited to professional dangerous activities. It was felt that there was a need to refer to the definition of pollution in Article 2 of the revised Barcelona Convention and to the concept of the preservation of biodiversity without restricting it to specially-protected areas and species. It was explained that the term "professional" had been taken from the Lugano Convention and was intended to cover industrial, commercial, agricultural and scientific activities. It was pointed out that leisure activities, for example, might also lead to pollution. One expert suggested that the word "professional" should be deleted. It was suggested that the Mediterranean liability regime should cover all acts or activities causing pollution as defined in Article 2 (a) of the revised Barcelona Convention. This would ensure a more effective protection of Mediterranean biodiversity. However, it was pointed out that the special regime of strict liability was usually linked to dangerous activities and could be over-extended. There was a majority view that the Mediterranean liability regime should be limited to dangerous activities that should be specifically listed. This should not prejudice any obligation, arising from domestic legislation, to compensate for acts or activities which caused pollution, as defined in Article 2 of the Barcelona Convention. One expert recalled that the Lugano Convention excluded nuclear substances from its scope of application in certain cases.

III. Liability standard

32. It was suggested that the scope of application of the Mediterranean liability regime should be identified before dealing with the liability standard since the insurance market would not be up to the task of covering too broad a spectrum of activities. Two experts thought that any list of activities had to be accompanied by lists of dangerous substances and a list of wastes, whereas another considered that a reference to the lists already annexed to the Protocols would be quite sufficient. The majority of experts adhered to the latter view.

33. There was a general view that the liability regime of the operator should be based on strict liability, thus endorsing the proposal in the Secretariat's working document.

IV. Exemptions under the liability regime

34. Several speakers expressed reservations concerning the grounds for exemption set forth in the Secretariat working document. The following views were expressed: an "act of terrorism" could be deleted in subparagraph (a), as it could be regarded as being covered by "acts by a third party" in subparagraph (c); "compliance with compulsory measures of a public authority" (subparagraph (e)), should be clarified; subparagraph (d) was not related to the exemptions. Lastly, another view was expressed that "an act of terrorism" in subparagraph (a) should be retained.

Compulsory financial and security scheme

35. Considering the special present conditions of the insurance market, one expert felt that it was unrealistic to examine the issue of a compulsory financial and security scheme before the scope of the draft instrument had been precisely defined. Another indicated that there were two basic options: one could either accept the cost of protecting the environment and encourage the insurance market to move with the times, or one could leave it to the market, which would have the effect of halting environmental protection in its tracks.

36. The Coordinator expressed a similar point of view, stating that the future depended on developing all forms of liability, which, in the case of the environment, would incite businesses and individuals to take the necessary precautions and preventive measures. The new instruments should not be under the control of special interests since public opinion expected that there would be stringent regulations that it was the task of jurists to translate into realistic and applicable terms.

37. A debate then ensued on the concepts of limits on the liability of operators and ceilings on financial security, two elements that were closely linked in the minds of most speakers. Some, however, found it very difficult, if not impossible, to calculate and fix a uniform ceiling for compulsory insurance in view of the diversity of the damages involved, while others were in favour of establishing a uniform system because excessive disparities between States would distort competition and result in "dumping" phenomena. Yet other speakers believed that it was first necessary to set limits on the liability of operators, with the financial security scheme covering the whole of this liability and the State covering any amounts over and above the ceiling.

38. The Meeting noted that the draft protocol to the Basel Convention currently under negotiation showed that the question of setting a limit on liability and financial security ceilings was particularly complex and controversial. The Chairperson suggested that representatives of insurers, industries and NGOs active in the field should be invited to participate in the next meeting of legal and technical experts with a view to hearing the opinions of the essential actors.

V. International liability and compensation

39. The Meeting considered the three-tiered structure proposed for the liability regime, namely, strict liability, the establishment of a Mediterranean Inter-State Compensation Fund, and the residual liability of States.

40. During the discussion of residual State liability, it was pointed out that it would represent a departure from the ordinary liability system according to which the liability of private operators could not be replaced by State liability. In addition, the primary obligation of a State was to control and prevent pollution and its liability could only arise if control and prevention measures failed. In this connection, it was emphasized that a State was ultimately responsible for events resulting from activities under its own jurisdiction and that residual State liability would enhance the effectiveness and credibility of the Barcelona Convention system. One expert pointed out, however, that residual State liability could have a negative effect on activities by operators, who might be incited to behave less cautiously in the knowledge that States too could be held liable in addition to the operators.

41. At the conclusion of the discussion, some experts supported the introduction of residual State liability, whereas others expressed reservations. Consequently, it was agreed that further reflection was required on this subject.

42. There were divergent opinions regarding the establishment of the proposed Mediterranean Inter-State Compensation Fund (MISC), some experts speaking in favour of the creation of the fund as outlined in the Secretariat's working document and others expressing reservations. Various views were also expressed concerning the financing of the MISC, in particular whether it should be made up of contributions from States or private operators. One question raised in particular was whether the residual liability of States would no longer apply if they contributed to the MISC. It was suggested that a fund, rather than being a separate international body, could be administered by bodies already existing within MAP, such as the Meeting of Contracting Parties or possibly the Bureau, which met relatively frequently.

43. The majority of those who took the floor expressed the view that further consideration had to be given to the issue of the fund before deciding upon any recommendations.

VI. Access to information

44. The Meeting expressed the view that the guidelines concerning access to information contained in the Secretariat working document should be followed. One expert pointed out that information should be provided to the public upon request and without having to prove an interest.

VII. Actions for compensation

45. The debate focused on the right of NGOs and other associations to submit requests in urgent situations in certain specified cases. Questions were raised as to why such action was limited to emergencies and it was pointed out that no such limitation was contained in the corresponding provisions in Article 18 of the Lugano Convention. Several participants supported the idea that NGOs should be allowed the right to go to court in certain specified circumstances.

46. Some representatives referred to their national legislation on the matter, which varied from country to country. It was pointed out that the spirit underlying the Secretariat text was the unification of systems of domestic law relating to the conditions under which NGOs could take legal action in the case of threats and damage to the environment. Four representatives expressed reservations on the subject.

47. The question of the retroactivity of the application of any protocol that might be adopted was raised and it was stated that transitional provisions would have to be foreseen. The general feeling of the Meeting was opposed to retroactivity and it was suggested that Article 5 of the Lugano Convention could serve as a model.

48. Concluding consideration of item 5 of the agenda, the participants, having examined the principal issues raised by the establishment of a liability and compensation regime in the Mediterranean, invited the Secretariat to report to the Contracting Parties on the results of this first Meeting so that they could decide upon the principle of preparing a draft protocol that would take into account the conclusions of this Meeting to be submitted to a second Meeting of experts.

Agenda item 6. Any other matters

49. There was no discussion under this item.

Agenda item 7. Adoption of the Report of the Meeting

50. The Meeting considered its draft report, which was adopted after the inclusion of a number of amendments.

Agenda item 8. Closure of the Meeting

51. Following the customary exchange of courtesies, the Chairperson declared the Meeting closed at 5.50 p.m. on Wednesday, 25 September 1997.

AGENDA

1. Opening of the meeting.

2. Rules of procedure.

3. Election of officers.

4. Adoption of the Agenda and Organization of work.

5. Examination of the draft of an appropriate procedure for the determination of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area.

6. Any other matters.

7. Adoption of the report of the meetings.

8. Closure of the meeting.

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ANNEX III

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 (UNEP(OCA)/MED WG.117/3)

I. FORM

1. Even the recently completed amendment of the Barcelona Convention (Barcelona, June 1995), did not touch on the relevant provision concerning Liability and Compensation. Unlike the 1991 MADRID PROTOCOL ON ENVIRONMENTAL PROTECTION TO THE ANTARCTIC TREATY which also contains a framework provision on Liability (Art. 16), the relevant provision of the Barcelona Convention does not indicate the form in which the rules and procedures for the determination of Liability and Compensation for damage to the Mediterranean marine environment may be expressed.

2. Following the example of the 1991 MADRID PROTOCOL ("Those rules and procedures shall be included in one or more Annexes to be adopted in accordance with Article 9 (2)"), it might be advisable that in view of the nature of the rules and procedures for Liability and Compensation and their importance in the enforcement aspect of the Barcelona Convention, they could, like the arbitration procedure in relation to Article 18 "Settlement of Disputes", take the form of a new Annex B to the Convention.

II. DAMAGE

1. The definition of damage is central to the development of a liability and compensation regime. The definition should be consistent with the obligations of the Contracting Parties as constituted in the Barcelona Convention and its Protocols. It should also be consistent with the definition of damage given in other related international instruments, such as the 1982 LAW OF THE SEA CONVENTION or the 1993 COUNCIL OF EUROPE CONVENTION ON CIVIL LIABILITY.

2. The definition should:

   first include the object of environmental damage and the conduct that constitutes damage; and

   second indicate the nature of the activities that fall within the scope of the liability and compensation regime in the Barcelona Convention system.

   Thus, the elements that such a definition should include are:

   (a) damage to persons and property;

   (b) damage caused by impairment of the marine and coastal environment of the Mediterranean;

   (c) the cost of preventive measures and further loss or damage caused by the preventive measures;

(d) all professional operations dealing with dangerous substances and materials, wastes, non-indigenous or genetically modified species, or having a harmful effect on the biological diversity or the specially protected areas in the Mediterranean;

(e) a causal link between the damage and the incident.

Such a broad definition of the damage follows the example of the 1993 COUNCIL OF EUROPE CONVENTION ON CIVIL LIABILITY, while a similar broad approach is adopted in the 1989 CONVENTION ON CIVIL LIABILITY FOR DAMAGE CAUSED DURING CARRIAGE OF DANGEROUS GOODS BY ROAD, RAIL, AND INLAND NAVIGATION VESSELS.

3. In this framework, the key-concepts may be commented upon as follows:

(a) Property: the extent of the notion of "property" should be left to the internal law of the Contracting Parties. Damage to the installation itself or to property under the control of the operator should not be compensated.

(b) Persons: this would include any individual or legal person including the State or any of its constituent subdivisions.

(c) The impairment of the marine and coastal environment: will give rise to compensation in the form of measures of reinstatement. Measures of reinstatement consist first of all and whenever possible in environmental restoration and reestablishment. When restoration and reestablishment is not possible, then reinstatement may take the form of the re-introduction of equivalent components into the marine and coastal environment e.g. re-introduction of disappeared protected species of flora and fauna. An interesting case of reintroduction is provided in the new, not yet in force, 1995 Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean which in Art. 11(8) provides the reintroduction of exported or held illegally protected species to their natural habitats.

The method of compensation by means of reintroduction aims at achieving an equivalent instead of an identical environment. Both methods of reinstatement are of fundamental importance because they point to the direct protection of the environment, irrespective of any damage to persons or property.

It should be left to the internal law to decide the authority to take the appropriate reinstatement measures in an effective manner.

(d) Preventive measures: part of the definition of damage should also be the cost of preventive measures taken in order (i) to prevent an impending grave threat of causing damage or (ii) to avoid the aggravation of damage to human beings, to property and to the environment. These measures may be taken by any "person" and they must be reasonable. The measures to prevent or minimise damage are taken after the occurrence of the incident, that is, after any sudden occurrence, or continuous occurrence or any series of occurrences having the same origin, as defined below. The cost of preventive measures is

one element of the definition of damage and they are compensated by the operator (especially when the public authorities implement them and subsequently charge the operator), if only they are reasonable in view of the circumstances.

(e) Incidents: the damage may result from three kinds of incidents: (a) from a sudden occurrence (fire, leak or emission); (b) from a continuous occurrence (discharging or releasing dangerous substances into the sea from land-based sources and activities); (c) from a series of occurrences with the same origin (a series of explosions affecting successively the parts of an installation). This broad approach to incident, covering an accidental occurrence, a continuous occurrence and a series of occurrences having the same origin, is adopted by the 1993 COUNCIL OF EUROPE CONVENTION ON CIVIL LIABILITY, and as such, it goes far beyond the "accident" approach. In view of the normative nature of the Barcelona Convention system, this all-encompassing determination of incident is adequate.

(f) Operator: the person who is in control of a dangerous or potentially dangerous activity, as defined below. This person must exercise effective control over the dangerous or potentially dangerous activity and have the power to decide upon the operation of that activity-thus e.g. employees are not considered as operators.

(g) Dangerous or potentially dangerous activities: the scope of the definition of damage should finally comprise the dangerous activities wherefrom the damage results, as well as other activities which may cause damage to the marine environment.

4. In view of the wide coverage of the Barcelona Convention system, it would be advisable that the wide definition of dangerous activities as contained in the 1993 COUNCIL OF EUROPE CONVENTION ON CIVIL LIABILITY should be adopted. Thus, dangerous activities concern all professional (in contradistinction to domestic) activities, including activities by the state, which basically deal with:

(a) the production, storage, use and discharge or release of dangerous substances and materials in the marine and coastal environment of the Mediterranean;

(b) the introduction of non-indigenous or genetically modified species which may have harmful impacts on the ecosystems, habitats or species in the marine and coastal environment of the Mediterranean or pose significant risk for man and property;

(c) the removal of abandoned or disused installations engaged in the exploration and exploitation of the Continental shelf and the seabed and its subsoil;

(d) the discharge and disposal of wastes from the operation of offshore installations and the transboundary movement of hazardous wastes and their disposal;

(e) the operation of an installation or site for the incineration, treatment, handling or recycling of waste provided that the quantities involved pose a significant risk for man, property and the marine and coastal environment of the Mediterranean;

(f) the operation of a site for the permanent deposit of waste; and

(g) the operation of a site for the dumping of wastes or other matter.

In addition, those activities or acts may be included which are likely to harm or disturb the species, that might endanger the state of conservation of the ecosystems or species or might impair the natural or cultural characteristics of the specially protected areas.

Hence, the proposed definition of "dangerous or potentially dangerous activities" encompasses all professional activities which involve dangerous substances and materials, non-indigenous or genetically modified species and generally operations which are harmful to the biological diversity and Specially Protected Areas, the removal of offshore installations and operations concerning waste or discharging waste.

5. In regard to dangerous activities the following remarks should be made:

The distinction of wastes from other dangerous substances is due to the fact that wastes usually do not consist of substances which may be considered as dangerous. Except the case of the transboundary movement of hazardous wastes and their disposal, in all other cases regulated by the Barcelona Convention system (e.g. wastes resulting from the operation of offshore installations or wastes dumped from ships or aircraft) wastes usually do not consist of dangerous substances. On the other hand, the distinction between installations treating waste and sites for the permanent deposit and dumping of wastes seems to be necessary in view of the specific character of the latter as a permanent storage of untreated wastes.

6. An important question may be raised, here, regarding the inclusion of the notion "significant risk" in the liability and compensation regime. In fact, the inclusion of this notion may result in the committing of a range of environmental harm which may not be considered as "posing significant risk" for man, property and the marine and coastal environment.

For this reason it would be advisable to leave the determination of what "poses significant risk" to the operation of the environmental impact assessment procedures (EIA) provided under Art. 4(c) and (d) of the Barcelona Convention, as amended. It would be more appropriate to determine permissible harm by reference "to EIA for proposed activities that are likely to cause a significant adverse impact on the marine environment and are subject to an authorisation by competent national authorities"

rather than to apply a vague standard, based on 'significant risk for man, property and the environment." If an activity is given the public permission, this does not mean that liability won' t arise for damage that may occur. On the other hand an activity in full compliance with an EIA is not a mere permission. If the damage that occurs is strictly within that which is envisaged or assessed in the EIA and found to be acceptable, then liability does not arise for the operator; otherwise, if the damage is beyond that which is envisaged or assessed in the EIA, then liability arises.

III. LIABILITY STANDARD

1. An effective liability regime under the Barcelona Convention system should be based on strict liability. Unlike the fault-based liability, strict liability requires no proof of fault (which may be very difficult or even impossible to obtain) that the conduct of the operator was intentionally or negligently in violation of the law. Strict liability only requires that the damage was caused as a result of the conduct of the operator and that the damage is not permissible under the Barcelona Convention or the liability regime. At the same time, strict liability is more flexible than absolute liability because it allows a narrowly defined range of exemptions.

   The preference to the strict liability standard may also be supported by the following functional reasons:

   - it operates preventively in the sense that, in view of its strict character, the operator is directed to take more precautions in order to avoid harm;

   - it is an effective and efficient compensation mechanism because the very occurrence of a damage due to the conduct of the operator will give rise to liability irrespective of fault, provided of course the harmful event or act do not constitute grounds for exemption under the liability regime;

   - it safeguards a stringent liability regime which is more adequate in view of the vulnerability of the Mediterranean sea area, while, at the same time, it is a flexible regime since it permits narrowly defined exemptions from the operator's liability when the harmful event or act is beyond the control of the operator.

2. The introduction of the standard of strict liability to the Barcelona Convention system can be, first, stated *ratione materiae* - in respect of which activities the resulting damage may give rise to strict liability.

   Thus, strict liability may arise from damage resulting from the dangerous or potentially dangerous activities as defined in Section II. More specifically, strict liability may arise in respect of substances, materials, organisms, wastes (transboundary movement and disposal), the operation of offshore installations and their removal, the operation of waste installations or sites, in respect of sites for the permanent deposit of waste and operations which may be harmful to the biological diversity and specially protected areas.

   The strict liability standard can, secondly, be stated *ratione temporis* - in respect of the time at which the damage was caused or became known.

Finally, the strict liability standard can be stated *ratione personae* - in respect of the operators who can be liable if an incident consists of either a continuous occurrence or of a series of occurrences having the same origin.

3. More specifically, the proposed strict liability standard, taking into account all aspects of the Barcelona Convention system, could be formulated as follows:

(A) Liability in respect of dangerous activities which contain:

(i) the production, storage, use and discharge or release of dangerous substances and materials, in the marine and coastal environment of the Mediterranean;

(ii) the introduction of non-indigenous or genetically modified species which have harmful impacts on the ecosystems, habitats or species in the marine and coastal environment of the Mediterranean or pose significant risk for man and property;

(iii) the removal of abandoned or disused installations engaged in the exploration and exploitation of the continental shelf and the seabed and its subsoil;

(iv) the discharge and disposal of wastes from the operation of offshore installations and the transboundary movements of hazardous wastes and their disposal;

(v) the operation of an installation or site for the incineration, treatment, handling or recycling of waste provided that the quantities involved pose a significant risk for man, property and the marine and coastal environment of the Mediterranean.

(B) Liability in respect of dangerous activities which contain:

(i) the operation of a site for the permanent deposit of wastes;

(ii) the operation of a site for the dumping of wastes or other matter.

(C) Liability in respect of activities or acts which may harm or disturb the species, endangers the state of conservation of the ecosystems or species and impairs the natural or cultural characteristics of the specially protected areas;

In regard to liability arising under (A), the following normative elements may be included:

(a) strict liability applies only to the operator who was in control of the dangerous activity that caused the damage at the time when the incident occurred.

(b) where several operators are involved, then joint and several liability should be established as follows:

(aa) if an incident consists of a continuous occurrence, all operators successively exercising control of the dangerous activity during that time should be jointly and severely liable;

(bb) if an incident consists of a series of occurrences having the same origin, the operators at the time of any such occurrence should be jointly and severely liable;

(cc) in both cases, the operator may avoid part of his liability if he proves that he caused only part of the damage and, hence, he should have been held liable for that part of the damage only.

(c) where the damage resulting from the dangerous activity becomes known after this activity has ceased, then liability for damage should lie with the last operator; however, the last operator may avoid liability if he proves that the damage was caused when he was not in control of the dangerous activity;

(d) finally, the proposed international liability regime does not prejudice the operator' s rights to resort to the internal law and seek redress from another party which caused or contributed to the damage.

In regard to liability arising under (B), the following normative elements may be included:

(a) in case of damage caused by waste deposited or dumped on a site for the permanent deposit of wastes, strict liability arises for the operator who was in control on the date when the damage becomes known and not on the date of the incident - in the case the damage becomes known after the closure of such a site, the last operator should be liable;

(b) strict liability under (B) should arise irrespective of the nature of the waste;

(c) strict liability under (B) shall take precedence over strict liability under (A), if the same operator conducts another dangerous activity on the site for the permanent deposit of waste;

(d) again, the proposed liability regime does not prejudice any right of recourse of the operator against third parties and this may have particular importance if applied against the producer of waste.

The above normative elements prescribing strict liability under (A) and (B) appear, to a various extent, in the 1993 COUNCIL OF EUROPE CONVENTION ON CIVIL LIABILITY, in the 1988 CONVENTION ON ANTARCTIC MINERALS and in the 1994 DRAFT PROTOCOL ON LIABILITY AND COMPENSATION which is being developed

under the Basel Convention.

In regard to liability arising under (C), the normative elements as proposed under (A) may be applicable mutatis mutandis.

4. In the proposed strict liability regime, there is, however, one case where absolute liability may be established in view of the nature of the incident. This concerns the liability for illegal traffic of hazardous wastes, that is any transboundary movement of hazardous wastes in contravention of the relevant (Draft) Protocol of the Barcelona Convention system, or of general principles of international law.

Thus, a clause may be inserted providing that in the case of damage as a result of illegal traffic as defined in the related Protocol on the Transboundary Movement of Hazardous Wastes and their Disposal, all persons involved in the illegality should be held liable and no exoneration should be permitted.

IV. EXEMPTIONS UNDER THE LIABILITY REGIME

1. Another important element in the development of a strict liability regime in the Mediterranean region is the determination of Exemptions.
Exemptions should be determined on the basis of two criteria. First, that a party should not be held liable for the acts or events beyond its control. Second, that the exemptions should be defined as narrowly as possible so that the Parties would not be able to take advantage of any lacuna in the regime.

2. The standard of exemption from duties under the Barcelona Convention system on the ground of events beyond the control of a Contracting Party, is recognised in a number of instances.

Thus, under the DUMPING PROTOCOL, 1976 (as amended in 1995) it is provided that dumping may exceptionally take place (that is beyond the prohibition of Art. 4 and the restrictions of Arts. 5 and 6) “in case of *force majeure* due to stress of weather or any other cause when human life or the safety of a ship or aircraft is threatened” and it should immediately be reported to the Organisation and the Parties “likely to be affected”.

Under the SPECIALLY PROTECTED AREAS PROTOCOL, 1982 and the new PROTOCOL CONCERNING SPECIALLY PROTECTED AREAS AND THE BIOLOGICAL DIVERSITY IN THE MEDITERRANEAN, 1995 (Art. 18 - not yet in force), exemptions from the established regime are also provided, in order “to meet the needs of the traditional subsistence and cultural activities of their local populations”. This generic determination of the possibility of granting exemptions is accompanied by a specified narrowing of these exemptions, by means of determining the cases where no exemption is to be allowed and by means of imposing the duty of information in cases where exemptions are granted.

Finally, under the OFFSHORE PROTOCOL, 1994, (Art. 14- not yet in force), a more elaborated provision is formulated in regard to exceptions of the operators from their duty to minimise the risk of pollution from wastes as well as the use, storage and discharge of harmful or noxious substances and materials. Exceptions, thus, are

made for *force majeure* and in particular for disposals, to save human life, to ensure safety of installations, and in case of damage to the installation or its equipment, on the condition that all reasonable precautions have been taken after the damage is discovered or after the disposal has been performed to reduce the negative efforts (Art. 14 (1)(a)).

Exceptions are also made for "the discharges into the sea of substances containing oil or harmful or noxious substances or materials which, subject to the prior approval of the competent authority, are being used for the purpose of combatting specific pollution incidents in order to minimise the damage due to pollution" (Art. 14 (1) (b). These exceptions are, however, narrowed by the provision contained in Art. 14 (2): "in case where the operator acted with the intent to cause damage or recklessly and with the knowledge that damage will probably result" these exceptions shall not apply. Finally, the operation of exceptions is accompanied, again, by the duty to inform the Organisation and the Parties "likely to be affected" (Art. 14 (3)).

3. In the light of this, it is pertinent to define, as narrow as possible, the grounds for exemption which should be introduced to the proposed liability and compensation regime for events or acts beyond the control of a party which may otherwise be liable. Taking also into account the COUNCIL OF EUROPE CONVENTION ON CIVIL LIABILITY, 1993, the 1991 EEC COUNCIL DIRECTIVE ON CIVIL LIABILITY FOR DAMAGE CAUSED BY WASTE, but also the relevant provisions of the 1988 CONVENTION ON THE REGULATION OF ANTARCTIC MINERAL RESOURCE ACTIVITIES, the following grounds for exemption may be inserted:

(a) An act of war, hostilities, civil war, insurrection, an act of terrorism against which no reasonable precautionary measures could have been effective;

(b) A natural phenomenon constituting in the circumstances of the Mediterranean a disaster of an exceptional, inevitable and irresistible character;

(c) Acts by a third party with the intent to cause damage, which is unassociated with the operator (violent acts by operator's employees are not covered) provided that all appropriate safety measures have been taken;

(d) Pollution at a tolerable level in the light of local circumstances (in urban or rural zones);

(e) Compliance with compulsory measures of a public authority;

(f) A dangerous activity taken lawfully in the interests of the person suffering a damage (this ground covers in particular emergency cases or cases where the dangerous activity was carried out with the real and unequivocal consent of the person who has suffered a damage).

These grounds for exemption operate at the international level and as such they would not prevent any claim for compensation under internal law, or recourse to the MISC Fund (see section V.a) under the terms and conditions prescribed below.

RELIEF UNDER THE LIABILITY REGIME

4. The relief of the Operator due to the fault of the person who suffered the damage is another element of the Liability Regime which can be found in the 1988 CONVENTION ON ANTARCTIC MINERALS Art. 8 (6) as well as in the 1993 COUNCIL OF EUROPE CONVENTION ON CIVIL LIABILITY (Art. 9). Thus, it should be provided that if an operator proves that damage has been caused totally or in part by the fault of the person seeking redress that operator may be relieved totally or in part from its obligation to pay compensation to this person (at the discretion of the court).

COMPULSORY FINANCIAL AND SECURITY SCHEME

5. This element is already provided in the 1994 OFFSHORE PROTOCOL. Art. 27 (2) (b) of this Protocol states that each Contracting Party should ensure that operators have insurance cover or other financial security of such a type under its internal law so that compensation for damage caused by the activities covered by this Protocol will be safeguarded. Taking into account a similar Article 12 of the 1993 COUNCIL OF EUROPE CONVENTION ON CIVIL LIABILITY, this element should contain the following:

(a) each Contracting Party should, where appropriate, ensure under internal law that operators have financial security to cover liability for damage under the Barcelona Convention system;

(b) in this context, each Contracting Party should determine the scope, the conditions and the form of the financial security (determine in particular a certain limit to which this financial security may be subject and which activities should be subject to the financial security);

(c) in order to avoid any failure to apply the financial security requirement due to the impossibility to foresee the risk, a financial guarantee should be established to cover such risk;

(d) a financial security scheme or financial guarantee can exist in many different forms (e.g. an insurance contract or a financial cooperation between operators).

V. INTERNATIONAL LIABILITY AND COMPENSATION

1. The proposed liability regime is built upon the “Polluter Pays Principle”, an international standard of civil environmental law, which is inserted to many international agreements and is now included in the 1995 Amendment to the Barcelona Convention. Thus Art. 4 (3) (b) provides that the Contracting Parties “shall apply 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”.

It is evident that, in the first place, the state will be held liable for damage resulting from activities dangerous to the marine and coastal environment of the Mediterranean where the State itself, a state corporation or a State agent, cause such a damage. This is a clear case and creates no problem for the application of the "polluter pays principle".

On the other hand, the very application of the "polluter pays principle" may practically become inefficient, if such a damage, being caused by private individuals or non-state agencies acting under the jurisdiction and control of the state, cannot entirely be met by the polluter. There are cases where private operators cannot meet the full cost of the reparations of the damage to the marine and coastal environment resulting from their dangerous or potentially dangerous activities. And given the fact that, in general, insurances impose limits on the extent of their liabilities, it is possible that the extent of the compensation and reparation required from the damage may clearly exceed the limit imposed by the insurance. In such a case, two alternatives may be considered: first, the establishment of residual liability for the state; second, the establishment of an Inter-state Compensation Fund to cover the remaining cost of the compensation and reparation and, if this is not possible, the establishment of the residual liability for the state.

2. The establishment of the residual liability for the state is supplementary to the application of the "polluter pays principle" because it operates only when the private operator cannot pay the entire cost of the required compensation and reparation. The basis of the residual state liability is broadly conceived, in the sense that it derives from the fact that the state has jurisdiction and control over the dangerous or potentially dangerous activities through permits (e.g. DUMPING PROTOCOL), authorisations or regulations (e.g. LBS PROTOCOL, OFFSHORE PROTOCOL), notifications (e.g. HAZARDOUS WASTES PROTOCOL) or granting exemptions (SPA PROTOCOL). This broadly conceived residual state liability is of particular importance in relation to those dangerous or potentially dangerous activities which cause significant adverse effect on the marine environment of other States or areas beyond the limits of national jurisdiction.

On the other hand, the possibility of establishing a narrowly conceived basis of the residual state liability, that is liability for damage only to the extent that such damage is casually related to the State' s failure to comply with its duties under the Barcelona Convention system, would clearly seem to be inadequate. Such a fault-based, instead of a strict, state liability would not effectively work in view of the vulnerability of the Mediterranean marine and coastal environment and the nature of the protection system it requires.

The establishment of an Inter-State Compensation Fund would have two objectives: first, to play a supplementary role to the application of the "pollution pays principle" in case that the private operator was not able to meet the entire cost of the required compensation and reparation for the damage he has caused; second, to secure the implementation of preventive measures in an emergency situation. In regard to the second objective it is worth noting that the operation of such a Fund would assist public authorities to immediately respond to emergency situations taking, should the operator default, reasonable preventive measures.

3. In the light of the above observations, International Liability and Compensation could be formulated by standards containing the following elements:

(a) Mediterranean Inter-State Compensation Fund (MISC Fund)

The Contracting Parties may establish the Mediterranean Inter-State Compensation Fund (hereinafter, as MISC Fund) for two purposes:

(i) for compensation only to the extent that compensation for damage under the civil liability regime is inadequate or not available (in case of unknown polluters);

(ii) for the implementation of reasonable preventive measures in emergency situations (after the occurrence of the incident).

More specifically, the MISC Fund may be provided to pay compensation to any person suffering damage if such person has been unable to receive full and adequate compensation for the damage under the Civil Liability regime for the following four reasons:

(a) when no liability for the damage arises under the Civil Liability regime;

(b) when the cause of the loss or damage is of an indeterminate character;

(c) when the damage exceeds polluter's liability;

(d) when the polluter is financially incapable of meeting his obligations in full and the provided financial security does not cover or is insufficient to satisfy the claims for compensation for damage, provided that the person suffering the damage has been unable to obtain full satisfaction of his claim after having taken all reasonable steps to pursue the available legal remedies.

The MISC Fund should also operate in cases where the polluter, in order to prevent or minimize damage, makes reasonably and voluntarily expenses or sacrifices, which should be treated as damage.

The operation of the MISC Fund should be exempted in cases where it proves that the damage resulted from the operation of any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used at the time of the incident only on government non-commercial service. The MISC Fund should also be exonerated wholly or partially from the obligation to pay compensation if it proves that the damage resulted wholly or partially from an intentional or negligent act or omission done by the person who suffered the damage. However, no such an exoneration may exist with regard to preventive measures.

As far as its status is concerned, the MISC Fund should be recognized by each Contracting Party as a legal person under its laws, capable of assuming rights and obligations and of being a party in legal proceedings before its courts.

Other related tasks of the MISC Fund should be the consideration of claims made against it, the preparation of its budget and its assistance to a Contracting Party, at its request, to prevent or mitigate damage arising from an incident in respect of which the MISC Fund may be called upon to pay compensation.

The principal source of finance of the MISC Fund should come from contributions of the Contracting Parties, possibly based on a percentage of their contributions to the Mediterranean Trust Fund. However, the terms and conditions of the contributions to the MISC Fund as well as organizational matters of the MISC Fund, should not be further pursued, at this stage.

The MISC Fund should also operate in emergency situation providing an immediate source of finance to reimburse the Contracting Parties which undertake immediate response actions to deal with any damage and abate emergency.

In both situations, such an operation of the MISC Fund would be extremely useful and beneficial because it would set an important incentive for both the operator to be immediately involved to prevent or minimize the damage and for the Contracting Parties to undertake immediate response actions avoiding lengthy litigations to recover the cost of their operations.

In both situations, such an immediate response action may be required in order to avoid irreversible loss or to prevent or reduce any continuing danger to natural resource, where, for instance, a continuing discharge or release must be abated in order to avoid the complete destruction of a resource or where continuing degradation threatens more and more of the resource.

In both situations, the burden of proof should lie upon the operator or upon the Contracting Party. It should be based on the information available at the time that irreversible damage would have resulted if the immediate response action were not undertaken and that the costs associated with the emergency actions were reasonable and necessary.

(b) State Liability

A Contracting Party may be held liable for damage caused to persons, property and the marine and coastal environment of the Mediterranean, and provide for compensation only to the extent that the compensation for damage under (i) the civil liability regime and (ii) under the Mediterranean Inter-State Compensation Fund, is inadequate.

(c) The complementary combination of the three concepts (Civil Liability regime - Mediterranean Inter-State Compensation Fund - State Liability) should also apply in regard to damage caused on the marine environment of other Contracting Parties or areas beyond the limits of national jurisdiction.

VI. ACCESS TO INFORMATION

1. In the amended Barcelona Convention a new provision was included laying down, in a framework form, the standards for public information and participation (New Article 15). More detailed standards concerning access to information in the context of liability and compensation regime are stated in the 1993 COUNCIL OF EUROPE

CONVENTION ON CIVIL LIABILITY which present particular interest especially in regard to access to information held by operators. It is suggested that the formulation of this important procedural aspect of the liability and compensation regime should contain the following elements:

(a) The widest possible access to environmental information held by public authorities

As it is already provided under the new Article 15 of the Barcelona Convention, such information shall be provided by the public authorities of the Contracting Parties irrespective of whether damage has been caused: "appropriate access to information" shall be given to the public "on the environmental state in the field of application of the Convention and the Protocols, on activities or measures adversely affecting or likely to affect it, and on activities carried out or measures taken in accordance with the Convention and the Protocols." The conditions under which the public authorities of the Contracting Parties may refuse such information are also prescribed in paragraph 3 of this Article. Two more normative aspects may be added in view of the nature of the liability regime: *first*, that the positive or negative response to a request for information by a public authority should be given within a specific time limit (the 1993 COUNCIL OF EUROPE CONVENTION ON CIVIL LIABILITY provides "a maximum of two months"); *second*, that bodies which are endowed with public responsibilities for the environment and are involved in the environmental field together with the public authorities, should be subject to the same duty.

(b) The ability of the person who suffered damage to obtain information held by operators

This is an important procedural safeguard for the person suffering damage and supplements the procedural right under (a). In view of the nature of the Barcelona Convention system, while taking into account Art. 16 of the 1993 COUNCIL OF EUROPE CONVENTION ON CIVIL LIABILITY, the following normative aspects should be considered:

(i) The right of a person suffering damage to request at any moment, and especially before instituting legal proceedings, information held by the operator. Such information may be requested either directly from the operator or indirectly through a court order;

(ii) Apart from the objective grounds for refusal of an access to information, prescribed in Art. 15(3) of the amended Barcelona Convention, which may be applicable *mutatis mutandis*, an operator should not be required to provide information which will incriminate him;

(iii) The court, taking into account all the interests involved may refuse a request for an access to information held by operator if, in its judgement, such an access may place a disproportionate burden on the operator;

(iv) The operator should provide information concerning the elements available to him and especially dealing with his equipment, machinery, dangerous substances and materials, wastes, or the nature of non-indigenous or genetically modified species. Reasonable costs of providing such information should be borne by the requesting person, unless the court decides otherwise.

VII. ACTIONS FOR COMPENSATION

1. Financial limitation on liability

The question of financial limitation on liability should be examined in the light of the liability regime already discussed. The proposed combination of the three concepts - civil liability regime, Mediterranean Inter-State Compensation Fund and residual state liability - point to the direction that there should be no fixed financial limit on liability. In fact, a limitation for compensation payable would actually undermine the proposed liability regime. On the other hand, unlimited liability would have an invaluable learning impact upon all those who are involved: it will send a message to the operators that in view of the unlimited liability their conduct should be carefully designed and carried out; it will constitute a great incentive for the public authorities of the Contracting Parties to scrutinise operators activities applying effectively and efficiently all those procedural safeguards ensuring prevention, control and compliance with the Barcelona Convention system; and, finally, it will not have any impact upon the conduct of the insurance companies because their financial limit of liability is set independently from the acceptance of a limited or unlimited compensation under the liability regime.

After all, the very lack of any ceiling on the financial liability of the operator is the basic reason for the function of the proposed combination of strict liability-Inter-State Compensation Fund - residual liability of State, aiming at the most efficient distribution of the costs of the damage inflicted upon man, property and the marine and coastal environment.

It is, therefore, suggested, it should be provided that no fixed financial limit of liability should be set. A similar provision is set in the 1994 DRAFT PROTOCOL ON LIABILITY AND COMPENSATION of the BASEL CONVENTION.

2. Time Limit of Liability

It is necessary that the time limits within which an action may be brought are specified and not left to internal law, otherwise “forum-shopping” may be forwarded. Thus, a provision on time limit of liability should be inserted providing:

(a) A time limit of three years from the date on which the claimant knew or ought reasonable to have known of the damage and of the identity of the operator, within which claims for compensation are admissible;

(b) A time limit of thirty years from the date of the incident after which no actions can be brought;

(c) Where the incident consists of a continuous occurrence the thirty years period will run from the end of that occurrence; where the incident consists of a series of occurrences having the same origin, the thirty years period will run from the date of the last of such occurrences; in respect of sites for permanent deposit of waste or for the dumping of wastes and other matter, the period will run at the latest from the date of the closure of the site;

(d) No time limit of liability will apply in the case of illegal traffic of hazardous wastes as provided in the HAZARDOUS WASTES PROTOCOL, 1996.

3. Right to Submit Requests by Organisations

The implementation of the sustainable development objective within the framework of the Mediterranean Action Plan regime and of the Barcelona Convention system is connected with the recognition of the respective public role of Non-Governmental Organizations. This is effectively reflected in the recently revised Barcelona Convention system and in the establishment of the Mediterranean Commission on Sustainable Development, where Non-Governmental Organizations may participate as members on equal footing with the Contracting Parties and other actors (local authorities and socio-economic actors). The public role of the Non-governmental Organisations and of other relevant associations (e.g. trade unions) may be also effectively recognized in the context of the proposed liability regime, by establishing a right for them to submit requests in certain cases.

More specifically, Non-Governmental Organisations and other relevant associations may be attributed the right to submit requests in urgent situations for:

(a) the prohibition of a dangerous or potentially dangerous activity which is posing a grave threat of damage to the environment;

(b) an order to the operator to take preventive measures;

(c) an order to the operator to reinstate the environment.

By the establishment of such a public right, the international common interest for the protection and sustainable development of the Mediterranean environment is further promoted and better served, especially in view of the fact that the required efficient and rapid intervention by individuals may not be feasible.

The more detailed formulations of such a public right should take into account the relevant provision set in the 1993 COUNCIL OF EUROPE CONVENTION ON CIVIL LIABILITY.

4. List of Experts

The Secretariat may establish and maintain a list of experts in the field of assessment and remedy of environmental damage. Hence, the Contracting Parties may draw on this list in case that their courts require specialized assistance in this field.

VIII. PROCEDURES

1. Matters related to jurisdiction, Recognition and Enforcement of the various actions should be approached in terms of the rules laid down by the Brussels (27 September 1968) and Lugano (16 September 1988) CONVENTIONS ON JURISDICTION AND THE ENFORCEMENT OF JUDGEMENTS ON CIVIL AND COMMERCIAL MATTERS. It is understood that a Contracting Party which is engaged in dangerous or potentially dangerous activities, as defined above, performs acts jure gestionis and, hence, it should not enjoy immunity from jurisdiction.

   (1) Jurisdiction

   The following normative elements should be included:

   (a) Claims for compensation may only be brought in the courts of a Contracting Party where the damage was suffered or the dangerous or potentially dangerous activity was conducted or the defendant has his habitual residence;

   (b) Requests for access to information held by operators may only be submitted in the courts of the Contracting Party where the dangerous or potentially dangerous activity was conducted or where the operator who is required to provide the information has his habitual residence.

   (2) Mutual Recognition and Enforcement

   It should be positively provided that any decision given by a court competent, which is no longer subject to ordinary forms of review, should be enforceable in any Contracting Party without review of the merits of the case.

   Possible grounds for exceptions should also be considered. Among these, the following could be included:

   (a) where the decision was obtained by fraud;

   (b) where the defendant was not duly served with the internal procedures of the court competent;

   (c) where the decision is irreconcilable either with a decision given in a dispute between the same parties in the Contracting Party in which recognition is sought or with an earlier decision given in another Contracting Party involving the same cause of action between the same parties.

2. Furthermore, in regard to the enforceability in each Contracting Party, the following standardized normative element should be included:

   - A recognized decision which is enforceable in the Party of origin should be enforceable in each Contracting Party as soon as the formalities required by that Party have been completed - the formalities should not permit the merits of the case to be re-opened.

IX. SCOPE OF APPLICATION

1. The scope of application of the proposed liability and compensation regime is to be envisaged in two levels: in its relation to the internal law of the Contacting Parties and in its relation to the relevant international commitments of the Contracting Parties.

(1) Relation to the Internal Law

It should be stated that the proposed liability and compensation regime should not take precedence over the law of the competent courts in the sense of limiting or derogating from any of the rights of the persons who have suffered the damage or limiting the provisions concerning the protection or reinstatement of the marine and coastal environment.

(2) Relationship with other Treaties

Similarly, no precedence should be taken over international agreements or arrangements in which the Contracting Parties participate as parties whenever the proposed liability and compensation regime is less favourable to persons suffering the damage or to provisions protecting the marine and coastal environment. In any case, it should also be provided that the rights for adequate and prompt compensation under the proposed liability regime would not be offended by a conflict between the latter and another international agreements or arrangement establishing a similar regime.