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Second consultation meeting of legal experts on liability and compensation for damage, resulting from pollution of the marine environment in the Mediterranean Sea area

Athens, Greece, 17 June 2005

REPORT OF THE SECOND CONSULTATION MEETING

OF LEGAL EXPERTS ON LIABILITY AND COMPENSATION

UNEP/MAP
Athens, 2005

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Introduction

1. At their thirteenth meeting held in Catania, Italy, on the 11th-14th November 2003, the Contracting Parties to the Barcelona Convention requested the MAP Secretariat to prepare a feasibility study for submission to the meeting of the Contracting Parties in 2005 covering the legal, economic, financial and social aspects of a liability and compensation regime based on the organization of a participatory process with the Contracting Parties and socio-economic actors and with a view to avoiding overlapping with any other liability and compensation regime (UNEP(DEC)/MED IG.15/11).

2. Accordingly the MAP Secretariat has prepared the above study with the assistance of Mr. Aref Fakhry, Consultant.

3. With a view to sharing the main findings and recommendations of the draft study, the MAP Secretariat organized a meeting of a restricted number of legal experts involved in the field of liability and compensation at MEDU premises in Athens, Greece, on the 17th June 2005.

Participants

4. The meeting was attended by three legal experts, a representative of a Contracting Party (France) and a representative of a civil society organization (International Juridical Organization for Environment and Development) along with members of the Secretariat. The full list of participants is attached as annex I to this report.

Agenda Item 1: Opening of the Meeting

5. The meeting was opened by Mr. Paul Mifsud, MAP Coordinator, who welcomed the participants and declared the meeting open. He stated that the purpose of the meeting was to obtain feedback on the draft study so as to enable the MAP Secretariat to adequately advise the Contracting Parties at their fourteenth meeting in November 2005 on what should be done next. He welcomed comments and criticism from participants on the draft study.

Agenda Item 2: Adoption of the Provisional Agenda and Organization of Work

6. The Meeting adopted the provisional agenda and approved the organization of work (UNEP(DEC)/MED WG.280/1). The agenda and timetable are attached as annex II to this report.

Agenda Item 3: Presentation of the Draft "Feasibility Study Covering the Legal, Economic, Financial and Social Aspects of a Liability and Compensation Regime in the Mediterranean Sea and its Coastal Area"

7. Mr. Fakhry provided a summary presentation of the main findings and recommendations of the draft study.

8. By way of a report on the main findings of the draft study, comments were first made on the outcome of the consultations carried out. The poor rate of response received on the questionnaires was pointed out. It was, nonetheless, possible to draw some conclusions from the responses actually received. It could thus safely be said that there was a positive perception among respondents towards the setting up of appropriate rules and procedures for the determination of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area. It was noteworthy that certain issues submitted to consultation had carried general consensus among respondents while divergences had been recorded in relation to other issues.

9. Some remarks were made concerning the existing law of liability and compensation in Contracting Parties and it was noted that a plethora of sources had to be considered, including national civil codes. A certain legal disharmony could be observed across the region and it was reported that a number of international and regional agreements were unevenly adopted. It was clear that the review of the law in place had to take into consideration both marine/coastal documents and the more general environmental law instruments. Reference was made to the draft study for an exposition of the subject of liability and compensation with a particular emphasis on environmental damage in marine and coastal areas in Mediterranean countries.

10. It was emphasized that the study's findings both as to law and the consultation carried out pointed to the need for MAP to continue working towards the development of an appropriate regime of liability and compensation, not the least because article 16 of the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, 1995 (known as "the Barcelona Convention") mandated it.

11. It was difficult, however, at this early stage of research and consultation, to favour a particular instrument for the prospective regime, hence the recommendation that work should proceed step-by-step and that no preconceived format for a prospective regime of liability and compensation be adopted at this stage, but that all options with respect to the nature of the ultimate instrument be kept open.

Agenda Item 4: Discussions, Next Steps and Conclusions

12. Following the presentation, the Chairman invited comments by participants on the draft study.

13. Prof. Scovazzi took the floor by thanking the Consultant for his sensible report. He felt that, for the implementation of article 16, two alternatives were discernible as follows:

a. Interstate liability (or international responsibility), that is liability by one State towards another State;
b. Uniform rules of liability and compensation.

He observed that the draft study was based on the French system and noted that other countries had interesting developments and experience which it would be worthwhile to refer to in the study. Another noteworthy practice was that operating before the United Nations Compensation Commission on claims relating to Iraq, which involved elaborate developments on methods of assessment of liability and compensation.

14. Prof. Scovazzi wondered how representative the draft study was given that only five Contracting States had responded to the questionnaires. He queried whether the responses from MAP Focal points reflected the opinion of other ministries. He also conjectured that the poor rate of response was linked in essence to the very difficult topic at hand from a legal point of view and the fact that it was a political issue. As far as he was aware, many States were lukewarm about developing a new regime of liability and compensation. Following the Brijuni meeting, an inter-ministerial consultation had been carried out where doubts were expressed on the proposed regime. The main problems were that no insurance was available for seabed exploitation activities and that the issue of who was liable for land-based pollution was unclear, bearing in mind that, in addition to industrial discharges, the sea was polluted by many land-based diffuse sources.

15. Turning to certain legislative precedents, he mentioned Directive 2004/35/EC of the 21st April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage (hereinafter "the EC Directive on Environmental Liability") and the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, 2003 (hereinafter "the Kiev

Protocol"), under which the "superseding instrument" clause was particularly attractive in addressing conflicts. In other words, Mediterranean countries could adopt a regime which filled all the gaps, but that would be superseded by other, more specific regimes.

16. On the issue of the high seas, Prof. Scovazzi stressed that it should be covered under the prospective instrument. It was noteworthy that the picture in the Mediterranean Sea was changing. Following in the footsteps of France with their recent adoption of ecological zones, a bill for the setting up of a similar zone off the Italian coast had just been approved by the Italian Chamber of Deputies and was awaiting approval by the Senate. The Mediterranean had witnessed other recent initiatives, including the creation of exclusive economic zones by Cyprus and Syria and the proclamation of an exclusive fishing zone by Libya.

17. Last but not least, Prof. Scovazzi drew attention to an important difference between article 16 of the new Barcelona Convention and article 12 of the original Convention (Convention for the Protection of the Mediterranean Sea Against Pollution, 1976) which was not commented upon in the draft study. The difference related to the phrase "as soon as possible," which appeared in the old text, but was not carried forward in the new Convention. Accordingly, he felt that there was no compelling obligation to adopt a protocol and that a step-by-step approach was perfectly permissible.

18. Mr. Lorenzo Schiano di Pepe then took the floor and pointed out the undeniable difficulties in collecting necessary materials, the nature of the task and the timeframe. He wished to table, however, three general comments.

19. Firstly, it was clear that inasmuch as the intention was to fill gaps in the existing law, maritime transport stood outside the ambit of the work at hand. Furthermore, the very specialized nature of maritime transport made it, in his opinion, very difficult to export certain of its governing provisions, such as global limitation of liability, to other sectors.

20. Secondly, he felt that the impact of the EC Directive on Environmental Liability was undeniable. The Directive, which formed part of the law of a large number of Mediterranean Contracting Parties to the Barcelona Convention, had two main characteristics, to wit:

a. A restricted scope of application: The Directive does not deal with traditional damage, but only with pure environmental damage–or damage to natural resources–although traditional damage was meant to be covered in the development stages of the Directive (see the damage *to* the environment vs. damage *through* the environment debate);
b. A very advanced standard of liability: It was debatable whether such a standard was adaptable to the project under discussion.

21. Thirdly, the assembled experts' mandate appeared to one of helping craft an instrument which would be acceptable to all the Contracting Parties to the Barcelona Convention with respect to both substantive and formal issues. Accordingly, it was essential to take into account national practices as there might be countries in which standards were already higher than the prospective scheme, whereas the latter would be a significant step forward in other countries. He cited as examples environmental damage and limitation of liability. As far as the latter was concerned, it might very well be that in certain countries no limitation was available and that liability was therefore unlimited. He also felt inclined towards the inclusion in the prospective scheme of a "superseding instrument clause" similar to the one found in the Kiev Protocol.

22. In turn, the representative of France felt that the draft study was very thorough, but opined that the conclusions did not match the extent of the research carried out.

23. He added that the work under discussion should not be considered in isolation from other developments. He referred, for instance, to the discussions taking place under the framework of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (known as “the Cartagena Protocol on Biodiversity”) and the Stockholm Convention on Persistent Organic Pollutants, 2001, relating to the setting up of a private liability scheme.

24. It was furthermore fundamental to carry out a thorough reflection of any prospective scheme before undertaking any steps. It was also very important to avoid any overlaps.

25. The representative of France drew attention to the fact that the Consultant’s report should reflect the responses furnished by States. For instance, he was afraid that France’s negative response vis-à-vis question 1) of the general consultation questionnaire had not been properly echoed in the study. As a matter of fact, France favoured a step-by-step approach, calling for great caution and a comprehensive assessment of the existing situation. Furthermore, according to France, the study should take into consideration the opinions underlying the EC Directive and should seek a closer correlation between the latter and the prospective Mediterranean regime.

26. In responding to remarks by the representative of France that the study had to reflect the position expressed by Contracting Parties, the Consultant submitted that France’s answer to question 1) on the general consultation questionnaire read “Non avec réserve” and that his interpretation of the comments had led him to conclude that the answer was in fact largely affirmative. He undertook to review the conformity of the compilation in the study with the original answers and promised to correct any shortcomings in the final version.

27. For her part, commenting further on the poor rate of response to the questionnaires, the representative of IJOED said that the matter deserved proper reflection in order to determine whether it resulted from lack of interest or lack of information. Moreover, she questioned the ultimate goal of the work at hand and asked whether the objective was to adopt a protocol or a set of guidelines.

28. She disagreed with any suggestion that, because of the sheer number of existing instruments, there was no need to have a Mediterranean regime. In any case, however, getting the support of all Mediterranean Contracting Parties was a must.

29. According to Prof. Evangelos Raftopoulos, there were questions that lawyers could not answer and that would have to be left to the negotiation process. It was also fair to expect that areas of dispute on legal, technical or scientific aspects would usually be opened for debate and disposed of during the negotiation process.

30. Commenting on the report, he thought that the section recapitulating previous work should somehow be more “coloured” in the sense that, since the fifth meeting of Contracting Parties, a negotiation process had commenced. At the Brijuni meeting, Government-designated legal and technical experts, including 15 lawyers and 16 technical persons, had met for three days and had thus had ample time to discuss relevant issues. The consultation meeting of legal experts on liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area, held in Athens, Greece on the 21st April 2003 (UNEP(DEC)/MED WG.230/2) and the Study concerning the Interstate Guarantee Fund for the Mediterranean Sea Area and the Issue of Liability and Compensation for Damage resulting from Pollution of the Marine Environment, commissioned by UNEP to Messrs. A. Lahlou and M. Loukili (UNEP/IG.14/INF.18, UNEP/IG.23/INF.3), had in comparison been more restricted. He foresaw the need for yet another meeting of Government-designated legal experts for matters to be resolved on a different level. In the current meeting, the participants could start the discussions and make some inroads on the negotiation path.

31. Regarding the approach to take, he said that a possible avenue lied in a comprehensive Mediterranean regime, which would be justified on the grounds that the Mediterranean was a specific area. Prof. Raftopoulos would agree that one of the problems that would arise in this regard was the possible linkages, which was a very important aspect of the negotiation process. He continued saying that linkages existed even in prioritized areas, for example as regards offshore activities with the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001. In his view, the EC Directive should not be overemphasized despite its importance. He called for an elaboration of the question whether existing regimes could be considered as already covering the Mediterranean Sea Area and felt that, in any case, linkages could be discussed not only by legal experts, but also during the negotiation process.

32. On the issue of exemptions from strict liability, he referred to important developments in the field of maritime security, citing the recent IMO International Ship and Port Facility Security Code (known as the "ISPS Code"), the impending amendments to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (known as "the SUA Convention") and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988, and ILO's Seafarers' Identity Documents Convention (Revised), 2003. He was thus inclined to leave the question of the defence of "act of terrorism" to the negotiation process.

33. A number of points were then opened for discussion.

34. The fallacies of the resort to questionnaires, the difficulty of the topic and the time allocated for the study were thought to have affected the final output.

35. There was general consensus that article 16 of the Barcelona Convention offered no alternative but to see the process underway through. The task of the assembled experts was to draw up a work plan which could be submitted to Contracting Parties at their forthcoming meeting.

36. Three recommendations, not necessarily exclusive of each other, were thus identified for possible submission to the Contracting Parties, to wit:

a. The drafting of a protocol to the Barcelona Convention;
b. A step-by-step approach, leaving the whole subject for further study and for the tabling of proposals by an ad hoc group of experts;
c. Referral of a recommendatory choice between the first two options above to an ad hoc group of experts.

37. The representative of France took the opportunity to clarify to meeting participants that his country's "no" was a methodological "no." Indeed, a methodical, step-by-step approach was apposite, starting with an assessment of extant conditions, leading potentially to the drafting of guidelines (and ultimately possibly a protocol). Hasting towards an overly binding instrument at this stage was utterly rash. Article 16 of the Barcelona Convention, it was noted, did not specify a particular modus operandi.

38. Ultimately, option c) above was agreed to exclusively. The MAP Secretariat explained that an open-ended group of legal and technical experts could be constituted, following the procedure established under the framework of the compliance review.

39. A discussion took place on whether NGOs were properly represented under the said procedure. A distinction was made between industry and environmental NGOs. A better term suggested for "NGO" could be "civil society." Budgetary limitations imposed restrictions on membership.

40. The Chairman then called on the meeting participants to improve the recommendations on page 210 of the draft, which would form the basis of the terms of reference of the prospective group of experts.

41. As far as the first recommendation was concerned, adherence to the terminology of article 16 (“appropriate rules and procedures”) was called for and a recommendation that there be further reflection on the prospective regime was suggested for inclusion.

42. Given the historical background, it was proposed to add wording such as “building on previous activities within the MAP framework.”

43. It was furthermore argued that the third recommendation should be brought up after the first recommendation. A suggestion was made to include in it the word “regional.”

44. It was moreover agreed that, in the second recommendation, options should be identified.

45. The words “no preconceived format” were seen on the other hand to be inappropriate as they left the matter far too wide open.

46. The third recommendation was to be worded positively rather than negatively, that is “[that the prospective regime should be compatible with…]”

47. It was also suggested to add under the third recommendation the words “take into consideration current trends and developments,” especially since the process might take some time to complete.

48. Moving to the fourth recommendation, it was suggested to change its final part since article 16 of the Barcelona Convention already covered the high seas. An alternative formulation could thus be to the effect that the prospective regime would cover the Mediterranean Sea, including the high seas and the various jurisdictional areas. Yet another view suggested adding words such as “in accordance with the Barcelona Convention *and* its Protocols.” One participant asked whether it was not better to refer to the “Mediterranean Sea Area” simply. It was finally decided to reformulate the impugned part of the recommendation along the following lines: “the prospective regime should in principle cover the Mediterranean Sea Area as determined under the Barcelona Convention and its Protocols.”

49. It was furthermore agreed that the group of experts be tasked to consider those items listed in a non-exhaustive manner in the fifth recommendation and following on page 210 of the draft study.

50. It was proposed that the working group should be asked to recommend the format to be adopted and that the point could be added in the list of items to be considered by the group either in limine or in fine.

51. After an exchange of views, use of the term “ecological damage” was preferred to “pure environmental damage.” The former term, it was pointed out, could be referred to damage devoid of economic significance and covered the loss of quality of the environment. By contrast, reinstatement and restoration did not constitute ecological damage. An example was given of the loss of a species of birds with no economic value. Under Italian law, for instance, ecological damage was compensable, but its method of assessment was a question mark.

52. Prioritisation of certain activities done at previous meetings for purposes of developing a prospective regime was referred to. Yet, according to one view, article 16 of the

Barcelona Convention was very general and did not tally necessarily with prioritization. A comprehensive regime was perhaps called for. It was nonetheless agreed that the seventh and fourth recommendations could be merged together.

53. It was also suggested to ask the group of experts to consider whether the prospective regime should cover kinds of pollution covered under existing regimes which had not yet entered into force.

54. Overall, the list of items for consideration by the group of experts should be worded concisely and so as to avoid setting forth specific directions.

55. The group of experts' terms of reference would stretch over two years, so that its report would be due at the sixteenth meeting of Contracting Parties.

56. A concern was raised as to the manner of suggesting to Contracting Parties to improve the current situation pending the two-year period needed for the working group to carry out its work. That period could in fact stretch longer. It was felt that this was an important matter, but that it should be left to the compliance framework. Although the point could not be taken into consideration in these recommendations, the study could perhaps suggest that nothing prevented States from improving their laws of liability and compensation.

57. The Chairman said that the report of the current meeting would be taken to the Bureau and thence to the meeting of MAP Focal Points before being submitted to the meeting of Contracting Parties which would decide on the following steps for the next biennium.

Agenda Item 5: Closure of the Meeting

58. All issues having been discussed, the Chairman closed the meeting with the usual words of thanks to participants.

Annex I

Agenda of the Meeting

1. Opening of the meeting

2. Adoption of the Provisional Agenda and organization of work

3. Presentation of the draft “Feasibility study covering the legal, economic, financial and social aspects of a liability and compensation regime in the Mediterranean Sea and its coastal area”

4. Discussions, next steps and conclusions

5. Closure of the meeting

Annex II
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