

Decision IG 17/4: Guidelines for the Determination of Liability and Compensation for Damage resulting from Pollution of the Marine Environment in the Mediterranean Sea Area

The 15th Meeting of the Contracting Parties,

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

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

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

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

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

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

Recommends that the Contracting Parties take into account the Feasibility Study Covering the Legal, Economic, Financial and Social Aspects of a Liability and Compensation Regime in the Mediterranean Sea and its Coastal Area UNEP(DEC)/MED WG.270/Inf.4 and the Explanatory Note to the Draft Guidelines UNEP(DEPI)/MED WG.320/Inf.4 for the purpose of facilitating the implementation of the said Guidelines,

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

Also decides to establish a working group of legal and technical experts to facilitate and assess the implementation of the Guidelines and make proposals regarding the advisability of additional action;

Requests the Secretariat to:

- prepare for adoption by the 16th Meeting of the Contracting Parties in 2009 a concise draft format for reporting on the implementation of the Guidelines;
- provide assistance to Mediterranean countries upon request to facilitate the implementation of the Guidelines, with particular reference to the development of domestic legislation and capacity building;
- prepare a draft assessment report on the implementation of the Guidelines for the consideration of the working group of legal and technical experts established for this purpose by the Meeting of the Contracting Parties.

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

A. Purpose of the Guidelines

1. These Guidelines aim at implementing Article 16 of the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, done in Barcelona on 16 February 1976, as amended in Barcelona on 10 June 1995 (the "Barcelona Convention"), according to which the Contracting Parties undertake to cooperate in the formulation and adoption of appropriate rules and procedures for the determination of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area.
2. These Guidelines are also aimed at the furtherance of the polluter pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter, with due regard to the public interest, as provided for in Article 4, paragraph 3, sub-paragraph (b), of the Barcelona Convention. These Guidelines do not provide for any State subsidiary liability.
3. While not having a legally binding character *per se*, these Guidelines are intended to strengthen cooperation among the Contracting Parties for the development of a regime of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area and to facilitate the adoption by the Contracting Parties of relevant legislation.
4. These Guidelines apply to the activities to which the Barcelona Convention and any of its Protocols apply.

B. Relationship with Other Regimes

5. These Guidelines are without prejudice to existing global and regional environmental liability and compensation regimes, which are either in force or may enter into force, as indicatively listed in the Appendix to these Guidelines, bearing in mind the need to ensure their effective implementation in the Mediterranean Sea Area as defined in paragraph 7.
6. These Guidelines are without prejudice to the rules of international law on State responsibility for internationally wrongful acts.

C. Geographical Scope

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

D. Damage

8. The legislation of Contracting Parties should include provisions to compensate both environmental damage and traditional damage resulting from pollution of the marine environment in the Mediterranean Sea Area.
9. For the purpose of these Guidelines, “environmental damage” means a measurable adverse change in a natural or biological resource or measurable impairment of a natural or biological resource service which may occur directly or indirectly.
10. Compensation for environmental damage should include, as the case may be:
 - (a) costs of activities and studies to assess the damage;
 - (b) costs of preventive measures including measures to prevent a threat of damage or an aggravation of damage;
 - (c) costs of measures undertaken or to be undertaken to clean up, restore and reinstate the impaired environment, including the cost of monitoring and control of the effectiveness of such measures;
 - (d) diminution in value of natural or biological resources pending restoration;
 - (e) compensation by equivalent if the impaired environment cannot return to its previous condition.
11. In assessing the extent of environmental damage, use should be made of all available sources of information on the previous condition of the environment, including the National Baseline Budgets of Pollution Emissions and Releases, developed in the context of the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities, done in Athens on 17 May 1980, as amended in Syracuse on 7 March in 1996, and the Biodiversity Inventory carried out in the framework of the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean, done in Barcelona on 10 June 1995.
12. The measures referred to in paragraph 10(b) and (c) should be reasonable, that is appropriate, practicable, proportionate and based on the availability of objective criteria and information.
13. When compensation is granted for damage referred to in paragraph 10(d) and (e), it should be earmarked for intervention in the environmental field in the Mediterranean Sea Area.
14. For the purpose of these Guidelines, “traditional damage” means:
 - (a) loss of life or personal injury;
 - (b) loss of or damage to property other than property held by the person liable;
 - (c) loss of income directly deriving from an impairment of a legally protected interest in any use of the marine environment for economic purposes, incurred as a result of impairment of the environment, taking into account savings and costs;
 - (d) any loss or damage caused by preventive measures taken to avoid damage referred to under sub-paragraphs (a), (b) and (c).
15. These Guidelines also apply to damage caused by pollution of a diffuse character provided that it is possible to establish a causal link between the damage and the activities of individual operators.

E. Preventive and Remedial Measures

16. The legislation of the Contracting Parties should require that the measures referred to in paragraph 10(b) and (c) are taken by the operator. If the operator fails to take such measures or cannot be identified or is not liable under the legislation implementing these Guidelines, the Contracting Parties should take these measures themselves and recover the costs from the operator where appropriate.

F. Channeling of Liability

17. Liability for damage covered by these Guidelines will be imposed on the liable operator.
18. For the purpose of these Guidelines, "operator" means any natural or juridical person, whether private or public, who exercises the *de jure* or *de facto* control over an activity covered by these Guidelines, as provided for in paragraph 4.

G. Standard of Liability

19. The basic standard of liability will be strict liability, that is liability dependent on the establishment of a causal link between the incident and the damage, without it being necessary to establish the fault or negligence of the operator.
20. In cases of damage resulting from activities not covered by any of the Protocols to the Barcelona Convention, the Contracting Parties may apply fault-based liability.
21. In the case of multiple-party causation, liability will be apportioned among the various operators on the basis of an equitable assessment of their contribution to the damage.
22. For the purpose of these Guidelines, "incident" means any sudden occurrence or continuous occurrence or any series of occurrences having the same origin, which cause damage or create a grave and imminent threat of causing damage.

H. Exemptions of Liability

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

I. Limitation of Liability

24. In cases where strict liability is applied, financial limits of liability may be established on the basis of international treaties or relevant domestic legislation.
25. The Contracting Parties are invited to re-evaluate on a regular basis the appropriate extent of the amount of such limits, taking into account, in particular, the potential risks posed to the environment by the activities covered by these Guidelines.

J. Time Limits

26. Time limits to commence proceedings for compensation should be based on a two-tier system of a shorter period from the knowledge of the damage or from the identification of the liable operator, whichever is later (e.g. three years), and a longer period from the date of the incident (e.g. thirty years).
27. Where the incident consists of a series of occurrences having the same origin, the time limits should run from the date of the last of such occurrences. Where the incident consists of a continuous occurrence, the time limits should run from the end of that continuous occurrence.

K. Financial and Security Scheme

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

L. Mediterranean Compensation Fund

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

M. Access to Information

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

N. Action for Compensation

31. The legislation of the Contracting Parties should ensure that actions for compensation in respect of environmental damage are as widely accessible to the public as possible.
32. The legislation of Contracting Parties should also ensure that natural and juridical persons that are victims of traditional damage may bring actions for compensation in the widest manner possible.

Appendix

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

- Convention on Third Party Liability in the Field of Nuclear Energy, Paris, 29 July 1960, amended by Paris Additional Protocol of 28 January 1964; Paris Protocol of 16 November 1982; and Paris Protocol of 12 February 2004
- Convention Supplementary to the Paris Convention of the 29th July 1960 on Third Party Liability in the Field of Nuclear Energy, Brussels, 31 January 1963, as amended by Paris Additional Protocol of 28 January 1964; Paris Protocol of 16 November 1982; and Paris Protocol of 12 February 2004
- International Convention on Civil Liability for Oil Pollution Damage, London, 27 November 1992
- Convention on Civil Liability for Nuclear Damage, Vienna, 21 March 1963, amended by Vienna Protocol of 12 September 1997
- Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, Brussels, 17 December 1971
- International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, London, 27 November 1992
- Convention on Limitation of Liability for Maritime Claims, London, 19 November 1976, amended by London Protocol of 2 May 1996
- Joint Protocol relating to the Application of the Vienna Convention and the Paris Convention, Vienna, 21 September 1988
- Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, Geneva, 10 October 1989
- International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, London, 3 May 1996
- Convention on Supplementary Compensation for Nuclear Damage, Vienna, 12 September 1997
- Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 10 December 1999
- International Convention on Civil Liability for Bunker Oil Pollution Damage, London, 23 March 2001
- Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, Kiev, 21 March 2003

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- Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, London, 16 May 2003
- Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage