

Introduction

This document gives a summary of the work carried out within the framework of MAP on the issue of liability and compensation. It sets forth in Part I a series of milestones leading up to this meeting whereas Part II sums up the analytical points of discussion. Finally, in Part III, a number of issues are being proposed for the consideration of this meeting.

Part I: Milestones

Previous work on liability and compensation under MAP's framework can be traced to a series of milestones as follows.

I.1 Barcelona Convention, 1976

The legal basis of the work on the issue of liability and compensation for damage from pollution lies in article 12 of the Barcelona Convention, 1976, entitled "Liability and Compensation," which reads:

"The Contracting Parties undertake to cooperate as soon as possible in the formulation and adoption of appropriate procedures for the determination of liability and compensation for damage resulting from the pollution of the marine environment deriving from violations of the provisions of this Convention and applicable Protocols."

The geographical scope of application resulting from Article 4 of the Convention is reflected in the expression "Mediterranean Sea Area," which corresponds to "the maritime waters of the Mediterranean Sea proper" excluding, except as may be otherwise provided for in the protocols to the Convention, internal waters.

I.2 Messrs. Lahlou & Loukili's Study, 1979/1981

As early as 1978, UNEP commissioned a study on the subject of liability and compensation pursuant to the above provisions of the Barcelona Convention to Messrs. A. Lahlou and M. Loukili. 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 was submitted to the Intergovernmental Meeting of Mediterranean Littoral States aiming at evaluating the state of progress of the Mediterranean Action Plan and the First Meeting of Contracting Parties to the Convention for the Protection of the Mediterranean Sea from Pollution and the Protocols relating thereto, which was held in Geneva from the 5th to the 10th February 1979.

By and large, the study advocated the setting up in the Mediterranean Sea Area of a regime of strict or objective liability coupled with a system of compensation based on one or more interstate funds the contributions to which would be levied on the industry. The study strongly pressed for a multidisciplinary regime, i.e. covering all sources of pollution, including ship-source oil pollution which, at the time, was already regulated by the International Convention on Civil Liability for Oil Pollution Damage, 1969 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971. Arguing that shipping should be covered by the prospective regime, the authors of the study foresaw the need to convene an international global conference to adopt the requisite legal instrument. Insofar as land-based marine pollution was concerned, Messrs. Lahlou and Loukili considered that the sheer extent of the phenomenon required that non-littoral States lying upstream on rivers flowing into the Mediterranean Sea should be brought under the regime.

I.3 Revised Barcelona Convention, 1995

Under the heading “Liability and Compensation,” article 16 of the revised Barcelona Convention, 1995, provides:

“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.”

Pursuant to article 1(1), “Mediterranean Sea Area” means the maritime waters of the Mediterranean Sea proper. Under article 1(2), “[t]he application of the Convention may be extended to coastal areas as defined by each Contracting Party within its own territory.” Accordingly, the prospective regime would theoretically apply at sea in the harbour area, inland waters, as well as the open sea. The question whether it would also extend to coastal areas is left up to each Contracting Party and subject to the geographical limits determined by each Contracting Party within its own territory.

I.4 Brijuni Meeting (1997)

A first meeting of government-designated legal and technical experts was convened by the MAP Secretariat at Brijuni, Croatia, from the 23rd to the 25th September 1997 for the purpose of preparing 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. The participants at the meeting generally agreed that a binding legal instrument, rather than a soft law mechanism, should preferably be, in the form of a Protocol rather than an Annex to the Barcelona Convention, 1995.

I.5 1st Athens Meeting (2003)

A first consultation meeting of legal experts on liability and compensation was held at Athens, Greece, on the 21st April 2003 in order to discuss the grounds and feasibility for a new legal instrument related to liability for damage to the Mediterranean marine environment. It was generally felt by participants in attendance at the Athens meeting that the previous Brijuni meeting had come up with a basic proposal and explanatory document setting up a very advanced liability regime, but that such a regime was seen as too ambitious in various aspects by some countries.

The Athens meeting reached the following conclusions:

“- to move forward a legal instrument which covers all the activities not already regulated at an international level, taking also into consideration the proposed European Directive on environmental liability, i.e., dumping, operation of offshore installations and land based activities. It was proposed to include the SPA Protocol activities as far as alien species are concerned.

- The legal instrument should have the form of a Protocol in order to allow its adoption by the Parliaments of the Parties

- The Protocol could be divided in two parts: a first part dedicated to the general liability and compensation rules, and a second part containing annexes addressing specific activities. It was proposed to start with offshore installations or dumping”

I.6 13th Meeting of the Contracting Parties (2003)

At their 13th meeting held in Catania, Italy from the 11th to the 14th November 2003, the Contracting Parties to the Barcelona Convention, 1995 requested the Secretariat to prepare

a feasibility study for submission to the meeting of the Contracting Parties in November 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.

I.7 Feasibility Study, 2005

MAP commissioned Mr. Aref Fakhry to prepare the said feasibility study, which was submitted to the Secretariat in draft form in the first half of 2005. The draft contained a methodical review of a number of international and regional regimes of liability and compensation for environmental damage that Contracting Parties to the Barcelona Convention were already bound by or could inspire themselves from for developing appropriate rules and procedures under article 16. The study also reported on consultations held with Contracting Parties and MAP Partners on the kind and content of the prospective rules and procedures.

I.8 2nd Athens Meeting (2005)

A second meeting of legal experts on liability and compensation was held at Athens, Greece, on the 16th June 2005 in order to discuss the main findings and conclusions of the draft feasibility study. The main outcome of the meeting can be summarized in the following two recommendations:

- Building on previous activities, it was recommended that further action and reflection be undertaken by the Contracting Parties towards 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;
- It was further recommended that a step-by-step approach should be followed and that no preconceived format for the above-mentioned rules and procedures be singled out at this stage, but that all options with respect to the nature of the ultimate instrument be kept open, including but not limited to a protocol or an annex to the Barcelona Convention, 1995.

I.9 14th Meeting of the Contracting Parties (2005)

At their 14th meeting held from the 8th to the 11th November 2005 in Portoroz, Slovenia, the Contracting Parties agreed to establish an open-ended working group of legal and technical experts nominated by the Contracting Parties and whose mandate would be to formulate appropriate rules and procedures for the determination of liability and compensation for damage resulting from pollution of the Mediterranean Sea Area for their consideration at the 15th meeting of Contracting Parties to be held in 2007.

Part II: Analytical Points for Discussion

II.1 Rationale for a Prospective Regime

In view of implementing article 16 of the revised Barcelona Convention, 1995, in force since July 2004, there is a clear 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. The foregoing is supported by the outcome of the consultations carried out for the purpose of the feasibility study, which point to a need to create in the Mediterranean Sea Area and under the framework of the Barcelona Convention an ad hoc liability and compensation regime to deal with the consequences of environmental degradation. In itself, this means that a perception has so far been confirmed that current

gaps or inadequacies in the rules of liability and compensation call for intervention. It should be said that there is nothing in principle standing in the way for the adoption of such an ad hoc regime in view of the piece-meal development of environmental law.

II.2 Formal Aspects – Nature of Instrument

Both meetings of experts at Brijuni (1997) and Athens (2003) favoured the adoption of a binding legal instrument such as a protocol to the Barcelona Convention whereas the second meeting of experts in Athens (2005) adopted a more cautious approach. The Contracting Parties appeared to be generally divided on the issue while socio-economic actors consulted all seemed to support the adoption of a protocol.

One line of thought for instance that is premature to favour a specific form for the “appropriate rules and procedures” before having defined exactly their scope of application. It is better to proceed step by step, for instance by having the Conference of Contracting Parties issue guidelines which Parties can then transfer into their national law. Only following assessment after a certain period of time should a binding legal instrument be envisaged. This approach would open the door to various options and would seem to address the flexibility reflected in Article 16 of the revised Barcelona Convention as well as to facilitate the work by keeping the door open to all possibilities. On the other hand, there seems to be unanimity that any regime to be developed should ultimately be submitted to Parliamentary approval. This can be explained by the perceived importance of the prospective regime and the desire of interested parties to see it undergo the democratic forms of scrutiny prior to its adoption.

A number of options with respect to the nature of the appropriate rules and procedures under article 16 of the Barcelona Convention need to be investigated, including but not limited to a protocol or an annex to the Convention, a model law, a code of conduct, uniform principles, guidelines and/or recommendations.

II.3 Relationship with Other Regimes

The preparatory document submitted by the MAP Secretariat ahead of the Brijuni meeting envisaged that the prospective regime could actually overlap with “international agreements or arrangements in which the Contracting Parties participate as parties.” It proposed, however, to deal with the potential conflict by allowing victims to benefit from the more generous regime of liability and compensation. The meeting’s report does not contain the trace of how the discussion, if any, ensued on this particular point and what direction it may have taken.

At the first Athens meeting, 2003, participating legal experts agreed on the other hand that the prospective regime should cover “all the activities not already regulated at an international level.” An example given of the latter was maritime transport covered by IMO conventions.

Be that as it may, the prospective regime should be compatible with existing international, regional and, where applicable, European Community regimes of liability and compensation relating to specified types of environmental degradation, notably IMO conventions dealing with ship-source pollution damage, taking into consideration current trends and developments.

II.4 Geographical Scope of Application

The Brijuni meeting concluded that the new regime should cover the high seas. The majority of parties consulted for the purpose of the preparation of the feasibility study would agree with this view, especially since the revised Barcelona Convention already covers the high

seas. It is worth mentioning that a number of existing environmental liability and compensation regimes are applicable on the high seas. Thus, there would not seem to be a legal impediment to such an extension although the matter deserves further investigation. Yet, there is a perceived difficulty to control activities on the high seas, particularly by the less developed countries. A suggestion could be that the prospective regime should first be implemented in the coastal zone before being extended further out at sea. In this regard, application of the prospective regime in the coastal area seems to attract wider consensus. The argument that such an area is already covered by the Barcelona Convention may be reiterated here.

Accordingly, the prospective regime should in principle cover the Mediterranean Sea Area, as determined by the Barcelona Convention and its Protocols.

II.5 "Damage"

It was rightly pointed out at the Brijuni meeting that the definition of compensable damage should be consistent with the obligations of the Contracting Parties under the Barcelona Convention. Any examination of the point requires a discussion of not only the types of damage that may fit the definition ultimately adopted, but also the method of assessing damage for purposes of placing a monetary figure on compensation. These two facets are considered in turn below.

II.5.1 Types of Damage to be Covered

Participants in the Brijuni meeting considered that the definition of "damage" should include damage to persons and property, damage caused by impairment of the marine and coastal environment of the Mediterranean (the so-called "environmental damage") and the cost of (reasonable) preventive measures, including further loss or damage caused by the preventive measures.

To the Athens meeting of 2003, it appeared equally important to clarify the kind of damage to be covered. For instance, should any kind of damage be covered or only specific kinds of damage such as damage related to dumping, seabed pollution and land-based pollution? This issue could, however, more conveniently be dealt with under the heading "Activities," discussed further below.

In any case, the definition of compensable damage should be further considered.

II.5.2 Assessment

There was consensus at the Brijuni meeting that damage caused by impairment of the marine and coastal environment should be assessed on the basis of the cost of reinstatement measures. More generally, according to the first Athens meeting participants, it was important to clarify which criteria should be used for the assessment of the damage. Reference was made in this regard to current judicial and arbitral practices and procedures used by major international compensation funds in the assessment of damage. It is clear that, along the path of the formulation of a prospective regime, an investigation of such practices and procedures should be carried out so that lessons may be drawn by the Mediterranean Contracting Parties.

Accordingly, as far as assessment of compensable damage is concerned, the matter should be looked into in more detail in forthcoming actions.

II.6 “Activities”

The MAP Secretariat’s preparatory document submitted at the Brijuni meeting suggested that the definition of “damage” should “indicate the nature of the activities that fall within the scope of the liability and compensation regime in the Barcelona Convention system.” It was recommended by the Secretariat that the definition should include “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.” There was a majority view at the meeting that the Mediterranean liability regime should be limited to dangerous activities which should be specifically listed. Points of disagreement emanating from the Brijuni meeting related to the inclusion or not of land-based pollution.

At the first consultation meeting in Athens (2003), three types of activities were identified as noteworthy of inclusion, i.e. operation of offshore installations, dumping and land-based pollution. As far as damage to biodiversity was concerned, the discussion at the meeting identified two possible approaches.

By and large, parties consulted for the purpose of the feasibility study were of the view that all land-based activities deserved to be included under the regime and that aquaculture, offshore mineral activities, dumping as well as leisure activities at sea should be covered.

Reverting to the four activities singled out by the Athens meeting participants, the following comments are apposite:

- As far as land-based activities are concerned, it is noteworthy that the LBS Protocol includes a long list of activities in its annex. A proposal that could be envisaged is that Mediterranean States should prioritize activities that they wish to cover under the prospective liability and compensation regime. Prioritization could be done on the basis of the criteria already included in the annex to the Protocol, but States could also set priorities on the basis of their own situation. The MAP Secretariat could help Mediterranean States in prioritizing land-based activities to be covered. A source of inspiration in this endeavour could be the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, 1993 adopted at Kiev under the framework of the Convention of the Protection and Use of Transboundary Watercourses and International Lakes, 1992 and the Convention on the Transboundary Effects of Industrial Accidents, 1992, both done at Helsinki and, specifically, the Protocol’s annex. Standards could thus be developed regarding toxic substances and threshold quantities as a pre-requisite to the triggering of liability provisions.
- As far as offshore activities are concerned, it was felt that this was not a pressing area for intervention especially since that the industry is to a considerable extent already observing its own codes of ethics and other forms of self-regulation. Reference was made to OPOL (Offshore Pollution Liability Agreement, 1974), an agreement entered into between offshore concerns, which should be distinguished from the international convention of the same name adopted in London in 1977 and which never entered into force. A measure of control should however be ensured so that industry does not fall under certain standards.
- Furthermore, the point was made that the issue of biodiversity would best be tackled in a way similar to that obtaining under the Directive 2004/35/CE of the European Parliament and of the Council of the 21st April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage, which sets forth state-of-the-art standards on the matter.
- Finally, dumping was seen as an activity falling largely outside international conventions when it came to private liability and compensation. An opportunity arises within the framework of the Barcelona Convention to include it within the prospective regime to be developed.

In conclusion, further consideration should be given to the activities that should be covered under a prospective Mediterranean regime and, in particular, whether priority should be given to land-based and offshore activities, dumping and biodiversity.

II.7 “Incident”

According to the MEDU Secretariat proposal at the Brijuni meeting, damage may result from three kinds of incidents, i.e. a sudden occurrence, a continuous occurrence or a series of occurrences with the same origin.

This matter should be further considered.

II.8 “Operator”

The MAP Secretariat’s preparatory document at the Brijuni meeting suggested a definition of the “operator” who would bear the primary liability under the prospective regime. The definition was accepted by participants at the Brijuni meeting. The view was stressed, however, that it was important to clarify how to identify the polluter in the event that land-based pollution was included in the regime.

Various definitions were gathered in the feasibility study’s section analysing regimes in place and there should be no difficulty to come up with a satisfactory provision on the issue.

The definition of the liable party or parties should be considered further.

II.9 Multiple Tier Liability and Compensation

It was arguable whether liability and compensation should be framed in a single or a multiple tier, bringing, in addition to the notional operator, other parties liable, such as an interstate fund and individual States.

II.9.1 Operator

As to the definition of “operator,” see above.

II.9.1.1 Standard of Liability

There was a general view at the Brijuni meeting supporting the MAP Secretariat’s proposal of a strict liability system. Exceptionally, the Secretariat document suggested the creation of absolute liability.

Liability would be triggered once damage was causally linked to an incident, as these terms would ultimately be defined under the prospective regime.

The matter should be further considered.

II.9.1.2 Exemptions of Liability

No opinion could as yet be formed on matters related to exemption of liability which *would be best analysed in relation to the activities to be included under the prospective regime.*

II.9.1.3 Limitation of Liability

This issue remained undecided following the Brijuni meeting.

Limitation of liability should be further considered.

II.9.1.4 Compulsory Financial and Security Scheme

Compulsory insurance or other systems of financial security, capacity of the insurance market, financial limits or caps of insurance, direct action: these are all matters which should be further considered.

II.9.2 Mediterranean Inter-State Compensation Fund

This issue remained undecided following the Brijuni meeting.

The first meeting in Athens (2003) stressed the importance of clarifying the role of the complementary Fund in providing but also receiving compensation.

It was premature to suggest or even conjecture whether an international fund could be usefully resorted to under the prospective regime.

This issue should be considered further.

II.9.3 State Residual Liability

This issue remained undecided following the Brijuni meeting. It did not seem that there was much substance to move forward on this ground. It is true that public funds are allocated for compensation purposes in nuclear liability instances.

Further consideration is suggested of the issue of State residual liability

II.10 Actions for Compensation or Who Can Sue?

As far as environmental damage was concerned, participants at the Brijuni meeting were of the view that the State could be considered as a trustee of the general interest for the protection of the Mediterranean marine environment. Points of disagreement emanating from the Brijuni meeting included the role to be attributed to NGO's.

A view was articulated at the first Athens meeting that it was important to clarify how to determine the victims when pollution occurred on the high seas.

In the course of the consultations carried out towards preparation of the feasibility study, it was noticed that all respondents supported right of suit by the State whereas Contracting Parties were generally against NGO's being given the right to claim. Socio-economic actors were understandably favourable to the role of NGO's.

In any case, further consideration should be given to the issue of the right of suit.

II.11 Further Work

A more in-depth study should go into, inter alia, the reasons for the non-ratification of certain international and regional instruments.

Part III: Compilation of Recommendations

Following the second Athens meeting of experts, the following conclusions and recommendations were made and which are being reproduced here for the consideration of this meeting:

- 1) The prospective regime/rules and procedures should be compatible with existing international, regional and, where applicable, European Community regimes of liability and compensation relating to specified types of environmental degradation, notably IMO conventions dealing with ship-source pollution damage, taking into consideration current trends and developments;
- 2) All options with respect to the nature of the ultimate instrument, including but not limited to a protocol or an annex to the Barcelona Convention, a model law, a code of conduct, uniform principles, guidelines and/or recommendations should be kept open;
- 3) The prospective regime should in principle cover the Mediterranean Sea Area, as determined by the Barcelona Convention and its Protocols;
- 4) The working group of legal and technical experts should consider and propose recommendations on the various issues relating to the formulation and adoption of rules and procedures, including but not limited to the following *issues*:
 - (a) *The choice of the legal instrument to be adopted;*
 - (b) *The scope of the instrument and the definition of activities to be covered and, in particular, whether priority should be given to land-based and offshore activities, dumping and activities attaining biodiversity;*
 - (c) *The definition and nature of compensable damage;*
 - (d) *The assessment of compensable damage;*
 - (e) *The definition of incidents to be covered;*
 - (f) *The definition of the liable party or parties;*
 - (g) *The standard of liability, including, where applicable, exemptions from liability;*
 - (h) *The channeling of liability (causation issues);*
 - (i) *Limitations on liability;*
 - (j) *Mechanism of financial security;*
 - (k) *The setting up of an interstate compensation fund, whether based on contributions from States or industry;*
 - (l) *State liability;*
 - (m) *Standing/right to bring claims.*