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MEDITERRANEAN ACTION PLAN

13th Ordinary Meeting of the Contracting Parties to
the Convention for the Protection of the Mediterranean
Sea against Pollution

Catania (Italy), 11-14 November 2003

REPORT

CONSULTATION MEETING OF LEGAL EXPERTS ON LIABILITY AND COMPENSATION FOR DAMAGE RESULTING FROM POLLUTION OF THE MARINE ENVIRONMENT IN THE MEDITERRANEAN SEA AREA



**United Nations
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MEDITERRANEAN ACTION PLAN

Meeting of MAP National Focal Points

Athens (Greece), 15-18 September 2003

REPORT

**CONSULTATION MEETING OF LEGAL EXPERTS ON LIABILITY
AND COMPENSATION FOR DAMAGE RESULTING FROM POLLUTION OF
THE MARINE ENVIRONMENT IN THE MEDITERRANEAN SEA AREA**



**United Nations
Environment
Programme**



UNEP(DEC)/MED WG.230/2
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MEDITERRANEAN ACTION PLAN

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, 21 April 2003

REPORT

**CONSULTATION MEETING OF LEGAL EXPERTS ON LIABILITY
AND COMPENSATION FOR DAMAGE RESULTING FROM POLLUTION OF
THE MARINE ENVIRONMENT IN THE MEDITERRANEAN SEA AREA**

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Introduction

1. The 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) requested the MAP Secretariat to convene a second meeting of experts in order to examine the results of this first Meeting (paragraph 48 to document UNEP(OCA)/MEDWG.117/4).

2. Pursuant to this request, the second Meeting of legal experts on Liability and Compensation was held at Athens, Greece, 21 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.

Participants

3. Experts from Italy and Greece attended the meeting:

4. The UNEP/IMO Regional Marine Pollution Emergency Response Centre for the Mediterranean (REMPEC), as well as the UNEP BASEL Convention Secretariat, were also represented.

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

Agenda item 1. Opening of the Meeting

6. The Meeting was chaired by M. Lucien Chabason, Coordinator of the Mediterranean Action Plan, who welcomed the participants and declared the Meeting open.

Agenda item 2. Adoption of the Agenda and organization of work

7. The Meeting adopted the provisional agenda and approved the timetable of work (UNEP(DEC)/MED WG.230/1). Both agenda and timetable are attached as Annex II to this report.

Agenda item 3 Main findings and recommendations of the Brijuni Meeting related to the need for a new legal instrument on liability under Barcelona Convention and its feasibility, by Prof. Raftopoulos, MAP legal adviser

8. Prof. Evangelos Raftopoulos, MAP Legal consultant, introduced the working document UNEP(OCA)/MED WG.117/4 (Report of the 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).

9. He underlined the importance of the implementation of article 16 of the Barcelona Convention on liability and compensation to improve the effectiveness of the overall Barcelona system and commented its broader formulation compared to article 12 of the Barcelona Convention.

10. He recalled the outcome of the Brijuni Meeting which discussed a draft working document on appropriate procedure for determination of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea. He

summarized the working document, presenting the proposed formal and substantial approach as well as analysis of the establishment of liability and compensation regime in the framework of the Barcelona Convention. Regarding the form, the experts generally agreed that a binding legal instrument, rather than a soft law instrument, should be preferable, in a form of a Protocol rather than an Annex to the Barcelona Convention.

11. Coming to the discussed substantial issues, Prof. Raftopoulos indicated that the adopted definition of damage, as proposed in the document, was a comprehensive one. Moreover, it was decided that the definition should refer to a specific list of activities, which has to be limited to dangerous or potential dangerous acts or activities. The Brijuni Meeting also adopted definitions of key concepts, like impairment of the marine or coastal environment, preventive measures, incidents, operator.

12. The Meeting dealt with liability standards: a strict liability of the operator should be established in the proposed liability regime. Determination of strict liability should refer to a list of activities that give rise to it, and formulated by reference to the Protocols of the Barcelona system. Moreover, the proposed Mediterranean liability standard should be compatible with national laws as well as international law.

13. It was agreed that exemptions under the liability regime should be defined as narrowly as possible, and include "an act of terrorism".

14. Prof. Raftopoulos indicated also that the compulsory financial and security scheme was debated, with special concern on the capability of the insurance market to cover the consequences of a damage to the marine environment. A uniform financial security system was preferred at a regional level and it was agreed that the first step should be to set the limit of the liability of operators, and that States should cover any amount over and above this limit.

15. The concept of residual liability of State, as well as the establishment of the proposed Mediterranean Inter-State Compensation Fund were discussed during the Meeting but further reflection on both subjects were felt necessary.

16. Finally, the proposed access to information and actions for compensation provisions were endorsed by the Meeting, especially as far as NGOs were concerned.

Agenda item 4. Remarks on a Mediterranean instrument on liability and compensation for environmental damage, by Prof. Scovazzi, University of Milan

17. Prof. Scovazzi provided the participants with information regarding the development of liability and compensation issues at the international level after the Brijuni Meeting which can be of a great interest for the proposed Mediterranean regime. The Coordinator underlined in this context the importance of the Directive on liability and compensation. He recalled the two provisional elements that in his opinion, should be taken into consideration, i.e. article 16 of the Barcelona Convention and article 27 paragraph 2 of the 1994 Madrid Protocol related to pollution resulting from exploration and exploitation of the continental shelf.

18. Prof. Scovazzi also expressed his views concerning the outcome of the Brijuni Meeting: the basic proposal and the explanatory document were setting up a very advanced liability regime, but such a regime was seen as too ambitious in various aspects by some countries. In addition, not all the participants to the Brijuni Meeting were lawyers.

19. He listed and developed the points of agreement that were reached during the Meeting, especially the necessity to avoid overlapping with other international regimes, such as IMO conventions, the fact that the regime should cover the high seas and the assessment of cost of reinstatement measures. Nevertheless, some points of disagreement are still pending, i.e. inclusion or not of land based pollution; limitation of liability; creation of a Mediterranean Fund, residual liability of State; role to be attributed to NGOs. He provided the Meeting with the view expressed by Italy on these issues.

20. Prof. Scovazzi then listed the main questions which still need to be clarified: identification of the polluter in case land based pollution is included within the Mediterranean liability regime, the determination of victims when a pollution occurs in the high Seas, the criteria to be chosen in order to assess the damage, the role of the complementary Fund in providing but also receiving compensation, the damage to be covered (any kind of damage or specific kinds of damage such as damage related to dumping, seabed pollution and land based pollution). He also raised the point of the preferable approach to be followed: a step by step approach by adding specific annexes to the Protocol rather than a general approach, could be a solution.

Agenda item 5. Remarks on a new Protocol on “civil liability and compensation for damage caused by the trans-boundary effects of industrial accidents on trans-boundary waters” under the UN/ECE Conventions on “the protection and use of trans-boundary watercourses and international lakes” and on “Industrial Accidents on Trans-boundary context”, by Prof. Economidis, University of Athens

21. Prof. Economidis informed the Meeting of recent developments regarding the issue of international liability and compensation under the Commission de Droit International (CDI). The CDI finalized a project of 19 articles in 2001 on prevention of transboundary damages resulting from dangerous activities. Nevertheless, the work related to the elaboration of an international liability concept did not solve the question on whether the liability should be based on licit dangerous activities that might generate a damage for the environment or on a strict liability where it is not necessary to give evidence of a offence in order to obtain a compensation.

22. Ms Phani Daskalopoulou-Livada introduced the new draft Protocol on “civil liability and compensation for damage caused by the trans-boundary effects of industrial accidents on trans-boundary waters” adopted very recently, recalling its historical and legal background, especially with reference to the Lugano Convention. She summarized and commented the main key-concepts of the legal instrument: definition of damage, scope of application, legally protected interest, strict liability and limitation, mandatory insurance, complementary Fund, right of recourse.

23. Two main original elements were drawn to the attention of the participants: the relationship between the Protocol and the applicable domestic law, where any person who have suffered damage can request the application of domestic law, and the connection with European law, as regarding jurisdiction, recognition and enforcement of judgments, where the relevant community rules shall apply to the courts of Parties which are members of the European Community.

Agenda item 6. Remarks on a new proposed EU Directive on “Environmental liability” and its implication on the Mediterranean region by Mr. Schianno di Pepe, University of Genoa

24. Mr. Schianno di Pepe introduced the proposed Directive on “Environmental Liability with regard to the prevention and remedying of environmental damage”. He presented the

historical background of the proposed Directive which is strongly based on the “polluter pays” principle, and outlined its key features, focusing first on prevention aspects and then on liability aspects of the Directive, underlining in this context that there is no compulsory insurance requirement under the Directive.

25. Relationship with other existing instruments was taken into consideration, as the proposed Directive will not apply to damage arising from an incident already regulated by IMO conventions neither to damage covered by conventions related to liability for nuclear damage.

26. Finally, he considered the possible impact of the proposed instrument on the Mediterranean region. The proposed liability regime of the Directive is useful because it provides the bases for a comparison exercise between the provisions of the Directive and those proposed in the Mediterranean regime. On the other hand, the proposed Directive addresses a liability regime in potential competition with the Mediterranean regime and in this regard, an examination of all possible conflicts or overlaps between the two proposals is required.

Agenda item 7. Remarks on the Basel protocol on liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal

27. Mr. Pavel Suian described the huge preparatory work and negotiations which took place prior to the adoption of the Basel Protocol on liability and compensation and provided the Meeting with advises on the matter. He also gave to the participants some information on the insurance market attitude regarding the environmental coverage insurance.

Agenda item 8. Discussion

28. The methodology to apply to the proposed liability and compensation regime was addressed. A step by step approach was explored at this point.

29. The Meeting reviewed the international and European community law, including the proposed EU Directive On environmental liability, considering their application or possible application in the future, partly or totally to the Mediterranean region, from the geographical point of view as well as from the activities covered point of view. As a result of the discussion, the following activities were identified to be part of the step by step approach:

- operation of off-shore installations,
- dumping
- and land based sources,

30. A discussion also addressed biodiversity. While some participants were of the opinion to include provisions of the SPA Protocol within the list and consequently dedicate an Annex to the Liability and Compensation Protocol to the issue, other were considering that the provisions of the SPA Protocol were referring to damage to biodiversity rather to an activity as such. The coordinator pointed out that both approaches were not necessarily contradictory.

31. Among various issues, the question of a financial security scheme was discussed by the participants, who agreed that future negotiations should consider whether to establish a compulsory insurance requirement or other systems of financial security as well as all legal implications thereof (including the possibility of direct action). The point was made that the question of insurance was in any case strictly linked to other aspect of the liability and

compensation regime (e.g. the range of liable subjects and limitation). In any event, it was generally agreed by the participants, also on the basis of the experience gained in the negotiations of other liability regimes, that in order for the proposed scheme to be effective, there was a need to involve representatives of the insurance business from an early stage".

32. There was unanimous agreement on the assumption that liability and compensation issues related to maritime transport and regulated by IMO conventions are out of the scope of this exercise.

Agenda item 9. Conclusions, recommendations and next steps

33. The Meeting agreed on 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.

34. The next step to be followed will be the following:

To report to the Bureau of the Contracting Parties the outcome of the two Meetings of experts in order to get the agreement to go ahead and to present a consolidated draft proposal to the Contracting Parties.

Agenda item 10. Closure of the Meeting

35. The Chairperson declared the Meeting closed at 18.00 p.m. on Monday, 21 April, 2003.

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ANNEX II

AGENDA

1. Opening of the meeting
2. Adoption of the Agenda and organization of work
3. Main findings and recommendations of the Brijuni meeting related to the need for a new legal instrument on liability under Barcelona Convention and its feasibility, by Prof. Raftopoulos the MAP legal adviser.
4. Remarks on a Mediterranean instrument on liability and compensation for environmental damage, by Prof. Scovazzi, University of Milan.
5. Remarks on a new Protocol "On civil liability and compensation for damage caused by the trans-boundary effects of industrial accidents on trans-boundary waters" under the UNECE Conventions: On the protection and use of trans-boundary watercourses and international lakes and "On Industrial Accidents on Trans-boundary context, by Prof. Economides, University of Athens.
6. Remarks on a new proposed EU directive "On Environmental liability" and its implication on Mediterranean Region by prof. Di Schianni, University of Genova
7. Remarks on the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal
8. Discussions
9. Conclusions, recommendations and next steps
10. Closure of the meeting