



**United Nations  
Environment  
Programme**



UNEP(DEPI)/MED WG.319/3  
8 June 2007

ENGLISH



**MEDITERRANEAN ACTION PLAN**

Second meeting of 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

Athens, Greece, 28-29 June 2007

**Draft Guidelines on liability and compensation for damage  
resulting from pollution of the marine environment in  
the Mediterranean Sea area**



## **Introduction**

On the recommendation of the 14<sup>th</sup> meeting of the Contracting Parties held in Portoroz, Slovenia, from 8-11 November 2005,<sup>1</sup> an Open-Ended Working Group of Legal and Technical Experts was set up by the MAP Secretariat 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. The first meeting of the Open-Ended Working Group took place from 7-8 March 2006 in Loutraki, Greece.<sup>2</sup> The Open-Ended Working Group recommended proceeding cautiously through a step-by-step approach and requested the MAP Secretariat to prepare draft guidelines on the subject by early 2007 and to circulate the same to members of the Open-Ended Working Group ahead of a second meeting to be held in the spring of 2007. The MAP Secretariat prepared these draft Guidelines accordingly for discussion by the second meeting of the Open-Ended Working Group.

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<sup>1</sup> UNEP(DEPI)/MED IG.16/13, annex III, section I.A.1.3, p. 2.

<sup>2</sup> UNEP(DEPI)/MED WG.285/4.



**DRAFT 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 implement article 16 of the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, done at Barcelona on 16 February 1976, as amended in Barcelona on 10 June 1995 (the “Barcelona Convention”),<sup>3</sup> according to which 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 also aim to 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 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 Contracting Parties of relevant legislation.

Note:

*The first two paragraphs reflect obligations in the Barcelona Convention. Reference could also be made to article 14 of the Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal, done at Izmir on 1 October 1996 (the “Hazardous Wastes Protocol”), and article 27 of the Protocol for the Protection of the Mediterranean Sea against Pollution resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil, done at Madrid on 14 October 1994 (the “Offshore Protocol”), which also call for cooperation in this matter. It is noteworthy that article 27 of the Offshore Protocol is more elaborated than the other provisions.*

**B. Scope of the Guidelines and Relationship with Other Regimes**

4. These Guidelines apply to the activities to which the Barcelona Convention or any of its Protocols applies.
5. These Guidelines are subject to existing global and regional environmental liability and compensation regimes, including Directive 2004/35/CE of the European Parliament and the Council of the European Union of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, which are either in force or may enter into force, as listed in Annex I to these Guidelines,

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<sup>3</sup> The amended Convention entered into force on 9 July 2004.

bearing in mind the need of ensuring their effective implementation in the Mediterranean Sea Area.

6. These Guidelines do not prejudice questions of 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. They also apply to other areas, such as the seabed, the coastal area and the hydrologic basin, insofar as they are covered by the relevant Protocols to the Convention, in accordance with article 1, paragraph 3, of the Convention.

#### Note:

*The Barcelona Convention, along with the Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea, done at Barcelona on 16 February 1976, as amended in Barcelona on 10 June 1995, at article 2, the Protocol concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea, done at Valletta on 25 January 2002, at article 2, and the Hazardous Wastes Protocol, at article 5, paragraph 1, and article 2, apply to the same area, that is the Mediterranean Sea Area as defined in article 1, paragraph 1 of the Convention. For their part, the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities, done at Athens on 17 May 1980, as amended in Syracuse on 7 March 1996, at article 3, the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean, done at Barcelona on 10 June 1995, at article 2, and the Offshore Protocol, at article 2, extend their application beyond the Mediterranean Sea Area, as permitted under article 1, paragraph 3, of the Barcelona Convention.*

### **D. Damage**

8. The legislation of Contracting Parties should include provisions to compensate [both traditional damage and] environmental damage resulting from pollution of the marine environment.
9. [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).]
10. For the purpose of these Guidelines, “environmental damage” means a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly.
11. 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;
  - (d) diminution in value of natural resources pending restoration;
  - (e) compensation by equivalent if the impaired environment cannot return to its previous condition.
12. 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 at Athens on 17 May 1980, as amended in Syracuse on 7 March 1996, and the Biodiversity Inventory carried out in the framework of the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean, done at Barcelona on 10 June 1995.
13. The measures referred to in paragraph 11(b) and (c) should be reasonable, that is appropriate, practicable, proportionate and based on the availability of objective criteria and information.
14. When compensation is granted for damage referred to in paragraph 11(d) and (e), it should be earmarked for intervention in the environmental field in the Mediterranean Sea Area.

Note:

*There is no restriction in the Barcelona Convention as to the damage covered thereby. At its Loutraki meeting, the Open-Ended Working Group left open the question whether the Guidelines should extend to traditional damage in addition to environmental damage. The MAP Secretariat believes that, for the sake of uniformity across the Mediterranean region, traditional damage should be tackled.*

*Compensation for environmental damage should not result in excessive, duplicated or punitive awards of damages. The fact that environmental damage is irreparable or unquantifiable should not result in exemption from compensation. An operator who causes environmental damage of an irreparable nature must not end up in a possibly more favourable condition than other operators.*

**E. Preventive and Remedial Measures**

15. The Contracting Parties should require that the measures referred to in paragraph 11(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 these Guidelines, the Contracting Parties should take these measures themselves by charging the operator where appropriate.

**F. Operator**

16. Liability for damage covered by these Guidelines should be imposed on the operator.
17. For the purpose of these Guidelines, "operator" means any natural or legal, whether private or public, person, who exercises the control over an activity covered by these Guidelines. "Operator" includes any person who does not hold an authorization, but is in *de facto* control of an activity covered by these Guidelines.

### **G. Apportionment**

18. These Guidelines 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. In such a case, liability should be apportioned between these operators on the basis of an equitable assessment of their contribution to the damage.

### **H. Standard of Liability**

19. The basic standard of liability should be strict liability; however, in cases of damage resulting from activities not covered by any of the Protocols to the Convention, the Contracting Parties could apply fault-based liability.
20. Liability under these Guidelines should be dependent on the establishment of a causal link between the incident and the damage.
21. For the purpose of these Guidelines, "incident" means any sudden occurrence or continuous occurrence or any series of occurrences having the same origin, which causes damage or creates a grave and imminent threat of causing damage.

Note:

*Strict liability is liability that is imposed on the defendant regardless of any proof of fault or negligence against him. The mere occurrence of damage and its attribution to the defendant are sufficient to make the latter liable. Fault-based liability, on the other hand, requires proof of fault or negligence. Of the two, strict liability is obviously more favourable to the claimant.*

### **I. Exemptions of Liability**

22. The operator should not be liable for damage which he proves to have been caused by acts or events which are totally beyond its control, namely an act of war, hostilities, civil war, insurrection, an act of terrorism or a natural phenomenon of an exceptional and irresistible character.

Note:

*Paragraph 22 addresses the general principle of force majeure, which is recognized in all legal systems, and follows the recommendations of the Open-Ended Working Group's Loutraki meeting for narrowly defined exceptions. Other cases may be added by the Contracting Parties under the general concept of exemptions of liability such as acts done with the intent to cause damage by a third party in spite of safety measures appropriate to the type of dangerous activity in question having been taken (art. 8(b), Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Lugano, 21 June 1993).*

### **J. Limitation of Liability**

23. In cases where strict liability applies, financial limits of liability may be established on the basis of international treaties or relevant domestic legislation.
24. The limits should be reviewed by the Contracting Parties on a regular basis taking into account, *inter alia*, the potential risks posed to the environment by the activities covered by these Guidelines.



Note:

*Various systems of limitation of liability are in place. For instance, IMO conventions typically provide for a limit of the shipowner's liability based on the ship's tonnage. Limitation under the Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal, done at Basel on 10 December 1999 (the "Basel Protocol"), is generally a function of the weight of the shipment and, for disposers of waste, is set per incident (art. 12(1) & annex B). The Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, done at Kiev on 21 March 2003 (the "Kiev Protocol"), caps for its part overall strict liability per hazardous activity at a level which varies in relation to the type and quantity of hazardous substances present in the activity in question in comparison with predetermined threshold quantities; three categories of hazardous activities are thus set forth (art. 9(1) & annex II, part One). Directive 2004/35/CE of the European Parliament and the Council of the European Union of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (the "EC Environmental Liability Directive") does not limit liability for environmental damage, but preserves the right of operators to limit their liability in accordance with maritime law (art. 4(3)).*

**K. Time Limits**

25. Time limits should be based on a two-tier system of a shorter period from the knowledge of the damage (three years) and a longer period from the date of the incident (thirty years).

Note:

*Where the incident consists of a series of occurrences having the same origin, time limits should run from the date of the last of such occurrences. Where the incident consists of a continuous occurrence, such time limits should run from the end of that continuous occurrence.*

**L. Financial and Security Scheme**

26. Contracting Parties should take measures to encourage the development of insurance or other financial security instruments and markets, with the aim of enabling and requiring operators to use financial guarantees to cover their liability under these Guidelines.

Note:

*Both the Kiev Protocol and the Basel Protocol require insurance or other financial security to be carried by the person strictly liable up to a minimum level of his liability (Kiev Protocol, art. 11(1); Basel Protocol, art. 14(1)). Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty, done at Madrid on 4 October 1991, requires insurance or other financial security for the whole liability (art. 11).*

**M. [Mediterranean Compensation Fund]**

27. 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.

28. The Contracting Parties may exclude the operation of the Fund in cases of diffuse pollution.
29. The Fund should be financed as appropriate by regular contributions from both the Contracting Parties and operators.]

Note:

*There are different views on the establishment of a fund as reflected in the discussions at the Loutraki meeting. More elaboration on this point could be done if the proposal is accepted.*

**N. Access to Information**

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

**O. Action for Compensation**

31. Contracting Parties should identify the public authorities, which are entitled to bring action in court for the compensation of environmental damage under these Guidelines.
32. Contracting Parties should define the appropriate legal means to involve the public, including non-governmental organizations active in the environmental field, in the procedures referred to in paragraph 31.

**P. Future Steps**

33. Contracting Parties should assess the implementation of these Guidelines within two [four] years from their adoption by the meeting of the Contracting Parties. On the basis of the assessment, the meeting of the Contracting Parties could make a decision regarding the advisability of developing a legally binding instrument.