

# The Mediterranean Guidelines for the Determination of Environmental Liability and Compensation: The Negotiations for the Instrument and the Question of Damage that Can Be Compensated

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## I. “Dead Letters in the Sea”?

On 18 January 2008, the 15th ordinary meeting of the Contracting Parties to the *Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean* (Barcelona, 1976; amended in 1995),<sup>1</sup> held in Almeria, Spain, adopted the *Guidelines for the Determination of Liability and Compensation for Damage resulting from Pollution of the Marine Environment in the Mediterranean Sea Area*.<sup>2</sup>

In fact, the drafting of rules on liability and compensation for damage resulting from the pollution of the environment has proved to be a difficult task in the case of Conventions relating to regional seas.<sup>3</sup> Several Conventions contain a *pactum de contrahendo* provision, according to which the Parties undertake to cooperate to develop a liability regime. Besides the case of the Mediterranean, such a provision is, for instance, included in the *Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution* (Kuwait,

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<sup>1</sup> Hereinafter the *Barcelona Convention*. The Convention entered into force on 12 February 1978. The 1995 amendments have entered into force on 9 July 2004.

<sup>2</sup> Hereinafter the Guidelines. For the text, see the Report of the meeting, Doc. UNEP(DEPI)/MED. IG.17/10 of 18 January 2008, page 133.

<sup>3</sup> On the subject see, besides the general works on international environmental law, P.M. Dupuy, *La responsabilité internationale des Etats pour les dommages d'origine technologique et industrielle*, 1976; F. Francioni/ T. Scovazzi (eds), *International Responsibility for Environmental Harm*, 1991; J. Barboza, “International Liability for the Injurious Consequences of Acts not Prohibited by International Law and Protection of the Environment”, *RdC* 247 (1994), 291 et seq.; S. Murase, “Perspectives from International Economic Law on Transnational Environmental Issues”, *RdC* 253 (1995), 283 et seq.; R. Wolfrum, “Means of Ensuring Compliance with and Enforcement of International Environmental Law”, *RdC* 272 (1998), 9 et seq.; R. Churchill, “Facilitating (Transnational) Civil Liability Litigation for Environmental Damage by Means of Treaties: Progress, Problems, Prospects”, *Yearbook of International Environmental Law* 12 (2001), 3 et seq.; T. Scovazzi, “State Responsibility for Environmental Harm”, *ibid.*, 43 et seq.; L. de La Fayette, “The Concept of Environmental Damage in International Liability Regimes”, in: M. Bowman/ A. Boyle (eds), *Environmental Damage in International and Comparative Law - Problems of Definition and Valuation*, 2002, 181 et seq.; M. Fitzmaurice, “International Responsibility and Liability”, in: D. Bodansky/ J. Brunnée/ E. Hey (eds), *The Oxford Handbook of International Environmental Law*, 2007, 1010 et seq.

1978; article XIII), the *Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region* (Abidjan, 1981; article 15), the *Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific* (Lima, 1981; article 11), the *Regional Convention for the Conservation of the Red Sea and the Gulf of Aden Environment* (Jeddah, 1982; article XIII), the *Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region* (Cartagena, 1983; article 14), the *Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region* (Nairobi, 1985; article 15), the *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region* (Noumea, 1986; article 20), the *Convention on the Protection of the Marine Environment of the Baltic Sea Area* (Helsinki, 1992; article 25),<sup>4</sup> and the *Convention on the Protection of the Black Sea against Pollution* (Bucharest, 1992; article XVI).

However, very few of the liability provisions have been implemented as yet. Because of this rather poor record, some writers have considered the liability provisions in regional seas Conventions as “Greek calends provisions”<sup>5</sup> or “dead letters in the sea”.<sup>6</sup> The truth may be that problems involved in the matter of liability and compensation for environmental damage are both very sophisticated to handle and very hard to solve. National legislation and judicial practice vary greatly from country to country. Not only the criteria to assess compensation, but the concept itself of environmental damage, are far from being defined in a uniform way.

## II. How Much Time is “as Soon as Possible”?

Some rules on liability and compensation can also be found within the regional system for the protection of the Mediterranean Sea against pol-

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<sup>4</sup> An analogous provision (article 17) was included in the previous convention (Helsinki, 1974).

<sup>5</sup> T. Scovazzi, “The Recent Developments in the ‘Barcelona System’ for the Protection of the Mediterranean against Pollution”, *International Journal of Marine and Coastal Law* 11 (1996), 95 et seq. (97).

<sup>6</sup> R. Lefeber, “The Liability Provisions of Regional Sea Conventions: Dead Letters in the Sea?”, in: D. Vidas/ W. Oestreich (eds), *Order for the Oceans at the Turn of the Century*, 1999, 507.

lution. Article 12 of the original version of the *Barcelona Convention* (1976)<sup>7</sup> stated as follows:

“The Contracting Parties undertake to co-operate 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.” (Emphasis added)

In 1995, the *Barcelona Convention* and some of its protocols were amended in order to adapt the Mediterranean legal system to the evolution of international environmental law in the field of the protection of the environment, as embodied in the instruments adopted by the United Nations Conference on Environment and Development (UNCED, Rio de Janeiro, 1992).<sup>8</sup> Substantive changes and additions were made in many of the provisions of the *Barcelona Convention*. The new text of the article on liability and compensation is the following:

“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” (article 16).

As can be seen, one of the changes with respect to the wording of 1976 is that in the amended provision the words “*as soon as possible*” have been deleted. The deletion was suggested by one delegate who remarked that the lapse of almost twenty years had not been sufficient to

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<sup>7</sup> Before the 1995 amendments, the name of the *Barcelona Convention* was Convention for the Protection of the Mediterranean Sea against Pollution.

<sup>8</sup> See J. Juste Ruiz, “Le plan d’action pour la Méditerranée vingt ans après: la révision des instruments de Barcelone”, in: *Collection Espaces et Ressources Maritimes*, 1995, 249; E. Raftopoulos, *Studies on the Implementation of the Barcelona Convention: The Development of an International Trust Regime*, 1999; T. Scovazzi (ed.), *Marine Specially Protected Areas - The General Aspects and the Mediterranean Regional System*, 1999, Chapter 7; J. Juste Ruiz, “Regional Approaches to the Protection of the Marine Environment”, in: *Thesaurus Acroasium*, 2002, 402; E. Raftopoulos/ M.L. McConnell (eds), *Contributions to International Environmental Negotiation in the Mediterranean Context*, 2004; T. Scovazzi, “The Developments within the ‘Barcelona System’ for the Protection of the Mediterranean Sea against Pollution”, in: *Annuaire de Droit Maritime et Océanique*, 2008, 201 et seq.

finalise what the parties in 1976 had undertaken to do “*as soon as possible*”.

Another provision on liability and compensation is included in 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 (Offshore Protocol, Madrid, 1994)*:

“1. The Parties undertake to cooperate as soon as possible in formulating and adopting appropriate rules and procedures for the determination of liability and compensation for damage resulting from the activities dealt with in this Protocol, in conformity with Article 12 of the Convention.

2. Pending development of such procedures, each Party:

(a) Shall take all measures necessary to ensure that liability for damage caused by activities is imposed on operators, and they shall be required to pay prompt and adequate compensation;

(b) Shall take all measures necessary to ensure that operators shall have and maintain insurance cover or other financial security of such type and under such terms as the Contracting Parties shall specify in order to ensure compensation for damages caused by the activities covered by this Protocol” (article 27).

The words “*as soon as possible*” figure in para. 1 of article 27. The subsequent paragraph sets forth the obligation of the Parties to adopt provisional measures while waiting for the development of what should be done “*as soon as possible*.” These measures include the obligation of the operators to have insurance or another financial security and the provision of their liability to pay prompt and adequate compensation in cases of pollution. However, at the moment of the adoption of the Protocol, the European Community and France expressed a reservation, “pending consideration”, with specific regard to the paragraph in question.

Also in the *Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal (Hazardous Wastes Protocol, Izmir, 1996)* a provision on liability and compensation may be found:

“The Parties shall cooperate with a view to setting out, as soon as possible, appropriate guidelines for the evaluation of the damage, as well as rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes” (article 14).

Here the expression “*as soon as possible*” again comes to the fore. But – the question may be asked – how much time is “*as soon as possible*”? Today we know that the first step on the way to a Mediterranean liability and compensation regime has been made almost thirty-two years after the adoption of the *Barcelona Convention*. Perhaps such a delay does not correspond to the proper meaning of “*as soon as possible*”, even at the slow pace of international relations. But “better late, than never”, especially if the first step may be considered a good starting point, as happens with the Guidelines.

### III. The 1997 Brijuni Meeting

As early as 1978 the United Nations Environment Programme - Mediterranean Action Plan (UNEP-MAP) commissioned a study on liability and compensation.<sup>9</sup> But it was only in 1996 that the Contracting Parties to the *Barcelona Convention*, during their 9th meeting, invited the UNEP-MAP Secretariat to convene a meeting of government-designated legal and technical experts in order to discuss an appropriate procedure for the determination of liability and compensation for damage resulting from the pollution of the Mediterranean marine environment.

The meeting was held in Brijuni, Croatia, on 23–25 September 1997.<sup>10</sup> The basis for discussion was a draft text prepared by the

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<sup>9</sup> *Study concerning the Mediterranean Inter-State Guarantee Fund and Liability and Compensation for Damage resulting from the Pollution of the Marine Environment*, Doc. UNEP/IG.23/INF.3 of 3 November 1980. The study was prepared by Mr. Lahlou and Mr. Loukili.

<sup>10</sup> The Report of the meeting (hereinafter: the 1997 Report) is reproduced in Doc. UNEP(OCA)/MED WG.117/4 of 7 October 1997. See V. Bou Franch, “Towards a Liability Protocol for Environmental Harm in the Mediterranean Sea Area”, in: G. Kokasoy (ed.), *The Kriton Curi International Symposium on Environmental Management in the Mediterranean Region - Proceedings*, I, Istanbul, 1998, 207; L. Schiano di Pepe, “Introducing an International Civil Liability Regime for Damage to the Marine Environment in the Mediterranean Sea Area”, in: *Environmental Liability*, 1999, 8; T. Scovazzi, “As perspectivas de um instrumento legal para os danos ao ambiente marinho do Mediterrâneo”, in: *Estudos Leme Machado* 2005, 314.

UNEP-MAP Secretariat<sup>11</sup> which had a very far-reaching purpose. It provided, *inter alia*, for a three-tier regime of liability, based on namely:

- strict liability of the operator, that is the person who exercises effective control over a dangerous or potentially dangerous activity,<sup>12</sup> combined with a narrowly defined number of exemptions;<sup>13</sup>
- establishment of a Mediterranean Inter-State Compensation Fund (MISC Fund), which would play a supplementary role if the operator were not able to meet the entire cost of the required compensation<sup>14</sup> or there were a need of preventive measures in emergency situations;
- residual liability of the state which had jurisdiction and control over the activity, if the civil liability regime and the MISC Fund were inadequate.<sup>15</sup>

Other aspects of the 1997 Draft, which confirmed its ambitious objectives, were the following:

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<sup>11</sup> Doc. UNEP(OCA)/MED WG.117/3 of 1 July 1997, hereinafter quoted as the 1997 Draft.

<sup>12</sup> “Unlike the fault-based liability, strict liability requires no proof of fault (which may be very difficult or even impossible to obtain) that the conduct of the operator was intentionally or negligently in violation of the law. Strict liability only requires that the damage was caused as a result of the conduct of the operator and that the damage is not permissible under the Barcelona Convention or the liability regime. At the same time, strict liability is more flexible than absolute liability because it allows a narrowly defined range of exemptions” (1997 Draft, page 8).

<sup>13</sup> Namely, acts of war or terrorism, natural phenomena of irresistible character, acts by a third party with the intent to cause damage, pollution of tolerable level in the light of local circumstances, compliance with compulsory measures of a public authority, dangerous activities taken lawfully in the interests of the person suffering a damage (1997 Draft, page 12).

<sup>14</sup> This occurs if compensation under the civil liability regime is inadequate to cover the whole damage or in case of unknown polluters (1997 Draft, page 15).

<sup>15</sup> Under the 1997 Draft, “the possibility of establishing a narrowly conceived basis of the residual State liability, that is liability for damage only to the extent that such damage is related to the State’s failure to comply with its duties under the Barcelona Convention system, would clearly seem to be inadequate. Such a fault-based, instead of a strict, State liability would not effectively work in view of the vulnerability of the Mediterranean marine and coastal environment and the nature of the protection system it requires” (page 14).

- no financial limitation for any of the three-tier levels of liability was proposed;<sup>16</sup>
- the Parties were required to ensure under their internal law that operators had a financial security scheme or a financial guarantee to cover liability for damage;
- the dangerous activities included “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”;<sup>17</sup>
- the term “incident” was defined in a broad way, that covered not only a sudden occurrence (e.g. fires, leaks) or a series of occurrences with the same origin (e.g. explosions affecting successively different installations; so-called domino effect), but also gradual and continuous occurrences (e.g. releases of dangerous substances into the sea from land-based sources);
- in urgent situations non-governmental organisations were granted the right to submit requests to courts to prohibit dangerous or potentially dangerous activities and to order the operator to take preventive measures or to reinstate the environment.

The concept of damage was defined as meaning:

- damage to persons (including the state or its constituent subdivisions) and property;
- the cost of reasonable preventive measures and further loss of damage caused by them;

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<sup>16</sup> “In fact, a limitation for compensation payable would actually undermine the proposed liability regime. On the other hand, unlimited liability would have an invaluable learning impact upon all those who are involved: it will send a message to the operators that in view of the unlimited liability their conduct should be carefully designed and carried out; it will constitute a great incentive for the public authorities of the Contracting Parties to scrutinise operators activities applying effectively and efficiently all those safeguards ensuring prevention, control and compliance with the Barcelona Convention system; and, finally, it will not have any impact upon the conduct of the insurance companies because their financial limit of liability is set independently from the acceptance of a limited or unlimited compensation under the liability regime” (1997 Draft, page 18).

<sup>17</sup> 1997 Draft, page 5.



- damage caused by the impairment of the marine and coastal environment of the Mediterranean.

Damage caused by the impairment of the marine and coastal environment was to be compensated only in the form of measures of reinstatement aiming at environmental restoration and re-establishment or, if reinstatement was impossible, in the form of re-introduction of equivalent components into the environment.

In the light of the exchanges of views made at the 1997 Brijuni meeting, it clearly appeared that the proposals submitted in the 1997 Draft, while being a good basis for discussion, were too far-reaching to be fully acceptable by the majority of Mediterranean countries. The fact that the 1997 Draft was, in several aspects, based on the *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment* (Lugano, 1993), which has not yet entered into force, may also explain some rather lukewarm attitudes.

On some matters the discussion held at Brijuni showed that there was a general understanding among the majority, if not the totality, of the governmental experts. The relevant instances are the following:

- A.) The experts agreed to base the discussion on article 16 of the amended *Barcelona Convention* rather than on article 12 of the 1976 text. Specific rules and procedures should be drafted “for the determination of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area” (article 16 of the 1995 Convention) and not “for damage resulting from the pollution of the marine environment deriving from violations of the provisions of this Convention and applicable protocols” (article 12 of the 1976 Convention). Emphasis was consequently put on uniform private law provisions which can ensure adequate compensation to the victims of pollution, be they either public entities or private persons, rather than on questions of state responsibility for wrongful acts under public international law.

- B.) As to the form which a future Mediterranean liability regime might take, “the general view among the experts was that a binding legal instrument was to be preferred to a soft law instrument. It was also the general view that a Protocol to the Convention was to be preferred to an Annex to the Convention. In this respect it was pointed out that in some instances a liability and compensation regime would require

amendments to domestic legislation, which could only be done if a ratification process involving national parliaments was followed.”<sup>18</sup>

- C.) The need to avoid duplicating provisions contained in other instruments was strongly emphasised. “It was the general view of the Meeting that the Mediterranean liability regime should not overlap or enter into competition with specific liability regimes established by treaties in force or expected to enter into force in the near future (for example, in the field of maritime transport), if, after more detailed examination, these regimes proved to be adequately adapted to the objectives of the Barcelona Convention and its Protocols in relation to liability and compensation for damage.”<sup>19</sup>

- D.) It was the general view “that the Mediterranean liability regime should also cover the high seas and that the drafting of this regime should solve all the technical legal problems arising from its application to the high seas.”<sup>20</sup> To manage the high seas, an area where no state sovereignty or jurisdiction is established and where any flag state can use (and perhaps abuse) the right of freedom of the sea, is always a difficult task from the legal point of view. However, in the special case of the Mediterranean, if all the coastal states established their own exclusive economic zones, the high seas would disappear, as in this semi-enclosed sea no point is located at a distance of more than 200 nautical miles from the nearest land or island.<sup>21</sup>

- E.) There was a majority view “that the Mediterranean liability regime should be limited to dangerous activities that should be specifically listed.”<sup>22</sup>

- F.) As regards the concept of damage, the experts noted that there was a trend to compensate not only damage to persons and property, but also damage consisting of the impairment of the marine and coastal environment, covering measures of reinstatement undertaken or to be

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<sup>18</sup> 1997 Report, page 4.

<sup>19</sup> Ibid., page 3.

<sup>20</sup> Ibid., page 4.

<sup>21</sup> For the present complex situation of coastal zones in the Mediterranean, where some states have proclaimed exclusive economic zones, others ecological protection zones, others fishing zones and others do not go beyond the limit of their territorial seas (3, 6 or 12 n.m., depending on the cases), see T. Scovazzi, “La zone de protection écologique italienne dans le contexte confus des zones côtières méditerranéennes”, *Annuaire du Droit de la Mer* 10 (2005), 209 et seq.

<sup>22</sup> 1997 Report, page 5.

undertaken, as well as reinstatement by equivalent, if re-establishment of the *status quo ante* was not possible. An important remark was made as regards the role of the state, which was seen “as a trustee of the general interest for the protection of the Mediterranean marine environment.”<sup>23</sup>

- G.) There was a general view that the liability regime of the operator should be based on strict liability.<sup>24</sup> However, on a number of other matters the positions taken by the governmental experts diverged.

aa.) The question of liability arising from gradual pollution of the marine environment, which typically occurs in the case of land-based pollution, raised different reactions. In relation to the concept of incidents, “several experts considered that it would be more logical not to include continuous occurrence (from land-based sources and activities), while others pointed out that such an interpretation was fully in line with the Barcelona Convention.”<sup>25</sup> The assessment and apportionment of liability among a great number of gradual polluters is a very difficult problem to address in legal terms.

bb.) The idea of unlimited liability raised the concern of several experts who believed that strict liability should always be accompanied by a predetermined ceiling on compensation to be paid by the operator. In the mind of many experts, ceilings on financial security were also to be added to limits on the liability of the operator. The condition of the insurance market, where not all dangerous activities carried out by operators can be insured, was also discussed.

cc.) There were various opinions on the proposed MISC Fund (see above), some experts speaking in favour of its creation and others expressing serious reservations. If it is established, the question of the financing of the fund needs to be addressed. Should it be made up of contributions from states or from private operators or from both and under what criteria should the contributions be assessed?

dd.) Another issue which required further reflection was the residual liability of states. It was pointed out that “it would represent a departure from the ordinary liability system according to which the liability of private operators could not be replaced by State liability. In addition,

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<sup>23</sup> Ibid., page 4 “It was added that in certain cases the State might in fact be both the perpetrator and the victim of the environmental damage. Even in this case, it was the State’s duty to reinstate the environment as its trustee.”

<sup>24</sup> Ibid., page 5.

<sup>25</sup> Ibid., page 5.

the primary obligation of a State was to control and prevent pollution and its liability could only arise if control and prevention measures failed. In this connection, it was emphasized that a State was ultimately responsible for events resulting from activities under its own jurisdiction and that residual State liability would enhance the effectiveness and credibility of the Barcelona Convention system. One expert pointed out, however, that residual State liability could have a negative effect on activities by operators, who might be incited to behave less cautiously in the knowledge that States too could be held liable in addition to operators.<sup>26</sup>

ee.) Reservations were also expressed by some experts on the idea to grant to non-governmental organisations the right to take legal action in certain specified cases.

In conclusion of their work, the participants to the 1997 Brijuni meeting, "having examined the principal issues raised by the establishment of a liability and compensation regime in the Mediterranean, invited the Secretariat to report to the Contracting Parties on the results of this first Meeting so that they could decide upon the principle of preparing a draft protocol that would take into account the conclusions of this Meeting to be submitted to a second Meeting of experts."<sup>27</sup>

#### IV. The Resumption of the Preparatory Works (2003-2007)

Only on 21 April 2003 a meeting of non-governmental experts was convened in Athens to discuss the grounds and the feasibility of a new legal instrument related to liability for damage to the Mediterranean marine environment.<sup>28</sup>

The 2003 meeting considered the instruments which had been or were being elaborated in other fora, in particular the proposal for a Directive of the European Community on environmental liability<sup>29</sup> (that

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<sup>26</sup> Ibid., page 6.

<sup>27</sup> Ibid., page 7.

<sup>28</sup> For the Report of the meeting (hereinafter quoted as the 2003 Report) see Doc. UNEP(DEC)/MED WG.230/2 of 6 May 2003.

<sup>29</sup> Proposal for a Directive of the European Parliament and of the Council on Environmental Liability with regard to the prevention and remedying of environmental damage (*Official Journal of the European Communities* No. C 151 of 25 June 2002).

subsequently became Directive 2004/35/EC of the European Parliament and the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage).<sup>30</sup> The European Community, which is a party to the *Barcelona Convention* and some of its protocols, is an important actor within the UNEP-MAP policy.

The participants of the 2003 meeting expressed a preference for a step by step approach, based on different sets of rules addressing different kinds of potentially polluting activities for which no liability regimes had been envisaged under other legal frameworks (such as the operation of offshore installations, dumping, land-based discharges).<sup>31</sup> They suggested that the future instrument should have the form of a protocol to the *Barcelona Convention* and that it could be divided into two parts: a first part dedicated to general liability and compensation rules, and a second part containing annexes addressing specific activities not regulated at the international level as regards their liability and compensation implications, such as offshore installations or dumping.<sup>32</sup>

At their 13th ordinary meeting (11-14 November 2003), the Contracting Parties to the *Barcelona Convention* requested the Secretariat to prepare a feasibility study, "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." Following consideration of a draft version by a meeting of non-governmental experts held in Athens on 17 June 2005,<sup>33</sup> the feasibility study was finalised.<sup>34</sup> After having discussed the main aspects of the subject, such as the definition, nature and assessment of compensable damage, the incidents to be covered, the liable party, the standard of liability and the relevant exemptions, the channelling and limitations of liability, the mechanism of fi-

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<sup>30</sup> *Official Journal of the European Union* No. L 143 of 30 April 2004.

<sup>31</sup> 2003 Report, para. 29.

<sup>32</sup> *Ibid.*, para. 33.

<sup>33</sup> For the Report of the 2005 Meeting see Doc. UNEP(DEC)/MED WG.280/3 of 30 August 2005.

<sup>34</sup> *Feasibility Study covering the Legal, Economic, Financial and Social Aspects of a Liability and Compensation Regime in the Mediterranean Sea and its Coastal Area*, Doc. UNEP(DEC)/MED WG.270/Inf.4 of 25 July 2005. The study was prepared by Mr. Fakhry.

nancial security, the setting up of an interstate compensation fund, the right to bring claims, the feasibility study recommended, *inter alia*:

“that, building on previous activities, action and reflection continue within the MAP framework 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;

that 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;

that work proceeds step-by-step 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, 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, be kept open.”<sup>35</sup>

The 14th ordinary meeting of the Contracting Parties (8-11 November 2005), to which the feasibility study had been submitted, recommended the establishment of an 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.

The Working Group held two meetings. In the first (Loutraki, Greece, 7-8 March 2006), the governmental experts, after having made presentations of the rules on liability and compensation being applied in their domestic systems, discussed the substantive aspects of the prospective Mediterranean rules and agreed on a number of conclusions.<sup>36</sup> On the basis of the discussion, the experts asked the UNEP-MAP Secretariat to prepare a set of draft guidelines, to be circulated and examined at the second meeting of the Working Group.<sup>37</sup> This meeting, held

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<sup>35</sup> Ibid., page 211.

<sup>36</sup> See the Report of the first meeting of experts (hereinafter: 2006 Report), Doc. UNEP(DEPI)/MED WG.285/4 of 16 May 2006, Annex III.

<sup>37</sup> See Doc. UNEP(DEPI)/MED WG 319/Inf.4 of 25 June 2007, *Explanatory Text to Draft Guidelines on Liability and Compensation for Damage Re-*

in Athens on 28-29 June 2007, adopted the draft guidelines and decided to send them to the forthcoming ordinary meeting of the Contracting Parties (2008), where, as already said,<sup>38</sup> they were formally adopted by Decision IG 17/4.<sup>39</sup>

The Guidelines are numbered from A to N (purpose of the Guidelines; relationship with other regimes; geographical scope; damage; preventive and remedial measures; channelling of liability; standard of liability; exemptions of liability; limitation of liability; time limits; financial and security scheme; Mediterranean compensation fund; access to information; action for compensation) and distributed altogether in 32 paragraphs.

While quite different from what was envisaged in the 1997 Draft, the outcome of the lengthy works for the elaboration of the Guidelines presents several areas of interest. As it would be impossible to discuss all the aspects of the Guidelines and even more to set them against the ongoing theoretical elaboration of principles and rules on liability and compensation for environmental damage, the analysis made hereunder will focus only on some selected issues.

## V. The Nature and Scope of the Guidelines

As regards the legal nature of the Guidelines, article 16 of the *Barcelona Convention* does not mandate either a specific or a binding form for the “appropriate rules and procedures” to be formulated and adopted. The Guidelines, as this denomination itself clearly implies, do not have a mandatory character for the Parties:<sup>40</sup>

“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.” (Guideline A, para. 3)

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*sulting from Pollution of the Marine Environment in the Mediterranean Sea Area* (hereinafter: 2007 Explanatory Text).

<sup>38</sup> See note 2, para. 1.

<sup>39</sup> See the Report of the second meeting of experts (hereinafter: 2007 Report), Doc. UNEP(DEPI)/MED WG.319/4 of 17 September 2007.

<sup>40</sup> Here and hereunder the term “Parties” is referred to the Parties to the Barcelona Convention.

Rather than drafting a protocol (and waiting for the number of ratifications needed for its entry into force), the Parties preferred to follow a step-by-step approach:

“The Secretariat pointed out that the process of formulating a Protocol on liability and compensation would be long and complex and recalled that such a Protocol would have to be submitted to national Parliaments for ratification. Another possible option was the development of a soft law instrument, such as a model law, guidelines or recommendations, as an intermediary step before proceeding to the formulation of a Protocol. Such a soft law instrument could go into greater depth than a Protocol and its development might facilitate the subsequent elaboration of a Protocol.”<sup>41</sup>

During the discussion on this subject, the Parties remarked that several treaties relating to environmental liability and compensation had not yet come into force and there were doubts as to when they would actually do so. They preferred a step-by-step approach:

“Many of the speakers therefore advocated a slower and more flexible step-by-step approach, which would allow time for the development of the relevant rules and procedures over a longer period, taking fully into account all the relevant experience acquired in relation to liability and compensation schemes under other international and regional Conventions and in the context of the European Union.”<sup>42</sup>

“It was accordingly agreed that a prudent approach would be recommended consisting of a limited number of steps. The first of these would consist of the development of guidelines on liability and compensation for environmental damage in the Mediterranean, which should be elaborated and proposed for adoption by the next meeting of the Contracting Parties. An assessment would then be undertaken of the implementation of the guidelines and a decision would be taken by a future meeting of the Contracting Parties as to whether it was appropriate to develop a binding instrument. On the basis of this decision, a binding instrument could then be negotiated.”<sup>43</sup>

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<sup>41</sup> 2006 Report, para. 40.

<sup>42</sup> *Ibid.*, para. 41.

<sup>43</sup> *Ibid.*, para. 42. In response to a question, one of the UNEP-MAP legal experts “indicated that in his opinion there was no fundamental contradiction between the aim of developing a Protocol and the adoption of a step-by-



It also appears from the wording of Guideline D, para. 8 (“The legislation of Contracting Parties should include provisions to ...”) or Guideline E, para. 16 (“The legislation of the Contracting Parties should require that ...”), the Guidelines aim at giving an indication of what provisions should be included in the national legislation of the Parties. While article 12 of the 1976 text of the *Barcelona Convention* seemed to imply that rules on liability and compensation were to be limited to state responsibility under international law,<sup>44</sup> article 16 of the amended Convention has a broader formulation which encompasses also liability by private subjects under domestic legislation.<sup>45</sup> As a first step, the Parties decided to strengthen their cooperation in the field of liability and compensation through the adoption in their national legislation of a set of provisions which are as uniform as possible, being based on the model of the Guidelines:

“If it were possible to develop an instrument that was applied in a uniform fashion by all countries in the region, it would be an important achievement. If not, it would have little added value.”<sup>46</sup>

To this aim, the Parties by Decision IG 17/4 of 2008 already asked the UNEP-MAP Secretariat to “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.”

As regards their substantive scope, the Guidelines in principle apply to all the subject matters covered by the so-called Barcelona system,

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step approach, which might include the formulation, as a first stage, of a model law or guidelines, to be followed at a later stage by a Protocol. The adoption of a gradual approach would permit current developments to be taken into account more fully and would allow more time to address the difficult matters involved” (ibid., para. 24). The representative of non-governmental organisations attending the 2006 meeting “expressed regret at the lack of support for the elaboration of a Protocol on liability and compensation” (ibid., para. 42).

<sup>44</sup> Article 12 envisaged rules on 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.” In fact, the provisions of international treaties can be violated only by states and other international law subjects that are Parties to them.

<sup>45</sup> “These Guidelines are without prejudice to the rules of international law on State responsibility for internationally wrongful acts” (Guideline B, para. 6).

<sup>46</sup> 2006 Report, para. 46.

that is “to the activities to which the Barcelona Convention and any of its Protocols apply” (Guideline A, para. 4). While the *Barcelona Convention* is a framework instrument, the seven protocols that have so far been concluded cover a broad range of matters. They relate, respectively, to the prevention and elimination of pollution of the Mediterranean Sea by dumping from ships and aircraft or incineration at sea (Barcelona, 1976; amended in 1995);<sup>47</sup> to cooperation in preventing pollution from ships and, in cases of emergency, combating pollution (Valletta, 2002);<sup>48</sup> to protection against pollution from land-based sources and activities (Athens, 1980, amended in 1996);<sup>49</sup> to specially protected areas and biological diversity (Barcelona, 1995);<sup>50</sup> to pollution resulting from exploration and exploitation of the continental shelf, the seabed and its subsoil (Madrid, 1994);<sup>51</sup> to prevention of pollution by transboundary movements of hazardous wastes and their disposal (Izmir, 1996)<sup>52</sup> and to integrated coastal zone management (Madrid, 2008).<sup>53</sup> The main activities which are not directly covered by any instruments of the Barcelona system seem to be the exploitation of living marine resources (fishing and aquaculture), leisure activities at sea, as well as some activities that could take place in the future, such as carbon sequestration in the seabed.

But the precise determination of the substantive scope of application of the Guidelines could become a question open to discussion.<sup>54</sup> For example, it is not clear whether the expression “activities to which the Barcelona Convention and any of its Protocols apply” covers only the

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<sup>47</sup> In force since 12 February 1978 (the original name is Protocol for the Prevention of the Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft). The 1995 amendments have not yet entered into force.

<sup>48</sup> In force since 17 March 2004. It replaces the previous Protocol concerning co-operation in combating Pollution of the Mediterranean Sea by Oil and Other Harmful Substances in Cases of Emergency (Barcelona, 1976, in force since 12 February 1978).

<sup>49</sup> In force since 17 June 1983 (the original name was Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources). The amendments entered into force on 11 May 2008.

<sup>50</sup> In force since 12 December 1999. It replaces the previous Protocol concerning Mediterranean Specially Protected Areas (Geneva, 1982, in force since 23 March 1986).

<sup>51</sup> Not yet in force.

<sup>52</sup> In force since 18 December 2007.

<sup>53</sup> Not yet in force.

<sup>54</sup> See 2007 Explanatory Text, page 13.

protocols in force or may also be extended to the protocols already concluded, but not yet in force.<sup>55</sup> Nor is it clear whether some activities that are not specifically covered by any protocol could fall under the scope of the Guidelines if they take place in an area specifically covered by a protocol, such as a marine protected area or the coastal zone.<sup>56</sup>

In the determination of the substantive scope of the Guidelines account should also be taken of the fact that they have a complementary character and do not intend to prejudice any environmental liability and compensation regime which exists or may exist in the future:

“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.” (Guideline B, para. 5)

The Appendix lists fifteen treaties, either in force or not yet in force, as well as the already mentioned European Community Directive 2004/35/EC.<sup>57</sup> The treaties in question relate to liability and compensation in the fields of exploitation of nuclear energy, shipping (transport of oil, including bunker oil, of hazardous and noxious substances, of dangerous goods and of hazardous wastes) and industrial incidents. The main activities to which the Barcelona system applies that do not fall under the listed treaties seem to be the mineral exploitation of the seabed and the several activities that can produce land-based pollution of the sea.<sup>58</sup> But here again some difficult legal questions may arise:

“(…) tackling existing regimes is not an easy task. For instance, some regimes may be in force in certain parts of the Mediterranean, but not in others. It may moreover be difficult to predict whether certain regimes will gather the required number of ratifications or accessions for them to enter into force. ‘European regimes’, including regimes adopted by the European Community and those adopted under the auspices of the Council of Europe and UNECE

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<sup>55</sup> The second solution seems preferable.

<sup>56</sup> The second solution seems preferable.

<sup>57</sup> For the instruments included in, as well as those excluded from, the list, see 2007 Explanatory Text, page 21.

<sup>58</sup> However, the 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” (Guideline D, para. 15).

[= United Nations Economic Commission for Europe], pose yet another type of difficulty given their geographical asymmetry with the MAP region as a whole.”<sup>59</sup>

As regards the geographical scope of application, the 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 hydrological basin as are covered by the relevant Protocols to the Convention, in accordance with Article 1, paragraph 3, of the Convention.” (Guideline C, para. 7)

The *Barcelona Convention*, as amended, applies without distinction to all the “maritime waters” of the Mediterranean Sea (article 1, para. 1), including the high seas waters. The geographical scope of application of the protocols may be extended (article 1, para. 3), depending on their subject matter. This occurred in the case of the protocols dealing with mineral exploration and exploitation, applying also to the seabed, with land-based pollution, applying also to the hydrological basin, and with the coastal zone, applying landward up to the limit of the competent coastal units as defined by the Parties. The Guidelines simply reflect the flexible notion of geographical coverage which is typical for the Barcelona system.

## VI. Damage that Can Be Compensated

From the theoretical point of view, the most interesting aspect of the Guidelines is the distinction they make between two kinds of damage resulting from the pollution of the marine environment, called respectively “traditional damage” and “environmental damage”,<sup>60</sup> and the

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<sup>59</sup> 2007 Explanatory Text, page 23. It must be considered that European Community Directive 2004/35/EC has its own scope of application, relating to damage caused by a number of listed occupational activities and to damage to protected species and natural habitats (see article 3 and Annex III). “The representative of Morocco believed that the reference to Directive 2004/35/EC was out of place, as it only directly concerned certain countries in the region. Reference should only be made to international or regional instruments that could cover all the countries in the region” (2007 Report, para. 20).

<sup>60</sup> The expressions “pure environmental damage” or “ecological damage” could have been used, also to avoid the risk of confusion between “envi-

classification they provide of the entries falling under either kind of them. Both kinds of damage determine an obligation to compensate:

“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.” (Guideline D, para. 8)

On the inclusion of both kinds of damage in the Guidelines, the governmental experts:

“generally agreed that it was important to refer to both traditional damage and environmental damage and that the definitions provided were clear and concise. Although so-called ‘traditional’ damage was generally already covered by national legislation, the link was not always made in national legislation between the two types of damage, nor was there necessarily a clear distinction between them. It would therefore be beneficial for the guidelines to make the distinction between the two types of damage. (...) Moreover, greater attention should be paid in the text to environmental damage which was a much newer concept and therefore required closer definition, particularly since the value of environmental damage was likely to vary widely from one area to another and was, at least in part, governed by the reliance of economic and social actors on the marine environment.”<sup>61</sup>

The first kind of damage, that is traditional damage, is composed of four entries:

“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).” (Guideline D, para. 14)

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ronmental damage” in a strict sense and the more general category of “damage resulting from the pollution of the marine environment”.

<sup>61</sup> 2007 Report, para. 25.

In the light of the Guidelines, traditional damage is intended as the damage suffered by persons, either natural or juridical, such as individuals and private or public entities, including the state. The damage can consist in bodily injuries or loss of life, in loss or deterioration of property and in loss or reduction of earnings. The adjective “traditional” simply means that there is no discussion that this kind of damage can be compensated under well established general principles of law, which have existed for hundreds, if not thousands, of years in the national legislation of most countries.

The second kind of damage is typical of cases of pollution of natural components, including marine waters. It is suffered by the environment as such (*per se*), determining a negative change in the quality of a natural component:

“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.” (Guideline D, para. 9)<sup>62</sup>

The entries composing the “environmental damage” are the following:

“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 or control of the effectiveness of such measures;

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<sup>62</sup> The source of inspiration for the Guideline is article 2, para. 2 of European Community Directive 2004/35/EC: “‘Damage’ means a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly”. The utilitarian and anthropocentric wording of the Guideline, which treats natural components as “resources” (for whom? for man, it seems to be implied) and their characteristics as “services” (for whom? for man, it seems to be implied), cannot change very much the conclusion that the damage is suffered directly by the environment. “A proposal introducing the alternative concept of ‘significant damage’ (instead of ‘measurable damage’) so as to thwart claims for negligible damage did not gather sufficient support and was turned down” (2007 Report, para. 27).

(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.” (Guideline D, para. 10)

The first three entries of environmental damage relate to costs that are borne by a person, in many cases the state or another public entity, especially where there is a need to take urgent measures or where the liable operator cannot be identified.<sup>63</sup> These costs can be calculated in precise monetary terms, corresponding to the sum of the “bills” for the measures taken.

Several treaties establishing uniform regimes of liability and compensation are based on the assumption that compensation for environmental damage must be restricted to damage that can be determined in precise monetary terms.<sup>64</sup> For example, under the *International Convention on Civil Liability for Oil Pollution Damage* (London, 1992), “pollution damage” means:

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<sup>63</sup> “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” (Guideline E, para. 16).

<sup>64</sup> However, the Panel of the United Nations Compensation Commission, established by S/RES/687 (1991) of 3 April 1991, did not consider that “the fact that the effects of the loss of or damage to natural resources might be for a temporary duration should have any relevance to the issue of the compensability of the damage or loss, although it might affect the nature and quantum of compensation that might be appropriate. In the view of the Panel, it is not reasonable to suggest that a loss that is documented to have occurred, and is shown to have resulted from the invasion and occupation of Kuwait, should nevertheless be denied compensation solely on the grounds that the effects of the loss were not permanent” (Report and Recommendations, Doc. S/AC.26/2005/10 of 30 June 2005, para. 56). Moreover, the Panel did not consider “that this finding is inconsistent with any principle or rule of general international law. In the view of the Panel, there is no justification for the contention that general international law precludes compensation for pure environmental damage. In particular, the panel does not consider that the exclusion of compensation for pure environmental damage in some international conventions on civil liability and compensation is a valid basis for asserting that international law, in general, prohibits compensation for such damage in all cases, even where the damage results from an internationally wrongful act” (ibid., para. 58).

“(a) loss or damage caused outside the ship by contamination, resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;

(b) the costs of preventive measures and further loss or damage caused by preventive measures.” (article 1, para. 6)

However, the Guidelines, as the last two entries of “environmental damage” show, follow a broader and more advanced approach, based on the model of some legislative texts, such as European Community Directive 2004/35/EC. This instrument makes a distinction between “primary remediation”, that is “any remedial measure which returns the damaged natural resources and/or impaired services to, or towards, baseline condition”, “complementary remediation”, that is “any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources and/or services” and “compensatory remediation”, that is “any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect.” (Annex II, para. 1, subparas a, b and c)<sup>65</sup>

According to this logic, also accepted by the Guidelines, compensation for environmental damage includes the cost of the re-establishment of the condition that existed before the pollution (primary remediation, covered by Guideline D, para. 10, entries from a. to c.), the cost of compensation by equivalent action to be taken elsewhere if the polluted environment cannot fully return to its previous condition (complementary remediation, covered by entry e. of the Guideline), as well as the value of the diminution of the quality of natural components during the time when restoration is pending (compensatory remediation or interim compensation, covered by entry d. of the Guideline). Neither complementary nor compensatory remediation can be assessed in precise monetary terms. Both correspond to a damage suffered by the envi-

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<sup>65</sup> Interim losses are defined in the Directive as “losses which result from the fact that the damaged natural resources and/or services are not able to perform their ecological functions or provide services to other natural resources or to the public until the primary or complementary measures have taken effect. It does not consist of financial compensation to members of the public” (Annex II, para. 1, subpara. d).



ronment itself and are paid by the liable operator to the state or another public entity, as a trustee of the public interest in the preservation of the quality of the environment.

On the complex issue of the assessment of damage that cannot be determined in precise monetary terms, the Guidelines avoid any reference to specific criteria, such as the habitat equivalency analysis<sup>66</sup> or others that are also sometimes proposed. They provide in general that:

“in assessing the extent of environmental damage, use should be made of all available sources of information on the previous condition of the environment (...).” (Guideline D, para. 11)

An important condition is put on what is perceived as complementary and compensatory compensation. It must be earmarked for environmental purposes:

“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.” (Guideline D, para. 13)

## VII. The Future Steps

At the moment of the adoption of the Guidelines, the Parties also envisaged the possible subsequent steps. Decision IG 17/4 of 2008 estab-

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<sup>66</sup> The already mentioned Panel of the United Nations Compensation Commission (see note 64) recognised that “there are inherent difficulties in attempting to place a monetary value on damaged natural resources, particularly resources that are not traded on the market. With specific regard to HEA [= Habitat Equivalency Analysis], the Panel recognises that it is relatively a novel methodology, and that it has had limited application at the national and international levels. The Panel is also aware that there are uncertainties in HEA calculations, especially for establishing a metric that appropriately accounts for different types of service losses and for determining the nature and scale of compensatory restoration measures that are appropriate for damage to particular resources. For these reasons, the Panel considers that claims presented on the basis of HEA or similar methodologies of resource valuation should be accepted only after the Panel has satisfied itself that the extent of damage and the quantification of compensation claimed are appropriate and reasonable in the circumstances of each claim. However, the Panel does not consider that these potential difficulties are a sufficient reason for a wholesale rejection of these methodologies, or for concluding that their use is contrary to international law principles”.

lished 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.”<sup>67</sup> In particular, such action could, *inter alia*, relate to three subjects, namely:

“compulsory insurance, a supplementary compensation fund and the development of a legally binding instrument for the consideration of the meeting of the Contracting Parties in 2013.”<sup>68</sup>

The Guidelines channel liability<sup>69</sup> on the operator (Guideline F, para. 17),<sup>70</sup> who can avail himself of limitations of liability on the basis of international treaties or relevant domestic legislation (Guideline I, para. 25). However, the question of compulsory insurance for the operators, which could be seen as linked to the benefit of limitation of liability, was the subject of lengthy discussions, due also to the lack of a sufficiently developed market for insuring environmental damage:

“With regard to financial security, it was re-emphasized that the question of the insurance of environmental risks raised very great problems and that the expertise in the field of insurance would be needed in developing the liability and compensation regime. Although it was hoped that the EC Directive would play a role in developing an insurance market for these risks, there was no guarantee that this would occur in practice. Moreover, the experience of the United States in this field in the 1970s was not very encouraging since, although certain companies had started to offer insurance for environmental damage, many of them had since withdrawn from the market. It was also recalled that the EC Directive called upon the Commission to report back on the issue in 2010. Representatives of the insurance market consulted in the formulation of the Feasibility Study had expressed caution in this respect.”<sup>71</sup>

In consideration of the doubts expressed, the Guidelines postpone the question of a financial and security scheme:

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<sup>67</sup> The Working Group held a meeting in Athens on 22-23 January 2009. See the Report in Doc. UNEP(DEPI)/MED WG 329/4 of 6 February 2009.

<sup>68</sup> 2007 Report, para. 57.

<sup>69</sup> The basic standard of liability is strict liability (see Guideline G, para. 19).

<sup>70</sup> The operator is defined as “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” (Guideline F, para. 18).

<sup>71</sup> 2006 Report, para. 67.

“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.” (Guideline K, para. 28)

While the basic rule is that the operator should pay for the damage, there may be cases where the operator is unknown or unable to pay or the amount of compensation goes beyond the limit of his liability. However, the question of the establishment of a Mediterranean Compensation Fund (MCF) was also the subject of discussions that could not, for the time being, reach a generally agreed solution:

“(...) it was pointed out that (...) it would not be in accordance with the step-by-step approach to attempt to set up such a fund at the present time. The appropriate time to examine the matter more closely would be during a second stage, when the implementation of the guidelines was being reviewed. (...) However, it was also emphasized that the MCF was a key component in the successful implementation of a liability and compensation regime. The establishment of an MCF would demonstrate the commitment of the Mediterranean community to address the various forms of damage that might occur to the environment in the region.”<sup>72</sup>

If a fund were to be established, the complex question should be addressed of whether it would be financed by the states, by the operators concerned or by both and a system would have to be developed to assess the respective contributions.<sup>73</sup> These are political questions rather than legal ones. Here again the Parties were prudent in reserving further action for the future:

“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 financial security or where the State takes preventive measures in emergency situations and is not reimbursed for the cost thereof.” (Guideline L, para. 29)

What is sure is that the Guidelines do not envisage a three-tier regime which would include a residual state liability. The Parties are not inclined to support such a concept:<sup>74</sup>

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<sup>72</sup> 2007 Report, para. 47.

<sup>73</sup> 2006 Report, para. 69.

<sup>74</sup> 2006 Report, paras 70 and 71.

“(...) These Guidelines do not provide for any State subsidiary liability.” (Guideline A, para. 2)

### VIII. Concluding Remark

The web of responsibility for environmental harm seems today less inextricable than it did before. Contributions to the clarification of the theoretical questions involved in the subject can be found in a number of documents approved at various levels, such as the resolution on responsibility and liability under international law for environmental damage, adopted by the Institute of International Law on 4 September 1997,<sup>75</sup> the draft articles on prevention of transboundary harm from hazardous activities, adopted in 2001 by the ILC, the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, adopted in 2006 by the same body, the draft guidelines for the development of national legislation on liability, response action and compensation for damage caused by activities dangerous to the environment, submitted in 2008 to the UNEP Governing Council,<sup>76</sup> and other documents.<sup>77</sup>

The Guidelines produced within the framework of the Barcelona regional system for the Mediterranean move in the same direction, that is towards the establishment of general principles of law in the field of liability and compensation for damage to the environment. Instances of these general principles could be the provision of compensation for both traditional and environmental damage, including compensatory and complementary remediation, or the earmarking of compensation for environmental purposes. These principles are well represented in the Guidelines and are strengthened by them. Perhaps in the near future they will constitute the core of a special regime of liability and compen-

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<sup>75</sup> *Annuaire de l'Institut de Droit International*, Vol. 67, II, 1998, 486. See F. Orrego Vicuña, *Final Report on Responsibility and Liability under International Law for Environmental Damage*, *ibid.*, 1998, 312 et seq.

<sup>76</sup> Doc. UNEP/GC/25/INF/15/Add.3 of 26 November 2008.

<sup>77</sup> See, for instance, the report on *Liability and Redress in the Context of Paragraph 2 of Article 14 of the Convention on Biological Diversity*, Doc. UNEP/CBD/COP/9/20/Add. 1 of 20 March 2008.

sation for environmental damage, extending to both international law<sup>78</sup> and domestic legal systems.

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<sup>78</sup> The draft articles on Responsibility of States for Internationally Wrongful Acts, adopted in 2001 by the ILC allow for the establishment of special regimes of international responsibility: “These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law” (article 55).