TOWARDS A PROTOCOL ON LIABILITY AND COMPENSATION FOR ENVIRONMENTAL DAMAGE IN THE MEDITERRANEAN SEA AREA

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ABSTRACT

Despite the preparatory works carried out since 1978 towards the international negotiation of a Protocol on 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 Ninth Ordinary Meeting of the Contracting Parties to the Barcelona Convention (Barcelona, 5-8 June 1995) discussed this subject again and invited the Secretariat to convene a first Meeting of government-designated legal and technical experts in order to review a draft to be prepared by the Secretariat, taking into account the work of other international bodies on the subject. This first Meeting of Government-designated legal and technical experts was held at Rijeka, Croatia, from 23 to 25 September 1997 and other Meetings are scheduled for the near future. Therefore, in this paper I will examine the contents already agreed on this topic that are, at present, under international negotiations, as well as the main problems on which consensus has not yet been possible.

KEY WORDS

Compensation, Damage, Liability, Mediterranean, Protocol.

INTRODUCTION

It must be remembered that the Convention for the Protection of the Mediterranean Sea (Barcelona, 16 February 1976) (De Yturriaga Barberan, 1976; Kiss, 1977) included an Article 12, entitled "Liability and compensation", which needed to be implemented by the Contracting Parties. In order to be accurate, it must be pointed out that the Mediterranean Coastal States and the European Community began very early to comply with the contents of this provision. The preparatory works for the formulation and adoption of appropriate legal procedures for the determination of liability and compensation for damage resulting from the pollution of the marine environment began in 1978. However, twenty years after the adoption of the 1976 Barcelona Convention, the contents of its Article 12 have not been implemented yet.

Maybe this is the reason that explains why the Contracting Parties reacted to this situation during the revision process of the Barcelona system for the protection of the Mediterranean Sea against pollution (Scovazzi, 1995; Bou, 1996; Juste 1995). Therefore, on the one hand, in 1995 the old 1976 Barcelona Convention was amended, and nowadays it enjoys a new amended Article 16, also entitled "Liability and Compensation", which reads as follows: "The Contracting Parties undertake to co-operate 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".

On the other hand, during the Ninth Ordinary Meeting of the Contracting Parties to the Barcelona Convention (Barcelona, 5-8 June 1996), the subject of liability for damage to the Mediterranean environment was discussed again. The Contracting Parties decided to invite the Secretariat to convene a first meeting of government-designated legal and technical experts in order to review a draft to be prepared by the Secretariat of appropriate procedures for the determination of liability and compensation for damage resulting from the pollution of the marine environment, in conformity with Article 16 of the 1995 amended Barcelona Convention and taking into account the works of other bodies on the subject.

Pursuant to this decision, the Secretariat prepared a draft of appropriate rules and procedures for the determination of liability and compensation which, after being reviewed and amended by a petit comité was submitted as a working document (UNEP(OCA)/MED WG.117/3) to the First Meeting of Legal and Technical Experts for the preparation of appropriate rules and procedures on liability and compensation for its thorough consideration. This First Meeting of Experts was held at Rijeka, Croatia, from 23 to 25 September 1997 and it concluded with an invitation to the Secretariat to draw up a draft Protocol on this subject, taking into account the conclusions of this First Meeting of Experts (UNEP(OCA)/MED WG.117/CRP.1), and to submit it for consideration by a future Second Meeting of Legal and Technical Experts.

THE PREPARATORY WORKS OF THE FUTURE PROTOCOL

Upon the preparatory works already carried out, it is possible to make different legal considerations concerning the future legal regime for the determination of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea Area.

The Legal Form Of The Instrument Concerning Environmental Liability In The Mediterranean

It must be highlighted that the First Meeting of Experts reached a general agreement of all the Contracting Parties on the legal form of the future liability regime. It was agreed that the future regime on environmental liability will be embodied in a legal instrument which will enjoy a mandatory character and not an hortatory one. It means that in relation to the question of 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.

However, there were different opinions concerning the concrete legal form that will enjoy the future instrument on liability and compensation. On the one hand, the working document prepared by the Secretariat considered that it might be advisable that, in view of the nature of the rules and procedures for liability and compensation and their importance in the enforcement aspect of the 1995 amended Barcelona Convention, they could, like the arbitration procedure in relation to Article 18 of the 1995 amended Barcelona Convention, entitled "Settlement of Disputes", take the form of a new Annex B to the Barcelona Convention. The Secretariat's proposal was based upon the idea that the simplest procedure for the Contracting Parties would be to adopt an Annex to the 1995 amended Barcelona Convention, thereby avoiding the need for the lengthy ratification process required for a new Protocol to the Barcelona Convention. However, on the other hand, during the Meeting of Experts the general view was that a Protocol to the 1995 amended Barcelona Convention was to be preferred to an Annex to the same

Barcelona Convention. This decision was agreed upon the consideration that in some instances the adoption of a liability and compensation Mediterranean regime would require amendments of the domestic legislation of the Contracting Parties, which could only be done if a ratification process involving national parliaments was followed. Therefore, the legal security afforded by the process for the entry into force of Protocols to the 1995 amended Barcelona Convention was preferred to the celerity that is reached with the process for the entry into force of an Annex to the same Convention.

The Definition Of Damage

The Meeting of Experts also made substantive progress towards the definition of damage that will be followed in the future Mediterranean regime on liability for damage to the environment. It expressed its preference for a broad definition of damage, encompassing not only the damage to persons and property, but also the damage caused by impairment of the marine and coastal environment of the Mediterranean, as well as the cost of preventive measures and further loss or damage caused by the preventive measures. A general agreement was reached on preventive measures, considering that: "Part of the definition of damage should also be the cost of preventive measures taken in order: (1) to prevent an impeding grave threat of causing damage; or (2) to avoid the aggravation of damage to human beings, to property and to the environment. These measures may be taken by any person and they must be reasonable. The measures to prevent or minimise damage are taken after the occurrence of the incident, that is, after any sudden occurrence, or continuous occurrence or any series of occurrences having the same origin ... The cost of preventive measures is one element of the definition of damage and they are compensated by the operator (especially when the public authorities implement them and subsequently charge the operator), if only they are reasonable in view of the circumstances". The Meeting of Experts even discussed whether impairment of the marine environment also included the Mediterranean high seas, which might entail further consideration of how to identify the victim which may claim legal liability for damage. Finally, taking into account that both the 1995 amended Barcelona Convention and its related Protocols covered the whole of the Mediterranean, including the high seas, the Meeting expressed 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.

The Meeting of Experts also agreed on several questions related directly to the definition of damage, that are really important in order to concrete its future contents. Among them, the three following agreements must be highlighted. Firstly, the Meeting of Experts considered advisable that the future Mediterranean liability regime will cover both accidental and incidental pollution. Therefore, the Meeting of Experts accepted the proposal embodied in the Secretariat's working document, stating that: "the damage may result from three kinds of incidents: (1) from a sudden occurrence (fire, leak or emission); (2) from a continuous occurrence (discharging or releasing dangerous substances into the sea from land-based sources and activities); and (3) from a series of occurrences with the same origin (a series of explosions affecting successively the parts of an installation)". Secondly, regarding the persons to whom address an eventual application of liability for damage to the environment, the Meeting of Experts decided not to confine solely to the liability of the owner of the ship, as existing maritime conventions usually do, but considered that all liability should accrue to the operator, which was defined as the person who is in control of a dangerous or potentially dangerous activity. This person must exercise effective control over the dangerous or potentially dangerous activity and have the power to decide upon the operation of that activity. Hence, employees are not considered as operators.

Thirdly, an interesting discussion took place concerning the scope of the expression "dangerous or potentially dangerous activity". Some delegations considered the need to limit the scope of

dangerous activities to professional (in contradiction to domestic) activities. It was explained that the term "professional" was taken from the Council of Europe Convention on civil liability for damage resulting from activities dangerous to the environment (Lugano, 21 June 1993) and was intended to cover industrial, commercial, agricultural and scientific activities. In fact, the definition of "dangerous or potentially dangerous activities" encompasses all professional activities which involve dangerous substances and materials, non-indigenous or genetically modified species, and generally operations which are harmful to the biological diversity and specially protected areas, the removal of offshore installations and operations concerning waste or discharging waste. Nonetheless, other national experts held a different opinion and they backed a wider definition that will not confine the scope of the expression "dangerous or potentially dangerous activities" only to professional activities. They pointed out that leisure activities, for instance, might also lead to marine pollution. Therefore, they suggested that the Mediterranean liability regime should cover all acts or activities causing pollution as it is defined in Article 2 (a) of the 1995 amended Barcelona Convention. Pursuant to this provision: "Pollution means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results, or is likely to result, in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of seawater and reduction of amenities". This would ensure, in their opinion, a more effective protection of Mediterranean biological diversity.

However, thorough the deliberations of the Meeting of Experts it was evident that there was a majority view considering that the Mediterranean liability regime should be based on a limited definition of dangerous or potentially dangerous activities. In particular, it was suggested that it should be limited to dangerous or potentially dangerous activities specifically listed. This should not prejudice any obligation, arising from domestic legislation, to compensate for acts or activities which caused pollution, as defined in Article 2 (a) of the 1995 amended Barcelona Convention.

Thus, the dangerous or potentially dangerous activities that will be of international relevance for the future Protocol on environmental liability in the Mediterranean will be limited to those activities specifically listed, which by the moment cover the following professional activities: (1) the production, storage, use and discharge or release of dangerous substances and materials in the marine and coastal environment of the Mediterranean; (2) the introduction of non-indigenous or genetically modified species which may have harmful impacts on the ecosystems, habitats or species in the marine and coastal environment of the Mediterranean or pose significant risk for man and property; (3) the removal of abandoned or disused installations engaged in the exploration and exploitation of the continental shelf and the seabed and its subsoil; (4) the discharge and disposal of wastes from the operation of offshore installations and the transboundary movement of hazardous wastes and their disposal; (5) the operation of an installation or site for the incineration, treatment, handling or recycling of waste provided that the quantities involved pose a significant risk for man, property and the marine and coastal environment of the Mediterranean; (6) the operation of a site for the permanent deposit of waste; (7) the operation of a site for the dumping of wastes or other matter; and (8) those activities or acts which are likely to harm or disturb the species, that might endanger the state of conservation of the ecosystems or species or might impair the natural or cultural characteristics of the specially protected areas.

Scope And Exemptions Under The Liability Regime

The Meeting of Experts considered three different options when determining the legal kind of liability that will be provided for by the future Protocol. The fault-based liability was rejected, as it requires the proof of fault that the conduct of the operator was intentionally or negligently in

violation of the law. Proof that, in some events, may be very difficult or even impossible to obtain. Unlike the fault-based liability, strict liability was preferred because it does not need the proof of fault, as it 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 1995 amended Barcelona Convention or the future liability regime. Moreover, strict liability also enjoys the additional advantage, unlike absolute liability, that it allows a narrowly defined range of exemptions.

Therefore, at the Meeting of Experts there was a general consensus that the liability regime of the operator should be based on strict liability, thus endorsing the proposal of the Secretariat's working document. The introduction of the standard of strict liability to the Barcelona system can be defined, firstly, ratione materiae, in respect of which activities the resulting damage may give rise to strict liability. Hence, strict liability may arise from damage resulting from the dangerous or potentially dangerous activities specifically listed. Secondly, the strict liability standard can be stated ratione temporis, taking into account the time at which the damage was caused or became known. Finally, the strict liability standard can be approached ratione personae, in respect of the operators who can be liable if an incident consists of either a continuous occurrence or of a series of occurrences having the same origin.

This Meeting of Experts also discussed possible grounds for exempting the strict liability regime for damage resulting from pollution of the marine environment in the Mediterranean Sea Area. Exemptions should be determined on the basis of two criteria. First, that a Contracting Party should not be held liable for the acts or the events beyond its control. Second, that the exemptions should be defined as narrowly as possible so that the Contracting Parties would not take advantage of any lacuna in the liability regime for the Mediterranean. It was also taken into account that some exemptions already existed in different Protocols to the 1995 amended Barcelona Convention, such as Article 8 of the Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea, Article 18 of the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean and Article 14 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. Pointing out that these grounds for exemptions operate at the international level and as such they would not prevent any claim for compensation under domestic laws, or recourse to the Mediterranean Inter-State Compensation Fund (MISC Fund), the following list of exemptions were proposed and discussed: (1) an act of war, hostilities, civil war, insurrection, an act of terrorism against which no reasonable precautionary measures could have been effective; (2) a natural phenomenon constituting in the circumstances of the Mediterranean a disaster of an exceptional, inevitable and irresistible character; (3) acts by a third Party with the intent to cause damage, which is unassociated with the operator (violent acts by operator's employees are not covered) provided that all appropriate safety measures have been taken; (4) pollution at a tolerable level in the light of local circumstances (in urban or rural zones); (5) compliance with compulsory measures of a public authority; and (6) a dangerous activity taken lawfully in the interests of the person suffering a damage (this ground covers in particular emergency cases or cases where the dangerous activity was carried out with the real and unequivocal consent of the person who has suffered a damage).

But several delegates expressed reservations concerning the grounds for exemption set forth in that List. Thus, for instance, some delegates held that an "act of terrorism" could be deleted in the first exemption, as it could be regarded as being covered by the reference to "acts by a third party" included in the third exemption. Other expert held that the mention of "an act of terrorism" should be retained. The contents of the fifth exemption "compliance with compulsory measures of a public authority" should be clarified; another view expressed that the fourth exemption was not really an exemption. Therefore, the List containing the grounds for exemptions to strict civil

liability of the operator for damage to the environment in the Mediterranean Sea Area will be discussed again at the next Second Meeting of Experts.

The System For Liability And Compensation For Damage To The Environment

The system for liability that is being negotiated is the most original feature of the future Mediterranean liability regime and it is probably the subject where most different views and reservations were expressed during the First Meeting of Experts. The three-tiered proposed system for the Mediterranean liability regime combines the strict civil liability of the operators, the establishment of a Mediterranean Inter-State Compensation Fund (MISC Fund) and the residual liability of States.

The proposed liability system is built upon the "polluter pays principle", which is already included in Article 4 (3) (b) of the 1995 amended Barcelona Convention. Pursuant to this provision, by virtue of the polluter pays principle "the costs of pollution prevention, control and reduction measures are to be borne by the polluter, with due regard to the public interest". Hence, two hypotheses must be distinguished in applying the polluter pays principle at this initial stage of the determination of liability for damage to the Mediterranean environment. On the one hand, it is evident that States will be held liable for damage resulting from activities dangerous to the marine and coastal environment of the Mediterranean where the State itself, a State corporation or a State agent, cause such a damage. This is a clear case and creates no problem for the application of the polluter pays principle.

However, on the other hand, the application of the polluter pays principle may practically become inefficient if such a damage is caused by private individuals or non-State agencies acting under the jurisdiction and control of the State. For this case, it is scheduled, firstly, a system of strict civil liability of the operator. But there may be cases where private operators cannot meet the full cost of the reparations of the damage to the marine and coastal environment resulting from their dangerous or potentially dangerous activities. Although private operators can be forced to enjoy a private insurance, it must be taken into account that, in general, insurances impose limits on the extent of their liabilities and so it is possible that the extent of the compensation and reparation required from the damage may clearly exceed the limit imposed by the insurance.

To face these problems, the First Meeting of Experts followed a three-tiered liability system that allows to cover all the costs required from the damage to the Mediterranean environment. This system consists in establishing three consecutive and supplementary phases for liability for damages to the environment: strict civil liability of the operator, the establishment of the Mediterranean Inter-State Compensation Fund (MISC Fund) and the implementation of a residual liability for the State.

In regard of the regime of strict civil liability of the operator, a compulsory financial and security scheme was scheduled, which will be implemented upon the four following elements: (1) each Contracting Party, should, where appropriate, ensure under internal law that operators have financial security to cover liability for damage under the 1995 amended Barcelona Convention system; (2) in this context, each Contracting Party should determine the scope, the conditions and the form of the financial security. In particular, each Contracting Party shall determine a certain limit to which this financial security may be subject and which activities should be subject to the financial security; (3) in order to avoid any failure to apply the financial security requirement due to the impossibility to foresee the risk, a financial guarantee should be established to cover such risk; and (4) a financial security scheme or financial guarantee can exist in many different forms (e. g. an insurance contract or a financial co-operation between operators). The most controversial element and the one which will need further discussion in the future is the limit of

the strict civil liability of the operators, as some experts found it very difficult, if not impossible, to calculate and fix a uniform ceiling for compulsory insurance in view of the diversity of the damages involved. Other delegates were in favour of establishing a uniform system because excessive disparities between the internal laws of the different Mediterranean States would distort competition and result in "dumping" phenomena.

Secondly, there is a prediction to establish a Mediterranean Inter-State Compensation Fund (MISC Fund), although there still is a great deal of different views on it. Thus, for instance, the Secretariat and some national experts considered that the MISC Fund should be recognised by each Contracting Party as a legal person under its laws, capable of assuming rights and obligations and of being a party in legal proceedings before its domestic courts. Other experts suggested that the MISC Fund, rather than being a separate international body, could be administered by bodies already existing within the Mediterranean Action Plan, such as the Meeting of the Contracting Parties or possibly the Bureau, which meets relatively frequently.

The establishment of a MISC Fund would fulfil two goals. On the one hand, the MISC Fund would supplement the application of the polluter pays principle, that is, in cases where the private operator is not able to meet the entire cost of the required compensation and reparation for the damage he has caused. It implies that the MISC Fund will be established for paying compensation but only to the extent that compensation for damage under the strict civil liability regime of the operator is inadequate (e. g. in cases where the extent of the compensation and reparation required from the damage exceeds the limit imposed by the insurance) or not available (e. g. in cases of unknown polluters). On the other hand, the MISC Fund would also ensure a faster implementation of preventive measures in an emergency situation, that is, after the occurrence of the incident. In regard to this second objective, it is worth noting that the operation of the MISC Fund would assist public authorities to immediately respond to emergency situations taking, should the operator default, reasonable preventive measures.

More specifically, the MISC Fund might pay compensation to any person suffering damage if such person has been unable to receive full and adequate compensation for the damage under the strict civil liability regime of the operator for the following four reasons: (1) when no liability for the damage arises under the strict civil liability regime of the operator; (2) when the cause of the loss or damage is of an indeterminate character; (3) when the damage exceeds polluter's liability; and (4) when the polluter is financially incapable of meeting his obligations in full and the provided financial security does not cover or is insufficient to satisfy the claims for compensation for damage, provided that the person suffering the damage has been unable to obtain full satisfaction of his claim after having taken all reasonable steps to pursue the available legal remedies. There are two cases in which the operation of the MISC Fund will be exempted. Firstly, the operation of the MISC Fund should be exempted in cases where it is proved that the damage resulted from the operation of any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used at the time of the incident only on government non-commercial service. Although it was not expressly stated, in these cases it must be understood that the international liability of the State concerned must be directly required. Secondly, the MISC Fund should be exonerated wholly or partially from the obligation to pay compensation if it proves that the damage resulted wholly or partially from an intentional or negligent act or omission done by the person who suffered the damage. This is a particular application of the doctrine of "clean hands", according to which a claimant's involvement in activity illegal under either municipal or international law may bar the claim. However, no such an exoneration may exist with regard to preventive measures.

Moreover, there are two additional special cases in which the MISC Fund should also operate: (1) in cases where the polluter, in order to prevent or minimise damage, makes reasonably and

voluntarily expenses or sacrifices, which should be treated as damage; and (2) in emergency situations providing an immediate source of finance to reimburse the Contracting Parties which undertake immediate response actions to deal with any damage and abate emergency. In these two special cases, such an operation of the MISC Fund will be extremely useful and beneficial because it would represent an important incentive for both the operator to be immediately involved to prevent or minimise the damage and for the Contracting Parties to undertake immediate response actions avoiding lengthy litigations to recover the cost of their operations. In both special situations, the burden of proof should lie upon the operator or upon the Contracting Party. The proof should be based on the information available at the time that irreversible damage would have resulted if the immediate response action were not undertaken and that the costs associated with the emergency actions were reasonable and necessary.

It is also important to highlight that, although it was not negotiated in detail, discussions began in this very First Meeting of Experts on the sources of finance of the MISC Fund. Although it was agreed that further consideration had to be given to this issue before deciding upon any recommendations concerning the MISC Fund, different views were also expressed in relation to its financing. In particular, some experts considered that its financing should come from contributions of the Contracting Parties, possibly based on a percentage of their contributions to the Mediterranean Trust Fund. Other delegates held the view that its financing should be made up of contributions from private operators. The First Meeting of Experts could not even agree on the limits of the compensation that the MISC Fund would have to pay in a particular situation.

Thirdly and last but not least, the Meeting of Experts considered the establishment of residual State liability. On this topic, the opinions of the national experts were even more divergent, despite that the residual State liability implies that a Contracting Party may be held liable for damage caused to persons, property and the marine and coastal environment of the Mediterranean, and provide for compensation only to the extent that the compensation for damage under the strict civil liability regime of the operator and under the MISC Fund, is inadequate. Some national experts 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. Other national experts held that the primary obligation of a State was to control and prevent pollution and its liability could only arise if control and prevention measures had failed. In this connection, it was emphasised that a State was ultimately responsible for events occurring within its own jurisdiction and that residual State liability would enhance the effectiveness and credibility of the 1995 amended Barcelona Convention system. One question particularly raised whether the residual liability of States would no longer apply if they contributed to the MISC Fund. After these considerations, the First Meeting of Experts could not reach any substantive agreement on this topic and, at the end of the discussion, some experts supported the introduction of residual State liability, whereas others expressed reservations on it. Consequently, it was agreed that further reflection was required on this subject by the future Second Meeting of Experts.

FINAL CONSIDERATIONS

The Mediterranean Coastal States and the European Community have been negotiating during nearly twenty years a Protocol on liability for damage resulting from pollution of the marine environment in the Mediterranean Sea Area without any success. Nowadays, it seems that once the revision process of the Barcelona system for the protection of the Mediterranean has been concluded, they have made for the first time substantive progress towards the adoption of a future Protocol on this subject.

This new ecological impetus of the Mediterranean Coastal States and the European Community is being very broadly defined. The decisions that the future liability Protocol will establish a broad definition of damage, covering both accidental and incidental pollution, the reception of the definition of operator, that substantive progress had been reached towards the elaboration of a List of dangerous or potentially dangerous activities, the preference for a strict liability system, the development of a three-tiered system of liability which combines the strict civil liability of operators, the establishment of a MISC Fund and the residual liability of States, are all of them good expressions of the will that the future Protocol will be able to face all the liabilities and compensations for all the damages resulting from pollution of the Mediterranean environment. Therefore, we must express our wish of success for the immediate conclusion of this international negotiation.

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