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LIABILITY AND REDRESS IN THE CONTEXT OF
THE CARTAGENA PROTOCOL ON BIOSAFETY
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Item 3 of the provisional agenda*

RECENT DEVELOPMENTS IN INTERNATIONAL LAW RELATING TO LIABILITY AND REDRESS, INCLUDING THE STATUS OF INTERNATIONAL ENVIRONMENT-RELATED THIRD PARTY LIABILITY INSTRUMENTS

Note by the Executive Secretary

I. INTRODUCTION

1. This information document is prepared in line with Article 27 of the Biosafety Protocol, which requires the process of the elaboration of international rules and procedures on liability and redress to take into account and to benefit from analysis of other relevant ongoing processes in international law.

2. Information on developments in international law relating to liability and redress has been gathered, analysed and updated by the Secretariat since the earlier phase of the process under the Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety. The present note, therefore, updates the information gathered and made available for the last meeting of the Working Group (UNEP/CBD/BS/WG-L&R/5/INF/1). As has been the practice in the past, the information on the status of international environment-related third-party-liability treaties is presented in the form of a table annexed to this document.

II. RECENT DEVELOPMENTS IN INTERNATIONAL LAW RELATING TO LIABILITY AND REDRESS, INCLUDING "SOFT LAW"

3. This section presents a summary of recent developments in the field of liability and redress within the processes of some multilateral and regional environmental agreements, and regional or global organizations or arrangements that have some ongoing work, provisions or cases relevant to the field.

A. United Nations Environment Programme (UNEP)

4. In early 2007, UNEP convened an Advisory Expert Group on Liability and Compensation for Environmental Damage. The Group prepared a set of recommendations containing Guidelines on Liability and Compensation for Environmental Damage with a view to make these guidelines available

* UNEP/CBD/BS/GF-L&R/1/1.

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for use, as appropriate, by national Governments in developing or reforming their domestic legislation in the field. The Group identified key elements and principles for inclusion in the Guidelines and recommended further work. It suggested that the polluter pays principle should be taken as central to the Guidelines. The second meeting of the Advisory Expert Group took place from 31 October to 2 November 2007. The meeting reviewed the proposed draft guidelines.

5. Following the two Advisory Expert Group meetings, UNEP organized a Consultative Meeting of Government Officials and Experts to Review and Further Develop Draft Guidelines for the Development of National Legislation on Liability and Compensation for Environmental Damage, which was held in Nairobi on 18-19 June 2008. The Consultative Meeting revised and further developed the draft Guidelines and recommended that the draft Guidelines: (i) be submitted to the twenty-fifth session of the Governing Council/Global Ministerial Environment Forum scheduled to take place from 16 to 20 February 2009, for consideration and adoption; 1/ and (ii) once adopted, be forwarded to all countries, in particular developing countries and countries with economies in transition, with a view to assisting them to develop, adopt or reform their national legislation in this field. 2/

6. The guidelines were renamed as "Draft Guidelines for the Development of National Legislation on Liability and Compensation for Damage Caused by Activities Dangerous to the Environment". According to the draft, "activities dangerous to the environment" means any activity involving any of the hazardous substances referred to in Annex I or any activity listed in Annex II to the Guidelines. 3/ The draft Guidelines discuss key elements that could be included in any national legislation in the field of environmental liability and compensation and they provide possible formulations of legal texts in this respect.

7. According to the draft Guidelines, "damage", includes: (i) loss of life or personal injury; (ii) loss of or damage to property; (iii) pure economic loss; (iv) the costs of reinstatement measures of the impaired environment, limited to the costs of measures actually taken or to be undertaken; (v) the costs of preventive measures, including any loss or damage caused by such measures; and (vi) environmental damage. 4/ For the purpose of the draft Guidelines, 5/ "environmental damage" means an adverse or negative effect on the environment that is measurable and significant. "Measurability" is supposed to be determined by taking into account scientifically established baselines and "significance" to be decided on the basis of factors, such as (i) the long-term or permanent change that could not be redressed through natural recovery within a reasonable period of time; (ii) the extent of the qualitative or quantitative changes that adversely or negatively affect the environment; (iii) the reduction or loss of the ability of the environment to provide goods and services either of a permanent nature or on a temporary basis; (iv) the extent of any adverse or negative effect/impact on human health; (v) the aesthetic, scientific, and recreational value of parks, wilderness areas, and other lands. "Operator" is defined as "the person or persons/entity or entities in operational control of the activity, or any part thereof. 6/

1/ Recently UNEP has received extensive comments on the draft from a member country. Because of this development, it appears unlikely that the Governing Council will adopt the draft Guidelines at this meeting.

2/ Report of the Consultative Meeting of Government Officials and Experts to Review and Further Develop Draft Guidelines for the Development of National Legislation on Liability and Compensation for Environmental Damage, UN Doc. UNEP/Env.Law/CM/12, 18 July 2008.

3/ Guideline 3, paragraph 1, Draft Guidelines for the Development of National Legislation on Liability and Compensation for Damage Caused by Activities Dangerous to the Environment, Annex, UNEP/GC/25/INF/15/Add.3, 26 November 2008. Annexes I and II of the Draft Guidelines refer to other legal instruments for possible model formulations of a list of hazardous substances and a list of activities and installations dangerous to the environment, respectively.

4/ Some experts understood the loss described in (i), (ii) and (iii) to mean loss arising from damage to the environment.

5/ Guideline 3, paragraph 3.

6/ The Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities adopted by the International Law Commission (A/61/10) defines "operator" to mean "any person in command or control of the activity at the time of the incident causing transboundary damage occurs", principle 2, paragraph (g)

8. The draft Guidelines proposes that liability should be channelled to the operator and the standard of liability should be strict. The operator could be exonerated from liability if it proves that the damage was caused by: (i) an act of God/*force majeure* (caused by natural phenomena of an exceptional, inevitable and uncontrollable nature); (ii) armed conflict, hostilities, civil war, insurrections, or terrorist attacks; (iii) an act or omission, wholly or in part, of a third party; (iii) compliance with compulsory measures imposed by a public authority; or (iv) an activity expressly authorized by and fully in conformity with an authorization given under domestic law that allows the effect on the environment. Exoneration may also be extended if the operator proves that the damage was the result of the claimant's fault (Guideline 6). Any person could also be liable for environmental damage caused by fault (Guideline 5).

9. Claims for compensation for personal loss or for environmental damage may be brought by any person, including public authorities. In the case of pure environmental damage, only public authorities, including their trustees should have a standing to bring the claim for compensation (Guideline 8). However, draft Guideline 9 recognizes also the right of any person or group of persons with a sufficient interest to seek response action by public authorities if either the operator or the concerned public authorities fail to take prompt and effective measures to redress the environmental damage. The draft Guidelines include indicative time limits for admissibility of claims for compensation (Guideline 12). According to draft Guideline 10, there should be no financial limit on fault-based liability indicated in paragraph 2 of Guideline 5. National law should require the operator to enter into and maintain appropriate financial arrangements commensurate with the operator's potential liabilities (Guideline 11). Finally, in the event where a choice of applicable law becomes an issue, draft Guideline 13 proposes that any claim for compensation to be decided in accordance with the law of the place where the damage occurred, unless the claimant prefers the law of the country in which the event giving rise to the damage occurred. The timing of the claimant's choice in this regard should be determined by the law of the forum.

B. Barcelona Convention for the Protection of the Mediterranean Sea against Pollution ("Barcelona Convention")

10. At their 15th Meeting, held in January 2008, the Contracting Parties to the Barcelona Convention adopted decision IG 17/4 on "Guidelines for the Determination of Liability and Compensation for Damage resulting from Pollution of the Marine Environment in the Mediterranean Sea Area". The content of the Guidelines has been previously described in document UNEP/CBD/BS/WG-L&R/4/INF/2. 7/ In the decision, the Parties agreed "to establish 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". 8/ The first meeting of this working group was held on January 22nd and 23rd, 2009. According to the provisional agenda for the meeting, the working group was to discuss the state of the art of liability and compensation regimes applied by the Contracting Parties to the Barcelona Convention. 9/ To aid in this discussion, a questionnaire was submitted to the Contracting Parties to gauge the state of the art and implementation of the Guidelines in their national legislation. The questionnaire aimed to collect information on the existing legal frameworks of the Contracting Parties on liability and compensation for damage to the marine environment and their compatibility with the Guidelines; capacity-building needs to facilitate implementation of the Guidelines; and views on the possible establishment of a Mediterranean Compensation Fund and other actions related to liability and compensation for environmental damage in

7/ The only change between the version of the Draft Guidelines described in document UNEP/CBD/BS/WG-L&R/4/INF/2 and the final version of the Guidelines as adopted by the Contracting Parties at their 15th meeting is that the square brackets that appeared around the word "measurable" in the definition of "environmental damage" in paragraph 9 of the Guidelines were removed.

8/ "Guidelines for the Determination of Liability and Compensation for Damage resulting from Pollution of the Marine Environment in the Mediterranean Sea Area", dec. IG 17/4 at operative para. 5.

9/ "Provisional Agenda", Working Group of Legal and Technical Experts for the implementation of Guidelines for the Determination of Liability and Compensation for Damage Resulting from Pollution of the Marine Environment in the Mediterranean Sea Area, 3rd mtg., UN Doc. UNEP(DEPI)/MED WG 329 /1 (15 December 2008).

the Mediterranean. 10/ Responses to the questionnaire were received from nine of the 22 Contracting Parties to the Barcelona Convention and a document examining the responses was prepared for the meeting of the working group.

11. The provisional agenda for the meeting also indicates that the working group was to discuss possible future developments in view of strengthening Mediterranean cooperation on liability and compensation issues and promoting the implementation of relevant guidelines of the Mediterranean Action Plan (MAP); and the elaboration of a draft programme of work to facilitate the implementation of the MAP Guidelines on Liability and Compensation.

12. Decision IG/17/4 also requests the Secretariat of the Barcelona Convention to, amongst other things, prepare a draft reporting format on the implementation of the Guidelines for adoption by the 16th Meeting of the Contracting Parties. The reporting format will also be discussed by the working group and may be based on the questionnaire. 11/ The 16th Meeting of the Contracting Parties will be held from 4 to 6 November 2009 in Marrakesh, Morocco.

C. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal ("Basel Convention") and the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal ("Basel Protocol")

13. The ninth meeting of the Conference of the Parties to the Basel Convention was held in Bali, Indonesia, from 23 to 27 June 2008. The Secretariat reported, among other things, to the meeting that it was not able to convene a meeting to facilitate consultations on mechanisms to meet the requirement of insurance, bonds or other financial guarantees under the Protocol, as requested by the sixth session of the Open-ended Working Group of the Basel Convention, due to lack of financial resources.

14. In its decision IX/24, the ninth meeting of the Conference of the Parties appealed to Parties to the Convention to expedite the process of ratifying the Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal to facilitate its entry into force at the earliest opportunity; and called upon them to continue to consult at the national and regional levels with a view to determining possible means of overcoming perceived obstacles to ratification of the Protocol, including in respect of the requirement for insurance, bonds or other financial guarantees under Article 14 of the Protocol. 12/

D. International Civil Aviation Organization (ICAO)

15. In accordance with the agreement of the 182nd session of the ICAO Council, the 33rd session of the Legal Committee was convened from 21 April to 2 May 2008 to consider the draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference, and the draft Convention on Compensation for Damage Caused by Aircraft to Third Parties. The Committee made further changes to the texts, including to the title of the draft convention concerning damage caused by aircraft due to unlawful interference. Under the previous draft texts, both conventions were intended to

10/ "Implementation of Guidelines for the Determination of Liability and Compensation for Damage resulting from Pollution of the Marine Environment in the Mediterranean Sea Area", Working Group of Legal and Technical Experts for the implementation of Guidelines for the Determination of Liability and Compensation for Damage Resulting from Pollution of the Marine Environment in the Mediterranean Sea Area, 3rd mtg., UN Doc. UNEP (DEPI)/MED WG 329 /3 (9 January 2009) at para. 3.

11/ "Annotated Provisional Agenda", Working Group of Legal and Technical Experts for the implementation of Guidelines for the Determination of Liability and Compensation for Damage Resulting from Pollution of the Marine Environment in the Mediterranean Sea Area, 3rd mtg., UN Doc. UNEP(DEPI)/MED WG 329 /2 (15 December 2008).

12/ "Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal on its ninth meeting" UN Doc. UNEP/CHW.9/39 (27 June 2008) at 49-50.

apply to damage to third parties caused by an aircraft in flight when the operator has its principal business or permanent residence in another State. In the case of the draft convention concerning damage caused by aircraft due to unlawful interference, the scope also required the damage to have been caused by an act of unlawful interference. The current drafts refer to an aircraft in flight on an "international flight" instead of the elements referring to the place of business or permanent residence of the operator.13/ International flight is defined as "any flight whose place of departure and whose intended destination are situated within the territories of two States, whether or not there be a break in the flight, or within the territory of one State if there is an agreed stopping place in the territory of another State". 14/

16. It is also stipulated in the draft convention concerning damage caused by aircraft due to unlawful interference that no liability arises under the Convention "for damage caused by a nuclear incident as defined in the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy or nuclear damage as defined in the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, and any amendment or supplements to these Conventions in force at the time of the event". 15/ Environmental damage is compensable under both draft Conventions insofar as such compensation is provided for under the law of the State Party in the territory of which the damage occurred. 16/

17. The Legal Committee agreed on the texts of the: (i) Draft Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft, and (ii) Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties. 17/

18. At the sixth meeting of its 184th session, held on 23 June 2008, the Council considered a report on the outcome of the 33rd Session of the Legal Committee and decided to convene a Diplomatic Conference at the ICAO Headquarters in Montreal from 20 April to 2 May 2009 to finalize and adopt the texts of the two draft conventions.

E. International Court of Justice

19. In March 2008, Ecuador instituted proceedings against Colombia at the International Court of Justice (ICJ). The dispute concerns the alleged aerial spraying by Colombia of toxic herbicides over Ecuadorian territory. According to Ecuador's application to the ICJ, the spraying is part of Colombia's strategy to eradicate illicit coca and poppy plantations and it has been ongoing since the year 2000. 18/ Ecuador and Colombia abut along the former's northern border – an area that is home, according to Ecuador, to a number of indigenous communities who practice subsistence agriculture and are dependent on the natural environment for their survival. 19/ Ecuador is also designated as a megadiverse country by the World Conservation Monitoring Centre of the United Nations Environment Programme. It states that, "[a]s a consequence, Colombia's fumigations are being conducted in a particularly vulnerable area in a manner that dramatically heightens the risks involved to people and to the natural environment." 20/

13/ Article 2, paragraph 1 of both draft Conventions.

14/ Article 1, paragraph d of the draft Convention on Compensation for Damage to Third Parties, resulting from acts of Unlawful Interference Involving Aircraft; Article 1, paragraph c of the draft Convention on Compensation for Damage caused by Aircraft to Third Parties.

15/ Article 3, paragraph 6.

16/ Article 3, paragraph 5 of both draft Conventions.

17/ "Report of the Legal Committee", Legal Committee of the International Civil Aviation Organization, 33rd sess., UN Doc. 9907.

18/ *Case concerning Aerial Herbicide Spraying (Ecuador v. Colombia)*, "Application of the Republic of Ecuador" (31 March 2008), online: International Court of Justice, http://www.icj-cij.org/docket/files/138/14474.pdf, at para. 3.

19/ *Ibid.* at para. 24.

20/ *Ibid.* at para. 26.

20. While Colombia has not disclosed the chemical composition of the herbicide or the surfactants it is using in its aerial spraying, Ecuador cites evidence that the primary active ingredient in the herbicide is glyphosate and the surfactant may be polyethoxylated tallowamine (POEA) and/or Cosmoflux 411F. 21/

21. Ecuador asserts that the spraying has already caused serious damage to people, crops, animals and the natural environment within Ecuador and poses a grave risk of further damage over time. 22/ Ecuador describes the health damage as including burning, itching eyes, skin sores, intestinal bleeding and death. 23/ It states that there has also been serious and wide-spread damage to non-target plant species, including key local crops such as yucca, plantains, rice, coffee, hay and others. The damage to these crops has serious consequences for the subsistence farming of the local population. According to Ecuador, reported deaths of poultry and fish were widespread while dogs, horses, cows and other animals also became ill. 24/ Ecuador also cites the report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people on his 2006 mission to Ecuador. He recounted statements that, four years after the spraying began, some crop varieties have disappeared or their yields have considerably diminished and that the polluting of water sources and aquatic life by the spraying has had negative impacts on the health and food security of the border populations. 25/

22. Ecuador describes efforts to reach a diplomatic solution to the dispute. It states that appeals to Colombia to negotiate a compromise were largely rejected and joint scientific committees between the two countries failed to reach agreement on the effects of the spraying in Ecuador. Understanding the process of dialogue to be exhausted and without the prospect of success, Ecuador launched the application to the ICJ. 26/

23. Ecuador requests the ICJ to adjudge and declare that:

(a) Colombia has violated its obligations under international law by causing or allowing the deposit on the territory of Ecuador of toxic herbicides that have caused damage to human health, property and the environment;

(b) Colombia shall indemnify Ecuador for any loss or damage caused by its internationally unlawful acts, namely the use of herbicides, including by aerial dispersion, and in particular:

(i) Death or injury to the health of any person or persons arising from the use of such herbicides; and

(ii) Any loss of or damage to the property or livelihood or human rights of such persons; and

(iii) Environmental damage or the depletion of natural resources; and

(iv) The costs of monitoring to identify and assess future risks to public health, human rights and the environment resulting from Colombia's use of herbicides; and

(v) Any other loss or damage; and

21/ *Ibid.* at paras. 19 and 22-23.

22/ *Ibid.* at para. 2.

23/ *Ibid.* at para. 4.

24/ *Ibid.* at para. 15.

25/ *Ibid.* at para. 29; see also "Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council": Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen: Addendum: Mission to Ecuador", Human Rights Council, 4th sess., UN Doc. A/HRC/4/32/Add.2.

26/ *Ibid.* at paras. 28-34.

(c) Colombia shall:

(i) Respect the sovereignty and territorial integrity of Ecuador; and

(ii) Forthwith, take all steps necessary to prevent, on any part of its territory, the use of any toxic herbicides in such a way that they could be deposited onto the territory of Ecuador; and

(iii) Prohibit the use, by means of aerial dispersion, of such herbicides in Ecuador, or on or near any part of its border with Ecuador [.] 27/

24. The ICJ subsequently fixed a time limit of 29 April 2009 for Ecuador to file its memorial (written pleadings) and 29 March 2010 for Colombia to file its counter-memorial. 28/

F. International Maritime Organization (IMO)

Single insurance certificates under the IMO liability and compensation conventions

25. The 93rd session of the IMO Legal Committee held in October 2007 requested the IMO Secretariat to prepare a model single insurance certificate for consideration by the Legal Committee at its 94th session held in October 2008. The adoption of a model single insurance certificate would allow State Parties to issue a single insurance certificate in respect of every ship under the relevant IMO liability and compensation conventions. Accordingly, the secretariat prepared a document with a model single insurance certificate as well as information on issues the Committee may wish to take into consideration regarding the single insurance certificate. 29/

26. As developed by the secretariat, the model combines certificates issued under the:

- International Convention on Civil Liability for Oil Pollution Damage, 1969;
- International Convention on Civil Liability for Oil Pollution Damage, 1992;
- International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996;
- International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001; and
- Nairobi International Convention on the Removal of Wrecks, 2007.

27. The secretariat notes in its document that the single insurance certificate can only become legally binding if all the treaties mentioned in the preceding paragraph were amended to include the model single insurance certificate in place of the original models contained in each of them. An alternative would be to recommend the model certificate as an alternative to the models in the treaties. 30/ The secretariat suggested that the Legal Committee should also consider:

(a) The consequences of adoption of future amendments to the interested treaties which may affect the contents of the model single insurance certificate;

27/ *Ibid.* at para. 38.

28/ *Case concerning Aerial Herbicide Spraying (Ecuador v. Colombia)*, Order of 30 May 2008, I.C.J. No. 138.

29/ "Any Other Business: Single Model Insurance Certificates under Existing IMO Maritime Liability Conventions: Note by the Secretariat", IMO Legal Committee, 94th sess., UN Doc. LEG 94/11 (31 July 2008).

30/ *Ibid.* at para. 6.

(b) The different dates of expiration of insurance cover depending on the treaty; and

(c) Whether the single insurance certificate could only be issued by a party to all the treaties referred to in paragraph 26. 31/

28. The discussion during the 94th session of the Legal Committee concluded that a single insurance certificate would be desirable if it reduced the administrative burden on States, ships and insurers but that several legal and practical issues must be resolved before such a certificate could be adopted. The Committee agreed to establish an informal Correspondence Group coordinated by the Netherlands to work on the issue inter-sessionally.

International Convention on Liability and Compensation in Connection with Carriage of Hazardous and Noxious Substances by Sea ("HNS Convention")

29. During the twelfth session of the Assembly of the 1992 International Oil Pollution Compensation Fund, the Assembly decided to establish the HNS Focus Group with the aim of facilitating the rapid entry into force of the HNS Convention. 32/ The primary task in the terms of reference of the Group was to identify and develop a draft protocol to the HNS Convention that addresses the issues that have been identified as inhibiting the entry into force of the HNS Convention, namely: (i) contributions to the LNG (liquefied natural gases) Account, (ii) the concept of "receiver", (iii) non-submission of contributing cargo reports on ratification of the Convention and annually thereafter, as well as administrative or "house-keeping" issues that would facilitate the operation of the Convention.

30. The HNS Focus Group met in March and June 2008 and discussed various proposals for amendments to the HNS Convention and developed a draft Protocol. The HNS Focus Group was able to reach a consensus on all outstanding issues except that regarding the person liable to pay contributions to the LNG Account. 33/ At its second meeting, the HNS Focus Group made recommendations to the June 2008 Administrative Council, acting on behalf of the thirteenth extraordinary session of the Assembly. The Administrative Council followed these recommendations and approved the text of the draft Protocol, which was then submitted to the Legal Committee for its consideration. 34/ In addition, during the meeting of the Administrative Council, the delegation of Malaysia offered to coordinate an informal correspondence group to develop a compromise proposal on the issue of contributions to the LNG Account. The correspondence group was successful in its endeavour and submitted a compromise proposal to the Legal Committee. 35/

31. The 94th session of the Legal Committee was held in October 2008 and considered the draft Protocol to the HNS Convention under the agenda item "monitoring the implementation of the HNS Convention: development of a possible draft protocol to the Convention". The Legal Committee made some amendments to the draft Protocol and agreed to recommend to the Council that a diplomatic conference be convened as early as possible in 2010 in order to consider and adopt the protocol. The Legal Committee will also consider this agenda item again at its next session which will be held in the fall of 2009. 36/

31/ *Ibid.* at para. 7.

32/ *Record of Decisions of the Twelfth Session of the Assembly* (19 October 2007), document 92FUND/A.12/28 at para. 27.16.

33/ "HNS Convention: Note by the Director", Assembly of the International Oil Pollution Compensation Fund 1992, 13th sess., doc. 92FUND/A.13/22/1 (24 September 2008) at para. 3.3.

34/ *Ibid.* at paras. 3.4-3.9.

35/ *Ibid.* at paras. 3.6 & 3.13.

36/ "Report of the Legal Committee on the Work of its Ninety-Fourth Session", International Maritime Organization Legal Committee, 94th sess., UN Doc. LEG 94/12 (31 October 2008).

32. As it currently stands, the draft Protocol makes amendments to the HNS Convention and countries that become parties to the Protocol will be required to give effect to the provisions of the Protocol and the provisions of the HNS Convention, as these are amended by the Protocol. 37/ The major amendments that are proposed under the draft Protocol respond to the three areas mentioned in paragraph 29 above, that have been identified as inhibiting the entry into force of the HNS Convention. The issues of the contributions to the LNG Account and the concept of "receiver" are intimately related and have been dealt with together. The draft Protocol would keep the receiver of liquefied natural gas as the primary person responsible for making payments to the LNG Account except where there has been an agreement between the receiver and the titleholder of the liquefied natural gas for the latter to make the contributions. If, however, the titleholder does not make the required contributions, responsibility for the contributions will revert to the receiver. 38/

33. The draft Protocol proposes two amendments to the HNS Convention in order to respond to the issues associated with the reporting obligations. One of the main reasons preventing states from becoming party to the HNS Convention has been the difficulty in collecting data and reporting on packaged HNS. The draft Protocol would therefore amend the HNS Convention so that packaged HNS would not contribute to the International Hazardous and Noxious Substances Fund (and so contributing cargo reports would no longer be needed) but damages caused by packaged HNS would still be covered by the Fund. Furthermore, the limits of liability of the shipowner would also be raised in cases where the damage was caused by packaged HNS, by both bulk and packaged HNS originated from the same ship, or where it was not possible to assess whether the damage had been caused by packaged or bulk HNS from that ship. 39/

34. Article 43 of the HNS Convention provides that a state expressing its consent to be bound by the Convention must also submit data on the relevant quantities of contributing cargo received during the preceding year. Article 46 provides that the Convention will only enter into force once, amongst other things, persons in Contracting States who would be liable to contribute to the Fund report having received a total quantity of at least 40 million tonnes of cargo during the previous calendar year. Because not all the Contracting States have been submitting data on the relevant quantities of contributing cargoes received, the Secretary-General of IMO has not been in a position to determine the date of entry into force of the Convention. 40/ To rectify this problem, the draft Protocol contains an amendment that would require states to submit reports on contributing cargo as an essential precondition for the validity of expressing their consent to be bound by the Protocol. Any expression of consent that is not accompanied by such reports would not be accepted by the Secretary-General. Furthermore, for a Contracting State that does not continue to submit annual reports until the Protocol enters into force, amendments in the draft Protocol would see that State being temporarily suspended from its status as a Contracting State, a situation that would continue until it had submitted the required information. The Protocol would not enter into force for a Contracting State that is in arrears in its reports nor would that State be counted for the purposes of determining the date of entry into force of the Protocol. 41/

35. For a State that does not submit the necessary information after the Protocol has entered into force, the draft Protocol would see compensation be withheld temporarily from that State pending compliance with the reporting obligation, except for claims for death or personal injury. If the State fails

37/ "Draft Protocol of [20..] to Amend the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996" as contained in Annex 2 to the "Report of the Legal Committee", *ibid.*, at Art. 2.

38/ *Ibid.* at Art. 7.

39/ *Ibid.* at Art. 3.3 & Art. 5; *supra* note 36 at para. 4.11.

40/ *Supra* note 36 at para. 4.29.

41/ *Supra* note 37 at Art. 16; *supra* note 36 at paras. 4.30-4.31.

to submit its reports within one year of receiving notification from the Director of its failure to fulfil these obligations, compensation would be permanently denied. 42/

G. International Oil Pollution Compensation Funds (IOPC Funds)

36. As described in document UNEP/CBD/BS/WG-L&R/5/INF/1, the International Convention on Civil Liability for Oil Pollution Damage, 1992 (1992 CLC) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (1992 Fund Convention) are providing compensation through the International Oil Pollution Compensation Fund 1992 (IOPC Fund) established under the 1992 Fund Convention for the pollution damage that resulted from the sinking of the oil tanker *Erika* off the coast of France in 1999. In January 2008, the Paris Criminal Court found the representative of the registered owner of the ship (Tevere Shipping), the president of the management company (Panship Management and Services Srl), the classification society (RINA) and Total SA to be criminally responsible for pollution and they were ordered to pay the maximum available fines. 43/ The Criminal Court also found the four parties to be jointly and severally liable for a number of civil liabilities, namely economic loss, damage to the image of several regions and municipalities, moral damage and damage to the environment. The Court assessed the damage at €192.8 million, including €153.9 million for the French state. 44/ These four parties have all appealed the judgment as have some of the civil parties who initiated the claims.

37. Total SA has now paid the French state the €153.9 million assessed by the Court for the civil liabilities. This amount took into account the compensation already received from the 1992 Fund. As a result of this payment, France has withdrawn all of its civil actions, including those against the Fund. 45/

38. When the judgment of the Paris Criminal Court was considered by the Executive Committee of the 1992 Fund at its fortieth session in March 2008, a number of delegations expressed concern that the ruling resulted in "compensation for moral and environmental damages when Article I.6 (a) of the (...) 1992 CLC (...) restricts compensation for impairment of the environment to the costs of reasonable measures of reinstatement actually undertaken or to be undertaken." 46/ The point was made that the judgement had interpreted Article III.4 (which prohibits making claims for compensation for pollution damage against a set list of persons) of the 1992 CLC in such a manner that parties which normally would have been covered by that provision were found not to fall within its scope and hence could be found liable. Several delegations to the Executive Committee meeting pointed out that the judgement could have serious consequences for the international compensation regime. 47/

39. The community of Mesquer has also been pursuing Total in the French civil courts for the costs the community incurred in cleaning up its coast from the oil that washed ashore following the sinking of the tanker. Specifically, Mesquer has argued that the oil constituted waste and that Total had an obligation to pay for the costs arising out of the disposal of that waste in accordance with the polluter-pays principle.

42/ *Supra* note 37 at Art. 10; *supra* note 36 at para. 4.35.

43/ "Incidents Involving the 1992 Fund: *Erika*: Document submitted by France", Executive Committee of the International Oil Pollution Compensation Fund 1992, 40th sess., doc. 92FUND/EXC.40/4/1 (19 February 2008).

44/ "Incidents Involving the 1992 Fund: *Erika*: Note by the Director", Executive Committee of the International Oil Pollution Compensation Fund 1992, 42d sess., doc. 92FUND/EXC.42/4 (1 October 2008) at para. 4.5.

45/ *Ibid.* at para. 4.11.

46/ *Ibid.* at para. 4.8. It might also be noted that in ongoing litigation surrounding the sinking of the *Prestige* and subsequent oil pollution damage to the coasts of Spain, the Spanish government is relying on the decision of the Paris Criminal Court to argue that the American Bureau of Shipping (the international classification society that had certified the last voyage of the *Prestige*) does not fall under Article III.4 of the 1992 CLC and so claims for compensation for pollution damage can be brought against the classification society, see "Incidents Involving the 1992 Fund: *Prestige*: Note by the Director", Executive Committee of the International Oil Pollution Compensation Fund 1992, 42d sess., doc. 92FUND/EXC.42/6 (1 October 2008) at para. 8.2.11.

47/ *Ibid.*

The claim was based on French statute 75-633 (article L 541-2 of the *Code de l'environnement*) which implements the European Community Waste Directive. 48/ The dispute reached the French Supreme Court (*Cour de cassation*), which considered that the matter raised questions of interpretation of European law and so referred three questions to the European Court of Justice (ECJ) for a preliminary ruling. The questions submitted for ruling were whether:

(a) The fuel oil being transported as cargo on the *Erika* could be treated as "waste" within the meaning of Article 1 of Directive 75/442;

(b) A cargo of fuel oil accidentally spilled into the sea from a ship would, once it had been mixed with water and sediment, constitute "waste" under Directive 75/442; and

(c) If the cargo on the *Erika* was not waste but became so after accidentally escaping from the ship, the producer of the fuel oil and/or the seller and carrier should be considered responsible for the waste under European law even though at the time of the accident that transformed the cargo into waste, the cargo was being transported by a third party.

40. On 24 June 2008, the ECJ ruled that the answer to the first question was "no" as the oil being carried by the *Erika* was capable of being sold and used as fuel without prior processing. 49/ For the second question, two Member States had submitted that the Waste Directive should not apply and that the matter should be covered exclusively by the 1992 CLC and Fund conventions. 50/ The ECJ rejected this argument and found the question to turn on the meaning of "discard" in Article 1(a) of the Directive. It ruled that the spilled oil, once mixed with water and sediment, was no longer a reusable product without further processing. It was thus a substance that the holder did not intend to produce and so was "discarded", albeit involuntarily, during transport and therefore must be considered "waste" within the meaning of the Directive. 51/

41. Finally, the Court found the third question to rest on the polluter pays principle in accordance with Article 174(2) of the Treaty Establishing the European Economic Community and Article 15 of the Waste Directive. It found that the application of the principle "would be frustrated if such persons involved in causing waste escaped their financial obligations". 52/ In this light, while the owner of the ship that spilled the oil can be a "holder" of the waste under the terms of the Waste Directive (and as such, is responsible for the cost of disposing of the waste), the person who sold the oil to the final consignee and chartered the ship to carry the oil can be considered a "previous holder" or "the producer of the product from which the waste came" and thus also responsible for the costs of disposing the waste:

> "In the case of hydrocarbons accidentally spilled at sea following the sinking of an oil tanker, the national court may therefore consider that the seller of the hydrocarbons and charterer of the ship carrying them has "produced" waste, if that court, in the light of the elements which it alone is in a position to assess, reaches the conclusion that the seller-charterer contributed to the risk that the pollution caused by the shipwreck would occur, in particular if he failed to take measures to prevent such an incident, such as measures concerning the choice of ship." 53/

48/ EC, *Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste* [2006] O.J. L 114/9. The French statute actually implemented an earlier version of the Waste Directive – EC, *Council Directive of 15 July 1975 on waste* [1975] O.J. L 194/39 – but this directive has now been replaced by the 2006 version.

49/ *Commune de Mesquer v. Total France SA, Total International Ltd*, C-188/07 at para. 48.

50/ *Ibid.* at para. 52.

51/ *Ibid.* at paras. 55-63.

52/ *Ibid.* at para. 72.

53/ *Ibid.* at para. 78.

42. In arguing this third question, certain Member States had again submitted that the matter should be dealt with exclusively by the 1992 CLC and Fund conventions. 54/ The ECJ found instead that the conventions and the Waste Directive are not mutually exclusive. The Waste Directive does not prevent Member States from setting ceilings for the liability of the shipowner and charterer "depending on the tonnage of the vessel and/or in particular circumstances linked to their negligent conduct." 55/ The Directive also does not preclude the Fund with its ceiling for damages per accident from assuming liability for the cost of the disposal of the waste in place of the "holders" as defined in the Waste Directive. In implementing their international obligations under the 1992 CLC and Fund conventions, however, Member States must also implement the polluter pays principle as contained in the Waste Directive. This means that if the ceiling for damages is reached, liability is excluded from coverage under the Fund or the liability of the shipowner or charterer is limited or exempted under the conventions then the national law of the Member States must provide for the cost of waste disposal to be borne by the producer of the product from which the waste came if the producer has contributed by his conduct to the risk that the pollution caused by the shipwreck will occur. 56/

43. On 17 December 2008, the *Cour de cassation* implemented the ECJ decision and ruled that Total can be considered a previous holder of the waste and that the company contributed to the risk of the occurrence of the pollution caused by the sinking of the ship. 57/ Mesquer has not yet won its claim for compensation, however. The matter now moves to another court that will determine whether or not Mesquer qualifies for compensation.

44. The ruling of the ECJ makes it clear that within Europe, the "producer" of a product that is carried by sea and that, having become "waste", accidentally washes ashore, is exposed to a risk of unlimited liability if by his conduct he has contributed to the risk. In practice, this ruling may not have much of an effect on the operation of the 1992 Civil Liability and Fund conventions. While the Directive and the ECJ ruling require a claimant bringing a claim under the Waste Directive to prove that the defendant's conduct contributed to the risk of pollution, the conventions provide for strict liability. A claimant seeking compensation has no incentive to bring a claim under the Directive so long as adequate compensation is available under the international strict liability regimes. With the entry into force in 2005 of the Supplementary Fund Protocol (the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992), the funds available to cover pollution damage from any one incident have increased significantly – the new ceiling is over five times the amount available to claimants from the shipwreck of the *Erika* – and so the claims arising from an incident are that much less likely to exceed the maximum amount of available compensation. The Director of the IOPC Fund appears to have reached a similar conclusion, stating that the judgement of the European Court of Justice seems to have "taken into account all the relevant international commitments of the EU Member States, including the 1992 Civil Liability and Fund Conventions and it would therefore appear that the judgement does not affect the applicability of these conventions." 58/

45. In the specific case of the *Erika*, however, it was thought that the established claims may exceed the maximum amount of compensation that was available under the 1992 Civil Liability and Fund conventions and so Mesquer did have an incentive to bring a civil action against Total. It is possible that others may now bring forth other claims against Total seeking compensation for cleanup costs in the wake of the precedent set by Mesquer.

54/ *Ibid.* at para. 68.

55/ *Ibid.* at para. 81.

56/ *Ibid.* at paras. 81 & 82.

57/ Cass. civ. 3e, 17 December 2008, decision no. 1317.

58/ *Supra* note 44 at para. 7.3.10.

H. European Union

46. Article 14.2 of the European Environmental Liability Directive 59/ requires the European Commission, before 30 April 2010, to "present a report on the effectiveness of the Directive in terms of actual remediation of environmental damage, on the availability at reasonable costs and on conditions of insurance and other types of financial security for the activities covered by Annex III." To this end, a first exploratory study on "Financial Security in [the] Environmental Liability Directive" was carried out by a consultant in 2008 and this will be followed by a more comprehensive study in 2009.

47. The exploratory study includes, amongst other things, an overview of some of the existing insurance products available in Europe to cover the new environmental liabilities introduced by the Directive. Of the 26 insurance companies/products that are described in the study, at least ten exclude damage from or activities related to genetically modified organisms (GMOs) from the scope of their coverage. 60/ The study states that insurers usually exclude some of the activities in Annex III of the Directive from their policies, particularly those activities for which less information is available on the frequency and severity of losses. The study notes that GMOs and waste management are often quoted as being excluded from product coverage. 61/

59/ EC, *Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage* [2004] O.J. L 143/56.

60/ Bio Intelligence Service, "Financial Security in Environmental Liability Directive: Final Report" (August 2008), online: http://ec.europa.eu/environment/legal/liability/pdf/eld_report.pdf at 42-43 & 127-130.

61/ *Ibid*. at 48.

Annex

STATUS OF INTERNATIONAL ENVIRONMENT-RELATED LIABILITY INSTRUMENTS AS OF FEBRUARY 2008 IN CHRONOLOGICAL ORDER OF ADOPTION

INSTRUMENTS	Date of adoption	Number of signatures	Ratification/Acceptance /Approval/Accession	Date of entry into force
ICAO Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface	7 October 1952	25	49	4 February 1958
• Amending Protocol	23 September 1978	14	12	25 July 2002
OECD Paris Convention on Third party Liability in the Field of Nuclear Energy	29 July 1960	18	15	1 April 1968
• Amending protocol	28 January 1964	15	15	1 April 1968
• Amending protocol	16 November 1982	15	15	1 August 1991
• Amending protocol	12 February 2004	16	None	Not in force
Supplementary Convention	31 January 1963	13	12	4 December 1974
• Amending protocol	28 January 1964	13	12	4 December 1974
• Amending protocol	16 November 1982	14	12	7 October 1988
• Amending protocol	12 February 2004	13	1	Not in force
Convention on the Liability of Operators of Nuclear Ships	25 May 1962	17	7	Not in force
IAEA Vienna Convention on Civil Liability for Nuclear Damage	21 May 1963	14	35	12 November 1977
• Amending protocol	12 September 1997	15	5	4 October 2003
Supplementary Convention	12 September 1997	13	4	Not in force
UN Convention on International Liability for Damage Caused by Space Objects	29 November 1971	25	89	1 September 1972
Convention on Civil Liability for Oil Pollution Damage resulting from the Exploration for and Exploitation of Seabed Mineral Resources	1 May 1977	6	None	Not in force

INSTRUMENTS	Date of Adoption	Number of signatures	Ratification/Acceptance /Approval/Accession	Date of Entry into force
UNECE Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels	10 October 1989	2	1	Not in force
IMO International Convention on Civil Liability for Oil Pollution Damage (replaced 1969 Convention)	27 November 1992	10	121	30 May 1996
• Amendment	18 October 2000	N/A	N/A	1 November 2003
Supplementary FUND Convention (replaced 1971 Convention)	27 November 1992	10	103	30 May 1996
• Amendment	18 October 2000	N/A	N/A	1 November 2003
• Protocol	16 May 2003	3	22	3 March 2005
Council of Europe Lugano Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment	21 June 1993	9	0	Not in force
IMO International Convention on Liability and Compensation in Connection with Carriage of Hazardous and Noxious Substances by Sea	3 May 1996	8	10	Not in force
Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal	10 December 1999	13	9	Not in force
IMO International Convention on Civil Liability for Bunker Oil Pollution Damage	23 March 2001	11	30	21 November 2008
UNECE Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters	21 May 2003	24	1	Not in force
Antarctic Treaty System, annex VI, Liability arising from Environmental Emergencies, to the Protocol on Environmental Protection to the Antarctic Treaty	14 June 2005	N/A	2	Not in force
IMO Nairobi International Convention on the Removal of Wrecks, 2007	18 May 2007	2	0	Not in force

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