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**GROUP OF THE FRIENDS OF THE CO-CHAIRS ON
LIABILITY AND REDRESS IN THE CONTEXT OF
THE CARTAGENA PROTOCOL ON BIOSAFETY**

Third meeting

Kuala Lumpur, 15-19 June 2010

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. The present information document has been 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 due account of 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 beginning of the process. The present note, therefore, updates the information gathered and made available for the previous meetings of the Group of the Friends of the Co-Chairs on Liability and Redress (UNEP/CBD/BS/GF-L&R/1/INF/1 and UNEP/CBD/BS/GF-L&R/2/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 agreements, organizations or arrangements that have some ongoing work, provisions or cases relevant to the field.

* UNEP/CBD/BS/GF-L&R/3/1.

A. United Nations Environment Programme (UNEP)

4. Following the intergovernmental meeting held in Nairobi from 9 to 11 November 2009 to revise the draft guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment,¹ Governments continued consultations, through the Committee of Permanent Representatives to UNEP and amended the guidelines and their commentary.²

5. Accordingly, Governments agreed to include the previously bracketed text in guideline 6 allowing for exoneration from liability when (i) there is “express authorization” of the activity that has allegedly caused the damage and (ii) the state of scientific and technical knowledge at the time the damage occurred shows that the activity was not likely to cause damage.³

6. Paragraph 3 of guideline 14 contained bracketed text on the Globally Harmonized System of Classification and Labelling of Chemicals. The paragraph also referenced two annexes to the commentary to the guidelines that contained illustrative samples of lists of hazardous substances and activities and installations dangerous to the environment. The provision was intended to facilitate the listing of hazardous substances that are dangerous to the environment to make “apparent the nature and scope of the risk of liability and thereby strengthen ... insurability of risk.”⁴ The paragraph has now been moved from the guidelines and incorporated into the text of the commentary to guideline 14.⁵

7. The revised draft Guidelines were submitted to the UNEP Governing Council/Global Ministerial Environment Forum for its consideration and adoption.⁶ At its eleventh special session held in Bali, Indonesia, from 24 to 26 February 2010, the UNEP Governing Council/Global Ministerial Environment Forum adopted the ‘Guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment’ through its decision SS.XI/4 II. The Governing Council affirmed that the guidelines were voluntary and did not set a precedent for the development of international law. It also invited countries to provide comments on the draft commentary and annexes to enhance their quality, with a view to their subsequent distribution.

B. International Court of Justice

8. In May 2006, Argentina initiated proceedings against Uruguay at the International Court of Justice (ICJ). Argentina alleged that Uruguay breached its obligations under the Statute of the River Uruguay, which was signed by the two countries in 1975. The action by Argentina was prompted by Uruguay’s authorization of the construction of two pulp mills near the river as well as a port to service one of the mills. Summaries of the facts and arguments in the dispute can be found in documents UNEP/CBD/BS/GF-L&R/2/INF/1 and UNEP/CBD/BS/WG-L&R/3/INF/2.

¹ Discussions on revisions made to the draft guidelines by the intergovernmental meeting are contained in document UNEP/CBD/BS/GF-L&R/2/INF/1 prepared for the last meeting of the Group of the Friends of the Co-Chairs. See also the report of the intergovernmental meeting to review and further develop draft guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment (UNEP/GCSS.XI/INF/6/Add.1).

² The consultations also resulted in further revisions to the commentary to the guidelines. These may be found in the information document on “Result of further consultations between Governments following the intergovernmental meeting on the draft guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment” (UNEP/GCSS.XI/INF/6/Add.2).

³ Annex to document UNEP/GCSS.XI/8/Add.1 at guideline 6, para. 2.

⁴ Annex to document UNEP/GCSS.XI/INF/6/Add.2 at commentary to guideline 14.

⁵ *Ibid.*

⁶ The final version of the revised guidelines as presented to the eleventh special session of the Governing Council/Global Ministerial Environment Forum is contained in document UNEP/GCSS.XI/8/Add.1.

9. In its judgment rendered on 20 April 2010,⁷ the Court ruled that Uruguay breached its procedural obligations under the 1975 Statute to inform, notify and negotiate with Argentina about the planned work before issuing the authorizations for each of the mills and letting construction start.⁸ The ICJ further held that Uruguay did not breach its substantive obligations under the 1975 Statute including its obligation to prevent pollution and preserve the aquatic environment in accordance with Article 41.⁹ According to the Court, the declaration of Uruguay's breach of its procedural obligations was in itself appropriate satisfaction for Argentina.¹⁰ The Court did not feel that ordering the dismantling of the mill would constitute an appropriate remedy for the breach of procedural obligations so Uruguay could continue operating the pulp mill on the River Uruguay.¹¹

10. In response to the arguments set out by Argentina, the issue related to multilateral environmental treaties, including the Convention on Biological Diversity, was addressed in the judgment, in particular in the context of the scope of the Court's jurisdiction. The Court examined the issue of whether its jurisdiction under Article 60 of the Statute also encompassed obligations of the parties under other international agreements invoked by Argentina. Examining Article 1 of the 1975 Statute, the Court took the view that it only sets out the purpose of the Statute and the reference to "the rights and obligations arising from treaties and other international agreements in force for each of the parties" does not suggest that the parties intended to make compliance with their obligations under other treaties one of their duties under the 1975 Statute.¹²

11. The Court next turned to examine Article 41 (a) of the Statute. The Court noted that the purpose of the provision is to protect and preserve the aquatic environment by requiring each of the parties to enact rules and to adopt appropriate measures. The Court found that Article 41 "does not incorporate international agreements as such into the 1975 Statute but rather sets obligations for the parties to exercise their regulatory powers, in conformity with applicable international agreements, for the protection and preservation of the aquatic environment of the River Uruguay".¹³ The Court concluded that there is no basis in the text of Article 41 of the 1975 Statute for the contention that it constitutes a "referral clause" incorporating the obligations under other international agreements into the Statute. Consequently, the various multilateral conventions relied on by Argentina are not, as such, incorporated into the 1975 Statute. For that reason, they did not fall within the scope of the compromissory clause in the Statute that provides for dispute resolution by the ICJ and therefore the Court had no jurisdiction to rule on whether Uruguay had complied with its obligations under these other treaties.¹⁴ The Court also found that relying on the customary rules of treaty interpretation, including taking into account any relevant rules of international law applicable in the relations between the parties, did not affect the scope of the Court's jurisdiction, which remained confined to disputes concerning the interpretation or application of the Statute.¹⁵

12. In the examination of Uruguay's compliance with its substantive obligations under the 1975 Statute, the Court expressed the opinion that the parties have a duty to protect the fauna and flora of the river as part of their obligation to preserve the aquatic environment. According to the Court, the rules and

⁷ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, online: International Court of Justice: <http://www.icj-cij.org/doCKET/files/135/15877.pdf> (as of 4 May 2010).

⁸ *Ibid.* at para. 282.

⁹ *Ibid.* at para.282.

¹⁰ *Ibid.* at paras. 267-275, 282.

¹¹ *Ibid.* at para. 275.

¹² *Ibid.* at para. 59.

¹³ *Ibid.* at para. 62.

¹⁴ *Ibid.* at para.63.

¹⁵ *Ibid.* at para. 66.

measures which they must adopt under Article 41 of the Statute should also reflect their international undertakings in respect of biodiversity and habitat protection, in addition to the other standards on water quality and discharges of effluent. However, the Court found that there was insufficient evidence to conclude that Uruguay had breached its obligation to preserve the aquatic environment including the protection of fauna and flora. The Court determined that a clear relationship had not been established between the discharges from the pulp mill and the alleged effects on different organisms.

C. *International Maritime Organization (IMO)*

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

13. A Protocol to the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea was adopted at an International Diplomatic Conference held in London from 26 to 30 April 2010. The Protocol aims to facilitate the rapid entry into force of the HNS Convention by addressing several practical problems which prevented many States from ratifying it. A summary of the issues addressed in this revision is contained in UNEP/CBD/BS/GF-L&R/2/INF/1.

14. The Conference agreed that the Protocol will enter into force 18 months after the date on which: (a) at least twelve States, including four States each with not less than 2 million units of gross tonnage, have expressed their consent to be bound by it; and (b) the Secretary-General of IMO has received information that those persons in such States who would be liable to contribute have received during the preceding calendar year a total quantity of at least 40 million tonnes of cargo contributing to the general account.¹⁶

15. The Diplomatic Conference also adopted four resolutions, which include a request to the Assembly of the International Oil Pollution Compensation Fund, 1992 to give its Director the assignment of setting up the HNS Fund in accordance with the HNS Convention as amended by the Protocol (resolution 1), and (resolution 2) the implementation of the HNS Protocol (resolution 4).

International Oil Pollution Compensation Funds

16. The Court of Appeal in Paris handed down its ruling on 30 March 2010¹⁷ in the appeal of the 2008 judgment of the Paris Criminal Court on compensation claims that arose from the sinking of the oil tanker *Erika* off the coast of France in 1999.¹⁸ 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 the oil company (Total SA) that were held criminally and civilly liable had appealed the judgment.

17. In its decision, the Court of Appeal confirmed the lower court’s ruling of criminal responsibility. It found that Total SA had failed to apply precautionary rules and was imprudent in implementing its

¹⁶ Press Briefing 19/2010, International Maritime Organization- <http://www.imo.org/>

¹⁷ A complete transcript of the ruling is available (in French) at: http://coordination-maree-noire.eu/IMG/pdf_0802278A_-_pdf.

¹⁸ For more information on the dispute, claims and judgement, see documents UNEP/CBD/BS/WG-L&R/5/INF/1 and UNEP/CBD/BS/GF-L&R/1/INF/1 that describe the compensation claims under the *International Convention on Civil Liability for Oil Pollution Damage, 1992* and the *International Convention on the Establishment of an International Fund for Oil Pollution Damage, 1992*.

vessel vetting process. It ordered Total to pay a fine of €375,000. It also found the other actors criminally responsible and ordered them to pay the fines imposed.¹⁹

18. The Court of Appeal, however, exonerated Total for civil liability, deciding that it cannot be held as having deliberately taken a risk in chartering the vessel and therefore the claim was inadmissible under the 1992 International Convention on Civil Liability for Oil Pollution Damage.²⁰ The ruling of civil liability against the other three defendants was upheld.

19. The Court increased the amount of compensation awarded to the civil plaintiffs, including the French Government, local authorities and other parties affected by the pollution caused by the *Erika*'s cargo, from 192 million to 200 million euros. Although Total is no longer obligated to pay compensation, it had already paid 170 million euros to the plaintiffs and will not be reimbursed. The remaining three actors must pay the 30 million euros still owing.

20. The ruling also upheld the legal notion that sees harm to the environment as a form of damage on a par with economic damage for which polluters must pay compensation to individuals and corporations.

21. RINA, Total SA and several coastline communities have appealed the decision and the Supreme Court of France is expected to make a final ruling within a year.

22. The 1992, International Oil Pollution Compensation Fund (IOPC) took legal action, for the purposes of protecting the right of recovering the amounts paid by it in compensation, against the parties who may be found liable as a result of the incident. The Fund intended to pursue or withdraw the actions against all or some of the parties in light of the outcome of the criminal proceedings brought before the French courts. The forty-eighth session of the IOPC Funds Executive Committee will be held from 28 to 30 June 2010.

D. European Union

23. Following the 2008 exploratory study on Financial Security under the Environmental Liability Directive (ELD),²¹ a second more comprehensive study, contracted by the European Commission (DG Environment) was published in November 2009.²² The study is part of the preparatory work for the Commission's report due on 30 April 2010 on the effectiveness of the ELD.²³ It explores further certain issues on the implementation efficiency of the directive in the European Union member States by identifying and collecting available information on ELD case-studies and running questionnaires targeting the authorities in the member States and operators potentially affected by the ELD. The study also

¹⁹ The classification society (RINA) was fined €375,000 whereas the representative of the registered owner of the ship (Tevere Shipping) and the president of the management company (Panship Management and Services Srl) were fined €75,000 each. These, along with the fine imposed on Total, were the same amounts as the fines imposed by the Paris Criminal Court and are the maximum amounts available under French law.

²⁰ Paragraph 4(c) of the 1992 International Convention on Civil Liability for Oil Pollution Damage states that, "no claim for compensation for pollution damage under this Convention or otherwise may be made against ... any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship, ... unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."

²¹ A brief summary of relevant issues in this exploratory study is contained in UNEP/CBD/BS/GF-L&R/1/INF/1.

²² "Study on the Implementation Effectiveness of the Environmental Liability Directive (ELD) and Related Financial Security Issues" (November of 2009), available at: http://ec.europa.eu/environment/enveco/others/pdf/implementation_efficiency.pdf.

²³ The Report on the effectiveness of the Directive in terms of actual remediation of environmental damages, on the availability at reasonable costs and on conditions of insurance and other types of financial security for the activities covered by Annex III which was due on 30 April 2010 (as mandated by Article 14.2 of the ELD) was not available at the time of writing.

examines the availability of products that respond to the need for financial security as required under the directive.

24. The study confirms the findings of the previous exploratory study regarding the exclusion, either implicit or explicit, of damage from or activities related to genetically modified organisms (GMOs) from the scope of coverage by insurance companies. However, the study states that “the lack of insurance coverage is partially offset by the limited number of companies that carry out activities involving GMOs in the European Union and the large size of a substantial proportion of these companies”.²⁴ According to the study, these companies should therefore be able to obtain other evidence of financial security such as letters of credit and trust funds.

25. The study also points out that many Member States and operators are unaware of the alternatives to insurance to cover ELD-related liabilities. It states that many of these instruments already exist and would not need to be developed specifically to cover these risks.²⁵ The study further provides an overview of the different instruments.

26. The instruments that were frequently identified by stakeholder groups of the study as pertinent alternatives to insurance include: (i) financial test and corporate guarantee (which enables a company with a large parent or affiliated company to provide evidence of the financial strength of its parent or affiliated company on its behalf); (ii) trust funds (fund administered by a trustee on behalf of a beneficiary, which, in case of environmental liabilities, is a governmental entity); (iii) letters of credit/bank guarantees (an agreement by the financial institution that issues it to pay money from it to the governmental entity when requested to do so by the entity); (iv) surety bonds (instruments under which banks and other financial institutions, including insurance companies, agree to pay a certain amount in case a regulated company or other person, does not or is not in the position to pay itself); (v) escrow agreements (where deposits are made with a third party, such as a bank, that can only be released under conditions pre-determined in the agreement); and (vi) governmental schemes (legislation requiring financial security for environmental liabilities may, in some cases, establish or enable a scheme by which regulated companies may meet the requirements if commercial financial security mechanisms are generally unavailable—for example, a fund could be established into which taxes levied on the regulated companies themselves or other persons are paid).²⁶

²⁴ *Supra* note 22 at 59.

²⁵ *Supra* note 22 at 68.

²⁶ *Supra* at 22, sections 6.2.1-6.2.6, pages 69-71.

Annex

**STATUS OF INTERNATIONAL ENVIRONMENT-RELATED LIABILITY INSTRUMENTS AS OF MAY 2010
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
ICAO Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft	2 May 2009	7	0	Not in force
ICAO Convention on Compensation for Damage Caused by Aircraft to Third Parties	2 May 2009	9	0	Not in force
OECD Paris Convention on Third party Liability in the Field of Nuclear Energy	29 July 1960	18	16	1 April 1968
• Amending protocol	28 January 1964	15	16	1 April 1968
• Amending protocol	16 November 1982	15	16	1 August 1991
• Amending protocol	12 February 2004	16	1	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	2	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	36	12 November 1977
• Amending protocol	12 September 1997	15	5	4 October 2003
• Supplementary Convention	12 September 1997	13	4	Not in force
• Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention	21 September 1988	22	26	27 April 1992
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	0	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	124 (123 +1 joining by 21/09/2010)	30 May 1996
<ul style="list-style-type: none"> • Amendment 		N/A	N/A	1 November 2003
Supplementary FUND Convention (replaced 1971 Convention)	18 October 2000	10	105	30 May 1996
<ul style="list-style-type: none"> • Amendment • Protocol 	27 November 1992	N/A	(104 +1 joining by 05/02/2011)	
	18 October 2000	N/A	N/A	1 November 2003
	16 May 2003	5	26	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 (HNS Convention)	3 May 1996	8	14	Not in force
Protocol to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea of 1996 (HNS Convention),	30 April 2010	0	0	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	10	Not in force
IMO International Convention on Civil Liability for Bunker Oil Pollution Damage	23 March 2001	11	51	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	4	Not in force
IMO Nairobi International Convention on the Removal of Wrecks, 2007	18 May 2007	6	1	Not in force