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OPEN-ENDED AD HOC WORKING GROUP OF
LEGAL AND TECHNICAL EXPERTS ON
LIABILITY AND REDRESS IN THE CONTEXT OF
THE CARTAGENA PROTOCOL ON BIOSAFETY
Second meeting
Montreal, 20-24 February 2006
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 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 "Working Group", hereinafter) held its first meeting from 25 to 27 May 2005 in Montreal. At that meeting, the Working Group considered and further developed scenarios of damage resulting from the transboundary movement of living modified organisms (LMOs), options, approaches and issues for further consideration relating to liability and redress, that were initially identified by a technical group of experts that met earlier to undertake preparatory work for the first meeting of the Working Group.

2. The Working Group also concluded that it needs further information in several areas that it considered were pertinent to accomplish its tasks specified in its terms of reference. In that regard, it requested the Secretariat, among other things, to update the information that was before it at its first meeting concerning recent developments in international law relating to liability and redress and on the status of international environment-related third party liability treaties. Such information was made available to the Working Group, at its first meeting (UNEP/CBD/BS/WG-L&R/1/INF/3 and UNEP/CBD/BS/WG-L&R/1/INF/4) (the "April 2005 document", hereinafter) respectively.

3. The present information document has been prepared in response to that request and is therefore intended to cover the latest relevant developments in international law relating to liability and redress, as well as changes, if any, in the status of international environment-related third party liability treaties that have occurred since the preparation of the above mentioned information documents for the purpose of the

* UNEP/CBD/BS/WG-L&R/2/1.

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first meeting of the Working Group. The updated information on the status of international environment-related third party liability treaties is presented as an annex to this document.

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

4. Recent developments in the Convention on Biological Diversity, the Antarctic Treaty System, the International Atomic Energy Agency, the International Civil Aviation Organization, the International Law Commission, the International Maritime Organization, the United Nations Compensation Commission, the United Nations Economic Commission for Europe, the European Union and the Stockholm Convention on Persistent Organic Pollutants are summarized below.

A. Convention on Biological Diversity

5. Under Article 14, paragraph of the Convention on Biological Diversity, the Conference of the Parties is to examine, "on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter." To this end, the Conference of the Parties in decision VI/11 requested the Executive Secretary to convene a group of legal and technical experts to review information gathered in accordance with paragraph 2 of the decision and conduct further analysis of pertinent issues relating to liability and redress in the context of paragraph 2 of Article 14 of the Convention. Accordingly, a Group of Legal and Technical Experts on Liability and Redress in the Context of Paragraph 2 of Article 14 of the Convention on Biological Diversity met in October 2005.

6. The Group heard a report on developments within the framework of Article 27 of the Cartagena Protocol on Biosafety and reviewed information gathered in accordance with paragraph 2 of decision VI/11 and further analysis of pertinent issues including: a clarification of basic concepts and the development of definitions relevant to paragraph 2 of Article 14; an analysis of activities and situations that contribute to damage to biological diversity including situations of potential concern; proposals regarding the possible introduction of elements to address liability and redress for damage to biological diversity into existing liability and redress regimes; an examination of the appropriateness of a liability and redress regime under the Convention; and consideration of preventive measures on the basis of the responsibility recognized under Article 3 of the Convention.

7. The discussions of the Group of Experts are described in more detail in the information document on determination of damage to the conservation and sustainable use of biological diversity, including case-studies (UNEP/CBD/BS/WG-L&R/2/INF/3) that was prepared for this Working Group. In addition, the report of the Group of Legal and Technical Experts (UNEP/CBD/COP/8/27/Add.3) has been made available to this Working Group and is to be considered by the Conference of the Parties to the Convention at its eighth meeting.

B. Antarctic Treaty System

8. The success of the first multinational research programme known as the International Geophysical Year (IGY) in 1957-1958 led the nations that participated in the IGY 1/ to negotiate and adopt an international agreement, known as the Antarctic Treaty, that sanctions the use of the Antarctic for peaceful and research purposes. The Antarctic Treaty was signed on 1 December 1959 in Washington. The Antarctic Treaty System comprises the Treaty itself and several other related agreements including the 1991 *Protocol on Environmental Protection to the Antarctic Treaty*.

1// Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, United Kingdom, United States and the Union of Soviet Socialist Republics.

9. Article 16 of the 1991 *Protocol on Environmental Protection to the Antarctic Treaty* provides that Parties undertake to elaborate rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by the Protocol. In view of this provision, negotiations for a liability annex to the Protocol have been underway for several years.

10. These negotiations have culminated to date in the adoption of annex VI to the Protocol at the XXVIII Antarctic Treaty Consultative Meeting (ATCM) in June 2005. The Annex addresses "Liability arising from Environmental Emergencies" and it is attached to Measure 1 (2005) from the XXVIII ATCM. The annex will enter into force on the day the Measure is approved by all 28 Consultative Parties who were entitled to attend the XXVIII ATCM. Approval is expected to take some time as many Consultative Parties will need to make changes to their domestic legislation in order to implement the annex.

11. The preamble to the annex notes that the elaboration of an annex on the liability aspects of environmental emergencies is one step towards the establishment of a liability regime in accordance with Article 16 of the Protocol. The scope of the annex is set out in Article 1 as follows:

> "This annex shall apply to environmental emergencies in the Antarctic Treaty area which relate to scientific research programmes, tourism and all other governmental and non-governmental activities in the Antarctic Treaty area for which advance notice is required under Article VII(5) of the Antarctic Treaty, including associated logistical support activities. Measures and plans for preventing and responding to such emergencies are also included in this annex. It shall apply to all tourist vessels that enter the Antarctic Treaty area. It shall also apply to environmental emergencies in the Antarctic Treaty area which relate to other vessels and activities as may be decided in accordance with Article 13."

12. Under the annex, Parties are to require their operators to: undertake reasonable preventative measures designed to reduce the risk of environmental emergencies and minimize their potential impact; establish contingency plans for responses to incidents with potential adverse impacts on the Antarctic environment or dependent and associated ecosystems and to cooperate in the formulation and implementation of these plans; and take prompt and effective response action to environmental emergencies arising from the activities of that operator (Articles 3 to 5). In the event that an operator does not take prompt and effective response action, the Party of the operator and other Parties are encouraged to take such action.

13. Article 6 addresses liability. The annex does not create liability for damage (and so no definition of damage is included in the text); rather, it creates liability for the costs of a response action. In addition, the approach to liability under the Protocol cannot be categorized as State responsibility, State liability or civil liability. Two forms of liability are created. First, under Article 6 (1), an operator that fails to take prompt and effective response action to environmental emergencies arising from its activities is liable for the costs of response action taken by Parties and these costs are to be paid to the Parties. Article 6(2) distinguishes between State and non-State operators. Under Article 6(2) (a), "[w]hen a State operator should have taken prompt and effective response action but did not, and no response action was taken by any Party, the State operator shall be liable to pay the costs of the response action which should have been undertaken, into the fund referred to in Article 12". Under Article 6 (2) (b), when the same conditions arise in relation to a non-State operator, "the non-State operator shall be liable to pay an amount of money that reflects as much as possible the costs of the response action that should have been taken". The money is to be paid either to the fund created under Article 12 or to the Party of the operator or to the Party that enforces the enforcement mechanism it is obligated to create under Article 7 (3). Furthermore, a Party that receives funds under this provision is to make best efforts to make a contribution to the Article 12 fund that at least equals the money received from the operator.

14. Article 7 allows both national and international proceedings for establishing liability in different situations. Paragraph 1 of Article 7 allows a Party to bring an action against a non-State operator for liability and includes rules on the jurisdiction where the action may be brought and the limitation periods within which the action must be brought. Paragraphs 4 and 5 of Article 7 provide that the liability of a State operator may only be resolved through an enquiry procedure, through the provisions on dispute settlement in the Protocol, the Schedule to the Protocol on arbitration, or by the Antarctic Treaty Consultative Meeting. It should be noted that only States can be applicants under these proceedings.

15. Liability under Article 6 is strict in subject to the limited number of defences contained in Article 8. These defences are:

(a) An act or omission necessary to protect human life or safety;

(b) An event constituting in the circumstances of Antarctica a natural disaster of an exceptional character, which could not have been reasonably foreseen, either generally or in the particular case, provided all reasonable preventative measures have been taken that are designed to reduce the risk of environmental emergencies and their potential adverse impact;

(c) An act of terrorism; or

(d) An act of belligerency against the activities of the operator.

Furthermore, an environmental emergency that results from response action taken by a Party or agents or operators it has so authorized does not create liability to the extent that the response action was reasonable in all the circumstances.

16. Article 9 creates financial limits to liability, which are three million special drawing rights as these are defined by the International Monetary Fund or, for environmental emergencies involving ships, are calculated according to the tonnage of the ship. Article 11 requires Parties to require their operators to maintain adequate financial security to cover liability up to the relevant limits set in Article 9. In addition, Article 12 creates the fund mentioned above "to provide, *inter alia*, for the reimbursement of the reasonable and justified costs incurred by a Party or Parties in taking response action …". The fund can be funded through voluntary contributions by States or persons in addition to the mechanisms described above.

C. International Civil Aviation Organization

17. In 2001, the International Civil Aviation Organization (ICAO) launched a study on the modernization of the 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome Convention). The study was a response to the decision taken by the Legal Committee of ICAO, at its thirty-first session held from 28 August to 8 September 2000, to include in its programme of work the modernization of the Convention. Though the Rome Convention entered into force on 4 February 1958, it has failed to generate wide support. Over time, its provisions such as those on the limits of liability became outdated and the scope of damage and other standards failed to meet present-day concepts and standards. Among those few States that were once Parties to the Convention, some have, in fact, begun withdrawing. 2/

18. With the assistance of a secretariat study group, a draft Convention on Damage Caused by Foreign Aircraft to Third Parties was prepared by the ICAO secretariat and submitted to the Legal Committee at its thirty-second session, held from 15 to 21 March 2004. The Committee reviewed the draft Convention and agreed that further work was needed in certain areas such as caps with respect to

2/ Canada, Austria and Nigeria have deposited instruments of denunciation with ICAO in 1976, 2000 and 2002, respectively.

insurability and the rules of private international law. Following that, the ICAO Council decided, at the 6th meeting of its 172nd session on 31 May 2004, to establish a Special Group on the Modernization of the 1952 Rome Convention to advance the work. 3/ The main focus of the Special Group would be to balance the demands for victim protection and the availability of insurance cover with adequate protection of the air transport system that avoids a compensation regime that would threaten the financial status of the air transport sector. In this regard, the availability of war-risk insurance has become of a special concern after the attacks of 11 September 2001 on the World Trade Centre in New York and the Pentagon in Washington, D.C. The Special Group met in Montreal from 10 to 14 January 2005. The Special Group made changes to the draft Convention on Damage Caused by Foreign Aircraft to Third Parties, reached 12 points of general agreement, and arrived at a list of "grey points" that required additional work. The report of the Special Group was considered by the ICAO Council at its 174th session, in February 2005.

19. A second meeting of the Special Group was held in July 2005. The Special Group considered the list of "grey points" from its first meeting and made further changes to the draft Convention. The Special Group spent much of its time considering grey point No. 1, on the possibility of a supplementary funding mechanism and its nature and modality, and arrived at 21 points of conclusion. While the Chair of the Special Group considered that considerable progress had been made at the second meeting, the Special Group did not feel that the draft Convention was ripe for submission to either another session of the Legal Committee or directly to a Diplomatic Conference. The Special Group recommended that it reconvene for another meeting. The Council of ICAO has agreed to two meetings of the Special Group in 2006 – one in February and a second in June.

D. International Law Commission

20. During its fifty-sixth session in 2004, the International Law Commission (ILC) adopted, on first reading, eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. Governments are requested to provide their comments and observations on the draft principles by 1 January 2006. During its fifty-seventh session, in 2005, the Commission did not consider the topic of international liability in case of loss from transboundary harm arising out of hazardous activities. The report of the International Law Commission on the work of its fifty-seventh session was considered by the United Nations General Assembly during the latter's sixtieth session, in November 2005. The General Assembly adopted a resolution on the report, which, *inter alia*, drew the attention of Governments to the importance for the ILC of having their views on the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, which were adopted by the Commission at its fifty-sixth session. 4/ The fifty-eighth session of the ILC will be held from 1 May to 9 June and from 3 July to 11 August 2006.

E. International Maritime Organization

21. In October 2005, the Assembly of the International Oil Pollution Compensation Fund 5/ decided that the Working Group that had been considering a revision of the oil pollution damage conventions 6/ had completed its mandate. The Working Group's activities are now terminated and the revision of the

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3/ Progress report on the Modernisation of the Rome Convention of 1952, working paper A35-WP/18, LE/3, 08-07-04.

4/ United Nations General Assembly, A/RES/60/20, "Report of the International Law Commission on the work of its fifty-seventh session" at para. 3(b).

5/ The International Oil Pollution Compensation Fund was created under the 1992 *International Convention on the Establishment of a Fund for Compensation for Oil Pollution Damage* ("1992 Fund Convention").

6/ Namely, the 1992 *International Convention on Civil Liability for Oil Pollution Damage* and the 1992 Fund Convention.

conventions has been removed from the agenda of the Assembly. The Working Group had been unable to agree on proposals to revise the regime. 7/

F. United Nations Compensation Commission

22. In June 2005, the Governing Council of the United Nations Compensation Commission (UNCC) approved the last reports and recommendations of the Panels of Commissioners. This completed the processing of claims and brought to a conclusion the work of the Panels of Commissioners. Awards of approximately US$ 52.5 billion were approved in respect of approximately 1.5 million of the over 2.6 million claims that were received. The work of the UNCC will now focus on payments of awards to claimants. 8/

23. In its June 2005 report and recommendations on the so-called "F4" claims, 9/ the Panel of Commissioners considered whether claims for damage to natural resources without commercial value were compensable. The Panel found that such claims are within the scope of Security Council resolution 687 (1991), which establishes Iraq's legal responsibility for the invasion and occupation of Kuwait. The reasoning of the Panel is discussed in more detail in the information document on determination of damage to the conservation and sustainable use of biological diversity, including case-studies, (UNEP/CBD/BS/WG-L&R/2/INF/3), which has also been prepared and made available for this meeting.

G. Stockholm Convention on Persistent Organic Pollutants

24. The first meeting of the Conference of the Parties to the 2001 Stockholm Convention on Persistent Organic Pollutants was held in May 2005. Item 6 (o) of the agenda concerned liability and redress and the Conference was supposed to consider the report of a Workshop on Liability and Redress that had been held in 2002 and decide on any further action to be taken. Given the volume of work that was before the Conference, however, it was unable to take up consideration of this agenda item and it was agreed that liability and redress would be included on the agenda of the next Conference of the Parties. The second meeting of the Conference of the Parties is to be held in May 2006.

7/ International Oil Pollution Compensation Fund 1992, "Record of Discussions of the Tenth Session of the Assembly", doc. 92FUND/A.10/37, 21 October 2005 at para. 8.26.

8/ UNCC at a glance, at http://www2.unog.ch/uncc/ataglance.htm

9/ United Nations Compensation Commission Governing Council, *Report and Recommendations made by the Panel of Commissioners Concerning the Fifth Instalment of "F4" Claims*, doc. S/AC.26/2005/10 (30 June 2005). "F4" claims are claims for damage to the environment.

Annex

STATUS OF INTERNATIONAL ENVIRONMENT-RELATED LIABILITY INSTRUMENTS AS OF JANUARY 2006 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	47	4 February 1958
• Amending Protocol	23 September 1978	14	9	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	15	12	4 December 1974
• Amending protocol	28 January 1964	15	12	4 December 1974
• Amending protocol	16 November 1982	12	12	7 October 1988
• Amending protocol	12 February 2004	13	None	Not in force
Convention on the Liability of Operators of Nuclear Ships	25 May 1962	14	7	Not in force
IAEA Vienna Convention on Civil Liability for Nuclear Damage	21 May 1963	14	33	12 November 1977
• Amending protocol	12 September 1997	15	5	4 October 2003
Supplementary Convention	12 September 1997	13	3	Not in force
UN Convention on International Liability for Damage Caused by Space Objects	29 November 1971	73	82	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
UNECE Convention on Civil Liability for Damage Caused During Carriage of Dangerous goods by Road, Rail and Inland Navigation Vessels	10 October 1989	2	None	Not in force

IMO International Convention on Civil Liability for Oil Pollution Damage (replaced 1969 Convention) • Amendment Supplementary FUND Convention (replaced 1971 Convention) • Amendment • Protocol	27 November 1992 18 October 2000 27 November 1992 18 October 2000 16 May 2003	10 N/A 10 N/A 1	113 N/A 92 N/A 11	30 May 1996 1 November 2003 30 May 1996 1 November 2003 3 March 2005
Council of Europe Lugano Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment	21 June 1993	9	None	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	8	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	7	Not in force
IMO International Convention on Civil Liability for Bunker Oil Pollution Damage	23 March 2001	3	6	Not in force
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

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