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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
Third meeting
Montreal, 19-23 February 2007
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 second meeting from 20-24 February 2006 in Montreal. At the end of that meeting, the Working Group requested, among other things, the Secretariat to gather and make available, at its third meeting, information on recent developments in international law relating to liability and redress, including the status of international environment-related third party liability instruments.

2. At its second meeting, the Working Group had before it an information document on recent developments in international law relating to liability and redress, including the status of international environment-related third party liability instruments (UNEP/CBD/BS/WG-L&R/2/INF/5). The document was, in turn, an update of two earlier information documents (UNEP/CBD/BS/WG-L&R/1/INF/3 and UNEP/CBD/BS/WG-L&R/1/INF/4), which were prepared for the first meeting of the Working Group. The present information document which has been prepared in response to the request by the second meeting of the Working Group is 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 document UNEP/CBD/BS/WG-L&R/2/INF/5. The updated information on the status of international environment-related third party liability treaties is presented as an annex to this document.

* UNEP/CBD/BS/WG-L&R/3/1

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

3. This section presents summary of recent developments in the field of liability and redress within the processes of the Convention on Biological Diversity, the Antarctic Treaty System, the Convention on Environmental Assessment in a Transboundary Context, the International Court of Justice, the International Civil Aviation Organization, the Stockholm Convention on Persistent Organic Pollutants, the International Atomic Energy Agency, the International Law Commission, the International Law Association, and the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal.

A. Convention on Biological Diversity

4. At its eighth meeting, in March 2006, the Conference of the Parties to the Convention on Biological Diversity considered the report of the Group of Legal and Technical Experts on Liability and Redress (UNEP/CBD/COP/8/27/Add.3). The Conference of the Parties then adopted decision VIII/29, on liability and redress, which:

(a) Invites Parties and other Governments to submit to the Executive Secretary examples of national/domestic legislation and case studies relating to liability and redress for damage to biodiversity, including approaches to valuation and restoration. This information is to be compiled and disseminated through the clearing-house mechanism;

(b) Requests the Executive Secretary to gather and compile technical information relating to damage to biodiversity and approaches to the valuation and restoration thereof as well as information on national/domestic measures and experiences. A synthesis report of this information is to be prepared for the ninth meeting of the Conference of the Parties; and

(c) Reiterates the call to Parties, Governments and relevant international organizations from decision VI/11, paragraph 3 for cooperation on capacity-building in this area.

B. Convention on Environmental Impact Assessment in a Transboundary Context

5. The 1991 Convention on Environmental Impact Assessment in a Transboundary Context ("Espoo Convention") was negotiated under the auspices of the United Nations Economic Commission for Europe and entered into force in 1997. Article 3 of the Convention requires that in cases where a proposed activity listed in Appendix I to the Convention is likely to cause a significant adverse transboundary impact, the Party of origin of the activity must notify any Party that it considers may be an affected Party (Article 3(1)). Where a Party has not been notified under Article 3(1) and considers that it would be affected by a significant adverse transboundary impact of a proposed activity listed under Appendix I, "the concerned Parties shall, at the request of the affected Party, exchange sufficient information for the purposes of holding discussions on whether there is likely to be a significant transboundary impact. … If those Parties cannot agree whether there is likely to be a significant transboundary impact, any such Party may submit that question to an inquiry commission in accordance with the provisions of Appendix IV to advise on the likelihood of significant adverse transboundary impact" (Article 3(7)). Appendix IV, in turn, sets out the inquiry procedure.

6. In August 2004, the Secretariat of the Espoo Convention received notification from Romania of a request for the establishment of an inquiry commission regarding work authorized by Ukraine on the Danube-Black Sea Navigation Route at the border of the two countries. Between 2001 and 2004, Ukraine authorized a number of projects on the navigation route including dredging and deepening the channel,

building a retaining dam and dumping the dredged material. This was the first inquiry commission established under the Espoo Convention.

7. The Commission began its inquiry in January 2005 and presented its final report in July 2006. The Commission described its objective as follows:

> "The objective of the Commission is to assess the likelihood of a significant adverse transboundary impact of the dredging and maintenance of the entrance channel and the rifts in the Danube River and the dumping of dredged spoil on riparian land or at a dump site offshore at sea.." 1/

The Commission considered that all impacts of the dredging on the Navigation Route are *ipso facto* transboundary "because the dredging is operated at and on the state boundary between Romania and the Ukraine. The question is whether the effects are likely significant and adverse." 2/ The relevance of the Inquiry Commission to this Working Group lies in its consideration, assessment and determination of the likelihood of significant adverse transboundary impacts.

8. Both "impact" and "transboundary impact" are defined in the Convention:

> "Impact" means any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors; …
>
> "Transboundary impact" means any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party [.] 3/

9. The Commission identified the words "likely significant" from Appendix IV of the Convention to be the threshold for its inquiry:

> "In natural systems variables pertinent to the system may show a rather large variability due to daily, seasonal, yearly or decadal conditions and to unknown inherent system-specific causes. This means that time series of measurements of such variables show a certain realm in which the measurements vary. Such variations may be random or systematic related to daily, seasonal etc. conditions. When the boundary conditions of a system are changed some variables may be affected, resulting in a change of the realm of the measurements and/or the systematic conditions. This may result in a change or a break in the trend in the measurements. *The above described main subject of the Inquiry Commission strictly speaking require[s] that these changes in realm and/or trend should be significant: distinguishable with some certainty*." 4/

10. The Commission also quotes from the document "Current Policies, Strategies and Aspects of Environmental Impact Assessment in a Transboundary Context":

1/ Espoo Inquiry Commission, "Report on the Likely Significant Adverse Transboundary Impacts of the Danube-Black Sea Navigation Route at the Border of Romania and the Ukraine" (July 2006) ["Inquiry Commission"] at p. 9.

2/ Inquiry Commission, *ibid.* at p. 6.

3/ *Convention on Environmental Impact Assessment in a Transboundary Context* at Art. 1(vii) & (viii).

4/ Inquiry Commission, *supra* note 1 at p. 13, emphasis added.

> "Criteria on the significance of any impact should be set in a general decision-making framework. In some cases, it may be possible to establish generally acceptable criteria on significance. In most cases, however, the decision that an adverse transboundary impact is likely to be significant would be based on a comprehensive consideration of the characteristics of the activity and its possible impact. An element of judgement would always be present." 5/

The Commission goes on to interpret this statement as meaning that "judgement" implies an undefined uncertainty; it is based on knowledge and experiences(s) from other, more or less similar areas or phenomena." 6/ In light of this, the Commission used four experts to advise it on the different realms of its inquiry, including hydrology, siltation and erosion, pollution, fisheries and birds. 7/

11. The Commission created four categories for the "likely significance of adverse transboundary impacts": unlikely, hardly likely (inconclusive), likely, and very likely. These were then applied to six subjects that were identified as controversial:

(a) Transboundary impact on the hydrology of the River Danube;

(b) Transboundary impact on sediment discharge and the storage and dumping of dredged material in the coastal zone;

(c) Transboundary impact of dredging on pollution of the coastal waters;

(d) Transboundary impact on fisheries, and

(e) Transboundary impact on biodiversity, because of loss of habitat of protected migratory birds. 8/

12. The transboundary impact on biodiversity was considered solely in terms of birdlife and the transboundary socio-economic impacts were limited to those on the commercial fishery. Within each of the six subjects, the Commission determined the likely significance of adverse transboundary impacts from the different components of the work on the Navigation Route. For example, under transboundary impact on fisheries, the Commission made the following determinations, amongst others:

> 3. *effect of reduction of flooding magnitude and frequency* and potential loss of spawning and nursery floodplain habitats: **likely adverse transboundary**
>
> 4. *impacts of deterioration of water quality:* **unlikely adverse transboundary** …
>
> 5. *impact of repeated maintenance of dredging,* hampering the recovery processes of affected areas in the long term: **likely adverse transboundary** …
>
> 11. *cumulative impacts* of increased suspended sediment, habitat loss and modification, water quality deterioration etc: **likely adverse transboundary impact,** on a large scale and long term [.] 9/

5/ Inquiry Commission, *supra* note 1 at p. 14.

6/ Inquiry Commission, *supra* note 1 at p. 14.

7/ Inquiry Commission, *supra* note 1 at p. 22.

8/ Inquiry Commission, *supra* note 1 at p. 22.

9/ Inquiry Commission, *supra* note 1 at p. 57, emphasis in original.

The Commission also noted "a substantial number of potential impacts could not be assessed because of lack of sufficient and/or reliable data or information". These are "gaps in our knowledge"."10/ Because of these gaps, the Commission describes its final evaluation as being of restricted value and leaving open many important aspects.

13. The report of the Inquiry Commission concludes with a recommendation to organize a Bilateral Research Programme within the framework of bilateral cooperation under the Espoo Convention. 11/ The Commission proposed that the Bilateral Research Programme "may cover a characterisation of the baseline situation, an assessment of the expected impacts of the construction and operation of the Navigation Route, the identification and assessment of measures mitigating expected adverse impacts and a monitoring plan to follow the actual impacts in the years to come." 12/ Such a research programme would help to provide information in order to better assess the transboundary impacts of activities taking place on the Navigation Route, particularly for those areas where no conclusive evidence was available.

14. It may also be noted that the work on the Danube-Black Sea Navigation Route has been brought to the attention of the Compliance Committee of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. In 2004, both Romania and a Ukrainian non-governmental organization made submissions to the Committee regarding public participation in the decision-making associated with the work on the Navigation Route. 13/ To date, these have culminated in decision II/5b adopted at the second meeting of the Parties, which, inter alia, finds that the Ukraine was not in compliance with certain provisions of the Convention and requests the country to take steps to come into compliance with the Convention. In its response to date, the Ukraine has begun drafting an implementation strategy with the intent of finalizing it and submitting it to the Compliance Committee by the end of 2006. 14/

C. The International Court of Justice

15. In May 2006, Argentina initiated proceedings against Uruguay at the International Court of Justice (ICJ). Argentina alleges that Uruguay breached its obligations under the *Statute of the River Uruguay*, which was signed by the two countries in 1975. The purpose of the Statute is "to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay", of that part of the River Uruguay which is shared by the two States and constitutes their common boundary". 15/ Through a number of provisions, the Statute governs the conservation, utilization and exploitation of natural resources and the prevention of pollution. 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. Argentina submits "that Articles 7 to 13 of the Statute provide for an obligatory procedure for prior notification and consultation through CARU [the Administrative Commission of the River Uruguay created under the Statute] for any party planning to carry out works liable to affect navigation, the regime of the river or the quality of its waters". 16/

10/ Inquiry Commission, *supra* note 1 at p. 58.

11 / See Article 8 and Appendix VI of the Convention.

12/ Inquiry Commission, *supra* note 1 at p. 64.

13/ See UN docs. ACCC/S/2004/01 (Submission by Romania about compliance by Ukraine), and ACCC/C/2004/3 (Communication from Charitable Foundation Ecopravo-Lviv).

14/ "Report of the Thirteenth Meeting" of the Compliance Committee of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (16 November 2006), UN doc. ECE/MP.PP/C.1/2006/6 at paras. 27-30.

15/ *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order of 13 July 2006, I.C.J. No. 135 at para. 4 [*Pulp Mills on the River Uruguay*]. See also Article 1 of the *Statute of the River Uruguay*, Argentina and Uruguay, 26 February 1975, 1295 U.N.T.S. 359.

16/ *Pulp Mills on the River Uruguay*, *supra* note 15 at para. 4.

16. Prior to the initiation of proceedings at the ICJ, the two governments had set up a High-Level Technical Group in an attempt to resolve the dispute. The group met twelve times between August 2005 and January 2006 without reaching an agreement. 17/

17. Argentina asserts that over 300,000 residents of the area will be affected by the mills. These residents are concerned at the "major risks of pollution of the river, deterioration in biodiversity, harmful effects on health and damage to fish stocks as well as to the extremely serious consequences for tourism and other economic interests". 18/ Argentina thus requested the Court to adjudge and declare:

1. That Uruguay has breached the obligations incumbent upon it under the 1975 Statute and the other rules of international law to which that Statute refers, including but not exclusively:

(a) The obligation to take all necessary measures for the optimum and rational use of the River Uruguay;

(b) The obligation of prior notification to CARU and to Argentina;

(c) The obligation to comply with the procedures laid down in Chapter II of the 1975 Statute;

(d) The obligation to take all necessary measures to preserve the aquatic environment and prevent pollution and the obligation to protect biodiversity and fisheries, including the obligation to prepare a full, objective study on environmental impact;

(e) The obligation to co-operate in regard to the prevention of pollution and the protection of biodiversity and fisheries; and

2. That, by its conduct, Uruguay has engaged its international responsibility to Argentina;

3. That Uruguay shall cease its wrongful conduct and comply scrupulously in future with the obligations incumbent upon it; and

4. That Uruguay shall make full reparation for the injury caused by its breach of the obligations incumbent upon it. 19/

18. Argentina also filed a request for the indication of provisional measures, in which it explains that "the continued construction of the works in question under present conditions will significantly aggravate their harmful economic and social impact". 20/ The Argentine Government further states that the harmful consequences of these activities would be "such that they could not simply be made good by means of financial compensation or some other material provision". It adds that "the commissioning of the mills . . . before a final decision is rendered [by the Court] would seriously and irreversibly compromise the conservation of the environment of the River Uruguay and its area of influence, as well as the rights of Argentina and of the inhabitants of the neighbouring areas under its jurisdiction". According to Argentina, the continued construction of the mills would set the seal on Uruguay's unilateral effort to create a "fait accompli" and to render irreversible the current siting of the mills. 21/

17/ *Pulp Mills on the River Uruguay, supra* note 15 at para. 9.

18/ *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, "Application Instituting Proceedings Submitted by Argentina" (4 May 2006) at para. 15.

19/ *Ibid*. at para. 25.

20/ International Court of Justice, Press Release 2006/17, "Argentina institutes proceedings against Uruguay and requests the Court to indicate provisional measures" (4 May 2006).

21/ *Ibid.*

19. The Court held a public sitting in June 2006 during which it heard arguments regarding provisional measures. Argentina argued before the Court that the standard or threshold for an indication of provisional measures was, *inter alia*, "that there should be a serious risk that irreparable prejudice or damage might occur". 22/ To this end, Argentina submitted that "environmental damage was, at the least, "a very serious probability" and would be irreparable", and that economic and social damage would also result and would be impossible to assess. 23/ Argentina also argued "that the construction of the mills itself was capable of causing "significant damage" to Argentina and was already doing so". 24/

20. The Court was not persuaded by these arguments, but it did note that in proceeding with the authorization and construction of the mills, Uruguay bears the risks relating to any findings on the merits that the Court might subsequently make. 25/ The Court issued its Order on 13 July 2006, where, in short, it found "that the circumstances, as they now present themselves to it, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures". 26/

21. A majority of 14 judges agreed with these findings; one judge dissented. The dissenting opinion of Judge *ad hoc* Vinuesa agrees "with the majority's findings that the evidence presented by Argentina at this stage is not sufficient to prove that the authorization and subsequent construction of the plants, in themselves, and just in themselves, have already caused irreparable harm to the environment". 27/ He disagrees, however, with the majority's finding that the construction of the plants will not affect the future preservation of the environment and so believes that the Court should have indicated alternative provisional measures. 28/ More specifically, Judge Vinuesa finds that the Court should have indicated alternative provisional measures in order to preserve Argentina's procedural consultation rights under Chapter II of the 1975 Statute "as well as the substantive right that is intrinsically associated with it under the Statute, pending a final solution on the merits." 29/ Judge Vinuesa adopts Argentina's characterization of the "substantive rights" or "substantive obligations" under the Statute, namely Uruguay's obligation not to allow any construction before the requirements of the 1975 Statute have been met, and its obligation not to cause environmental pollution or consequential economic or social harm. 30/

22. Judge Vinuesa finds that Argentina proved "that the work authorizations and the actual execution of the works have generated a reasonable basis of uncertainty on the probable negative effects to the environment of the works". 31/ Thus, in order to implement the precautionary principle as embodied in the 1975 Statute, Judge Vinuesa finds that alternative provisional measures indicating the temporary suspension of the construction of the mills until Uruguay notified the Court of its fulfilment of its obligations under the Statute should have been ordered. Such measures would preserve Argentina's procedural and associated substantive rights.

23. Argentina has until 15 January 2007 to file its Memorial and Uruguay has until 20 July 2007 to file a Counter-Memorial. A recent development in the case is that on 30 November 2006, Uruguay filed a request for the indication of provisional measures with the Court. Uruguay's request concerns a blockade by Argentinean citizens of a bridge that spans the River Uruguay and links the two countries. Uruguay

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22/ *Pulp Mills on the River Uruguay*, *supra* note 15 at para. 35.

23/ *Ibid.*

24/ *Pulp Mills on the River Uruguay, supra* note 15 at para. 52.

25/ *Pulp Mills on the River Uruguay, supra* note 15 at para. 78.

26/ *Pulp Mills on the River Uruguay, supra* note 15 at para. 87.

27/ *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, dissenting opinion of Judge *ad hoc* Vinuesa, 13 July 2006 at p. 1.

28/ *Ibid.*

29/ *Ibid.* at p. 4.

30/ *Ibid.* at p. 3.

31/ *Ibid.* at p. 5.

asserts that the blockade is costing the country hundreds of millions of dollars in lost trade and tourism revenue and that Argentina has not taken any actions against the blockade. Uruguay requests that the Court order the following provisional measures pending a final resolution on the merits of the case:

While awaiting the final judgment of the court, Argentina:

(i) Shall take all reasonable and appropriate steps at its disposal to prevent or end the interruption of transit between Uruguay and Argentina, including the blockading of bridges and roads between the two States;

(ii) Shall abstain from any measure that might aggravate, extend or make more difficult the settlement of this dispute; and

(iii) Shall abstain from any other measure that might prejudice the rights of Uruguay in dispute before the Court. .32/

24. The Court held public hearings on the request on 18 and 19 December 2006 and the decision would be announced in the coming weeks. 33/ It may also be noted that the World Bank decided in November 2006 to provide loans and insurance for the construction of one of the mills at issue. Furthermore, in response to Argentina's complaints, the company seeking to build the second mill has announced that the location of the mill is to be moved.

D. International Civil Aviation Organization

25. Work is ongoing at the International Civil Aviation Organization (ICAO) to modernize the 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome Convention). Two meetings of the Special Group on the Modernization of the Rome Convention were held in 2006. The Special Group has produced two draft conventions: a draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference, and a draft Convention on Damage Caused by Foreign Aircraft to Third Parties.

26. The Special Group has not finalized these texts and will continue its work by correspondence and informal meetings. No additional formal meetings of the Group are envisaged. It is expected that the Group will complete its work in time for submission to the next session of the ICAO Council, in February/March 2007. If the Group concludes its work, a proposal will be made to the Session of the Council to convene from 26 June to 6 July 2007 a session of the Legal Committee of ICAO for further consideration of the two draft texts. Most recently, at its meeting in December 2006, the ICAO Council renamed the item on the modernization of the Rome Convention on the General Work Programme of the Legal Committee to read "Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks". This was in recognition of the fact that the work is now moving beyond a mere update or modernization of the Rome Convention.

27. The descriptions, below, of the two draft conventions are based on their status after the fourth meeting of the Special Group held in June 2006. The report from the fifth meeting of the Special Group, held in October-November 2006 was not available at the time of writing.

32/ *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, "Request for the Indication of Provisional Measures Submitted by Uruguay" (30 November 2006) at para. 28.

33/ International Court of Justice, Press Release 2006/44.

Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference

28. The draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference creates significant changes to the regime of the Rome Convention. Under Article 3(1) of a draft dated 6 October 2006, it is the operator who "shall be liable for damage sustained by third parties upon condition only that the damage was caused by an aircraft in flight." At the same time, however, the operator may be exonerated from liability in two ways. First, Article 12 provides, "Without prejudice to Articles 3, 4 and 19, all operators which held a commercial licence covering that flight issued by a State Party, or in the case of operators which are not so licensed, those of aircraft which are registered in a State Party, and their servants and agents, shall be exonerated from liability for damage covered by this Convention." Secondly, under Article 17(1), "If the operator proves that the damage was caused or contributed to by an act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, done with intent or recklessly and with knowledge that damage would probably result, the operator shall be wholly or partly exonerated from its liability to the claimant to the extent that such act or omission caused or contributed to the damage".

29. Damage is defined in the draft Convention to mean death, bodily injury or damage to property, with an asterix stating that an appropriate limitation on mental injury should be included (Article 1(b)). Article 3(3) states that, "Nothing in this Convention shall prevent compensation for environmental damage, if and insofar as such compensation is provided for under the law of the State [Party] in the territory of which, or under the jurisdiction of which, the damage occurred." Article 3(2) requires the damage to be a direct consequence of the incident that gave rise to the damage in order for there to be a right to compensation while Article 3(4) disallows the recovery of punitive, exemplary or any other non-compensatory damages. Article 7 of the draft Convention requires State Parties to require their operators "to maintain adequate insurance or guarantee covering their liability" under the Convention.

30. The draft Convention creates limits on an operator's liability based on the mass of the aircraft involved in the event (Article 4). The draft Convention also establishes an organization named the Supplementary Compensation Mechanism (Article 8). Article 13 sets terms for contributions to the Supplementary Compensation Mechanism although much of the text is in square brackets. At the moment, the relevant part reads "All persons [belonging to a category mentioned in Article 12] shall make contributions to the Supplementary Compensation Mechanism to the extent and on the basis decided by the Conference of the Parties" (Article 13(1)). The categories in Article 12 are: owners of aircraft, lessors of financiers of aircraft, manufacturers of aircraft, air navigation service providers, airports, security providers, ground handling service providers, and the servants or agents of any such person.

31. Under Article 15, the Supplementary Compensation Mechanism is to "provide compensation to persons suffering damage in the territory of a State Party … Compensation shall only be paid to the extent that the total amount of damages exceed the limits according Article 4" (Article 15(1)). Paragraph 2 of Article 15 sets the maximum amount of compensation available from the Supplementary Compensation Mechanism for each event. The amount is 3 billion special drawing rights, although this figure is in square brackets. Paragraph 3 of Article 15 states:

> "In case insurance for the risks of damages covered by the Convention, or for part of these risks, is unavailable, or only available at a cost incompatible with the continued operation of air transport, the Conference of Parties may decide that the Supplementary Compensation Mechanism shall, in case of an event causing damage compensable under this Convention, provide financial support to operators for the payment of damages for which they are liable according to Articles 3 and 4."

The Supplementary Compensation Mechanism may also make advance payments "without delay to natural persons who are entitled to claim compensation under this Convention in order to meet the immediate economic needs of such persons" (Article 16(1)). The Supplementary Compensation Mechanism may also take other measures to minimize or mitigate damages in case of an event (Article 16(2)). As described above, the operator can be exonerated from liability under Article 17 where the person claiming compensation caused or contributed to the damage. Similarly, the Supplementary Compensation Mechanism will not provide compensation where the claimant caused or contributed to the damage (Article 17(2)).

32. Article 18 provides for the apportionment of damages where the total claims exceed the available amounts. The article states that "the total amount shall be awarded preferentially to meet proportionately the claims in respect of death and bodily injury in the first instance. The remainder, if any, of the total amount distributable shall be awarded proportionately among the claims in respects of other damages."

33. Article 19 describes the rights of recourse under the Convention. Both the person liable and the Supplementary Compensation Mechanism only have a right of recourse against any person if the damage was the result of an intentional or negligent act. Whether the right of recourse against 'any person' is confined to categories of people listed in Article 12 is in square brackets.

Draft Convention on Damage Caused by Foreign Aircraft to Third Parties

34. The discussion below of the draft Convention on Damage Caused by Foreign Aircraft to Third Parties is based on a version of the draft Convention dated 23 October 2006.

35. Under Article 3(1), liability for damage sustained by third parties is placed on the operator on the condition "that the damage was caused by an aircraft in flight or by any person or object falling therefrom." 'Damage' is defined as meaning death, bodily injury or damage to property, with an asterix stating that an appropriate limitation on mental injury should be included. Article 3(5) states that "Nothing in this Convention shall prevent compensation for environmental damage, if and insofar as such compensation is provided for under the law of the State in the territory of which, or under the jurisdiction of which, the damage occurred." The operator can be exonerated from liability if there was contributory negligence on the part of the person claiming compensation (Article 4).

36. The draft Convention creates a mixture of strict and fault-based liability. Under Article 3(2), the operator cannot exclude or limit its liability where the damages for each third party do not exceed "[250 000 - 500 000] Special Drawing Rights". Under Article 3(3), however, the operator will not be liable for damages that exceed "[250 000 - 500 000] Special Drawing Rights" for each third party, if the operator proves that:

(a) Such damage was not due to its negligence or other wrongful act or omission or that of its servants or agents; or

(b) Such damage was solely due to the negligence or other wrongful act or omission of another person.

Article 3(4) states that "[t]here shall be no right to compensation under this Convention if the damage is not a direct consequence of the incident giving rise thereto, or if the damage results from the mere fact of passage of the aircraft through the airspace in conformity with existing air traffic regulations."

37. Article 5 provides for the apportionment of damages where the total amount of compensation exceeds the limits of liability applicable under the provisions of Chapter III (which does not include the limits from Article 3, described above.) In this case, it is indicated that the following rules would apply:

(a) If the compensation is exclusively in respect of death or bodily injury or exclusively in respect of damage to property, such compensation shall be reduced in proportion to the respective amounts;

(b) If the compensation is both in respect of death or bodily injury and in respect of damage to property, the total sum shall be awarded preferentially to meet proportionately the claims in respect of death and bodily injury in the first instance. The remainder, if any, of the total sum distributable shall be awarded proportionately among the claims in respects of damage to property.

This article is, however, in square brackets with a note that "[a]dditional drafting work is required to find a formulation that would be suitable for all legal systems."

38. Article 7 creates joint and several liability of the operators where "two or more aircraft have been involved in an incident causing damage for which a right to compensation under the present Convention results" (Article 7(1)). Article 11 requires States Parties to "require their operators to maintain adequate insurance or guarantee covering their liability under this Convention."

E. International Law Commission

39. During its fifty-eighth session in 2006, the International Law Commission (ILC) adopted the text of the preamble and a set of eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. The ILC also adopted the commentaries to the draft principles.34/ This concludes the Commission's work on the topic "International liability for injurious consequences arising out of acts not prohibited by international law". The Commission has submitted the draft preamble and draft principles to the General Assembly along with a recommendation "that the Assembly endorse the draft principles by a resolution and urge States to take national and international action to implement them." 35/ The General Assembly considered the work of the ILC during its sixty-first session and adopted a resolution in which it, *inter alia*, took note of the draft principles. 36/

40. The Commission concluded that the form of the instrument, i.e. draft principles, has the advantage of not requiring a harmonization of national laws and legal systems and that widespread acceptance is more likely to be met if the outcome is cast as principles. It is also noted that the Commission "did not attempt to identify the current status of the various aspects of the draft principles in customary international law and the way in which the draft principles are formulated is not intended to affect that question." 37/

41. The preamble to the draft principles places the principles in the context of the 1992 Rio Declaration on Environment and Development and the ILC's earlier Draft articles on the Prevention of Transboundary Harm from Hazardous Activities from 2001. The scope of application as provided in draft principle 1 states that the draft principles apply to transboundary damage caused by hazardous activities not prohibited by international law. The commentary accompanying draft principle 1 elaborates on the distinction between hazardous and non-hazardous activities: "The combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact separates such [hazardous] activities

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34/ The draft preamble, draft principles and commentary may be found in chapter V of United Nations International Law Commission, *Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006)*, GAOR 61st session, supplement no. 10 (A/61/10).

35/ *Ibid.* at para. 63, p. 105.

36/ United Nations General Assembly resolution 61/36.

37/ ILC, *Report on the work of its fifty-eighth session, supra* note 34 at para. 13, p. 114.

from any other activities." 38/ Thus, both activities carrying a low risk of causing disastrous transboundary harm as well as those carrying a high risk of causing significant transboundary harm are encompassed by the principles.

42. The commentary also states that the term "transboundary harm" comprises questions of "territory, jurisdiction" and "control". 39/ The scope of application of the principles is limited in that it does not include transboundary harm caused by State policies in trade, monetary, socio-economic or similar fields.

43. Under draft principle 2 on "Use of terms", the Commission defines some of the key terms used in the principles. "Damage" is defined to mean:

> "Significant damage caused to persons, property or the environment; and includes:
>
> (iv) Loss of life or personal injury;
>
> (v) Loss of, or damage to, property, including property which forms part of the cultural heritage;
>
> (vi) Loss or damage by impairment of the environment;
>
> (vii) The costs of reasonable measures of reinstatement of the property, or environment, including natural resources;
>
> (viii) The costs of reasonable response measures[.]"

44. The commentary states that damage must reach a certain threshold in order to be eligible for compensation. The draft principles use the term 'significant' to designate the threshold of damage they cover (principle 2, para. (c)), where " 'significant' is understood to refer to something more than 'detectable' but need not be at the level of 'serious' or 'substantial' ". 40/ The commentary also states that the harm must lead to real detrimental effects and these effects "must be susceptible of being measured by factual and objective standards." 41/ In relation to this, it is pointed out that the determination of 'significant damage' also includes a value determination, which depends on the circumstances of a particular case and the time, when the damage occurs. Changes in understanding mean that damage may not be considered significant when it occurs at one period of time but may be so considered at a later period of time.

45. The commentary describes the meaning of property loss or damage in paragraph (a)(ii) of draft principle 2: "It embraces a wide range of aspects, including monuments, buildings and sites, while natural heritage denotes natural features and sites and geological and physical formations. Their value cannot easily be quantifiable in monetary terms but lies in their historical, artistic, scientific, aesthetic, ethnological, or anthropological importance or in their conservation or natural beauty." 42/ Concerning the meaning of 'loss or damage by impairment of the environment' in sub-paragraph (iii), the commentary states that this may include "loss of income directly deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment". 43/

38/ *Ibid.* at para. 2, p. 117.
39/ *Ibid.* at para. 10, p. 120.
40/ *Ibid.* at para. 2, p. 123.
41/ *Ibid.*
42/ *Ibid.* at para. 9, p. 126.
43/ *Ibid.* at para. 13, p. 129.

46. 'Environment' is defined in draft principle 2 to include "natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, and the characteristic aspects of the landscape". The commentary explains that the Commission chose to include environmental values in the definition and that these encompass non-service values such as aesthetic aspects of landscapes, and "the enjoyment of nature because of its natural beauty and its recreational attributes and opportunities associated with it. This broader approach is justified by the general and residual character of the present draft principles." 44/ The commentary makes reference to the definition of ecosystem in the Convention on Biological Diversity.

47. The draft principles define "operator" to mean "any person in command or control of the activity at the time the incident causing transboundary damage occurs" (principle 2, para. (g)). The commentary cites with favour the notion that 'operator' means one in actual, legal or economic control of the polluting activity. The term "control" is, in turn, described as denoting "power or authority to manage, direct, regulate, administer or oversee. This could cover the person to whom decisive power over the technical functioning of an activity has been delegated, including the holder of a permit or authorization for such an activity or the person registering or notifying such an activity. It may also include a parent company or other related entity, whether corporate or not, particularly if that entity has actual control of the operation." 45/

48. Draft principle 3 states that the purposes of the draft principles are:

(a) To ensure prompt and adequate compensation to victims of transboundary damage; and

(b) To preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement.

49. The commentary describes paragraph (b) as emphasizing "the more recent concern of the international community to recognize protection of the environment *per se* as a value by itself without having to be seen only in the context of damage to persons and property." 46/ With regard to the 'restoration or reinstatement' element of paragraph (b), the commentary states that "[t]he aim is not to restore or return the environment to its original state but to enable it to maintain its permanent functions. … Where restoration or reinstatement of the environment is not possible, it is reasonable to introduce the equivalent of those components into the environment." 47/

50. In addition to the two purposes formalized in the draft principles, the commentary adds that

> "The draft principles serve or imply the serving of other objectives, including: (a) providing incentives to the operator and other relevant persons or entities to prevent transboundary damage from hazardous activities; (b) resolving disputes among States concerning transboundary damage in a peaceful manner that promotes friendly relations among States; (c) preserving and promoting the viability of economic activities that are important to the welfare of States and peoples; (d) and providing compensation in a manner that is predictable, equitable, expeditious and cost effective. Wherever possible, the draft principles should be interpreted and applied so as to further all these objectives." 48/

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44 / *Ibid.* at para. 20, p. 133.

45/ *Ibid.* at para. 33, p. 139-140.

46/ *Ibid.* at para. 6, p. 142.

47/ *Ibid.* at para. 7, p. 142-143.

48/ *Ibid.* at para. 10, p. 144.

51. Draft principle 4 concerns 'Prompt and adequate compensation'. Paragraph 1 says that States should take all necessary measures to ensure that prompt and adequate compensation is available while paragraph 2 states that "[t]hese measures should include the imposition of liability on the operator or, where appropriate, other person or entity. Such liability should not require proof of fault. Any conditions, limitations or exceptions to such liability shall be consistent with draft principle 3." In addition to the discussion of the term 'operator' in the context of draft principle 2, the commentary states that "The real underlying principle is not that "operators" are always liable, but that the party with the most effective control of the risk at the time of the accident or has the ability to provide compensation is made primarily liable."49/ The commentary also explains the rationale for adopting strict liability:

> "Hazardous and ultrahazardous activities, the subject of the present draft principles, involve complex operations and carry with them certain inherent risks of causing significant harm. In such matters, it is widely recognized that it would be unjust and inappropriate to make the claimant shoulder a heavy burden of proof of fault or negligence in respect of highly complex technological activities whose risks and operation the concerned industry closely guards as a secret. Strict liability is recognized in many jurisdictions, when assigning liability for inherently dangerous or hazardous activities. The case for strict liability for ultrahazardous or abnormally dangerous activities was held to be the most proper technique both under common and civil law to enable victims of dangerous and ultrahazardous activities to recover compensation without having to establish proof of fault on the basis of what is often detailed technical evidence, which, in turn, would require on the part of victims a complete understanding of the complicated and complex operation or activity. The case for strict liability is strengthened when the risk has been introduced unilaterally by the defendant. 50/

52. Paragraphs 3 and 4 of draft principle 4 may also be relevant to the work of the Working Group. They read as follows:

> "3. These measures should also include the requirement on the operator or, where appropriate, other person or entity, to establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.
>
> "4. In appropriate cases, these measures should include the requirement for the establishment of industry-wide funds at the national level."

53. Draft principle 5 addresses 'Response measures'. It requires, *inter alia,* that the State ensure that appropriate response measures to an incident involving a hazardous activity, which results or is likely to result in transboundary damage are taken. The commentary elaborates that "[s]uch response measures should include not only clean-up and restoration measures within the jurisdiction of the State of origin but also extend to contain the geographical range of the damage to prevent it from becoming transboundary damage, if it had already not become one." 51/

54. Draft principle 6 is titled 'International and domestic remedies' and it addresses access to justice and access to information. Paragraph 2 states that "[v]ictims of transboundary damage should have access to remedies in the State of origin that are no less prompt, adequate and effective than those available to victims that suffer damage, from the same incident, within the territory of that State." Under paragraph 5, "States should guarantee appropriate access to information relevant for the pursuance of remedies, including claims for compensation." The commentary elaborates that elements of information include:

49/ *Ibid.* at para. 10, p. 154-155.

50/ *Ibid.* at para. 13, p. 156.

51/ *Ibid.* at para. 1, p. 167.

"the precise nature of risk, the standards of safety required, financial base of the activity, provisions concerning insurance or financial guarantees the operator is required to maintain, applicable laws and regulations and institutions designated to deal with complaints including complaints about non-compliance with the required safety standards and redress of grievances." 52/

55. Draft principle 7 on the 'Development of specific international regimes' urges the development of specific international agreements in respect of particular categories of hazardous activities where such agreements would be effective. It also states that such agreements "should, as appropriate, include arrangements for industry and/or State funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, are insufficient to cover the damage suffered as a result of an incident" (para. 2). Finally, draft principle 8 addresses implementation and requires, *inter alia*, that the draft principles and the measures adopted to implement them be applied without discrimination, including on the basis of nationality, domicile or residence.

F. International Law Association

56. The 72nd Conference of the International Law Association (ILA) held in June 2006 adopted the "Toronto Rules on the Transnational Enforcement of Environmental Law" (resolution 6/2006). The Rules were prepared by the ILA's Committee on Transnational Enforcement of Environmental Law. The Toronto Rules do not themselves go to the substantive question of liability and redress from transboundary harm. Instead, they address procedural issues related to the transnational enforcement of environmental law. Included are six rules, which address access to justice, decision-making by public authorities, standing, jurisdiction, applicable law and the scope of applicable law.

57. Rule 1 sets a broad right of access to justice. It grants every person "the right of access to a court in case of environmental risk or damage where the outcome of the proceedings may be decisive for the enjoyment of existing environmental rights and of the right to life; the right to private and family life and home; the right to receive and impart information and ideas; or the right to peaceful enjoyment of possessions." Rule 2 on 'Decision-making by public authorities' requires States to ensure, *inter alia,* "that, in the process of making decisions relating to the environment, public authorities shall take into account the interests and representations of any person in another jurisdiction who may be affected." Questions of standing are addressed in rule 3, which requires states to ensure that any person having a 'sufficient interest' has a right of access. Paragraph 2 elaborates that non-governmental organizations promoting environmental protection are considered to have sufficient interest.

58. Rule 4 on 'Jurisdiction' gives the plaintiff the option of suing the defendant in proceedings relating to environmental damage in the courts of the State where the defendant is domiciled or resident, where the act or omission that caused the injury occurred or may occur, or where the injury arose or may arise. Rule 5 on 'Applicable law' also gives the plaintiff the option of choosing either the law of the State in which the damage arose or may arise, or the law of the State in which the event giving rise to the damage occurred or may occur. Rule 6 elaborates which elements the applicable law chosen under rule 5 will govern. These elements include the conditions and extent of liability, the grounds for exemption from liability as well as any limitations to or division of liability, the existence and kinds of injury or damage for which compensation may be due, and the assessment of the damage in so far as prescribed by law.

52/ *Ibid.* at para. 13, p. 179.

Annex

STATUS OF INTERNATIONAL ENVIRONMENT-RELATED LIABILITY INSTRUMENTS AS OF DECEMBER 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	1	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	25	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

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	113	30 May 1996
• Amendment	18 October 2000	N/A	N/A	1 November 2003
Supplementary FUND Convention (replaced 1971 Convention)	27 November 1992	10	98	30 May 1996
• Amendment	18 October 2000	N/A	N/A	1 November 2003
• Protocol	16 May 2003	5	15	3 March 2005
Council of Europe Lugano Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment	21 June 1993	9	1	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	11	9	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
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	1	Not in force

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