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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

Fifth meeting

Cartagena, Colombia, 12-19 March 2008

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 fourth meeting from 22 to 26 October 2007 in Montreal. At the end of that meeting, the Working Group requested, among other things, the Secretariat to continue to gather and make available, at its fifth 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. This subject has been a standing item for consideration by the Working Group since its first meeting. At its last 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/4/INF/2), which was an update of similar information documents prepared for its earlier meetings.

3. The present note again updates the information gathered and made available for the last meeting of the Working Group, as regards new developments in international law relating to liability and redress. It also contains information on the status of international environment-related third-party liability treaties as of 18 January 2008. The 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/5/1.

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

4. This section presents a summary of recent developments in the field of liability and redress within the processes of the Convention on Environmental Impact Assessment in a Transboundary Context, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and the Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal, the International Civil Aviation Organization, and the International Maritime Organization.

A. *Convention on Environmental Impact Assessment in a Transboundary Context*

5. As outlined in document UNEP/CBD/BS/WG-L&R/3/INF/2 prepared for an earlier meeting of this Working Group, Romania requested the establishment of an inquiry commission under the Convention on Environmental Impact Assessment in a Transboundary Context (“Espoo Convention”). The inquiry concerned work authorized by the Ukraine on the Danube-Black Sea Navigation Route at the border of the two countries. A Commission was established and presented its final report in July 2006, finding that the construction work was likely to have a number of significant adverse transboundary impacts.

6. In January 2007, Romania made a submission to the Implementation Committee of the Espoo Convention expressing “concerns about Ukraine’s compliance with its obligations under the Convention, in light of the opinion of the inquiry commission.”^{1/} The Implementation Committee considered the submission at its twelfth meeting in June 2007 and was to have prepared draft findings and recommendations in response to the submission at its thirteenth meeting in October-November 2007.^{2/} The provisional agenda for the 14th meeting of the Implementation Committee to be held from 15 to 17 January 2008 indicates that the draft findings and recommendations are to be finalized at this meeting.

B. *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (“Basel Convention”) and the Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal (“Basel Protocol”)*

7. The sixth session of the Open-ended Working Group of the Basel Convention was held from 3 to 7 September 2007. The Open-ended Working Group adopted decision OEWG-VI/15 in which it, *inter alia*, requested the Secretariat to organize a meeting to facilitate consultations on mechanisms to meet the requirement of insurance, bonds or other financial guarantees with a view to considering the feasibility of such mechanisms to meet the requirements of Article 14 of the Basel Protocol, and to report on the outcomes of these consultations to the ninth meeting of the Conference of the Parties to the Basel Convention to be held in June 2008.

C. *International Civil Aviation Organization (ICAO)*

8. The Council of ICAO held its 182nd session in November-December 2007. In the course of its meeting, the Council considered the issue of “compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks”. The Council agreed to convene the 33rd session of the Legal Committee to consider the draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference, and the draft Convention on Compensation

^{1/} “Inquiry Procedure: Review of the first inquiry procedure: Note by the secretariat” prepared for the Working Group on Environmental Impact Assessment of the Convention on Environmental Impact Assessment in a Transboundary Context, doc. ECE/MP.EIA/WG.1/2007/5 (12 March 2007) at para. 13.

^{2/} The reports of these meetings were not available at the time of writing.

for Damage Caused by Aircraft to Third Parties. ^{3/} The Legal Committee will meet in Montreal from 21 April to 2 May 2008. This could lead to a diplomatic conference sometime in 2009.

D. International Maritime Organization (IMO)

London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter

9. Article X of the 1972 London Convention provides that, “In accordance with the principles of international law regarding State responsibility for damage to the environment of the other States or to any other area of the environment, caused by dumping of wastes and other matter of all kinds, the Contracting Parties undertake to develop procedures for the assessment of liability and the settlement of disputes regarding dumping.” Discussions regarding the development of a liability regime under this article took place between 1988 and 1991 under the Consultative Meeting of Contracting Parties to the London Convention. It was agreed, however, at the 14th Consultative Meeting not to undertake the development of a liability and compensation regime within the London Convention at that time and the issue has not been reconsidered since then. ^{4/}

10. In 1996, the London Protocol to the London Convention was adopted. The London Protocol was intended to modernize the London Convention and eventually to replace it. Article 15 of the London Protocol was modelled after Article X of the London Convention and reads: “In accordance with the principles of international law regarding State responsibility for damage to the environment of other States or to any other area of the environment, the Contracting Parties undertake to develop procedures regarding liability arising from the dumping or incineration at sea of wastes or other matter.”

11. At the first Meeting of Contracting Parties to the London Protocol in 2006, the Parties agreed to consider the development of procedures regarding liability arising from the dumping or incineration at sea of wastes or other matter as well as to explore liability questions relating to carbon dioxide sequestration. The Meeting of Contracting Parties took up this latter exploration at its second meeting in November 2007.

12. At this second meeting, the Contracting Parties agreed not to embark on the development of liability procedures under Article 15 of the London Protocol at this stage. They requested the Contracting Parties to voluntarily report to the Secretariat on the national regulations applicable to environment-related liability and redress, so that a file would be available for when this issue would be taken up in earnest in accordance with the obligation under Article 15. They also requested the Secretariat to keep the governing bodies informed of new developments regarding international environment-related third party liability instruments.

International Convention on Civil Liability for Bunker Oil Pollution Damage

13. Under Article 14(1) of the International Convention on Civil Liability for Bunker Oil Pollution Damage (“Bunkers Convention”), the Convention will enter into force one year after the date on which 18 States, including five States with ships whose combined gross tonnage is not less than 1 million, have ratified it. With the accession of Sierra Leone to the Bunkers Convention on 21 November 2007, the

^{3/} See ICAO document C-DEC 182/12 (13 December 2007) at para. 3 (c) and (d). For overviews of the content of the draft conventions, see documents UNEP/CBD/BS/WG-L&R/3/INF/2 and UNEP/CBD/BS/WG-L&R/4/INF/2.

^{4/} “Development of Procedures Regarding Liability Arising from Dumping: Overview of Liability Issues Under Multilateral Environmental Agreements Relevant for the Purpose of the London Protocol: Note by the Secretariat” (21 September 2007), document LC 29/9 at para. 10.

Bunkers Convention has been ratified by 18 States with a combined gross tonnage of 114,484,743, representing 15.86% of world merchant shipping tonnage. ^{5/}

14. IMO states that the entry into force of the Bunkers Convention will close the “last significant gap in the international regime for compensating victims of oil spills from ships”. ^{6/} The Bunkers Convention has not been described in earlier versions of this document prepared for previous meetings of the Working Group so its main provisions are outlined below.

15. The Bunkers Convention provides that, with certain exceptions, the shipowner at the time of an incident is to be liable for pollution damage caused by any bunker oil on board or originating from the ship. If an incident consists of a series of occurrences having the same origin, the liability attaches to the shipowner at the time of the first occurrence (Art. 3(1)). “Pollution damage” is defined to mean:

(a) Loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and

(b) The costs of preventative measures and further loss or damage caused by preventive measures (Art. 1(9)).

The definition of the term ‘incident’ includes both occurrences that cause pollution damage and those that create a grave and imminent threat of causing such damage (Article 1(8)).

16. The geographic scope of the Bunkers Convention is restricted to pollution damage caused in the territory, including the territorial sea, of a State Party and such damage caused “in the exclusive economic zone of a State Party, established in accordance with international law, or, if a State Party has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured” (Article 2). The Bunkers Convention also applies only to preventive measures, wherever taken, to prevent or minimize pollution damage.

17. The shipowner will not be liable where it proves that the damage: resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; was wholly caused by an act or omission done with the intent to cause damage by a third party; or was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function (Article 3(3))

18. Article 5 of the Bunkers Convention provides for joint and several liability for all pollution damage that is not reasonably separable when pollution damage results from an incident involving two or more ships.

19. Article 6 allows the shipowner or the insurer or provider of other financial security to limit liability “under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.”

^{5/} “Pollution Damage from Fuel Oil Carried on Ships will be Covered in 2008”, IMO Press Briefing 48 (30 November 2007), online: http://www.imo.org/Newsroom/mainframe.asp?topic_id=1472&doc_id=8756. Bahamas subsequently acceded to the Bunkers Convention in February 2008.

^{6/} *Ibid.*

20. Article 7 contains lengthy provisions on compulsory insurance and financial security. Under paragraph 1 of Article 7, the registered owner of a ship having a gross tonnage greater than 1000 registered in a State Party is required to maintain insurance or other financial security to cover the liability of the registered owner for pollution damage in an amount equal to the limits of liability under the applicable national or international limitation regime. In all cases, this insurance or other financial security is not to exceed an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976, as amended. Paragraph 2 of the article states that a certificate attesting that insurance or other financial security is in force in accordance with the provisions of the Bunkers Convention is to be issued to each ship after the appropriate authority of a State Party has determined that the requirements of paragraph 1 have been met. The certificate is to follow the model set out in the annex to the Bunkers Convention. The certificate is required to be carried on board the ship (Article 7(5)).

21. Paragraph 10 of Article 7 allows for any claim for compensation for pollution damage to be brought directly against the insurer or other person providing financial security for the registered owner's liability for pollution damage. In such a case, the defendant may invoke the defences (other than bankruptcy or winding up of the shipowner) which the shipowner would have been entitled to invoke, including the limitation of liability pursuant to Article 6. Furthermore, even if the shipowner is not entitled to limitation of liability according to Article 6, the defendant may limit liability to an amount equal to the amount of the insurance or other financial security required to be maintained in accordance with paragraph 1 of Article 7. Moreover, the defendant may invoke the defence that the pollution damage resulted from the willful misconduct of the shipowner, but the defendant cannot invoke any other defence that it might have been entitled to invoke in proceedings brought by the shipowner against the defendant. The defendant also has the right to require the shipowner to be joined in the proceedings.

22. Paragraph 12 of Article 7 places the obligation on each State Party to ensure that, under its national law, insurance or other security to the extent specified in paragraph 1, is in force in respect of any ship having a gross tonnage greater than 1000, wherever registered, entering or leaving a port in its territory, or arriving at or leaving an offshore facility in its territorial sea.

23. Article 8 sets the time limits under the Bunkers Convention stating that rights to compensation will be extinguished unless an action is brought within three years from the date when the damage occurred and in no case may an action be brought more than six years from the date of the incident that caused the damage. Where the incident consists of a series of occurrences, the six year period runs from the date of the first such occurrence.

24. Articles 9 and 10 address questions of private international law. Paragraph 1 of Article 9 defines which courts have jurisdiction for an action under the Bunkers Convention: "Where an incident has caused pollution damage in the territory, including the territorial sea, or in an area referred to in article 2 (a) (ii) of one or more States Parties, or preventive measures have been taken to prevent or minimize pollution damage in such territory, including the territorial sea, or in such area, actions for compensation against the shipowner, insurer or other person providing security for the shipowner's liability may be brought only in the courts of any such States Parties." Paragraph 2 of the article requires reasonable notice of any action taken under paragraph 1 be given to each defendant while paragraph 3 requires each State Party to ensure that its courts have jurisdiction to hear actions for compensation under the Bunkers Convention.

25. Article 10 speaks to recognition and enforcement of judgements. Paragraph 1 requires the judgement given by a court with jurisdiction in accordance with Article 9 which is enforceable in the State of origin where it is no longer subject to ordinary forms of review to be recognised by any State Party except where the judgement was obtained by fraud or where the defendant was not given reasonable notice and a fair opportunity to present its case. Paragraph 2 requires a judgement recognised under

paragraph 1 to be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities are not to allow the merits of the case to be re-opened.

26. Finally, Article 11 contains a supersession clause wherein the Bunkers Convention “shall supersede any Convention in force or open for signature, ratification or accession at the date on which this Convention is opened for signature, but only to the extent that such Convention would be in conflict with it; however, nothing in this article shall affect the obligations of States Parties to States not party to this Convention arising under such Convention.”

Single insurance certificates under the IMO liability and compensation conventions

27. The Nairobi diplomatic conference in May 2007 during which the Nairobi International Convention on the Removal of Wrecks was adopted also invited the IMO Legal Committee to develop a model for a single insurance certificate that may be issued by State Parties in respect of every ship under the relevant IMO liability and compensation conventions including the Nairobi Convention. During the 93rd session of the Legal Committee held in October 2007, the Committee requested the IMO Secretariat to prepare such a model insurance certificate for consideration by the Committee at its 94th session to be held in October 2008.

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

28. During the twelfth session of the Assembly of the 1992 International Oil Pollution Compensation Fund, the Assembly decided to establish the HNS Focus Group with the aim of facilitating the rapid entry into force of the HNS Convention. ^{7/} The Assembly also adopted terms of reference for the HNS Focus Group. These include a specific mandate for the group. It is mandated:

(a) To examine the underlying causes of the issues which have been identified as inhibiting the entry into force of the HNS Convention, i.e.:

- (i) Contributions to the LNG Account;
- (ii) The concept of “receive”; and
- (iii) Non-submission of contributing cargo reports, on ratification of the Convention and annual thereafter;

(b) To examine any issues of an administrative (“house-keeping”) nature as identified by the Secretariat which would facilitate the operation of the HNS Convention;

(c) To identify and develop legally-binding solutions to these issues, taking into account *inter alia* the impact on developing countries, in the form of a draft protocol to the HNS Convention. ^{8/}

29. According to its terms of reference, the HNS Focus Group is not to embark on a wholesale revision of the HNS Convention but is to confine its work to the issues set out above. The terms of reference also include a timetable by which the HNS Focus Group is to aim to complete its work. The timetable requires interested delegations to submit concrete policy proposals accompanied by draft treaty text to the Secretariat by 18 January 2008, at the latest. Based on the proposals received, the Chair of the Group, in conjunction with the Secretariat, will develop a draft text of a protocol to the HNS Convention for

^{7/} *Record of Decisions of the Twelfth Session of the Assembly* (19 October 2007), document 92FUND/A.12/28 at para. 27.16.

^{8/} “Terms of Reference of the HNS Focus Group” being Annex II to the *Record of Decisions of the Twelfth Session of the Assembly*, *ibid.* at para. 1.2 The ‘LNG Account’ is defined in Article 16.2(b) of the HNS Convention to mean a separate account of the HNS Fund (which is established under the HNS Convention) in respect of “liquefied natural gases of light hydrocarbons with methane as the main constituent”.

circulation to delegations by 15 February 2008. The HNS Focus Group will meet in March 2008 and, if required, again in June 2008 in order to consider the draft text of the protocol and to make recommendations to the Assembly upon the completion of the HNS Focus Group's work, ideally at an extraordinary session of the Assembly to be held in June 2008.

30. The terms of reference also provide for the Chair of the HNS Focus Group, "in conjunction with the Secretariat, to work closely with the IMO Secretariat in order to ensure that the draft protocol is in compliance with international treaty law, taking due account of the interests of those States that have already ratified the Convention or are at an advanced stage in so doing." If the draft protocol is approved by the Assembly, it will be submitted for consideration by IMO's Legal Committee, ideally at its 94th session to be held in October 2008, with a view to holding a Diplomatic Conference as soon as possible.

International Oil Pollution Compensation Funds (IOPC Funds)

31. In December 1999, the oil tanker *Erika* sank off the coast of France, spilling heavy fuel oil and polluting a large stretch of the French coastline. Under the International Convention on Civil Liability for Oil Pollution Damage, 1992 (1992 Civil Liability Convention) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (1992 Fund Convention), compensation was available to any individual, business, private organization or public body that suffered pollution damage as a result of the oil pollution caused by the incident and for expenses actually incurred. The IOPC Funds state that approximately €13 million in compensation is available from the shipowner's liability insurer and approximately €172 million in compensation is available from the 1992 Fund established under the 1992 Fund Convention for a total of €185 million. ^{9/} By May 2007, over 7,000 claims for compensation had been submitted for a total of €388 million while payments totalling €128 million had been made in respect of 5,666 of the claims. ^{10/} There are also questions about the amount of funds that will be paid to the French Government and the French oil company Total SA.

32. As a result of the incident, legal proceedings were launched by a large number of plaintiffs including environmental groups, fishermen, local associations and hotel owners against various defendants including the shipowner, the ship manager, the maritime certification company as well as Total SA – the owner of the cargo. The action includes both criminal and civil proceedings. On 16 January 2008, the Paris Criminal Court found the four abovementioned defendants guilty of maritime pollution and levied fines against them. In addition, in the civil proceedings, all four were held liable for damages to be paid to the French Government, various regional governments and several environmental groups. It was the first time the French court had handed down a criminal conviction for damage to the environment.

33. The decision seems to be unusual in that the 1992 Civil Liability Convention intends for shipowners to be held strictly liable for oil pollution damage (see paragraph 1 of Article III), while cargo owners that charter a ship are usually precluded from responsibility (see paragraph 4 of Article III). Total SA has decided to pay the court-ordered compensation to the victims of pollution but also to appeal the court's ruling. ^{11/} It is also possible that the IOPC Funds will seek recourse against Total SA and the other liable parties for the compensation already paid out by the 1992 Fund (as described in paragraph 31 above), but a decision on this matter will only be taken after the appeals process has run its course.

^{9/} "Erika: France, 12 December 1999" (20 November 2007), International Oil Pollution Compensation Funds, online: <http://www.iopcfund.org/erika.htm>.

^{10/} *Ibid.*

^{11/} "Erika: Total Compensates Third-Parties", Total Press Release (25 January 2008), online: http://www.total.com/en/press/press_releases/pr-2008/080125-erika-compensates-third-parties_14529.htm.

Annex

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

INSTRUMENTS	Date of Adoption	Number of signatures	Ratification/Acceptance /Approval/Accession	Date of Entry into force
ICAO Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface	7 October 1952	25	49	4 February 1958
• Amending Protocol	23 September 1978	14	12	25 July 2002
OECD Paris Convention on Third party Liability in the Field of Nuclear Energy	29 July 1960	18	15	1 April 1968
• Amending protocol	28 January 1964	15	15	1 April 1968
• Amending protocol	16 November 1982	15	15	1 August 1991
• Amending protocol	12 February 2004	16	None	Not in force
Supplementary Convention	31 January 1963	13	12	4 December 1974
• Amending protocol	28 January 1964	13	12	4 December 1974
• Amending protocol	16 November 1982	14	12	7 October 1988
• Amending protocol	12 February 2004	13	1	Not in force
Convention on the Liability of Operators of Nuclear Ships	25 May 1962	17	7	Not in force
IAEA Vienna Convention on Civil Liability for Nuclear Damage	21 May 1963	14	35	12 November 1977
• Amending protocol	12 September 1997	15	5	4 October 2003
Supplementary Convention	12 September 1997	13	3	Not in force
UN Convention on International Liability for Damage Caused by Space Objects	29 November 1971	25	87	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	120	30 May 1996
• Amendment	18 October 2000	N/A	N/A	1 November 2003
Supplementary FUND Convention (replaced 1971 Convention)	27 November 1992	10	102	30 May 1996
• Amendment	18 October 2000	N/A	N/A	1 November 2003
• Protocol	16 May 2003	3	21	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	10	Not in force
Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal	10 December 1999	13	8	Not in force
IMO International Convention on Civil Liability for Bunker Oil Pollution Damage	23 March 2001	11	19	21 November 2008
UNECE Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters	21 May 2003	24	1	Not in force
Antarctic Treaty System, annex VI, Liability arising from Environmental Emergencies, to the Protocol on Environmental Protection to the Antarctic Treaty	14 June 2005	N/A	2	Not in force
IMO Nairobi International Convention on the Removal of Wrecks, 2007	18 May 2007	0	0	Not in force
