ADDRESS

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TO THE

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Agenda of Environmental Law Research in support to the enhanced phase of implementation of the three objectives of the Convention on Biological Diversity

Mr. Director of the IUCN Academy of Environmental Law,
Dear Participants,

It's a great honor to join you today and to be given the opportunity to address this important gathering of distinguished scholars from all over the world to discuss the conceptualization and planning of future research to be undertaken in the field of environmental law.

In 1987, the World Commission on Environment and Development wrote:

> *"Today, legal regimes are being rapidly outdistanced by the accelerating pace and expanding scale of impacts on the environmental base of development. Human laws must be reformulated to keep human activities in harmony with the unchanging and universal laws of nature".*

Twenty years later, and while acknowledging the very significant advances of environmental international law during this period, I believe that this statement remains valid. Indeed, the international community is still struggling to ensure that environmental law keeps pace with the fast changes in our world as a result of the progress of science and technology, as well as processes such as globalization that have an impact on all countries.

After twelve years of development of thematic work programmes, guidelines and other cross-cutting frameworks, the Convention on Biological Diversity at its eight meeting of the Conference of the Parties, held in Curitiba, Brazil, in March 2006, has entered a new phase of enhanced implementation. Achieving the objectives of creating harmony between human activities and the objective of sustainable use of biodiversity poses a real challenge for lawyers and those who have the responsibility to implement the convention at national level.

As Professor Philippe Sands wrote, "*the conservation of biodiversity probably presents greater regulatory challenges to international law than any other environmental issue*"[1]. Indeed, among environmental agreements the Convention on Biological Diversity is of unparalleled complexity. Its three objectives namely the conservation, the sustainable use and the fair and equitable sharing of benefits arising from the use of genetic resources, are mutually supportive. Their implementation requires a far-reaching integration of environmental concerns in development and economic policies at all levels as well new ethics among humans, a new code of conduct between man and nature. The implementation of the Convention poses therefore tremendous challenges. The implementation of its Cartagena Protocol on Biosafety poses another unique challenge to

[1] Philippe Sands, Principles of International Environmental Law, Manchester University Press, 1995, p 450

national and international lawyers as it is the first international legal instrument to elevate the precautionary principle into a legal international norm.

Just consider this figure: one thousand eight hundred and twenty five (1825)! This is the number of pages of decisions adopted by the Conference of the Parties to the Convention on Biological Diversity since its entry into force. As you know, the Convention on Biological Diversity (CBD) is the first comprehensive agreement on the conservation and sustainable use of biological diversity, and the fair and equitable sharing of benefits arising from the use of biological resources. It recognizes that the conservation of life on Earth is a common concern of humankind and an integral part of the sustainable development. These 1825 pages representing 226 decisions adopted in the twelve years since the entry into force of the Convention are intended to translate the commitments in the Convention in concrete action. A number of "tools" have been developed: operational guidance for the ecosystem approach and guiding principles for sustainable use; guidelines for incorporating biodiversity-related issues into environmental impact assessment; guidelines on integrated marine and coastal area management, and the Bonn Guidelines on Access and Benefit-sharing, to name just a few.

While these achievements are not insignificant, they are not in themselves sufficient. As the international community strives to achieve, by 2010, a significant reduction of the current rate of biodiversity loss at global, regional and national levels, as agreed by Heads of State and Governments, a number of challenges remain. The further development of international environmental law could - and should - make a crucial contribution in overcoming these challenges, which include obstacles to national implementation, biodiversity governance, mainstreaming biodiversity in the development an economic agenda, capacity building, synergistic implementation of multilateral environment and other agreements.

Perhaps one single area that stands out as requiring more work is the mainstreaming of biodiversity into national development and economic agendas at all levels. There is a need in particular to further explore, and better articulate, the interface between environmental and trade laws at the international level, as well as their integration at the national level to ensure that biodiversity considerations are mainstreamed in social and economic decision-making processes.

The relationship between the international biodiversity regime and the international trade regime under the World Trade Organization requires further research to ensure their harmonization and their mutual supportiveness. This concerns in particular the evolving regime of access and benefit-sharing under the CBD and the TRIPS Agreement, subsidies and biodiversity conservation, perverse incentives, and trade in living modified organisms and the Cartagena Protocol on Biosafety. A clarification of the articulation between the two regimes at the international level and the identification of areas of potential conflict and how to resolve them would make an important contribution to the development of environmental law.

In the wake of the Millennium Ecosystem Assessment, which highlighted the role of ecosystems for human well-being, there is increased recognition among policy-makers of the huge economic value associated with biodiversity and ecosystem services, and an increased interest in economic valuation and economic instruments as prime mechanisms for cross-sectoral integration of biodiversity considerations. At the last Governing Council meeting of the United Nations Environment Programme, environment ministers underscored that economic globalization allows governments to harness the power of the private sector and markets for sustainable development.

Against this background, the work of lawyers will increasingly need to act as a bridge between economic analysis and concepts, on the one hand, and the concrete political and administrative realities, on the other hand. All governmental activities are based on the rule of law, and it is lawyers who will be tasked to translate economic concepts into legal texts that can be adopted by the legislators and properly monitored and enforced by the administrations.

Economic instruments are more indirect and more flexible. Instead of directly prescribing human behavior through direct regulations, they seek to provide the right incentives while leaving leeway to individuals. Thus, legal work will increasingly require an interdisciplinary mindset. I believe that the IUCN Academy can play a prime role in advocating such interdisciplinary thinking and promoting interdisciplinary collaboration between economists and lawyers.

Distinguished legal experts,

Lawyers will also remain ever more important for another reason. The legitimacy and the effectiveness of economic instruments will, in many cases, be based on clear and enforceable rights and obligations, and economists will in these cases need the expertise and advice of the legal experts. For instance, when referring to payments for ecosystem services, environment ministers at the Global Environment Forum noted that these are but the obverse of the polluter pays principle, and that the question of who pays and who received should be resolved in relation to legitimate entitlements to environmental resources. Lawyers will have to play a key role in determining such legitimacy. Indeed, I believe that a useful element in the IUCN research agenda on the area of economic instruments and environmental regulation could be to develop legal guidance on when entitlements to environmental resources are legitimate, and when they are not.

Yet another area requiring further research by legal scholars is the negotiation of an international regime on access to genetic resources and benefit-sharing. As you will be aware, the legal concepts that should underpin the international regime remain largely to be defined and articulated. Thus, the IUCN Academy could make a strong contribution to advancing the negotiations in particular by clarifying the gaps that may exist at the international level in order to ensure the operationalization of the international regime. Assistance could also be provided in the development of model laws to implement article 15 of the Convention at the national level, as many countries have yet to develop such legislation.

Another area closely related to the negotiation of an international regime on ABS is that of the preservation and maintenance of the traditional knowledge of indigenous and local communities and, in particular, ensuring that these communities obtain a fair share of the utilization of their traditional knowledge. More research is needed on the interface between the traditional knowledge of indigenous and local communities and the sharing of benefits deriving from the utilization of genetic resources. In other words, there is a need to define legal mechanisms likely to ensure that the indigenous and local communities obtain a fair share of the benefits deriving from the utilization of their knowledge associated with genetic resources. One possibility currently under consideration is the development of *sui generis* systems of protection for traditional knowledge based on customary laws of indigenous peoples. However, this raises a number of complex legal issues, which need further examination. Not only do the elements of such regime need to be identified, but the relationship with existing intellectual property rights regimes need to be clarified with a view to ensuring their harmonization.

Another area that could benefit from further legal research is that of alien invasive species, which has been identified in the Millenium Ecosystem Assessment as one of the to main causes of biodiversity loss. There is a need to further develop and harmonize existing regulatory frameworks for alien invasive species and to ensure that any gaps in the existing frameworks are addressed. Currently, international regulation is fragmented and arguably inadequate. The CBD provides a framework for a more comprehensive approach and coordination. Future research in this field should focus on how these two imperatives may be addressed by the global community within the framework of the CBD.

In the area of biosafety, a legal research on when and how to apply the precautionary principle on the one hand, and socio-economic considerations on the other hand, would go a long way in helping Parties implement their obligations under the Biosafety Protocol in a manner that is consistent with their other international obligations. Under the Protocol, Parties may take into account the precautionary approach and/or socio-economic considerations in taking decisions whether to import certain genetically modified organisms. However, in so doing they have to avoid unwarranted recourse to either precaution and/or socio-economic considerations, as disguised forms of protectionism. Parties may need to develop guidelines on how to assess and communicate risks that science is not yet able to evaluate fully. There is also a need to build a common understanding on how to identify and appraise the socio-economic impacts of genetically modified organisms.

I do not wish to conclude my remarks without mentioning the issue of liability and redress for damage to biological diversity within the framework of the CBD. The feasibility and appropriateness of a liability regime under the CBD remain unclear twelve years after the entry into force of the Convention. This is an issue that calls for innovative thinking so as to provide responses to basic questions such as the assessment and valuation of damage to biodiversity, how to remedy damage in particular when

restoration is not possible, how to determine adequate compensation, the legal nature a the liability regime applicable, as well as the development of new legal techniques to respond to the special challenges posed in international law with regard to redress in cases of "breach of obligations owed to the international community as a whole" and damage which is outside the scope of existing causes of action.

Finally, I cannot over-emphasize the importance of capacity-building in the successful implementation of the Convention. Therefore, when considering the areas for research in the coming years, I invite you to keep in mind the need to enhance the capacity of developing countries in all these areas to ensure that governments are in a position to adopt and implement the complex legal and administrative measures needed to successfully implement the CBD. We must adopt at al times a practical and realistic approach to the CBD's implementation, for the finest concepts remain useless if they are not actually utilized in the field.

I hope that these remarks will provide "food for thought" in your deliberations, and I wish to take this opportunity to reiterate the importance I attach to enhancing the Secretariat's relationship with scientific institutions and universities. I look forward to a solid and vibrant relationship with the IUCN Academy of Environmental Law as we pursue are common goals for the benefit of life on Earth.

As Sir Martin Holdgate wrote in 1999: "*the Convention on International Trade in Endangered Species, the Convention on Biological Diversity, the Convention on Migratory Species and the World Charter for Nature all began on the drawing boards of IUCN*."[2] I invite you to keep this good tradition alive and strong!

Thank you for your attention

[2] Sir Martin Holdgate (1999), The Green Web (History of IUCN)