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IMPACT ASSESSMENT AND MINIMIZING ADVERSE IMPACTS: IMPLEMENTATION OF ARTICLE 14

Note by the Executive Secretary

INTRODUCTION

1. In its medium-term programme of work, adopted by its decision II/18, the Conference of the Parties decided that the question of measures to provide information and share experiences on the implementation of Article 14 would be considered at its fourth meeting. Article 14 contained objectives concerning impact assessment and minimizing adverse effects.

2. The present note has been prepared by the Executive Secretary to assist the Conference of the Parties in its consideration of this item. It mainly focuses on:

(a) Environmental impact assessment (EIA) and its application under the Convention on Biological Diversity by setting out the range of approaches that have thus far been taken in addressing this issue in existing international and regional agreements;

(b) The issue of liability and redress, by examining existing regimes on international law.

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I. IMPACT ASSESSMENT AND THE CONVENTION ON BIOLOGICAL DIVERSITY

3. Impact assessment under the Convention on Biological Diversity is considered in paragraph 1 of Article 14. The present note provides an overview of environmental impact assessment, as well as an analysis of impact assessment and minimization of adverse effects and an outline of ongoing activities under the Convention on Biological Diversity.

A. An overview of environmental impact assessment

4. Environmental impact assessment is a category of impact assessment procedures that are generally used for evaluating the likely environmental and consequent social impacts, both beneficial and adverse, of a proposed development project or activity. Increasing attention has been given to social impact assessment (SIA), as part of the environmental impact assesment process. Social impact assessment is often applied to those activities where serious social impacts are to be expected, like industrial or power plants and hazardous waste sites. 1/ The 1991 Good Practices for Environmental Impact Assessment of Development Projects of the Organisation for Economic Co-operation and Development (OECD) states that "the EIA should address all the expected effects on human health, the natural environment and property as well as social effects, particularly gender specific and special group needs, resettlement and impacts on indigenous people resulting from environmental changes" (article I, paragraph 4).

5. To be most effective, the environmental impact assessment should be carried out at the design stage of a project to identify where practical plans can be made to minimize any adverse effects. The environmental impact assessment should, where adverse impacts are envisaged, identify alternative project designs (including rejection or the "no-action" alternative) as well as mitigation measures or environmental safeguards that can be incorporated into the project design to reduce the adverse impacts.

6. The approach was pioneered in the domestic law of the United States under the 1969 National Environmental Policy Act, where it was made mandatory for major federal actions, including construction projects by, or financed by, the Federal Government. Many countries and organizations have progressively adopted this approach in their national legal systems through legislation and/or guidelines.

7. Internationally, since the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, environmental impact assessment has emerged as an important process for integrating environment and other elements, including socio-economic impacts, into the decision-making processes. Environmental impact assessment is required under the European Community (EC) Directive 85/337 on Environmental Impact Assessment (1995), the 1991 Economic Commission for Europe (ECE) Convention on Environmental Impact Assessment in a Transboundary Context (the "Espoo Convention") and annex I of the 1991 Protocol on Environmental Protection to the Antarctic Treaty.

8. Following the Stockholm Conference, support for environmental impact assessment can also be found in the recommendations of the following

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1/ Policies and Systems of Environmental Impact Assessment of the Economic Commission for Europe of the United Nations, 1991.

international institutions: OECD Council Recommendation C(74) 216, Analysis of the Environmental Consequences of Significant Public and Private Projects (14 November 1974); OECD Council Recommendation C(790) 116, Assessment of Projects with Significant Impact on the Environment (8 May 1979); and the Comparative Legal Strategy on Environmental Impact Assessment and Agricultural Development of the Food and Agriculture Organization of the United Nations (1982, FAO Environmental Paper). The OECD Council Recommendation C(85) 104 on Environmental Assessment of Development of Assistance Projects and Programmes and the World Bank Operating Directives also reflect that environmental impact assessment procedures should be undertaken for development assistance projects.

9. By 1986, the Experts Group on Environmental Law of the World Commission on Environment and Development had identified environmental impact assessment as an "emerging principle of international law", taking the view that States planning to carry out or permit activities which may significantly affect a natural resource or the environment should make or require an assessment of their effects before carrying out or permitting the planned activities. 2/ In 1987, UNEP prepared guidelines on the nature and extent of the obligation to carry out an assessment which were adopted by the UNEP Governing Council in its decision 14/25 as "Goals and Principles of Environmental Impact Assessment".

10. Principle 17 of the Rio Declaration states that:

> "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."

11. The international agreements that provide environmental impact assessment as a measure for protecting the biological diversity include the 1973 Convention on International Trade in Endangered Species of Wild Flora and Fauna and the 1971 Convention on Wetlands of International Importance, especially as Waterfowl Habitat (the "Ramsar Convention").

B. Impact assessment and minimization of adverse effects under the Convention on Biological Diversity

12. Article 14, paragraph 1 (a), of the Convention requires, as far as possible and as appropriate, each Contracting Party to introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures.

1. Establishing a need for environmental impact assessment ("screening")

13. The first stage of the environmental impact assessment process is the determination of whether such an assessment is required; this stage is generally known as "screening". One commonly used procedure for screening is to establish a set of criteria based on the type of activity, the character of the environment and the character of the project in order to enable the competent authorities to take a decision on the need for an environmental

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2/ See Environmental Protection and Sustainable Development: Legal Principles and Recommendations, 1986.

impact assessment. To meet the objectives of Article 14, paragraph 1 (a), of the Convention on Biological Diversity, Parties might wish to consider the importance and the need of establishing a biodiversity selection criterion for environmental impact assessment. This type of criterion as an indicator of a particular environmental sensitivity would ensure that an environmental impact assessment is conducted with respect to proposed projects and activities that are likely to have significant adverse effects on the conservation and sustainable use of biological diversity.

14. The criteria and procedures for determining whether an activity is likely to significantly affect the conservation and sustainable use of biological diversity and is, therefore, subject to environmental impact assessment, should be comprehensively defined by legislation, regulation or other means, so that relevant activities can be quickly and surely identified, and environmental impact assessment can be applied as soon as the activity is being planned. This principle may be implemented through a variety of mechanisms, including lists of categories of:

(a) Activities that by their nature are, or are not, likely to have significant effects;

(b) Areas that are of special importance or sensitivity (such as national parks or wetland areas), so that activities affecting such areas are likely to have significant effects;

(c) Resources (such as water, tropical rain forests, etc.) or environmental problems (such as increased soil erosion, desertification, deforestation) which are of special concern, so that diminution of such resources as well as exacerbation of such problems are likely to be "significant".

2. Criteria and scale of impact ("scoping")

15. Once a decision is taken that a proposed project or activity should be subject to an environmental impact assessment, the next stage is gathering data and identifying those matters which could be covered in the environmental assessment, this stage is generally known as "scoping". The information gathered usually focuses on the most important impacts expected from the identification of the activity and the site. The assessment identifies the type of alternatives to be considered and may address the measures that would be taken to mitigate adverse impacts. Following the analysis, the results of the environmental impact assessment are submitted to the appropriate competent authorities for decision. Parties may wish to consider establishing guidelines for evaluating specific biodiversity considerations as target effects for environmental impact assessment.

16. Gathering information relevant to the environmental impact assessment process as well as baseline studies and surveys are needed to effectively assess a proposed project or activity's impact on the conservation and sustainable use of biological diversity. In this respect, Parties may wish to draw on article 7 (Identification and monitoring), Article 12 (b), on research, as well as Article 17 (Exchange of information) of the Convention on Biological Diversity. The scoping stage will also require the development of methods to be used to predict the magnitude of environmental impacts as well as the establishment of criteria against which the significance of impacts should be evaluated. This process can only be carried out successfully if adequate

resources and expertise are available; to this end, Parties may wish to draw on Article 12, paragraph (a), of the Convention, on training and develop programmes for training people in undertaking and reviewing environmental impact assessment in both the public and the private sectors.

3. Public participation

17. Paragraph 1 (a) of Article 14 also requires the Contracting Parties, where appropriate, to allow for public participation in the environmental impact assessment process. Article 2, paragraph 6, of the Espoo Convention states that:

> "The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin."

18. The OECD Good Practices for Environmental Impact Assessment of Development Projects dedicates Article 7 to the involvement and motivation of local institutions and targets groups, pointing out, inter alia, in paragraph 34, that "the participation of non governmental organizations in the recipient country should be encouraged, especially if they have expertise not available from official sources". Furthermore, "greater emphasis should be given to ensuring the commitment of recipients' executing agencies through their active involvement in selection, design and implementation. For many types of projects, active involvement of end users and beneficiaries, e.g. through communities and other local organizations, is essential to ensure that the project mobilizes local energies and meets actual need and circumstances" (paragraph 35). Finally, the World Bank Environment Department paper on "Biodiversity and Environmental Assessment" also underscores the importance of local community and NGO involvement in conserving biological diversity, especially for situation where conservation involves the imposition of restrictions upon the use of lands enjoyed by the public or considered the domain of indigenous people. Therefore, with regard to identification and assessment of potential impacts "it is particularly important to pursue a dialogue with affected groups on: the importance of biological diversity and benefits to be gained from its conservation; realistic management options; and local customs, traditions and cultural values" 3/

4. National legislation and regulations

19. Article 14, paragraph 1 (b), of the Convention requires each Contracting Party, as far as possible and as appropriate, to introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account. This provision complements Articles 10 (a) (which requires Parties to integrate consideration of conservation and sustainable use of biological resources into national decision making) and Article 6 (b) (which requires Parties to integrate conservation and sustainable use of biological diversity into relevant sectoral and cross-sectoral plans, programmes and policies) of the Convention on Biological Diversity.

3/ Environmental Assessment Sourcebook, number 20, October 1997

5. Transnational notification, exchange of information and consultation

20. Article 14, paragraph 1 (c), encourages each Contracting Party, as far as possible and as appropriate, to promote, on the basis of reciprocity, notification, exchange of information and consultation on activities under its jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate.

21. This provision is consistent with the existing international principles relating to transfrontier cooperation. Principle 24 of the Stockholm Declaration noted that "international matters concerning the protection and improvement of the environment should be handled in a cooperative spirit" while Principle 7 of the Rio Declaration emphasized that "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem". The Espoo Convention analyses the notification item in its article 3, inter alia, by providing the right of the affected Party to participate in the environmental impact assessment procedure as well as by ensuring that "the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity, and for the transmittal of these comments or objections to the competent authority of the Party of origin" (paragraph 8).

6. Emergency and contingency responses

22. Article 14, paragraph 1 (d), of the Convention on Biological Diversity requires each Contracting Party, as far as possible and as appropriate, in the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage. This point is also emphasized in Principle 18 of the Rio Declaration which provides that "States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States", while Principle 19 stipulates that "States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith".

23. The increasing range of State practice has led the International Law Association to conclude that "a rule of international customary law has emerged that in principle a State is obliged to render information on new or increasing pollution to a potential victim State". 4/

24. Article 14, paragraph 1 (e), of the Convention on Biological Diversity requires each Contracting Party, as far as possible and as appropriate, to promote national arrangements for emergency responses to activities or events,

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4/ International Law Association, Report of the Sixtieth Conference, 1982, pp. 172-3

whether caused naturally or otherwise, which present a grave and imminent danger to biological diversity and encourage international cooperation to supplement such national efforts and, where appropriate and agreed by the States or regional economic integration organizations concerned, to establish joint contingency plans.

C. Ongoing activities under the Convention on Biological Diversity

25. Paragraph 1 of Article 14 of the Convention has been constantly and extensively addressed under the Convention on Biological Diversity, by previous recommendations of the Subsidiary Body on Scientific, Technical and Technological Advice and decisions of the Conference of the Parties, in relation to specific thematic areas. The thematic areas considered so far have been forest, marine and coastal, agricultural and terrestrial biodiversity and some of the relevant actions taken include:

(a) The statement on biological diversity and forests which the Conference of the Parties decided, in its decision II/9, to transmit to the Intergovernmental Panel on Forests at its second meeting. In paragraph 10 of that statement, the Conference of the Parties requested the Intergovernmental Panel to consider appropriate environmental impact assessment of sectoral activities, plans, programmes and policies with expected negative impact on forest ecosystems. In paragraph 12, the Conference of the Parties recognized the need to develop and implement methods for sustainable forest management which combine production goals, socio-economic goals of forest-dependent local communities and environmental goals, particularly those related to biological diversity;

(b) Decision II/10, on conservation and sustainable use of marine and coastal biological diversity, by which the Conference of the Parties took note of the recommendation I/8 of the Subsidiary Body on Scientific, Technical and Technological Advice, on scientific, technical and technological aspects of the conservation and sustainable use of marine and coastal biological diversity and affirmed that it represented a solid basis for future elaboration of the issues presented. In paragraph 10 of that recommendation, recommended the promotion of integrated marine and coastal area management (IMCAM) as the framework for addressing impacts of land-based activities on marine and coastal biodiversity and human impacts on marine and coastal biological diversity. It further recommended that Governments, communities and users should be encouraged to develop and adopt integrated management measures, that environmental impact assessment of all major coastal and marine development activities should be carried out, taking into account cumulative impacts, and systematic monitoring and evaluation of project impacts during implementation. The recommendation also pointed to the need to address socio-economic needs of coastal communities in the planning and implementation of the marine and coastal area management; to promote rapid appraisal techniques to improve the conservation and management of marine and coastal biological diversity; to address impacts of land-based activities on marine and coastal biological diversity and identify methodologies and research to assess these impacts; and to address impacts of desludging and pollution by maritime vessels on marine and coastal biological diversity and adopt measures to mitigate adverse effects. In regard to mariculture, the Subsidiary Body, recommended Parties, in paragraph 15 of the same recommendation to implement environmentally sustainable mariculture practices, inter alia, through the application of prior environmental and social impact assessments (in accordance with Article 14) and regulations (Article 10) and the incorporation of participation and needs of local and

indigenous communities. In regard to alien species, the Subsidiary Body, in paragraph 16, recommended Parties to include in their national plans, as far as possible and appropriate, conduct of environmental impact assessment, including risk assessment, prior to the intentional introduction of alien species and to make an assessment of possible indigenous species alternatives, whether the introduced species can be adequately monitored and whether adverse effects can be reversed within two human generations. It also recommended that environmental impact assessments should be conducted prior to the construction of canals linking coastal water bodies;

(c) Decision III/11 on conservation and sustainable use of agricultural biological diversity, by paragraph 1 of which the Conference of the Parties established a multi-year programme of activities on agricultural biological diversity aiming, inter alia, to promote the positive effects and mitigate the negative impacts of agricultural practices on biological diversity, including the identification and assessment of relevant ongoing activities and existing instruments at the international and national level. In paragraph 15 of the same decision, the Conference, inter alia, encouraged Parties to undertake impact assessments in order to minimize adverse impacts on agrobiodiversity, in accordance with Article 14 of the Convention;

(c) The input to the Intergovernmental Panel on Forests, which the Conference of the Parties decided in its decision III/12 to transmit to the Panel at its fourth meeting, identified as a research and technological priority, inter alia, the scientific analysis of the ways in which human activities, in particular forest management practices, influence biodiversity and the assessment of ways to minimize or mitigate negative influences.

II. LIABILITY AND REDRESS

26. Article 14, paragraph 2, of the Convention on Biological Diversity requires that:

> "The Conference of the Parties shall examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter."

27. As can be seen from the above, that paragraph asks for studies to be carried out before the examination of the issues of liability and redress as such. In order to facilitate the discussion of this item at the fourth meeting of the Conference of the Parties and to identify criteria for studies to be undertaken, the present note describes the functions of liability, provides an overview of what is currently being discussed on liability and redress within other international forums and under other agreements, and points out elements of liability and redress in international environmental law that might be taken into consideration to address the issue of liability under the Convention on Biological Diversity.

A. Functions of liability

28. In international law, the function of liability is fourfold:

(a) Preventive, by acting as an incentive that urges an actor to do its utmost to avert the imposition of liability by applying preventive and

precautionary mechanisms, such as environmental impact assessment, environmental management systems and risk analysis;

(b) Reparative, by shifting the injurious consequences of conduct in whole or in part from the plaintiff to the author of the conduct through a compensatory arrangement. This is the basis for the application of the "polluter-pays principle", which holds that whoever caused the pollution must pay the cost of the damage;

(c) Corrective, by serving as a method of enforcing the law even after the damage has occurred. It provides the plaintiff with an instrument to secure its legally protected interest and covers the punitive function of liability to the extent that such a function exists in international law;

(d) Deterrence, by encouraging States, companies and individuals to conduct themselves with the appropriate standard of due diligence in order to avoid compensating innocent victims for damage inflicted upon them.

B. Related discussions in other international forums

29. Liability has been widely discussed in public international law. A distinction has to be made between general discussions related to international law and norms in specific agreements regulating particular activities.

30. It is a generally accepted rule that States are under an obligation to refrain from activities which could cause harm to other States or to areas beyond national jurisdiction. This general principle of international law has been confirmed in State practice and in doctrine many times. It is stated in Principle 21 of the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, as well as in Principle 2 of the 1992 Rio Declaration on Environment and Development, and it was included as Article 3 of the Convention on Biological Diversity:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

31. Principle 22 of the Stockholm Declaration and Principle 13 of the Rio Declaration provide that States shall cooperate to develop further the international and national law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

32. The Open-ended Ad Hoc Working Group on Biosafety, under the auspices of the Convention on Biological Diversity, is currently negotiating a protocol to regulate the transboundary movement of living modified organisms. One of the issues being discussed by the Working Group is liability and compensation. Liability for environmental damage is also currently being considered by an Ad Hoc Working Group of Legal and Technical Experts to consider and develop a draft protocol on liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal under the Basel Convention, as well as by a group of legal experts under the 1991 Protocol on Environmental Protection to the Antarctic Treaty.

33. In 1996, the International Law Commission (ILC) appointed a working group to draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. Article 4 provides that "States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm and, if such harm has occurred, to minimize its effects", while Article 5 reiterates that liability arising from significant transboundary harm shall give rise to compensation or other relief.

34. Several international and regional agreements deal with liability and redress for environmental damage. They contain a number of substantive and procedural rules which should be examined in the context of preparing a study of the issue of liability under the Convention on Biological Diversity.

C. Elements of liability and redress in international environmental law

35. Provisions on liability and redress in international agreements usually contain a number of substantive and procedural elements. The principal common elements are the following:

(a) Definition of the activities or substances covered;

(b) Definition of damage;

(c) Type of liability;

(d) Establishment of the measure of damages;

(e) Channelling liability;

(f) Determination of who may bring a claim;

(g) Determination of the available remedies;

(h) Identification of a court or courts to receive claims;

(i) Provision for the enforceability of national judgements in the courts of all Parties;

(j) Limitation on the amount of liability;

(k) Provision for exoneration.

1. Definition of the activities or substances covered

36. It can be underscored that most of the agreements address hazardous or dangerous activities; liability in these cases aims primarily at promoting deterrence and reparation. The International Law Commission's draft articles on international liability for injurious consequences arising out of acts not prohibited by international law refer to damage caused by hazardous activities posing a clear risk of injurious consequences. Nevertheless, the International Law Commission (ILC) deliberately refrained from providing even an exemplary list of activities to be covered, most probably for fear of omitting some. Relevant conventions addressing hazardous or dangerous substances include: the 1969 International Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention) and the 1971 International Convention on the

Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention) which establish a regime of environmental damage caused by oil pollution while the 1992 Liability Protocol revises and develops the 1969 definition of pollution, including compensation for impairment of the environment; the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy and the 1963 Vienna Convention on Civil Liability for Nuclear Damage and its Protocol of 1997; the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and its draft protocol on liability and compensation; the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention), which is not in force. The 1993 long-term Programme for the Development and Periodic Review of Environmental Law, adopted by the UNEP Governing Council, develops rules and procedures for appropriate remedies to victims suffering loss from environmentally harmful activities.

37. The definition of the activities and substances covered corresponds to the scope of the international law. Therefore, any study of liability under the Convention on Biological Diversity should consider how the objectives of the Convention, established in Article 1, relate to the functions of liability.

2. Definition of damage

38. Article 14, paragraph 2, of the Convention specifically refers to "damage to biological diversity", while Article 2 defines biological diversity as: "the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems". This rather broad definition makes it difficult to distinguish between environment and biological diversity. The Conference of the Parties might wish to consider including a clarification of the term in the study to be undertaken pursuant to Article 14, paragraph 2.

39. International agreements on liability for damage caused by environmentally hazardous activities provide compensation essentially under three classes of damage: loss of life, personal injury and loss or damage to property. Following this trend, the 1972 Convention on International Liability for Damage caused by Space Objects, in its article I (a), defines as damage "a loss of life, personal injury or other impairment of health" or "loss of or damage to property of States or of persons, natural or judicial, or property of international intergovernmental organizations". The two nuclear-liability conventions provide for injury or loss of life and damage or loss of property.

40. International law has been developed to provide protection to the environment. The Convention on the Transboundary Effects of Industrial Accidents of 1992 and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, both concluded under the auspices of the United Nations Economic Commission for Europe (ECE), provide a broad definition of environmental damage which includes effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments. Article 2, paragraph 7, of the Lugano Convention and article 2, paragraph 2 (b), of the draft protocol to the Basel Convention consider as damage: loss of life or personal injury; loss or damage to property; loss of profit; the costs of preventive measures, including any loss or damage caused by such measures. The International Law Commission’s draft articles on international liability consider physical damage to persons, property and the environment. In 1994, UNEP established a Working Group of Experts on Liability and Compensation for

Environmental Damage arising from Military Activities. The Group was requested, inter alia, to provide a definition for "environmental damage". Defining firstly the environment as abiotic and biotic components and the ecosystem formed by their interactions as well as cultural heritage, features of the landscape and environmental amenity, the Working Group defined "impairment of the environment" as: "a change which has a measurable adverse impact on the quality of a particular environment of any of its components, including its use and non-use values and its ability to support and sustain an acceptable quality of life and a viable ecological balance" (UNEP/Env.Law/3/1, para. 45).

3. Type of liability

41. The main distinction exists between State liability and civil liability. The first refers to the liability of international subjects, State or any other international organization, whereas the second refers to liability of any legal or natural person.

42. Both State and civil liability can be subdivided into:

(a) Fault-based liability, which refers to conduct which would require intention, recklessness or negligence. The plaintiff has the burden to prove the negligent behaviour and the consequentially provoked damage;

(b) Strict or absolute liability, which directly attaches to the defendant without regard to fault; the plaintiff does not have to prove anything except a causal connection between the activity in question and the damage suffered. Liability without fault has been generally used to deter dangerous activities while not entirely prohibiting benefits they may have. Thus, the rationale of strict liability is that whoever engages in activities that might have an inherent risk of injury - such as those classified as hazardous activities - is liable for injuries caused to third parties, even without evident negligence.

43. Strict liability for dangerous activities is present in national legal systems all over the world, as well as in a number of international treaties. A strict liability regime is provided in the oil pollution conventions; in both the Paris and Vienna conventions on nuclear damage; in the draft protocol of the Basel Convention; and in the International Law Commission’s draft articles on international liability. The sole example with a clear rule of State's absolute liability is the 1972 Convention on International Liability for Damage Caused by Space Objects, article 11 of which provides that a State which launches a space object is liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight.

4. Establishment of the measure of damages

44. An important issue raised in relation to "environmental damage" concerns the threshold that such depletion or damage would/might entail a liability on a party. There are no agreed international standards which establish a threshold for environmental damage that triggers liability. The 1993 European Commission green paper on remedying environmental damage recognizes the need for thresholds in a liability regime and identifies several possibilities for determining the level of environmental damage triggering liability. These include:

(a) Reference to "critical loads", which describe the point at which a pollutant becomes concentrated in the environment at a level which cannot be diluted or broken down by natural processes;

(b) Reference to environmental indicators and environmental accounting to measure environmental performance, pressures and conditions;

(c) Reference to existing international legislation that establishes quality requirements for flora and fauna, water and air quality and that might be considered to establish a threshold for environmental damage above which a person responsible for the increase would be considered liable for the consequences. International instruments that set environmental quality standards, or product, emission or process standards, may provide some guidance as to the level of environmental damage considered to be tolerable or acceptable by the international community.

45. The 1963 Vienna Convention on Civil Liability for Nuclear Damage refers to "significant deleterious effects", while the International Law Commission in its work on non-navigational uses of international watercourses amended the threshold of harm in its articles from "appreciable" to "significant", in response to comments from States. According to the International Law Commission, "significant" means "something more than measurable, but less than serious or substantial".

5. Channelling liability

46. Most of the international agreements channel liability to a clear identifiable subject who is usually the "operator", namely the person who has operational control at the time of the incident which causes the damage. This is found in the oil pollution conventions, in the nuclear conventions as well as in the Lugano Convention. The draft protocol to the Basel Convention provides for a more elaborate approach channelling liability on the notifier, the disposer or any person - not including his employees or governmental agencies - that at the time of the incident has operational control of the wastes (article 4). The International Law Commission's draft articles on international liability provides, not without controversy, liability of the State, excluding liability of an individual or company. Finally, the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA) provides for a shared liability for environmental damage between the operator and the State, therefore linking civil and State liability. This Convention is not in force.

47. Article 14, paragraph 2, of the Convention on Biological Diversity specifically excludes liability that is strictly internal. Any study of liability under the Convention on Biological Diversity should consider the relationship between channelling of liability and this exclusion.

6. Determination of who may bring a claim

48. Article 3, paragraph 2 (a), of the draft protocol to the Basel Convention establishes that the protocol shall not apply to damage suffered in an area under the national jurisdiction of a State that is not a party to the protocol, whereas, in its discussion of the scope of decision 7 of the Governing Council of the United Nations Compensation Commission, the UNEP Working Group on Liability and Compensation did not consider there to be any restrictions upon a State bringing a claim on behalf of non-governmental organizations registered

or incorporated under its law, for any losses they have incurred (UNEP/Env.Law/3/Inf.1, para. 28).

49. The Parties might consider whether, within the framework of the Convention on Biological Diversity, damage to biological diversity could be claimed by States that are Parties of the Convention, by other States and/or by private parties.

7. Determination of the available remedies

50. In most international agreements the plaintiff is likely to be seeking financial reparation to cover the costs associated with material damage to environmental resources, including restoration and reinstatement. The 1997 Protocol to amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage, in its article 2, provides that:

> "Measure of reinstatement means any reasonable measures which have been approved by the competent authorities of the State where the measures were taken and which aim to reinstate or restore damaged or destroyed components of the environment or to introduce, where reasonable, the equivalent of these components into the environment. The law of the State where the damage is suffered shall determine who is entitled to take such measures."

51. Article 1 of the Basel Convention's draft protocol provides for adequate and prompt compensation, including reinstatement of the environment, for damage resulting from the transboundary movement of hazardous wastes and other wastes and their disposal. Although it is desirable to restore the status existing before the damage, some types of environmental damage might not be restored.

52. The difficulty which arises in relation to evaluating damage to the environment or to biological diversity for the purposes of assessing appropriate compensation has become object of increasing attention. In this regard, article 10 bis of the Basel Convention's draft protocol considers the possibility of creating a list of experts in the field of assessment and restoration of environmental damage that may be drawn upon by Parties whose courts require assistance in the assessment of damage to the environment, the costs of preventive measures and of measures of reinstatement.

8. Identification of a court or courts to receive claims

53. The identification of courts where a plaintiff might bring a claim can facilitate the redress of the damage. The question of equal access is addressed by article 19 of the Lugano Convention which establishes that actions for compensation may only be brought within a party at the court of the place:

(a) Where the damage was suffered;

(b) Where the dangerous activity was conducted;

(c) Where the defendant has his habitual residence.

This type of provision imposes an obligation upon the States parties to grant jurisdiction to their courts to deal with this type of claims.

54. According to the International Law Commission's draft articles on liability, the affected persons who consider that they have been injured may elect to institute proceedings either in the courts of the affected State or in those of the State of origin. Article 10 of the Basel Convention's draft protocol states that claims for compensation may be brought in the courts of a contracting party only where:

(a) The damage was suffered;

(b) The incident occurred;

(c) The defendant has his habitual residence or his principal place of business.

9. Provision for the enforceability of national judgements in the courts of all Parties

55. Article 23 of the Lugano Convention establishes that a decision given by a court with jurisdiction where it is no longer subject to ordinary forms of review shall be recognized in any party and be enforceable in each party as soon as the formalities required by the party of origin have been completed. Article 10 of the 1969 International Convention on Civil Liability for Oil Pollution Damage and Article 12 of the 1963 Vienna Convention on Civil Liability for Nuclear Damage contain provisions similar to those contained in the Lugano Convention.

10. Limitation on the amount of liability

56. To set a limitation on the amount of financial liability which an operator may incur in case of damage is a policy matter that varies according to the subject of the conventions. Some international agreements dealing with liability require certain parties to maintain adequate insurance or provide for the constitution of a Fund. This is the case with the 1969 Civil Liability Convention for Oil Pollution Damage and the 1971 Fund Convention. The Civil Liability Convention deals with the liability of ship-owners and requires them to take out liability insurance. The ship-owner is normally entitled to limit his liability to an amount which is linked to the tonnage of his ship. The Fund Convention creates a system of additional compensation through a worldwide intergovernmental organization called International Oil Pollution Compensation Fund (IOPC Fund). Compensation is payable to Governments or other authorities which have incurred clean-up costs or costs for preventing or minimising pollution damage as well as to private bodies or individuals who have suffered the damage. At the same time as the 1969 Civil Liability Convention and the 1971 Fund Convention were negotiated, two corresponding voluntary industry schemes were adopted: the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP) and the Contract Regarding a Supplement to Tanker Liability for Oil Pollution (CRISTAL). The purpose of these industry schemes was to provide benefits comparable to those available under the Civil Liability Convention and the Fund Convention in States which had not ratified these conventions. Both TOVALOP and CRISTAL expired in 1997. Two Protocols amended the Civil Liability Convention and the Fund Convention in 1992, providing higher limits of compensation and a wider scope of application.

57. The 1997 Protocol to Amend the Vienna Convention and the related Convention on Supplementary Compensation for Nuclear Damage provide a broader scope, increased amount of liability of the operator of a nuclear installation and enhanced means for securing adequate and equitable compensation. Article 12 of the Lugano Convention establishes that:

> "Each Party shall ensure that where appropriate, taking due account of the risks of the activity, operators conducting a dangerous activity on its territory be required to participate in a financial security scheme or to have and maintain a financial guarantee up to a certain limit, of such type and terms as specified by internal law, to cover the liability under this Convention."

58. On the other hand, article 5 of the Basel Convention's draft protocol does not include any financial limit of liability.

11. Provision for exoneration

59. Civil liability treaties usually provide exceptions by establishing that the operator shall not be held liable for damage which he proves to be caused by acts of war, hostilities, civil wars, insurrections; natural phenomena of an exceptional inevitable and irresistible character; the wrongful intentional conduct of a third party; compliance with a specific order or compulsory measure of a public authority; negligent or other wrongful act of any government or other authority. 5/

III. CONCLUSION AND RECOMMENDATIONS

60. The Conference of the Parties is invited to consider the following elements of a decision:

Concerning impact assessment

1. Recalling its decisions which refer to impact assessment in relation to specific thematic areas, to invite Parties, countries and national and international organizations to transmit to the Executive Secretary, reports and case-studies relating to environmental impact assessment in these thematic areas, for the purpose of exchanging information and sharing experiences;

2. To request the Executive Secretary to prepare a synthesis of such case-studies and reports for consideration of SBSTTA, with a view to assisting in the preparation of guidelines on environmental impact assessment procedures that specifically address impacts on biological diversity;

3. To instruct SBSTTA to submit to the Conference of the Parties at its fifth meeting draft guidelines on EIA procedures for its consideration;

5/ See, for example, article 8 of the Lugano Convention, article 4 of the Basel Convention, article III of the Civil Liability Convention, and article IV of the Vienna Convention.

4. To request the Executive Secretary to make this information, referred to in paragraph 1 above, available through the clearing-house mechanism and other appropriate means;

Concerning liability and redress

5. To invite Parties, countries and relevant international organizations to provide the Executive Secretary with information on national, international and regional regulations and agreements on liability and redress in cases of damage to biological diversity, including the nature, scope and coverage of such provisions, and information on experiences in their implementation;

6. Recalling paragraph 2 of Article 14 of the Convention, to request the Executive Secretary to prepare a report based on the synthesis of the information contained in such submissions and other relevant information, for the consideration of the Conference of the Parties at its fifth meeting.
