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IMPACT ASSESSMENT, LIABILITY AND REDRESS (ARTICLE 14)

Synthesis of submissions from Governments and international organizations in response to the questionnaire on liability and redress under the Convention on Biological Diversity

Note by the Executive Secretary

INTRODUCTION

1. The present note has been prepared by the Executive Secretary to assist the Conference of the Parties in its consideration of the implementation of paragraph 2 of Article 14 on liability and redress under the Convention on the basis of submissions made by Parties and other relevant developments. Section I of the document briefly recalls the background to the issue and activities of the Secretariat since the fourth meeting of the Conference of the Parties. Section II contains a summary of submissions received by the Executive Secretary and relevant information contained in national reports. Section III briefly reviews relevant developments in international law. Section IV considers various options with respect to the further implementation of Article 14, paragraph 2. In section V the Executive Secretary presents a recommendation on the subject for the consideration of the Conference of the Parties.

I. BACKGROUND

2. Paragraph 2 of Article 14 of the Convention on Biological Diversity provides 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. 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. In order to facilitate the discussion of this item at the fourth meeting of

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the Conference of the Parties and to identify criteria for studies to be undertaken, the Executive Secretary prepared a note entitled "Impact assessment and minimizing adverse impacts: implementation of Article 14" (UNEP/CBD/COP/4/20). This document described the functions of liability and reviewed developments in other international forums. The Executive Secretary also outlined some of the critical issues with respect to promoting implementation of this paragraph in terms of gaps in the existing legal framework and modalities for addressing these issues.

3. At its fourth meeting, the Conference of the Parties took note of the above-mentioned note by the Executive Secretary and, based on the information provided in the document, adopted decision IV/10 C, which sets out a process for developing the necessary studies mentioned in paragraph 2 of Article 14. By paragraph 8 of decision IV/10 C, the Conference of the Parties invited Governments and international organizations to provide information on national, international and regional measures and agreements on liability and redress applicable to damage to biological diversity, including the nature, scope and coverage of such provisions, and information on experiences in their implementation, as well as information regarding access by foreign citizens to national courts potentially applicable to or in cases involving transboundary environmental harm. The Conference of the Parties also invited Parties to include in their national reports relevant information on this issue.

4. The Conference of the Parties requested the Executive Secretary to prepare a synthesis report based on information contained in submissions by Parties and other relevant information, for examination by the Conference of the Parties at its fifth meeting.

5. In addition to the transmission of decision IV/10 C in the report of the fourth meeting of the Conference of the Parties, the Executive Secretary specifically invited Parties and relevant organizations to provide information on these issues by letter of 28 April 1999.

II. SUMMARY OF SUBMISSIONS RECEIVED BY THE EXECUTIVE SECRETARY

6. As of February 2000, the Secretariat had received five submissions. Three addressed liability and redress as it relates to environmental damage generally. Two indicated that the legislation addressing this issue is still at the stage of legal drafting. There follows a brief summary of the responses received.

7. In the United Kingdom, statute law imposes liability with respect to environmental damage in general. The acts for which liability has been imposed include land contamination, waste disposal and dumping, nature conservation, and marine and water pollution. Redress measures comprise restoration and compensation. In addition to statute law, the common-law framework provides for civil liability in respect of damage to persons or property, or interference with property rights. Some of the measures contemplated by legislation apply directly to damage to biological diversity. Under the Wildlife and Countryside Act, 1981, for example, the courts are empowered to require an offender who has damaged land covered by a nature conservation order to undertake specific activities to restore the land. Further, the Habitats Regulations, 1994, allow the Secretary of State to secure compensatory measures in cases where a development or a project is likely to damage certain protected land. Such measures may include requiring the developer to relocate affected flora and fauna to a new habitat. The

United Kingdom is a Party to the OECD (Organisation for Economic Co-operation and Development) Paris Convention on Third Party Liability in the Field of Nuclear Energy, 1960. The Convention imposes strict liability on the operator of a nuclear facility. However, liability is limited both in time and in the amount of compensation payable.

8. In Turkey, the Environmental Law (No. 2872) covers all activities that give rise to environmental damage or risk to environmental health, including damage and risks to the natural processes and functions of ecosystems. Strict liability is imposed with regard to acts causing environmental pollution, overuse or unsustainable use of land, release of chemicals, and marine pollution. Redress measures include restoration and compensation. Legislation governing aquatic resources, terrestrial hunting, and forestry provide for compensation in cases of unauthorized damage to flora and fauna.

9. In Austria, civil liability has been specifically imposed with regard to genetically modified organisms by a federal law promulgated in 1998 (Federal Law Gazette 1 No. 73/1998). Liability is strict concerning personal injuries and environmental impairment arising from the utilisation and release of genetically modified organisms. The Federal Act on Civil Liability for Damage Caused by Radioactivity, 1999 (Federal Law Gazette 1 No.170/1998), governs liability with respect to nuclear incidents. The operator of a nuclear power plant and the transporter of nuclear material are strictly liable with regard to personal injuries and environmental impairment. Redress measures include restoration of degraded environmental resources and compensation. The law further requires operators of nuclear facilities to take-up liability insurance.

10. In paragraph 9 of decision IV/10 C, the Conference of the Parties invited Parties to include in their national reports information on actions taken with respect to this issue. Nine Parties have made a general reference to the role of liability in the framework of their overall environmental legislation.

11. The report of the Commission of the European Communities (the Commission) mentions that it and its member States have been considering the development of a Community-wide liability regime for damage to the environment. This issue has been under active consideration by the Commission and its member States since 1993 with respect to the development of an environmental liability regime and since 1983 with respect to liability for damage resulting from hazardous activities. To this end, there was a Commission Green Paper in 1993, a Joint Hearing with the European Parliament that year, a Parliament resolution asking for an European Community directive and an Opinion of the Economic and Social Committee in 1994, and a Commission decision in January 1997 to produce a White Paper. The White Paper on Environmental Liability (COM(2000) 66 Final) was issued on 9 February 2000.

12. The Paper considers the role and function of a liability regime, possible main features of a Community regime and options for further action. The Paper suggests that any regime should include damage to biodiversity but only if protected under the protected area network of the Union (Natura 2000 network). The liability should be strict for damage caused by inherently dangerous activities, and fault-based liability for damage to biodiversity caused by a non-dangerous activity. The Paper also proposes commonly accepted defences, some alleviation of the plaintiffs' burden of proof and some equitable relief for defendants; liability focused on the operator in control

of the activity which caused the damage; criteria for assessing and dealing with the different types of damage; an obligation to spend compensation paid by the polluter on environmental restoration; an approach to enhanced access to justice in environmental damage cases; coordination with international conventions; financial security for potential liabilities, working with the markets.

13. On the basis of the analysis set out in this Paper, the Commission considers as the most appropriate option that of a Community framework directive on environmental liability, providing for strict liability - with defences – with respect to traditional damage (namely damage to health and property) and environmental damage (contamination of sites and damage to biodiversity in Natura 2000 areas) caused by EC-regulated dangerous activities, and fault-based liability for damage to such biodiversity caused by non-dangerous activities.

III. DEVELOPMENTS IN INTERNATIONAL LAW

14. Since the Executive Secretary prepared his note on the subject for the fourth meeting of the Conference of the Parties (UNEP/CBD/COP/4/20) (11 March 1998), there have been a number of relevant developments. Without being comprehensive, the following account is representative of general trends in international law.

The Cartagena Protocol on Biosafety

15. First and foremost are the provisions on liability and redress in the recently adopted Cartagena Protocol On Biosafety. The issue was of central importance to many Parties in the negotiations. Consequently, the provisions addressing the issue were the subject of considerable attention during the negotiations. Despite this, Article 27 is no more than an enabling provision and provides:

> "The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, analysing and taking due account of the ongoing processes in international law on these matters, and shall endeavour to complete this process within four years."

16. The Secretariat, in consultation with the Bureau of the Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP), will prepare a document addressing this issue (including recommendations) for consideration by ICCP and subsequently by the first meeting of the Parties to the Protocol.

The liability protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal

17. A protocol on liability and compensation for damage resulting from the transboundary movement of hazardous wastes and their disposal has been under negotiations since the conclusion of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. During the period covered by the present note, the Working Group established to develop

the protocol held its eight, ninth and tenth meetings. At its tenth meeting, it concluded its work and presented a draft protocol to the Conference of the Parties at its fifth meeting (6 to 10 December 1999). The draft was duly considered and adopted, by decision V/29, as the Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal.

18. The Protocol is to provide for a comprehensive regime for liability and for adequate and prompt compensation for damage resulting from the transboundary movement of hazardous wastes and other wastes and their disposal including illegal traffic in those wastes. Damage is defined as

"(i) Loss of life or personal injury;

"(ii) Loss of or damage to property other than property held by the person liable in accordance with the present Protocol;

"(iii) Loss of income directly deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment, taking into account savings and costs;

"(iv) The costs of measures of reinstatement of the impaired environment, limited to the costs of measures actually taken or to be undertaken; and

"(v) The costs of preventive measures, including any loss or damage caused by such measures, to the extent that the damage arises out of or results from hazardous properties of the wastes involved in the transboundary movement and disposal of hazardous wastes and other wastes subject to the Convention."

19. "Measures of reinstatement" are defined "as any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the environment. Domestic law may indicate who will be entitled to take such measures". Movements covered by the Protocol are defined in detail in its article 3. Hazardous wastes and other wastes are defined in article 1 of the Basel Convention.

International Law Commission

20. In the period in question the International Law Commission (ILC) has been considering liability with respect to transboundary damage from hazardous activities. At its fiftieth session, in 1998, the Commission had before it the Special Rapporteur's first report (A/CN.4/487 and Add.1). The report reviewed the Commission's work on the topic of liability since it was first placed on the agenda in 1978, focusing in particular on the question of the scope of the draft articles to be elaborated. The Commission established a working group to review the draft articles recommended by an earlier working group in 1996. After consideration by the Working Group and the Drafting Committee, the Commission adopted 17 draft articles on prevention of transboundary damage from hazardous activities, which were transmitted to Governments with a request for comments and observations to be submitted to the Secretary-General by 1 January 2000.

21. At its fifty-first session, in 1999, the Commission had before it the second report of the Special Rapporteur (A/CN.4/501), comprising five

sections: sections I and II dealt with the questions raised in the 1998 ILC report of on the nature of the obligation of prevention, the eventual form of the draft articles and the type of dispute settlement procedures that may be suitable for the draft articles as well as reaction by Governments to the ILC report during the Sixth Committee debate at the fifty-third session of the General Assembly; section III elaborated on the salient features of the concept of due diligence and ways in which that concept could be implemented in the light of State practice and doctrine; section IV reviewed the treatment of the concept of international liability in the International Law Commission since the topic was placed on its agenda, as well as negotiations on liability issues in other international forums; and section V offered three options with respect to future course of action on the question of liability. The first option was to proceed with the topic of liability and finalize some recommendations, taking into account the work of the previous Special Rapporteurs and the text prepared by the ILC working group in 1996. The second option was to suspend the work on international liability, until the Commission finalizes its second reading of the draft articles on the regime of prevention. The third option was for the Commission to terminate its work on the topic of international liability, unless a fresh and revised mandate is given by the General Assembly.

22. The Commission opted for the second option and decided to defer consideration of the question of international liability, pending completion of the second reading of the draft articles on the prevention of transboundary damage from hazardous activities.

Liability protocol with the Antarctic Treaty system

23. Negotiations on a protocol on liability have been taking place within the context of the Antarctic Treaty system for several years. Article 16 of the Protocol on Environmental Protection, calls on Parties to elaborate rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by the Protocol on Environmental Protection. For this purpose, a Group of Legal Experts on Liability was established. This Group started its work in 1993. At the Twenty-first Antarctic Treaty Consultative Meeting, in 1997, the Group of Legal Experts reported that there was lack of clarity with regard to a number of matters, including the definition of damage, the actions to be taken by operators, the reimbursement of costs, unrepaired damage and the process for the settlement of disputes. At the Twenty-second Antarctic Treaty Consultative Meeting, 1998, it was decided that the Group of Legal Experts had ended its task by submitting its report and that further negotiations of an annex or annexes would take place in Working Group 1. These further negotiations would include input from the Scientific Committee on Antarctic Research (SCAR), the Council of Managers of National Antarctic Programmes (COMNAP) and others on risk assessments, concentrating on factual information about the likely types and scales of environmental damage and the financial magnitude of such damage.

24. The Twenty-third Antarctic Treaty Consultative Meeting, in 1999, affirmed its commitment to develop a liability regime. Areas of convergence included:

(a) The approach should involve consideration of preventative measures, response action and liability;

(b) The term "operator" should include all States parties and all public and private entities engaged in activities in the Antarctic Treaty area and authorized by or under the jurisdiction and control of a State party;

(c) There should be a regime of strict liability, that is, no need to prove an operator acted intentionally or negligently;

(d) Exemptions from liability would be for acts of God, force majeure, armed conflict, or acts of terrorism;

(e) Scientific activities would not be exempt from the liability regime;

(f) Where the need arises for response action in order to prevent environmental damage, a State Party may request the cooperation of, or give its consent for, a third party to take such action.

25. By resolution 5 (1999), the Antarctic Treaty Consultative Meeting requested Working Group 1 to prepare a working paper for submission to the Twenty-fourth Antarctic Treaty Consultative Meeting, on the operational and scientific aspects of preventative measures and response action to enlighten and facilitate work on liability issues. No time frame was set for completion of negotiations.

26. Even though the Antarctic Treaty system deals with a unique and distinct area of international law, the issues that need to be considered in terms of substance within the Antarctic Treaty system are directly relevant to the issue of liability and redress under the Convention. In fact it is fair to note that due to the simplified circumstances of Antarctica (principal among them that it is a continent devoted to science) in many important ways the Antarctic Treaty system is a harbinger of what is possible in the more complex context in which the Convention has to consider the issue.

IV. OPTIONS FOR THE FURTHER IMPLEMENTATION OF PARAGRAPH 2 OF ARTICLE 14 OF THE CONVENTION

27. Developing a regime for liability and redress for damage to biological diversity raises many complex issues. Some of the more fundamental ones were highlighted in the above-mentioned note by the Executive Secretary on the subject prepared for the fourth meeting of the Conference of the Parties.

28. Despite some significant developments since the fourth meeting of the Conference of the Parties, most notably with respect to the adoption of the Basel Protocol, progress in more directly relevant areas has been limited. For example, the Cartagena Protocol on Biosafety only provides an enabling clause on the issue. Consideration of the issue with the relatively narrow scope of the Antarctic Treaty system has not progressed significantly. Moreover, the International Law Commission has not made progress with the more general issues of liability it is addressing.

29. A similar lack of progress within Parties is also evident from the submissions received, national reports and other relevant information. The European Community White Paper on Environmental Liability is not only the most recent development in this area, but the Community is also the only Party that is reported as considering the issue in a transboundary context, and therefore of direct relevance to paragraph 2 of Article 14.

30. As mentioned previously, the European Commission recommends that its member States develop a Community framework directive on environmental liability, providing for strict liability - with defences – with respect to traditional damage (namely damage to health and property) and environmental damage (contamination of sites and damage to biodiversity in Natura 2000 areas) caused by EC-regulated dangerous activities, and fault-based liability for damage to such biodiversity caused by non-dangerous activities. The White Paper proposes that the details of such a framework directive should be further elaborated in the light of the consultations to be held. To this end, the Commission invites the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions as well as interested parties to discuss and comment on the White Paper by 1 July 2000. No further detail on schedule is provided. The Paper has already proved to be controversial and it appears that significant discussion will be required before resolution of the issue.

31. As noted in the note by the Executive Secretary prepared for the fourth meeting of the Conference of the Parties, the Commission also notes that damage to biodiversity is not generally covered by liability rules of member States. All of the key problems with developing a liability regime outlined in the previous note by the Executive Secretary remain unresolved within the European Union. Indeed, one of the main reasons for the Commission recommending the development of legislation on liability and redress for damage to biodiversity is the absence of such protection for biodiversity currently within it member States.

32. The limited number and the general nature of the information provided by Parties, the fact that most of this information deals with internal environmental impacts (which are excluded from the scope of paragraph 2 of Article 14), as well as the general trends in international law demonstrate that the necessary political will and commitment among Parties to develop this issue has not been made apparent through the review process established by the Conference of the Parties in decision IV/10 C or in other related forums.

33. As with other international processes, the Conference of the Parties could, in conjunction with the options outlined below, establish an ad hoc technical expert group to consider the issue. The mandate of such a group could be to stimulate further interest in Parties and to make recommendations to the seventh meeting of the Conference of the Parties on ways and means to implement Article 14, paragraph 2, in light of all relevant factors.

34. In light of the above, other options could include postponing consideration of this issue to a future meeting of the Conference of the Parties in order to focus on more pressing issues, particularly programme areas and cross-cutting issues. A more proactive approach would be to establish a review process prior to the next consideration of the topic by the Conference of the Parties in order to generate more submissions and thereby better gauge support for developing paragraph 2 of Article 14. The proactive approach could include consideration of the issue inter-sessionally by a subsidiary body of the Conference of the Parties (e.g. the Inter-Sessional Meeting on the Operations of the Convention or its successor) or by a technical group composed of experts from Parties as suggested in paragraph 33 above.

35. Another option would be for the Conference of the Parties to renew its request to Parties, Governments and 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 biodiversity, including the nature, scope and coverage of such provisions, and information on experiences in their implementation, as well as information regarding access by foreign citizens to national courts potentially applicable to or in cases involving transboundary environmental harm, and request the Executive Secretary to prepare a synthesis report of such submissions as well as other relevant information.

V. RECOMMENDATION

36. The Executive Secretary recommends, in the absence of more interest from Parties on this matter, that the Conference of the Parties decide to consider a detailed process of review at its seventh meeting with a view to taking a decision on the issue at its eighth meeting.
