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GROUP OF LEGAL AND TECHNICAL EXPERTS ON LIABILITY AND REDRESS IN THE CONTEXT OF ARTICLE 14(2) OF THE CONVENTION ON BIOLOGICAL DIVERSITY
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LIABILITY AND REDRESS IN THE CONTEXT OF PARAGRAPH 2 OF ARTICLE 14 OF THE CONVENTION ON BIOLOGICAL DIVERSITY

Update on developments in relevant sectoral international and regional legal instruments and developments in private international law

Information note by the Executive Secretary

I. BACKGROUND

1. By its decision VI/11, paragraph 2, the Conference of the Parties to the Convention on Biological Diversity, at its sixth meeting, requested the Executive Secretary, *inter alia*, to continue collecting relevant information and to conduct analysis of such information and other relevant issues, with the cooperation of the Parties, Governments and relevant organizations, and to make such information and analysis available prior to convening the group of legal and technical experts. According to the decision, such information gathering should focus, as appropriate, on, *inter alia*, updating the documentation on sectoral international and regional legal instruments dealing with activities which may cause damage to biological diversity (oil, chemicals, hazardous wastes, wildlife conventions, etc.) as well as developments in private international law.

2. The Executive Secretary undertook a review of relevant international legal instruments in a note (UNEP/CBD/WS-L&R/2) prepared for the Workshop on Liability and Redress in the Context of the Convention on Biological Diversity held in Paris, from 18 to 20 June 2001. The present document updates information on relevant sectoral international and regional legal instruments, as well as developments in private international law as requested by decision VI/11.

* UNEP/CBD/EG-L&R/1.

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II. RECENT DEVELOPMENTS IN INTERNATIONAL PROCESSES

A. The Cartagena Protocol on Biosafety

3. Article 27 of the Cartagena Protocol on Biosafety provides that the Conference of the Parties serving as the meeting of the Parties to this Protocol (COP/MOP) 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. In accordance with this provision the Conference of the Parties serving as the meeting of the Parties to this Protocol, at its first meeting in February 2004, by decision BS-I/8, established an Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress to carry out the process pursuant to Article 27 of the Protocol. The mandate of the Working Group is to analyse the issues relevant to liability and redress with a view to building understanding and consensus on the nature and contents of international rules and procedures referred to in Article 27. In this respect it is required to: (i) analyse issues relating to the potential and/or actual damage scenarios of concern that may be covered under the Protocol and the application of international rules and procedures on liability and redress to such scenarios and (ii) elaborate options for elements of rules and procedures referred to in Article 27.

4. Decision BS-I/8 also requested the Executive Secretary to convene a Technical Group of Experts on Liability and Redress to undertake preparatory work for the first meeting of the Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress. The Technical Group of Experts met in Montreal from 18 to 20 October 2004. The Group elaborated a non-exhaustive list of scenarios with a view to identifying the situations for which international rules and procedures referred to in Article 27 of the Protocol may be needed. 1/ It also identified options regarding the scope of "damage resulting from the transboundary movements of living modified organisms"; definition of damage; valuation of damage; causation; channelling of liability; standard of liability; mechanisms of financial security; standing to sue; settlement of claims; limitation of liability; and choice of instrument. It further identified issues requiring further consideration.

5. The Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress held its first meeting in Montreal from 30 May to 3 June 2005. It reviewed the information gathered by the Executive Secretary pursuant to the request of the Technical Group of Experts and further developed the options, approaches and issues for further consideration that had been identified by that Group. The report of the Working Group (UNEP/CBD/BS/COP-MOP/2/11) was submitted to the Conference of the Parties serving as the meeting of the Parties to the Protocol, which decided that the next meeting of the Working Group should be held in February 2006.

B. The International Law Commission (ILC)

6. At its fifty-third session in 2001, the Commission considered the fourth report of the Special Rapporteur on the topic "Responsibility of States for internationally wrongful acts." It completed the second reading of the draft articles prepared under the topic. The Commission decided to recommend to the General Assembly that it take note in a resolution of the draft articles on responsibility of States for internationally wrongful acts, and that it annex the draft articles to the resolution. The Commission decided further to recommend that the General Assembly consider, at a later stage, and in the light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to adopting a convention on the topic.

1/ See UNEP/CBD/BS/TEG-L&R/1/3.

7. In resolution 56/83, on responsibility of States for internationally wrongful acts, the Assembly "took note of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to attention of Governments without prejudice to the question of their future adoption or other appropriate action". The General Assembly further decided to include in the provisional agenda of its fifty-ninth session an item entitled "Responsibility of States for internationally wrongful acts". 1/ At its fifty-ninth session, by its resolution 59/35 of 2 December 2004, the General Assembly commended once again the articles to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action, and requested the Secretary-General to invite Governments to submit their written comments on any future action regarding the articles.

8. The draft articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. They establish the general conditions under international law for the State to be considered responsible for acts or omissions, and the legal consequences that flow therefrom. The articles to do not attempt to define the content of the international obligations whose breach gives rise to responsibility. As regards content, the articles address the nature of the internationally wrongful act; the content of the international responsibility of a State; and the implementation of the international responsibility of a State.

9. In conjunction with its work on State responsibility, the International Law Commission has, since 1978, been considering the issue of international liability for transboundary damage arising from inherently dangerous but otherwise lawful activities undertaken within national jurisdiction. This issue is being considered under the topic "International liability for injurious consequences arising from acts not prohibited by international law". In 1997 the Commission decided to focus, in the first instance, on issues of prevention and to suspend consideration of the liability aspects of the topic pending completion of the second reading of the draft articles on prevention of transboundary damage from hazardous activities. At its fifty-third session in 2001, the Commission also completed the second reading of the draft articles prepared under the topic of "International liability for injurious consequences arising from acts not prohibited by international law (prevention of transboundary damage from hazardous activities)", and decided to recommend to the General Assembly the elaboration of a convention by the General Assembly on the basis of the draft articles. At its fifty-sixth session, following the consideration of the report of the Commission, the General Assembly in resolution 56/82, on the report of the International Law Commission, *inter alia*, expressed it appreciation "for the valuable work done on the issue of prevention on the topic of 'International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities)". 2/ The resolution further requested the Commission to resume, during its fifty-fourth session in 2002, its consideration of the liability aspects of the topic, which it had suspended in 1997.

10. The articles deal with the concept of prevention in the context of authorization and regulation of hazardous activities. Prevention, as a procedure or as a duty, therefore addresses the phase prior to the occurrence of significant harm or damage. The articles underline that prevention should be a preferred policy since compensation often cannot restore the situation that existed before the incident. The articles are without prejudice to any obligation incurred by States under relevant treaties or rules of customary international law (art. 18). As regards the scope of application, the Articles apply to activities not prohibited by international law that involve a risk of causing significant transboundary harm through their physical consequences (article 1). The State origin (i.e. the State in whose territory or under whose

1/ See the report of the International Law Commission on the work of its fifty-third session, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10).*

2/ Ibid.

jurisdiction and control the activities are planned or carried out art. 2) is under the obligation to take all appropriate measures to prevent significant transboundary harm or to minimize the risk of such harm (Art. 3). The State of origin is required to establish a system of authorization of hazardous activities (Art. 6) and such authorization is to be based on assessment of risk of transboundary harm (art. 7). Where the risk assessment indicates a risk of significant transboundary harm, States likely to be affected shall be notified and provided with technical and other relevant information. The States concerned are required to consult regarding measures to be adopted to prevent significant transboundary harm. As regards emergencies, the State of origin shall develop contingency plans for emergencies and shall notify any State likely to be affected of such emergencies (Arts. 16 and 17).

11. At its fifty-fourth session, in 2002, the Commission resumed its consideration of the second part of the topic under the title "International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities)". At its fifty-sixth session, in 2004, the Commission adopted on first reading a set of eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. It further decided to transmit the draft principles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary General by 1 January 2006. At its fifty-ninth session, by its resolution 59/41 of 2 December 2004, the General Assembly expressed its appreciation to the Commission for the completion of the first reading of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities and drew the attention of Governments to the importance for the Commission of having their views on the topic. 3/

12. Even where the State of origin fully complies with its prevention obligations under the Draft Articles on prevention, accidents or other incidents may still occur and have transboundary consequences. The objective of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities is to ensure that those (including States) who suffer harm or loss (including environmental damage) as a result of incidents involving hazardous activities receive prompt and adequate compensation (principle 3). The draft principles are intended to contribute to the further development of international law in this field both by providing appropriate guidance to States in respect of hazardous activities not covered by specific treaties and by indicating the matters that should be dealt with in such treaties. The preamble therefore notes that the necessary arrangements for compensation may be provided under international agreements covering specific activities and principle 7 urges States to cooperate in the development of appropriate international agreements on a global, regional or bilateral basis regarding prevention and compensation with respect to specific hazardous activities.

13. The draft principles are general and residual in character. Different activities may require different approaches. It is made clear in the preamble that States are responsible in international law for complying with their prevention obligations. The draft principles are therefore without prejudice to the rules relating to State responsibility and any claim that may lie under those rules in the event of a breach of the obligations of prevention. The imperative of widespread acceptance dictated that they be cast as principles rather than articles. The ILC has however reserved the right to reconsider the final form of the instrument at the second reading in light of the comments and observations of Governments. The scope of application of the draft principles is the same as that of the draft articles on prevention, that is, they apply in relation to transboundary damage caused by activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences (principle 1). Each State would be required to take measures to ensure compensation to victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its

3/ See the report of the International Law Commission on the work of its fifty-sixth session, *Official Records of the General Assembly, fifty-ninth Session, Supplement No. 10 (A/59/10).*

jurisdiction or control (principle 4). Such measures should include the imposition of strict liability on the operator of the hazardous activity and the requirement that the operator establishes and maintains financial security. In order to minimize transboundary damage from an incident, States (with the assistance of the operator) should take prompt and effective response measures (principle 5). These should include prompt notification of potentially affected States. States should provide appropriate procedures to ensure compensation to victims of transboundary damage (principle 6). Such procedures should include expeditious and inexpensive international claims settlement procedures and access to effective domestic administrative and judicial mechanisms by foreign nationals. States should adopt legislative, regulatory and administrative measures to implement the draft principles (principle 8).

C. International Maritime Organization (IMO)

14. On 23 March 2001 the International Convention on Civil Liability for Bunker Oil Pollution Damage was adopted. It enters into force 12 months following the date on which 18 States, including five States each with ships whose combined gross tonnage is not less than 1 million gross tonnage have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession. To date the Convention has been ratified by two States.

15. The Convention was adopted to ensure that adequate, prompt, and effective compensation is available to persons who suffer damage caused by spills of oil, when carried as fuel in ships' bunkers. It applies to damage caused on the territory, i.e. it applies to the territorial sea, and the exclusive economic zones of States Parties.

16. Moreover, the Convention provides a freestanding instrument, which only covers pollution damage. “Pollution damage” is defined as:

(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 preventive measures and further loss or damage caused by preventive measures.

17. The Convention is modelled on the International Convention on Civil Liability for Oil Pollution Damage of 1969. It establishes the requirement for the registered owner of a vessel to maintain compulsory insurance cover as well as providing for direct action to allow a claim for compensation for pollution damage to be brought directly against an insurer. The Convention requires ships over 1,000 gross tonnage to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, 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, but in all cases, not exceeding an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims of 1976, as amended by the 1996 Protocol which sets the limits for ships not exceeding 2,000 gt to 2 million special drawing rights (SDR) (US $2.56 million) for loss of life or personal injury and 1 million SDR (US $1.28 million) for other claims. Liability then increases with tonnage to a maximum above 70,000 gt of 2 million SDR + 400 SDR per ton for loss of life or personal injury and 1 million SDR + 200 SDR per tonne for other claims.

18. The Assembly for the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, approved, at its ninth session held from 19 to 22 October 2004, a modification to the 1992 Fund’s Claim Manual with respect to criteria for the admissibility of claims for costs of measures to reinstate the environment. It was noted that the modification become necessary to reflect the fact that it was virtually impossible to bring damaged site back to the same

ecological condition (*ex ante*) that would have existed had an oil spill not occurred. The revised Manual also makes a distinction between claims for costs of reinstatement measures and claims for economic losses caused by environmental damage and the different criteria that applied to these claims Accordingly, the manual now includes, as examples of economic loss due to environmental damage: (i) a reduction in revenue for a marine park or nature reserve which charges the public for admission; and (ii) a reduction in catches of commercial species of marine products directly affected by the oil. 4/

D. Stockholm Convention on Persistent Organic Pollutants (POPs)

19. The Conference of the Plenipotentiaries on the Stockholm Convention on Persistent Organic Pollutants (POPs), which met from 22 to 23 May 2001 adopted a resolution 5/ recognizing that the time is appropriate for further discussions on the need for elaboration of international rules in the field of liability and redress resulting from the production, use and intentional release into the environment of persistent organic pollutants. A series of key questions that would have to be addressed when considering a possible POPs liability regime was identified at a workshop on liability and redress. These include user versus producer responsibility; State versus civil liability; the activities that could be included within the scope of such a regime and how compensation could be provided. Other issues that were highlighted were the greater difficulty of establishing causality in cases of long-term damage; the role of State responsibility; the possible applicability of compensation systems based on insurance or trust funds; circumstances that had given rise to existing international liability regimes; the adequacy of domestic versus international liability regimes; the lack of common methods to assess damage to the environment and human health; and possible scenarios under the Stockholm Convention which would be covered by the responsibility rules under international law or might warrant further consideration in regard to liability. Among the general considerations identified were also the need to take into account the time-lag between release of POPs and the manifestation of damage, the variety of POPs sources and their cumulative effects, the definition of damage caused by POPs and who is to be regarded as having suffered damage, and whether the activities were undertaken, or the effects felt, by States or by individuals.

20. The workshop report was considered at the first meeting of the Conference of the Parties to be in May 2005.

E. Antarctic Treaty

21. The 1991 Madrid Protocol on Environmental Protection to the 1959 Antarctic Treaty includes 6/ a specific commitment to elaborate rules and procedures relating to liability for damage arising from activities covered by the Protocol taking place in the Antarctic Treaty area. According to the Madrid Protocol Antarctica shall continue forever to be used exclusively only for peaceful purposes. The protection of the Antarctic environment and dependent and associated ecosystems and the intrinsic value of Antarctica, including its wilderness and aesthetic values and its value as an area for the conduct of scientific research, in particular research essential to understanding the global environment, shall be fundamental considerations in the planning and conduct of all activities in the Antarctic Treaty Area, which are to be carried out in accordance with elaborate environmental principles.

22. The process of elaborating rules and procedures relating to liability is ongoing and a draft annex on liability to the Madrid Protocol was considered at the 25th Antarctic Treaty Consultative Meeting (ATCM) in Warsaw from 10 to 20 September 2002 as well as at the 26th ATCM in Madrid, from 9 to 20

4/ For the text of revised Claims Manual, see the annex to document 92FUND/A.9/20. For the record of decisions of the ninth session of the Assembly see document 92FUND/A.9/31 of 22 October 2004.

5/ Resolution 4 on liability and redress concerning the use and intentional introduction into the environment of persistent organic pollutants.

6/ 1991 Madrid Protocol on Environmental Protection, art. 16.

June 2003. At the 27th ATCM, which took place in Cape Town from 24 May to 4 June 2004, member States considered and endorsed, among other things, a draft annex proposed by the Chair of the Working Group on Liability. The Working Group whose meeting preceded the ATCM addressed a number of issues arising from a revised Chairman's draft of the Liability Annex. These issues include: scope, non-retroactivity; limits on compensation (draft Article 9); criteria and mechanisms for the amendment of limits; actions for compensation, i.e. the question of who should bring actions (Article 7); dispute settlement mechanisms (interest was expressed to use an inquiry commission); the obligation of enforcement; the time limit for appealing to the fund and the nature and scope of the fund; definitions (Article 2), especially of "environmental emergency", "operator" and "response action". 7/ The Working Group agreed to continue working inter-sessionally on the Annex with a view to concluding negotiations within the next two years.

23. The draft annex establishes strict liability for operators for environmental emergencies in the Antarctic Treaty Area that arises from activities covered by the Madrid Protocol on Environmental Protection to the Antarctic Treaty. Some exemptions from liability are offered in case of acts necessary to protect human life or safety or an event constituting a natural disaster of an exceptional character, provided all reasonable measures were taken to prevent harmful impacts. Environmental emergencies are defined in the draft liability annex as any accidental event that results in, or imminently threatens to result in, any significant and harmful impact on the Antarctic environment. Under the draft, Parties shall require operators to undertake reasonable preventive measures that are designed to reduce the likelihood of environmental emergencies and their potential adverse impact. In case environmental emergencies arise from their activities, the operators are required to take prompt and effective response action. The Party of the operator and other Parties shall endeavour to take such response action in case the operator fails to undertake response action. The latter is strictly liable to pay the costs of response action taken by other Parties and in case response action is not taken, to pay the costs of the omitted response action into the Environmental Protection Fund established by the draft. Limits are proposed for the amount of compensation for which each operator can be held liable in respect of each environmental emergency and maintenance of adequate insurance or other financial security by operators is required within these limits. A State party is not liable for the failure of the operator, other than a governmental operator, to take response action.

F. United Nations Environment Programme (UNEP)

24. UNEP is currently organizing a series of experts meetings regarding the subject of Environmental Liability and Compensation. The first meeting was held in Geneva from 13 to 15 May 2002. 8/

25. Outcomes of the meeting, as reflected in the report 9/ included the identification of issues and gaps in the current network of liability and compensation. The identified issues and gaps listed in an Annex to the report include: the nature and scope of environmental liability; the issue of financial assurance and supplemental compensation; procedures for resolving claims; the nature of the regime and the question of capacity-building.

26. It was recommended that UNEP evaluate and explore specific measures to better assess any value they might add to current regimes and mechanisms. The activities to be evaluated and assessed are:

7/ Final report of the Twenty-Seventh Antarctic Treaty Consultative Meeting, Cape Town, South Africa, 24 May-4 June 2004.

8/ For this meeting the Secretariat of UNEP prepared a paper, entitled "Liability and Compensation Regimes related to Environmental Damage: Review by UNEP Secretariat". The document is available at UNEP's website at http://www.unep.org/depi/liabilityandcommpensation.asp.

9/ See UNEP/DEPI/L&C Expert Meeting 1/1.

(a) Development of guidelines, best practices or recommendations that otherwise facilitate the development and effective use of national and international environmental liability systems;

(b) Development of capacity-building programmes for public authorities including the judiciary (and where appropriate, the establishment of environmental courts and chambers), lawyers (litigating and defending), non-governmental organizations and other stakeholders, in particular, to promote and facilitate the use of national and international environmental liability systems;

(c) Promote research to enhance continued improvement of liability regimes including the identification of the reasons why some agreements covering environmental liability and compensation have not attracted wider State acceptance; and

(d) Develop new international agreement(s) on environmental liability and compensation.

27. An assessment of the options for future work by UNEP in the area of environmental liability and compensation, and revisions to the study prepared, is underway and a second experts meeting on the issue is envisaged.

G. International Atomic Energy Agency

28. Following a recommendation by the International Conference on the Safety of Transport of Radioactive Material held from 7 to 11 July 2003, the International Atomic Energy Agency (IAEA) established the International Expert Group on Nuclear Liability (INLEX) to explore and advise on issues related to nuclear liability. INLEX met three times, between October 2003 and July 2004, and reviewed and finalized explanatory texts on the nuclear liability instruments adopted under the auspices of the Agency, namely the 1963 Vienna Convention on Civil Liability for Nuclear Damage, 10/ and the 1997 Convention on Supplementary Compensation for Nuclear Damage. The Explanatory Texts 11/ are calculated to assist in the understanding and authoritative interpretation of the nuclear liability regime. The document explains, among other things, the origin of the international civil liability regime for damage caused by nuclear incidents, the purpose of the Conventions, the general principles of liability upon which the regime is based, i.e. (i) absolute liability; (ii) exclusive liability of the operator of the nuclear installation; (iii) limitation of liability in amount and/or limitation cover by insurance or other financial security; and (iv) limitation of liability in time.

29. With respect to the 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage, the Explanatory Texts provide the drafting history, and an extensive review of the purpose and meaning of the provisions of the Protocol. The purpose of the 1997 Protocol as stated in the preamble is to amend the 1963 Convention in order to provide for "broader scope, increased amount of liability of the operator of a nuclear installation and enhanced means for securing adequate and equitable compensation". The need to update the definition of "nuclear damage" was one of the important issues addressed by the Protocol. In this regard, the Explanatory Texts discuss, one of the "new heads of damage" introduced by the Protocol, namely measures of reinstatement of impaired environment and preventive measures. It clarifies that, in view of the difficulties involved in the monetary evaluation of environmental damage, it was decided in the Protocol to limit compensation to the costs of measures of reinstatement of impaired environment and as long as such impairment is significant. It is further explained that, while the question of what is a significant impairment is left to the competent court, there is an explicit instruction in the Protocol that damage is to be compensated under this head only in so far as it is not already included in the concept of property damage under the applicable substantive law. This is further illustrated in the Explanatory Texts. For example, measures taken by a farmer whose land has

10/ The Convention is amended by 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage. The Protocol entered into force on 4 October 2003.

11/ IAEA, Explanatory Texts- A comprehensive study of the Agency's nuclear liability regime by the IAEA International Expert Group on Nuclear Liability (INLEX), July 2004. The Explanatory Texts were approved by the IAEA Board of Governors on 13 September 2004 and by the IAEA General Conference that was held from 20 to 24 September 2004.

been contaminated would, in most cases fall under the concept of property damage, whereas the case of damage resulting from impairment of the environment is mainly designed to cover measures taken in respect of areas owned by the general public. 12/

H. The International Civil Aviation Organization

30. In 2001, the International Civil Aviation Organization (ICAO) launched a study on the modernization of the 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome Convention). The study was a response to the decision taken by the Legal Committee of ICAO at its thirty-first session, held from 28 August to 8 September 2000, to include in its programme of work the modernization of the Convention. Although the Rome Convention entered into force on 4 February 1958, it has failed to generate broad support. Over time, its provisions such as those on the limits of liability became outdated and the scope of damage and other standards failed to meet present day concepts and standards. Some of the few States that were parties have, in fact, begun withdrawing from the Convention. 13/

31. With the assistance of a Secretariat Study Group, a draft Convention on Damage Caused by Foreign Aircraft to Third Parties was prepared by ICAO Secretariat and submitted to the Legal Committee at its thirty second session held from 15 to 21 March 2004. The Committee reviewed the draft Convention and agreed that further work was needed in certain areas such as caps with respect to insurability and the rules of private international law. Subsequently, the ICAO Council decided, at the 6th meeting of its 172nd session, on 31 May 2004, to establish a Special Group on the Modernization of the 1952 Rome Convention to advance this work. 14/ The main focus of the Special Group would be to balance the demands for victim protection and the availability of insurance cover with adequate protection of the air transport system that avoids a compensation regime that would threaten the financial status of the air transport sector. In this regard, the availability of war-risk insurance has become a special concern after the attacks of 11 September 2001 on World Trade Centre in New York. The Special Group met in Montreal from 10 to 14 January 2005. The official report of the meeting will be considered at the next ICAO Council meeting. 15/

I. United Nations Compensation Commission

32. The United Nations Compensation Commission (UNCC) is a subsidiary organ of the United Nations Security Council established in 1991 to process claims resulting from Iraq's invasion and occupation of Kuwait. Compensation is payable for successful claims from a special fund that receives a portion of the proceeds from Iraq's oil sale. The UNCC has received over 2.6 million claims from about 100 Governments seeking a total of approximately US$ 350 billion.

33. According to paragraph 16 of Security Council resolution 687 (1991), Iraq is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources. Claims for environmental damage fall into two broad groups. The first group comprises claims for environmental damage and depletion of natural resources in the Persian Gulf region, including those resulting from oil-well fires and the discharge of oil into the sea. The second group of claims relate to the costs of clean-up measures undertaken by Governments that provided assistance to affected countries in the region in order to alleviate or mitigate damage caused by the oil-well fires or the oil spills.

12/ Ibid. p.41

13/ Canada, Austria and Nigeria have deposited instruments of denunciation with ICAO in 1976, 2000 and 2002, respectively.

14/ Progress report on the Modernisation of the Rome Convention of 1952, working paper A35-WP/18, LE/3, 08-07-04.

15/ MARSH, Aviation Special Bulletin, February 2005.

34. The UNCC Governing Council has adopted decision 7 (S/AC.26/1991/7/Rev.1) on criteria for processing environmental claims. Accordingly, direct environmental damage and depletion of natural resources as a result of Iraq's unlawful invasion and occupation of Kuwait which the Council has found to constitute compensable losses or expenses include 16/ losses or expenses resulting from:

(a) Abatement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters;

(b) Reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment;

(c) Reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment;

(d) Reasonable monitoring of public health and performing medical screenings for the purposes of investigation and combating increased health risks as a result of the environmental damage;

(e) Depletion of or damage to natural resources.

35. The UNCC Governing Council adopted a number of decisions since 2001 based on the recommendations of the panel of Commissioners, and awarded payment of compensation several claims. The claims relate to expenses incurred for measures to abate and prevent environmental damage, to clean and restore the environment, to monitor and assess environmental damage and public health risks alleged to have resulted from Iraq's invasion and occupation of Kuwait.

36. The Panel addressed a number of issues relating to causation in order to determine Iraq's liability and eligibility of each particular claim for compensation. In one instance, for example, the Panel made it clear that although the mere fact that the contribution of other factors (as parallel or concurrent causes) to any loss or damage may not necessarily exonerate Iraq from liability, the evidence submitted by the claimant must provide a sufficient basis for determining what proportion of the damage could have reasonably be attributed directly to Iraq's invasion and occupation of Kuwait.

III. DEVELOPMENTS AT REGIONAL LEVEL

A. European Union

EC directive on environmental liability with regard to the prevention and remedying of environmental damage

37. On 21 April 2004 the Council of the European Union (EU) and the European Parliament approved a directive on environmental liability with regard to the prevention and remedying of environmental damage 17/ after the differences on a number of issues between the two institutions of the EU were ironed out through a conciliation committee. In accordance with the conciliation process, the Council of the EU and the European Parliament agreed on adjustments with respect to the evaluation of the provisions relating to: (a) the development of financial security instruments; and (b) the exclusion of damage covered by certain international liability instruments.

38. Directive 2004/35/CE introduces a system of liability for environmental damage without prejudice to domestic civil-liability regimes for environmental damage. "Environmental damage" is defined in the directive as (a) damage to protected species and natural habitats, i.e. any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats

16/ Paragraph 35 of decision 7 (S/AC.26/1991/7/Rev.1). See paragraph 22 of the report and recommendations of the Panel of Commissioners concerning the second instalment of "F4" claims (S/AC.26/2002/26) for thoughts regarding the non-exhaustive nature of the list of specific losses and expenses under paragraph 35 of decision 7 of the UNCC Governing Council.

17/ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJEC 2004, L 143/56)

or species; (b) water damage, i.e. any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential of waters; and (c) land damage, i.e. any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms. The directive also defines "damage" as a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly.

39. According to the directive, operators shall bear the cost of prevention and clean-up or remediation measures. 18/ The member State concerned may cover those costs but only as a means of last resort. The limitation period for the recovery of costs is five years from the date on which those measures have been completed or the liable operator, or third party, has been identified, whichever is the later. Strict liability is the standard for defined hazardous activities, while fault-based liability is the basis for other activities.

40. The directive does not prevent member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage. 19/ The directive requires Member States to report to the Commission on the experience gained in the application of the directive by 30 April 2013 at the latest. On the basis of reports by member States, the Commission shall submit a report to the Council and Parliament before 30 April 2014. The report shall include, *inter alia*, a "review of the application of the Directive to environmental damage caused by genetically modified organism (GMOs), particularly in the light of experience gained within relevant international fora and Conventions, such as the Convention on Biological Diversity and the Cartagena Protocol on Biosafety, as well as the results of any incidents of environmental damage caused by GMOs". 20/

B. The United Nations Economic Commission for Europe (UNECE)

1. Civil liability and compensation for damage to transboundary waters caused by industrial accidents

41. In July 2001 the United Nations Economic Commission for Europe (UNECE) established an Intergovernmental Working Group on Civil Liability to develop a protocol on liability for transboundary damage caused by hazardous activities within the scope of the 1992 Convention on Protection and Use of Transboundary Watercourses and International Lakes (Water Convention) and the 1992 Convention on the Transboundary Effects of Industrial Accidents (Industrial Accidents Convention). After 15 months of negotiation the Working Group finalized its work on the Protocol with a view to signature and adoption of a legally binding instrument on the occasion of the Ministerial Conference "Environment for Europe", held in Kiev from 21 to 23 May 2003. The Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters was formally adopted and signed by 22 countries at the Ministerial Conference on 21 May 2003. It will be open for ratification by States Parties to one or both Conventions, but any United Nations Member State may accede to the Protocol upon approval by the Meeting of the Parties. It will enter into force when ratified by 16 States.

42. The Protocol provides for a comprehensive regime for civil liability and for adequate and prompt compensation for damage resulting from transboundary effects of industrial accidents on transboundary waters. Companies will be liable for accidents at industrial installations as well as transport via pipelines. The operator who causes the damage will be strictly liable for it, unless he can prove that one of the available defences applies to the situation. Fault-based liability is reserved for a person, other than the operator, whose wrongful intentional, reckless or negligent acts or omissions causes damage or

18/ Paragraph 1, Article 8, Directive 2004/35/CE.

19/ Paragraph 1, Article 16, Directive 2004/35/CE.

20/ Paragraph 3(b), Article 18, Directive 2004/35/CE.

contributes to damage. The definition of damage under the Protocol covers traditional damage to property and loss of life or personal injury as well as loss of income directly deriving from impairment of a legally protected interest in any use of protected areas and the cost of reinstatement and response measures. Financial limits of liability are set by the Protocol depending on the risk of the activity. To cover this liability, companies have to establish financial securities such as insurance or other guarantees.

43. The Protocol also incorporates provisions on private international law relating to questions of the competent court, the law applicable to claims and the mutual recognition and enforcement of judgements and arbitral awards.

2. Convention on Civil Liability for Damage caused During Carriage of Dangerous Goods by Road, Rail, and Inland Navigation Vessels (CRTD)

44. The Inland Transport Committee of the United Nations Economic Commission for Europe (UNECE) considered, at its sixty-sixth session held from 17 to 19 February 2004, a revised text of the 1989 Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail, and Inland Navigation Vessels (CRTD). The revised text was prepared by Ad Hoc Meeting of Experts constituted to look into the CRTD. The Committee noted that participation in the sessions of the Ad Hoc Meeting of Experts held from 7 to 9 July and 3 to 4 November 2003 was rather low. The Committee considered that in view of the uncertainties as to the willingness of member States to ratify a new CRTD, it would be premature to adopt the revised text. It felt necessary to pursue the matter on an informal basis and, therefore, decided not to renew the mandate of the Ad Hoc Meeting Experts. Member States are invited to study the revised CRTD and to conduct informal consultations. 21/

IV. DEVELOPMENTS IN PRIVATE INTERNATIONAL LAW AND INTERNATIONAL PROCEDURAL LAW CONCERNING TRANSBOUNDARY ENVIRONMENTAL DAMAGE

45. In the context of transboundary environmental damage, civil-liability proceedings allow a victim a direct and immediate remedy against the polluter and represent a means of implementation of the polluter pays principle instead of turning to Inter-State claims or the complex system of the law of State responsibility. In the absence of harmonization of the rules of civil liability for transboundary environmental damage at the global level, the differences in the national and international systems in place with regard to civil liability for damage resulting from injury to the environment will have to be reconciled. These divergences foster the need for conflict-of-law rules and underline the need for private international law and international procedural law to reconcile the various bodies of different national or international provisions dealing with transboundary environmental damage.

A. Private international law

46. The basic issues in private international law concern: (i) the international jurisdiction of the courts; (ii) the applicable law; and (iii) the recognition and enforcement of subsequent judgements. The limited analysis carried out below of the approaches of the European Union and the United States of America to these issues shows the main common elements of how these questions have been addressed in these legal systems.

21/ Report of the Inland Transport Committee on its Sixty-sixth Session (17-19 February 2004), , Inland Transport Committee, Economic Commission for Europe, ECE/TRANS/156, paragraphs 113-115.

1. *European Union*

Jurisdiction

47. The 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of the European Communities, as amended by the Conventions of the Accession of the new member States to that Convention (Brussels Convention) in conjunction with the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (the Lugano Convention) concluded between the EU member States and the countries of the European Free Trade Association (EFTA) 22/ provide the basis for the approach taken by the European Union.

48. In December 2000, a Council Regulation 23/ was agreed on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, which constitutes a directly applicable instrument that will to a large extent replace the 1968 Brussels Convention. The decisions issued by the European Court of Justice in the interpretation of the Brussels Convention will apply to the regulation as well.

49. In April 2002, the European Commission proposed that the Council authorize the opening of negotiations with a view to adopting a new Lugano Convention necessitated by the Brussels Regulation aiming at greater efficiency in obtaining and enforcing judgments in the European Union and since 1 March 2002 replacing the 1968 Brussels Convention, except with regard to Denmark. Accordingly, the new Lugano Convention is intended to extend the rules of the Brussels Regulation to the EFTA States and Poland.

50. In the case of environmental liability there are generally three different connecting points for creating an international competence for a national court: (i) the forum *rei sitae* (jurisdiction *in rem*) i.e. forum of the location (place) of the asset; (ii) the forum of the defendant's habitual residence /corporate domicile (jurisdiction in *personam*); and (iii) the forum of *locus delicti commissi* (the place where the conduct or occurrence took place).

The forum rei sitae

51. Assuming a jurisdiction *in rem* 24/ in cases of environmental liability 25/ would exclude all other legal venues from the beginning. 26/ To avoid this limitation of the claimant's choice of forum, the European Court of Justice (ECJ) advises a narrow interpretation. According to some of its rulings only those claims should fall under the jurisdiction *in rem* that display a close connection to the state and its local rule and customs. By this, the jurisdiction *in rem* generally plays an insignificant role.

22/ The European Free Trade Association - EFTA - is an international organisation promoting free trade and economic integration. Member states are Iceland, Liechtenstein, Norway and Switzerland. In 1988 Sweden, Austria and Finland were also members before joining the European Union.

23/ "Brussels Regulation, regulation no. 44/2001.

24/ The *Res* is latin for 'thing'. When a court exercises *in rem* jurisdiction, it exercises authority over a thing, rather than a person. *In rem* jurisdiction is limited to the property justifying jurisdiction and does not impose personal liability on the property owner.

25/ In view to cases of environmental liability jurisdiction *in rem* can generally be based on the impairment of real property rights or its legal enjoyment within claims in neighbour laws. One differentiates between preventative and restitutive claims; see Von Bar, Recueil Des Cours, Collected Courses, Volume 268 (1997) by Academie De Droit International De La Haye (RdC 268), p. 330.

26/ See Art.16 of the 1968 Brussels Convention and the parallel Lugano Convention.

The general forum of the defendant's habitual residence /corporate domicile 27/

52. In both the conventions and the regulation and in many national legal systems, the concept of the general forum of the defendant's habitual residence can be found. The simple background being that the judgement is normally directed against the defendant and he is subject to the local law and jurisdiction.

53. According to the regulation and the Lugano Convention, the internal law of the State whose courts are seized of the matter is applied to determine the defendant's domicile. By this, uniformity between the substantive and the procedural law is secured, although in case different States assume their jurisdiction, an accumulation of forums gives way to the possibility of forum shopping.

54. Uncertainty remains with regard to the determination of a corporate domicile as national laws have developed different criteria to determine the corporate domicile. For the purpose of the Brussels Regulation, a company or other legal person is domiciled at the place where it has its statutory seat or central administration or principal place of business. The regulation points out that the domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid the conflicts of jurisdiction.

55. Besides the jurisdiction of the court at the place of the head office of an enterprise, the Lugano Convention and the Brussels Regulation provide also a particular legal venue at the place of business of a corporation. 28/ By this, it is acknowledged that an enterprise that moves itself into the sphere of another jurisdiction should be held responsible there. The plaintiff then has the possibility to choose either the general venue at the defendant's domicile or the particular venue at the place of business. Given again the possibility of forum shopping, he can choose the most favourable forum. 29/

The particular forum of locus delicti commissi 30/

56. This legal venue, the jurisdiction at the place of tort, is for environmental liability the most important as the plaintiff gains the additional possibility to sue the polluter at the place of the tort with all its advantages (e.g. better assessment of the damage etc.). Actually, it represents a counterbalance to the general forum of the defendant's domicile but also to the narrow interpretation of the jurisdiction in rem. However, it is not always easy to qualify a suit as a tort claim even though a development towards a broad interpretation of the notion of tort can be observed. 31/

57. As already mentioned, the jurisdiction at the place of tort 32/ embraces the place of damage as well as the place of action. The European Court of Justice explicitly pointed this out in its decision *Handelskwekerij GJ Bier BV v. Mines De Potasse d'Alsace S.A.* 33/ The ECJ decided that in case of transboundary environmental damage, the plaintiff has the choice between either the forum of the place of behaviour and the forum of the place of effect (ubiquity principle). By this, the court not only stresses the importance of the closeness of the court to the facts in the case, but also the privileged position of the plaintiff. Indeed, it is up to him to make the most favourable choice considering not only the closeness to

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27/ Arts. 2, 52 and 53 of the 1968 Brussels Convention and the parallel 1988 Lugano Convention.

28/ Art. 5 No.5 of the 1968 Brussels Convention and the parallel 1988 Lugano Convention.

29/ Von Bar, RdC 268 (1997), p. 334 et seq.

30/ Art.5 No.3 of the 1968 Brussels Convention and the parallel Lugano Convention.

31/ For more see Von Bar, RdC 268 (1997), p. 338 et seq., who comes to the conclusion that environmental liability claims can be raised under art.5 No.3 of the 1968 Brussels Convention and the parallel Lugano Convention notwithstanding the fact that they may arise through national laws based upon neighbour principles. This position is supported by national court judgements dealing with this issue.

32/ See Art.5 No.3 of the 1968 Brussels Convention and the parallel Lugano Convention: "…the place, where the harmful event has occurred…".

33/ ECJ of 30 November 1976 – 21/76, Report, 1976, 1735 et seq.

the case but also other consequences of his choice, *inter alia*, the applicability of the most environmental friendly legislation. The possibility of forum shopping is however also limited by the ECJ. In *Marinari v. Lloyds Bank* 34/ the court gives a definition of the "place of effect" in the narrow sense of taking into account only primary damage. By this, the ECJ does not leave this question to different national laws but provides a uniform solution that avoids possible "spiralling extension of jurisdictional competences". 35/ However, uncertainties still exist, as the ECJ does not give a clear answer regarding the scope of primary damage. The court probably left some discretion here to restrict damage not only to loss of property and physical injury, but to be able to open its scope to other immaterial rights. 36/ Moreover, in connection with the question of limiting the plaintiff's choice of forum one has to take note of the fact that the rule of forum *non conveniens* does not apply within the Brussels Regulation or the Lugano Convention regime. Whereas in American jurisprudence the forum *non conveniens* doctrine plays a significant role, the European system relies on fixed rules of determining jurisdiction without giving recourse to a case by case based approach.

Applicable law

58. The question of what legal framework is applicable is not dealt with either in the Brussels Regulation or the Lugano Convention. It is dealt with in individual European national legal frameworks that link the law applicable to either the law of the place of behaviour in some countries, or the place of effect in others, or follow the principle of ubiquity (the law most favourable to the plaintiff prevails).

Recognition and enforcement

59. In the context of the European Union, the Brussels Regulation and the Lugano Convention also provide guidance with respect to recognition and enforcement of judgements. The instruments allow for a "*libre circulation des jugements*", 37/ including the recognition of provisional judgements without any special procedure being required. However, the reservation of the "ordre public" applies where the judgement itself cannot be contrary to public policy of the other State. Only violations of fundamental principles of the other States' legal system justify the invocation of the "*ordre public*" however. Reciprocity for recognition is not required, i.e a judgement of one State is to be recognized in another State notwithstanding the fact that judgements of the latter may not be recognized in the former.

60. Recognition is followed by enforcement. A judgement given in a member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, the judgement has been declared enforceable there.

2. United States of America

Jurisdiction

61. The United States approach is determined by case law and the main legal base is found in *The Second Restatement of Conflict of Laws* (1971), which provides in paragraph 87 that "a State may entertain an action that seeks to recover compensation for a trespass upon or harm done to land in another State".

34/ ECJ of 10 September 1995 – 364/93, Report, 1995, I, 2719 et seq.

35/ See Von Bar, RdC 268 (1997), p. 342, who points out that jurisdictional competence would exist in many states if environmental damage would embrace all its subsequent losses of property and money.

36/ Von Bar, RdC 268 (1997), p.343.

37/ Von Bar, RdC 268 (1997), p. 346.

62. In the case of *International Shoe Co v. Washington* 38/ it was decided that a state can assert jurisdiction over a defendant who has enough "minimum contacts" with the forum to make it reasonable to require his appearance. If these contacts are sufficiently continuous and systematic, the court should be given general jurisdiction, meaning that the defendant can be sued on grounds that are unrelated to his activities in the forum state. In the case of mere single and unrelated activities, he should have only specific jurisdiction, that is to say that the defendant can be sued only on causes that are related to his activities in the forum State. The problem is, however, that the existing case-law is far from being clear. In order to maintain some level of a general standard, the Supreme Court of the United States held in *Helicopteros Nacionales de Columbia SA v. Hall* 39/ that a substantial volume of sales of goods in the area of the court was sufficient to establish general jurisdiction.

63. In addition, one has to take note of State qualification statutes that force foreign enterprises to make themselves amenable to jurisdiction of a State as a *quid pro quo* for doing business there. However, even if jurisdiction is generally established, United States law generally applies the doctrine of forum *non conveniens.* 40/

64. There is a general possibility in environmental litigation to proceed against the non-resident polluter in the state where the damage occurred. The United States Supreme Court has, however, never expressed its view specifically on this matter. Generally, there is a flexible choice of forum possible, though the problems connected to the *forum non conveniens* doctrine and the substantial uncertainties in the specific jurisdiction for transboundary pollution do remain.

Applicable law

65. According to section 145 of the *1971 Second Restatement of Conflicts of Laws* the courts have to establish the closest, "most significant" connection. Section 145 reads:

> "(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in s. 6.
>
> (2) Contacts to be taken into account in applying the principles of s. 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicile, residence, nationality place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue."

38/ 326 US 310 (1945).

39/ 466 US 408 (1984).

40/ *Forum non conveniens* is Latin for "inappropriate forum." Although there are rules which govern where a lawsuit must be filed, sometimes the location is inconvenient for the witnesses or parties. If a party makes an adequate showing of inconvenience, the principle of *forum non conveniens* allows a judge to decline to hear, or to transfer, a case even though the court is an appropriate court for the case.

66. Section 6 of the *1971 Second Restatement of Conflicts of Law* provides basic criteria for evaluating the relationship between the law of a state and the issue at hand. These are the needs of the interstate and international systems, relevant policies of the forum and of other interested states, particulars of the parties involved in the issue, and ease in the determination and application of the law to be applied.

67. The United States law generally gives the possibility of choice. Taking into account the different criteria, the link may be established either to the place of the effect or to the place of behaviour. This may be decided on a case-by-case basis. However, the law of the place of effect may more often play an important role, 41/ as it represents the closest link to the victim, presupposing that the injury took place at his or her domicile.

Recognition and enforcement

68. The starting point can be seen in *Hilton v. Guyot* 42/, where the court invokes the ancient doctrine of "comity" calling for cooperation with other members of the international community and reasonable accommodation of the legal interests of the other states. However, the court underlined that the judgement should only be recognized, when there are no grounds to impeach it. In addition, the court establishes "reciprocity" as a prerequisite for recognition, meaning that the judgement will not be treated as conclusive in the United States as long as the other state does not recognize and enforce United States judgements. 43/

69. Today reciprocity is not demanded in all the United States, but in just a few. The recognition and enforcement of foreign judgements takes place in the same manner as judgements of sister states, which is entitled to full faith and credit. However, the preconditions are the following:

(a) The foreign court had personal and subject matter jurisdiction;

(b) The judgement does not conflict with another judgement;

(c) The judgement was not obtained by fraud; and

(d) The judgement does not violate the public policy of the recognizing state.

70. A problem arises in connection with the preclusive effects of foreign judgements, as it is not explicitly precluded that a plaintiff can choose between either suing the original claim again or seeking for enforcement of the given judgement. In any event, the *res judicata* (claim preclusion) and estoppel effect (issue preclusion) are applicable, so that the final decision of the foreign court is valid under the above-mentioned circumstances. 44/

71. State immunity must be taken into account while enforcing the recognized judgement, as the sovereignty of the foreign State has to be guarded and respected. By this, enforcement works only through cooperation and administrative assistance.

B. International procedural frameworks

72. The following paragraphs seek to provide a short overview of the processes/initiatives to bring the issue to the international level and establish international procedural frameworks for the solution of international environmental liability claims.

41/ Von Bar, RdC 268 (1997), p. 367.

42/ 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895).

43/ Hay, *Conflict of Laws,* p. 105.

44/ Hay, *Conflict of Laws,* p. 106.

1. Permanent Court of Arbitration

73. On 19 June 2001, the Rules of Procedure for Arbitrating Disputes Relating to Natural Resources and/or the Environment were approved by the Administrative Council of the Permanent Court of Arbitration (PCA). The rules, which are based on the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules, provide for a unified forum to which States, intergovernmental organisations, non-governmental organiZations, other legal entities and private Parties can have recourse when they agree to seek resolution to disputes relating to the environment and/or natural resources including in relation to disputes between two or more States parties to a multilateral agreement relating to access to and utilization of natural resources concerning the interpretation and application thereof. The rules provide an optional framework for resolution of disputes relating to natural resources and the environment with emphasis on flexibility and party autonomy. They are open for use by any combination or number of parties that agree thereto. In order to rapidly provide both scientific and juridical resources to the parties seeking resolution of a dispute, the Rules provide for the optional use of:

(a) A panel of arbitrators with experience and expertise in environmental or conservation of natural resources law nominated by the Member States and the Secretary-General, respectively (art. 8, para. 3);

(b) A panel of environmental scientists nominated by the Member States and the Secretary-General, respectively, who can provide expert scientific assistance to the parties and the arbitral tribunal (art. 27, para. 5).

74. Where arbitrations deal with highly technical questions, provision is made for the submission to the arbitral tribunal of a document agreed to by the parties, summarizing and providing background to any scientific or technical issues which the parties may wish to raise in their memorandums or at oral hearings (art. 24, para. 4).

75. The arbitral tribunal is empowered, unless the parties choose otherwise in their compromis, to order, within the subject matter of the dispute before the tribunal, any interim measures necessary to prevent serious harm to the environment (art. 26). Because time may be of the essence in disputes concerning natural resources and the environment, the Rules provide for arbitration in a shorter period of time than under previous PCA Optional Rules or the UNCITRAL Rules. The arbitral tribunal itself can be constituted rapidly because, if the parties cannot agree on arbitrators, the Secretary-General can appoint arbitrators.

76. Application of the rules take place where all parties have agreed in writing that a dispute that may arise or that has arisen between them shall be referred to arbitration under the Rules. The characterization of the dispute as relating to the environment or natural resources is not necessary for jurisdiction where all parties have agreed to settle a dispute under the Rules. The Rules provide for a readily available dispute settlement procedure that can be referred to in disputes arising under the context of environmental agreements containing dispute settlement clauses but not any defined procedures.

77. The Optional Rules for Conciliation of Disputes Relating to the Environment and/or Natural Resources 45/ adopted by the PCA on April 16, 2002 complement the environmental arbitration rules. The conciliation rules are also available for use of private parties, other entities existing under national or international law, international organisations and States where all Parties agree to use them. Together, the arbitration and conciliation rules developed by the PCA provide the international community with a wide variety of procedural machinery for addressing environmental disputes.

45/ The Environmental Rules can be found at www.pca-cpa.org/EDR.

2. Hague Conference

78. At the meeting in May 2000 of The Special Commission on General Affairs and Policy of the Hague Conference, 46/ the issue of civil liability resulting from transfrontier environmental damage and the potential role of the Hague Conference was on the agenda. 47/ On the basis of a summary of the international instruments that already exist and a detailed study on substantive and comparative international law of different legal systems possible subjects were identified that could be dealt with in a new private international law instrument. While some of the experts felt that the topic was important and promising and spoke in favour of giving priority to it, the majority of members of the Special Commission decided that no priority should be given to the preparation of an agreement on the conflict of jurisdictions, applicable law and international judicial and administrative cooperation in respect of civil liability for environmental damage. As a result, the subject has remained on the agenda of the Hague Conference, but without priority, and hence no concerted action is being taken by the Permanent Bureau on this subject at this time. The Permanent Bureau of the Hague Conference remains attentive to developments on this subject.

46/ The Hague Conference is an intergovernmental organization, the purpose of which is "to work for the progressive unification of the rules of private international law". The principal method used to achieve this purpose consists in the negotiation and drafting of multilateral treaties (conventions) in the different fields of private international law (e.g. international judicial and administrative co-operation; conflict of laws for contracts, torts, maintenance obligations, status and protection of children, relations between spouses, wills and estates or trusts; jurisdiction and enforcement of foreign judgments).

47/ The Special Commission was presented with a note prepared by the Secretariat to the Conference on “Civil Liability Resulting from Transfrontier Environmental Damage- a case for the Hague Conference?” The document is available on ftp://ftp.hcch.net/doc/gen_pd10e.doc.