

# Civil Liability Regimes as a Complement to Multilateral Environmental Agreements: Sound International Policy or False Comfort?

Anne Daniel

Over the last 30 years, the international community has increasingly chosen multilateral environmental agreements (MEAs) as the vehicles through which environmental problems requiring global cooperation are managed. Such agreements have become increasingly regulatory in nature, and have provided regular management meetings of parties to adapt continuously regulatory regimes in order to respond to increased scientific knowledge and changes in circumstance.<sup>1</sup>

In the last 10 years, the idea of liability instruments to support environmental goals has become an increasingly prevalent one. Although as long ago as the Stockholm Declaration in 1972 the international community agreed that attention should be focused on this topic,<sup>2</sup> and reiterated this in the 1992 Rio Declaration,<sup>3</sup> it is only in the last few years that this has been taken up collectively within United Nations Environment Programme (UNEP) MEAs.

However, this trend has developed at a time when it is well known that, of the international liability regimes that have been negotiated, few are in force and the only one with any practical experience in compensating victims of environmental harm is the oil-pollution regime. Moreover, of the regimes that have been developed and are not in force, there are flaws in those regimes that have been identified.

It is important to distinguish at the outset the differences between State liability and civil liability. State liability refers to 'the liability of international persons under the operation of rules of international law of

State responsibility'; while international civil liability is 'liability of any legal or natural person under the rules of national law adopted pursuant to international treaty obligations establishing harmonized minimum standards'.<sup>4</sup> This article will focus on aspects of international civil liability.

The purpose of this article is to examine recent civil liability developments in MEAs and consider whether the development of international liability regimes necessarily reflects sound international environmental policy, or may in some situations simply provide false comfort to proponents of such regimes. The first part of this article briefly describes existing civil liability regimes and outlines some of the challenges those regimes have experienced. The second part discusses issues arising in UNEP MEA venues where the topic of international civil liability is currently being discussed. The third section draws some lessons learned from the first two parts. The final part suggests a number of other policy approaches to MEAs that might provide alternative or complementary methods of achieving some of the goals identified by proponents of civil liability regimes, while avoiding some of the negative features of those regimes.

## CIVIL LIABILITY EFFORTS IN NON-UNEP FORA IN RELATED FIELDS: SUCCESSES AND FAILURES<sup>5</sup>

It is not the purpose of this section of the article to describe fully all of the features of the international civil liability regimes noted here, but simply to provide

<sup>1</sup> A. Chayes and A.H. Chayes, *The New Sovereignty* (Harvard University Press, 1996); R.R. Churchill and G. Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law', 94 *AJIL* (2000), 623.

<sup>2</sup> Stockholm Declaration on the Human Environment (UN Doc. A/CONF.48/14, Stockholm, 1972), printed in 11 *ILM* (1972), 1416, Principle 22.

<sup>3</sup> Rio Declaration on Environment and Development (UN Doc. A/CONF.151/26/Rev. 1, Vol. I, Rio de Janeiro, 1992), Principle 13.

<sup>4</sup> P. Sands, *Principles of International Environmental Law* (Manchester University Press, 1995), at 629.

<sup>5</sup> For a detailed review of numerous international liability regimes, see R. Wolfrum and C. Langenfeld, *Environmental Protection by Means of International Liability Law* (Erich Schmidt Verlag, 1999).

broad outlines and try to elicit some of the lessons that have been learned in their negotiation and operation.

## NUCLEAR LIABILITY TREATIES

Nuclear liability regimes had as their goal a harmonized approach to liability rules in order to protect victims of accidents better, while at the same time limiting the liability of industry so as to make nuclear power a feasible option.<sup>6</sup> The key conventions for stationary nuclear installations, the regional Paris Convention<sup>7</sup> and the global Vienna Convention,<sup>8</sup> have provided the basic outlines of the approaches that were taken up in later International Maritime Organization (IMO) treaties on ship-source pollution. The Vienna Convention, the first global treaty of this type, utilized strict liability for the operator of the installation, but limited this liability, while requiring insurance. The convention was criticized over the years because of its low limits of liability, its failure to cover environmental damage, the shortness of its time limits, and the fact that claims had to be brought where the incident occurred and not where the damage occurred.<sup>9</sup> When the convention was updated in 1997 and a Supplementary Compensation Convention also adopted, a number of these weaknesses were corrected.<sup>10</sup> The changes increased the limits of liability, broadened the definition of damage, and extended the time period for bringing an action to 30 years to reflect better the length of time before damage might manifest itself.<sup>11</sup> While it has been said that the overall approach in the 1997 Convention does not necessarily perfectly reflect the application of the polluter-pays principle, it is acknowledged to reflect the reality that, if nuclear power is going to continue to be feasible, the costs of accidents must be widely shared.<sup>12</sup> One area that could still be improved upon is the fact that, while many jurisdictional issues for claims have been simplified, there is no simplified procedure to deal with a major accident where many claims would be received, such as Chernobyl.<sup>13</sup> Despite the long-standing nature of the Vienna Convention, there have been no claims

under it,<sup>14</sup> but it is considered to provide a very useful model for international civil liability regimes for hazardous activities because it sets up a scheme that facilitates access by victims to legal remedies, ameliorates issues of proof and liability standards, and establishes a shared loss allocation and compensation scheme for valued activities.<sup>15</sup> Unfortunately, the improvements brought forward in 1997 have not yet entered into force, and the lack of an increased fund in particular is a weakness in the scheme.<sup>16</sup>

## IMO LIABILITY REGIMES FOR OIL POLLUTION, HNS AND BUNKER OIL

Much has been written about the success of the IMO treaties on oil pollution, and it has been stated as regards those and the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (the HNS Convention)<sup>17</sup> and the Bunker Oil Convention,<sup>18</sup> that they 'constitute an integrated regime of liability for ship-source marine pollution'.<sup>19</sup>

The Convention on Oil Pollution Damage (1969) and the International Fund Convention (1971) were updated in 1992 through new protocols that are actually new conventions and that entered into force in 1996.<sup>20</sup> The approach taken in these instruments is strict liability for the ship owner, with some exonerations, limited liability and an additional fund, financed by a levy on oil importers. Pollution damage includes loss or damage caused anywhere outside the ship resulting from the contamination from the oil, but impairment of the environment other than loss of profit from such impairment is limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken, as well as the costs of

<sup>6</sup> R.R. Churchill, 'Facilitating (Transnational) Civil Liability Litigation for Environmental Damage by Means of Treaties: Progress, Problems, and Prospects', 12 *YIEL* (2001), 3, at 7; P. Birnie and A. Boyle, *International Law and the Environment*, 2nd edn, (Oxford University Press, 2001), at 476.

<sup>7</sup> Organization for Economic Cooperation and Development (OECD) Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960).

<sup>8</sup> Convention on Civil Liability for Nuclear Damage (Vienna, 29 May 1963).

<sup>9</sup> See R.R. Churchill, n. 6 above, at 10–11.

<sup>10</sup> Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 12 September 1997); Convention on Supplementary Compensation for Nuclear Damage (Vienna, 12 September 1997).

<sup>11</sup> See R.R. Churchill, n. 6 above, at 11–12.

<sup>12</sup> See P. Birnie and A. Boyle, n. 6 above, at 481.

<sup>13</sup> *Ibid.*, at 482.

<sup>14</sup> *Ibid.*, at 484. Churchill suggests that one of the reasons claims have not been made is that many of the parties do not actually have nuclear facilities. For example, at the time of the Chernobyl accident, the former Soviet Union was not a party to the Vienna Convention; see R.R. Churchill, n. 6 above, at 10.

<sup>15</sup> *Ibid.*; P. Birnie and A. Boyle, n. 6 above, at 484.

<sup>16</sup> *Ibid.*

<sup>17</sup> International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (London, 3 May 1996), not yet in force.

<sup>18</sup> International Convention on Civil Liability for Bunker Oil Pollution Damage (London, 23 March 2001).

<sup>19</sup> International Law Commission, Special Rapporteur Rao, *First Report on the Legal Regime for Allocation of Loss in Case of Transboundary Harm arising out of Hazardous Activities* (A/CN.4/531, 21 March 2003) (hereinafter Rao First Report), at para. 65. See also M. Goransson, 'Liability for Damage to the Marine Environment', in A. Boyle and D. Freestone (eds), *International Law and Sustainable Development* (Oxford University Press, 1999), 345.

<sup>20</sup> See International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969), Article I; and see International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 18 December 1971), Article II.

measures to prevent or minimize damage and loss or damage caused by such measures. The USA is not a party, primarily due to the low liability limits, and this has also been an issue in the overall success of the regime in that, because the fund's limits have been exceeded on a number of occasions, this reduces the speed and amount of payments to victims.<sup>21</sup> Overall, however, these regimes are considered very successful and are the only really practical example the international community has of an active international liability regime with experience at compensating victims of hazardous activities.

The HNS Convention is similarly constructed, with strict liability for the ship owner, which is limited, with a supplementary fund with contributions from the receivers of HNS cargo or governments on their behalf.<sup>22</sup> However, given its adoption in 1996 and the low level of ratification activity, it has been questioned whether this convention will ever enter into force.<sup>23</sup>

The Bunker Oil Convention, adopted in 2001, has a similar construction, with strict but limited ship-owner liability, but no supplementary funding. A further flaw is that it also has no uniform liability limits: ship owners can use national or international limits.<sup>24</sup>

### **LONDON CONVENTION (1972) AND 1996 PROTOCOL**

There is a provision in the London Convention about parties pursuing procedures on liability and dispute settlement.<sup>25</sup> The former item has not been recently pursued within the convention. At the Eleventh Consultative Meeting of Contracting Parties, a small legal task group was asked to examine this question and the team's report was adopted by the Twelfth Consultative Meeting. The report questioned whether this was a matter of priority in the London Convention and further questioned whether any regime that was elaborated would be likely to achieve wide acceptance by contracting parties. Under the 1996 Protocol, which is not yet in force, Article 15 states:

In accordance with the principles of international law regarding State responsibility for damage to the environment

of other States or to any other area of the environment, the Contracting Parties undertake to develop procedures regarding liability arising from the dumping or incineration at sea of wastes or other matter.<sup>26</sup>

It is noteworthy that the parties to the London Convention have begun discussions on the development of a compliance procedure to fulfil the requirements of Article 11 of the protocol in order to prepare for the protocol's entry into force. No work has been commenced under Article 15.

### **LUGANO CONVENTION ON CIVIL LIABILITY FOR DAMAGE RESULTING FROM ACTIVITIES DANGEROUS TO THE ENVIRONMENT (1993)**

This regional agreement of the Council of Europe has not entered into force, even though it only requires three ratifications to do so.<sup>27</sup> The treaty contains the only comprehensive approach in an international civil liability regime to environmentally harmful activities.<sup>28</sup> Among the criticisms of this treaty, and among the suppositions for why it has not entered into force, are that, according to some countries, it is too different from their national approaches; liability is unlimited; insurability is thus an issue; the breadth and uncertainty around the definition of 'dangerous activity' and which activities are covered; the existence of sectoral liability treaties; the European Community's work on harmonization of rules on civil liability for environmental damage;<sup>29</sup> a general feeling that it is too vague and broad to be acceptable to States.<sup>30</sup> There appears to be little prospect of it entering into force unless the European Community decides to participate.<sup>31</sup>

<sup>21</sup> See P. Birnie and A. Boyle, n. 6 above, at 388. The liability limits were thought by Congress to be too low, compared to domestic limits post-Exxon Valdez.

<sup>22</sup> See Rao First Report, n. 19 above, at para. 62.

<sup>23</sup> See R.R. Churchill, n. 6 above, at 22.

<sup>24</sup> Ibid., at 20.

<sup>25</sup> London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico City, Moscow, Washington, 29 December 1972). The Task Team's report is found at LDC 12/8 (1991) and reported in International Maritime Organization (IMO), *The London Dumping Convention: The First Decade and Beyond* (IMO, 1991), at 93–95.

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<sup>26</sup> Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972) (London, 7 November 1996), Article 15, not yet in force, printed in 36 ILM (1997), 7.

<sup>27</sup> Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993), not yet in force.

<sup>28</sup> See R.R. Churchill, n. 6 above, at 27.

<sup>29</sup> Ibid., at 28. See United Nations Economic Commission for Europe Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents (Kiev, 21 May 2003), opened for signature 21 May 2003. See *Responses to the Questionnaire on the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention)* (MPWAT/2001/2-CPTEIA/2001/2 and Add.1, 1 May 2001), available at <<http://www.unece.org/env/civil-liability>>.

<sup>30</sup> J.G. Lammers, 'International Responsibility and Liability for Damage Caused by Environmental Interferences', 31 *Env. Policy and Law* (2001), 42, at 49; T. Scovazzi, 'State Responsibility for Environmental Harm', 12 *YIEL* (2001), 43, at 59.

<sup>31</sup> P. Birnie and A. Boyle, n. 6 above, at 281. R.R. Churchill, n. 6 above, at 28–29.



## **PROTOCOL ON CIVIL LIABILITY AND COMPENSATION FOR DAMAGE CAUSED BY THE TRANSBOUNDARY EFFECTS OF INDUSTRIAL ACCIDENTS ON TRANSBOUNDARY WATERS**

When the United Nations Economic Commission for Europe Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents opened for signature on 21 May 2003, this regional treaty attracted 22 signatures. It applies to damage caused by the transboundary effects of an industrial accident on transboundary waters, and only to damage suffered in a party other than the party where the industrial accident occurred.<sup>32</sup> The definition of industrial accident relies on the definition of 'hazardous activity', which is any activity in which one or more hazardous substances are present or may be present in quantities at or in excess of the threshold quantities listed in Annex 1, and which is capable of causing transboundary effects on transboundary waters and their water uses in the event of an industrial accident.<sup>33</sup> The protocol channels liability to the operator, although there are exonerations. Liability is limited and operators must be insured. The ultimate limitation period is 15 years.<sup>34</sup> The definition of damage includes the following: loss of income directly deriving from an impairment of a legally protected interest in any use of the transboundary waters for economic purposes, incurred as a result of impairment of the transboundary waters; the costs of measures of reinstatement, limited to the costs of measures actually taken or to be undertaken; and the costs of response measures, including any loss or damage caused by such measures, to the extent that the damage was caused by the transboundary effects of an industrial accident on transboundary waters. The definition of 'measures of reinstatement' includes the introduction of the equivalent of these components into the transboundary waters in circumstances where the environment cannot be restored.<sup>35</sup> It will be interesting to monitor this treaty to see whether countries will see it as providing a useful tool to address concerns over industrial accidents and their impacts on water. The protocol will enter into force on the ninetieth day after the date of deposit of the sixteenth

instrument of ratification, acceptance, approval or accession.<sup>36</sup>

## **ANTARCTIC TREATY: MADRID PROTOCOL**

The Madrid Protocol provides for an environmental protection and conservation scheme for the Antarctic continent.<sup>37</sup> Under Article 16 of the protocol, parties are required to elaborate rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area, with a view to adopting one or more annexes to the protocol on such rules and procedures. A group of legal experts met between 1993 and 1998 to discuss the complex legal issues surrounding the establishment of liability rules for the Antarctic. The group's work foundered for a number of reasons. No policy guidance was provided to it about the purpose of the liability rules. No analysis of the activities in the Antarctic, including their environmental risks, was undertaken. There was no analysis of liability rules in other regimes in force to supplement their work.<sup>38</sup> Added to this were the remoteness of the Antarctic and the complex jurisdictional questions that exist over its territory.<sup>39</sup> In 1998, the Consultative Meeting conferred this work upon a working group, taking it out of the hands of the more informal group. The most recent discussions were held in June 2003.

Among the future issues that will need to be resolved are those typical to international civil liability regimes, but made more complex in the Antarctic context. As regards damage, the question is whether only environmental damage should be covered, or whether damage to persons or property should also be included. Some have questioned whether it is appropriate to cover the latter in an area of the global commons where the concern is primarily environmental protection.<sup>40</sup> This is conceptually different from most sectoral liability treaties in that the focus is on the damage that may occur, rather than on regulating a hazardous activity.<sup>41</sup> Another issue is the threshold of damage and whether there should be a certain level of significance for any regime to be triggered.<sup>42</sup> Whether strict liability or

<sup>36</sup> Ibid., Article 29.

<sup>37</sup> See Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 4 October 1991), not in force; and see Antarctic Treaty (Washington, 1 December 1959).

<sup>38</sup> M. Skare, 'Liability Annex or Annexes to the Environmental Protocol: A Review of the Process within the Antarctic Treaty System', in D. Vidas (ed.), *Implementing the Environmental Protection Regime for the Antarctic* (Kluwer Academic Publishers, 2000), 63, at 180.

<sup>39</sup> Ibid., at 163–164.

<sup>40</sup> R. Lefeber, 'The Prospects for an Antarctic Environmental Liability Regime', in *ibid.*, 199, at 203.

<sup>41</sup> Ibid., at 201.

<sup>42</sup> Ibid., at 204.

<sup>32</sup> See Protocol on Civil Liability and Compensation for Damage, n. 29 above, Article 3.

<sup>33</sup> Ibid., Article 2.

<sup>34</sup> Ibid., Articles 4, 9, 11 and 10, respectively.

<sup>35</sup> Ibid., Article 2.

fault-based liability is more appropriate is an issue. Another complexity is whether jurisdiction of State parties over operators is a prerequisite for the imposition of liability on an operator.<sup>43</sup> Another unique issue is whether there should be compensation for irreparable damage to the environment,<sup>44</sup> something steered clear of in other regimes to date.

## RECENT LIABILITY DEVELOPMENTS IN UNEP MEAS

Despite the exhortations in the Law of the Sea Convention,<sup>45</sup> the Stockholm and Rio Declarations,<sup>46</sup> and the London Convention of 1972, the international community has been fairly slow to respond to calls for improving the state of international environmental law in the area of liability, although admittedly this has been during a period of extensive norm-making through MEAs. However, important developments in the liability regimes for oil pollution in 1992, and in 1996 for hazardous and noxious substances, helped provide useful precedents for analyses being undertaken on MEAs.<sup>47</sup>

The International Law Commission's (ILC) main contribution to international environmental law has been its work on international liability for injurious consequences of acts not prohibited by international law, which began in 1978.<sup>48</sup> The many years involved and the lack of conceptual clarity that has resulted has been criticized.<sup>49</sup> The ILC completed in 2001 a set of draft articles on the prevention of significant transboundary harm from hazardous activities and recommended the elaboration of a draft convention.<sup>50</sup> The UN General Assembly, in considering these draft articles, felt that more was required to complete the ILC's work.<sup>51</sup> In 2002, a working group was created to examine this issue further and make recommendations. These recent efforts of the ILC might be of assistance

in providing a useful conceptual background for some of the discussions unfolding within UNEP on liability. Special Rapporteur Rao's first report makes a number of observations in the context of developing a model of allocation of loss.<sup>52</sup> This report examines the history of the examination of this issue within the ILC, then examines various existing models for allocation of loss in international law and their common features. About its examination of these models, the Special Rapporteur noted:

These models make one point very clear. They demonstrate that States have a duty to ensure that some arrangement exists to guarantee equitable allocation of loss. While the schemes do show common elements, they also show that each scheme is tailor-made for its own context. It does not follow that in every case that duty is best discharged by negotiating a liability convention, still less one based on any particular set of elements. The duty could equally well be discharged, if it is considered appropriate, as in European Community law, by allowing forum shopping and letting the plaintiff sue in the most favourable jurisdiction, or by negotiating an ad hoc settlement, as in the Bhopal litigation.<sup>53</sup>

Until the late 1980s very little activity occurred within UNEP MEAs with respect to questions of liability. Beginning in 1989 with the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, however, the issue of liability is being canvassed with increasing regularity in a number of MEAs. Apart from a number of specific MEA activities, UNEP has recently begun conducting work in this area as suggested by its Montevideo Law Programme. UNEP had produced a detailed background study of a wide range of liability regimes, which was provided to a meeting of experts held in May 2002. Those experts tried to assess why many liability regimes had not entered into force, while others had. Among the factors that affected whether a liability regime would be successful were the following: the intended purpose (to provide a remedy or deter conduct); the nature and scope of liability; financial assurance and supplemental compensation; and the procedure for resolving claims.<sup>54</sup> The experts suggested four areas for further evaluation by UNEP: development of guidelines and best practices; capacity-building programmes; promotion of research to bring about improvements and implementation of liability regimes; and the development of a new international agreement or agreements on environmental liability and compensation. UNEP is evaluating these recommendations and intends to hold a further expert meeting in 2003.<sup>55</sup>

<sup>43</sup> Ibid., at 207.

<sup>44</sup> Ibid., at 209.

<sup>45</sup> United Nations Convention on the Law of the Sea (Montego Bay, 1982), Article 235(3).

<sup>46</sup> Principles 22 and 13, respectively.

<sup>47</sup> G.F. Silva Soares and E. Vieira Vargas, 'The Basel Liability Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal', 12 *YIEL* (2001), 69, at 76–85 discuss these and other precedents that were important in the Basel work.

<sup>48</sup> A. Boyle, 'Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited', in A. Boyle and D. Freestone, n. 19 above, 61 at 73.

<sup>49</sup> Ibid.

<sup>50</sup> Official Records of the General Assembly, Fifty-Sixth Session, Supplement No 10 (A/56/10), at para. 97.

<sup>51</sup> United Nations General Assembly Resolution 56/82; see Rao First Report, n. 19 above, at 3.

<sup>52</sup> Rao First Report, *ibid.*, at 3.

<sup>53</sup> Ibid., at para. 150.

<sup>54</sup> For the report of the experts meeting, see Liability and Compensation for Environmental Damage, First Meeting of Experts, *Report of the Meeting* (UNEP/DEPI/L&C Expert Meeting 1/1, 8 August 2002).

<sup>55</sup> Ibid.

## **BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL**

At the time of negotiation of the Basel Convention, there was no time to develop liability rules that were desired by some countries, and differences on the issue were resolved by including a provision which required the parties to deal with the topic later through the specific form of a protocol. These efforts were supplemented by language in Resolution 3 at the Diplomatic Conference adopting the treaty, which required a working group to be established to begin developing elements which could be included in such a protocol.<sup>56</sup>

Article 12 of the Basel Convention provides:

The Parties shall cooperate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes.

Based on the working group's efforts, the secretariat drafted a set of articles that were discussed at the First Conference of the Parties (COP-1), where the parties agreed to establish an ad hoc working group of legal and technical experts to develop a draft protocol on liability and compensation.<sup>57</sup> Those negotiations spanned the decade, finally concluding in 1999.

The protocol provides for a civil liability regime based on precedents developed in other fields, modified for the purposes of the Basel Convention and its particular needs.<sup>58</sup> Its objective is stated in Article 1:

to provide for a comprehensive regime for liability and 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.

It provides for a 'first tier' of civil liability, with strict liability for the notifier until the disposer has taken possession of the wastes, when it shifts to the disposer. In cases of failure to notify or where notification is provided by the party of export, strict liability is channelled to the exporter until the disposer takes possession of the wastes.<sup>59</sup> There is a list of exonerations

from strict liability, including where it results from the following: armed conflict, hostilities, civil war or insurrection; natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character; wholly the result of compliance with a compulsory measure of a public authority of the State where the damage occurred; or wholly the result of the wrongful intentional conduct of a third party, including the person who suffered the damage. There is fault-based liability for those who have contributed to damage through failure to comply with the provisions of the convention or through intentional wrongful, reckless or negligent acts or omissions. Where the financial instruments do not provide sufficient coverage or where the exonerations apply, the protocol does not provide for an international compensation fund.<sup>60</sup>

The protocol's application section is fairly complex, addressing the scope of coverage of liability with respect to the stages of the transboundary movement of hazardous wastes, identifying when the protocol does not apply to the party of export, its geographical scope based on the location of the damage, rules with respect to the protocol's application to transboundary movements covered by Article 11 of the convention agreements,<sup>61</sup> and the relationship between the protocol and other liability instruments.<sup>62</sup>

Damage includes loss of income due to impairment of the environment and the costs of measures of reinstatement of the impaired environment (limited to the costs of measures actually taken or to be taken) and the costs of preventive measures to the extent that the damage arises out of the hazardous properties of the wastes. The persons strictly liable are required to maintain insurance or other financial instruments for the period of the time limit of liability for amounts not less than the amounts set out in Annex B. Annex B indicates that the maximum limits of liability are to be established at the national level. The time limits of liability are 5 years from when the person ought reasonably to have known of the damage but no later than 10 years from the date of the incident.<sup>63</sup>

At the Basel Convention COP-5, the COP adopted the protocol, decided to enlarge the scope of the Technical Cooperation Trust Fund and provided for an international fund for protocol matters. It requested the Convention's Expanded Bureau, in consultation with

<sup>56</sup> K. Kummer, *International Management of Hazardous Wastes* (Clarendon Press, 1995), at 72. See Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (Basel, 22 March 1989); and see Basel Protocol on Liability and Compensation (Basel, 10 December 1999).

<sup>57</sup> K. Kummer, *ibid.*, at 243.

<sup>58</sup> See G.F. Silva Soares and E. Vieira Vargas, n. 47 above, at 85.

<sup>59</sup> See Basel Protocol on Liability and Compensation, n. 56 above, Article 4(1).

<sup>60</sup> *Ibid.*, Article 15.

<sup>61</sup> All of the foregoing is dealt with in *ibid.*, Article 3.

<sup>62</sup> *Ibid.*, Article 11. Under Article 4(5) of the Basel Convention, n. 56 above, parties are prohibited from importing hazardous wastes from, or exporting them to, a non-party. This strict rule is softened by Article 11 of the convention, which allows for bilateral, regional and multilateral agreements or arrangements meeting certain standards to be entered into with non-parties.

<sup>63</sup> See Basel Protocol on Liability and Compensation, n. 56 above, Article 13.



interested parties and stakeholders, to develop interim guidelines for the provision of funds from the Technical Cooperation Trust Fund in three areas, including a top-up fund for the protocol after it enters into force where compensation for damage to and reinstatement of the environment is not adequate. The guidelines were adopted at COP-6.<sup>64</sup>

At COP-5, the parties also took note of Article 23 of the protocol, which would have allowed Annex B of the protocol to be amended at COP-6, even if the protocol was not in force, and requested the legal and technical working groups to consider paragraph 2 of Annex B with a view to presenting a recommendation to COP-6. Between COP-5 and COP-6, Australia raised the question of utilizing Article 23 of the protocol, on the basis that the cool reaction to the protocol might be due to the annexes providing inappropriate financial limits. Although Australia prepared a study on the matter,<sup>65</sup> discussions at the legal working group meetings in 2001 and 2002 revealed little appetite to amend a treaty that had not yet entered into force, even though that eventuality had been provided for.

Since 1999, the treaty has only received 13 signatures and no ratifications, with 20 ratifications/accessions required to bring it into force. A number of criticisms have been made of the protocol, which may in fact explain the low participation rate. First of all, the protocol is an extremely complex instrument for States to consider and implement.<sup>66</sup> Some authors had predicted that Article 23 would need to be taken up and uniform maximum limits of liability established, instead of these being subject to national laws.<sup>67</sup> This was not done, and its impact on country ratifications is difficult to evaluate at this time. Other criticisms have been the lack of a compensation fund, the complexity of the application section as it relates to Article 11 agreements, the channelling to persons other than those with operational control, which does not take into account the polluter-pays principle, and that minimum liability limits based on waste tonnage would result in some limits being too low and others too high, depending on the nature of the waste.<sup>68</sup> Others have criticized Annex B as not having been based on risk.<sup>69</sup>

Throughout the negotiations, it was a sore point with some delegations that the secretariat was never really

able to identify the factual basis upon which negotiations were proceeding, i.e. the actual incidents of concern underlying the creation of the liability regime,<sup>70</sup> arguably putting into question the need for the regime. At COP-6, a questionnaire was agreed to which would enable parties to the convention to indicate why they were having difficulty in ratifying the protocol.<sup>71</sup> Responses to the questionnaire have been requested for 1 July 2003 and will be compiled by the secretariat for discussion at the Convention's Open-Ended Working Group in late 2003. At that point there may be a better indication as to why parties have not ratified the protocol, which will be important information to be taken on board to bring that regime into force, but also to be considered by other liability endeavours in the environmental field.

## CONVENTION ON BIOLOGICAL DIVERSITY

Article 14(2) of the Convention on Biological Diversity (CBD) provides:

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 purely an internal matter.

Over two COPs, parties were asked to submit information to the secretariat about their domestic liability regimes for biodiversity issues.<sup>72</sup> A synthesis document prepared by the secretariat in January 2002 for the CBD's COP-6 noted that, with the exception of a submission from the European Communities, no jurisdictions had specific liability rules for biological diversity. In many jurisdictions, such liability is addressed under general national environmental liability legislation.<sup>73</sup> COP-5 agreed that an experts' group should be established to examine the questions arising under Article 14(2). An expert meeting was held in Paris in June 2001 and reported to COP-6.<sup>74</sup>

The experts discussed the following general areas: assessment of the status of existing national and

<sup>64</sup> Basel Decision VI/14 (2002).

<sup>65</sup> Financial Limits of the Liability under the Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal (UNEP/CHW/LWG/3/INF/2, 17 May 2001) (hereinafter Australian Study).

<sup>66</sup> See G.F. Silva Soares and E. Vieira Vargas, n. 47 above, at 85: 'As a result of the long and intricate technical and diplomatic negotiations, it represents a very complex legal instrument'.

<sup>67</sup> See R.R. Churchill, n. 6 above, at 26.

<sup>68</sup> See P. Birnie and A. Boyle, n. 6 above, at 436.

<sup>69</sup> See Australian Study, n. 65 above.

<sup>70</sup> For example, in Basel Decision I/5 (1994), the COP decided that the working group should consider, *inter alia*, the adequacy of the factual basis on which further efforts can best proceed, and at COP-2, Basel Decision II/1 (1995) decided that a questionnaire on the factual basis should be sent to parties. Few incidents were revealed from this survey.

<sup>71</sup> Basel Decision VI/15 (2002).

<sup>72</sup> See CBD Decisions IV/10 (1998) and CBD Decision V/18 (2000).

<sup>73</sup> See *Liability and Redress (Article 14, Paragraph 2): Update of Synthesis Report of Submissions from Governments and International Organizations*, Note by the Executive Secretary (UNEP/CBD/COP6/12/Add.1, 11 January 2002), at para. 5.

<sup>74</sup> *Report of the Workshop on Liability and Redress in the Context of the Convention on Biological Diversity* (UNEP/CBD/WS-L&R/3, 29 June 2001) (hereinafter Biodiversity Workshop).

international law; Article 14(2), scope and definitions; main situations and activities to be considered in the context of the CBD; and means and process for the implementation of Article 14(2). On existing national and international law, a number of observations were made. Some experts felt that it was premature to speak of a liability regime when more work needed to be done to identify the kinds of problems that should be addressed. Others expressed the view that a new instrument could be justified both on the basis of activities that could cause damage to biodiversity as well as on the possible preventive/deterrent value of such a regime.<sup>75</sup> It was noted that traditional liability regimes started with an activity that was dangerous, yet in the context of biodiversity there was no particular activity that was being examined; rather, it was looking at the problem from the point of view of the damage that could occur. This made existing precedents less relevant.<sup>76</sup> As well, while existing treaties provided a patchwork of coverage over a number of special activities, such as maritime transport and oil pollution, nuclear energy, transboundary movements of hazardous wastes and others, none of them specifically addressed biological diversity.<sup>77</sup>

Experts also pointed out the need to take into account other approaches, such as private international law and capacity building to strengthen environmental legislation in developing countries, where they often lack trained lawyers, judges, enforcement officials and other infrastructure. It was also noted that to assess damage to biological diversity, a country would have to have a level of baseline knowledge or inventory of the biodiversity present, something not in existence in many countries, particularly developing countries. Other approaches included environmental impact assessment, licensing systems for operators and Article 3 of the convention.<sup>78</sup>

At the expert meeting, the relationship between this work and that under the Cartagena Protocol on Biosafety (see below) was considered, given that both treaties have as their goal the conservation and sustainable use of biological diversity. While there was recognition of the value of the two processes informing each other, it was noted by some that the time frame for the Cartagena discussions was supposed to be a 4-year one and that linking the two initiatives could slow down biosafety work. Certain activities of concern, such as trading in endangered species, are also already covered by the Convention on International Trade in Endangered Species of Wild Fauna and

Flora (CITES), although not from a liability perspective.<sup>79</sup> Activities that stayed within national borders but were of concern could benefit from the exchange of information between parties to the convention.<sup>80</sup>

There was disagreement about the scope of Article 14(2), including the vagueness inherent in the term 'except where such liability is a purely internal matter'.<sup>81</sup> It was noted at the expert meeting that the first priority should be a definition of 'damage to biological diversity', and there were discussions of how this related to existing definitions of damage to the environment. A starting point would be a clearer understanding of 'biological diversity'. The concept of threshold of damage would need to be explored, in terms of both the risk posed and the damage.

There was debate about the main situations and activities of concern in the context of the CBD. It was suggested by one expert that there might be three classifications of activity, only the first of which lent itself to a typical international civil liability regime. These were catastrophes, for which some instruments already existed (oil spills, nuclear, etc.); continuous degradation of the environment, whether legal or not; and one-off criminal incidents. Another expert noted a number of pollution-damage cases but stressed that the concept of damage had applied purely to economic interests and biological diversity damage had not been considered. A technical expert outlined some examples of how transboundary harm could occur to biological diversity, but in one example of an alien invasive species, it was obvious that it would be difficult to channel the liability to a legal entity.<sup>82</sup> The value of having technical experts involved in such meetings was highlighted.

Discussion was held about future processes and what further information would be required to take this issue forward, including an update of sectoral liability regimes, new developments in private international law, national legal regimes and non-judicial processes for addressing biodiversity damage.<sup>83</sup>

CBD COP-6 noted the recommendations of the expert meeting and requested the Executive Secretary to organize another meeting of legal and technical experts to review information gathered and conduct further analysis. However, there were insufficient funds and a meeting intended to be held in May 2003 was not held. Unless a country decides to host and pay

<sup>75</sup> Ibid., at para. 19.

<sup>76</sup> Ibid., at paras 21, 37–38.

<sup>77</sup> Ibid., at para. 22.

<sup>78</sup> Ibid., at para. 44. Article 3 is a restatement of Principle 21 of the 1972 Stockholm Declaration. See Stockholm Declaration, n. 2 above.

<sup>79</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, 3 March 1973).

<sup>80</sup> See Biodiversity Workshop, n. 74 above, at para. 40.

<sup>81</sup> See on the scope issue World Conservation Union (IUCN), *A Guide to the Convention on Biological Diversity*, Policy and Law Paper 30 (IUCN, 1994), at 71–75.

<sup>82</sup> Not recorded in meeting report: from author's notes.

<sup>83</sup> See Biodiversity Workshop, n. 74 above, at para. 47.



for the meeting, it is unlikely that any further work will be done before COP-7 in 2004.

## CARTAGENA PROTOCOL ON BIOSAFETY

Article 27 of the Cartagena Protocol on Biosafety<sup>84</sup> 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.

Article 27 was not easily achieved during the negotiations. It was the subject of extensive and difficult discussions, during which a number of countries opposed the inclusion of any provision whatsoever. Badges that became available during the negotiations that read, 'No liability, no Protocol', exemplified the stance on the other side of the equation. The African group had desired to establish a liability regime in the body of the protocol and had submitted draft text during one of the many rounds of national submissions accepted for the protocol. Ultimately, Article 27 was the compromise that was struck, leaving the appropriate elaboration of rules and procedures to the future. Article 27 does not dictate any particular outcome and simply requires that the First Meeting of Parties (MOP-1) negotiates a process with respect to the elaboration of such rules.

Since the adoption of the Cartagena Protocol, there have been discussions on liability carried on at the first, second and third sessions of the Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP), although these have, for the most part, involved proposals about the process that should be recommended by the ICCP for MOP-1. Little has been accomplished except that it was agreed to recommend to the MOP that an open-ended group undertake the Article 27 process. The terms of reference of that group have not yet been agreed, leaving a potentially divisive debate for MOP-1. There is a call from ICCP-3 for further national submissions to be sent prior to MOP-1 by States that have not already made them, in addition to submissions responding to a questionnaire, and submissions on the terms of reference of the open-ended working group.<sup>85</sup>

<sup>84</sup> Cartagena Protocol on Biosafety to the CBD (Montreal, 29 January 2000).

<sup>85</sup> ICCP-3, Decision 3/1 (2002).

During this time, two limited-participation experts' meetings were held, one organized by the Meridian Institute in September 2001<sup>86</sup> and one by the Secretariat of the CBD in December 2002.<sup>87</sup> The Meridian Institute also organized a workshop on 21 April 2002 in the Hague, the day before the start of ICCP-3, to help enrich the discussions that would occur on this topic during the ICCP meeting and subsequently.<sup>88</sup>

These smaller settings outlined a number of the complexities of developing appropriate rules and procedures under Article 27. First, there has been the whole debate of what Article 27 entails. Most appear to agree that it does not dictate any particular type of rules and procedures (i.e. not necessarily an international civil liability regime in the traditional sense), even though there are a number of strong proponents of that approach.<sup>89</sup> There is also agreement that there is a 4-year deadline within Article 27 that should be kept in mind, and that other international processes need to be taken into due account.

As regards damage, issues have been raised about the following: what damage to the conservation and sustainable use of biological diversity would involve; whether this is the only damage that should be covered by the protocol; whether Article 26 on socio-economics has any relevance; whether broader socio-economic impacts should be included; whether such impacts after the advance informed agreement (AIA) procedure has been complied with would constitute damage or would simply validate importing government choices; and whether *any* change to biological diversity constitutes damage or an adverse effect. The difficulties of quantifying damage to biodiversity have also been noted, as well as the need for more scientific understanding on the adverse effects on the conservation and sustainable use of biodiversity. The notion of adverse effects would also have to be linked to prior conservation status, a point also raised in the CBD context.<sup>90</sup> It was suggested at the Meridian Institute Workshop that there are different objectives for liability regimes and that these would affect any approach to the question of damage.<sup>91</sup> It was also suggested that

<sup>86</sup> See *Liability and Redress under the Cartagena Protocol on Biosafety*, Dialogue Summary (Grottaferrata, Italy, September 2001), available at <<http://www.merid.org>> (hereinafter Meridian Dialogue).

<sup>87</sup> See *Report of the Workshop on Liability and Redress in the Context of the Cartagena Protocol on Biosafety* (UNEP/CBD/BS/WS-L&R/1/3, 14 December 2002) (hereinafter UNEP Biosafety Workshop).

<sup>88</sup> See Workshop on Liability and Redress: Article 27 of the Cartagena Protocol on Biosafety, Workshop Proceedings (Grottaferrata, Italy, April 2002), available at <<http://www.merid.org>>. The workshop was co-chaired by Todd Barker and Rex Raimond of the Meridian Institute, Jimena Nieto of the Government of Colombia and the author (hereinafter Meridian Workshop).

<sup>89</sup> See UNEP Biosafety Workshop, n. 87 above, para. 30.

<sup>90</sup> *Ibid.*, at paras 50–53.

<sup>91</sup> See Meridian Workshop, n. 88 above, presentation by Rene Lefebvre, at 18.

one might have to look beyond existing precedents on damage in international law to address damage of a long-term, diffuse and gradual nature, such as that which could arise from genetically modified organisms (GMOs).<sup>92</sup> Some experts also suggested that there must be a threshold for damage (i.e. beyond a *de minimis* level) and that human health issues should be triggered only if there is first an adverse effect on biological diversity that leads to a human health effect<sup>93</sup> (although the opposite view has also been expressed).<sup>94</sup> There were also discussions about whether damage should include that from activities that had received regulatory approvals<sup>95</sup> or from activities that have been left outside the AIA procedure.<sup>96</sup>

As regards channelling of liability, there have been a range of potential actors identified: exporters, importers, parties of export, parties of import, developers, producers and those holding intellectual property rights.<sup>97</sup> The policy reasons behind channelling would influence who should be liable. If prevention were the focus, then one would channel to the actor in the chain of activity in the transboundary movement that would be in the best position to prevent the harm. If the focus is reparation, the channelling should be to the actor in the best financial position or most likely to be insurable.<sup>98</sup> In the case of illegal traffic, the illegal trafficker should be responsible.<sup>99</sup>

The suggestion has been made that it might be appropriate to channel liability to the party of import, since under the protocol's AIA procedure, parties of import have an obligation to conduct risk assessments and make decisions about whether to consent to the import, consent with conditions, or refuse the import. Others have suggested that regulatory consents and channelling should not be mixed.

On financial security and funds, a number of concerns have been expressed: insurability of the risk, availability of insurance and the price of alternatives

thereto; and the burden of ensuring compliance with the requirement to establish financial security.<sup>100</sup> As regards a fund to cover, for example, situations where exonerations are applicable, a number of issues arise, such as determining appropriate contributors and convincing them that this is in their interests, particularly when there is no indication of numerous and costly accidents.<sup>101</sup>

Article 27 also begs the question of the form that any rules and procedures should take. At the UNEP workshop this issue was discussed, and it was generally felt that, because it was not a negotiating meeting, but rather one of experts, all options should be left on the table for consideration. A wide range of options were mentioned, from an international civil liability regime to non-legally binding approaches such as guidelines, recommendations and best practices, or a combination of binding and non-binding approaches.<sup>102</sup>

It is clear that discussion on liability will continue to be contentious, with proponents for a liability regime and those who are more sceptical.<sup>103</sup> It is worth noting that a compliance mechanism has received a significant level of development through two ICCP meetings and an expert meeting, and there is a draft text available for further discussion at MOP-1.

## ROTTERDAM CONVENTION ON THE PRIOR INFORMED CONSENT FOR THE INTERNATIONAL TRADE IN CERTAIN CHEMICALS

Under the Rotterdam Convention, no liability provisions were included in the convention.<sup>104</sup> The issue, however, was referenced in a statement by the chair of the diplomatic conference and appended to the resolution on interim arrangements. Since adoption, the issue

<sup>92</sup> Ibid., presentation by Ruth Mackenzie, at 20.

<sup>93</sup> Ibid., presentation of Stanley Abramson, at 20.

<sup>94</sup> Ibid., presentation of Ruth Mackenzie, at 19.

<sup>95</sup> See Meridian Dialogue, n. 86 above. See also S.D. Murphy, 'Biotechnology and International Law', 42 *Harvard International Law Journal* (2001), 47, at 93: 'Further, if the risk of damage is known and fully disclosed to an importing State, but the State decides that the risk is far outweighed by the potential benefits to its economy and people, presumably that ought to be relevant when considering the liability of the biotechnology company'.

<sup>96</sup> See Meridian Workshop, n. 88 above, presentation of Anne Daniel, at 25.

<sup>97</sup> Meridian Workshop, *ibid.*, at 24–29; Meridian Dialogue, n. 86 above, at 8.

<sup>98</sup> Meridian Workshop, n. 88 above, presentation of Arthur Mpeirwe, at 26.

<sup>99</sup> See UNEP Biosafety Workshop, n. 87 above, at para. 57. See also Meridian Workshop, n. 88 above, Anne Daniel presentation, at 25.

<sup>100</sup> See UNEP Biosafety Workshop, n. 87 above, at para. 59.

<sup>101</sup> Ibid., at paras 60–61.

<sup>102</sup> Ibid., at paras 65–78. See also S.D. Murphy, n. 95 above, at 93, which suggests that one must consider whether a civil liability treaty is the best approach, or whether national legislation or private contracting should be considered.

<sup>103</sup> See S.D. Murphy, *ibid.*, who is more sceptical. Noting that novel solutions may be required, see R. Mackenzie and A. Ascencio, 'Legal Issues relating to Liability and Compensation for Damage in Relation to the Transboundary Movement of Living Modified Organisms', in K.J. Mulongoy (ed.), *Transboundary Movement of Living Modified Organisms Resulting from Modern Biotechnology: Issues and Opportunities for Policy-Makers* (International Academy of the Environment, 1997); for a proponent of a liability regime, see G. Singh Nijar, *Developing a Liability and Redress Regime under the Cartagena Protocol on Biosafety* (Institute for Agriculture and Trade Policy, 2000).

<sup>104</sup> Convention on the Prior Informed Consent for the International Trade in Certain Chemicals (Rotterdam, 10 September 1998), not yet in force.

has received little attention at the Intergovernmental Negotiating Committee (INC) meetings, and eventually was referred to the Inter-Organization Programme for the Sound Management of Chemicals (IOMC) for examination in the context of work it was doing in the context of illegal trafficking. At INC-9 in 2002, the oral progress report provided by the secretariat on the issue of illegal traffic and liability did not address the issue of liability. A compliance mechanism is also under consideration within the convention.

## **STOCKHOLM CONVENTION ON PERSISTENT ORGANIC POLLUTANTS (POPS)**

During the negotiations for the Stockholm Convention, there was little general interest in including a liability provision.<sup>105</sup> Colombia raised the issue at INC-4, but was convinced at INC-5 by other countries that it was too late in the proceedings to begin a discussion on this topic. It was agreed, as a compromise, that it would be included in a resolution to be approved at the Diplomatic Conference. Resolution 4 requested the secretariat, in cooperation with one or more States, to organize a workshop on liability and redress in the context of the Stockholm Convention and related matters. The resolution also provided that the report of the workshop would be considered at the first meeting of the COP, with a view to deciding what further action should be taken. The resolution also called upon States to provide information on national, regional and international measures and agreements on liability and redress, especially on POPs. Information received from 25 governments and two international secretariats was made available for the workshop. The Government of Austria co-hosted, in September 2002, the 3-day workshop during which the issue of liability in the context of POPs was considered, with the help of both technical and legal experts.

The workshop began with a series of presentations on the international law of responsibility and liability, on specific international regimes involving civil liability, updates on developments on liability in different fora and a technical presentation on the characteristics of POPs. The first presentation by a former member of the ILC<sup>106</sup> outlined the concepts of responsibility and liability in international law and described the elements common to international liability regimes. He

noted that liability might apply if damage from activities that were not wrongful occurred and a causal link could be established. As difficulties, he noted that there was a lack of common definition of the environment, as well as problems in measuring environmental damage, proving causality and identifying the responsible actor.

The technical presentation at the workshop<sup>107</sup> outlined the inherent qualities of POPs that make them hazardous, noting in particular their long-term effects, their long-range transport and their tendency to accumulate in the colder parts of the world far from the locations where such chemicals have been produced and used. The difficulties in making the causal link between POPs found in the environment and their source were outlined. For example, obstacles were pointed out in determining whether a specific chemical was released after a particular point in time, such as after adoption of a liability regime, or was part of the historical emissions of POPs. As a consequence, it would be difficult to determine whether any damage attributable to POPs was as a result of post-liability regime emissions or historical emissions.

The workshop used various fact situations to analyse the issues surrounding liability in the context of the Stockholm Convention and identified a number of general considerations, such as the time lag between release of POPs and manifestation of damage; the difficulties in establishing a causal link between a particular source and specific damage; the complexity of cumulative effects; possible retroactivity of any regime, given that developed countries no longer manufacture and use the intentionally produced POPs; and who is the victim. On channelling, there was some suggestion that liability could be channelled to producers, since they were fewer and this would be easier than targeting users. However, it was considered that this might be unfair, given that some chemical producers were allowed by the convention to continue to produce for certain limited exceptions and they have no control over users who misuse properly produced products.

Some participants suggested that, despite the complexities, it was still worth having further discussions on a liability regime. Others felt that the key elements of a liability regime might well be missing, including identifiable actors, concrete and quantifiable damage, and a causal link between the source and the damage. Others felt that perhaps the framework of responsibility might be more appropriate. Still another suggested a need to focus on prevention through capacity building, national inventory improvements, monitoring, compliance and effectiveness evaluation, before discussing the issue of liability further.

<sup>105</sup> Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001), not yet in force.

<sup>106</sup> Workshop on Liability and Redress held in the Context of the Stockholm Convention on Persistent Organic Pollutants (Vienna, 19–21 September 2002), Report of the Co-Chairs (UNEP/POPS/INC.7/INF/6), presentation by Gerhard Hafner, at para. 3.

<sup>107</sup> Ibid., presentation by Reiner Arndt, at paras 7 and 8.



## LESSONS LEARNED

A number of conclusions can be drawn from the foregoing discussion.

*Developing countries have a strong interest in the development of liability regimes as a method of protection against the activities of multinational corporations.* While some developed countries have been supportive of liability regimes, in many UNEP MEAs, developing countries were the driving force, whether it be in the context of hazardous wastes or GMOs.

*Most civil liability regimes that have been negotiated are not in force.* There are a range of reasons, some known, others pure speculation as to why these regimes are not in force – but this is the empirical reality that international policy makers must take into account.

*The negotiation of an international civil liability regime is a lengthy, time-consuming and resource-intensive process.* Given the entry into force record, it would appear wise to have some predictor of likely success before embarking on such an enterprise.<sup>108</sup> Ideally analyses of likely successes should be undertaken before programmatic provisions are included in treaties, but given negotiating realities this may not occur. Nevertheless, it should take place at some point. Policy guidance on the purpose of a civil liability regime is critical at this juncture, as was illustrated by the difficulties experienced in the negotiation of liability rules for Antarctica.

*Before civil liability regimes are undertaken, consideration should be given as to whether other alternative or complementary approaches might be more effective in addressing the policy problem.* A number of alternative or complementary courses of action are discussed below. This type of analysis should inform policy decisions to proceed.

*National implementation of international liability regimes is a complex process.* If, due to a lack of capacity, many developing countries are not in a position to implement properly primary norms addressing the environmental problem in question, it may be even less likely that they will be successful in implementing a civil liability treaty, thus compromising the ability of its own citizens to take full advantage of such a treaty. It is well known in many MEA regimes that numerous parties to these instruments have not implemented their obligations fully or at all.<sup>109</sup> Given limited capacity-building funding, should it be targeted at implementing

the primary norms, or liability rules? Further, a continuing series of sectoral liability treaties could simply result in implementation overload that could challenge even the most robust national legal systems. Given the failure to enter into force of many liability regimes, this would seem to point to the need to be selective in choosing which environmental problems lend themselves best to a civil liability treaty.

*Civil liability regimes have been successful when they have focused on specific hazardous activities, have addressed the interests of victims, but have provided a solution that allows the hazardous but beneficial activity to continue.* It is important to ensure that all of the traditional reasons for embarking upon a liability regime are honoured, such as relieving victims of the obligation of proving fault; setting up a strict liability regime that results in most cases being resolved out of court, thus speeding up recovery; enabling plaintiffs to sue in their own jurisdiction; clarifying the applicable law; and providing for the reciprocal enforcement of judgments.<sup>110</sup>

*Regimes have failed when they are too broad in focus, have not satisfactorily balanced the competing interests of the actors in the regime, or have not convinced States of the need for the regime.* If any of these factors exist, it may be wise to examine alternatives such as those suggested below.

*For a civil liability regime to be appropriate, the problem it addresses must be amenable to three elements: causal link between incident and damage; one or more identifiable actors; concrete and quantifiable damage.* There will have to be a balancing of the pros and cons identified through an analytical process. The Stockholm Convention provides an example of a situation where a liability regime might not be appropriate from a number of perspectives. The practical limitations of proving cause and effect due to long-range transport is a scientific and legal concern.

*There is also a presumption in an international civil liability regime that the activities of concern are considered beneficial and must continue, supported by an appropriate scheme to compensate any victims of damage arising from the activity.* The Stockholm Convention seeks to eliminate the production and use of intentionally produced POPs,<sup>111</sup> not the continuation of a necessary activity. In such a case, it would seem

<sup>108</sup> See Churchill's excellent discussion: R.R. Churchill, n. 6 above, at 34–41.

<sup>109</sup> For example, in the context of the Basel Convention, the lack of implementing legislation can be ascertained from the national reports which are filed – when they are filed. See Basel Convention, n. 56 above, Article 13.

<sup>110</sup> See R.R. Churchill, n. 6 above, at 33–35.

<sup>111</sup> It should be noted that the POPs Workshop did not have the issue of by-product emission POPs (Article 5 of the POPs Convention, n. 105 above) within its remit.

that a liability regime may not be the most appropriate focus of activity; rather, important initiatives, such as capacity building to assist developing countries in developing inventories and reducing stockpiles, developing national implementation plans, as well building strong convention institutions and mechanisms, such as a compliance mechanism, environmental monitoring and effectiveness reviews, might be the best way to eliminate POPs from the environment. Where harmful activities are banned, and parties to a treaty are required to implement and enforce the laws banning their production and use, the next logical step is not a civil liability regime, but a State liability regime, which, as noted above, is unacceptable to many States.<sup>112</sup>

*If a civil liability regime is chosen, rather than other approaches, a step-wise approach should be taken.* Even where a decision has been made to proceed with a liability regime, given the difficulty of concluding such regimes, a solid foundation should be laid before embarking on negotiations. It has become clear that time needs to be taken to conduct and gather appropriate research on recent developments in liability, valuation of the environment and its components, and the establishment of measures of compensation when damage is irreparable, to name a few. It is also important that attention be given to developing baseline measures, for example of biological diversity, in order to be able to measure whether harm has occurred. Further, even when a civil liability regime has been selected as the appropriate international policy choice, States can begin to implement, in their domestic law, the primary norms of the MEA control regime with additional tools that will facilitate domestic resolution of incidents causing harm by augmenting common-law and civil-code provisions.<sup>113</sup>

*If a civil liability regime is chosen, existing models should not be followed 'slavishly'.*<sup>114</sup> For example, the nature and limits of liability may differ depending on the activity involved and the economic capacity of those creating the risk to bear the cost of providing compensation for accidents which may occur. New approaches may have to be found, for example, to deal with the Antarctic context, where the focus is on protection of the Antarctic environment, or the CBD,

where focus is on the harm to biological diversity. Liability regimes as they have been constructed for ultra-hazardous activities also suggest that liability can always be channelled to a particular actor. The years of discussion in the Basel Convention regime over to whom liability should be channelled revealed that, where a number of actors are involved, this is a complex undertaking. In the case of the Stockholm Convention, the sources of many POPs are numerous and diffuse. In the case of invasive alien species, which can harm biological diversity, these may travel on their own to another jurisdiction – to whom should liability be channelled in such cases?

*Money cannot solve all problems.* It is recognized that irreparable harm to the environment has not been covered in such regimes for practical purposes, but the question arises whether an incentive is created for those who commit the worst forms of damage to the environment.<sup>115</sup> More research is needed to understand how better to value the environment and also, when damage is irreparable, how some measure of compensation might still be fixed. There may be circumstances where cessation of the activity is the most appropriate remedy, something a civil liability regime does not provide. For indigenous peoples in Arctic regions, who live off the land, can money truly compensate for the loss of this aspect of their culture?

*Who is the victim?* When the primary victim is the environment or the global commons, civil liability regimes may not be the best policy choice. Civil liability regimes have provided compensation for environmental damage in only a limited way, although this has improved over the years. More fundamentally, policy makers must consider whether environmental goals are ever really met through a civil liability regime. In such cases, the limited environmental damage covered is really an add-on to what is the primary focus: compensation for personal injury, property and economic damage. Further, when the harm occurs to the global commons, there is no particular plaintiff or victim.

## ALTERNATIVES OR COMPLEMENTARY APPROACHES TO INTERNATIONAL CIVIL LIABILITY REGIMES

Given the foregoing discussion, it is evident that international civil liability regimes are not necessarily the most pragmatic way to address environmental

<sup>112</sup> Insurers will not cover illegal activity, which is what banned production and use will be. Further, in the case of POPs, there is the thorny problem of the fact that current producers and users for legally exempted POPs are developing countries, which would certainly make this a less attractive option for them.

<sup>113</sup> For example, in the context of the Cartagena Protocol, funding is currently being provided by the Global Environment Facility to developing countries for development of national biosafety regulatory frameworks to implement the protocol. These domestic law initiatives could include provisions that would provide statutory liability and other remedies to address damage that occurs within a State's jurisdiction.

<sup>114</sup> See R.R. Churchill, n. 6 above, at 41.

<sup>115</sup> See T. Scovazzi, n. 30 above, at 65.

concerns related to damage that might be caused to the environment. As the UNEP Experts' Meeting concluded, there are a range of options that can be considered, including civil liability regimes, best practices and guidelines, and capacity-building programmes.<sup>116</sup> Similarly, the ILC Special Rapporteur Rao's first report, cited earlier, notes that other options such as forum shopping, or negotiating ad hoc settlements might be appropriate options in certain circumstances.<sup>117</sup> This section of the article canvasses a few of these alternative or, in cases where they can occur in conjunction with civil liability regimes, complementary approaches. Moreover, some of the approaches identified below could be combined.

## STATE RESPONSIBILITY

State responsibility involves the consequences of wrongful acts by States, whether in violation of customary international law or treaty law.<sup>118</sup> State responsibility speaks to the obligations that the State has, whereas State liability is used to refer to the consequences of its violation of the obligations.<sup>119</sup> The State is required to cease the violating behaviour and is liable to make reparations for any injury which has occurred.<sup>120</sup> The standard of care for States is generally considered to be a due diligence standard.<sup>121</sup> A number of authors have commented on the failure of State responsibility to be taken on board by States within the context of liability treaties<sup>122</sup> or even through State-to-State claims.<sup>123</sup> The disadvantages of relying simply on this general rule of international law, some of which are also disadvantages of civil liability regimes, are that:

- the rules, a violation of which would make a State responsible to another State, are often unclear;

- pollution is often not the result of the breach of an international legal obligation, so there is often no liability or obligation to make reparation;
- the standard of liability is simply due diligence, whereas civil regimes have established a strict liability approach where fewer defences are available;
- it is a reactive approach, when environmental problems require active management;
- much environmental harm cannot be reversed or compensated;
- it does not cover true ecological costs and systematic damage.

However, one key advantage the approach has is that it requires cessation of the harmful activity, which is something not required by civil liability regimes.<sup>124</sup> Furthermore, a number of well-known cases exist, such as the *Trail Smelter Case*, the *Nuclear Test Cases*, the *Cosmos* claim and a number of lesser known hazardous waste cases, where reliance was placed on a State's obligation not to cause harm to the environment of other States and, through legal or diplomatic means, the offending behaviour was stopped.<sup>125</sup> Nonetheless, the main failing is its unacceptability to States as a viable approach, and, as such, does not appear to provide a real alternative to civil liability regimes, or even a complement to them.

## STRENGTHENING NATIONAL LAWS DEALING WITH PREVENTING AND PUNISHING ENVIRONMENTAL HARM

Because work is already underway to strengthen domestic environmental frameworks to implement the Biosafety Protocol and to implement the Stockholm Convention, there is no time like the present to ensure that domestic law implementing these treaties is as strong as it can be. Domestic statutes can augment existing common-law or civil-code requirements by providing rights for citizens to obtain injunctions to stop environmental harm.<sup>126</sup> Statutes can provide that polluters have the obligation to clean up spills, and when they fail to do so, the State has the right to clean

<sup>116</sup> See UNEP Biosafety Workshop, n. 87 above.

<sup>117</sup> See Rao First Report, n. 19 above.

<sup>118</sup> J. Brunnee, 'The Responsibility of States for Environmental Harm in a Multinational Context – Problems and Trends', 34 *Les Cahiers de Droit* (1993), 827, at 832.

<sup>119</sup> P. Birnie and A. Boyle, n. 6 above, at 181 and footnote 14.

<sup>120</sup> J.G. Lammers, n. 30 above, at 45; P. Birnie and A. Boyle, n. 6 above.

<sup>121</sup> P. Birnie and A. Boyle, *ibid.*, at 185; J.G. Lammers, n. 30 above, at 46; T. Scovazzi, n. 30 above, at 65. Boyle and Birnie discuss the fact that there are other standards of liability considered by various writers, but conclude that the dominant view is that the standard is due diligence.

<sup>122</sup> A rare exception is the Convention on International Liability for Damage Caused by Space Objects (London, Washington, Moscow, 29 March 1972), which provides for absolute State liability. A recent example where State responsibility and liability was rejected is the Basel Protocol on Liability and Compensation, n. 56 above, where Article 16 just reiterates that there is no change to the customary international law rule on State responsibility.

<sup>123</sup> See J. Brunnee, n. 118 above. See T. Scovazzi, n. 30 above, at 67, which is more hopeful about its increasing utility.

<sup>124</sup> J. Brunnee, n. 118 above, at 834–843.

<sup>125</sup> See *Trail Smelter Arbitration (United States v. Canada)*, 3 R. Int'l Arb. Awards (1941), 1965; ICJ 8 July 1996, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 35 ILM (1996), 809. Various waste cases are recounted in T. Scovazzi, n. 30 above, at 47. Another famous case was the Canadian claim against the former Soviet Union in the *Cosmos* claim, made on the basis of absolute State liability, and on the basis of the 1972 Space Objects Liability Treaty, n. 122 above, which included absolute State liability. The claim was settled *ex gratia*: see P. Birnie and A. Boyle, n. 6 above, at 187.

<sup>126</sup> See, for example, Section 39 of the Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33 (hereinafter CEPA 1999).



up and recover its clean-up costs.<sup>127</sup> Another tool is to provide judges with a range of sentencing options when a polluter is convicted of an offence under environmental laws, including quasi-civil remedies, such as requiring the convicted person to remedy the harm caused by the offence, or requiring the offender to pay money for ecological research or to educational institutions.<sup>128</sup> Guidelines and best practices in this regard should be actively shared by States and nurtured by UNEP through its Montevideo Law Programme. This approach was supported by the UNEP paper for the expert workshop in May 2002.<sup>129</sup> Such remedies can augment the range of actions that can be taken against both domestic polluters and subsidiaries of foreign corporations.

## CAPACITY BUILDING

Capacity building is considered crucial in general for developing countries<sup>130</sup> and is important under all MEAs. In many MEAs, capacity building has been negotiated into the text of the instruments at the behest of the G77 and China, and manifested through references to the Global Environment Facility, which provides funding for the Biodiversity Convention, the Biosafety Protocol and the Stockholm Convention, to name a few. Capacity building to improve implementation of MEAs also attracted attention during UNEP's International Environmental Governance discussions.<sup>131</sup> Capacity building is crucial if developing countries are going to be in a position to address the environmental concerns of our time, including those that may not be of their making. This is where MEAs work or they do not: at the national level, with the consequent demands for new implementing legislation, bureaucrats to run permitting systems, and officers to enforce new standards. However, given limited funds, should the primary commitment be to funding achievement of the primary norms of environmental protection and conservation? Implementation of civil liability regimes is also a complex undertaking, particularly if a series of sectoral treaties are concluded, and if not implemented, developing countries will lose the benefits of such treaties.<sup>132</sup>

<sup>127</sup> See, for example, Proposal for a Directive of the European Parliament and of the Council of 23 January 2002 on environmental liability with regard to the prevention and remedying of environmental damage, COM (2002) 17 final, and CEPA 1999, Sections 95–99.

<sup>128</sup> CEPA 1999, Section 291.

<sup>129</sup> See also S.D. Murphy, n. 95 above, at 93.

<sup>130</sup> For a plea for capacity building in science and technology, see J. Sachs, 'Sachs on Development: Helping the World's Poorest', *The Economist* (14 August 1999).

<sup>131</sup> Open-Ended Intergovernmental Group of Ministers or their Representatives on International Environmental Governance, *Report of the Chair* (UNEP/IGM/2/6, 2 August 2001).

<sup>132</sup> For example, if it does not implement provisions on mutual recognition of judgments.

## COMPLIANCE MECHANISMS AND EFFECTIVENESS REVIEWS<sup>133</sup>

Compliance mechanisms are in place or under discussion in most global MEAs. If policy makers are seeking tools to prevent harm and promote compliance with primary environmental protection and conservation norms, encouraging the development of compliance mechanisms is an undertaking that can result in significant environmental benefits. This is something that can be done in conjunction with work on liability, but probably should never be displaced by work on liability. Increasingly, global MEAs are also cognizant of the need to include requirements for the review of effectiveness of those treaties,<sup>134</sup> and this is a provision that should also be included in every civil liability regime negotiated.

## EXPLORING AND ADVANCING PRIVATE INTERNATIONAL LAW REMEDIES

Exploring the research and contributions that have and can be made by organizations, such as the Hague Conference on Private International Law, may yield benefits that can be translated into both international and domestic law.<sup>135</sup> Key issues of private international law face any litigant seeking to recover for transboundary harm. Private international law rules of a State may not allow the bringing of all transboundary claims in that State, such as when the offending activity occurred in another State. Alternatively, there may be barriers to an individual suing in the State that has jurisdiction. Or, if suing abroad is permitted, it may be impossible to enforce the judgment at home.<sup>136</sup> Questions about the applicable law to be utilized by a court in a given case also raises legal uncertainty for victims. Given that there are currently,

<sup>133</sup> For some general reading on compliance and implementation see A. Chayes and A.H. Chayes, n. 1 above; and D.G. Victor, K. Raustiala and E.B. Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments* (International Institute for Applied Systems Analysis/The MIT Press, 1998).

<sup>134</sup> See, for example, Basel Convention, n. 56 above, Article 15(7), Cartagena Protocol, n. 84 above, Article 35 and Stockholm Convention, n. 105 above, Article 16.

<sup>135</sup> See C. Bernaconi, *Civil Liability resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?*, Preliminary Document No 8 (Hague Conference, undated), available at <<http://www.hcch.net/e/workprog/genaff.html>>.

<sup>136</sup> Note should be taken of ongoing work by the Hague Conference on civil and commercial judgments. See A. Schulz, *Report on the Work of the Informal Working Group on the Judgments Project, in Particular on the Preliminary Text Achieved at its Third Meeting 25–28 March 2003*, Preliminary Document No 22 (Hague Conference, 2003). Governments were asked to comment on the document by 1 July 2003.

under private international law rules, a number of possible jurisdictions that could assume jurisdiction over a transboundary environmental damage case, this allows a plaintiff the opportunity to evaluate the pros and cons of the procedural and substantive rules which would apply,<sup>137</sup> thereby allowing for victims to forum shop to find the most beneficial location for their case to be heard.<sup>138</sup> Such an opportunity is not without its legal complexities, and it has been suggested that improved private international law rules are not enough without substantive rules providing a common approach to damage and standards of liability, like the Lugano Convention,<sup>139</sup> which, as was noted earlier, has not yet entered into force 10 years after its negotiation. Nevertheless, increased harmonization of national private international law rules will be of great assistance in those cases where treaties have not been negotiated and environmental damage has occurred.

## INTERNATIONAL FUNDS

One complaint about international civil liability regimes is that they do not always perfectly implement the polluter-pays principle because the burden of the risk of the dangerous activity is shared among those who are not really polluters, such as States. States are also reluctant to be on the hook for contributions to funds for activities whose benefit lies in the private sector, such as was the case in the Basel Liability Protocol. Nevertheless, the idea of international funds, constituted by non-government actors, may be an appropriate tool for situations where substantial harm can occur to one jurisdiction in circumstances where it may not be possible to attribute fault to a State or to any legal entity. Governments could play a role in constructing international fund schemes constituted by the private sector and administered by an international body for such cases, such as when an invasive alien species of untraceable origin wipes out a country's native species. However, in the latter case, there is the challenge of determining which activities should be subject to a levy to constitute the fund. Voluntary industry funds may also be an appropriate option where few incidents have occurred – one of the situations that historically has inhibited entry into force of liability instruments. As noted earlier, the International Oil Pollution Compensation Fund has been fairly successful.<sup>140</sup> However, two supplementary private-sector agreement funds, CRISTAL and TOVALOP, have been allowed to lapse due to the

entry into force of the 1992 Fund Convention.<sup>141</sup> As noted earlier, the new fund limits are not as high as US domestic law, for example, and it has been suggested that should a very large oil disaster occur, the absence of CRISTAL and TOVALOP will be evident.

## BEST PRACTICES AND GUIDELINES

This is, in some senses, a generic category which could be the vehicle for accomplishing a number of the items mentioned in this section. Nevertheless, they are important soft-law tools that can be used in a step-wise fashion to start promoting harmonized international practice in a particular direction. One area that might benefit from this type of exercise is the development of best practices for domestic environmental law, which call for the remedies identified in the section on strengthening national laws dealing with preventing and punishing environmental harm, above, but also in removing barriers to transboundary litigation.

## CORPORATE SOCIAL RESPONSIBILITY

Another area to consider is whether instruments on corporate social responsibility can play a role in helping to minimize and mitigate the environmental impacts of the activities of multinational corporations that operate around the world under different legal regimes. The outcry among developing countries for liability regimes for hazardous activities appears to stem from a more general concern about the activities of multinational corporations acting in their territory under often inadequate national environmental regulation.

Corporate social responsibility is an area of international endeavour that has received a lot of interest of late. While Friends of the Earth had hoped at the World Summit on Sustainable Development to have governments agree to negotiate a binding treaty on corporate social responsibility, this was not agreed to by States. Instead, States agreed to:

actively promote corporate responsibility and accountability, based on the Rio principles, including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships, and appropriate national

<sup>137</sup> P. Birnie and A. Boyle, n. 6 above, at 276–279, discuss private international law challenges and selection of forum.

<sup>138</sup> See Rao First Report, n. 19 above, at para. 151.

<sup>139</sup> P. Birnie and A. Boyle, n. 6 above, at 279.

<sup>140</sup> See 1971 Fund Convention, n. 20 above.

<sup>141</sup> TOVALOP stands for the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution and CRISTAL is the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution. The former was funded by tanker owners and the latter by oil producers, exporters and others. For a review of the demise of the two funds, see S. Bloodworth, 'Death on the High Seas: the Demise of TOVALOP and CRISTAL', 13:2 *Florida State University Journal of Land Use and Environmental Law* (1998), 443.

regulations and support continuous improvement in corporate practices in all countries.<sup>142</sup>

At the recent G8 Summit, Heads of State declared:

Consistent with the outcomes of the World Summit on Sustainable Development, we support voluntary efforts to enhance corporate social and environmental responsibility . . . We also welcome voluntary initiatives by companies that promote corporate social and environmental responsibility, such as the [Organization for Economic Cooperation and Development (OECD)] Guidelines for Multinational Enterprises and the UN Global Compact Principles consistent with their economic interest. We encourage companies to work with other parties to complement and foster the implementation of existing instruments, such as the OECD guidelines and the 1998 ILO Declarations on Fundamental Principles and Rights at Work.<sup>143</sup>

The OECD Guidelines on Multinational Enterprises provide, under Part V on the environment, that:

Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.<sup>144</sup>

Of greatest interest for the topic of environmental damage may well be the existence of a system of national contact points, whereby, through a 'specific instances' procedure, non-observance of the guidelines can be drawn to the attention of the National Contact Point. This mechanism has been successfully used in some circumstances to encourage companies to do the 'right' thing. Whether this could prove to be an additional lever that could be used in cases of one-off environmental disasters or accidents, or by encouraging companies to comply with local environmental protection and conservation laws remains to be seen.<sup>145</sup> It certainly has the potential of providing a fairly responsive mechanism for those countries and non-government organizations that seek to utilize it in this manner. From an environmental perspective, quick action is often hard to come by, so this remedy may have a future.

<sup>142</sup> Johannesburg Plan of Implementation, *Report of the World Summit on Sustainable Development* (Johannesburg, South Africa, 26 August–4 September 2002) (A/CONF.199/20), Resolution 2, Annex, para. 49.

<sup>143</sup> See *Fostering Growth and Promoting a Responsible Market Economy: A G8 Declaration* (17 June 2003), available at <<http://www.g8.fr>>.

<sup>144</sup> After this general statement are a series of paragraphs with specific admonitions, including about environmental management systems, precaution, contingency and emergency planning and employee education. See OECD, *Guidelines for Multinational Enterprises: Text, Commentary and Clarifications* (DAFFE/IME/WPG(2000)15/FINAL, 31 October 2001).

Finally, although State responsibility rules may not enable the acts of a multinational corporation abroad to be attributed to the home State of that corporation,<sup>146</sup> recent cases involving foreign direct liability – where the parent company is held directly liable for the consequences of its subsidiaries – may be an area of increasing focus.<sup>147</sup>

## CONCLUDING THOUGHTS

The international oil-pollution conventions have illustrated that, where a valued legal activity is desired to continue, and there is an equitable allocation of rights and duties among key actors to protect victims against unintended outcomes of that activity, States will bring such a sectoral regime into force. Beyond this, it is not clear that a liability regime will enter into force simply because it is negotiated. Given this uncertainty, it is important to consider alternative or complementary approaches that may assist in achieving the goals of prevention of environmental damage and compensation, yet which may build on existing efforts and do not involve the same level of effort or complexity. This does not necessarily mean that civil liability regimes cannot be useful tools in appropriate cases, but simply that the international community must select those cases carefully if it wishes to enhance its chances of success.

Anne Daniel is General Counsel, Department of Justice Canada, Legal Services, Environment Canada. The opinions expressed in this article are those of the author and do not represent in any way the views of the Government of Canada.

<sup>145</sup> According to *Time Magazine's* website (see 'The Legislator: Marinus W. Sikkel' (1 December 2002), available at <<http://www.time.com/time/europe/magazine/2002>>): 'Labour unions and aid groups remain skeptical about the effectiveness of the guidelines and worry that the process isn't public enough. One of their biggest concerns is that cases are handled in vastly different ways depending on where they are filed'. See OECD, *The OECD Guidelines for Multinational Enterprises: A Key Corporate Responsibility Instrument* (OECD, June 2003), at 3, which stresses that there have already been successfully resolved cases, stating: 'Resettlement in the Zambian copper belt: The Canadian [National Contact Point] was asked by [non-government organizations (NGOs)] to consider the impending removal of local people from a Canadian mining company's lands and encouraged the company to cooperate with Canadian and Zambian NGOs in reconsidering the company's resettlement plans. The NGO involved in the case has reported that it resulted in the company agreeing to delay resettlement to allow time for better evaluation of associated social disruptions and for the Zambian government, with help from the World Bank, to provide alternatives'.

<sup>146</sup> See T. Scovazzi, n. 30 above, at 57.

<sup>147</sup> See H. Ward, 'Towards a New Convention on Corporate Accountability? Some Lessons from the Thor Chemicals and Cape plc Cases', 12 *YIEL* (2001), 105.



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