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International Rivers and Lakes

A Newsletter issued by the Department of Economic and Social Development
United Nations, New York

No. 18

May 1992

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Responsibility and liability: A note by the
Secretariat of the Economic Commission for Europe 1/

At their fourth session the senior advisers to ECE governments on environmental and water problems decided to examine the possibilities of providing guidance to countries regarding responsibility and liability at national and international levels. Since these issues are of significant relevance in international water resources management a summary of the research conducted by the Commission is submitted to the readership of the Newsletter.

Background

A first focus on the problems of transboundary responsibility and liability resulted from the Declaration of the United Nations Conference on the Human Environment of 1972. Hence, according to principle 21 of the Declaration, states have the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment or other states or areas beyond the limit of national jurisdiction. According to principle 22, states shall cooperate to develop further the international law regarding liability and compensation for victims of pollution and other environmental damages caused by activities within their jurisdiction and control to areas beyond their jurisdiction.

"Responsibility" denotes the duty of states and of juridical and natural persons to answer for a "breach of a legal duty", attributable to the person or state involved, according to national legislation, or general international law. "Liability" on the other hand designates the duty to make good, by compensation, the harmful consequences resulting from effects of activities or omissions which do not necessarily constitute the breach of any rule of law. The concept applies to hazardous activities if so established by national and international law 2/. According to the concept, a person might be liable for damages even if such person did not cause intentional harm, did not breach any rule of law, did not act without care, or did not breach any duties. Moreover, such person might have acted within the terms of the authorization of competent authorities, and still be liable for the damages caused while acting on the authorization.

1/ Economic Commission for Europe (ECE), Report of the Senior Advisers to ECE Governments on Environmental and Water Problems, ENVWA/R.66, 8 January 1992.

2/ ECE, Final Report of the Task Force on Responsibility and Liability regarding Transboundary Water Pollution, ENVWA/R.45, 20 November 1990.

"Responsibility" is a concept based on fault. Responsibility regulations have been perceived as inadequate, when dealing with activities involving risk. The result is a higher reliance on strict liability. The functional consequences of the evolution from responsibility to strict liability are important, since plaintiffs are relieved from the burden of proof. Thus, the persons benefiting from the economic returns of hazardous or risky activities are subject to stricter standards of accountability. It is expected that the use of liability principles will result in positive environmental effects, since persons creating environmental risks will be likely to take extra precautions if subject to stricter accountability.

Environmental economics also favour the application of liability concepts. They prompt the internalization of environmental costs, therefore resulting in a sounder relationship between environment and economics. Liability eventually results in compensation, or in measures to prevent harm, implying higher production costs. International economics requires the harmonization of rules on responsibility and liability at the international level, in order to prevent competitive advantages resulting from lax rules. Within an environment of environmental accountability, lax rules on liability are tantamount to a subsidy. The liability principle could apply to states, both at national and international levels, in situations where extremely hazardous activities, from which states derive benefits, are carried under state control. In addition, international action is required to facilitate compensation to victims of incidents with transboundary impacts.

Information on existing instruments

Information on activities on the subject, in different international fora, and agreements, is hereby summarized. The documents included in the report are: the Convention on Third Party Liability in the Field of Nuclear Energy (as amended) Paris, 1960; the Convention on Civil Liability for Nuclear Damage (as amended) Vienna, 1963; the International Convention on Civil Liability for Oil Pollution Damage, Brussels, 1969; the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Brussels, 1971; the Convention on International Liability for Damage Caused by Space Objects, London, Moscow, Washington 1972; the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration and Exploitation of the Seabed Mineral Resources, London, 1977; the Convention on Civil Liability Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, Geneva, 1989; the Draft Recommendation on Compensation for Victims of Accidental Pollution; the Elements which might be included in a Protocol on Liability and Compensation for Damage resulting from the Transboundary Movement and Disposal of

Hazardous Waste and Other Waste, to the Bassel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal; the Proposals on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law; the Amended Proposal for a Directive on Civil Liability for Damage Caused by Waste; and the Draft Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment. The criteria for the analysis of the above-mentioned documents are: general information, scope of responsibility and liability, types of damages and/or pollution, transboundary procedures and insurance fund.

Convention on third-party liability in the field of nuclear energy (Paris, 1960)

General

This Convention has a joint protocol with the Vienna Convention of 1963 on nuclear damages, mutually extending the civil liability regulations of each Convention to the parties for the other, for the wider protection of the victims and the prevention of conflicts of laws.

Scope of responsibility and liability

There are provisions for liability. The operator of a nuclear installation shall be liable. The operator is the person designated, or recognized, as such by the competent public authority. The operator is liable under certain circumstances of carriage of nuclear substances. There are no provisions on who can take legal action.

Types of damage and/or pollution

Damage caused by a nuclear incident is regarded as any occurrence, or succession of occurrences having the same origin that causes damages - arising out of - or resulting from the radioactive properties, or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or radioactive products or waste.

There shall be liability for damage to or loss of life or any person, and damage and loss of property. The operator is not liable for damage caused by a nuclear incident directly due to an act of armed conflict, hostilities, civil war, insurrection, or a grave natural disaster of an exceptional character.

Transboundary procedure

Jurisdiction usually lies with the party within whose territory the polluting nuclear incident occurred. Judgements by the competent courts are enforceable in the territory of other

contracting parties. The Convention shall be applied without discrimination based on nationality, domicile or residence.

Insurance or fund

The operator shall be protected by insurance or other financial security, as the competent public authority shall specify.

Convention on civil liability for nuclear damage (Vienna, 1963)

General

The Standing Committee on Liability for Nuclear Damage of the International Atomic Agency is considering the revision of nuclear damage to include the loss or damage resulting from environmental contamination, and the costs or preventive measures and further loss or damage caused by such measures (text of a draft International Convention on Compensation for Nuclear Damage, supplementary to the Vienna and Paris Conventions).

Scope of responsibility and liability

Operators shall be liable for nuclear damage. There are no special provisions on who can take legal action.

Type of damage or pollution

Damage is any occurrence or series of occurrences having the same origin which causes nuclear damage. Nuclear damage is the loss of life, any personal injury, loss of property, or damage to property, arising out of the radioactive properties or a combination of radioactive properties with the hazardous properties of nuclear fuel, radioactive products or waste in, or of nuclear material coming from or originating in or sent to a nuclear installation. It also includes any other loss or damage so arising, or resulting if, and to the extent that the law of the competent court so provides. Finally, it may refer, if the law of the installation state so provides, to loss of life, any personal injuries, or loss of, or damage to property which arises out of or results from other ionizing radiation emitted by any other source of radiation inside a nuclear installation.

Exemptions and defenses include armed conflicts, civil war, hostilities or insurrection. Nuclear incidents directly due to a grave natural disaster are also exceptionable, except to the extent that the law of the installation state provides for the contrary.

Transboundary procedure

Jurisdiction generally lies with the courts where the incident occurs. The judgements are also generally enforceable in the courts of any of the contracting parties. The Convention and the national law applicable thereunder shall be applied without any discrimination based on nationality, domicile or residence.

Insurance or fund

The operators shall maintain insurance, or other financial security covering liability, for the amounts, types, and terms that the installation state specifies. In turn, the installation state shall ensure the payment of claims for compensation, by providing the necessary funds, to the extent that the insurance, or other financial coverage of the operator, might not be enough to satisfy the claims of the affected parties. A limit on the claims might be established, according to art. V of the Convention.

International Convention on Civil Liability for Oil Pollution Damages (Brussels, 1969) and International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 1971)

Scope of responsibility and liability

The Conventions impose liability. States can be liable when they are the owners of ships used for commercial purposes, but not for warships, or for ships used for non-commercial government service. The owner of the ship is liable. "Owner" refers to the person registered as owner of the ship, or, in the absence of registration, the person owning the ship. However, if a ship is owned by a state, and a company is registered as operator of the ship, "owner" will be such operator. There are no provisions on who can take legal action.

Types of damage or pollution

The owner of the ship at the time of the incident resulting in pollution, or at the time of the first occurrence of a series of occurrences, when the incident consists of several linked episodes or occurrences, shall be liable for pollution damage caused by oil which has been discharged, or has escaped from the ship, as a result of the incident.

"Pollution damage" is the loss or damage caused outside the ship by contamination resulting from escape or discharge of oil from the ship. It includes the costs of preventive measures and the losses or damages resulting from such preventive measures. "Preventive measures" include any reasonable measures taken after the incident to prevent or minimize pollution damage.

No liability shall be attached to the owner if he proves that the damage results from acts of war, hostilities, civil war, insurrection, or natural phenomena of an exceptional, inevitable, or irresistible character; or was caused by an act or omission of a third party acting with the intent to cause damage; or was wholly caused by a wrongful act of a government charged with the maintenance of navigational aids in the exercise of its functions. If the owner proves that the pollution damage was wholly or partially caused by an act or omission done with the intent to cause damage, or with negligence, by the person suffering such damage, the owner may be exonerated, wholly or partially, from his liability towards such person.

Transboundary procedure

Actions for compensation can only be brought to the courts of the party in whose territory, including the territorial sea, damage was caused, or preventive measures were taken. The judgements of the competent court are recognized by any of the contracting parties, except in exceptional circumstances.

Insurance or fund

Ships registered with any of the contracting parties, and carrying more than 2000 Tn. of oil in bulk as cargo are requested to maintain insurance or other financial security, in a sum fixed according to the limits of liability established by the Convention. A certification shall be issued to prove compliance with the requirements of financial security. The 1969 Convention did not afford full compensation to the victims of pollution damages. Therefore, the 1971 Convention created a compensation fund for such purpose.

Convention on International Liability for Damage caused by Space Objects (London, Moscow, Washington, 1972)

Scope of responsibility and liability

Launching states shall be absolutely liable to pay compensation for damages caused by its space object on the surface of the earth, or to aircraft in flight. Damages other than to the surface of the earth or to aircraft in flight can also be claimed, by the state which suffers the damage, or by the state of nationality of affected natural or juridical persons or, if the state of nationality is inactive, by the state in whose territory the damage was sustained. If neither the state of nationality, nor the state in whose territory the damage was sustained present any claim, or notify the intention to claim, the state whose permanent residents have suffered damages can claim to the launching state.

Type of damage and/or pollution

The instrument relates to damage caused by space objects. Damage includes loss of life, personal injury or impairment of health; and loss of, or damage to property of, states or of persons, natural or juridical, or property of international legal organizations. The compensation to be paid is determined according to international law, and justice and equity, to provide reparation and restore the person to the conditions that would have existed if the damage had not occurred.

The launching state shall be exempted from absolute liability, provided it acted according to international law, if the state suffering the damages, or the persons it represents, have acted with gross negligence, or with intent to cause damage, and as a consequence a damage for which compensation is sought has resulted.

Transboundary procedure

Claims shall be presented through diplomatic channels, without requirement to exhaust local remedies. Failing the diplomatic negotiations, a Claims Commission is to be established at the request of any of the parties.

Insurance or fund

There are no provisions in this regard.

Convention on Civil Liability for Oil Pollution Damage from the Exploration and Exploitation of Seabed Mineral Resources (London, 1977)

Responsibility and liability

The Convention focuses on liability. There is no mention of states, but they shall be liable if they are operators. The operator of an installation at the time of an incident is liable. The operator is the person designated as such by the controlling state, for the purpose of the Convention, or in his absence the person who is in overall control of the activities carried out at the installation.

Type of damage or pollution

The Convention applies exclusively to pollution damage resulting from an incident occurring beyond the coastal low water line, in an installation under the jurisdiction of the controlling state; and suffered in the territory of a state party or in areas in which it has sovereignty over natural resources, in accordance with international law; and to preventive measures.

The Convention lists the installations posing risks.

Pollution damages means loss or damages outside the installation caused by contamination resulting from the discharge or escape of oil. It includes the costs or preventive measures, and the losses or damages outside the installation caused by the preventive measures. The latter are the reasonable measures taken to prevent and minimize pollution with the exception of well control measures and those taken to protect, repair, or replace an installation.

Defenses from liability include war, hostilities, civil war, insurrection, and natural phenomena of irresistible, inevitable, and exceptional character; incidents occurring more than five years after a well is abandoned under the authority and according to the requirements of the controlling state; and damage resulting from negligence, or intent to damage of the person who suffered the damage. The burden of proof is on the operator.

Transboundary procedures

Actions for compensation may be brought to the courts of the state party where pollution damage was suffered or to the courts of the state party which exercise sovereign rights in the area where the installation is situated. Save exceptional cases, judgements shall be recognized and enforceable in any state party.

Insurance or fund

The operator shall be required to provide financial security according to the specifications of the state of origin, provided that a certain minimum is respected.

Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail, and Inland Navigation Vessels, (Geneva, 1989)

The Convention provides for liability, but there are no provisions for state responsibility. With certain exceptions the carrier at the time of an incident is liable for damage caused by any dangerous goods during their carriage by road, rail, or inland navigation vessel. "Carrier" is the person who at the time of the incident controls the use of the vehicle on board of which the dangerous goods are carried (road and inland navigation); or for railroads the person(s) controlling the railway line on which the accident occurred.

Types of damages or pollution

The Convention applies to claims, other than the claims

resulting from contracts for the carrying of goods and passengers, for damage caused during the carriage of dangerous goods by road, rail, or inland navigation vessels. "Dangerous goods" means any substance or article which is listed in the classes or covered by a collective heading of the classes of the European Agreement concerning the International Carriage of Dangerous Goods by Road, or is subject to the provisions of that agreement. In addition to damages related to life, personal injuries, and property the Convention includes loss or damage by contamination of the environment caused by dangerous goods, and costs of, and losses resulting from, preventive measures.

Preventive measures are the reasonable measures taken by any person after an incident has occurred to prevent and minimize damage. Defenses against liability include acts of war, extraordinary natural phenomena, damage caused by a third party with the intent to damage, consignor failure to inform on the dangerous nature of cargo, and intent to damage or negligence of the plaintiff. Exemptions also apply when damage is caused during loading and unloading under the sole responsibility of a person other than the carrier.

Transboundary procedure

Claims can be brought to the courts of the party where the damage was sustained, or where the incident occurred, or where the carrier has its habitual residence. Subject to specific circumstances, the judgements are to be recognized by the courts of any of the parties.

Insurance or fund

Carriers shall have insurance or financial security to respond to liability claims. Such financial security is to be certified by the competent authorities of the state parties.

Recommendations on the Application of the Polluter Pays Principle to Accidental Pollution (Paris, 1989)

General

This is a non-binding agreement instrument setting up guiding principles.

Scope of responsibility and liability

In most instances costs are borne by the operator. The principles cover liability and responsibility. Costs are to be recovered by public authorities through fees and taxes; in addition the public authorities might seek compensation from the

party liable for an accident for the costs borne by the authority.

Type of damage or pollution

The recommendations apply to accidents involving "hazardous installations", which are those fixed installations defined by applicable law as being capable to give rise to hazards justifying the taking of precautions off-site. Nuclear and military installations and hazardous wastes repositories are not included. Controlling and preventing measures include safety improvements, accident preparedness, emergency plans, clean-ups, etc. Humanitarian, public services and economic consequences are not included in the measures.

Insurance or fund

The recommendations find that pooling of risks is consistent with the polluter pays principle.

Draft Recommendation on Compensation to the Victims of Accidental Pollution

Scope of responsibility and liability

Polluters shall be responsible for costs. The person responsible for pollution damages is the originator of the pollution, who in most cases is the operator. There are no indications on who can take legal action. However, there are indications that the operator shall bear the costs of compensating the victims.

Types of damages and pollution

The instrument focuses on accidental pollution and accidents at hazardous installations. The recommendations do not deal with pollution damage when the environment is in an acceptable state, or with pollution damage connected with nuclear or military installations, transport, or repositories of hazardous waste. Neither do they address the issue of "residual damage" or apply to deliberate damage caused by the operator or his employees, or to certain hazardous activities which are, or will shortly be, covered by special provisions on international liability.

Transboundary procedure

There are no specific provisions on the subject.

Insurance or fund

Pooling of risks is consistent with the polluter pays principle. Premiums and contributions should reflect real risks and be adjusted when accidents occur.

Protocol to the Bassel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

General

An ad hoc working group has met to list elements to include in a protocol for the implementation of art. 12 of the Convention. In some cases, the group has indicated alternative approaches to issues rather than settling for one text.

Scope of liability and responsibility

The instrument provides for liability, including state liability, to provide for compensation to the extent that compensation for damages is not available or is inadequate. The alternatives are: primary liability with the generator, with residual liability with the disposer, such liability being joint and several; or liability focused on the generator except when a disposer duly authorized to receive the wastes has taken charge of them; or imposition of liability on the person who is responsible or arranges the transboundary movement of the waste, such responsibility could be joint and several and includes the generator, exporter, broker, importer and disposer.

Type of damage or pollution

The scope of application are the damages arising in or resulting from a transboundary movement, as defined by the convention; or damage arising from hazardous and other wastes from their point of origin to their point of disposal, including the completion of such disposal. "Damage" includes: loss of life, personal injury, loss of, or damage to property, impairment of a committed use of the environment, economic loss, environmental damage, costs of environmental restoration, and costs of response measures including prevention, minimization, relief and rehabilitation.

The working group considered two possibilities for defenses and exceptions: one was to uphold the principle of absolute liability; the other was to accept strict liability subject to exonerations including armed conflict, civil war, hostilities, insurrection, unforeseeable natural phenomena, intentional acts of the claimant, intentional conduct of a third party being the sole originator of the damage. No exoneration shall be permitted for illegal traffic under the Convention.

Transboundary procedure

Claims for damages should be done primarily through domestic courts, while an international approach is advocated for the assessment of clean-up and remedial action costs, and the valuation of environmental damage. Conditions for access to the courts of a state party are listed, together with the question of applicable law, and the mutual recognition and enforcement of judgements.

Insurance or fund

The issues of insurance, financial guarantees and compensation fund are addressed. The fund is supposed to provide compensation and give prompt response to emergency situations. The fund is to be financed through levies from the persons involved in the generation, transboundary movements, and disposal of wastes, such as generators, exporters, importers, carriers, disposers, and the states and voluntary contributions.

International Liability arising out of Acts not Prohibited under International Law

The International Law Commission has addressed the subject and draft proposals on the subject have been prepared.

Scope of responsibility and liability

The instrument provides for liability and responsibility, which it extends to states. The articles apply to acts taking place within the territory of one state, or under its jurisdiction, or under its control, when these acts cause, or can cause, transboundary harm. It is still to be determined if state's responsibility will be primary or residual. Standing to act is granted to states and individuals.

Type of damage or pollution

The state of origin shall make reparation for appreciable harm, within the terms of the articles. Reparation is to be decided by negotiation. Liability is exempted when the harm results directly from acts of war, hostilities, civil war, insurrection; or a natural phenomenon of irresistible, exceptional and inevitable character; or is wholly the result of a third-party act done with the intent to cause harm; or results from the negligence or intent of the affected party.

Transboundary procedures

Actions can be commenced by either the affected state or individuals, which shall have standing to act within the courts

of the parties. In turn, the parties shall give their courts jurisdiction to act on claims resulting from the articles. The courts shall apply national law, unless special stipulations in the articles provide otherwise. Immunity from jurisdiction under national or international law applies only to enforcement measures. A final judgement by a competent court shall normally be recognized within the territory of another contracting party.

Amended Proposal for a Directive on Civil Liability caused by Waste

General

The proposal, published on June 27, 1991, was amended by the Commission of the European Communities, after consultation with the European Parliament.

Scope of liability and responsibility

The proposal would impose civil liability on the producer of waste. It does not refer to state responsibility or liability. "Producer" is the person who in the course of commercial or industrial activities produces waste, or changes its nature or composition, the term being applicable to importers, persons having control of the waste, and persons responsible for waste disposal installations.

The national laws of member states will determine the standing to act in the event of environmental damage or impairment. Standing is extended to common interest and environmental groups or associations.

Type of damage or pollution

The proposal relates to civil liability for environmental damage or impairment, resulting from an occupational activity, from the moment it arises. "Damage" includes death and physical injury, damage to property, and any significant physical, chemical or biological deterioration of the environment.

Remedies include injunctions for reinstatement of the environment, or ordering preventive measures, and reimbursement of costs. However, reimbursement of costs is not accepted when costs substantially exceed benefits, or other alternative measures can be taken at a substantially lower cost. The proposal does not apply to liability covered by other conventions.

A person shall not be liable if such person proves that, in the absence of fault on his/her part, the damage or impairment was caused by the intentional act or omission of a third party;

that damage or impairment resulted from force majeure as defined in community law. However, a producer shall not be relieved from liability by the sole fact of holding a permit issued by the public authorities. Liability is also relieved for the eliminator that can prove that, in the absence of fault on his part, he was deceived by the producer of the waste, regarding the true character of a consignment. The same criterion applies to damage or environmental impairment caused by the employees, or agents, or the injured party, or by the said party.

Insurance or fund

Liability shall be covered by insurance or other financial security. A fund to compensate for inadequate compensation, or impossibility to identify the person liable according to the proposed directive, shall be studied.

Draft Convention for Civil Liability resulting from Activities dangerous to the Environment

General

The draft convention is to be considered under the auspices of the Council for Europe.

Scope of responsibility and liability

The convention is to impose liability. There are no references to state responsibility and liability. The operator in control is responsible for the damages caused by an activity that he was controlling. The operator of a disposal site shall be liable for the damage, at the time of damage caused by waste deposited there. The convention grants standing to act to the person suffering the damages and to associations or foundations concerned with environmental issues. Standing to act authorizes requests to prohibit activities, to take preventive measures (both to prevent incidents and damages), and to take measures on reinstatement.

Type of damage or pollution

Liability is imposed with respect to "dangerous activities", which include handling, storage, production, discharge of dangerous substances; dangerous genetically modified organisms, or dangerous microorganisms; technologies producing dangerous radiations; the operation of installations or sites for incinerating, treating and recycling waste, when the quantities involved pose significant risk to man, environment and property; and the operation of sites for the permanent disposal of waste. "Dangerous substances" are defined with reference to particular properties and a non-exhaustive list.

"Damage" means loss of life, personal injury, loss of or damage to, property; loss or damage by impairment of the environment; and costs of preventive measures.

The "measures of reinstatement" include any reasonable measures to reinstate, or restore, or reintroduce damaged components of the environment.

"Preventive measures" are the reasonable measures taken after an incident to prevent or minimize loss or damage.

The convention would not apply to damage arising from carriage, or caused by nuclear substances (if liability is regulated by the Paris Convention of 1960, on Third-Party Liability in the Field of Nuclear Energy, and its Additional Protocol of 1964; or by the Vienna Convention of May 21, 1963 on Civil Liability for Nuclear Damage); or if liability is regulated by national law as favourable as the Paris or Vienna Conventions; or to the extent that is not compatible with workmen compensation or social security schemes.

An operator shall not be liable upon proof of damage resulting exclusively from acts of war, hostilities, civil war, insurrection or natural phenomenon of exceptional, irresistible and inevitable character; or damage resulting exclusively from an act, with intention to damage, or a third party; or from an act in compliance with an order, or compulsory measure of a public authority; or from a dangerous activity taken lawfully in the interest of the person suffering the damage, whereby it was reasonable to expose the person to the risk of the dangerous activity; or if the affected person has by his own fault contributed to the damage.

Transboundary procedure

Actions for compensation under the convention can be brought to the courts of the place where the damage was suffered, or the dangerous activity was conducted, or where the defendant has its habitual residence. As a rule, saving exceptional circumstances, judgements will be recognized by the courts of all contracting parties.

Insurance fund

Operators shall carry financial security, to cover liability under the convention.

Treaty of Asuncion: A treaty for the constitution of a common market with implications for environmental law and water resources legislation (Mercosur) 3/

The Treaty of Asuncion was signed by the Republics of Argentina, Brazil, Paraguay and Uruguay on March 26, 1991. Its purpose is to constitute a common market, as a means to accelerate the economic development of the parties, within a framework of social equity and improvements in the quality of life of their citizens. The achievement of these goals requires a more effective use of their natural resources, environmental protection, infrastructural improvements, coordination of macroeconomic policies, and economic complementation. The achievement of the economic goals of the Treaty and the effective integration of their economies will require the coordination of their environmental policies and the enactment of important pieces of parallel legislation, since the law is an essential tool for integration. The common market shall be conformed by 31 December 1994.

Issues in integrated environmental policy and legislation

In the experience of the European Economic Community the following issues of environmental policy and legislation impinge on a process of economic integration. (See generally: "Environmental Protection Policy: Legal Integration in the United States and the European Community", Eckard Rehbinder and Richard Stewart, European University Institute, Walter de Gruyter and Co., Berlin, 1988).

Trade barriers with respect to products and resources

The adoption of different environmental regulations by different countries, with respect to products, impedes free commerce among states.

Competitive distortions and relocation incentives caused by differing controls on industrial processes and natural resources development

Adoption by one state of relatively more stringent controls and regulations creates a competitive advantage for producers located in areas with less stringent control and requirements. Competition to attract industrial settlements may result in laxity in controls everywhere.

3/ Tratado de Asuncion : Tratado para la Constitucion de un Mercado Comun entre la Republica Argentina, La Republica Federativa del Brasil, La Republica del Paraguay y la Republica Oriental del Uruguay, Ministerio de Relaciones Exteriores de la Republica del Paraguay, 26 de Marzo de 1991.

Transboundary spillovers

Transboundary spillovers are unlikely to be adequately dealt with at the national level, since they will be affected by national interests and bias. In addition, the receiving state may face serious constraints in enforcing remedial measures against activities in the state of origin. This issue will be especially important in the countries of La Plata River Basin, since there are numerous opportunities to generate negative externalities in the use of the transboundary river system.

Economies of scale in research, analysis and decision-making

To the extent that environmental regulatory problems in different states present common scientific, technological and analytical issues there would be economies of scale in tackling them jointly, instead of many times on a decentralized basis.

More efficient and effective controls through centralized directives and common front in international negotiations

A common environmental policy may improve regional bargaining power in international negotiations. In the European Community this has been a strong incentive for the regulations of chemical manufacture and sale. However, the integrative process of environmental policies and enactment of corresponding legislation and regulations is affected by several factors including, inter alia, variations in preference, differences in geographical, economical and industrial conditions, resentment at centralized directions, differences among legal and administrative systems in member states, functional interconnection between environmental regulations and local functions, and industrial and commercial opposition to integrated policies.

In the near future the parties to Mercosur will need to identify the environmental issues with a potential to affect markets and marketing within the region; to assess alternative technical, legal and institutional means to deal with them; and to determine legal, institutional, and organizational mechanisms for operational activities. The review of the experience of the European Community indicates that these mechanisms might aim at the complete integration of policies and law; or solely at the partial integration of policy and law.

Mechanisms of complete integration include centralized determination of environmental law and policy; implementation of law; encouragement of measures at the national level; and judicial invalidation of measures that impede trade. Mechanisms of partial integration include total and minimum harmonization; partial harmonization; optional harmonization; alternative

harmonization; recognition of other states' product certification; discretionary national implementation and enforcing; and centralized research, analysis and recommendations.

The preamble of the Treaty of Asuncion has given particular importance to environmental preservation. Article 2 provides ample room for coordination of policies and harmonization of law. Therefore, Mercosur may decide to address issues of environmental policy, not just as an incident to measures to remove barriers to trade, but as an autonomous objective. In this regard the Treaty of Asuncion might be on firmer constitutional grounds than the Treaty of Rome (the ECC Treaty), which did not mention the environment. Since issues of environmental policy and legislation are bound to arise in the implementation of the Treaty of Asuncion (both as incidents to the operation of the common market and as issues per se) it would be important that the present organs of the Treaty of Asuncion propose specific institutional arrangements vis-a-vis environmental policy and law. To do so they might need to resort to the procedures of articles 12 and 14 of the Treaty of Asuncion.

Yacireta: excess fishing and financial hurdles 4/

Yacireta is a joint project of Argentina and Paraguay. It has been affected by resource management issues and financial limitations.

Fishing

Fishing might have reached more than three tons per day; the amount makes the collection of fish within the area of influence of the dam: "the worst case of fisheries depredation in South America". The Argentinean Government asked the Ministry of Foreign Affairs of Paraguay for the signature of an agreement whereby the area of influence of the dam would be declared a fishery reserve. As of April 6, 1992 the basis for an agreement had been discussed by representatives and public officers of the two countries.

Controlling measures would include the reallocation of pontoons and barges, which will not be allowed to operate within less than 5 km from the dam (upstream and downstream), issuance of documentation allowing the patrolling of the area by the two countries, detention of transgressors, confiscation of vessels and craft, and creation of checkpoints to control the commerce

4/ ABC, Economics Section, Paraguay, p. 12, 6 April 1992 and p. 10, 7 April 1992.

and transportation of fish. However, the controls would also have to consider the requirements of local settlements and population, for whom the fishing is a means of subsistence. The enforcement of protection measures might be hampered by lack of personnel.

Financial constraints

At the same time "Yacireta Binational" was hampered by financial constraints which affected progress in the development of the works. 5/

A private sector approach to construction and exploitation of hydroelectricity: Corpus 6/

The Vice-Minister of Foreign Affairs of Paraguay met the representatives of the firm Knight Piesold, who will update the studies for the project. The United Kingdom might finance the costs of the updating. Financing of feasibility and construction costs would be borne by a pool of international investors. Therefore, direct public investment by the Governments of Argentina and Paraguay (parties to the waterworks) would be substituted for private investment under a special legal regime. Thus, the present economic constraints of the public sector in Latin America might result in the resurgence of legal devices such as the concession of public works and the concession of public services.

Interestingly, the output of Corpus (hydroelectricity) has already been related to the relatively recent Agreement of Asuncion, for the creation of a common market among Argentina, Brazil, Paraguay and Uruguay. Thus, the Vice-Minister of Foreign Affairs of Paraguay stated that the Corpus project shall be approached within the scope of Mercosur, which will provide the markets for the electricity, to be priced according to the energy prices of the region.

International Conference on Water and the Environment: Development Issues for the 21st Century, 26-31 January 1992, Dublin, Ireland 7/

The Conference produced a draft statement and a draft report which refer to legal and institutional issues related to

5/ Nacionales, Paraguay, p. 13, 8 April 1992.

6/ ABC, Economic Section, Paraguay, p. 12, 6 April 1992.

7/ ICWE Document of 31 January 1992.

water resources management and to transboundary water resources. A summary of institutional issues follows.

The draft statement endorses public participation and users involvement in planning and implementation of public projects as well as decentralization of decisions at the lowest possible appropriate level. It also endorses the need for integrated water management and international agreements for the management of international watershed. In this regard the catchment basin is endorsed as the appropriate planning unit, both for surface and groundwaters. International basin organizations should reconcile the interests of riparian countries, monitor water quality and quantity, exchange information, develop concerted action programmes and enforce agreements. The importance of institutional and legal arrangements was highlighted, although the statement does not elaborate on the characteristics or requirements of these legal arrangements. However, the statement notes the importance of institutional and legal arrangements for demand management.

The draft report of the Conference endorses a holistic and ecological approach to water planning and management, the need for participatory institutional arrangements, the role of women in water-related issues and the economic value of water. References to institutional and legal issues endorse a wide range of management tools including, inter alia, the principle of management at the lowest appropriate level; the role of national coordination, preferably by a non-user national administrative unit, in ensuring availability of information, policy development, planning, legal framework and development of human resources; greater reliance on market incentives; and the relevance of adequate legal implementation at both the national and international level.

Copies of the draft report, as well as the draft statement, are available upon request.

Draft Danube Ecological Convention 8/

A draft Danube ecological convention has been prepared. The purpose of the convention is to ensure that the technologies applied within the Danube Basin will not endanger human health and safety, natural resources, living communities, biological diversity and other environmental elements like groundwater. The parties will conserve the options serving as a basis for sustainable development, including diversity of available natural

8/ Draft Danube Basin Ecological Convention, Ministry for Environment and Regional Policy, National Authority for Water Conservation, Budapest, Hungary, 1991.

resources and values. An important goal is to avoid deterioration, protecting the opportunities of future generations. Environment should be restored and maintained at a level of acceptable quality. Regulations and control should be harmonized, when so required. Natural resources should be equitably and reasonably shared, and used in a sustainable manner.

The draft acknowledges the human right to a healthy environment. It gives high priority to ecological needs, acknowledging the right of the public to participate in decision-making concerning the environment. It accepts legal redress, within the due process of law, for environmentally adverse impacts. It recognizes the right to have access to information, and the need to avoid discrimination through the application and enforcement of differing environmental legislation. The need for a balanced approach to environmental elements is also endorsed. Issues like vulnerability, stability and resilience are to be given special consideration. Activities shall be implemented according to the precautionary principle. Initiators of activities shall prove that such activities do not pose significant damage or risk to the environment, and the costs of submitting evidence shall be considered part of the planning process. Conflicts of law among environmental legislation shall be solved in favour of the most stringent or specific obligation.

The parties also commit themselves to adopt detailed control and regulatory measures, and also to cooperate in basic research, environmental monitoring and environmental impact assessment. In addition, the parties shall conclude bilateral or multilateral agreements concerning subregions that could be considered a single unit, and also concerning harmonized regulations. There are provisions for limitations, controls and bans on technologies with adverse environmental impacts.

The institutional arrangements for the implementation of the convention provide for a conference of the parties, a scientific council and a secretariat. The conference monitors the implementation of the convention; promotes harmonization of policies and measures; considers and adopts amendments, additional actions, related agreements and protocols, rules for arbitration, and establishes subsidiary bodies. It also evaluates the effectiveness of the convention. The scientific council makes recommendations for cooperation in restoration of the environment and exchange of technologies. It can also, at the request of the nationals of one of the parties or the registered organization of such nationals, declare that certain technology causes intolerable damage to the environment. The experts at the council do not represent their states of origin, but the purposes and principles of the convention.

The secretariat arranges and services meetings, prepares and

transmits reports, prepares reports on the carrying out of activities, ensures coordination, and receives and conveys information on various subjects. Cooperation among the parties covers a wide range of activities including joint plans, programmes for monitoring the conditions of the environment, agreement on environmental parameters, establishment of registers for sources of environmental impacts, harmonization of rules for the above activities, publication of reports on the state of the Danube Basin, etc.

The parties shall also carry out environmental impact assessments, under adequate legal, technical and administrative arrangements, and with public participation. Environmental impact assessments are particularly relevant for activities that may cause significant adverse national or transboundary impact. Additional topics include research and development, exchange of information, early notice, consultation, national focal points, and protected areas.

The provisions on claim enforcement and dispute settlement are particularly relevant. States shall ensure that activities within their jurisdiction and control do not cause damage to the environment in other states or beyond the limits of national jurisdiction. Each party shall accord the same rights and treatment to its nationals and to the nationals of the other parties, when dealing with the implementation and enforcement of the convention. Equality of rights includes access to judicial and administrative fora, appeals and requests for review. Disputes on the interpretation and application, or compliance with the convention, shall be solved through negotiation or other peaceful means of the choice of the parties, including submission to the International Court of Justice.